American Bankruptcy Institute

Bankruptcy 2026: Views from the Bench

Great Debates

Debate 1: RESOLVED, that it is permissible, and may be appropriate, for a judge, with the express consent of the parties, to serve as a mediator in a case that is pending before that judge.

Debate 2: RESOLVED, that in a chapter 15 case, a bankruptcy court should recognize and enforce a foreign restructuring that includes a third-party release even if the debtor is headquartered in the U.S. but filed abroad for the purpose of circumventing the rule of *Purdue Pharma*.

Hon. Heather Zubke Cooper, Moderator
U.S. Bankruptcy Court | (D. Vt.) Burlington

Hon. Lisa G. Beckerman
U.S. Bankruptcy Court (S.D.N.Y.) | New York

Hon. Philip Bentley
U.S. Bankruptcy Court (S.D.N.Y.) | New York

Hon. Daniel P. Collins
U.S. Bankruptcy Court (D. Ariz.) | Phoenix

Hon. Vincent F. Papalia
U.S. Bankruptcy Court (D. N.J.) | Newark

2026

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

Guide to Judiciary Policy

Volume 2: Ethics and Judicial Conduct

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

Part A: Codes of Conduct
- Chapter 1: Overview
- Chapter 2: Code of Conduct for United States Judges
- Chapter 3: Code of Conduct for Judicial Employees
- Chapter 4: Code of Conduct for Federal Public Defender Employees

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- Chapter 5: Disqualification and Recusal
- Chapter 6: Gifts to Judicial Officers and Employees
- Chapter 7: Receipt of Foreign Gifts and Decorations
- Chapter 8: Judges Personally Implicated in Criminal Proceedings
- Chapter 9: Nepotism
- Chapter 10: Outside Earned Income, Honoraria, and Employment
- Chapter 11: Part-Time Judicial Officers
- Chapter 12: Practice of Law
- Chapter 13: Privately Funded Educational Seminars
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Part D: Financial Disclosure
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Part E: Judicial Conduct and Disability Act and Related Materials
- Chapter 1: Overview
- Chapter 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings
- Chapter 4: Rules for Processing Judicial Council Certificates of Potential Impeachable Conduct
- Chapter 5: Procedure for Transmitting Documents to Judicial Conference Committee

Topic Links for *Guide*, Volume 2 (Ethics and Judicial Conduct)

(Note: Unless otherwise indicated, all citations refer to this volume of the *Guide to Judiciary Policy*. This collection of "topic links" draws heavily on commonly submitted *Guide* search terms that have a connection to this volume and is by no means a comprehensive volume index. Report any errors or suggestions here.)

Transmittals of substantive Vol 2 amendments

Codes of Conduct: Part A

United States judges: Vol 2A, Ch 2 (public version)

- Canon 1: Integrity, judiciary independence
- Canon 2: Impropriety and its appearance
- Canon 3: Fairly, impartially, diligently
- Canon 4: Extrajudicial activities
  - financial disclosure (Canon 4H(3))
  - fund raising (Canon 4C)
- Canon 5: Political activity

Judicial employees: Vol 2A, Ch 3 (public version)

- Canon 1: Integrity, judiciary independence
- Canon 2: Impropriety and its appearance
- Canon 3: Appropriate performance
  - conflicts of interest (Canon 3F)
- Canon 4: Outside activities
  - financial activities (Canon 4C)
  - fund raising (Canon 4B)
  - practice of law (Canon 4D)
- Canon 5: Inappropriate political activity
  - partisan (Canon 5A); nonpartisan (5B)

Federal public defender employees: Vol 2A, Ch 4 (public version)

- Canon 1: Integrity, independence
- Canon 2: Impropriety and its appearance
- Canon 3: Appropriate performance
  - conflicts of interest (Canon 3F)
- Canon 4: Activities to improve law, legal system, and administration of justice
- Canon 5: Extra-official activities
  - fund raising (Canon 5C(2))
- Canon 6: Extra-official compensation
- Canon 7: Political activity

Model code of conduct for federal community defender employees: Vol 7A, Appx 4B

Definitions (multiple): Vol 2A, § 310.30, § 410.30

Ethics Advisory Opinions: Part B

Published advisory opinions (Vol 2B, Ch 2) (public version)

- continuing legal education: Adv. Op. 87
- investiture ceremonies: Adv. Op. 98
- nonprofit organizations: Adv. Ops. 2 and 35
- political activities: Adv. Op. 92
  - *Note:* Hatch Act inapplicable to Judiciary
- recommendation letter: Adv. Op. 73
- relatives, conflicts of interest
  - assistant U.S. attorney: Adv. Op. 38

    - class actions: Adv. Op. 90 and 99
    - law firm employment: Adv. Op. 58
    - special master: Adv. Op. 61
  - robes: Adv. Op. 98
  - social media: Adv. Op. 112
    - social media use by judicial employees – resources for developing guidelines
  - training, law-related: Adv. Op. 105

Compendium of Selected Opinions (Vol 2B, Ch 3):

- Canon 1: Integrity, judicial independence
- Canon 2: Impropriety and its appearance
  - nepotism, favoritism (§ 2.8)
  - part-time magistrate judges (§ 2.15)
  - relationships – potential parties (§ 2.10)
- Canon 3: Fairly, impartially, diligently
  - recusal, conflicts (§ 3.0-§ 3.6)
  - ex parte communications (§ 3.9-2)
- Canon 4: Extrajudicial activities
  - fund raising (§ 4.3)
  - gifts on special occasions (§ 4.8-8)
  - investitures (§ 4.8-3)
  - robes (§ 4.8-3(e))
  - speaking, teaching, writing (§ 4.1-1)
- Canon 5: Refrain from political activity
- Ethics Reform Act
  - gifts and donations (§ 21– § 29)
  - outside earned income limit (§ 33)
    - for senior judges: Vol 3, § 840.30
  - honoraria (§ 34)
  - outside employment (§ 35)

Statutes, Regulations and Judicial Conference Resolutions: Part C

Certificates of divestiture: Vol 2C, Ch 2
Conflicts of interest: Vol 2C, Ch 3
Conflicts screening: Vol 2C, Ch 4
Definitions (multiple): Vol 2C, § 210.40, § 1020.20
Disqualification, recusal: Vol 2C, Ch 5
Gifts, gratuities: Vol 2C, Ch 6 (public version)

- donations: Vol 2C, § 620.40, Ch 15
- foreign gifts: Vol 2C, Ch 7
- honoraria: Vol 2C, § 620.25(i)
- prizes: Vol 2C, § 620.25
- to the judicial branch: Vol 2C, Ch 15

Judges personally implicated in criminal proceedings: Vol 2C, Ch 8
Nepotism: Vol 2C, Ch 9
Outside income, honoraria: Vol 2C, Ch 10 (public version)

- outside income limits: JNet page
- senior judges: Vol 3, § 840.30
- teaching: Vol 2C, Ch 10, incl. § 1020.35

Part-time judicial officers: Vol 2C, Ch 11
Practice of law: Vol 2C, Ch 12
Privately funded seminars: Vol 2C, Ch 13
Procurement integrity and ethics: Vol 14, § 150
Use of government property: Vol 15, § 525

Financial Disclosure: Part D

Definitions: Vol 2D, § 170
Filing requirements: Vol 2D, Ch 2
Gifts and reimbursements: Vol 2D, § 330
How and where to file: Vol 2D, § 220
Income: Vol 2D, § 320
Instructions: JNet page
Interests in property: Vol 2D, § 315
Late report penalty: Vol 2D, § 610
Penalties: Vol 2D, Ch 6
Positions: Vol 2D, § 355
Professional fees reimbursement: Vol 2D, § 230
Public access to reports: Vol 2D, Ch 5
Release and redaction of reports: Vol 2D, Ch 5
Reportable property types: Vol 2D, § 312
Reporting thresholds for assets: Vol 2D, § 310
Report requests: Vol 2D, § 540
Required report contents: Vol 2D, Ch 3
Reviewing reports: Vol 2D, Ch 4
Security issues: Vol 2D, § 370, § 550.30
Spouses and dependent children: Vol 2D, § 360
Transactions: Vol 2D, § 210.45, § 325
Who must file and when: Vol 2D, § 210

Judicial Conduct and Disability Act and Related Materials: Part E

Statutory text: 28 U.S.C. chapter 16
Rules governing proceedings: Vol 2E, Ch 3
Potential impeachable conduct certificates: Vol 2E, Ch 4
Transmitting docs to JCUS committee: Vol 2E, Ch 5
Resources: public webpage

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. A: Codes of Conduct

Ch. 1: Overview

§ 110 Overview

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§ 110 Overview

The primary sources of information for ethical guidance are the applicable codes of conduct, which set forth general standards of conduct for judges and judicial employees. Four codes of conduct have been adopted by the Judicial Conference:

- Code of Conduct for United States Judges, containing the ethical canons applicable to federal judges, as well as commentary on them;
- Code of Conduct for Judicial Employees, applicable to virtually all judicial employees, including judges' law clerks and judicial assistants;
- Code of Conduct for Federal Public Defender Employees, applicable to all employees in federal public defender offices; and
- Model Code of Conduct for Federal Community Defender Employees, which must be adopted by a community defender organization's board of directors and made applicable to all the community defender organization's employees.

Reviewing these codes of conduct should be the first step in researching ethical questions. The codes provide useful guidance about the proper performance of official duties and about engaging in a variety of outside activities.

Last substantive revision (Transmittal GR-4) September 2, 2009
Last revised (minor technical changes) February 20, 2015

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. A: Codes of Conduct

Ch. 2: Code of Conduct for United States Judges

Introduction

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent With the Obligations of Judicial Office

Canon 5: A Judge Should Refrain From Political Activity

Compliance with the Code of Conduct

Applicable Date of Compliance

Introduction

The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." **See:** JCUS-APR 73, pp. 9-11. Since then, the Judicial Conference has made the following changes to the Code:

- March 1987: deleted the word "Judicial" from the name of the Code;
- September 1992: adopted substantial revisions to the Code;
- March 1996: revised part C of the Compliance section, immediately following the Code;
- September 1996: revised Canons 3C(3)(a) and 5C(4);
- September 1999: revised Canon 3C(1)(c);
- September 2000: clarified the Compliance section;
- March 2009: adopted substantial revisions to the Code;
- March 2014: revised part C of the Compliance section, which appears below, immediately following the Code;

Last revised (Transmittal 02-046) March 12, 2019

- March 2019: adopted revisions to Canon 2A Commentary, Canon 3, Canon 3A(3), Canon 3B(4), Canon 3B(4) Commentary, Canon 3B(6), and Canon 3B(6) Commentary.

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
202-502-1100

Procedural questions may be addressed to:

Office of the General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
202-502-1100

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

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

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. *See New York State*

Club Ass'n. Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. Administrative Responsibilities.

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge's direction to similar standards.

(5) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(6) A judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.

C. 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 in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal 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 or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

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

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

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

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

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

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

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

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the

public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(4). A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The duty to refrain from retaliation includes retaliation against former as well as current judiciary personnel.

Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others. See Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(2) (providing that "cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees") and Rule 4(a)(3) (providing that "cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability").

Canon 3B(6). Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. A judge, in deciding what action is appropriate, may take into account any request for confidentiality made by a person complaining of or reporting misconduct. See Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(6) (providing that "cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability. A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity

and proper functioning of the judiciary. A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge. Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.").

Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise cooperating with or participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent With the Obligations of Judicial Office

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. Law-related Activities.

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the

judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. Financial Activities.

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would

be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would 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.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

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

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Canon 4. Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

Canon 4A. Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board.

Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

Canon 4A(4). This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 4B. The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

Canon 4C. A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

Canon 4D(1), (2), and (3). Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 4D(5). The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Canon 4E. Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

Canon 4F. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

Canon 4H. A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

Canon 5: A Judge Should Refrain From Political Activity

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

Compliance with the Code of Conduct

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge

A part-time judge is a judge who serves part-time, whether continuously or periodically, 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 Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. Judge Pro Tempore

A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. Retired Judge

A judge who is retired under 28 U.S.C. § 371(b) or § 372(a) (applicable to Article III judges), or who is subject to recall under § 178(d) (applicable to judges on the Court of Federal Claims), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. However, bankruptcy judges and magistrate judges who are eligible for recall but who have notified the Administrative Office of the United States Courts that they will not consent to recall are not obligated to comply with the provisions of this Code governing part-time judges. Such notification may be made at any time after retirement, and is irrevocable. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. § 373(c)(5) and (d).

COMMENTARY

The 2014 amendment to the Compliance section, regarding retired bankruptcy judges and magistrate judges and exempting those judges from compliance with the Code as part-time judges if they notify the Administrative Office of the United States Courts that they will not consent to recall, was not intended to alter those judges' statutory entitlements to annuities, cost-of-living adjustments, or any other retirement benefits.

Applicable Date of Compliance

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. A: Codes of Conduct

Ch. 3: Code of Conduct for Judicial Employees

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- Canon 5: A Judicial Employee Should Refrain from Inappropriate Political Activity

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§ 310 Overview

§ 310.10 Scope

(a) This Code of Conduct applies to all employees of the judicial branch, including interns, externs, and other volunteer court employees, except it does not apply to Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and federal public defender offices.

(b) Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges (Guide, Vol. 2A, Ch. 2). Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees

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(Guide, Vol. 2A, Ch. 4). Intermittent employees [HR Manual, Sec. 5, Ch. 4.7] are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.

(c) Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

(d) Contractors and other nonemployees not covered above who serve the judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

§ 310.20 History

(a) With the adoption of the Code of Conduct for Judicial Employees on September 19, 1995, the Judicial Conference repealed the Code of Conduct for Clerks (and Deputy Clerks), the Code of Conduct for United States Probation Officers (and Pretrial Services Officers), the Code of Conduct for Circuit Executives, the Director of the Administrative Office, the Director of the Federal Judicial Center, the Administrative Assistant to the Chief Justice, and All Administrative Office Employees Grade GS-15 and Above, the Code of Conduct for Staff Attorneys of the United States, the Code of Conduct for Federal Public Defenders, and the Code of Conduct for Law Clerks. JCUS-SEP 1995, p. 74.

(b) This Code of Conduct for Judicial Employees took effect on January 1, 1996.

(c) In March 2001, the Conference revised Canon 3F(4). JCUS-MAR 2001, pp. 10-12.

(d) The Conference revised the following provisions in March 2013: "Scope" (§ 310.10(a) and (d)); "Definitions" (§ 310.30(a)); Canon 1; Canon 3F(2)(a)(ii); Canon 4A; and Canon 5B. JCUS-MAR 2013, p. 9.

(e) The Conference revised the following provisions in March 2019: Canon 3C(1); Canon 3D(2); and Canon 3D(3). JCUS-MAR 2019, pp. 12-13.

(f) In March 2022, the Conference revised Canon 4A and Canon 4D. JCUS-MAR 2022, p. 10.

§ 310.30 Definitions

(a) Member of a Judge's Personal Staff

As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(1), and 5B, a member of a judge's personal staff means a judge's secretary or judicial assistant, a judge's law clerk, intern, extern, or other volunteer court employee, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff.

(b) Third Degree of Relationship

As used in this code, the third degree of relationship is calculated according to the civil law system to include the following relatives: parent, child, grandparent, grandchild, great grandparent, great grandchild, brother, sister, aunt, uncle, niece and nephew.

§ 310.40 Further Guidance

(a) The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct.

(b) In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations (*e.g.*, receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations).

(c) Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the chair of the Committee on Codes of Conduct by email or as follows:

Chair of the Committee on Codes of Conduct
c/o Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

§ 320 Text of the Code

Canon 1: A Judicial Employee Should Uphold the Integrity and Independence of the Judiciary and of the Judicial Employee's Office

An independent and honorable Judiciary is indispensable to justice in our society. A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public. Judicial employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code do not affect or preclude other more stringent standards required by law, by court order, or by the appointing authority.

Canon 2: A Judicial Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.

Canon 3: A Judicial Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the judicial employee's appointing authority, the following standards apply:

A. A judicial employee should respect and comply with the law and these canons. A judicial employee should report to the appropriate supervising authority any attempt to induce the judicial employee to violate these canons.

Note: A number of criminal statutes of general applicability govern federal employees' performance of official duties. These include:

- 18 U.S.C. § 201 (bribery of public officials and witnesses);
- 18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
- 18 U.S.C. § 285 (taking or using papers relating to government claims);

- 18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
- 18 U.S.C. § 508 (counterfeiting or forging transportation requests);
- 18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
- 18 U.S.C. § 643 (failing to account for public money);
- 18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);
- 18 U.S.C. § 1001 (fraud or false statements in a government matter);
- 18 U.S.C. § 1719 (misuse of franking privilege);
- 18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
- 31 U.S.C. § 1344 (misuse of government vehicle);
- 31 U.S.C. § 3729 (false claims against the government).

In addition, provisions of specific applicability to court officers include:

- 18 U.S.C. § § 153, 154 (court officers embezzling or purchasing property from bankruptcy estate);
- 18 U.S.C. § 645 (embezzlement and theft by court officers);
- 18 U.S.C. § 646 (court officers failing to deposit registry moneys);
- 18 U.S.C. § 647 (receiving loans from registry moneys from court officer).

This is not a comprehensive listing but sets forth some of the more significant provisions with which judicial employees should be familiar.

B. A judicial employee should be faithful to professional standards and maintain competence in the judicial employee's profession.

C. Standards of Conduct

(1) A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the judicial employee deals in an official capacity, including other employees and the general public. A judicial employee should not engage in sexual or other forms of harassment of court employees or retaliate against those who report misconduct. A judicial employee should hold court personnel under the judicial employee's direction to similar standards. A judicial employee should take appropriate action upon receipt of reliable information indicating a likelihood of conduct contravening this code. Appropriate action depends on the circumstances and may include, for example, reporting such conduct to a supervisor, court executive, or chief judge. For

relevant elaboration, see Code of Conduct for United States Judges, Commentary to Canons 3B(4) and 3B(6).

(2) A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner. A judicial employee should never influence or attempt to influence the assignment of cases, or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

D. Duty of Confidentiality

(1) A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures.

(2) A judicial employee should not use for personal gain any confidential information received in the course of official duties.

(3) A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. A former judicial employee should observe the same restriction on disclosure of confidential information that applies to a current judicial employee, except as modified by the appointing authority. This general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.

E. A judicial employee should not engage in nepotism prohibited by law.

Note: *See also* 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

F. Conflicts of Interest

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially

affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter (provided that the prohibition relating to the previous practice of law does not apply if he or she did not work on the matter, did not access confidential information relating to the matter, and did not practice in the same office as the lawyer), or he, she, or such lawyer has been a material witness;

(iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding;

(iv) he or she, a spouse, or a person related to either within the third degree of relationship (as defined above in § 310.30), or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;

(v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has

expressed an opinion concerning the merits of the particular case in controversy.

(b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (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) has an interest that could be substantially affected by the outcome of the proceeding; or (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the Code of Conduct for United States Judges may require the judge to recuse.

(c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:

(i) he or she has a personal bias or prejudice concerning a party;

(ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;

(iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining

that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

(4) A judicial employee who is subject to canon 3F(2)(a) should keep informed about his or her personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;

(b) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(c) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(d) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

Canon 4: In Engaging in Outside Activities, a Judicial Employee Should Avoid the Risk of Conflict with Official Duties, Should Avoid the Appearance of Impropriety, and Should Comply with Disclosure Requirements

A. Outside Activities

A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and serve in the military reserves. A judicial employee may also speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code. With the exception of an appointment relating to service in the military reserves, a judicial employee should not accept a governmental appointment that has the potential for dual service to and/or supervision by independent branches of government (including state courts) or different governments during judicial employment.

B. Solicitation of Funds

A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

(1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities

(1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.

(2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial employee's family residing in the household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: *See* 5 U.S.C. § 7353 (gifts to federal employees). *See also* 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: *See* 5 U.S.C. §§ 13101–13111 (financial disclosure provisions).

(4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm,

lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

D. Practice of Law

A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, may perform legal work during the course of the judicial employee's service in the military reserves, and may provide pro bono legal services in civil matters, so long as such pro se, family, military, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

(1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);

(2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;

(3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code; and

(4) in the case of legal work during the course of service in the military reserves, such work (a) does not involve the entry of an appearance in any civilian federal, state, or local court or administrative agency; and (b) does not involve a matter of public controversy, or an issue likely to come before the judicial employee's court.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

Note: *See also* 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law in any "court of the United States"). As used in this code, the "military reserves" includes the Army National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. The term "civilian" court excludes any Article I court established by Congress to regulate military life or enforce the Uniform Code of Military Justice against military personnel. *See United States v. Joshua*, 607 F.3d 379, 383 (4th Cir. 2010); *see also* 28 U.S.C. §§ 963, 610 (defining "court" that clerk's office employees may not practice law in as the United States Supreme Court, "the courts of appeals and district courts of the United States," and "the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade").

E. Compensation and Reimbursement

A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a judicial employee and, where appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Note: *See* 5 U.S.C. §§ 13101–13111 (financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). *See also* 5 U.S.C. §§ 13141–13146 (outside earned income and employment).

Canon 5: A Judicial Employee Should Refrain from Inappropriate Political Activity

A. Partisan Political Activity

A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

B. Nonpartisan Political Activity

A member of a judge's personal staff, lawyer who is employed by the court and assists judges on cases, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

Note: *See also* 18 U.S.C. chapter 29 (elections and political activities).

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Ch. 4: Code of Conduct for Federal Public Defender Employees

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- Canon 1: A Federal Public Defender Employee Should Uphold the Integrity and Independence of the Office
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- Canon 3: A Federal Public Defender Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office
- Canon 4: A Federal Public Defender Employee May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice
- Canon 5: A Federal Public Defender Employee Should Regulate Extra-official Activities to Minimize the Risk of Conflict with Official Duties
- Canon 6: A Federal Public Defender Employee Should Regularly File Reports of Compensation Received for All Extra-official Activities
- Canon 7: A Federal Public Defender Employee Should Refrain from Inappropriate Political Activity

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§ 410 Overview

§ 410.10 Scope

(a) This Code of Conduct applies to all federal public defender employees, including interns, externs, and other volunteer employees. (When Actually Employed (WAE) employees are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority).

(b) This Code of Conduct does not apply to private counsel appointed under the Criminal Justice Act, or to attorneys provided by a bar association or legal aid agency or by a community defender organization established in accordance with the provisions of the Criminal Justice Act (18 U.S.C.

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§ 3006A(g)(2)(B)). (For the Model Code of Conduct for Federal Community Defender Employees, *see* Guide, Vol. 7A, Appx. 4B.)

(c) Nothing contained in these canons is intended to limit or modify the primary responsibility of public defenders, as appointed counsel, to render effective legal representation to clients as required by the Constitution and laws of the United States and by applicable rules governing professional conduct, including the codes of professional responsibility applicable in the jurisdiction in which the public defender practices.

§ 410.20 History

(a) This Code of Conduct for Federal Public Defender Employees was adopted September 19, 1995 by the Judicial Conference of the United States and became effective January 1, 1996. With the adoption of the Code of Conduct for Federal Public Defender Employees on September 19, 1995, the Judicial Conference repealed the Code of the Conduct for Federal Public Defenders.

(b) Canon 6 was revised at the September 1998 Judicial Conference.

(c) The Conference revised Canon 3C and Canon 3D in March 2020.

(d) In March 2024, the Conference revised the “Scope” provision (§ 410.10(a)).

§ 410.30 Definitions

(a) Federal Public Defender Employees, or Defender Employees

As used in this code, "federal public defender employees" (or "defender employees") means federal public defenders, assistant federal public defenders, and all other staff employees of the federal public defender office.

(b) Public Defenders

“Public defenders" means only the federal public defenders and assistant federal public defenders.

§ 410.40 Further Guidance

(a) The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Defender employees (other than the federal public defender) should consult with the federal public defender, and the

federal public defender may consult with the court of appeals, for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct.

(b) In assessing the propriety of one's proposed conduct, a defender employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations (e.g., receipt of a gift may implicate canon 2 as well as canon 5C(2) and the Ethics Reform Act gift regulations).

(c) Should a question remain after this consultation, the affected defender employee may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the chair of the Committee on Codes of Conduct by email or as follows:

Chair of the Committee on Codes of Conduct
c/o Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

§ 420 Text of the Code

Canon 1: A Federal Public Defender Employee Should Uphold the Integrity and Independence of the Office

An independent and honorable defender system is indispensable to justice in our society. A defender employee should personally observe high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. Defender employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code will not affect or preclude other more stringent standards required by law, by applicable codes of professional responsibility, by court order, or by the federal public defender.

Canon 2: A Federal Public Defender Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A defender employee should not engage in any activities that would put into question the propriety of the defender employee's conduct in carrying out the duties of the office. A defender employee should not use public office for private gain.

Canon 3: A Federal Public Defender Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the federal public defender, the following standards apply:

A. A defender employee should respect and comply with the law and these canons. A defender employee should report to the appropriate supervising authority any attempt to induce the defender employee to violate these canons.

Note: A number of criminal statutes of general applicability govern defender employees' performance of official duties. These include:

- 18 U.S.C. § 201 (bribery of public officials and witnesses);
- 18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
- 18 U.S.C. § 285 (taking or using papers relating to government claims);
- 18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
- 18 U.S.C. § 508 (counterfeiting or forging transportation requests);
- 18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
- 18 U.S.C. § 643 (failing to account for public money);
- 18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);
- 18 U.S.C. § 1001 (fraud or false statements in a government matter);
- 18 U.S.C. § 1719 (misuse of franking privilege);
- 18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
- 31 U.S.C. § 1344 (misuse of government vehicle);

- 31 U.S.C. § 3729 (false claims against the government).

This is not a comprehensive listing but sets forth some of the more significant provisions with which defender employees should be familiar.

B. A defender employee should be faithful to professional standards and maintain competence in the defender employee's profession.

C. A defender employee should be patient, dignified, respectful, and courteous to all persons with whom the defender employee deals in an official capacity, including other employees and the general public. A defender employee should not engage in sexual or other forms of harassment of other employees or retaliate against those who report misconduct. A defender employee should hold personnel under the defender employee's direction to similar standards. A defender employee should take appropriate action upon receipt of reliable information indicating a likelihood of conduct contravening this Code. Appropriate action depends on the circumstances and may include, for example, reporting such conduct to a supervisor, court executive, or chief judge. For relevant elaboration, see Code of Conduct for United States Judges, Commentary to Canons 3B(4) and 3B(6). A defender employee should diligently discharge the responsibilities of the office in a nondiscriminatory fashion.

D. (1) A defender employee should not solicit or accept a payment of money or anything of value from a client, except that a defender employee may accept an appropriate memento or token that is neither money nor of commercial value.

(2) A defender employee should not use for personal gain any confidential information received in the course of official duties.

(3) A defender employee should never disclose any confidential communications from a client, or any other confidential information received in the course of official duties, except as authorized by law. A former defender employee should observe the same restrictions on disclosure of confidential information that apply to a current defender employee. This general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.

E. A defender employee should not engage in nepotism prohibited by law.

Note: *See also* 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

F. Conflicts of Interest

(1) In providing legal representation to clients, a public defender should observe applicable rules of professional conduct governing the disclosure and avoidance of conflicts of interest.

(2) In the performance of administrative duties, a defender employee should avoid conflicts of interest. A conflict of interest arises when a defender employee knows that he or she (or the spouse, minor child residing in the defender employee's household, or other close relative of the defender employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the defender employee's ability properly to perform administrative duties.

(3) When a defender employee knows that a conflict of interest may be presented in the performance of duties, the defender employee should promptly inform the federal public defender. The federal public defender, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the defender employee's performance of duties in such a matter so as to avoid a conflict or the appearance of a conflict of interest. If the conflict involves a conflict between or among clients, the federal public defender should consider withdrawal from one or more representations, or other appropriate remedial actions, as necessary to comply with applicable rules of professional conduct. A defender employee should observe any restrictions imposed by the federal public defender in this regard.

Canon 4: A Federal Public Defender Employee May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A defender employee, subject to the proper performance of official duties, may engage in the law-related activities enumerated below.

A. A defender employee may speak, write, lecture, teach, and participate in other activities concerning defender services, the legal system, and the administration of justice.

B. A defender employee 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. A defender employee may assist such an organization in raising funds and may

participate in the management and investment of such funds. A defender employee may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal profession, and the administration of justice. A defender employee may solicit funds for law-related activities, subject to the following limitations:

(1) A defender employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A defender employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign.

(3) A defender employee should not solicit or accept funds from lawyers, clients, or other persons likely to have official business with the federal public defender office, except as an incident to a general fund-raising activity.

C. A defender employee may promote the development of professional organizations and foster the interchange of information and experience with others in the profession. A defender employee may make himself or herself available to the public at large for speaking engagements and public appearances designed to enhance the public's knowledge of the operation of defender services and the criminal justice system.

Canon 5: A Federal Public Defender Employee Should Regulate Extra-official Activities to Minimize the Risk of Conflict with Official Duties

A. Avocational Activities

A defender employee may write, lecture, teach, and speak on subjects unrelated to the profession, and may engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office, interfere with the performance of official duties, or adversely reflect on the public defender's role as an advocate. A defender employee may solicit funds for avocational activities, subject to the limitations set forth in canon 4B.

B. Civic and Charitable Activities

A defender employee may participate in civic and charitable activities that do not detract from the dignity of the office, interfere with the performance of official duties, or adversely reflect on the public defender's role as an advocate. A defender employee may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal, or civic

organization, and may solicit funds for any such organization subject to the limitations set forth in canon 4B.

C. Financial Activities

(1) A defender employee should refrain from financial and business dealings that tend to detract from the dignity of the office or interfere with the performance of official duties.

(2) A defender employee should not solicit or accept a gift from anyone seeking official action from or doing business with the federal public defender office, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a defender employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A defender employee should endeavor to prevent a member of a defender employee's family residing in the household from soliciting or accepting any such gift except to the extent that a defender employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: *See* 5 U.S.C. § 7353 (gifts to federal employees). *See also* 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A defender employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: *See* 5 U.S.C. §§ 13101–13111 (financial disclosure provisions)

D. Practice of Law

A defender employee should not engage in the private practice of law. Notwithstanding this prohibition, a defender employee may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the defender employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the defender employee's primary responsibility to the defender office.

Note: *See* 18 U.S.C. § 3006A(g)(2)(A) (prohibiting public defenders from engaging in the private practice of law). *See also* 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States).

Canon 6: A Federal Public Defender Employee Should Regularly File Reports of Compensation Received for All Extra-official Activities

A defender employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation or reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the defender employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a defender employee and, where appropriate to the occasion, by the defender employee's spouse or relative. Any payment in excess of such an amount is compensation. A defender employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a defender employee (other than a defender employee serving without compensation) should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States.

Note: *See* 5 U.S.C. §§ 13101–13111 (financial disclosure provisions). *See also* 5 U.S.C. §§ 13141–13146 (outside earned income and employment).

Canon 7: A Federal Public Defender Employee Should Refrain from Inappropriate Political Activity

A. A defender employee should not be a candidate for or hold partisan elective office and should not solicit partisan political contributions. A defender employee should not engage in any political activity while on duty or in the defender employee's workplace and may not utilize any federal resources in any such activity. Political activity includes, but is not limited to, displaying campaign literature, badges, stickers, signs or other items of political advertising on behalf of any party, political committee, or candidate for political office and soliciting signatures for political candidacy or membership in a political party.

B. A defender employee may engage in political activity not otherwise prohibited, provided that such activity does not detract from the dignity of the office or interfere with the proper performance of official duties. A defender employee who participates in political activity should not use his or her position or title in connection with such activity.

Note: *See also* 18 U.S.C. chapter 29 (elections and political activities).

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Vol. 2: Ethics and Judicial Conduct
Pt. B: Ethics Advisory Opinions

Ch. 1: Overview

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

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§ 120 Further Guidance

§ 130 Confidential Advisory Opinions

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§ 110 Overview

(a) The Committee on Codes of Conduct is authorized by the Judicial Conference of the United States to publish formal advisory opinions on issues frequently raised or issues of broad application.

(b) The Committee's first 26 published Advisory Opinions were issued prior to the Judicial Conference's adoption in 1973 of the Code of Conduct for United States Judges. Although those opinions originally interpreted the Canons of Judicial Ethics of the American Bar Association, the opinions have been revised to conform to the Code of Conduct for United States Judges. Subsequent opinions interpret the Code of Conduct for United States Judges (Guide, Vol. 2A, Ch. 2), the Code of Conduct for Judicial Employees (Guide, Vol. 2A, Ch. 3), and the Code of Conduct for Federal Public Defender Employees (Guide, Vol. 2A, Ch. 4).

§ 120 Further Guidance

In addition to the published Advisory Opinions, persons subject to the Codes of Conduct should consult:

- the Codes (**see:** Guide, Vol. 2A),
- the Ethics Reform Act of 1989 and the related regulations (**see:** Guide, Vol. 2C, Ch. 6 (Gifts) and Ch. 10 (Outside Income, Honoraria, and Employment)); and

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- the Compendium of Selected Opinions (**see:** Guide, Vol. 2B, Ch. 3), which summarize certain published and unpublished opinions of the Committee.

§ 130 Confidential Advisory Opinions

(a) The Committee on Codes of Conduct may provide confidential advisory opinions in response to confidential inquiries from persons who are bound by the judicial branch codes of conduct and ethics regulations, and who are authorized by the Judicial Conference to request an opinion from the Committee. **See:** Guide, Vol. 1, § 430.23.

(b) A request for an advisory opinion should be addressed, *by email if possible*, to the Chair of the Committee on Codes of Conduct, or else by mail as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the U.S. Courts
1 Columbus Circle, NE
Washington, DC 20544

(c) Consistent with the Committee's jurisdiction to render confidential advisory opinions, the Committee on Codes of Conduct and its staff treat all inquiries, the Committee's response to such inquiries, and the absence of an inquiry as confidential. The Committee will not reveal any information related to an inquiry unless required by law or where the inquirer has consented or waived confidentiality, either expressly or impliedly. Except as prohibited by law, the Committee will provide the inquirer notice of any request for disclosure before producing information. Disclosure of inquiry-related information by the inquirer to an immediate supervisor does not constitute a waiver of confidentiality. The Committee may summarize and disclose its analysis of an inquiry but will safeguard confidentiality by omitting details that might tend, directly or indirectly, to reveal the identity of the inquirer.

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§ 220 Committee on Codes of Conduct Advisory Opinions

Committee on Codes of Conduct Advisory Opinion
No. 2: Service on Governing Boards of Nonprofit Organizations

Judges are often invited to serve on the governing boards of nonprofit religious, civic, charitable, educational, fraternal, or social organizations. This opinion addresses the propriety under Canon 4B of a judge serving on the board of a nonprofit organization. This opinion does not address judges' involvement with law-related nonprofit organizations, which is covered by Canon 4A(3). *See also* Advisory Opinion No. 34 ("Service as Officer or on Governing Board of Bar Association").

Judges who wish to participate in their communities through service on nonprofit boards are at liberty to do so, subject to certain restrictions discussed below and in Canon 4 of the Code of Conduct for United States Judges. In deciding whether to serve on a particular nonprofit board, judges should bear in mind the Code's basic imperative that "[a] judge should avoid impropriety and the appearance of impropriety in all activities." Canon 2. The judge should also consider the following factors:

- The judge must not receive any compensation for service to the organization, although the judge may receive reimbursement for expenses reasonably related to that service.

- The judge's service must not interfere with the prompt and proper performance of judicial duties. "The duties of judicial office take precedence over all other activities." Canon 3. Accordingly, a judge should consider existing judicial and extrajudicial obligations before accepting membership on a nonprofit board.

- The judge may not serve on the board of any organization that practices invidious discrimination. Canon 2C.

- The judge should not serve on the board of a nonprofit civic, charitable, educational, religious or social organization "if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court." Canon 4B(1). This proscription would likely preclude judges serving on boards for certain types of nonprofit organizations, such as legal aid bureaus. *See also* Advisory Opinion Nos. 28 ("Service as Officer or Trustee of Hospital or Hospital Association") and 40 ("Service on Governing Board of Nonprofit Organization that Tends to Become Involved in Court Proceedings").

- The judge must not personally engage in fund-raising for the organization, subject to the exceptions noted in Canon 4C regarding family members and certain judicial colleagues. The judge should not use or permit the use of the prestige of office for fund-raising purposes. Canon 4C. However, a judge may assist a nonprofit organization in planning fund-raising activities. *Id*. Further, the organization's letterhead may list the judge's name and title if comparable information and designations are listed for others. Commentary to Canon 4C. *See also* Advisory Opinion No. 35 ("Solicitation of Funds for Nonprofit Organizations, Including Listing of Judges on Solicitation Materials").

- The judge may not give investment advice to the organization, although it is acceptable to sit on a board that is responsible for approving investment decisions. Canon 4B(2).

- The judge should not serve on the board of a nonprofit organization if the judge perceives there is any other ethical obligation that would preclude such service. For example, if the organization takes public positions on controversial topics, association with the group might raise a reasonable question regarding the judge's impartiality. The judge should bear in mind that the public will normally be uninformed of any restriction or qualification that the judge may have placed on affiliation with the organization.

- The judge should remain knowledgeable about the group's activities in order to regularly reassess whether participation in the organization continues to be appropriate.

With these cautions in mind, the Committee reiterates that judges may contribute to their communities through service on nonprofit boards, subject to certain ethical obligations.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 3: Participation in a Seminar of General Character

This opinion discusses participation by judges in seminars of general character. Canon 4H of the Code of Conduct for United States Judges provides that "[a] judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following limitations: . . . (2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation." For example, judges may properly accept a limited scholarship for partial reimbursement of travel and subsistence expenses incurred while attending and participating in the Appellate Judges Seminar conducted each summer under the auspices of the New York University Law School. At the seminar, federal and state judges in attendance address subjects relating to the operation and functioning of appellate courts. Participating judges are not compensated. The Committee advises that there is no impropriety under the Code in the attendance by a federal judge at such a seminar, or the judge's acceptance of such a scholarship.

As an additional example, the Committee also advises that it is permissible for a judge to participate as a faculty member in a two-week seminar on humanist studies. The content of the seminar is broadly based, philosophic in nature, and intended to promote discussion in depth among faculty and participants. No compensation is paid to the judge, but the judge is reimbursed for the travel, food and lodging expenses of the judge and the judge's spouse during the period of the institute. The Committee is of the opinion that the judge may properly participate so long as the commitment does not interfere with official duties and provides no ground for any reasonable suspicion that the judge persuaded others to patronize or contribute to the seminar sponsor. *See also* Advisory Opinion No. 67 (relating to attendance at privately-funded seminars).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 7: Service as Faculty Member of the National College of State Trial Judges

This opinion addresses the propriety of serving as a member of the faculty of the National College of State Trial Judges. The judge would receive no compensation for such services, but would be reimbursed for travel and subsistence for the judge and the judge's spouse. We assume that the membership would not interfere or impinge upon the full performance of judicial duties.

The Committee is of the opinion that there is no impropriety in a judge participating as a faculty member of the National College of State Trial Judges. Canon 4A(1). We also believe that the judge and the judge's spouse or relative may accept reimbursement for travel and subsistence, so long as that reimbursement does not exceed the actual costs of travel, food, lodging and related expenses. Canon 4H(2). However, the judge should make any required financial disclosures. Canon 4H(3).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 9: Testifying as a Character Witness

This opinion addresses the issue of a judge testifying as a character witness. By way of example, we consider the following situation: A state court trial judge is on trial on federal fraud charges. The defendant proposes to ask one or more of the federal judges of the district court in which the prosecution is proceeding to testify as a character witness. The district judges hold differing views as to the propriety of appearing as a witness, especially in the judges' own district.

Canon 2 of the Code of Conduct for United States Judges and its Commentary provide valuable guidance. Canon 2B states that "[a] judge should not testify voluntarily as a character witness." The Commentary elaborates further on this advice:

> Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

The Committee believes that the practice of judges appearing as character witnesses should be discouraged, except where justice demands, but we affirm that a judge must respond to a subpoena. If a judge testifies in response to a subpoena, some of the otherwise unfortunate effects of providing character testimony may be dissipated if the trial judge, either on direct or cross-examination, makes it clear that the judge-witness is testifying in response to official summons. Moreover, to the extent that the trial court has discretion to limit character evidence generally, the trial judge should consider limiting the number of judges providing that evidence.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 11: Disqualification Where Long-Time Friend or Friend's Law Firm Is Counsel

This opinion addresses whether a judge should recuse in a case where one of the attorneys is either a long-time friend of the judge or from a long-time friend's law firm. As an example, we consider whether a judge should recuse in cases where one of the attorneys is a friend of long standing and is also a godfather of one of the judge's children. We further discuss whether the judge should sit in cases where a party is represented by a member or associate of that friend's firm.

The first question is not capable of answer by crisp formulation. Canon 2B prohibits a judge from allowing family, social or various other relationships to influence judicial conduct or judgment. It likewise directs judges not to convey or allow others to convey the impression that another person is in a special position to influence the judge. In a similar vein, Canon 3C requires a judge to recuse when "the judge's impartiality might reasonably be questioned, including but not limited to" a number of enumerated circumstances, including the appearance of relatives who are within the third degree of relationship as counsel or a party.

A godfather is not a "relative" within the meaning of Canon 3C(1)(d) and is not otherwise covered by any of the enumerated circumstances requiring recusal. Recusal may nonetheless be required if the circumstances are such that the judge's impartiality could reasonably be questioned. No such question would be raised if the relationship were simply one of historical significance, the godfather being merely within the wide circle of the judge's friends, and the obligation having been perfunctorily assumed. By contrast, if the godfather is a close friend whose relationship is like that of a close relative, then the judge's impartiality might reasonably be questioned. Ultimately, the question is one that only the judge may answer.

The question regarding members or associates of the firm of the friend and godfather poses no problem. We do not believe that judges must recuse from all cases handled by a law firm simply because judges have law firm members for friends. Although there may be special circumstances dictating disqualification, a friendly relationship is not sufficient reason in itself.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 17: Acceptance of Hospitality and Travel Expense Reimbursements From Lawyers

This opinion addresses a judge's acceptance of hospitality extended by lawyers. The pertinent canons of the Code of Conduct for United States Judges are Canon 2, which requires a judge to avoid the appearance of impropriety, Canon 2B, which provides that a judge should not lend the prestige of judicial office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that they are in a special position to influence the judge, and Canon 4H(2), which permits reimbursement for extrajudicial activities permitted by the Code, 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 relative. Also relevant are the Ethics Reform Act Gift Regulations. Sections 3(a) and (b) of the Gift Regulations exclude from the definition of a gift "social hospitality based on personal relationships" and "modest items, such as food and refreshments, offered as a matter of social hospitality." Sections 5(b)(3) and (b)(4) permit judges to accept invitations to bar-related functions and appropriate gifts from relatives and friends.

Canon 4H of the Code provides:

> A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions: . . . (2) Expense reimbursement should 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 relative. Any additional payment is compensation.

Application of these standards to the context of hospitality extended by lawyers requires recognition of both the need to avoid the appearance of impropriety and the appropriateness of encouraging judges to maintain collegial relationships with members of the bar. We consider the issue separately with respect to lawyer organizations, law firms, and individual lawyers.

When hospitality is extended by lawyer organizations, the risk of an appearance of impropriety is markedly reduced, compared to hospitality conferred by a particular law firm or lawyer. Section 5(b)(3) of the Gift Regulations specifically authorizes acceptance of an invitation and travel expenses for the judge and a family member to attend bar-related functions. We see no impropriety if a judge and spouse are reimbursed for hotel and travel expenses reasonably required for their attendance at dinners and similar social events sponsored by lawyer organizations such as bar associations. An appearance of impropriety might arise, however, if the hospitality was extended by lawyer organizations identified with a particular viewpoint regularly advanced in litigation.

Hospitality extended by a law firm obviously can more readily raise questions about the appearance of impropriety. Also, section 5(a) of the Gift Regulations restricts judges from accepting gifts from persons who are seeking official action from or doing business with the court, or whose interests may be substantially affected by the performance or nonperformance of the judge's official duties. In this context, we believe that a judge and spouse may attend cocktail parties hosted by law firms in connection with bar association gatherings and an infrequent dinner commemorating a firm's significant anniversary, but should not accept hotel and travel expense reimbursement.

Hospitality of an individual lawyer is a matter of private social relationships. Sections 3(a) and (b) of the Gift Regulations exclude from the definition of "gift" "social hospitality based on personal relationships" and "modest items, such as food and refreshments, offered as a matter of social hospitality," and section 5(b)(4) permits judges to accept ordinary social hospitality and appropriate gifts from relatives and friends. Individual determinations must be made as to the appropriate extent of such relationships and the point at which such relationships warrant recusal from cases in which the lawyer appears.

Finally, attention should be called to Advisory Opinion Nos. 3 and 67, which relate to participation in and attendance at seminars, and include consideration of accepting reimbursement for related expenses.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 19: Membership in a Political Club

This opinion addresses the propriety of a judge continuing membership in a political club. We consider as an example: A club's certificate of incorporation states that one of the main purposes of the club is advocating and maintaining the principles of the named political party. The club is very active politically, but the judge does not actively participate in the club. The judge's participation is limited to eating lunch at the club on an average of once a year.

Canon 5 of the Code of Conduct for United States Judges provides:

> A. *General Prohibitions*. A judge should not:
>
> (1) act as a leader or hold any office in a political organization;
>
> (2) make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office; or
>
> (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
>
> B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.
>
> C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

The Commentary to Canon 5 states: "The term 'political organization' refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office."

The ethical proscription on judges engaging in partisan activities is longstanding. The American Bar Association adopted the Canons of Judicial Ethics in 1923; Canon 28 of those Canons was a predecessor of Canon 5 of the Code of Conduct. In interpreting Canon 28, the ABA Committee on Professional Ethics stated in its Formal Opinion 113:

> A judge is entitled to entertain his personal views of political questions, but should not directly nor indirectly participate in partisan political activities. It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice

> some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, *ex necessitate rei*, he thereby voluntarily places certain well recognized limitations upon his activities.

The club employed as an example here is a "political organization" under Canon 5, and thus a judge's membership could be considered as giving the appearance of partisan activities. At all times a judge's conduct is to be free of the appearance of impropriety. Canon 2. As the Commentary to Canon 2A instructs, in part, "[a] judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen." The Committee advises that a judge should resign such a membership in a political club.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 20: Disqualification Based on Stockholdings by Household Family Member

This opinion addresses recusal issues related to stock investments by a judge's household family member. The Committee takes as an example a district judge whose spouse owns 150 shares of stock worth about $10,000 in one of the largest American corporations. We consider in this opinion whether it would be proper for that judge to hear and decide a case to which the stock-issuing corporation is a party, where the judge told all the lawyers in advance of the spouse's holdings, asked if they objected to the judge hearing the case, and was told by the lawyers for both sides that they had no objection.

Canon 3 of the Code of Conduct for United States Judges provides, "[a] judge should perform the duties of the office fairly, impartially and diligently," and Canon 3C further provides:

> (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 in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding[.]

These provisions are similar to those found in 28, United States Code, section 455(b)(4), which requires a judge to disqualify under the circumstances set forth above. While the Committee is not authorized to interpret the statute, the Committee does have authority to interpret the provisions of the canon, which are substantially identical to section 455(b)(4).

It is clear that under the provisions of Canon 3C(1)(c) a judge must disqualify himself or herself in any case in which the judge's spouse or minor child residing in the household owns stock in a party to the proceeding. (Further, the Commentary to Canon 3C explains that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.") Canon 3C(3)(c) provides that a financial interest "means ownership of a legal or equitable interest, however small," with certain exceptions not applicable to this situation. Ownership of even one share of stock by the judge's spouse would require disqualification.

Due to the mandatory language of Canon 3, remittal of disqualification in these circumstances is not permitted.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 24: Financial Settlement and Disqualification on Resignation From Law Firm

This opinion addresses how a newly-appointed federal judge who is withdrawing from private practice at a law firm should address related financial settlement and disqualification issues. As an example, we consider the following situation: The newly-appointed judge is in active practice in a law partnership. The partnership agreement provides for payment of an agreed amount representing the retiring partner's interest in the firm. Some of the payments are to be paid in the years following the partner's appointment as a judge.

A partner who leaves a law firm to become a federal judge should, if possible, agree with the partners on an exact amount that the judge will receive for his or her interest in the firm, whether that sum is to be paid within the year or over a period of years.

Such agreed-upon payments may be made to the judge provided (1) it is clear that the judge is not sharing in profits of the firm earned after the judge's departure, as distinguished from sharing in an amount representing the fair value of the judge's interest in the firm, including the fair value of the judge's interest in fees to be collected in the future for work done before leaving the firm, and (2) the judge does not participate in any case in which any attorney in the former firm is counsel until the firm has paid the full amount the judge is entitled to receive under the agreement.

Apart from recusal during the period when the judge is receiving payments from a former law firm, there is a broader question of the appearance of impropriety in the judge's hearing cases involving that firm. Many judges have a self-imposed automatic rule of disqualification for a specified number of years after leaving the law firm. How long a judge should continue to recuse depends upon various circumstances, such as the relationship the judge had at the law firm with the lawyer appearing before the judge, the length of time since the judge left the law firm, and the relationship between the judge and the particular client, and the importance of that client to the firm's practice. The Committee recommends that judges consider a recusal period of at least two years, recognizing that there will be circumstances where a longer period is more appropriate. In all cases in which the judge's former law firm appears before the judge, the judge should carefully analyze the situation to determine whether his or her participation would create any appearance of impropriety.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 26: Disqualification Based on Holding Insurance Policy from Company that is a Party

Occasionally, cases arise in which an insurance company is a party and the judge has a relationship to that company, generally in the form of an insurance policy involving the judge, the judge's spouse or the judge's children. The policy may be for health insurance, life insurance or other types of coverage. This opinion addresses whether a judge should recuse in that situation.

Canon 3C(1) of the Code of Conduct for United States Judges provides:

> (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 in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding[.]

Thus, in any litigation in which an insurance company is a party, if the outcome of the litigation could substantially affect the value of the judge's interest, i.e. the policy in the company involved, the judge should recuse. The judge should also recuse if any other interest (other than a financial interest) could be affected substantially by the outcome of the proceeding. The same rules apply to policies held by the judge's spouse or minor children residing in the judge's household. (Note that for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Canon 3C Commentary.)

This issue initially arose in 1973 when we considered whether judges who hold Blue Cross policies could sit in a case brought by an insurance company against a local Blue Cross organization. At the time, all but two of the circuit judges throughout the country, whether in active or senior status, participated in various health benefit plans with Blue Cross-Blue Shield or some other insurance company or association as the carrier. The federal government would negotiate coverage by Blue Cross-Blue Shield, and the Administrative Office would pay a lump sum for the coverage provided the judiciary. The federal government did not do business with local organizations. This type of practice was followed with respect to the other insurers participating in the federal employees health benefits program. It appeared that practically all circuit judges could be affected in a slight degree by the result of the pending case in which Blue Cross was a party.

The Committee determined that the interests that the judges had in the Blue Cross policies would not be considered "financial interests" within the meaning of that term as it is used in the Code of Conduct for United States Judges. We concluded the interest was analogous to "the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest," which Canon 3C(3)(c)(iii) states "is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest." We rendered similar advice regarding judges who were insured under a government-wide indemnity plan written by the Aetna Casualty and Surety Company.

In sum, the Committee advises that when an insurance company is a party, the judge ordinarily need not recuse unless the judge has a financial interest in the company. The judge has a financial interest in the company only if the outcome of the proceeding could substantially affect the value of the judge's interest in the company. This could occur if, as a result of a judgment against the insurance company in the particular case, the judge's premiums could be significantly increased or coverage substantially reduced. Conceivably, a huge judgment against a medical insurer could make it impossible for the insurer to continue to operate at all, or at its prior level.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 27: Disqualification Based on Spouse's Interest as Beneficiary of a Trust from which Defendant Leases Property

This opinion considers whether a judge should recuse in a case in which the judge's spouse is the beneficiary of a trust from which the defendant leases property. By way of explanation, we consider the following circumstances: A judge is assigned a class action case alleging federal and state antitrust allegations and various statutory and constitutional violations. Defendants are various major distilling companies, local wholesalers, retail drug stores, the state through its alcoholic beverage commission, and the State Wholesale Liquor Dealers Association.

One of the drug store defendants is a lessee in a shopping center. The lessor is a national bank, acting as trustee. The judge's spouse is the sole beneficiary of the trust as it relates to the shopping center operation. The lease was in existence at the time the spouse acquired the interest, and will continue for several years in the future. The annual rental income is substantial, but barely exceeds five figures. The property is managed by a real estate firm.

Canon 3C(1)(c) of the Code of Conduct for United States Judges provides:

> 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 in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding[.]

Canon 3C(3)(c) states that a "'financial interest' means ownership of a legal or equitable interest, however small . . . ." It would appear that the spouse does not have a financial interest in the subject matter in controversy or in a party to the proceeding, as financial interest is defined in Canon 3C(3)(c).

Whether the spouse has "[an]other interest that could be affected substantially by the outcome of the proceeding" cannot be determined on the facts used in this example. Information as to the extent of the operations of the drug store lessee and the potential effect of an adverse judgment would help to determine whether the interest of the judge's spouse could be substantially affected by the outcome of the antitrust action. However, such a determination would not completely resolve the question, as

disqualification is not limited to the specifically enumerated instances under Canon 3C(1), of which (c) is but one.

Canon 3C(1) is clear that a judge should disqualify in *any* proceeding in which his or her impartiality might reasonably be questioned. This directive is to be read in connection with Canon 2, which states that "[a] judge should avoid impropriety and the appearance of impropriety in all activities." To preside in a case involving a defendant who pays a substantial amount of rent that is ultimately credited to the judge's spouse might, in our opinion, raise a reasonable question regarding the judge's propriety and impartiality. However, if recusal is required pursuant to an appearance of impropriety or a question of impartiality, but is not mandatory under one of the specific circumstances set out in Canon 3C(1)(a) through (e), the remittal procedure under Canon 3D remains available.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 28: Service as Officer or Trustee of Hospital or Hospital Association

A judge is permitted under the Code of Conduct for United States Judges to participate in civic and charitable activities, such as service as an officer or trustee of a hospital or hospital association. The canons do, however, impose limits on such participation. Canon 4 generally provides that a judge may participate in extrajudicial civic and charitable activities that do not detract from the dignity of the judge's office, reflect adversely upon the judge's impartiality, interfere with the performance of a judge's official duties, or lead to frequent disqualification. Canon 4B reads:

> A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:
>
> (1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.
>
> (2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Canon 4C further provides that a judge may assist in planning fund-raising activities for such nonprofit organizations and may be listed as an officer, director, or trustee, but a judge should not personally solicit funds or use or permit the use of the prestige of judicial office for that purpose. Further, "[a] judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism."

Canon 4F also imposes a limitation on the judge's service in terms of governmental appointments: "[a] judge should not . . . accept . . . an appointment [to a governmental committee, commission, or other position concerning the law] if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary."

The Commentary to Canon 4B notes particular concerns for a judge to consider in determining whether to serve a hospital or hospital organization in some capacity:

> The changing nature of some organizations and their exposure to litigation makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions *charitable hospitals are in court more often now than in the past*. (Emphasis added.)

Additional issues specific to hospital officers or trustees – such as challenges under the employment laws, the minimum wage laws, tax exemptions and the like – should also be considered in deciding whether to take on such a responsibility.

In sum, a judge should carefully evaluate Canon 4B's limitations when determining whether to accept a post as an officer or trustee of a hospital or hospital association. Also, as suggested by Canon 4B's Commentary, a judge should continually re-evaluate the organization to ensure that continued involvement is consistent with the judge's ethical obligations under the canons.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 29: Service as President or Director of a Corporation Operating a Cooperative Apartment or Condominium

This opinion considers whether a judge may hold a position, such as an officer or director, of a corporation that controls the operations of a cooperative apartment or condominium in which the judge resides. The following prescriptions are pertinent to this question:

1. The still-effective 1963 formal resolution of the Judicial Conference of the United States (*see* Judicial Conference of the United States, *Report of the Proceedings* 62 (Sep. 1963)) states:

> No justice or judge appointed under the authority of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit.

2. Canon 4 of the Code of Conduct for United States Judges instructs that "[a] judge should not participate in extra-judicial activities that . . . interfere with the performance of the judge's official duties."

3. Canon 4B, concerning a judge's civic and charitable activities, provides:

> B. *Civic and Charitable Activities*. A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:
>
> (1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

4. Canons 4D(1) and (2), relating to a judge's financial activities provide:

> (1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.
>
> (2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse

> maintains a close familial relationship, and the spouse of any of the foregoing.

We assume, of course, that the judge who serves as an officer or director of the corporation controlling the operations of the cooperative apartment or condominium receives no compensation for this service. *See* Judicial Conference Ethics Reform Act Regulations on Outside Earned Income, Honoraria, and Outside Employment § 5(a) (prohibiting service for compensation as an officer, board member, or fiduciary). We further assume that the duties are confined to activities unrelated to profit-making, in the sense that they relate only to the operation and maintenance of the members' residence facility. The activities, although relating in part to residents other than the judge, are equivalent to those the judge would find necessary to undertake were the judge living in a privately owned, single-family residence.

On these assumptions, the Committee is of the opinion that the judge's service as an officer or director of this type of corporation does not, in and of itself, violate the 1963 Resolution.

The Committee is also of the opinion, however, that service in this capacity is not readily characterized either as "civic or charitable" activity within the permissive reach of Canon 4B or as a "business dealing" within the contemplation of Canon 4D(1). The endeavor possesses certain commercial features that make it unlike a "civic or charitable" activity. The service is, however, directed at the saving of expense and wise expenditure of funds rather than to the maximization of income. The service does not appear akin to the forbidden type of "business dealing" that exploits the judicial office; it may more closely approximate permissible real estate investment.

The Committee is of the view that each case depends upon its facts. If the cooperative or condominium is not large or substantial, and if the duties of being an officer or director are routine and primarily internal (allocating responsibilities; employing maintenance, security, and essential personnel; providing for services; passing on prospective occupants; formulating occupancy rules; and the like), the activity would not appear to violate the provisions or spirit of the 1963 Resolution or the Code. If, however, the duties entail substantial or numerous business-type contacts with outside enterprises, particularly of the kind that could result in litigation, a judge's participation becomes questionable. The judge should then consider leaving those responsibilities to others. Throughout, the judge should keep in mind the basic requirements of Canon 2 (that the judge "should avoid impropriety and the appearance of impropriety in all activities") and Canon 3 (that "[t]he duties of judicial office take precedence over all other activities"). The judge must also bear in mind that positions held by a federal judge should not be so great in number as to jeopardize the performance of judicial duties.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 32: Limited Solicitation of Funds for the Boy Scouts of America

This opinion considers the propriety of a judge soliciting funds for the Boy Scouts of America. As an example, we consider whether a judge, who chairs the finance committee for an area council of the Boy Scouts, may solicit financial support from board members and trust funds.

> Canon 4C of the Code of Conduct for United States Judges states, in pertinent part:
>
> > A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose.

In Advisory Opinion No. 2, we state in substance that a judge may serve without compensation on governing boards of organizations that are similar to the Boy Scouts, provided the judge does not solicit funds for the organization. Canon 4C does not make any exception for persons whom may be solicited. The solicitation by a judge of funds for an area council of the Boy Scouts, even though the solicitation is of a limited class of persons, is thus forbidden by the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 33: Service as a Co-trustee of a Pension Trust

This opinion addresses whether, following appointment, a judge may continue to serve as co-trustee of a federal savings and loan pension trust. The general subject of the service of a judge as a fiduciary of an estate or trust is also addressed in Advisory Opinion 96. By way of example, we consider the following circumstances:

> The pension trust is almost a dry trust. It is a trust approved by the Internal Revenue Service, and hence there are no policy determinations relating to the trust. The judge renders no legal advice to the trust; the trust has never been in litigation and is not likely to be as no difficulty has been experienced during its almost 17 years of operation. The trust covers the officers and employees of the association who qualify under its terms. The judge receives no compensation nor any expenses attendant to the fiduciary obligation, which the judge continued after appointment as a judge as a matter of past loyalty to a valued former client. The duties entailed are nominal and consist of signing about two checks a year to the insurance company.

Such a trust would appear to be a part of an arrangement deemed necessary for managing the affairs of a business, within the meaning of Canon 4D(1) of the Code of Conduct for United States Judges; the trust can be viewed as a segment of a business.

The duties of a co-trustee are, while nominal, fiduciary in nature. Canon 4E would seem to rule out service as a fiduciary for a trust other than the trust of a family member. Service as a fiduciary for other than a family member is permitted to continue in limited circumstances, as provided in the Code's "Applicable Date of Compliance" section, but this section seems to contemplate a relationship with an individual rather than with a pension plan. In any event, even such a permissible nonfamily fiduciary relationship is to be terminated, as stated in the Compliance section, if it would not unnecessarily jeopardize any financial interest of the beneficiary.

Canon 4B(2), which prohibits a judge giving any investment advice to a civic or charitable organization that the judge may serve as trustee or director, is also implicated. In the pension trust considered here, it might be presumed that there could be some residual duty of giving advice on investments.

If, in fact, no duties other than the ministerial one of check signing are involved, the practical likelihood of conflict or litigation may be remote. But the canons taken together appear to bar this co-trustee relationship.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 34: Service as Officer or on Governing Board of Bar Association

We address whether a judge may serve on the governing board of a bar association. In doing so, we consider this policy statement adopted by the Judicial Conference of the United States in October 1971:

> Federal judges should not serve as officers or directors of organizations, national, regional or local, which are present or potential litigants in the federal courts or are the promoters, sponsors or financiers of organizations sponsoring litigation in the federal courts.

We examine two aspects of this issue in particular: (1) whether it is a violation of the statement of policy for a judge to serve as a member of the governing board of a bar association when the association might be involved in litigation and the board determines whether the association should file *amicus curiae* briefs; and (2) whether the spirit and intent of the statement of policy is satisfied by the judge abstaining from discussion, debate and vote on matters being considered by the board of governors that present a conflict of interest or that might give the appearance of impropriety if the judge participated in the debate and vote.

Canon 4 of the Code of Judicial Conduct reads, in pertinent part:

> A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

More specifically, under Canon 4A(3):

> *Organizations*. A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

The Commentary to Canon 4 reads, in part:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Although Canon 4A(3) does not contain an explicit limitation regarding law-related organizations' involvement with litigation (*see* Canon 4B limiting participation in civic and charitable organizations that regularly engage in adversary proceedings), a similar concern animates participation in bar association activities. Under the provision of Canon 4 covering all extrajudicial activity, the judge should not participate in law-related activities "that reflect adversely on the judge's impartiality," and so should refrain from participation in determining whether the bar association should become involved in litigation as a party or as *amicus curiae* if an appearance of partiality could reasonably arise. For example, a judge should not be responsible for developing positions on controversial political or social matters that are frequently the subject of federal court litigation, and should abstain from debating or voting on such matters. Further, a judge sitting on a board of a law-related organization must refrain from offering legal advice that could constitute the practice of law under Canon 4A(5).

In conclusion, we are of the opinion that a judge may properly serve as an officer or member of a board, council or committee of a bar association, subject to the restrictions set forth in Canon 4. The spirit and intent of the Code and of the 1971 Judicial Conference policy statement are satisfied if the judge abstains from discussion, debate and vote on matters that may present a conflict of interest or may give the appearance of impropriety if the judge did participate in the discussion and vote. *See also* Advisory Opinion No. 85 ("Membership and Participation in the American Bar Association") and Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 35: Solicitation of Funds for Nonprofit Organizations, Including Listing of Judges on Solicitation Materials

Judges are often involved in their communities through nonprofit organizations, which are frequently engaged in fund-raising activities. This opinion discusses limitation on judges' involvement in soliciting funds for nonprofit organizations. It includes guidance regarding how judges may be identified on letterhead and in other solicitation materials.

In Advisory Opinion Nos. 2 and 82, the Committee affirms that a judge may be a member of or serve on the governing board of a nonprofit organization, subject to certain restrictions imposed by the Code of Conduct for United States Judges. Canon 4C sets out the acceptable limits to judges' involvement in soliciting funds:

> A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

Although the Code precludes personal solicitation of funds by judges, a judge may assist in planning fund-raising activities for nonprofit organizations, if that participation is not prohibited based on any other ethical obligation. Internal brainstorming of fund-raising ideas is an example of such a permitted planning activity.

The Commentary to Canon 4C explains that "[u]se of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund-raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others." In other words, the judge's name and office may not be selectively emphasized by the organization.

The Commentary to Canon 4C further states that "[a] judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event."

Finally, the Committee advises that a judge may be included in a list of contributors disseminated by a nonprofit organization. The list may use the judge's title, as long as the judge is designated in a similar manner to other contributors, and is in no way specially emphasized.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 36: Commenting on Legal Issues Arising before the Governing Board of a Private College or University

This opinion addresses the propriety of a judge, who is a member of a governing board of a private college or university, commenting on legal issues arising before that board. Our discussion is informed by the following two examples:

> 1. A judge serves as a member of a "Lay Advisory Committee" of a college. Although the judge participates in no fund-raising activities for the organization, the judge has on occasion, as a board or committee member, expressed views as to the legal effect of contemplated action under discussion.
>
> 2. A judge serves as a trustee of a college. Although the college has its own counsel, the judge has, with other board members, reviewed and commented on legal aspects of leases and other instruments.

One federal statute and two provisions of Canon 4 of the Code of Conduct for United States Judges must be considered regarding this issue.

Section 454 of title 28, United States Code, provides:

> Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

Canon 4 provides, in pertinent part:

> A(5). *Practice of Law*. A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.
>
> * * *
>
> B. *Civic and Charitable Activities*. A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to [certain] limitations[.]

Subject to other restrictions in Canon 4, a judge may serve as a member of the governing board of a private college or university, and may vote, as any other member, to approve or disapprove leases and other instruments. But a judge should leave to counsel for the college the responsibility for reviewing, passing upon and commenting on the legal aspects of the proposed leases and other instruments. A judge may with propriety suggest that there are legal questions involved in a proposed instrument or

course of action, and suggest that the matter be referred to counsel for a legal opinion. *See also* Advisory Opinion No. 44 ("Service on Governing Board of a Public College or University").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 37: Service as Officer or Trustee of a Professional Organization Receiving Governmental or Private Grants or Operating Funds

This opinion considers the propriety of judges serving as officers or trustees of professional organizations that receive governmental or private grants or operating funds. We take as an example a professional organization that requests and receives operating funds and grants from federal as well as state and local governments. The professional group is organized for educational, research and study purposes.

We consider whether the judge's prestige is an important factor in obtaining such financing, possibly to the detriment of similar organizations that lack participation by judges. This particular question deals with the prospect that an organization with which a judge may otherwise be properly associated may nevertheless be in a unique position because of the fact that the judge's organization seeks and obtains federal or state grants.

Canon 4 of the Code of Conduct for United States Judges provides that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civil, charitable [and] educational . . . activities." The Committee concludes that mere service on the board of a Canon 4A (law-related) or 4B (civic or charitable) organization is not inappropriate by reason of the fact that the organization utilizes funds received from federal, state, or local governments. *See also* Advisory Opinion No. 28 ("Service as Officer or Trustee of Hospital or Hospital Association"). Further, with respect to a law-related organization, "[a] judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice." Canon 4A(3).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 38: Disqualification When Relative Is an Assistant United States Attorney

Over the years, the Committee on Codes of Conduct has received a number of inquiries regarding recusal considerations when a judge's spouse, child, or other relative serves as an Assistant United States Attorney ("AUSA"). This opinion summarizes the Committee's advice on that topic.

> Canon 3C(1)(d), Code of Conduct for United States Judges, provides in part:
>
> C. 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 in which:
>
> * * *
>
> (d) the judge or the judge's spouse[1], or a person related to either within the third degree of relationship, or the spouse of such a person is:
>
> * * *
>
> (ii) acting as a lawyer in the proceeding[.]

The Commentary under subsection 3C(1)(d)(ii) provides:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

We note first that service as an AUSA is distinguishable from service as an attorney in a private law firm or representation of a private litigant. As the United States Supreme Court has explained:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1934). A similar dual aim applies in civil litigation advanced by the United States Attorney's Office. For these reasons, it would be unreasonable to question a judge's impartiality merely because the judge's relative is an AUSA. Likewise, an AUSA does not have an "interest" in the United States Attorney's Office in the same sense that a partner, member or shareholder may have an interest in a private law firm.

Specific circumstances may, however, require recusal. The most frequent circumstances are addressed below.

1. **Acting as an attorney.** Recusal is required by Canon 3C(1)(d)(ii) if the relative has acted as an attorney in or relating to the proceeding. This restriction includes cases in which the relative has done any work or given any advice, whether that advice was given or work done before or after the action was filed. Recusal for this reason is not subject to remittal under Canon 3D because the basis for recusal falls within the specific disqualifying circumstances described in Canon 3C(1)(a)-(e).

2. **Acting as a supervisor**. Recusal is also necessary if the relative has supervisory responsibility over the attorney handling a case before the judge, even if the relative is not personally involved and has no knowledge of the case. Such a circumstance falls within Canon 3C(1)'s "catch-all" provision requiring disqualification in a proceeding "in which the judge's impartiality might reasonably be questioned." Disqualification under this catch-all provision is subject to remittal under Canon 3D.

3. **Acting United States Attorney**. If the relative serves as either the United States Attorney or Acting United States Attorney, the judge should recuse in all cases in which the office appears.

Recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

Note for Advisory Opinion No. 38

[1] For purposes of recusal, "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Canon 3C Commentary.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 40: Service on Governing Board of Nonprofit Organization that Tends to Become Involved in Court Proceedings

This opinion considers the propriety of service by judges as officers or directors of nonprofit organizations that tend to become involved in court proceedings. Our discussion has been informed by considering the examples of a variety of organizations that, in pursuit of their goals, regularly become involved in legal proceedings.

Canon 4 generally affirms the propriety of judicial participation in nonprofit civic, charitable, educational, religious and social organizations, and service as an officer, director, trustee, or non-legal advisor in such organizations, so long as such activities do not detract from the dignity of the judicial office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification. *See* Advisory Opinion No. 2 ("Service on Governing Boards of Nonprofit Organizations"). Canon 4B(1) provides the limitation, however, that "[a] judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court."

These unambiguous principles should be applied in accordance with the good judgment of each individual judge. It may well be that, in a given time and place, it is not likely that the organization in question will be engaged in proceedings that would ordinarily come before the judge. Therefore, the first caveat of Canon 4B(1) would be inapplicable.

However, the judge should recognize that some organizations frequently appeal to the courts in furtherance of their stated goals. This fact gives rise to the probability that the organization will be regularly engaged in adversary proceedings in various courts. If such is the case, the second proscription of Canon 4B(1) would act to bar judicial participation as an officer or director of the group.

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization to determine if it is proper to continue the relationship. *See* Commentary to Canon 4B. The judge involved in the group is in the best position to determine whether Canon 4B(1) applies, requiring resignation as an officer or director of the organization.

On a final note, although Canon 4B(1) is limited by its terms to service as an officer, director, trustee or non-legal advisor, the Committee is of the view that the same considerations are applicable to and govern membership in such organizations. *See also* Advisory Opinion Nos. 82 ("Joining Organizations") and 93 ("Extrajudicial Activities Related to the Law").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 42: Participation in Fund Raising for a Religious Organization

This opinion considers whether the participation of a judge in the fund-raising activities of a religious organization by "taking part in the every-member canvass (each year or two years)" is in violation of the Code of Conduct for United States Judges.

The question is dealt with by our Advisory Opinion Nos. 2 and 35, in which the Committee advises that a judge should not engage in any personal solicitation of funds for a nonprofit religious, civic, charitable, educational or social organization, except as permitted by Canon 4C. The Committee believes that this rule applies to the solicitation of funds in an every-member campaign for a church. *See* Canon 4C and its Commentary.

To the extent, however, that "taking part" means contributing funds, a judge may certainly participate in the fund-raising by contributing funds to a religious organization.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 43: Service as a Statutory Member of a Citizens' Supervisory Commission of the County Personnel Board

This opinion considers the propriety of a judge serving as an *ex officio* member of a citizens' supervisory commission of the personnel board of the county of the judge's residence.

The commission, which supervises the state civil service system, is created by an act of the state legislature. The act designates United States district judges as members of the commission.

Canon 4F of the Code of Conduct for United States Judges provides that a judge may accept appointment to a governmental commission only if it is one that concerns the law, the legal system, or the administration of justice. The Commentary to Canon 4F states that the "appropriateness of accepting extrajudicial assignments must be assessed in light of the demand on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial," and that "[j]udges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial duties, or tend to undermine the public confidence in the judiciary."

The citizens' supervisory commission of the personnel board is not concerned with the improvement of the law, the legal system, or the administration of justice as those terms are used in Canon 4F. In discharging its statutory duties, the commission will of necessity deal with issues of fact or policy. We conclude that it would be improper under Canon 4F for a United States district judge to serve as a member of this governmental supervisory commission. *See also* Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 44: Service on Governing Board of a Public College or University

This opinion considers the propriety of serving on the governing board of a public college or university, for example a board of visitors or a board of regents.

Canon 4 of the Code of Conduct for United States Judges provides, in part:

> [A] judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification. . . .
>
> > B. Civic and Charitable Activities. A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, charitable, fraternal, or social organization . . . .

If Canon 4B stood alone, there would be no apparent objection to a judge's service on the board of a public college or university; however, this authority to serve is a part of a section addressing "civic and charitable activities." Those activities must be distinguished from "governmental appointments," which are treated under Canon 4F.

Canon 4F provides:

> A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if the appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Canon 4F limits service by a judge to governmental (federal, state or local) institutions concerning "the law, the legal system, or the administration of justice." The Commentary to Canon 4A specifically instructs that "[t]eaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board." We conclude that service on a state board vested with authority to operate a public college or university would be in violation of the prohibition contained in Canon 4F. *See also* Advisory Opinion No. 36 ("Commenting on Legal Issues Arising before the Governing Board of a Private College or University"); Code of Conduct for United States Judges, Compliance with the Code of Conduct, § C ("Retired Judge. A retired judge who is retired under 28 U.S.C. §§ 371(b) or 372(a), or

who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 4F . . . .").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 46: Acceptance of Public Testimonials or Awards

This opinion considers the issue of acceptance by judges of public testimonials or awards. The Committee frequently receives inquiries regarding this topic.

Judges who have achieved a preeminence prompting public recognition should ordinarily be able to accept such honors. In addition to the personal gratification involved, the entire judiciary benefits from public recognition of one of its members.

Before accepting such recognition, however, a judge should take certain factors into consideration. A judge must consider whether acceptance of the award would raise the appearance of impropriety or partiality, as enjoined by Canon 2 of the Code of Conduct for United States Judges. For example, notwithstanding the spirit in which it is proffered, an award should not be accepted from an organization whose public image embodies a clearly defined point of view on controversial legal, social or political issues. Neither should an award be accepted from an organization that is apt to come before the courts as a litigant. *See* Advisory Opinion No. 40 ("Service on Governing Board of Nonprofit Organization that Tends to Become Involved in Court Proceedings").

Finally, a judge must be cautious if the award is presented in conjunction with a fund-raising dinner or event. The Commentary to Canon 4C states that "[a] judge may attend fund-raising activities of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event." When a judge is chosen to receive an award, it would appear likely that the judge would be either a "guest of honor" or a "speaker" at such an event. Additionally, the judge should consider whether the judge's presence is being employed as a device to promote publicity and the sale of tickets.

The nature of these cautions, and the variety of situations to which they apply, make it clear that the decision in each case must remain within the conscientious discretion of the judge, consistent with the obligation to avoid the appearance of impropriety or partiality.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 47: Acceptance of Complimentary or Discounted Club Memberships

Congress passed a law effective October 13, 2008, restricting judges' acceptance of "honorary club memberships." In particular, the law specifies that "a judicial officer may not accept a gift of an honorary club membership with a value of more than $50 in any calendar year." Pub. L. No. 110-402, § 2, 122 Stat. 4255 (Oct. 13, 2008), codified at note to 5 U.S.C. § 7353. This opinion provides guidance on whether under the law a judge may accept, or continue to hold, a complimentary or discounted membership in a given club.

Shortly following the passage of 5 U.S.C. § 7353, the Director of the Administrative Office of the Courts issued a memorandum on the new club membership law. Memorandum from A.O. Director to United States Judges, October 20, 2008. The Director addressed three questions regarding the law: (1) applicability; (2) effective date; and (3) covered clubs. The memorandum concluded that the statute applies to all judicial officers, including bankruptcy and magistrate judges. The memorandum noted that the law became effective immediately and further advised that judges should cease accepting the benefit of any ongoing honorary club membership that was accepted before the effective date. Finally, the memorandum concluded that the honorary club membership prohibition extends to recreational and social clubs – such as country clubs, athletic clubs, or eating clubs – but does not restrict judges from accepting discounted or complimentary memberships in professional organizations, including bar associations.

Since the law's enactment, the Committee on Codes of Conduct has received a number of informal and formal requests for opinions relating to compliance with the club legislation. These inquiries have included questions about discounted or complimentary memberships in professional groups such as Inns of Court, service clubs such as Rotary, and a range of membership arrangements in social clubs, eating clubs and athletic clubs.

In providing advice to individual judges, the Committee has referred to the terms of the statute itself, the Director's initial guidance memorandum, and the Judicial Conference Regulations Concerning Gifts ("Gift Regulations"). The Gift Regulations provide helpful guidance for evaluating whether certain club memberships might run afoul of the new restriction. In particular, the Gift Regulations define a "gift" to mean "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value." Gift Regulations § 3. The Regulations exclude from the definition of "gift" "opportunities and benefits, including favorable rates and commercial discounts, that are available based on factors other than judicial status," and "anything for which market value is paid by the judicial officer or employee." Gift Regulations §§ 3(e) & (h).

Applying these principles, the Committee has advised that in some circumstances a judge may accept discounted membership in a social or recreational

club that offers multiple membership categories associated with different levels of membership privileges and sets membership dues or fees according to broad occupational categories that are not directed to judges or to a narrow category of members. Due to the wide variance in club bylaws and membership practices, it is difficult in the abstract to draw a bright line regarding which memberships are acceptable.

While advising that some memberships are permissible, the Committee has advised that certain types of discounted memberships in recreational and social clubs should not be accepted in light of the statute and the Gift Regulations. The Committee has advised, for example, that a judge should not accept a discounted membership that is offered to a very limited group selected by the club to enhance its reputation. The Committee has also advised that a judge should not continue to accept the benefit of a now prohibited honorary club membership with a value of more than $50 per year that was accepted prior to the law's enactment.

Additionally, the Committee has advised that a judge may accept "honorary" membership in a service club that exempts the judge from paying annual dues. In reaching this decision the Committee relied in part on an opinion by the General Counsel of the Administrative Office concluding that service organizations are not, as a general matter, the types of clubs that Congress intended to include within the statutory prohibition on honorary club memberships. With respect to Inns of Court and similar professional organizations, the Committee has advised that judges may accept a discounted or complimentary membership because such organizations are not "clubs" within the meaning of the statute and such memberships do not constitute prohibited gifts.

Through a series of inquiries, the Committee has learned that the details of club memberships vary widely. Although some general principles may be drawn from the individual inquiries, the Committee's conclusions are based on the specific characteristics of the club. Any judge who has a question related to compliance with the club membership statute therefore is encouraged to request a confidential advisory opinion from the Committee. Additionally, the Committee's guidance does not address financial disclosure issues. As with all gifts, the judge must comply with the pertinent financial disclosure requirements of the Ethics in Government Act and the Judicial Conference. Judges should contact the Financial Disclosure Committee staff for questions related to reporting club memberships.

Before accepting a complimentary or discounted club membership, judges must consider the other restrictions on membership in organizations. They should ascertain that the club is not involved or likely to become regularly involved in litigation. Judges must also consider whether the offer of membership is designed to exploit the judicial position or the court. They must be cautious that membership in the club would not convey the impression that lawyers who are also members are in a special position to influence the judge. Finally, the judge should not accept membership in an organization or club that practices invidious discrimination. *See also* Advisory Opinion Nos. 2

("Service on Governing Boards of Nonprofit Organizations") and 82 ("Joining Organizations").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 48: Application of Judicial Conference Conflict-of-Interest Rules for Part-Time Magistrate Judges

This opinion considers the application of conflict-of-interest rules to part-time magistrate judges. The Committee takes this scenario as an example: A part-time magistrate judge was formerly a partner in a law firm. Approximately two years ago the judge withdrew from the partnership, at which time the judge's name was dropped from the firm name. Since that time the judge has not participated in the profits or losses of the firm. The judge has continued to occupy office space, for which the judge pays the law firm a flat monthly charge. The judge's name appears on the firm stationery as "of counsel." The judge uses the firm's conference room for arraignments and trials conducted as a part-time magistrate. The judge does not appear to have been assigned additional duties under title 28 U.S.C. § 636(b).

A partner in the law firm has been consulted by a client in a tax matter being handled by the intelligence division of the Internal Revenue Service. It appears that the IRS is conducting an investigation to determine if there has been tax fraud and, if warranted, to assess a tax fraud penalty.

The scenario presents two separate questions. Before addressing these questions, it should be noted that part-time magistrate judges are treated differently than full-time magistrate judges in the Federal Magistrates Act. (28 U.S.C. § 631 *et seq.*) The history of the Act indicates that this distinction was largely to provide magistrate judge service in areas where the workload is insufficient for the appointment of a full-time magistrate judge, and to upgrade the part-time magistrate judges, whose work under the commissioner system had been frequently performed by persons with little or no legal training or experience.

The Act provides:

> (b) Part-time United States magistrates shall render such service as judicial officers as is required by law. While so serving they may engage in the practice of law, but may not serve as counsel in any criminal action in any court of the United States, nor act in any capacity that is, under such regulations as the [Judicial C]onference may establish, inconsistent with the proper discharge of their office. Within such restrictions, they may engage in any other business, occupation, or employment which is not inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers.

28 U.S.C. § 632(b).

The Judicial Conference took into account the special issues pertinent to part-time magistrates when devising the Conflict-of-Interest Rules for Part-time U.S.

Magistrates. These conflict rules are set forth in *Guide to Judiciary Policy*, Vol. 2C, § 1110.

Applying the conflict rules to the example, the part-time magistrate judge is not prohibited from renting space from former law partners. Additionally, the judge may serve as counsel to the law firm and have his or her name on its letterhead. The judge may use the law firm's conference room for hearings and trials, but may not use the judge's official office to refer cases either to associates or others.

The second question from this example presents a more difficult problem. We must first determine whether the former partner of the part-time magistrate judge is an associate within the conflict rules, and particularly under Rule 2. The Judicial Conference adopted the rules in the form in which they were submitted by the Magistrates Committee. The Magistrates Committee used the word "associates" in these rules as a broad term intended to include any office arrangement or association existing between two lawyers other than a partnership. In this example, where the part-time magistrate judge has withdrawn from the firm but continues the office arrangement outlined, we believe the firm partner who was consulted on the tax question and the judge are associates.

Next we must determine whether the work tendered to the firm partner is in a civil or criminal action. If it is in a civil case, then under Conflict-of-Interest Rule 1, the associate may appear before the judge, assuming the part-time magistrate judge has not been involved in the matter in connection with official duties. If it is a criminal case in the district in which the part-time magistrate judge serves, then Conflict-of-Interest Rule 4 would appear to preclude the appearance.

Tax fraud or tax penalty proceedings are not handled uniformly throughout the United States, although they are regarded by the IRS as civil cases. Usually a proceeding to recover a tax fraud penalty is not started until the IRS has exhausted the criminal remedies available or has decided not to proceed criminally. This is not universally true, however. In this example, it would be advisable for the part-time magistrate judge or the judge's former partner to check with the United States Attorney's office as to whether there is any intention to proceed criminally in the federal court of the district in which the part-time magistrate judge serves. In the event the United States Attorney declines to answer, the magistrate judge would need to assume a criminal proceeding is in the offing. If the former partner accepts the employment, the part-time magistrate should recuse if assigned any part of the criminal proceedings.

As a final note, a part-time magistrate judge is of course subject to Canon 2, requiring judges to avoid impropriety and the appearance of impropriety, and must consider that proscription in addition to the conflict rules.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 49: Disqualification Based on Financial Interest in Member of a Trade Association

This opinion considers whether a judge who owns a small percentage of the outstanding publicly-traded shares of one or more members of a trade association is required by the Code of Conduct for United States Judges to disqualify where the association appears as a party.

Under Canon 3C:

> (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 in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

"Financial interest" is defined in Canon 3C(3)(c) as:

> ownership of a legal or equitable interest, however small . . . except that:
>
> (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the funds; . . .
>
> (iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

While the exceptions of Canon 3C(3)(c) do not specifically refer to trade associations, the judge's small financial interest in a member of the association should be considered a "similar proprietary interest" within the meaning of that provision. Accordingly, the Committee sees no impropriety in a judge serving in a proceeding

where a trade association appears as a party, even though the judge owns a small percentage of the publicly-traded shares of one or more members of the association, so long as that interest could not be substantially affected by the outcome of the proceeding.

Recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 50: Appearance Before a Legislative or Executive Body or Official

This opinion considers the propriety of a judge appearing before a legislative or executive body or official as a witness or as a supporter or opponent of proposed legislation.

Canon 4 of the Code of Conduct for United States Judges provides, in part:

> A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture and teach both law-related and non-legal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification . . .
>
> A. Law Related Activities
>
> (1) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
>
> (2) A judge may consult with or appear at a public hearing before an executive or legislative body or official:
>
> (a) on matters concerning the law, the legal system, or the administration of justice;
>
> (b) to the extent that it would generally be perceived that a judge's judicial experience provides expertise in the area; or
>
> (c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

The accompanying Commentary states:

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits, and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar

> association, judicial conference, or other organization dedicated to the improvement of the law.

Under Canon 4, a judge properly may appear before a legislative or executive body or official, at a public hearing or in private consultation, with respect to matters concerning the administration of justice. Examples would be matters relating to court personnel, budget, equipment, housing, and procedures. These matters are all vital to the judiciary's housekeeping functions and the smooth operation of the dispensation of justice generally. This much is clear. *See also* Advisory Opinion No. 59 ("Providing Recommendations or Evaluations of Nominees for Judicial, Executive, or Legislative Branch Appointments").

Less clear, however, is the propriety of a judge appearing on behalf of, or against, particular proposed legislation that relates to subject matter other than the administration of justice. Advocacy for or against legislation aimed at vital political issues or policy may well raise questions of propriety despite the fact that the judge, too, is a citizen and may be affected by the legislation. Such legislation also may spawn litigation likely to come before the judge. Although Canon 4A(2)(a)'s phrase "matters concerning the law" could be broadly construed to embrace nearly all legislation and executive decisions, the Committee advises that the reach of the canon is not that broad and, indeed, was intended to be comparatively narrow. *See* Advisory Opinion No. 93 ("Extrajudicial Activities Under Canon 4").

There will, of course, be subject matter that falls close to the line between the permissible and impermissible categories for consultation with public bodies. The judge then must use his or her best judgment, having in mind the basic purpose and intent of the canon, and the likelihood that litigation relating to the subject matter will come before the judge.

In summary, with the exception noted below, a judge may appear at a public hearing before or consult with an executive or legislative body or official relative to matters *not* concerning judicial administration only "to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in that area." Canon 4A(2).

An exception is made when the judge's interest as an individual will be affected. *See* Canon 4A(2)(c). Proposed rezoning of property, or the imposition of assessments for improvements, are ready illustrations. The Committee sees no impropriety in the judge appearing at a public hearing relative to a subject of that type. However, as the Commentary to the corresponding rule in the ABA Model Code of Judicial Conduct observes, "In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with governmental officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the

prestige of the judicial office." MODEL CODE OF JUDICIAL CONDUCT, Rule 3.2 Comment [3] (ABA 2007 Edition).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 51: Law Clerk Working on Case in Which a Party Is Represented by Spouse's Law Firm

This opinion considers the propriety of a judge's law clerk working on cases in which the law firm of the law clerk's spouse represents a party.

Among judicial employees, law clerks are in a unique position since their work may have direct input into a judicial decision. Even if this is not true in all judicial chambers, the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge.

The significance of the relationship between judge and law clerk is reflected in certain provisions of the Code of Conduct for Judicial Employees (Employees' Code) that are directly relevant to the inquiry. Canon 3F(2)(a)(iv)(B) precludes a law clerk from performing official duties in any matter where the law clerk's spouse is acting as a lawyer in the proceeding. Canon 3F(2)(a)(iii) provides that law clerks should disqualify themselves in cases where their spouses or minor children have a financial interest in a matter in controversy. We have previously concluded that a partner in a law firm has a financial interest in all matters handled by the firm. Accordingly, if the law clerk's spouse is working on the case, or if the spouse is a partner in the firm handling the matter, the law clerk should not participate in the case.

A more difficult question arises when the spouse is an associate in a large firm and has no involvement in the case. Even under these circumstances, the Committee concludes that the clerk should not be permitted to work on any cases of the firm that employs the law clerk's spouse. To do so violates the spirit of Canon 2 of the Employees' Code and Canon 2A of the Code of Conduct for United States Judges in that it may erode public confidence in the integrity and impartiality of the judiciary. The dangers, real and perceived, of the exploitation of the relationship to the law firm's financial or other advantage call for a per se rule of recusal when the firm employs the law clerk's spouse.[1]

In so concluding, the Committee recognizes that it has not applied a similar blanket recusal rule for judges. For example, we have concluded previously that a judge was not required to recuse when the judge's child was an associate in a law firm representing a party in a case before the court. In that instance, the child was not working on the matter and the child's compensation was not affected by the outcome of the case.

The Committee believes that several factors justify making a distinction. Clerks often come to clerkships directly from law school. As a rule, they are not as steeped in or sensitive to the ethical issues that govern a judge's conduct and are not likely to have the same level of judgment as the more experienced judges for whom they work. Law clerks and their spouses are more likely to find themselves in situations where attorneys or others may intentionally or inadvertently discuss matters that are pending before the

law clerk's judge. To avoid these dangers and any appearance of impropriety, a blanket recusal policy is necessary, and from this it follows that the recused clerk should avoid any discussion of the case with the judge, law clerks, or others.

Finally, the disqualification of a judge is far more disruptive to the administration of justice than the disqualification of a law clerk. Most judges have more than one clerk, and the matter may be transferred easily to another clerk. If a judge has only one clerk, an arrangement may be made to trade the services of the law clerk for the services of a law clerk to another judge on the same bench. A balancing of the relative ease of handling the consequences of law clerk recusal against the considerations outlined herein and Canon 2 concerns for the appearance of impropriety accordingly supports a blanket recusal policy.

The Committee additionally observes that for many of the reasons articulated in Advisory Opinion No. 38 ("Disqualification When Relative Is an Assistant United States Attorney"), a similar blanket rule does not apply where the spouse of the judge's law clerk is employed as a lawyer for the United States Attorney, public defender or other government agency.

Note for Advisory Opinion No. 51

[1] An amendment to the Code of Conduct for United States Judges, which became effective July 1, 2009, advises judges that, for purposes of recusal, "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C. No similar amendment has yet been made to the Employees' Code, although a judge may impose the more stringent requirement on staff members. A law clerk should, therefore, determine the judge's preference as to recusal if such circumstances are presented.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 52: American Bar Association or Other Open-Membership Bar Association Appearing as a Party

This opinion considers whether a judge should recuse where a national, state, or other bar association appears as a party (plaintiff or defendant) and the judge is a member of the association. The Committee assumes that the association has an open membership.

This question implicates Canons 2A, providing that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and 3C(1), instructing:

> 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 in which:
>
> * * *
>
> (c) the judge knows that . . . [he or she] has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3) goes on to provide:

> For the purposes of this section:
>
> * * *
>
> (c) "financial interest" means ownership of a legal or equitable interest, however small, or arelationship as director, advisor, or other active participant in the affairs of a party, except that:
>
> (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
>
> (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
>
> (iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of

the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

In Advisory Opinion No. 26, relating to litigation involving health insurance companies, the Committee concludes judges holding health insurance policies are not disqualified from sitting in a case where the issuing health insurance organization is a defendant. The judges' interests as health insurance policy-holders are not deemed "financial interests" within the meaning of that term as it is used in the Code. The Committee considers the interest analogous to the property interest of a policy-holder in a mutual insurance company, or that of a depositor in a mutual savings association, and that, in any event, on the facts the interest could not be regarded as substantial. Similarly, in Advisory Opinion No. 49, addressing ownership of a small percentage of the outstanding publicly-traded shares of a corporation member of a trade association, the Committee advises there is no impropriety in the judge sitting on a case in which the trade association is a party. In each of these instances, the Committee's conclusion is subject to the general qualifications set forth in Canons 3C(1)(c) and (3)(c).

The Committee concludes that a like analysis applies to the financial interest a judge holds through membership in an open-member bar association. The judge's interest in a professional organization of the bar association type is particularly tenuous, for the "financial" aspect is inconsequential, if it could be said to exist at all. The Committee therefore sees no impropriety in a judge sitting on a case where an open-membership bar association of which the judge is a member is a party. The judge must determine, however, that no other disqualifying interest exists, for example, participation in development of the bar association position on the matter or service as an officer or board member of the association. *See* Advisory Opinion No. 85 ("Membership and Participation in the American Bar Association"). Again, this conclusion is subject to the general qualifications contained in Canons 3C(1)(c) and (3)(c).

As an additional consideration, the Committee advises that unwarranted recusal may bring public disfavor to the bench and to the judge. Where the provisions of the Code point to recusal, then recusal must follow; but where the only factor present is hypersensitivity on the part of the judge, or a distaste for the litigation, or annoyance at a party's suggestion that the judge recuse – and nothing more – the dignity of the bench, the judge's respect for the fulfillment of judicial duties, and a proper concern for judicial colleagues all require that the judge *not* recuse.

To close, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United

States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 53: Political Involvement of a Judge's Spouse

Canon 5 (refrain from political activity) and Canon 2 (avoid impropriety and the appearance of impropriety in all activities) of the Code of Conduct for United States Judges define a judge's obligations where the judge's spouse engages in political activity. The Code does not govern the conduct of a judge's spouse, however. Therefore, a judge should, to the extent possible, disassociate himself or herself from the spouse's political involvement.

The judge should not, for example,

(a) accompany the spouse to any political function or any function that is likely to be considered political in nature. However, when the spouse is a candidate for elected office, the judge may attend civic gatherings sponsored by nonpolitical organizations to which all candidates are invited. Additionally, judges may attend purely ceremonial events, such as inaugurations, as those events are not considered political;

(b) join in the use of the marital home for political meetings or fund-raising events, and should disassociate himself or herself from any such gathering;

(c) join in or approve any reference to the relationship between the judge and spouse in any communication relating directly or indirectly to the spouse's political activity. However, the judge may appear in a family photograph used in campaign materials, so long as that photograph does not identify the judge as a judge.

A spouse's involvement in political activities or candidacy for elected office may increase the frequency with which a judge is required to recuse. Judges should pay attention to that increased likelihood. Additionally, if there is a person other than a spouse with whom the judge maintains both a household and an intimate relationship, the judge should consider the cautions contained in this opinion in order to avoid any appearance of impropriety.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 55: Extrajudicial Writings and Publications

This opinion considers the topic of extrajudicial writing and publishing. We consider two particular aspects of this issue: (1) the propriety of a judge writing about cases that the judge has heard; and (2) the extent of permissible advertising of the judge's publications. While it is difficult to prescribe precise guidelines, the following factors are worthy of consideration by a judge contemplating these endeavors. If after consideration of these factors a judge remains uncertain about the propriety of a particular action, the Committee stands ready to answer specific inquiries.

Writing Generally

As a general matter, the Code of Conduct for United States Judges advises that a "judge may . . . write . . . on both law-related and nonlegal subjects." Canon 4. Indeed, the Commentary to Canon 4 notes that "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice . . . ." The Code's authorization for extrajudicial writing, however, is subject to various limitations. Canon 4 imposes the general caveat that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality [or] lead to frequent disqualification . . . ." Canon 4G restricts the use of court resources to undertake extrajudicial writing, instructing that a "judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon."

Regarding compensation for extrajudicial writing, Canon 4H states: "A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety . . . ." The Code, however, restricts this allowance in the following ways: (1) compensation must be reasonable and not exceed what a non-judge would receive for the same activity; (2) expense reimbursement should be limited to the actual costs reasonably incurred by the judge, and, where appropriate to the occasion, by the judge's spouse or relative; excess payments should be treated as gifts or compensation and not expense reimbursement; and (3) the judge should file the required financial disclosures. Canon 4H(1)-(3).

Writing About Cases the Judge Has Heard

A judge must exercise special caution when writing about a case the judge has heard. To start, a "judge should not make public comment on the merits of a matter pending or impending in any court." Canon 3A(6). However, "the prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations

made for purposes of legal education." *Id.* The Commentary to Canon 3 elaborates on the public comment restriction:

> The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Commentary to Canon 3A(6).

The Committee offers these additional suggestions, which are not intended to be comprehensive. When writing about a case the judge has heard, even after final disposition, the judge should be especially careful to avoid the potential for exploitation of the judicial position. If referring to a criminal case, the judge should consider whether the comments might afford a basis for collateral attack on the judgment. A judge must avoid writings that are likely to lead to disqualification. In every case, the judge should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the office. Finally, the judge should consider the language, intent, and spirit of the entire Code when deciding to write about a case handled by the judge.

Advertising

The judge should, as far as possible, make certain that advertising for the judge's publications does not violate the language, spirit, or intent of the Code. A judge should be particularly careful to comply with Canon 2B, which, in part, counsels against lending the prestige of the judicial office to advance the private interests of the judge or others. To that end, in contracting for publication it would be advisable for a judge to retain a measure of control over the advertising (including the right to veto inappropriate advertising), so that the advertising does not exploit the judicial position or use the prestige of the judge's office to advance the private interests of the judge or others.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 57: Disqualification Based on a Parent-Subsidiary Relationship

This opinion considers recusal issues arising out of parent-subsidiary relationships between corporations.

Canon 3C(1) of the Code of Conduct for United States Judges provides that:

> (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 in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small." The provision enumerates exceptions to the definition, including ownership in a mutual or common investment fund; the proprietary interest of a policy-holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest; and ownership of government securities, where the outcome of the proceeding could not substantially affect the value of the securities. None of these exceptions are applicable to parent-subsidiary relationships, which present materially different issues.

If a parent corporation owns all or a majority of stock in a subsidiary that is a party, the Committee advises that a judge who owns stock in the parent then has a financial interest in the subsidiary, requiring recusal.

The issue is less clear where the parent holds less than a majority interest. The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a subsidiary that the parent controls. Therefore, when a corporation does not own all or a majority of stock in a party, the judge should determine whether the corporation has control of the party. *See* Black's Law Dictionary (11th ed. 2019) (defining "parent corporation" as "[a] corporation that has a controlling interest in another corporation"). The Committee advises that the 10% disclosure requirement in the Federal Rules (e.g., Fed. R. App. P. 26.1, Fed R. Civ. P. 7.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012) creates a threshold rebuttable presumption of control for recusal purposes. Whether that presumption may be rebutted or not depends on other indicia of control, such as board representation or wide dispersion of the remainder of the stock, which are relevant to the influence wielded by a 10% interest. To determine if one entity controls another, a judge may

exercise his or her discretion to seek information from the parties or their attorneys; a judge also may review publicly available sources, such as Securities and Exchange Commission filings. When a judge concludes that a party is controlled by a corporation in which the judge owns stock, the judge must recuse.

Whether recusal is necessary when a party discloses that a mutual fund company or holding company owns 10% or more of its stock warrants additional elaboration. Ordinarily, because a judge who invests in a mutual fund does not have a financial interest in the mutual fund management company, or the securities held in the fund, unless the judge participates in the fund's management, the judge does not have a financial interest in a subsidiary and there is no need for the judge to determine whether the mutual fund company exercises control. *See* Canon 3C(3)(c)(i); Advisory Opinion No. 106 ("Mutual or Common Investment Funds"); *see also* Black's Law Dictionary (11th ed. 2019) (defining "mutual fund" as "[a]n investment company that invests its shareholders' money in a usu[ally] diversified selection of securities"). In the case of holding companies, the necessary inquiry is once again the percentage of ownership interest, with 10% the relevant threshold. But, as explained above, this threshold creates a rebuttable presumption and is not an absolute line, because in practical terms the specific percentage of ownership may fluctuate over time based simply on market conditions without affecting whether the holding company has control over the party. *See* Black's Law Dictionary (11th ed. 2019) (holding company is a "company formed to control other companies, usu[ally] confining its role to owning stock and supervising management").

Regardless of control, a judge must recuse if the company in which the judge owns stock could be substantially affected by the outcome of the proceeding. For example, recusal would be required if the value of the party's stock is likely to be affected by the outcome of the proceeding, and the value of the company in which the judge owns stock would in turn be affected substantially by the change in the party's stock price. The Committee notes that the 10% disclosure requirement in the Federal Rules "assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal." Fed. R. App. P. 26.1, 1998 Advisory Committee Note. But although a 10% ownership interest in a party may raise a threshold presumption that a company could be substantially affected by litigation, in the case of large holding companies invested in a wide range of corporations, a share greater than 10% in a single enterprise may not represent a significant portion of its overall portfolio.

Even in the case of mutual funds, a judge may, in rare circumstances, be required to recuse based on ownership of a mutual fund that owns 10% or more of a party's stock if the judge's interest in the mutual fund could be affected substantially by the outcome of the proceeding. While a judge is not required to monitor the underlying investments in a mutual fund, Canon 3C(1)(c) requires a judge to recuse if the judge knows that his or her interest in a mutual fund could be substantially affected by the outcome of a case. *See* Advisory Opinion No. 106. A judge who invests in a "sector" or

"industry" fund, for example, must recuse from a case involving that particular sector or industry if the outcome of the proceeding could substantially affect the value of the judge's interest in the fund. *Id.*

If a judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as a party in a proceeding, the judge must recuse if the value of the judge's interest in the subsidiary could be substantially affected by the proceeding. As the Committee has explained in other contexts, it is not the size of the judge's interest that matters, but rather whether the interest could be substantially affected.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

February 2024

Committee on Codes of Conduct Advisory Opinion
No. 58: Disqualification When Relative is Employed by a Participating Law Firm

Questions often arise regarding recusal based on employment by a law firm of a relative of the judge. In most instances, the relative is the child of the judge. This opinion, however, applies to all relatives within the third degree of relationship to either the judge or the judge's spouse, as defined in Canon 3C(3)(a) of the Code of Conduct for United States Judges. It also applies to offers of employment, and to employment by individual lawyers. Additionally, for purposes of recusal, "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.

The Committee advises that if the relative participates in the representation of a party in a case before the judge or is an equity partner in a law firm that represents a party, the judge must recuse. Canon 3C(1)(d)(ii) and (iii) of the Code provide:

> (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 in which:
>
> * * *
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such person is:
>
> * * *
>
> (ii) acting as a lawyer in the proceeding;
>
> (iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]

The Committee concludes that an equity partner in a law firm generally has "an interest that could be substantially affected by the outcome of the proceeding" in all cases where the law firm represents a party before the court.

The typical and more difficult situation arises when the relative is employed by the firm as either an associate or a non-equity partner. For the purposes of this opinion, a non-equity partner is understood as one who receives a fixed salary, is not entitled to share in the firm's profits, and has no interest in the firm's client list or goodwill. If the relative is an associate or non-equity partner and has not participated in the preparation or presentation of the case before the judge, and the relative's compensation is in no manner dependent upon the result of the case, recusal is not mandated.

The judge, however, always must be mindful of Canon 2A, which directs that a judge should act at all times in a manner that "promotes public confidence in the

integrity and impartiality of the judiciary," as well as the general command of Canon 3C(1) that a judge should recuse in a proceeding in which the "judge's impartiality might reasonably be questioned." Accordingly, although recusal may not be prescribed for participation by a relative who is an associate or non-equity partner, other circumstances may arise that in combination with the relative's status at the firm could raise a question about the judge's impartiality and thereby warrant recusal.

As a cautionary note, the Committee further observes that the remittal procedures of Canon 3D are not available if the judge's relative is acting as a lawyer in the case or is a partner in the law firm representing a party before the court. Recusal is required. As discussed, recusal is not mandated if the firm representing a party before the court employs a judge's relative as an associate or non-equity partner and the relative has no involvement in the case. If nonetheless a judge is concerned that his or her impartiality might reasonably be questioned, the judge may invoke the remittal procedures of Canon 3D.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 59: Providing Recommendations or Evaluations of Nominees for Judicial, Executive, or Legislative Branch Appointments

Judges are frequently asked by federal and state merit selection commissions for recommendations of suitable judicial nominees or for evaluations of pending judicial nominees. Judges also are sometimes asked to provide recommendations about executive or legislative nominees.

Canon 2A of the Code of Conduct for United States Judges directs that judges should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The Commentary to Canon 2A states that "[a]n appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Canon 2B advises judges against lending the prestige of judicial office to advance the private interests of others and against conveying the impression that others are in a special position to influence the judge.

This opinion explains how judges may, within the parameters of the Code of Conduct, provide recommendations or evaluations concerning potential appointees for judicial, executive, or legislative branch appointments.

The Committee notes that the cautions raised in this opinion are consistent with, and should not discourage, judges' efforts to consult with legislative or executive branch officials with respect to matters concerning the administration of justice—including general issues related to judgeships, judicial vacancies, and judicial resources. See Canon 4A(2); Advisory Op. No. 50.

Involvement by Judges in Screening or Reviewing Judicial Nominees

Judges commonly receive inquiries about potential judicial nominees from various entities, including federal and state merit selection commissions or national, state, and local bar associations. The Commentary to Canon 2B expressly provides that judges "may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship." The Committee views the term "appointing authority" as intended to include federal executive and legislative officers, such as the President and senators, and their selection committees or commissions and their staff, along with state executive officers, such as governors, and their selection committees or commissions and their staff. The Committee views "screening committee" as intended to include bar committees or other groups that are officially charged with evaluating the professional qualifications of a judicial nominee. For example, this definition includes the Department of Justice, judicial committees that facilitate the hiring of magistrate and bankruptcy judges, the

American Bar Association judicial rating committees, and state appointing or screening authorities.

Initiating Contact or Responding to a Request

Judges should not initiate communications with federal or state appointing authorities, such as Congress or the White House, or screening committees for the purpose of supporting or opposing any candidate or nominee for judicial, executive or legislative branch appointment. Unsolicited contact with an appointing authority or screening committee is contrary to Canon 2B's proscription against lending the prestige of the judicial office to advance the private interests of others. A judge also should not respond to media requests, issue any statements, or participate in joint efforts with others to support or oppose a nominee. Such contact might also transgress Canon 5C and its proscriptions against engaging in political activity.

In contrast, based on the Commentary to Canon 2B, judges may respond to requests from an appointing authority or screening committee. A judge, if asked, may recommend and evaluate judicial nominees based on the judge's insight and experience, with the objective of maintaining a qualified and honorable judiciary. The Committee also advises that judges may—when requested to do so—provide recommendations of persons to be considered for judicial office. Any opinion offered by a judge should be, and should appear to be, directed only to the nominee's qualifications and factors relevant to the performance of the judicial office. A judge also should not publicly advocate for or oppose, or otherwise lend his or her name to any publicity campaign associated with any nominee for judicial appointment. In any communications regarding a nominee, however, judges should be mindful of Canon 5, which mandates that judges refrain from both partisan and nonpartisan political activity.

Further, a judge should not volunteer to testify at a confirmation hearing as that would run contrary to Canon 2B ("A judge should not testify voluntarily as a character witness").

A judge may permit a judicial nominee to list the judge as a reference in the nominee's application. If the screening committee has required that all nominees submit a letter of recommendation from a judge, and the nominee has requested a letter of recommendation, the judge may respond, but responses and recommendations should be directed only to the nominee's qualifications and factors relevant to the performance of the judicial office. The strictures of Canons 2B and 5C should serve as a guide to a judge communicating any recommendation or evaluation.

Involvement by Judges in Screening or Reviewing Executive and Legislative Branch Appointments

Similar considerations apply with respect to communications on behalf of a nominee for an executive or legislative branch appointment. (See also Note 1 below concerning legislative vacancies.) Canon 2 is implicated in any request for

recommendations regarding nominees for such appointments. As is the case with judicial nominees, a judge would act contrary to Canon 2B if he or she were to initiate communications with an appointing authority regarding a nominee for an executive or legislative branch appointment, such as sending an unsolicited letter of recommendation. On the other hand, in light of the Commentary to Canon 2B, the Committee believes that there would be no impropriety in a judge answering an inquiry from a screening committee or appointing authority with respect to the judge's knowledge concerning the qualifications and other relevant factors of a nominee for appointment to any public office. As in responding to inquiries of or about judicial nominees, any opinion the judge offers should be, and should appear to be, directed only to the nominee's qualifications and factors relevant to performance of the office, and the judge should not publicly advocate for or against a nominee.

Providing Advice to Potential Applicants

Additionally, judges sometimes are asked by a potential applicant about the judicial selection process. A judge who answers a prospective applicant's questions regarding the selection process and encourages a qualified individual to apply for the position is not using the judicial position to initiate contact with the reviewing authority. The judge is not indicating a preference to a reviewing authority for one applicant over another. The Committee also believes that there is no appearance of impropriety in meeting with prospective applicants or in urging qualified practitioners to apply, because the judge is promoting the public interest in obtaining a high level of quality and integrity in the judiciary, and there is no need to recuse from matters involving potential judicial applicants on this particular basis. See Canon 3C. If after consulting the judge, an attorney chooses to apply, however, it would be improper for the judge to initiate contact with the selection committee or appointing authority.

Involvement of Judicial Employees in Screening or Reviewing Nominees

Similar constraints apply to judicial employees providing evaluations of judicial, executive, or legislative nominees to appointing authorities or screening committees. Canon 2 of the Code of Conduct for Judicial Employees directs that a judicial employee should avoid impropriety and the appearance of impropriety in all activities. Canon 2 further directs that a judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. Thus, judicial employees, like judges, should not initiate communications, but may respond to requests from an appointing authority or screening committee with information directed only to the nominee's qualifications and factors relevant to the performance of the office.

Additionally, Canon 5 of the Employees' Code cautions that judicial employees should refrain from inappropriate political activity. See Advisory Op. No. 92. In keeping with Canon 5, a judicial employee should not initiate or circulate a petition or publicly endorse or oppose, including on social media, a judicial, executive, or legislative nominee. A judicial employee also should not initiate or circulate a recall petition.

Notes for Advisory Opinion No. 59

[1] Occasionally, interim nominees for a legislative vacancy will arise. This opinion applies when a judge is asked to respond to an inquiry about such a nominee.

October 2019

Committee on Codes of Conduct Advisory Opinion
No. 60: Appointment of Spouse of an Assistant United States Attorney as Part-Time Magistrate Judge

This opinion considers whether a district court may appoint the spouse of an Assistant United States Attorney ("AUSA") as a magistrate judge, where the AUSA would not appear in any case over which the magistrate judge presides, and the couple would in fact perform their duties in different divisions of the district. Before addressing this question, the Committee notes that "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C of the Code of Conduct for United States Judges.

In Advisory Opinion No. 38, the Committee addressed in detail the recusal considerations when a judge's relative serves as an AUSA, concluding that a judge would not be disqualified *per se* from hearing all cases in which the United States was represented by any member of the United States Attorney's office if the judge's relative accepted a position as an AUSA. The Committee did caution that recusal might be required in certain specific circumstances, such as where the judge's relative is acting as attorney, supervisor, or the United States Attorney in a proceeding. But because there is no *per se* disqualification from all cases, we find no barrier in the Code to the appointment of a spouse of an assistant United States attorney to the position of magistrate judge.

In addition to the Code, the Judicial Conference has adopted a specific rule for part-time magistrate appointees that also applies to this question. The Judicial Conference Conflict-of-Interest Rules for Part-Time Magistrate Judges provide that:

> 1. A part-time magistrate judge, [and] his or her partners and associates, may appear as counsel in any civil action in any court or governmental agency, including matters in which the United States is a party or has a direct and substantial interest, but they may not appear in cases in which the part-time magistrate judge has been involved in connection with his or her official duties.
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> * * *
>
> 4. A part-time magistrate judge's partners and associates may appear as counsel in any criminal action in any state court and in any federal court other than in the district in which the part-time magistrate judge serves, provided that the part-time magistrate judge has not been involved in such criminal proceeding in connection with his or her official duties.

Guide to Judiciary Policy, Vol. 2C, § 1110.

If the spousal relationship were considered analogous to the law partner-part-time magistrate judge relationship, then under the conflict rules a part-time magistrate

judge would have difficulty presiding in a district where the spouse was an AUSA, except where the prosecutor appeared only in civil cases. However, we conclude that the relationship of spouses and current law partners is not an analogous situation. The sharing of income among spouses on annual fixed salaries is very different from the sharing of a law firm's income among partners whose draw depends on the firm's income. The firm's income varies from year to year, and so may the partners' percentages. In addition, reputation and standing are more important to the annual economic success of a law firm than they are to a married couple holding government jobs. While under other circumstances the analogy may be close enough to require application to spouses of the law partner conflict rules, the situation of spouses both employed in government service does not.

The Committee concludes that there is no impropriety in the appointment of a part-time magistrate judge whose spouse is employed by the United States Attorney's office in a division of the district different from the magistrate judge. We believe this separation in divisions should ensure that neither the spouse nor anyone supervised by the spouse would be assigned to or have any involvement with a case before the magistrate judge. We express no opinion on the propriety of simultaneous service of one spouse as judge and another as prosecutor in a very small district where such service would cause significant distortion in the allocation of caseloads due to required disqualifications.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 61: Appointment of Law Partner of Judge's Relative as Special Master

This opinion considers the propriety of a judge appointing as special master an attorney who is a law partner in a firm in which a relative of the judge is also a partner. The Committee considers an example with the following characteristics. The special master would be appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure to supervise discovery in a civil case pending before the judge. The proposed special master is a partner in a firm of which the judge's nephew is also a partner. Additionally, the firm has employed on a part-time basis the judge's child, currently a law student. The judge has previously taken the position that no member of the firm may appear before the judge in any matter. The proposed special master is eminently qualified to handle the assignment. Under Rule 53, compensation for the special master would be fixed by the court and charged to the parties.

Canon 3B(3) of the Code of Conduct for United States Judges provides: "[a] judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism." By including "favoritism" as an impermissible objective in making appointments, the canon goes beyond the statutory ban on nepotism contained in 28 U.S.C. § 458, which prohibits appointment of any person "related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court."

These circumstances raise the question of when an appointment, even though initially proposed on the basis of merit, ought to be precluded because of relationships that either indicate or create the appearance of favoritism. In another context the Committee has concluded that the appearance of an attorney who is a partner in a firm of which another partner is related to the judge within the third degree of relationship is grounds for recusal of the judge. *See* Advisory Opinion No. 58 ("Disqualification When Relative is Employed by a Participating Law Firm"). That conclusion was prompted by concern about the judge's decision affecting compensation of a relative because the relative would participate in the fee of the attorney appearing before the judge.

The Committee believes the same concern applies to a judge's relative who shares in a fee derived from a law partner's compensation for duties as a special master. Even if a partner of the firm is not obliged to share fees earned for professional services rendered as a special master, the appearance of impropriety standard of Canon 2 ought to preclude a judge from determining the compensation of a partner of the judge's relative. Similarly, even if the special master waived fees, the appointment would likely be regarded in the community as conferring a monetary benefit. In addition, waiver of compensation would raise the additional issue of the impropriety of a law firm performing costly favors for the court. The Committee notes that there are also situations in which a proposed appointment, without compensation, of the law partner of a judge's relative would be considered "favoritism" within the meaning of Canon 3B(3) or would create the appearance of impropriety within the meaning of Canon 2.

The Committee has no doubt that in these circumstances the selection of the attorney to serve as a special master was made entirely on the basis of merit and with no thought of conferring a benefit on the judge's relative. But we do not believe that an appointment's propriety under Canon 3B(3) can turn solely upon an individual assessment of high professional competence. We therefore conclude that, in the circumstances described, a judge should not appoint as special master a law partner of the judge's nephew.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 63: Disqualification Based on Interest in Amicus that is a Corporation

In this opinion we consider whether recusal is required when a judge has an interest in a corporation that is an *amicus curiae*. This opinion does not consider other recusal questions that may arise in relation to *amici*, such as when a law firm that is on a judge's recusal list represents an *amicus*, or when a judge has an interest in a nonprofit organization that is an *amicus*. *See, e.g.*, Advisory Opinion No. 34 ("Serving as Officer or on Governing Board of Bar Association").

Canon 3C(1)(c) of the Code of Conduct for United States Judges provides that the judge shall disqualify when:

> [T]he judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party." In most cases, a judge with an interest in a corporate *amicus* will not have a legal or equitable interest in a party to the proceeding or in the subject matter in controversy that would constitute a financial interest under the Code. There remains, however, the question of whether the judge's interest in the *amicus* constitutes "any other interest that could be affected substantially by the outcome of the proceeding."

Any interest that could be substantially affected by the outcome of a proceeding is a disqualifying interest; this restriction applies to an ownership interest in *any* corporation, whether or not the corporation appears as an *amicus*. An example of when an ownership interest in an *amicus* could result in disqualification would be when the *amicus* is in the same industry as the party and the value of industry stock generally could be substantially affected by the decision in the pending case. Even in those situations where an ownership interest could be substantially affected, one might doubt that a judge's impartiality might reasonably be questioned if the interest is minimal. However, under the Code the extent of the judge's interest is irrelevant.

Given the mandatory nature of Canon 3C(1)(c), the requirement to recuse if a disqualifying interest in an *amicus* exists is the same even when the *amicus* does not surface until, for example, the rehearing stage.

In the event that a decision in a pending case will not substantially affect a judge's interest in an *amicus*, the judge still must consider whether recusal is required because "the judge's impartiality might reasonably be questioned." Canon 3C(1).

To conclude, if an interest in an *amicus* would not be substantially affected by the outcome, and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an *amicus* is not *per se* a disqualification.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 64: Employing a Judge's Child as Law Clerk

This opinion discusses whether it is proper for a federal judge to employ as law clerk the son or daughter of another federal judge. We consider the issue vis-a-vis judges on the same court, judges on related courts, and judges on courts in different districts or circuits.

At the outset, we note that 28 U.S.C. § 458 expressly prohibits some appointments within the court system. It provides:

> No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court.

The term "court" is generally construed so that each district court and each circuit court of appeals constitutes a different court. *See* 28 U.S.C. § 451 (defining courts). Accordingly, the statutory provision, if applicable, would not apply to other than judges of the same court. This conclusion makes it unnecessary to resolve the question of whether the position of law clerk is "any office or duty of the court" as defined in the statute.[1]

Although interpretation of § 458 is beyond the jurisdiction of the Committee, the same principles evident in the statute are reflected in Canon 3B of the Code of Conduct for United States Judges related to nepotism and favoritism. As discussed in this opinion, we conclude that whether or not § 458 is directly applicable, both the Code and the congressional policy underlying § 458 would in any event counsel against a judge hiring as a clerk the son or daughter of a judge who sits on the same court. In the case of judges sitting on different courts, such hiring is permissible, subject to appropriate ethical safeguards.

Same Court

Section 458 evinces a congressional policy that the judiciary should be kept free from the practice, or the appearance, of nepotistic hiring. Canon 3B(3) of the Code goes beyond the statutory ban in that it proscribes "favoritism," a broader term than nepotism. It provides:

> A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

Hiring the son or daughter of a colleague raises two principal concerns. First, a judge should not use the hiring prerogative to dispense government offices for his or her

personal advantage or that of a colleague. This would be an improper use of judicial office in violation of Canon 2 (avoid impropriety and appearance of impropriety) as well as Canon 3B(3). Second, employment of a related law clerk might undermine the impartiality, or give the appearance of that fault, when the employing judge and the judge who is a parent of the law clerk work closely with each other on the same court. This would contravene Canon 3.

We think that to avoid the fact or appearance of the improprieties noted above, and to give meaning to the congressional policies underlying § 458–regardless of its applicability to the specific position of law clerk–it is improper for a judge to hire as law clerk a son or daughter of a judge of the same court.

For purposes of this opinion and related nepotism/favoritism rulings, magistrate judges are properly regarded as serving on the same court as district judges in their district. Likewise, bankruptcy judges are properly regarded as serving on the same court as district judges in their district. Thus, it is ordinarily improper for a district judge to hire the child of a magistrate or bankruptcy judge in the same district, and vice versa.

Separate and Unrelated Courts

At the other extreme from hiring within the same court as the applicant's parent lies the case presented when a federal judge employs the son or daughter of another federal judge who sits on a court that is a separate entity and that has no jurisdictional relation to the court of employment, e.g., the District of Idaho and the District of Maine, or the District of Idaho and the Court of Appeals for the First Circuit. Although the danger of favoritism in the dispensation of government offices is not altogether absent in such cases, it is neither as compelling nor as apparent as where the judges sit as colleagues. The rights and legitimate expectations of the prospective clerk, moreover, should not be ignored in this instance. The children of judges already bear some of the sacrifices of the offices held by their parent. It is unfair, we think, to visit upon them a blanket disability from seeking an employment that is often the reward of academic excellence. Also it appears that any threat to impartiality is entirely absent. Thus we see no impropriety in hiring the son or daughter of a judge of a different court with no jurisdictional relationship or connection to the court of the employing judge. The judge who is a parent should not, of course, use his or her judicial or personal position to influence the selection of the clerk.

Related Courts

When the judges involved sit on courts with a jurisdictional connection, e.g., a court of appeals and a district court within the same circuit, the Committee believes it is not appropriate to prohibit all hiring of children of judges within the same circuit but on different courts.[2] The Committee advises that each judge should consider the facts of the individual case, with reference to the factors discussed below.

The first consideration is whether hiring the applicant will constitute favoritism, in fact or appearance. The hiring judge should make an appointment only with confidence that the fact of the applicant's family connections is not a factor in the decision to hire, and that no appearance to the contrary will arise. In this regard, the hiring judge should examine the personal and formal contacts he or she has with the parent of the applicant. Ethical questions cannot always be answered by *per se* rules and in this instance, as in others, the decision must of necessity be that of the judge. *See* Advisory Opinion No. 11 ("Disqualification Where Long-Time Friend or Friend's Law Firm Is Counsel").

As for the necessity of maintaining the fact and the appearance of impartiality, it is unacceptable for a reviewing judge to rely upon the assistance of a clerk who is the son or daughter of a judge who decided the case in the lower court. We have previously recognized that:

> Among judicial employees, law clerks are in a unique position since their work may have direct input into a judicial decision. Even if this is not true in all judicial chambers, the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge.

Advisory Opinion No. 51.

The Committee concludes, however, that the remedy of excluding the related clerk from participation in any discussion or research involving the case is a sufficient safeguard against a threat to impartiality so that a general prohibition against hiring the clerk is unnecessary. The Committee has applied the same rule when a case is argued by a firm in which the clerk's spouse is employed. *See id*.

When a circuit judge hires a district judge's child: A circuit judge, before making the decision to hire a clerk who is related to a district judge whose work will be reviewed, should consider whether it will be necessary to insulate the clerk from case participation with frequency and, if so, whether such insulation will disrupt orderly procedures within the reviewing judge's chambers or court.

If the hiring judge has considered these factors and finds no ground for concern either that favoritism will occur or that impartiality or orderly procedures will be undermined, a circuit judge may, with propriety and without violating Canons 2 and 3, hire as law clerk the son or daughter of a judge from a district court even if there is a jurisdictional relation between the courts. The same considerations govern a circuit judge's decision whether to hire the child of a bankruptcy or magistrate judge in the same circuit.

When a district judge hires a circuit judge's child: Ordinarily the need for the district judge to isolate the law clerk will arise only infrequently; that is, only when a case is returned by that circuit judge to the district judge. However, the more significant

problem lies in the fact that a circuit judge should ordinarily recuse in appeals of cases that were decided by the district judge at the time that the circuit judge's child was a law clerk in the district judge's chambers. The circuit judge should also consider recusing in appeals from the employing district judge that arise while the child serves as a law clerk, whether or not the cases were decided by the district judge during the child's clerkship. Most circuits are sufficiently large that it might not be overly burdensome for a circuit judge to recuse in all cases coming from a particular district judge during that time. However, it would mean that the circuit en banc court would be one judge short with respect to appeals from the decision of a district judge who hired as a law clerk the child of a circuit judge.

In making a hiring decision in this situation, the district judge should consider, in addition to the factors discussed above (pertaining to favoritism and impartiality), that hiring the child of a circuit judge in the same circuit will necessitate the latter's recusal in many cases. The same considerations govern a bankruptcy or magistrate judge's decision whether to hire the child of a circuit judge in the same circuit.

Conclusions

A. The Committee concludes that to avoid the fact or appearance of nepotism or favoritism in hiring, a judge should not hire as a law clerk a son or daughter of a judge serving on the same court.

B. The Committee finds no impropriety in hiring a son or daughter of a judge sitting on a different court that has no jurisdictional connection with the court of the employing judge.

C. The Committee concludes that a judge may hire as a law clerk the son or daughter of a judge of another court that has a jurisdictional connection with the court of the hiring judge, with the exercise of care and discretion. If the hiring decision will not be influenced by the applicant's family connections, or reasonably appear to be so influenced, if impartiality can be preserved with efficiency by excluding the clerk from any connection with the cases decided by his or her parent, and if disruption and undue disqualification can be minimized in the chambers of both the hiring and the parent judges, then the hiring presents no conflict with the objectives of Canons 2 and 3.

Notes for Advisory Opinion No. 64

[1] A Comptroller General's opinion, 15 Comp. Gen. 765 (1936), advises that a law clerk occupies a position personal to the judge, and that this employment is distinct from "any office or duty" of the court as the phrase is used in the statute. The Committee expresses no opinion upon the correctness of the Comptroller General's statutory interpretation.

[2] For simplicity's sake, we discuss the situation of court of appeals and district court judges. The same principles apply, however, to the judges of other

courts in a hierarchical situation, such as the judges of the Court of International Trade, the Court of Appeals for Veterans Claims and the Court of Federal Claims, all of whose decisions are reviewed by the Court of Appeals for the Federal Circuit.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 65: Providing a Recommendation for Commutation, Pardon, or Parole

This opinion addresses the propriety of actions by a judge in relation to an application for commutation of sentence, pardon, or parole.

The responsibility for making commutation, pardon, and parole decisions falls to the executive branch. Indeed, in opposing transfer of the Parole Commission from the Justice Department to the judiciary, the Judicial Conference adopted the statement, inter alia, that parole is a form of clemency inherently connected with the executive function of prosecution and incarceration. Further, the Conference cited the possible problem with respect to Court review of Parole Commission policy, practices, or decisions. (JCUS-SEP 79, p. 74).

The Committee advises against making a recommendation (favorable or unfavorable) regarding commutation, pardon, or parole upon the request of a prisoner, or someone acting on his/her behalf, or of a third party, such as a victim. The Committee's reason for advising against such recommendations is rooted in Canon 2's charge to avoid impropriety or the appearance of impropriety, including prestige of office issues and character witness issues. This advice applies to recommendations to either the Justice Department or an equivalent state authority. Moreover, because recommendations sought as personal favors would be addressed to the Justice Department, and because that department is a frequent litigant in the federal courts, the potential exists that undue influence would be felt. Therefore, an appearance of impropriety could arise from a judge's personal recommendation that the Justice Department act favorably or unfavorably with respect to a prisoner within its custody.

The Committee advises against any unsolicited communication with the Justice Department. If contacted by the Justice Department, this opinion does not prohibit a judge's transmission of objective information (without recommendation) that the judge may be privy to and that the Justice Department may not have which would assist it in making its determination; nor does it prohibit a sentencing judge's response to a Justice Department request for other information or for a recommendation (favorable or unfavorable) concerning commutation, pardon, or parole. The same advice applies to an equivalent state authority.

December 2018

Committee on Codes of Conduct Advisory Opinion
No. 66: Disqualification Following Conduct Complaint Against Attorney or Judge

Canon 3B(6) of the Code of Conduct for United States Judges requires that a judge "should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code [. . .] or that a lawyer violated applicable rules of professional conduct." State laws often contain similar requirements. This opinion considers whether a judge must recuse if an attorney against whom the judge has filed a complaint of unprofessional conduct appears before the judge. The opinion also discusses whether a judge must recuse following a complaint filed by an attorney against the judge.

Canon 3C(1)(a) provides:

> C. 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 in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

The Committee concludes that when a judge files a complaint of unprofessional conduct against a lawyer, either in compliance with a state law or Canon 3B(6), and the lawyer is before the judge as counsel in the case giving rise to the unprofessional conduct, or in a later case, the judge is not required to recuse on grounds of bias or prejudice simply because the complaint was filed.

Opinions formed by a judge on the basis of facts introduced or events occurring in the course of current or prior proceedings ordinarily do not constitute a basis to show bias or partiality. Strongly stated judicial views rooted in the record, a stern and short-tempered judge's efforts at courtroom administration, expressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias. Thus, a showing of bias warranting recusal generally must be based on extra-judicial conduct and not conduct that arises in a judicial context unless the conduct displays a deep-seated favoritism or antagonism that would make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540, 555 (1994). A judge still needs to consider, however, whether the judge does hold a bias or prejudice that would require recusal and, additionally, whether any circumstances would create a reasonable question of the judge's impartiality. Canon 3C(1).

Recusal is also not automatically warranted when an attorney has filed a complaint against the judge before whom the attorney is appearing. In such an

instance, the judge must determine whether the judge holds a personal bias or prejudice against the attorney, or whether the circumstances would create a reasonable question of the judge's impartiality. Canon 3C. The Committee addresses some similar concerns in Advisory Opinion No. 103 ("Disqualification Based on Harassing Claims Against Judge"). While remittal under Canon 3D is not available if the judge determines recusal is warranted under 3C(1)(a) due to personal bias or prejudice, it would be available for recusal under 3C(1) due to a question of the judge's impartiality.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009; August 2022 (minor technical changes)

Committee on Codes of Conduct Advisory Opinion No. 67: Attendance at Independent Educational Seminars

The Committee often receives inquiries as to whether judges may attend seminars and similar educational programs organized, sponsored, or funded by entities other than the federal judiciary and have the expenses of attendance paid or reimbursed by such entities. As discussed below, judges may ordinarily accept such invitations to independent educational seminars, except when particular circumstances make it inadvisable.[1] However, judges must comply with the requirements of the Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs and the annual financial disclosure requirements for judges under the Ethics in Government Act, 5 U.S.C. §§ 13101-13111 (Financial Disclosure Requirements of Federal Personnel).

The education of judges in various academic and law-related disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them. Yet, notwithstanding the general principle that judges may attend independent seminars and accept the provision of or reimbursement for expenses, there are instances in which attendance at such seminars would be inconsistent with the Code of Conduct for United States Judges. It is consequently essential for judges to assess each invitation on a case-by-case basis.

Canon 4 of the Code of Conduct for United States Judges permits judges to engage in a wide range of outside activities, both law-related and non-law-related. Under Canon 4 and its Commentary, judges are encouraged to take part in law-related activities. The Commentary to Canon 4 observes, "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives." Judges who engage in extrajudicial activities are expected to conform their conduct to the standards set forth in Canon 4, which advises judges to ensure that their activities "do not detract from the dignity of judicial office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification. . . ." Consistent with these standards, judges are permitted to speak, write, lecture, teach, and participate in other extrajudicial activities concerning legal and non-legal subjects.

Participation in outside activities must also be consistent with Canons 2A and 3C(1). Canon 2A applies to judges' personal as well as professional conduct, and advises judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; judges therefore should not attend seminars sponsored by organizations with which the judge may not properly be associated (such as organizations referred to in Canon 2C). Canon 3C(1) advises judges to recuse from any proceedings in which their impartiality might reasonably be questioned. In determining whether to attend and accept benefits associated with a particular seminar, a judge should be guided by Canon 2 and should consider any consequent recusal

obligation under Canon 3C(1). In doing so, judges should keep in mind their obligation to conduct themselves in a manner that minimizes the occasion for recusal.

Payment of tuition and expenses involved in attendance at an independent seminar constitutes a gift within the meaning of the Code of Conduct and ethics regulations. Canon 4D(4) permits a judge to accept a gift as permitted by the Judicial Conference Gift Regulations. Under section 5(a) of the Gift Regulations, judicial officers may accept gifts as long as they are not from someone seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person or whose interests may be substantially affected by the performance or nonperformance of official duties. Gifts offered by such interested persons may be accepted only in narrowly-defined circumstances. In particular, section 5(b)(3) of the Gift Regulations permits a judicial officer or employee to accept a gift consisting of "an invitation and travel expenses, including the cost of transportation, lodging, and meals for the judicial officer or employee and a family member to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice." Judges who accept such benefits should be mindful of their financial disclosure obligations.

A variety of factors may affect the propriety of a judge's attendance at an independent seminar. These include:

(1) the identity of the seminar sponsor, for example:

(a) whether the sponsor is an accredited institution of higher learning or a bar association, which are recognized and customary providers of educational programs; sponsorship by such a provider usually raises fewer concerns than sponsorship by other entities;

(b) whether the sponsor is a business corporation, law firm, attorney, other for-profit entity or a non-profit organization not described above; invitations by such a provider should be carefully examined by the invited judge;

(2) the nature and source of seminar funding, for example:

(a) whether there are numerous contributors to seminar funding, none of which contributes a substantial portion of the cost; when no single entity contributes more than a small proportion of a seminar's cost, there is little reason for concern about the identity of individual contributors as the resulting benefits are too minor and attenuated to create ethical concerns;

(b) whether an entity other than the sponsor is a source of substantial funding of the seminar; factors applicable to seminar sponsors also apply to such contributors;

(c) whether the seminar is funded by contributions earmarked for specific seminar programs, or by general contributions to the sponsoring entity; in the

latter situation, the benefits being provided are attributable to the sponsor and not to underlying contributors;

(3) whether a sponsor or a source of substantial funding of the seminar is currently involved as a party or attorney in litigation before the judge or is likely to be so involved;

(4) the subject matter of the seminar, including:

(a) whether the topics covered in the seminar are likely to be in some manner related to the subject matter of litigation before the judge in which the sponsor or source of substantial funding is involved as a party or attorney; for example, it would be improper for a judge to attend a seminar if the sponsor or source of substantial funding for the seminar is a litigant before the judge and the topics covered in the seminar are directly related to the subject matter of the litigation;

(b) whether contributors to seminar funding control the curriculum, faculty, or invitation list;

(5) the nature of expenses paid or reimbursed:

(a) whether the expenses are reasonable in amount;

(b) whether the seminar is primarily educational and not recreational in nature; and

(6) whether the seminar provider makes public disclosure about the sources of seminar funding and curriculum; public disclosure by the seminar provider will ordinarily obviate the need for further inquiry.

Factors other than those set forth above may be relevant in particular cases. A judge's determination whether to attend the seminar should be made considering the totality of the circumstances. If, in light of all the relevant factors, the judge concludes that there is a reasonable question concerning the propriety of attendance, the judge should not attend the seminar.

If there is insufficient information for the judge to decide whether to attend, the judge should decline the invitation or take reasonable steps to obtain additional information. Information about the seminar sponsor, subject matter, and curriculum will typically be apparent from the invitation and materials. Information about the nature and source of seminar funding may not be available unless it is requested from the sponsor.

If the necessary additional information is not available, whether through public disclosure, disclosure from the sponsor upon inquiry, or other sources, the judge should not attend the seminar. If the information obtained by the judge does not resolve the question concerning the propriety of attendance, the judge should not attend. To the extent the judge obtains additional information from the sponsor of the seminar, the

judge should make clear that the information is not confidential and that the judge may make the information public.

Note for Advisory Opinion No. 67

[1] This opinion does not address reimbursement of expenses for judges' participation in seminars or other programs as speakers or panelists.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 69: Removal of Disqualification by Disposal of Interest

Judges regularly inquire whether disposing of a disqualifying interest would remove the disqualification and permit them to continue to sit in a case. Ideally, the employment of careful conflict checks by the individual judge and the judge's court prevent a judge participating at all in a case in which the judge has a disqualifying interest. This opinion, however, addresses the circumstance of a disqualifying interest not surfacing until after the judge has been assigned a case. Inquiries to the Committee have demonstrated this circumstance arising in multiple variants. For example, a judge or judge's spouse owns stock in a corporation that intervenes as a party or that is found to be a corporate parent of a party. The existence of a disqualifying interest may be learned directly by the judge or may come to light in counsel's motion for recusal. The question may arise after the judge has taken minimal action, after years of discovery orders, or after trial but before decision. The issue arises in single and multi-judge districts and in appellate courts.

Canon 3C(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ." Canon 3C(1) then provides a non-exhaustive list of circumstances requiring disqualification. Canon 3C(4), however, recognizes that in some instances, such as those listed above, the disqualification may not exist or be known until after the judge has participated in the case, and addresses the propriety of the judge continuing to sit on such a case:

> Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for the disqualification.

Canon 3C(4). *See also* 28 U.S.C. § 455.

The Committee believes that this provision applies to cases in which a judge has already expended a substantial amount of time, cases in which a judge has expended no time, and those in between. Accordingly, if a judge learns of a disqualifying financial interest in a party before expending judicial time on the case, the judge may avoid disqualification by divesting himself or herself of the interest. Because in this situation a judge could recuse, divest and then have the matter reassigned to the judge, the Committee has concluded that Canon 3C(4) should apply, as any other interpretation would require the judge to perform a futile act.

While disposing of a disqualifying interest may allow a judge to continue to sit on a case, Canon 3C(4) limits this option to the disposal of financial interests that will not

be substantially affected by the outcome of the litigation. If the financial interest could be substantially affected, even after divestment the judge could not continue to sit on the case under Canon 3C(4). In determining whether a financial interest could be substantially affected, the Committee looks to the application of Canon 3C(1)(c), which provides for disqualification if the judge holds "any other interest that could be affected substantially by the outcome of the litigation." The natural reading of Canon 3C(1)(c) and 3C(4) is that it is the interest itself that must be substantially affected. Ultimately, an individual judge must decide the potential effect on the interest. The key inquiry is not the size of the interest, but the size of the impact on the interest.

The possibility that the judge may appear to be *seeking* to participate in a case by disposing of a disqualifying interest may under some circumstances create an appearance of impropriety. Though that possibility should be considered, the Committee considers the likelihood of such an appearance remote.

In a case in which a great deal of time and effort had been invested by the judge, counsel, and the litigants by the time the disqualifying interest came to light, the public interest in the efficient administration of justice would appear to outweigh concern for an appearance that the judge is seeking to continue participation in a particular case. Though disposal of the interest removes any question of the propriety of the judge's continued participation, the stage in the litigation at which the disqualifying interest is learned and the availability of another judge may, of course, influence the judge's decision to continue participation. The Committee further advises that, in general, the manner in which the fact of a disqualifying interest is learned, and the particular nature of the interest, are not important.

Finally, the Committee advises that should a judge decide to continue to participate in a matter following disposal of a disqualifying interest, the facts giving rise to the disqualification, the judge's disposal of the disqualifying interest, and the public interest in continued participation of the judge should generally be disclosed to the parties and on the record in the case.

To close, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 70: Disqualification When Former Judge Appears as Counsel

This opinion addresses recusal considerations when former judges, including judges who resign pursuant to 28 U.S.C. § 371(a), appear as counsel before the court in which they once held judicial office. It does not directly address the ethical obligations of the former judge who later appears as counsel, although these obligations may be relevant to whether the former judge or his or her law firm should be disqualified from representation. Those obligations are governed by the rules of professional responsibility applicable to attorneys in the relevant jurisdiction. *See, e.g.*, Rule 1.12, ABA Model Rules of Professional Conduct ("ABA Rule 1.12").

The Code of Conduct for United States Judges and 28 U.S.C. § 455(a) require recusal when the impartiality of a judge might reasonably be questioned. The Code also directs recusal where an appearance of impropriety might exist. These principles govern the duties of the judge when a former colleague appears as counsel. *See* Canon 2A and Canon 3B(3). Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting the recusal statutes, Canon 3C of the Code closely tracks the language of 28 U.S. C. § 455, and the Committee is authorized to provide advice regarding the application of the Code.

The Committee recommends that courts announce a policy that for a fixed period after the retirement or resignation of a colleague, judges recuse themselves in any case in which the former colleague appears as counsel. The Committee's experience suggests that a recusal period of one to two years would be appropriate, depending on the size of the bench and the degree and nature of interactions among the judges. The advantage of such a policy is that it is evenhanded, can be cited as supplying an objective basis for recusal, and may be formulated without respect to particular individuals. Advance adoption of a policy also gives fair notice of the practice restrictions a judge will face after resignation or retirement.

Even though a fixed period may have expired, a judge may be required to recuse in a case in which counsel for a party is a former judge with whom the sitting judge had a particularly close association. The standard applied here is the same as when a former associate or partner in a law firm, or a close friend, is an attorney in the case. The relevant considerations are set forth in Advisory Opinion No. 11 ("Disqualification Where Long-Time Friend or Friend's Law Firm Is Counsel"). We have suggested a two-fold test. First, does the judge feel capable of disregarding the relationship; second, can others reasonably be expected to believe the relationship is disregarded? In applying that test, the judge should consider the closeness of the relationship, the length of service together, the size of the bench, and the period that has elapsed since the former judge left the bench.

In a large court, personal or social associations may not have been close. If the former judge had been a colleague for a short time, it may be easier to disregard the past relationship, and more likely that litigants will feel the relationship will play no part

in the decision. When the association between the sitting and former judge has been long, close, and continuing, the judge's impartiality might reasonably be questioned, and the judge should consider recusal.

A discrete problem arises when a former judge appears as counsel in a case that was filed in his or her former court before he or she resigned. In such circumstances, the presiding judge should confirm that the attorney's representation is not in violation of the applicable rules of professional responsibility. Although the rules of some jurisdictions may allow waiver of conflicts resulting from an attorney's prior judicial service, the Committee concludes that waiver would not be appropriate to allow a former federal judge to represent parties in any case that had been assigned to the former judge's individual docket during his or her judicial tenure. *See generally* ABA Rule 1.12(a) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . unless all parties to the proceeding give informed consent, confirmed in writing."). Appropriate steps may include review of the docket sheet to ensure the case was not previously assigned to the attorney during his or her judicial service or inquiry of the parties.

If the principles stated here are followed, the Committee finds no objection to appearances by former judges. That the former colleague may have superior knowledge of the viewpoints of the sitting judges does not require disqualification. The same information is available from a thorough study of the sitting judge's opinions, or from observation of the judge in the courtroom. Lawyers who frequently litigate before a particular judge may acquire the same type of information, yet no one would suggest recusal or disqualification in such cases.

If a judge sits in a case in which a former colleague appears as counsel, care should be exercised in the courtroom to avoid using or permitting indications of familiarity. The former colleague should not use or be called by his or her former title. *See* Advisory Opinion No. 72 ("Use of Title 'Judge' by Former Judges"). First names and references to past association, events, or discussions should be avoided.

Absent special circumstances giving rise to reasonable questions regarding the impartiality of the sitting judge, the fact that a former judge is an associate or partner of the law firm appearing in the case, where the former judge does not appear or work on the case, does not of itself require recusal of the judge. Advisory Opinion No. 11, pertaining to the law firm of a close friend, sets forth the considerations here. The judge should, however, be alert to concerns relating to disqualification of the firm which, like disqualification of the former judge, is governed by the relevant jurisdiction's rules of professional responsibility. *See, e.g.,* ABA Rule 1.12(c) ("If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.").

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 71: Disqualification After Oral Argument

This opinion considers the recusal obligations of the remaining judges on a panel when one judge must recuse after the matter has been argued. Inquiries have raised two questions regarding this situation: (1) whether a decision that has been entered must be vacated, and the case submitted to a new panel, when it is discovered after entry of the decision that one of the judges who participated in it was disqualified; and (2) whether, after a panel has conferred but has not reached a decision, a judge finds that he or she is disqualified, the other judges are also disqualified or may proceed to decide the case?

The first question encompasses areas beyond this Committee's authority. Determination of what circumstances may taint a decision already entered is a judicial function, not that of a committee established to advise on ethical standards of the conduct of judges.

The Committee does advise that a judge should disclose to the parties the facts bearing on disqualification as soon as those facts are learned, even though that may occur after entry of the decision. The parties may then determine what relief they may seek and a court (without the disqualified judge) will decide the legal consequence, if any, arising from the participation of the disqualified judge in the entered decision. Similar considerations would apply when a judgment is entered in a district court by a judge and it is later learned that the judge was disqualified.

The second question, because it concerns the appearance of impropriety and Canon 3C of the Code of Conduct for United States Judges, is within the Committee's purview. Canon 3C(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." The Committee is of the opinion that the remaining two judges on the panel are not disqualified merely because they conferred with the disqualified judge. Numerous situations arise in which a judge becomes aware of an important fact and yet must proceed to decide without regard to that fact (e.g., inadmissible evidence in a trial). Those who might believe that the disqualified judge exerted influence on the other two, and those who might believe the disqualified judge would attempt to influence his colleagues on the new panel, are unlikely to be satisfied regardless of what is done. Canon 3C looks to disqualification when the impartiality of the two remaining panel members can "reasonably be questioned." The Committee believes that no reasonable basis exists for questioning the impartiality of the remaining panel members when the third judge recuses, whether that recusal occurs after oral argument or after conference on the case.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States

Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 72: Use of Title "Judge" by Former Judges

This opinion considers the use of the title "judge" by former judges who have returned to the practice of law and whether sitting judges have any ethical responsibilities relating to such use.

Historically, former judges have been addressed as "judge" as a matter of courtesy. Until recently there have been very few former federal judges. With federal judges returning to the practice of law in increasing numbers, ethical considerations arise. The prospect of former federal judges actively practicing in federal courts turns what otherwise might be an academic question into a matter of practical significance.

Canon 2A of the Code of Conduct for United States Judges instructs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A litigant whose lawyer is called "Mr.," and whose adversary's lawyer is called "Judge," may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary. In addition, application of the same title to advocates and to the presiding judicial officer can tend to demean the court as an institution. Judges should ensure that the title "judge" is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to accurately describe a person's status at a time pertinent to the lawsuit. The Committee notes that recusal obligations that may arise related to the appearance of a former judicial colleague are addressed in Advisory Opinion No. 70.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 73: Providing Letters of Recommendation and Similar Endorsements

Judges are often asked for letters of recommendation or other endorsements of particular persons. These requests come in a variety of circumstances. They may include requests on behalf of applicants for admission to colleges or law schools, persons seeking election or appointment to governmental offices, persons seeking appointment or employment by public and private entities, and persons seeking other forms of favor or consideration. This opinion considers how a judge should respond to such requests. It does not deal with recommendations for judicial office or appointments to executive branch positions requiring Senate confirmation, subjects that are covered by Advisory Opinion No. 59.

Because such requests, and the entities to which a recommendation would be addressed, are so varied, no single rule is universally applicable. Judges receiving such requests should evaluate them in the light of certain established ethical considerations under the Code of Conduct for United States Judges.

To start, it is clear under Canon 5 of the Code that a judge should not recommend persons seeking election to political office, or otherwise permit himself or herself to become involved in politics.

With respect to non-political recommendations, judges should pay mind to the Canon 2B requirement that a judge "should [not] lend the prestige of the judicial office to advance the private interests of the judge or others . . . ." Accordingly, at the very least, a judge should not make a recommendation in support of a commercial venture, or when a recommendation is, or could reasonably appear to be, requested primarily because of the prestige of office. This is very likely to be the case whenever the relationship between the judge and the person seeking the recommendation is such that the judge is in no better position than many others would be to evaluate that person.

It must be recognized, however, that judges are members of society, and of the community at large, and that not every action of a judge is intended, or could reasonably be perceived, as an assertion of the prestige of judicial office. When a judge is personally aware of facts or circumstances that would facilitate an accurate assessment of the individual under consideration, a judge may properly communicate that knowledge, and his or her opinions based thereon, to those responsible for making decisions concerning the applicant. The judge's awareness may be based, for example, on a longstanding and intimate knowledge of the person or special knowledge derived from some relationship, such as that with a law clerk. The judge may communicate this information through a letter of recommendation or through another format.

In light of concerns under Canon 2B, some judges have adopted a policy of inviting the applicant to list the judge as a reference, instead of initiating letters of

recommendation, with the understanding that, if requested to do so, the judge would respond with information known to the judge concerning the applicant.

In any event, when responding to any type of request, the judge should carefully consider whether the recommendation or endorsement might reasonably be perceived as exerting pressure by reason of the judicial office, and should avoid any action that could be so understood.

December 2017

Committee on Codes of Conduct Advisory Opinion
No. 74: Pursuit of Future Employment by Law Clerks and Staff Attorneys

This opinion addresses ethical issues that may arise in connection with a law clerk or staff attorney's pursuit of future employment. Canon 4C(4) of the Code of Conduct for Judicial Employees provides:

> During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

The Committee has advised that, to deal appropriately with this issue, a judge should take reasonable steps to require that law clerks keep the judge informed of their future employment plans and prospects.

I. Future Employment with a Lawyer, Law Firm, or Other Private Employer

A judge should implement appropriate procedures when it is contemplated that a law clerk may accept employment with a lawyer, law firm or other private employer that is participating in a pending case. The Committee advises that such a circumstance does not in itself mandate disqualification of the judge. The law clerk, however, should have no involvement whatsoever in pending matters handled by the prospective employer. The Committee believes that the need to exclude the law clerk from pending matters handled by the prospective employer arises whenever an offer of employment has been extended to the law clerk and either has been, or may be, accepted by the law clerk; the formalities are not crucial.

The occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment, but there may be situations in which, because of the nature of the litigation, or the likelihood that a future employment relationship with the clerk will develop, the judge feels it advisable to take these precautionary measures even at a preliminary stage of the employment discussions.

In appropriate circumstances, the judge may elect to inform counsel that the law clerk may have a prospective employment relation with counsel and that the procedures described here are being followed.

II. Future Employment with a United States Attorney's Office or Other Government Employer

The United States Attorney's office is not a law firm and the law clerk would have no financial interest in that office. *See* Advisory Opinion No. 38 ("Disqualification When Relative Is an Assistant United States Attorney"). Nonetheless, participation by the law clerk in a pending case involving the prospective employer may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel. *See* Canon 3F(1) of the Code of Conduct for Judicial Employees.

When a law clerk has been offered employment by a particular United States Attorney's office, and the offer has been or may be accepted by the law clerk, the judge should isolate the law clerk from cases in which that particular United States Attorney's office appears. Similar guidance applies when a law clerk has been offered employment by other components or agencies within the Department of Justice, or other government employers. For example, the Committee has advised that when a law clerk has accepted employment with the Civil Rights Division, the law clerk should be isolated from any case involving the Civil Rights Division but may work on other Department of Justice cases.

To avoid a future appearance of impropriety or potential grounds for questioning the impartiality of the court, a former law clerk should be disqualified from work in the United States Attorney's office on any cases that were pending in the court during the law clerk's employment with the court. A court rule may be adopted for this purpose. *See, e.g.*, Sup. Ct. R. 7; D.C. Circuit Rule 1(c).

III. Future Employment with Political Organizations

Canon 4C(4) of the Employees' Code permits law clerks and staff attorneys to seek future employment opportunities during their judicial employment provided such pursuits are in consultation with their appointing authority. The Employees' Code does not qualify this permission based on the type of prospective employment. Although seeking and obtaining future employment while clerking is generally acceptable under the ethics rules, prospective employment with a political organization may trigger Canon 5 concerns. The commentary to Canon 5 in the Code of Conduct for United States Judges explains that a political organization is "a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office."

The Committee has advised that keeping the judicial branch removed from politics and political preferences is critical. *See* Advisory Opinion No. 92 ("Political Activities Guidelines for Judicial Employees"). It is necessary, therefore, to safeguard against risks that may potentially associate a judge or chambers with politics. Under some circumstances, a law clerk's employment discussions with a political organization during a clerkship or judicial employment may pose such a risk. Ultimately, the appointing judge retains discretion to assess this risk and to impose restrictions or limitations, if any. Assessments should be made on a case-by-case basis in full consideration of all the facts, circumstances, and potential risks involved, underscoring

the importance that the judge, as the law clerk's appointing authority, should be completely informed.

February 2025

Committee on Codes of Conduct Advisory Opinion
No. 75: Disqualification Based on Military or Other Governmental Pensions

A number of judges receive pensions earned in the course of their military service or other governmental service. This opinion considers whether such a judge should disqualify when a military service or public body is a party.

The Committee advises that no reasonable basis for questioning the impartiality of the judge is raised when a judge who is receiving a military pension participates in a proceeding in which a military service is a party. *See* Canon 3C(1) of the Code of Conduct for United States Judges. Likewise, judges receiving a pension for other governmental service–local, state or federal–are not disqualified from cases in which the governmental entity is a party. Judges regularly participate in cases in which the federal government, from which the judge receives compensation for judicial services, is a party, without raising any reasonable question of the judge's impartiality.

Disqualification would be mandatory, however, when the outcome of the case could substantially affect the amount of the judge's pension or the judge's right to receive it. Canon 3C(1)(c). The mere presence of the military service or governmental entity as a party, however, when a judge's interest in the pension is not substantially affected, raises no question of disqualification.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 76: Service of State Employees as Part-Time United States Magistrate Judges

This opinion considers the propriety of appointing state or local public defenders or prosecutors as part-time United States Magistrate Judges.

The Committee advises that it would be inappropriate to appoint as part-time United States Magistrate Judges persons who are simultaneously serving as state or local public defenders or prosecutors. Likewise, it would be inappropriate for a part-time United States Magistrate Judge to serve as a state or local public defender or prosecutor.

The Judicial Conference has adopted Conflict-of-Interest Rules for Part-time Magistrate Judges. *See* *Guide to Judiciary Policy*, Vol. 2C, § 1110. Rule 3 provides that a part-time magistrate judge may appear as counsel in criminal actions in a state court. That provision relates to appearances as private counsel for the defendant and is permissible so long as it does not interfere with the performance of duty as a part-time magistrate judge.

Appearances in court of a part-time magistrate judge as a representative of the state or local government, whether as prosecutor or public defender, implicates two Canons of the Code of Conduct for United States Judges: Canon 1, that a judge should uphold the independence of the judiciary, and Canon 2, that a judge should avoid impropriety and the appearance of impropriety. Dual employment of the same person in the federal and in state or local judicial systems would be in conflict with the intent of these canons.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 78: Disqualification When Judge Is a Utility Ratepayer or Taxpayer

This opinion considers whether a judge needs to recuse when a party to a proceeding is a utility of which the judge is a customer or a governmental entity to which the judge pays taxes.

The Committee advises that mere status as a utility ratepayer, or as a taxpayer, is not in itself disqualifying. If the outcome of the proceeding could substantially affect the amount to be paid by the judge to the utility or in taxes, disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges would be required.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 79: Use of Chambers, Resources, and Staff for Law-Related Activities Permitted by Canon 4

This opinion addresses the use of judicial resources for the preparation of writings, speeches, and teaching materials that are related to the law, the legal system, and the administration of justice. Although we have attempted to furnish some rules of general applicability to govern the use of such resources, we recognize that questions pertaining to particular uses will often be context dependent and will require line-drawing on the part of the judge involved. Consequently, we have incorporated a number of examples into our opinion to offer additional guidance with respect to this difficult issue.

Guidelines for determining whether an extrajudicial activity is law-related or non-law-related are contained in Advisory Opinion No. 93. This opinion addresses only the use of chambers, resources and staff for *law-related* extrajudicial activity. Advisory Opinion No. 80 addressed the use of judicial resources for activities that are not related to the law.

The use of judicial resources–including judicial chambers and staff, as well as legal research materials–for extrajudicial law-related activities is both authorized and limited by Canon 4 of the Code of Conduct for United States Judges. Under Canon 4, a "judge may engage in extrajudicial activities, including law-related pursuits" and "may speak, write, lecture, and teach on . . . law-related . . . subjects." In particular, the Code specifies that the following law-related pursuits are permissible:

A. Law-related Activities.

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) Organizations. A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and

> may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

Canon A(1)-(3).[1]

In fact, the Code encourages judges to involve themselves in extrajudicial law-related activities:

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law.

Commentary to Canon 4.

Although the authorization is limited, the Code allows judges to use judicial resources when pursuing permissible extrajudicial law-related activities. In particular, the Code states the following: "*Chambers, Resources, and Staff*. A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon." Canon 4G. To some extent, then, the Code contemplates that a judge may properly use judicial resources in furtherance of permissible extrajudicial law-related activities. This opinion therefore gives guidance regarding the application of Canon 4G to a judge's involvement in law-related activities.

Two steps are required to determine whether the use of judicial resources for law-related activities is appropriate. First, the judge must determine whether the activity is "judicial" or "extrajudicial." If the activity is judicial, then the strictures of Canon 4G do not apply and a judge may make unlimited use of judicial resources. If the activity is extrajudicial, then the judge must next determine whether the use of judicial resources is "not to any substantial degree." Canon 4G.

In determining the scope of judicial duties, we start with the premise that a judge's central function is to decide cases. Accordingly, any activity directly related to this function is clearly judicial in nature. By itself, however, such a definition constitutes too limited a view of a judge's official duties. In addition to deciding cases, society properly expects a judge to supervise and educate members of the bar in the practice of law in the judge's court and to act as an official representative of the judiciary. A federal judge is performing a judicial function when, for example, the judge gives a lecture to

the local bar on the rules of procedure in the judge's court, gives a Law Day speech at the local high school, or presents a civics lecture on the judiciary to local community groups. Ultimately, however, the test for whether a particular activity qualifies as judicial rather than extrajudicial depends on whether the activity may properly be considered part of the judge's official duties.

Another rough way to gauge whether a judge is performing a judicial function is to look to who is paying the judge for the activity in question. A judge may not properly receive "compensation" beyond his or her normal salary for performance of a judicial activity. It generally follows that if a judge concludes it would be appropriate to receive compensation from a party other than the judicial branch of the United States for a law-related activity, the judge has necessarily determined that the activity is extrajudicial. However, this inference does not mean that all uncompensated activity should be regarded as judicial activity. *See, e.g.*, Ethics Reform Act, 5 U.S.C. App., §§ 501-505 (restricting the receipt of outside earned income and honoraria).

Once a law-related activity is determined to be extrajudicial, Canon 4G prohibits a judge from using judicial resources to any substantial degree. In interpreting this restriction, the Committee is mindful that judicial resources are held in public trust to assist judges in performing their official duties, and that to allow judges to draw upon these resources for extrajudicial activities diverts these resources from the function for which they were dedicated. At the same time, we recognize that judges are in a unique position to contribute to the improvement of the law and the judicial system by means of extrajudicial activities, and that these activities indirectly assist judges in the discharge of their official duties. *See* Commentary to Canon 4. Allowing judges some limited judicial resources to perform these activities permits such activities to be accomplished more efficiently, with resulting benefits for the functioning of the judge's entire office and the public more generally.

With these considerations in mind, we believe the following three criteria must be satisfied in order for a judge's use of judicial resources for extrajudicial activity to qualify as insubstantial. First, the absolute amount of staff time devoted to such activity must be minor or limited in amount. Ordinarily, the use of law clerks for one or two days for "blue-booking," cite-checking, editing, or discrete research assignments will qualify as a minor or limited use of law clerk time. By contrast, the use of law clerks for extensive research for, or drafting of, a substantial scholarly article ordinarily will not satisfy the requirements of this first criterion. These examples, of course, are not intended to represent bright-line rules; the amount of time for which a staff member is used must always be examined in the context of the individual's particular duties.

Second, if the extrajudicial activity is "compensated," a judge should not utilize judicial staff except as provided here. A judge may use judicial resources such as the library, chambers, and computers for compensated activity so long as this use is within reasonable limits and the government incurs no incremental cost. However, the use of judicial personnel to assist the judge in performing activities for which extra compensation is to be received raises too great a risk of abuse to permit. The danger

exists that a judge may pressure current or potential staff members to work on the judge's projects, and this danger is compounded by the difficulty of distinguishing between a staff member's official and unofficial time. Furthermore, extra compensation paid by the judge to the staff does not eliminate the danger that public resources will be misused for private gain. Thus, a judge may not avoid these restrictions on the use of judicial personnel for compensated activities, even if the judge offers to share this compensation with his or her staff.

We note that under the Code "compensation" is different than "expense reimbursement." *See*, *e.g.*, Canon 4H(1) & (2) (distinguishing "compensation" from "expense reimbursement"). "Expense reimbursement" within the meaning of the Code is limited "to *actual costs* of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative." Canon 4H(2) (emphasis added.). As a result, insubstantial use of chambers staff is generally permitted where the extrajudicial law-related activity results in "expense reimbursement" to the judge, but the judge does not receive "compensation." The absence of a profit motive reduces the risk of abuse mentioned in the preceding paragraph.

Third, the judge's use of judicial resources for extrajudicial law-related activity must not interfere with the judge's official duties. No judicial resources should be devoted to extrajudicial tasks if the judge needs these resources to perform judicial functions in a timely fashion. Accordingly, even a minor use of judicial resources may be regarded as substantial under Canon 4G if such use has an adverse impact on the business of the court.

Finally, when federal statutes or regulations impose other more stringent duties and obligations on judges pertaining to the appropriate use of government resources, these statutes or regulations, of course, control.

Note for Advisory Opinion No. 79

[1] Other legal activities outside the official judicial function, such as private arbitration or mediation and the practice of law, are prohibited. Canon 4A(4)-(5). For these prohibited activities, it would never be appropriate to use judicial resources.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 80: Use of Chambers, Resources, and Staff for Activities Permitted by Canon 4 that are Not Related to the Law

In a pluralistic society, judges can enrich their communities and their own lives by participation in those civic, charitable, and avocational activities best suited to their talents, interests, and backgrounds. A judge can preserve the integrity of the judicial office without undergoing complete isolation from community life.

In this opinion, the Committee supplies advice concerning the use of judicial resources by judges for activities that are not related to the law. Guidelines for determining whether an extrajudicial activity is law-related or not are contained in Advisory Opinion No. 93. Advisory Opinion No. 79 addresses the use of judicial resources for law-related extrajudicial activities.

Canon 4 of the Code of Conduct for United States Judges permits judges to engage in a variety of activities not related to the law. In pertinent part, Canon 4B states: "A judge may engage in extrajudicial activities, including . . . civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on . . . nonlegal subjects." Noting that a "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise," and observing that "a judge should not become isolated from the society in which the judge lives[,] the Code makes plain that, subject to limitations, judges "may [] engage in a wide range of non-law-related activities." Commentary to Canon 4.

There are, however, both general and specific limitations to that authorization. For example, "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality [or] lead to frequent disqualification[.]" Canon 4. Specific limitations also apply, such as to a judge's involvement in civic and charitable activities; fund-raising activity; financial ventures; fiduciary matters; and governmental committees and commissions. Canon 4B-F. Judges must also refrain from political activity. Canon 5. Still further, a judge should not use "the judicial office to advance the private interests of the judge or others . . . ." Canon 2B.

We reaffirm the need for judges to observe these limits on non-law-related activities. That said, where a non-law-related activity is permitted by Canon 4, there is a further question whether the judge may make use of judicial resources, including chambers, facilities, and staff, and, if so, to what extent.

Although the authorization is limited, the Code allows judges to use judicial resources when pursuing permissible non-law-related activities. In particular, the Code states: "*Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon." Canon 4G.[1] To some extent, then, the Code contemplates that a judge

may properly use judicial resources in furtherance of the judge's permissible non-law-related activities; this Advisory Opinion gives guidance regarding the application of Canon 4G to a judge's involvement in non-law-related activities.

First, Canon 4G prohibits a judge from using judicial resources to any substantial degree. In interpreting this restriction, the Committee is mindful that judicial resources are held in public trust to assist judges in performing their official duties, and that to allow judges to draw upon these resources for extrajudicial activities diverts these resources from the function for which they were dedicated. We are also mindful that, unlike extrajudicial law-related activities, which are encouraged by the Code, non-law-related activities are permissible, but not specifically encouraged. *See* Commentary to Canon 4. Therefore, a judge contemplating the use of judicial resources for non-law-related activities should start with a sensitivity to these twin observations and limit use accordingly.

Second, we believe that many of the principles regarding use of judicial resources for law-related activities set forth in Advisory Opinion 79 are applicable to non-law-related activities. (Although we do not advise that a permissible use of judicial resources for a law-related activity is necessarily permissible for a non-law-related activity). Thus, the absolute amount of staff time devoted to non-law-related activities must be minor or limited in amount. For example, the use of staff to maintain extensive files, correspondence, or equipment regarding non-law-related activities would be inappropriate. Furthermore, if the non-law-related activity is "compensated," a judge should not utilize judicial staff. In addition, no judicial resources should be devoted to non-law-related activities if the judge needs these resources to perform his or her judicial functions in a timely fashion. Accordingly, even a minor use of judicial resources may be regarded as substantial under Canon 4G if it has an adverse impact on the business of the court.

Third, there are some categories of use that are generally appropriate. For example, a judge may perform a permissible non-law-related activity in chambers so long as the activity does not interfere with the full and prompt performance of judicial duties and so long as the government incurs no incremental costs. Appropriate use of judicial resources is also exemplified by occasional telephone calls, scheduling, and storage of files, books, or equipment.

Fourth, anything more than the most minor use of government-owned supplies for non-law-related activities is inadvisable. Thus, it is prudent to use the judge's own funds to purchase the supplies necessary to perform the non-law-related activity. For example, a judge should purchase postage for use in non-law-related activities.

Finally, when federal statutes or regulations impose other, more stringent duties and obligations on judges pertaining to the appropriate use of government resources, those statutes or regulations, of course, control.

Note for Advisory Opinion No. 80

[1] With the most recent revision of the Code, the prior "de minimis" standard for use of judicial resources for non-law-related activities was omitted. *Compare* Code of Conduct for United States Judges, Canon 4G (2009) *with* Code of Conduct for United States Judges, Canon 5H (last clarified, September, 2000). The standard stated in Canon 4G of the present Code is now the same for law-related and non-law-related activities.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 81: United States Attorney as Law Clerk's Future Employer

Guidance for judges regarding appropriate procedures when a law clerk has been offered employment by a particular United States Attorney's office has been moved to Advisory Opinion No. 74 ("Pursuit of Future Employment by Law Clerks and Staff Attorneys").

September 2024

Committee on Codes of Conduct Advisory Opinion No. 82: Joining Organizations

Judges are interested in joining a wide variety of organizations and are often invited to join different organizations. Under Canon 4 of the Code of Conduct for United States Judges, judges are authorized to contribute their time and energy to a wide range of organizations, subject to certain limitations. *See* Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law"). Indeed, the Code recognizes that "a judge should not become isolated from the society in which the judge lives." Commentary to Canon 4.

When contemplating joining an organization, a judge must consider carefully the Code's fundamental commands to avoid impropriety or the appearance of impropriety, not lend the prestige of office, and not participate in activities that would detract from the dignity of the judge's office, interfere with the performance of official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification.

The motivation of the numerous organizations that have invited judges to join may vary from a simple desire to have the benefit of the judge's advice to a desire to employ the prestige of the judge's office to advance the organization's own interests. The activities of the inviting organization also vary widely. The Committee is neither equipped nor chartered to investigate or evaluate the motivation or activities of the inviting organization. Although the Committee is always available to provide specific guidance, in general individual judges must determine case-by-case whether it is appropriate to join a particular organization.

In Advisory Opinion No. 2, the Committee details factors that judges should consider when deciding whether to serve on the governing board of a nonprofit organization. The Committee believes the factors apply as well to the decision to join an organization (although the judge's determination may be affected by what role the judge anticipates in the organization) and so repeats them here. In addition to the basic principles outlined above, a judge should consider these factors before joining an organization:

- The judge must not receive any compensation for service to the organization, although the judge may receive reimbursement for expenses reasonably related to that service.
- The judge's membership must not interfere with the prompt and proper performance of judicial duties. "The duties of judicial office take precedence over all other activities." Canon 3. Accordingly, a judge should consider existing judicial and extrajudicial obligations before joining an organization.
- The judge may not join any organization that practices invidious discrimination. Canon 2C.

- The judge should not become a member of an organization "if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court." Canon 4B(1). This proscription would likely preclude judges' involvement with certain types of nonprofit organizations, such as legal aid bureaus. *See also* Advisory Opinion Nos. 28 ("Service as Officer or Trustee of Hospital or Hospital Association") and 40 ("Service on Governing Board of Nonprofit Organization that Tends to Become Involved in Court Proceedings").

- The judge must not personally engage in fund-raising solicitation for the organization, subject to the exceptions noted in Canon 4C regarding family members and certain judicial colleagues. The judge should not use or permit the use of the prestige of office for fund-raising purposes. Canon 4C. However, a judge may assist a nonprofit organization in planning fund-raising activities. *Id*. Further, the organization's letterhead may list the judge's name and title if comparable information and designations are listed for others. Commentary to Canon 4C. *See also* Advisory Opinion No. 35 ("Solicitation of Funds for Nonprofit Organizations, Including Listing of Judges on Solicitation Materials").

- The judge may not give investment advice to the organization, although it is acceptable to sit on a board that is responsible for approving investment decisions. Canon 4B(2).

- The judge should not join an organization if the judge perceives there is any other ethical obligation that would preclude such membership. For example, if the organization takes public positions on controversial topics, association with the group might raise a reasonable question regarding the judge's impartiality. The judge should bear in mind that the public will normally be uninformed of any restriction or qualification that the judge may have placed on affiliation with the organization.

- The judge should remain knowledgeable about the group's activities in order to regularly reassess whether participation in the organization continues to be appropriate.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 83: Payments to Law Clerks from Future Law Firm Employers

This opinion discusses the ethical propriety of law clerks receiving payments, either before or during their clerkships, from the law firms for which they have agreed to work following their clerkships. The Committee considers payments from law firms in the form of bonuses, payments for deferring employment start dates, salary advances, benefits such as health insurance, or reimbursement for bar-related and relocation expenses. The guidance in this opinion would also apply to any other form of payments offered to clerks by their prospective law firm employers. For the purposes of discussion, the Committee assumes that the clerk will not participate in any judicial decisions that involve the clerk's future employer. *See* Advisory Opinion No. 74 ("Pursuit of Future Employment by Law Clerks and Staff Attorneys").

The Committee notes that the guidance in this opinion applies equally to law clerks who are paid for their work by the United States government and to individuals who work for judges in an unpaid capacity.[1] It does not matter what term is used for these individuals: "volunteer law clerk," "extern," "intern," etc. Like paid clerks, these volunteers are subject to the Code of Conduct for Judicial Employees ("Employees' Code"). Voluntary and uncompensated services to the court are governed by 28 U.S.C. § 604(a)(17)(A), wherein the Clerk of Court is delegated by the Director of the Administrative Office to accept such services. *See* Guide to Judiciary Policy, Vol. 12, § 550.20. As a matter of judicial policy, most volunteers are deemed judicial employees, albeit uncompensated ones. *Id*. The Employees' Code applies to all judicial employees (except those officials or employees who have governing codes of conduct from other sources), and the Committee has previously recognized that unpaid interns should follow the Employees' Code. Additionally, 5 U.S.C. § 7353, which provides that employees of the judicial branch are restricted in when they can receive or solicit gifts or other things of value from those seeking official action or doing business with the court, also applies to unpaid externs.

Canon 4 of the Employees' Code provides guidance on whether law clerks may receive payments from prospective law firm employers during their clerkships. Canon 4C states that "a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States." Canon 4B(3) instructs that judicial employees "should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court." Additionally, 5 U.S.C. § 7353(a) provides that:

> no . . . employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person –
>
> > (1) seeking official action from [or] doing business with . . . the individual's employing entity; or

(2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.

Law clerks are offered payments by prospective law firm employers for a variety of reasons. Sometimes firms provide a "clerkship bonus" that is paid solely on the basis that the individual served as a law clerk for a judge. In other instances firms provide a bonus uniformly to all new associates of the firm, such as a "signing bonus" paid when the offer of employment is accepted. Some firms have developed programs through which associates will defer the start date to their firm employment in return for specified payments. Firms also often provide reimbursement for expenses related to relocation and taking the bar exam. Some firms offer salary advances that must be repaid when the law clerk begins working at the firm. Some of these assorted payments are scheduled for acceptance before the clerkship, some during, and some after. Based on the ethical considerations raised, we will discuss acceptance of payments according to when the payments would be accepted.

Acceptance of Payments Before the Clerkship: The Code of Conduct for Judicial Employees applies only to "employees of the Judicial Branch," not to prospective employees. Similarly, 5 U.S.C. § 7353 applies only to "employees" of the judicial branch. Accordingly, a prospective law clerk is not prohibited from accepting a payment from a law firm before the beginning of the clerkship, provided that the law clerk is not legally obligated to repay the firm. Before the clerkship begins, a prospective law clerk may also accept a bonus or stipend for living expenses while studying for the bar exam that is conditioned on the prospective law clerk working for the law firm after the clerkship, so long as the firm makes the same conditional bonus or stipend available to all of its incoming associates. However, judges are advised against appointing volunteer externs who are provided payments by law firms before, during or after the externship that are dependent on the individual serving as a judicial extern, for instance through a starting date deferral program that included such a restriction. This restriction would not preclude appointing, subject to other ethical restrictions, an extern who would receive a deferral payment before or following (though not during) an externship that was not tied to serving as a judicial extern.

A judge should not permit a law clerk to accept a salary advance from a law firm, either before or during the clerkship. The Committee views a salary advance as a loan from the law firm to the law clerk, through which the law firm effectively provides a supplement to the law clerk's salary during the clerkship. Acceptance of a salary advance could undermine public confidence in the integrity and independence of the court, and is contrary to Canon 4B and 4E of the Employee Code.

Acceptance of Payments During the Clerkship: A law clerk may not, during his or her service as a law clerk, accept *any* payment or salary advance from a law firm, except as noted below regarding reimbursement. Accepting any payments during the clerkship would violate Canon 4B(3) and 4C, as well as the prohibitions of 5 U.S.C. § 7353. In addition, benefits paid for by a law firm may not be accepted during the

period of service to the courts; for example, a volunteer extern may not accept health insurance benefits from a law firm during the term of the externship.

The Committee has also advised that a law clerk may not accept, during a clerkship, travel and other expenses associated with attending a "retreat" with a law firm that is the law clerk's future employer. Accepting such payments would be contrary to Canon 2 (avoiding the appearance of impropriety) and Canon 4C(2) of the Employee Code (prohibiting the acceptance of a gift from anyone seeking official action from or doing business with the court or whose interests might be substantially affected by the performance or nonperformance of an employee's official duties). *See also, Judicial Conference Gift Regulations § 3* (*Guide to Judiciary Policy,* Vol. 2C, § 620.35(a)).

Acceptance of Payments Following the Clerkship: As with prospective clerks, the Code and § 7353 do not apply to former clerks, and so would not prohibit acceptance by former clerks of payments such as clerkship bonuses. The Committee includes this category, however, to caution judges against appointing volunteer externs who may receive payments following their externships that are tied specifically to serving as a judicial extern.

Reimbursement for Bar-Related and Relocation Expenses: The Committee observes no problem with law clerks accepting reimbursement for relocation or bar-related expenses from a future employer, whenever that reimbursement is received. Prospective judicial employees are not covered by the Code, so the acceptance of reimbursement before the clerk begins work for the judge would not be prohibited. With regard to accepting such reimbursement payments during the clerkship, the Judicial Conference Gift Regulations, § 5(b)(6), specifically permits a judicial employee "who has obtained employment to commence after judicial employment ends" to accept "reimbursement of relocation and bar-related expenses customarily paid by the employer, so long as conflicts of interest are avoided." Judicial Conference Gift Regulations § 5(b)(6) (*Guide to Judiciary Policy,* Vol. 2C, § 620.35(b)(6)).

The Committee recognizes, of course, that some judges may prohibit their future or present law clerks from accepting bonuses or other payments that are permissible under this opinion. Accordingly, the present or future law clerk should consult with his or her judge before accepting any payment or reimbursement from the clerk's future law firm.

Note for Advisory Opinion No. 83

[1] This guidance may not apply to certain types of volunteers who are not considered to be judicial employees. *See, e.g.,* Guide to Judiciary Policy, Volume 12, § 555.60 (Federal Work-Study Programs).

February 2025

Committee on Codes of Conduct Advisory Opinion
No. 84: Pursuit of Post-Judicial Employment

This opinion considers measures that judges contemplating retirement or resignation may appropriately take to explore post-judicial employment.

A judge is subject to a number of obligations under the Code of Conduct for United States Judges in relation to this exploration. Canon 2A directs judges to avoid impropriety and the appearance of impropriety, and to act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3 instructs that the "duties of judicial office take precedence over all other activities." Canon 3C(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 4D(3) provides that "as soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification." Canon 4D(1) also provides that, while a judge may engage in remunerative activity, the judge "should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves."

The Committee concludes that a judge contemplating retirement or resignation appropriately may explore a professional relationship with law firms or other potential employers, provided that the judge proceeds in a dignified manner and complies with the Code. Although this opinion discusses exploration of employment opportunities with a law firm, the principles discussed would apply to other potential employers.

After the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge must recuse, subject to remittal, on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned. In addition, judges who are contemplating post-judicial employment with any private entity must comply with relevant provisions of the STOCK Act, Pub. L. No. 112-105, 126 Stat. 291 (2012). Among other requirements, the STOCK Act requires judges to submit a statement within three days of the commencement of any negotiation or agreement for post-judicial employment, and to file similar statements concerning recusal with respect to a future employer. For further information on complying with the STOCK Act, refer to the *Guide to Judiciary Policy*, Vol. 2C, Ch. 14.

In deciding what law firms to contact, a judge should be sensitive to public perspective and to obligations under the Code. At one extreme, a judge steers far from any impropriety or appearance of impropriety by negotiating only with firms that have not appeared before the judge. At the other extreme, a judge should refrain from negotiating with a firm, if the firm's cases before the court are of a character or frequency such that the judge's recusal (which would be required) would adversely affect litigants or would have an impact on the court's ability to handle its docket. In

such cases, judicial duties would have to take precedence over the legitimate personal interest in post-judicial employment.

In this regard, the Committee believes that a judge properly may negotiate with a law firm that appears before the court on which the judge serves, but only if the judge's recusal in such cases would not unduly affect the litigants or the court's docket. For example, it may be feasible to transfer those cases to other judges on the court without undue burden. But a judge should not negotiate for future employment with a firm, if transferring the cases would unduly burden the court by causing undue delays to these and other pending cases, or unduly prejudice litigants by causing repetition and delays of proceedings.

A judge should not explore employment opportunities with a law firm that has appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned. The appropriate interval of time will depend upon all the particular facts and circumstances. If a judge begins negotiations for future employment, but later decides not to leave the bench, the judge should continue to recuse from cases involving the firms or entities with which the judge negotiated, subject to remittal. Again, the appropriate interval for such recusals depends on the circumstances, including the nature and scope of the negotiations, but the Committee recommends recusal, subject to remittal, for a period of at least one year from the conclusion of the negotiations.

The Committee has approved the propriety of the procedure whereby the judge makes known a future retirement or resignation date, and during a reasonable time in the interim between the announcement and the projected retirement date the judge would complete pending assignments but not take on new cases. However, in the case of an active judge, the Committee concluded that it would be inappropriate for a judge to withdraw from all judicial duties during the interim between such an announcement and the projected retirement date. That approach would violate the duty of an active judge to perform judicial duties and would violate the requirement that judicial duties take precedence over all other activities.

A variety of ethical questions may arise concerning activities related to a judge's future employer. The Committee has advised that it is generally inappropriate for a judge to attend meetings or engage in communications with the judge's future employer concerning the employer's business. The Committee has advised, more generally, that attending social functions sponsored by a future employer gives rise to an appearance of impropriety, and therefore should be avoided until the judge's resignation is effective.

Questions also may arise concerning a future employer's desire to announce or otherwise advertise a judge's post-judicial employment. On these questions, the Committee has advised that once the judge has actually resigned and joined the new employer, it is not improper for the employer's formal announcement of affiliation to identify the office and court from which the judge retired or resigned. However, that guidance assumes the announcement is made after the judge has left the bench. A

post-resignation announcement avoids the appearance of impropriety because, after a judge has left the bench, the judge has no judicial position, and therefore no position to exploit. However, while a judge remains in office, this risk remains. In addition, the Committee has advised that by allowing a future employer to advertise the judge's employment while the judge remains in office, the judge unavoidably lends the prestige of judicial office to advance the private interests of the future employer. Similarly, the prospect of a pre-resignation announcement raises Canon 2 concerns for the judge. Although the judge may not enjoy any immediate profit from the announcement, the judge's future employer likely benefits from its association with a sitting judge, and the judge arguably stands to gain indirectly from the public advertisement of the judge's post-judicial employment. It follows that announcements of the judge's future employment made through interviews or contacts with the media are subject to the same restrictions.

April 2016

Committee on Codes of Conduct Advisory Opinion
No. 85: Membership and Participation in the American Bar Association

This opinion considers the propriety of a judge holding membership in the American Bar Association and actively participating in ABA programs, such as speaking on panels, considering that the ABA occasionally takes positions on controversial issues. It also discusses whether a judge who is an ABA member is required to recuse in a case in which the ABA files an *amicus curiae* brief.

The Commentary to Canon 4 specifically encourages participation in bar associations:

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Canon 4 further provides, however, that a judge should not participate in extrajudicial activities "that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below [in Canons 4A through 4H]." The Committee has set forth considerations judges should take into account when joining organizations or serving on the boards of organizations in Advisory Opinion Nos. 2 and 82. Advisory Opinion 93 discusses generally participation in extrajudicial activities related to the law.

The Committee advises that it is permissible for a judge to be a member or officer of an open membership bar association and that recusal is not required where such a bar association is a party or files an amicus curiae brief, so long as the judge has not participated in the development of the bar association position on the matter in question in the suit. *See* Advisory Opinion Nos. 34 ("Service as Officer or on Governing Board of Bar Association"), 52 ("American Bar Association or Other Open-Membership Bar Association Appearing as a Party"), 82 ("Joining Organizations"), and 93 ("Extrajudicial Activities Related to the Law").

In the Committee's view, the judge's membership in the ABA and participation on an ABA panel, as long as the panel is not devoted to a controversial subject, cannot reasonably be viewed by the bar or the public as an endorsement of any of the positions the ABA has occasionally taken on controversial issues.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 86: Applying the Honoraria, Teaching, and Outside Earned Income Limitations

This opinion considers an application of the rules governing judges regarding honoraria, teaching and outside earned income. The Committee takes as an example a judge who has already received for the calendar year "outside earned income" equal to the 15% limit imposed by 5 U.S.C. App. § 501(a)(1), but, in addition, plans to deliver in the same year a lecture at a law school for which the school would ordinarily pay a stipend. (The Committee notes at the outset that § 502(b) was amended in 1991 to exclude from the 15% cap income received by senior justices and judges for approved teaching.) We discuss three questions arising from this situation.

1. *Is There An Option to Treat the Stipend for the Lecture Either as Honorarium or as Compensation from Teaching?*

The lecture falls squarely within the definition of teaching in the Judicial Conference Ethics Reform Act Regulations on Outside Earned Income, Honoraria, and Outside Employment, § 5(b) ("course of study at an accredited educational institution or participating in an educational program of any duration that is sponsored by such an institution and is part of its educational offering. Examples of the latter are a lecture . . . ."). Regulation § 4(b)(2) defines honorarium to mean a payment for, *inter alia*, a speech, but excludes from the definition of an honorarium "[c]ompensation received for teaching activity, . . . approved pursuant to § 5 hereof." The Committee addresses whether the regulation could be read to give the judge an option to treat the lecture stipend *either* as an honorarium *or* as compensation from teaching, i.e., by reading Regulation § 4(b)(2) as excluding teaching compensation from the definition of honoraria only if the teaching activity is actually approved in the prescribed manner. Thus, by declining to obtain such approval, the judge in the example could in effect elect to treat the lecture stipend as an honorarium. The judge would then be able to take advantage of § 501(c) of the statute, which would permit the law school on behalf of the judge to pay the lecture stipend (up to $2,000) to charity.

The Committee's interpretation of the statute and regulation is that the lecture stipend is compensation for teaching, and cannot be treated as an honorarium. The intent of the regulations was to define teaching to include the educational offerings (including a lecture or lecture series) of an accredited law school, and to exclude from the definition of honoraria compensation received for teaching as thus defined. The regulation was not intended to allow a judge an option to obtain prior approval and treat such an amount as teaching, or to fail to obtain prior approval and treat the amount as an honorarium. This interpretation is supported by the Commentary:

> The Act does not define "teaching." These regulations define it to include meaningful participation in *bona fide* components of an educational curriculum or plan, regardless of the duration or format of the particular program in which the [judicial officer] participates.

> The statutory authority to "teach" for compensation thus includes permission to participate in the educational program of an accredited institution in the manner in which that institution plans and carries out its teaching function. When speeches and lectures are sponsored by and presented within the overall educational program of an accredited institution, the Conference believes that they do not provide the occasion for any of the evils Congress was seeking to avert [in the ban on honoraria] and accordingly, they should qualify as "teaching." Thus, a lecture, lecture series, symposia, moot courts, and jurist-in-residence programs may be compensated as "teaching," provided, of course, the strictures of the Codes of Conduct are met.

2. *Can 5 U.S.C. App.§ 501(c) Be Expansively Read to Encompass Teaching Compensation as Well as Honoraria?*

We next address whether the rationale of § 501(c) of the statute (permitting an otherwise banned honorarium to be paid on behalf of a judge to charity) can be expanded to compensation for teaching, which the law school is willing to pay, but that the judge cannot receive because of the 15% cap. In other words, if a judge directs the law school to give to charity amounts (up to the § 501(c) limit of $2,000) that the law school otherwise would have paid the judge, will such amounts be "deemed not to be received" under § 501(c), thus avoiding the 15% limit on outside earned income under § 501(a)(1). It has been suggested that similarities between honoraria and teaching compensation would make it rational for the § 501(c) rule to apply to both. However, the Committee interprets the statute and regulations to permit § 501(c) payments to charity *only* for honoraria, and not for teaching compensation. The fact that Congress limited § 501(c) to honoraria evidences a congressional intent that § 501(c) apply only to honoraria and not to teaching compensation. Moreover, one of the purposes of the 15% cap was to provide a bright line limit on outside activities to ensure that primary effort was devoted to the governmental function. This interpretation furthers that purpose.

3. *Is the Lecture Stipend Excluded from "Outside Earned Income" under Regulation § 3(b)(6)?*

Finally, the Committee considers whether Regulation § 3(b)(6) might exclude the stipend from the definition of "outside earned income" if the stipend is paid directly to a charity designated by the judge. That regulation excludes from the definition of "outside earned income":

> Anything of value earned or received for services rendered which is not includible as gross income in the relevant calendar year under controlling provisions of the Internal Revenue Code[.]

It has been suggested that under the complex tax principle of assignment of income, it is uncertain whether such amounts would be included in gross income for tax purposes.

Regulation § 3(b)(6) was included in the regulations because the regulations could not possibly provide adequate guidance on all of the questions likely to arise about the concept of earned income and the allocation of earned income to reporting years. The reference to the Internal Revenue Code in that section was intended to simplify the administration of the cap on earned income and provide judges with greater assurance that their conduct would not be called into question in those instances in which they received something of value that clearly would be excludable from that year's "gross income" for tax purposes. Where it is doubtful whether the amount in issue would properly be excludable from the judge's gross income for tax purposes, the Committee advises that the judge include the amount when planning compliance with the 15% cap, particularly where to do otherwise would appear to undermine the purposes of the cap. Accordingly, unless a judge is confident that the amounts diverted to charity would not be includible in gross income for tax purposes in the reporting year as having been constructively received, the Committee's advice is that the judge include those amounts in planning compliance with the 15% cap on outside earned income.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 87: Participation in Continuing Legal Education Programs

The Committee regularly receives inquiries from judges concerning various forms of participation in continuing legal education (CLE) programs and the impact of the Code of Conduct for United States Judges, together with various statutory and regulatory provisions, on such participation. This opinion summarizes the Committee's views concerning the ethical implications of judicial participation in such programs, and sets out important caveats at the end of the opinion. In Advisory Opinion No. 105, the Committee addresses judges' participation in private law-related training programs *other* than those offered by CLE providers, accredited institutions, and similar established educational providers. The caveats at the end of this opinion are equally applicable to Advisory Opinion No. 105.

In general, under Canon 4, judges are permitted to teach and write, and to receive compensation and reimbursement of expenses for doing so: "A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety . . . ." Canon 4H. Judges are not, however, permitted to accept honoraria, defined as including payment for a personal appearance, speech, or article. *See* 5 U.S.C. App. § 501(b); § 505(3)-(4); *Judicial Conference Regulations On Outside Earned Income, Honoraria, and Outside Employment* § 4(b); *Guide to Judiciary Policy*, Vol. 2C, § 1020.30 ("Regulations").

The Regulations make clear that "participation in continuing legal education programs for which credit is given by licensing authorities or programs which are sponsored by recognized providers of continuing legal education" constitutes teaching activity for which compensation (and reimbursement of expenses) may properly be accepted, and that such compensation is not prohibited honoraria. Regulation § 5(b). *See also* Regulations § 4(b)(2); 5 U.S.C. App. § 505(3)-(4).

It is, of course, necessary for the judge to obtain advance approval from the chief judge of the circuit before engaging in such teaching activity. Regulation § 5(c)-(d). Additionally, the normal restrictions on extrajudicial compensation and reimbursement of expenses apply, including: the compensation must be reasonable in amount and no greater than a similarly situated non-judge would receive for the same service; the 15% cap on "outside earned income" is applicable to the compensation paid; expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative; any additional payment is treated as compensation; and the payment must be included in the judge's annual financial disclosure report. *See* Canon 4H; Regulation § 3.

Judges are permitted to receive separate or additional compensation for preparing written instructional materials for use in CLE programs. Ordinarily, such

payments constitute compensation for teaching activities, rather than a sale of intellectual property or receipt of a royalty, and therefore such payments fall within the 15% "outside earned income" limitation. There may, however, be situations involving a CLE program and the sale of copyrighted material where the sale of intellectual property may not be considered as producing "outside earned income." The Regulations permit judges to receive "[r]oyalties, fees, and their functional equivalent, from the use or sale of copyright . . . received from established users or purchasers of those rights." Regulation § 3(b)(5). In addition, the Regulations permit judges to exclude such sums from the computation of the annual "earned income" cap. *Id.* (The Committee notes that it is authorized to address inquiries from judges regarding whether income is properly treated as "outside earned income" or excluded royalty income for purposes of the regulations. Regulation § 6.)

Avoiding Improper Exploitation of Judicial Office

The Code bars a judge from lending the "prestige of the judicial office to advance the private interests of the judge or others . . . ." Canon 2B. Thus, a "judge should be sensitive to possible abuse of the prestige of office." Commentary to Canon 2B. This caution applies to a judge deciding whether to participate in a CLE program.

The Committee believes that a judge who, when writing or teaching, utilizes the special insights derived from his or her judicial experience, is not engaging in improper exploitation of the judicial office if the subject is not principally concerned with the specific court on which the judge sits.

A judge who writes on a legal topic or teaches in the field of law inevitably draws to some degree upon his or her experience as a judge. This is unavoidable if judges are to write and teach as the Code encourages them to do. *See* Commentary to Canon 4 ("Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice."). And, as noted earlier, the Code expressly approves the receipt of reasonable compensation for permissible scholarly activity. But the Committee believes that there is a distinction between a judge's writing or teaching for compensation when the subject matter is how to practice before the judge's own court, and writing or teaching for compensation on other legal topics with respect to which the judge does not occupy a unique position by virtue of his or her own particular judgeship. The "unique position" mentioned in the Commentary to Canon 4 means the judicial position in general, rather than the particular judgeship of that particular judge.

For a judge to derive financial benefit, over and above the judicial salary, from the publication and sale of a book about his or her own court, or from participation in a seminar on the same topic, would constitute exploiting the judicial position for financial gain. It could also permit others—the publisher of the book, the sponsor of the

seminar—to benefit from the judge's exploitation of his or her judicial position. When the subject matter is so limited, there is the likelihood that a lawyer practicing in that court could reasonably believe that purchase of the publication, or attendance at the seminar, is endorsed or expected by the judiciary.

In short, it is the Committee's view that it is inappropriate for a judge to sell his or her expertise on the idiosyncrasies of practice before that particular court. This does not mean that a judge cannot lecture or write on that subject, only that the judge may not properly do so for compensation. Nor does this mean that a judge who is lecturing or writing for profit about some aspect of legal practice or procedure is foreclosed from giving illustrations from his or her own experience on the court, only that a judge may not charge for giving a lecture or writing a book where the principal focus is how to practice before the judge's court and where, as a necessary result, a substantial part of the value and appeal to the audience arises from the fact that the lecturer or author is an "insider."

Limitations on Uncompensated Teaching or Writing

As stated above, when a judge's teaching or writing focuses upon the ins-and-outs of practice before that judge's court, his or her particular judicial position is being exploited, to some extent. It is therefore improper for the judge to receive compensation for such activities, because to do so would be to exploit the judicial office for his or her own private gain. By the same token, when the sponsoring entity of the seminar or course is a private individual or a for-profit entity, the judge could be said to be exploiting the judicial position for the private benefit of the sponsor, irrespective of whether the judge is being compensated. *See* Advisory Opinion No. 105 ("Participation in Private Law-Related Training Programs"). With the caveats noted below, where the sponsoring organization is a law-related non-profit entity, however, these restrictions do not normally apply: Canon 4 permits judges to assist in the activities of law-related entities, including to a limited degree their fund-raising activities, so long as the judge does not personally participate in fund-raising activities. Hence, there is no ethical impediment to a judge teaching or writing about the practices of his or her own court, if the sponsor is a law-related non-profit entity, provided the judge does not accept compensation for doing so and the judge's presentation is not essentially a fund-raising mechanism. In such a circumstance, the judge may accept reimbursement of expenses, but not compensation, from the law-related non-profit entity.

In summary, it is permissible for judges to engage in teaching and writing, including participating in CLE seminars, and to accept compensation for doing so, unless the subject matter primarily relates to practice before the judge's own particular court. When the subject matter is thus focused, a judge may participate only if no compensation is accepted, and only if the sponsoring organization is a non-profit entity.

It is the continuing obligation of the participating judge to monitor any promotional activities associated with his or her participation to ensure that no improper exploitation

of judicial office occurs. *See* Advisory Op. No. 55 ("Extrajudicial Writings and Publications").

Important Caveats

Canons 2A and 2B of the Code are concerned with (1) preserving the appearance of impartiality, (2) prohibiting the lending of a judge's prestige to advance the interests of others, and (3) avoiding the impression that others are in a position to influence the judge. Thus, even though Canon 4 encourages judges to assist with legal education, the Committee has previously applied Canon 2 principles to participation in legal training programs, whether such programs offer CLE credit or not and whether the sponsor is a "for-profit" or "non-profit" entity.

In other words, merely because a provider offers CLE credit or is a "non-profit" entity does not eliminate the requirement that a judge determine whether his or her participation runs afoul of Canon 2. The following four examples illustrate how Canon 2 concerns may override the general desirability of judicial participation in the education of lawyers.

Example 1. The way in which seminars are marketed is important when considering whether Canon 2 trumps Canon 4 regarding judicial participation in seminars providing CLE for lawyers. For example, the Committee has advised against judicial participation in a CLE seminar, even though the judge would not be compensated, where the seminar exhibited in varying degrees all of the following characteristics: (a) the seminar focused on specialized litigation topics (for example, employment discrimination litigation, ERISA litigation, or asbestos claims) and required the payment of substantial fees in order to attend; (b) the seminar was aggressively marketed by a for-profit provider using marketing materials that highlighted the judge's participation (sometimes including photographs of the judge in marketing materials) to the exclusion of other speakers; (c) the seminar marketing materials suggested that participants would obtain special or exclusive access to the judge; (d) the seminar marketing materials described judicial participation in non-neutral terms, suggesting that the judge's participation would help attendees be more effective in court; and (e) seminar attendees were predominantly lawyers with a particular orientation (for example, members of the defense bar). Considering all these factors together, the Committee concluded that judicial participation in such a seminar could lead a reasonable person to question the judge's impartiality, to believe that the judge is biased in favor of defendants, and to conclude that the judge's prestige had been lent to advance the interests of the seminar sponsor or attendees. The Committee concluded that the special nature of the seminar and the privileged ability to learn helpful litigation tactics also suggested to a reasonable person that the sponsor or the attendees may be in a special position to influence a participating judge.

Example 2. In another "marketing" inquiry, the Committee recommended against judicial participation in a seminar (a) where the fees charged for attendance were likely to be substantially in excess of the direct cost of providing CLE credit to the seminar attendees; (b) where the marketing materials used by the sponsor prominently featured the biographies and photographs of the judges; (c) where the marketing materials suggested that participants would obtain special or exclusive access to the judges; and (d) where the seminar focused on the judges' courtroom practices. The Committee reasoned that when seminar marketing materials imply that a judge will give special access to a limited group of lawyers on matters pertaining to that particular judge's courtroom practices, and when lawyers pay a substantial fee to a third party to participate in the seminar, then the judge cannot be said to have avoided the appearance of impropriety. Rather, under those circumstances, it can be said that a judge has lent the prestige of his or her office to the sponsor by participating. In the foregoing example, the Committee recommended against participation even though the judges were to receive no compensation and even though the sponsor might have been a "non-profit" entity.

Example 3. As suggested by the preceding example, the fact that a sponsor is denominated a "non-profit" organization does not mean that the Committee automatically will treat the sponsor as a non-profit organization for purposes of applying Canon 2 of the Code of Conduct. Thus, if a seminar provider offering CLE credit (a) acts as if it is a private business when it offers seminars in which judges participate by aggressively emphasizing judicial participation as a marketing mechanism and (b) charges fees that are likely to be substantially in excess of the direct cost of providing CLE credit to seminar attendees, the Committee will consider the sponsor to be a "for-profit" entity without regard to its precise corporate or tax status.

Example 4. The involvement of lawyers from a single law firm in conjunction with a seminar providing CLE credit and offered by a separate third-party sponsor has caused the Committee to question the propriety of judicial participation. Thus, even though the judges were to receive no compensation, where (a) members from one law firm solicited judges to participate in a seminar offered by a separate provider; (b) those same law firm members were scheduled to serve as the sole seminar moderators; and (c) the seminar was focused on practice in those particular judges' courtrooms, the Committee recommended against judicial participation. The Committee believed that a reasonable person could conclude that the law firm was in a special position to influence the judges.

September 2010

Committee on Codes of Conduct Advisory Opinion
No. 88: Receipt of Mementoes or Other Tokens Under the Prohibition Against the Receipt of Honoraria for Any Appearance, Speech, or Article

Judges making presentations to nonprofit organizations often receive mementoes. This opinion considers whether a memento falls within the definition of "honorarium" as defined in the Judicial Conference Ethics Reform Act Regulations on Outside Earned Income, Honoraria, and Outside Employment ("Regulations"), promulgated under Title VI of the Ethics Reform Act of 1989, 5 U.S.C. App., §§ 501, 505, and whether it is permissible for the judge to be reimbursed for travel expenses in connection with the presentation.

Section 4(a) of the Regulations provides that no judicial officer or employee shall receive an honorarium. Section 4(b) defines "honorarium" as:

> a payment of money or anything of value (excluding or reduced by travel expenses as provided in 5 U.S.C. App., §§ 505(3) and (4)) for an appearance, speech or article by a judicial officer or employee, provided that the following shall *not* constitute an honorarium:
>
> * * *
>
> (2) Compensation received for teaching activity . . . approved pursuant to Section 5 hereof.
>
> * * *
>
> (7) A suitable memento or other token in connection with an occasion or article, provided that it is neither money nor of commercial value.

Guide to Judiciary Policies and Procedures, Volume 2, Chapter 6, Part H (emphasis added) [*see* *Guide to Judiciary Policy*, Vol. 2C, Ch. 10].

The Committee notes at the outset that a presentation to a nonprofit institute may constitute a teaching activity that is exempt from the definition of "honorarium." The Commentary to the Regulations states that "[t]eaching may also include participation in programs sponsored by bar associations or professional associations or other established providers of continuing legal education programs for practicing lawyers." If the institute is an established provider of continuing legal education programs for practicing lawyers, a presentation sponsored by it would appear to be a teaching activity. If so, the receipt of a memento or other token would not constitute an honorarium for purposes of the Ethics Reform Act.

Assuming that the presentation was a teaching activity and the judge had no advance knowledge that the organization would provide anything other than expenses, the receipt of a memento or other token following a presentation would not, in the Committee's view, convert the presentation into "compensated teaching" that required

prior approval. Under these circumstances, the ethical propriety of accepting the gift is to be determined under the Judicial Conference Ethics Reform Act Gift Regulations, the Code of Conduct for United States Judges's gift provisions (Canon 4D(4)), and the Code's prohibition of conduct giving the appearance of impropriety (Canon 2). If the institute is a bona fide customary provider of continuing legal education programs, the Committee believes that receipt of a memento or other token would be a permissible gift under the Gift Regulations and Canon 4D(4) and would not violate Canon 2.

Assuming that the presentation was not a teaching activity, the determinative issue is whether the gift would constitute an "honorarium" or a "suitable memento or other token." In order to be a suitable memento or token under the Regulations, the item received must be (1) something other than money and (2) without "commercial value." The prohibition on receiving anything of "commercial value" is intended to foreclose compensation in kind for a speech or appearance as a substitute for the payment of cash. A judge could not properly receive, for example, securities or other resalable property as compensation for a speech. The Regulations must be construed with this overall purpose in mind.

In this context, without "commercial value" does not refer to the absence of any commercial value in the hands of the manufacturer of the article or in the hands of the sponsor of the presentation. Any article, including the letter opener referred to in the Commentary to the Regulations as an example of a suitable memento, will have some commercial value in the hands of the manufacturer or sponsor, and such an interpretation would render the "suitable memento or other token" exception meaningless. Rather, the appropriate question is whether the gift would have meaningful commercial value in the hands of the judge if accepted.

This advice does not mean that a judge is free to accept any gift in connection with a presentation, no matter what its commercial value in the hands of the manufacturer or the sponsor. The article tendered must be "suitable" as a reminder of the occasion and must be in the nature of a "token." Thus a judge may accept a gift in connection with an appearance, speech, or article if its value to the judge is solely as a reminder of the occasion; a judge may not accept such a gift if it confers any other benefit upon him or her. While the "suitability" of a memento has no necessary relationship to the commercial value of the gift in the hands of the manufacturer or sponsor, if that value is in the neighborhood of $300 or less, it will be unlikely to have either a utilitarian or a prestige value to the judge beyond its value as a reminder of the occasion.

Assuming that the gift is a "suitable memento" and not an "honorarium," there remains the issue of whether it is a permissible gift under the Gift Regulations, and therefore also permissible under Canon 4D(4). If the gift is properly viewed as a gift from the organization as an entity, and not as a gift on behalf of identifiable lawyers, the receipt of the gift would be permissible under Gift Regulations Section 3(I), which excludes from the definition of gift those benefits "the acceptance of which is permitted by the Regulations of the Judicial Conference Concerning Outside Earned Income,

Honoraria, and Outside Employment," and Section 5(a), which restricts judges from accepting a gift "from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties."

We now turn to the propriety of accepting reimbursement of travel expenses in connection with the presentation. Under the provisions of 5 U.S.C. App., § 505 cited in Regulation § 4(b) *supra*, which excludes travel expenses from the definition of "honorarium," the term "travel expenses" means "necessary travel expenses incurred by such individual (and one relative)" and includes "the cost of transportation, and the cost of lodging and meals while away from his or her residence or principal place of employment." Thus, acceptance of reimbursement for the costs of transportation, lodging, and meals associated with the presentation is appropriate.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 89: Acceptance of Honors Funded Through Voluntary Contributions

The Committee is often asked to advise on the propriety of a judge consenting to or participating in a project to raise funds for scholarships and similar beneficial enterprises to be named in honor of the judge. In the past, projects to honor judges involved, for example, endowment of professorships or research chairs, or construction of practice courtrooms, libraries and the like. In Advisory Opinion No. 46, the Committee discusses the considerations bearing on judges' acceptance of honors and awards, while this opinion addresses the considerations relating to accompanying fund-raising efforts.

Under Canon 4, a judge may participate in a wide variety of good causes, both law-related and non-law-related. For example, for law-related organizations:

> A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

Canon 4A(3).

But, the judge's fund-raising activities for any type of organization are restricted:

> A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organization in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism

Canon 4C.

In addition to the restrictions placed on fund raising by Canon 4C, Canon 2's general prohibition against lending the prestige of the judicial office to a judge's

activities includes those activities permissible under Canon 4. The Commentary to Canon 4 reflects the Committee's caution regarding lending the prestige of office to organizations for fund-raising purposes: "A judge may attend fund-raising activities of a law-related or other organization although the judge may not be a speaker, a guest of honor, or featured on the program of such an event."

The Committee has considered a number of proposals to raise funds for projects to honor a judge. Typically, but not exclusively, former law clerks of a judge come together to establish a scholarship named after the judge. The clerks may seek funds from lawyers outside their ranks. Our consideration of these matters has led us to conclude that a judge may consent to others raising funds for scholarships and similar enterprises to be named in honor of the judge, but the degree of the judge's involvement in the project is controlled by Canon 2 and 4C, which prohibit lending the prestige of judicial office to advance private interests—even when the interests are charitable.

Examined in this light, the Committee recognizes that scholarships, libraries, courtrooms, reading rooms, and the like are named after judges, and funded through voluntary contributions, with some regularity without hint of scandal or public disapproval. While there are concerns about using the prestige of the judicial office, we believe these concerns would be offset by the fact that the judge neither (a) initiates, (b) encourages, (c) solicits funds, nor (d) knows who gave money or even who was asked to give money for the project. Our opinion that a judge may accept an honor if the judge is distanced from the process of initiating, developing and financing it is not dependent on whether the honor is associated with a law-related institution or some other charitable or educational institution. Judges have distinguished themselves as practitioners or patrons of a wide range of arts and sciences. A judge may legitimately receive recognition for a life's effort in realms other than the law.

A judge may therefore accept an honor, such as a scholarship or reading room or professorship named after the judge, that is funded through voluntary contributions if (1) the honor is associated with an organization or institution in which the judge could participate consistent with the provisions of Canons 4A(3) and 4C, (2) the judge neither initiates nor participates in the conception or completion of the fund-raising project, and (3) the judge makes a reasonable effort to remain unaware of the identity of those who fund the project. A senior judge who no longer hears cases need not be shielded from learning the identity of contributors after contributions have been made.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 90: Duty to Inquire When Relatives May Be Members of Class Action

This opinion considers whether, in a class action brought pursuant to Rule 23(b)(3), a judge must investigate to determine whether the interests of any of the judge's (or the judge's spouse's) relatives within the third degree of relationship, or the spouses of such relatives, place the relatives within the definition of the class. Class membership by the relative would then require the judge's recusal. The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.

The Committee previously advised a judge to undertake such an investigation and, if any of such third degree relatives or their spouses happened to be within the class definition, to ask them if they would be willing to opt out of the class, as Rule 23(c)(2) permits. The Committee has reconsidered the subject and now reaches a different conclusion.

Canon 3C(1)(d)(i) of the Code of Conduct for United States Judges provides:

> (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 in which:
>
> * * *
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:
>
> (i) a party to the proceeding, or an officer, director, or trustee of a party[.]

The Judicial Code contains a similar provision. 28 U.S.C. § 455(b)(5)(i). Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting § 455, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

Our previous advice was based on two considerations. First, we believed that all members of a Rule 23(b)(3) class action are parties within the meaning of Canon 3C(1)(d)(i). The Committee previously advised that all members of a class are parties, whether named or unnamed, so long as they have not opted out of the class. Second, we thought that if a judge failed to make these inquiries and then, at some later time, had to recuse upon discovering that a third degree relative or spouse thereof was a class member, whatever rulings the judge had already made in the case might have to be vacated.

The effect of our advice was to place judges in the position of having to delve into the financial affairs of third degree relatives who were not members of their household. (Relatives "within the third degree of relationship" include one's parents, grandparents, great grandparents, children, grandchildren, great grandchildren, uncles, aunts, brothers, sisters, nieces and nephews but do not include first cousins. *See* Canon 3C(3)(a).) Our former advice on this point was somewhat at odds, although not entirely inconsistent, with advice we have previously given that a judge is not bound to keep informed of the financial interests of relatives other than his or her spouse and minor children residing in the household. *See generally* Canon 3C(2).

The Committee adheres to its previous position that Rule 23(b)(3) class members are "parties" for purposes of Canon 3C(1)(d)(i). (The Committee expresses no view regarding Rule 23(b)(2) class actions. *See In re City of Houston*, 745 F.2d 925 (5th Cir. 1984).) This straightforward approach not only is consistent with the reasoning of decisions such as *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), and *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986), but also avoids the considerable difficulties that would arise in trying to draw distinctions between Rule 23(b)(3) class members who should be considered parties and those who should not.

The Committee now concludes, however, that a judge in a Rule 23(b)(3) class action does not have a duty to investigate whether his or her relatives within the third degree and their spouses are class members. If at some point the judge discovers that one of them was a class member, Canon 3C(1)(d)(i) would require recusal, but this does not mean the judge, prior to such discovery, was acting unethically by sitting on the case. The situation is thus unlike *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), interpreting 28 U.S.C. § 455(a), a provision comparable to Canon 3C(1), which provides that a judge must disqualify "himself in any proceeding in which his impartiality might reasonably be questioned." *See Liteky v. United States*, 510 U.S. 540 (1994). *Liljeberg* applied § 455(a) "retroactively" because the provision's disqualification standard does not depend on the judge's knowledge of the disqualifying facts. In other words, the provision is violated although the judge is unaware of the facts creating the appearance of impropriety. *See* 486 U.S. at 859-61. However, when a rule contains a knowledge requirement, there can be no violation until the judge obtains the requisite knowledge.

The knowledge requirement flows from the structure of Canon 3C. As Chief Justice Rehnquist said in dissent in *Liljeberg*, 486 U.S. at 871, with respect to § 455, "[u]nlike the more open-ended provision adopted in subsection (a), the language of subsection (b) requires recusal only in specific circumstances, and is phrased in such a way as to suggest a requirement of actual knowledge of the disqualifying circumstances." The same is true with respect to Canon 3C. The other specifically enumerated examples in Canon 3C either expressly contain a knowledge requirement, or involve situations in which it is almost impossible for the judge not to know of the disqualifying circumstance. *See* Canon 3C(1)(a)-(e); *Liteky v. United States*, 510 U.S. at 553-54 n.2.

In the case of Rule 23(b)(3) class actions, however, it is not necessarily true that a judge would know whether his or her relative is a party. If the judge later discovered this fact, the analysis in *Liljeberg* would not give rise to any retroactive consequences. Canon 3C(1)(d)(i) requires knowledge. Canon 3C(2) assures that judges will have such knowledge with respect to themselves, their spouses and their minor children living in the household: "A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household." The clear implication is – and the Committee has so concluded – that the judge is under no duty to acquire knowledge of the financial affairs of his or her other relatives within the third degree, or of their spouses. Without such information, a judge sitting on a case in which a relative was, without the judge's knowledge, a class member would not be acting in violation of the Code. In addition, cases in which third degree relatives turned out to be members of a class would doubtless fall within the Supreme Court's qualification in *Liljeberg* that "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." 486 U.S. at 862.

In short, the Committee is of the view that the *unknown* presence of a judge's relative as a party in a Rule 23(b)(3) class action does not create a risk of injustice to the parties, and does not undermine the public's confidence in the judicial process—so long as the judge recuses upon learning of the relative's status as a party. There is thus little risk of the sort of retroactive relief we sought to avoid when we previously advised that a judge should investigate to determine if any third degree relatives fit within the class definition. Accordingly, the Committee is now of the opinion that judges need not undertake such inquiries. Requiring judges to investigate imposes untenable burdens on them and puts judges in the potentially awkward and uncomfortable position of intruding into the personal affairs of those outside their households.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 91: Solicitation and Acceptance of Funds from Persons Doing Business With the Courts

This opinion addresses whether judicial employees may solicit funds from vendors who do business with the courts in order to defray the expenses of a conference devoted to improvement of the judicial system that is sponsored by an association whose members are judicial employees. The Committee also considers the related question of whether, if such solicitation is inappropriate, an unsolicited gift of funds for the conference may be accepted.

The Judicial Conference Regulations Concerning Gifts define a "gift" to mean "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value." Gift Regulations § 3(e). Funds to support a conference sponsored by an employee association fall under this definition. For the reasons that follow, the Committee advises that the Ethics Reform Act, the Gift Regulations, and the Code of Conduct for Judicial Employees ("Employees' Code") prohibit solicitation of such gifts from persons doing business with the courts.

The Ethics Reform Act provides, in part:

> (a) Except as permitted by subsection (b), no . . . employee of the . . . judicial branch shall solicit or accept anything of value from a person –
>
> > (1) seeking official action from, [or] doing business with . . . the individual's employing entity; or
> >
> > (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.
>
> (b)
>
> > (1) Each supervising ethics office is authorized to issue rules or regulations implementing the provisions of this section and providing for such reasonable exceptions as may be appropriate.

5 U.S.C. § 7353. The Judicial Conference, the supervising ethics office for the judicial branch, implemented these provisions through Gift Regulations sections 4 and 5. The statute and Regulations bar both solicitation and acceptance of gifts from vendors doing business with the courts, as well as from vendors whose interests may be substantially affected by official action of the courts. Although the Regulations permit some exceptions with respect to acceptance of gifts, they allow no exceptions to the prohibition against solicitation of gifts from persons doing business with the courts. The fact that the purpose of the conference involves improvement of the judicial system is not sufficient to avoid the prohibition.

The Committee concludes that the Ethics Reform Act and implementing regulations prohibit the solicitation from vendors doing business with the courts for a conference sponsored by an employee association. The Committee also concludes that the solicitation of such gifts from court vendors is contrary to Canon 2 of the Employees' Code because it would create an appearance of impropriety. The Committee advises that judges should exercise their supervisory powers to preclude employees under their supervision from making such solicitations.

A related question is whether an employee association may accept funds from vendors doing business with the courts if the funds are not improperly solicited. In other words, this follow-up question contemplates a genuinely voluntary offer by a court vendor to provide substantial funding to defray the conference expenses. We need not address whether such gifts to the association would contravene the gift prohibitions in the Ethics Reform Act, the Gift Regulations, and the Employees' Code, because the Committee concludes that, in any event, it would create an appearance of impropriety under Canon 2 for judicial employees to make arrangements with a court vendor through which the vendor would provide substantial financial support to assist an employee association in putting on a conference. The Committee has advised in the past that it would create an appearance of impropriety for a group of judges or judicial personnel to arrange with a vendor known to be doing business with the court to provide financial support for an event to be held at a conference or meeting sponsored by the judges or judicial personnel. The same conclusion applies here, and, therefore, if it comes to the attention of a judge who has supervisory authority that the employee plans to accept such a gift, the judge should prohibit the acceptance.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 92: Political Activities Guidelines for Judicial Employees

The Committee on Codes of Conduct has developed the guidelines set forth below for judicial employees covered by the Code of Conduct for Judicial Employees ("Employees' Code") who are contemplating involvement in political activities. Judicial employees who are covered by the Employees' Code should comply with Canon 5, which regulates permissible political activity.[1] This opinion provides guidelines regarding clearly permissible and clearly impermissible activities under Canon 5. It then offers some cautionary guidelines for employees who are permitted under Canon 5B to participate in nonpartisan political activities. The guidelines in the opinion are not intended to be exclusive or all-encompassing. If questions remain after consulting these guidelines, covered judicial employees may seek advice as set forth in the Introduction to the Employees' Code.

I. Political Activities Permitted for All Covered Employees

The following activities are consistent with the provisions of Canon 5 of the Employees' Code. For example, covered employees may:

a. register and vote in any primary or general election, including register as a member of a political party;

b. express an opinion privately as an individual citizen regarding a political candidate or party; and

c. participate in the nonpolitical activities of a civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, or recreational organization described in Canon 4 of the Code.

II. Partisan Political Activities Prohibited for All Covered Employees

Under Canon 5A, a covered judicial employee should refrain from partisan political activity, including the following:

a. taking an active role in a partisan political organization;

b. becoming a candidate for partisan political office;

c. publicly endorsing a partisan political candidate or organization by authorizing use of the employee's name, making speeches, or participating in a partisan political convention, caucus, rally, or fund-raising activity. However, employees who may permissibly participate in nonpartisan activities under Canon 5B may participate in caucuses in those states where caucuses substitute for primary elections, but only to the extent necessary to cast a vote. They may not participate beyond that

extent, for example by attempting to influence other voters, and they may not identify themselves as associated with the court;

d. publicly displaying a campaign picture, sign, sticker, badge, or button for a partisan political candidate or organization;

e. soliciting funds for or contributing to a partisan political organization, candidate, or event;

f. initiating or circulating a nominating petition for a candidate in a partisan political election;

g. participating in a campaign in support of or in opposition to a candidate in a partisan political election; or

h. serving in any position at a polling place in a partisan election or serving in any other position that relates to voting in a partisan election.

III. Nonpartisan Political Activities Prohibited for Members of a Judge's Personal Staff and Certain Court Unit Heads

Under Canon 5B, a member of a judge's personal staff, lawyer who is employed by the court and assists judges on cases, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, or district court executive, should refrain from nonpartisan political activity, including the following:

a. becoming a candidate for nonpartisan political office;

b. participating in a campaign in support of or in opposition to a candidate in a nonpartisan political election, including publicly displaying a campaign picture, sticker, badge or button or making speeches for or against nonpartisan candidates;

c. making speeches for or publicly endorsing or opposing a nonpartisan political candidate;

d. soliciting funds for or contributing to a nonpartisan political candidate or event;

e. initiating or circulating a nominating petition for a candidate for a nonpartisan political election; or

f. serving in any position at a polling place in a nonpartisan election or serving in any other position that relates to voting in a nonpartisan election.

IV. Nonpartisan Political Activities Permitted for Certain Covered Employees

Under Canon 5B, a judicial employee who is not a member of a judge's personal staff, lawyer who is employed by the court and assists judges on cases, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, or district court executive may participate in nonpartisan political activity "only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties." Canon 5B. When considering whether a nonpartisan political activity is permissible according to this standard, a judicial employee should consider, at a minimum, whether the following factors weigh against participation:

a. whether the nonpartisan activity involves a controversial issue that is being publicly debated;

b. whether the nonpartisan activity involves an issue that either currently is being litigated in federal court or may be litigated in federal court;

c. whether the nonpartisan activity involves an organization that frequently litigates in federal court;

d. the degree of responsibility and leadership the participation involves; and

e. whether the employee will be identified during the activity as an employee of the court.

If the judicial employee has any question about the propriety of engaging in a nonpartisan activity, the employee should first consult with the employee's supervisor or appointing authority. The employee and the supervisor or appointing authority are welcome to seek further guidance on the question from the Committee.

V. Future Employment with Political Organizations

Under Canon 5 and the Committee's guidance, certain restrictions may be appropriate for law clerks and staff attorneys seeking future employment with political organizations in order to avoid the risk of associating judges or judicial chambers with political activity. The commentary to Canon 5 in the Code of Conduct for United States Judges explains that a political organization is "a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office." Additionally, Canon 1 of the Employees' Code provides that "[a] judicial employee should uphold the integrity and independence of the judiciary and of the judicial employee's office."

A law clerk or staff attorney seeking employment with a political organization during a clerkship or judicial employment may risk linking a judge or chambers to political activity. Consistent with Canon 4C(4) of the Employees' Code, the law clerk or staff attorney should inform his or her appointing authority before pursuing or discussing

an employment opportunity with a political organization. Although seeking or obtaining future employment during judicial employment is generally acceptable, the appointing authority retains discretion to limit or restrict a law clerk or staff attorney from pursuing future employment with a political organization when the pursuit of such employment may risk compromising the independence of the judiciary. *See* Advisory Opinion No. 74 ("Pursuit of Future Employment by Law Clerks and Staff Attorneys").

Note for Advisory Opinion No. 92

[1] The Code of Conduct for Judicial Employees, and these guidelines, cover all employees of the judicial branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the U.S. Courts, the Federal Judicial Center, the Sentencing Commission, and federal public defender offices. Judges and judicial employees who are not covered by the Employees' Code should consult the codes and ethical standards applicable to them for guidance on participation in political activities.

February 2025

Committee on Codes of Conduct Advisory Opinion No. 93: Extrajudicial Activities Related to the Law

The Committee regularly is asked to give advice regarding involvement in extrajudicial activities related to the law. Canon 4 of the Code of Conduct for United States Judges applies to all extrajudicial activities; its heading states that "[a] judge may engage in extrajudicial activities that are consistent with the obligations of judicial office." This opinion is intended to explain the principles by which the Committee determines whether extrajudicial activity related to the law is consistent with the obligations of judicial office, and to clarify our precedents on the issue. Advisory Opinion No. 79 ("Use of Chambers, Resources, and Staff for Law-Related Activities Permitted by Canon 4") addresses, in part, whether an activity should be considered judicial or extrajudicial.

Canon 4 states that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects."

Canon 4 then continues: "However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations [in the following paragraphs of Canon 4]."

In assessing an extrajudicial activity, it is often useful to determine whether the activity is related to the law or not. While the Code permits judicial participation in non-law-related activities, judicial participation in law-related activities is actively encouraged. Canon 4A; Commentary to Canon 4 ("a judge is encouraged to" contribute to the law, the legal system, and the administration of justice). Accordingly, a judge will be given greater latitude when participating in law-related activities expressly encouraged by Canon 4A. An example of a distinction between law-related and non-law-related activity is found in Canon 4F, which permits a judge to accept appointment to a governmental position only if it concerns the law, the legal system, or the administration of justice, unless such an appointment is required by law. As another example, a judge may generally serve on the board of a law school, but may not serve on a state board responsible for operating a public university. Compare Commentary to 4A *with* Advisory Opinion No. 44. Whether a judge permissibly may use judicial resources to engage in law-related and non-law-related activities involves a variety of different factors, which are dealt with in Advisory Opinion Nos. 79 and 80.

A judge's participation in law-related activities is encouraged because "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute" to such endeavors. Commentary to Canon 4. However, not every activity that involves the law or the legal system is considered a permissible activity. Law is, after all, a tool by which many social, charitable and civic organizations seek to advance a variety of policy objectives. We have concluded, for example, that participating in an

organization lobbying for legislation to implement a particular policy pertaining to drug and alcohol abuse is not consistent with the obligations of judicial office. Similarly, we have advised that judicial participation in organizations that may engage in litigation in furtherance of stated policy goals is not permissible. Advisory Opinion No. 40. In addition, judicial participation as an arbitrator or mediator, or otherwise performing judicial functions apart from the judge's official duties, is prohibited unless expressly authorized by law. Canon 4A(4). Rather, to qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.

Two formulations emerge from our prior advice. First, permissible law-related activities are "limited to the kinds of matters a judge, by virtue of [the judge's] judicial experience, is uniquely qualified to address." If a judge's participation is sought for some reason other than his or her judicial expertise, the activity is less likely to be a permissible activity. For example, we have advised that service on a Senate Ethics Advisory Panel was not an activity designed to improve the law, where the judge's participation was sought primarily because of his previous experience as a state senator.

Consistent with this emphasis upon whether a judge brings to bear a special expertise, Canon 4A(2) provides that a judge may appear before or consult with an executive or legislative body or official only to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area at issue. We have accordingly advised that legislative appearances by a judge are generally permissible only where the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual. *See* Advisory Opinion No. 50 (suggesting that a judge should not testify before a legislative committee on social legislation). A similar inquiry pertains regarding appointment to governmental committees and commissions, which is covered by Canon 4F.

Second, we look to see if the beneficiary of the activity is the law or legal system itself. A permissible activity, in other words, is one that serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or enhances the prestige, efficiency or function of the legal system itself. The clearest examples of permissible activities are those addressing the legal process. Thus, we have concluded that judicial participation in such activities as an educational videotape to improve the quality of court reporters; a nonprofit organization to promote the concept of the resolution of disputes through arbitration; an organization that researches and provides information on the juvenile justice system; an organization sponsoring informative programs on trial practice; and an organization to eliminate gender bias in the judiciary is permissible. Whether an activity benefits a specific constituency or the legal system as a whole will sometimes be a close question; it should be answered by

evaluating how closely related the substance of the activity is to the core mission of the court of delivering unbiased, effective justice to all.

Although such matters as the administration of the business of the courts, the delivery of legal services, or the preparation of codifications of judicial decisions are the clearest examples of permissible activities, a broader range of activities is permissible. The Commentary to Canon 4 encourages judicial participation in the improvement of the law, the legal system, and the administration of justice, including "revising substantive and procedural law and improving criminal and juvenile justice." Therefore, activities directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group, may be permissible. We have concluded, for example, that activities of the National Conference of Commissioners on Uniform State Laws, whose purpose is to promote uniformity in the law across jurisdictions, and the American Law Institute, whose purpose is to distill, rationalize and restate the law, are permissible. Similarly, the Working Group on Detention of the United Nations Human Rights Commission, which reports to the United Nations on compliance with the Universal Declaration of Human Rights, was deemed an organization devoted to the improvement of the law. However, judicial participation in organizations that advocate particular causes rather than the general improvement of the law is prohibited. *See* Advisory Opinion No. 40.

Additionally, a judge may teach and write on substantive legal issues. Judicial scholarship is particularly encouraged by Canon 4. *See* Canon 4A. The evolution and exposition of the law is at the core of a judge's role. Judges, therefore, have the ability to make a unique contribution to academic activities such as teaching and scholarly writing, which similarly serve to advance the law. *See* Advisory Opinion No. 55.

A judge's extrajudicial activity related to the law will often implicate other canons aside from Canon 4. Sometimes we have referred to those canons explicitly; sometimes we have integrated the principles of those canons through explaining Canon 4. The key restrictions regarding extrajudicial activity contained in other canons are Canon 1's mandate that a judge uphold the independence of the judiciary; Canon 2's prohibition against impropriety and the appearance of impropriety in all activities; and Canon 5's restrictions on political activity.

Canon 1 provides that a judge should uphold the integrity and independence of the judiciary. A federal judge's extrajudicial activity directed toward improving the law may be impermissible, for example, to the extent that it enmeshes the judge in, or subordinates the judge to, the operation of a state or local government. For instance, we have advised that it would be inappropriate under Canon 4 for a judge to serve on a state law reform agency created by the state legislature and given quasi-legislative responsibilities, even though the goal of the agency was the improvement of state law. We noted that "a federal judge should not sit as a member of an official state body charged with quasi-legislative responsibilities." Although we did not explicitly discuss Canon 1, Canon 1's prescription for an independent federal judiciary was at the core of the advice.

Other times we have invoked Canon 1 explicitly. For example, we expressly relied on Canon 1 in advising that a judge may not serve on a state board of law examiners, an arm of the state supreme court. Similarly, we invoked Canon 1 in concluding that a judge may not serve, through appointment by the state supreme court, upon a state supreme court commission on racial and ethnic bias in the state court system. Although in both cases we observed that such extrajudicial activity was related to the law, it was prohibited because it could compromise the independence of the federal judiciary. We noted that federal courts occasionally are required to consider decisions of the state supreme court, and thus a federal judge should not sit on a committee of the state court.

Canon 2 may also preclude a judge's participation in an extrajudicial activity designed to improve the law. Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all activities. We have advised, therefore, that although participation as a member or officer of an open member bar association is generally a permissible Canon 4 activity, *see* Advisory Opinion Nos. 85 and 34, a judge may not run for a contested position in a bar association because of the unseemliness and potential for creating an appearance of impropriety of a federal judge seeking votes.

Canon 2A's provision that a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary may preclude a judge's participation in law-related activities or organizations concerning highly controversial subjects. Thus, a judge may remain a member of a bar association that takes controversial positions on policy issues, so long as the judge abstains from participating in the debate or vote on such matters in a manner in which the public may be effectively informed of the judge's abstention (*see* Advisory Opinion Nos. 82 and 34); however, we have advised that a judge may not serve as the chair of a section of the American Bar Association that concentrates its efforts on many of the most controversial political issues of the day. *See* Advisory Opinion No. 82. On the other hand, we have advised that membership in a United Nations human rights group is permissible, as the group only rarely, if ever, becomes involved in matters so controversial that a judge's involvement could jeopardize his or her effectiveness as a judge at home. Further, Canon 2B's restrictions against lending the prestige of the judicial office to advance the private interests of others also applies to Canon 4 activities. *See* Advisory Opinion No. 89. We have advised, for example, that a bankruptcy judge should not serve on the board of an organization designed to certify individual lawyers as bankruptcy specialists because it would violate Canon 2's prohibition against lending the prestige of the judicial position to a private interest.

Finally, we note that Canon 5 states a judge should not engage in political activity. Although the political prohibitions in Canon 5A are absolute, the catch-all prohibition in Canon 5C against "other political activity" contains a qualification that Canon 5C "should not prevent a judge from engaging in the activities described in Canon 4." However, engaging in law-related extrajudicial activities where the activity is political in nature is fraught with risks for judges. Thus, before deciding to engage in law-related activity with political overtones, a judge should consider whether the express

or implied values of other canons will be contravened. For example, we have advised that a judge should not serve on an official state committee formed to select state trial and appellate court judges. Although such activity is law-related and thus is to be evaluated under Canons 4 and 5C it might compromise the judge's independence, and therefore violate Canon 1. A judge should be sensitive to the nature and tone of the activity, and should not be drawn into an activity in a manner that would contravene Canon 2's goals of propriety and impartiality or Canon 5A's prohibition of activities pertaining to political organizations and candidates. Further, because of the ethical risks associated with any politically-oriented activity, we construe permissible Canon 4 activities in this context narrowly, restricted to those activities that are most directly related to the law and legal process.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 94: Disqualification Based on Mineral Interests

This opinion addresses two issues involving mineral interests:

(1) whether a judge must recuse whenever a purchaser of oil or gas, in which the judge has a fractional royalty interest, is a party in a case before the judge; and

(2) whether a judge who holds the executory rights to lease minerals for production must recuse whenever the lessee is a party in a case before the judge.

Of course, if the subject of the case before the judge involves the judge's fractional mineral royalty interest or the lease to which the judge is a party, the judge must recuse. This opinion addresses situations where the case before the judge does *not* involve either the lease or the minerals in which the judge has a royalty interest, but nevertheless one of the parties happens to be the purchaser of oil or gas in which the judge owns a fractional royalty interest or is a lessee of a mineral estate leased by the judge, who holds the executory rights to lease.

It is not uncommon, particularly in regions of the country where oil and gas production is concentrated, for a party to appear before a judge to whom the party is making royalty payments based on purchases of oil or gas in which the judge has a fractional royalty interest. For example, if a judge owns a fractional royalty interest in oil or gas that is being purchased by a major oil or gas company, it is likely that, during a time the judge is receiving royalty payments from the company, that company will be a party in cases before the judge on issues entirely unrelated to the judge's royalty interest.

A variation of that scenario occurs when the judge holds the executory rights to lease the mineral estate for development. If the judge signs a lease with a major oil or gas company it is, once again, possible that the company will appear occasionally as a party before the judge on matters completely unrelated to the lease while it is still in effect. In this scenario, the judge may either have had a history of direct contract negotiations with that party or, at the least, the judge will be a direct signatory to a lease involving that party.

Canon 3C(1)(c) of the Code of Conduct for United States Judges provides:

> C. 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 in which:
>
> * * *

> (c) the judge knows that the judge, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Neither receiving royalty payments from a party nor leasing a mineral estate to a party qualifies as a "financial interest" in a party, which is defined in Canon 3C(3)(c) as "ownership of a legal or equitable interest, however small, . . . in the affairs of a party." *Compare* Advisory Opinion No. 75 (judge receiving military pension need not recuse when military service is a party); Advisory Opinion No. 27 (judge's spouse who is the beneficiary of a trust that leased property to defendant does not have a "financial interest" in the defendant).

The inquiry, however, does not end there. Canon 3C(1)(c) also requires a judge to recuse whenever he or she has "any other interest that could be affected substantially by the outcome of the proceeding." *See also* 28 U.S.C. § 455(b)(4). (We note that although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting recusal statute 28 U.S.C. § 455, Canon 3C of the Code of Conduct closely tracks the language of § 455, and we are authorized to provide advice regarding the application of the Code.) Recusal, therefore, would be necessary under Canon 3C(1)(c) when the value of the judge's fractional royalty interest could be "substantially" affected, even though it cannot be characterized as a legal or equitable interest in the party appearing before the judge. The fact that the amount of royalties received might be small is not decisive; it is not the size of the interest that is a concern under Canon 3C(1)(c), but rather whether the interest could be substantially affected. Thus, we have said that a $.60 per month increase would not have a substantial effect on a judge's utility bill, but that the doubling of a utility bill from $10 to $20 per month would be substantial. However, unless the suit before the judge was of such a magnitude that it could realistically impact the party's financial ability to pay royalties to the judge, the "interest that could be affected substantially" clause of Canon 3C(1)(c) is not implicated. Moreover, even if the suit were of that magnitude, it might not have the potential to substantially affect the judge's royalty interest if it is clear that the oil or gas could and would be marketed to others at a comparable price in the eventuality that the purchaser/party before the judge no longer remained a viable purchaser as a result of the suit.

We turn next to consideration of the more general prohibition in Canon 3C(1) that a judge must recuse when the judge's "impartiality might reasonably be questioned." We have said that a judge's impartiality might reasonably be questioned in a variety of situations where a judge is asked to hear a case involving a party with whom the judge does business. For example, where a judge's spouse was the principal beneficiary of a trust that leased property to a party in a case, and the amount of rent was substantial, we said that it would create an appearance of impropriety for the judge to hear that case. Advisory Opinion No. 27. We also have said that it would create an appearance of impropriety for a judge who contracts with a party for the use of a service mark to

hear cases involving that party. We also have advised that an appearance of impropriety is created when a party before the judge is either a lessor of real estate to the judge or a lessee of real estate owned by the judge. In all of these cases, the judge should recuse, subject to remittal under Canon 3D.

On the other hand, we have recognized that a judge must be allowed to manage his or her investments and to purchase goods and services, and that a commercial relationship with a party does not always require recusal. For example, we have said that a judge's impartiality cannot reasonably be questioned when a judge sits on a case involving an insurance company of which the judge is a policy holder, so long as the case will not substantially affect the judge's interest in the policy. A judge who is a bondholder and periodically receives interest payments on the bonds may hear cases involving the bond issuer so long as the case does not involve the bonds held by the judge. Maintaining a bank account does not require a judge to recuse from cases in which the bank is a party, nor does owing money to a bank require recusal, absent special circumstances such as unusually favorable terms or a default. A judge who is a utility customer may hear cases involving the utility. A judge who receives a military pension may sit on cases in which the military is a party. Advisory Opinion No. 75.

Consideration of several factors can help to reconcile these opinions and assist in identifying when recusal is necessary: (1) When a transaction is standardized and generally available to all who qualify, it is not likely to require recusal. To the extent that the parties to the transaction are fungible, with either party able to go elsewhere, the power of each party over the other is diminished, and therefore so is the appearance of impropriety. (2) When, during the pendency of the litigation before the judge, a relationship has previously been structured and is not likely to be restructured or to give rise to controversy regarding the duties of the parties, recusal is less likely to be required. The converse is also true: When a relationship is being negotiated or is likely to be renegotiated during the time a party is in court or there is a reasonable possibility that the relationship may become the subject of controversy during the pendency of the court proceeding before the judge, it is much more likely to require recusal. (3) The size of the investment is a relevant consideration in evaluating an appearance of impropriety. (4) It is relevant to consider whether the transaction gave rise to a personal and recurring relationship between the judge and the party or whether it is an impersonal market relationship. (5) Finally, it is necessary to consider whether there are any other unique characteristics of the transaction that give rise to an appearance of impropriety.

Applying these factors to the first question posed, we believe that the judge presiding over a suit involving a party who pays royalties to a judge on unrelated mineral production will not ordinarily give rise to an appearance of impropriety. First, typically the judge as a fractional royalty interest owner will not have had any direct personal negotiations or a direct personal relationship with the party. Second, ordinarily the interests of most fractional royalty interest owners are fairly standardized within a particular community or producing field. Finally, many, although certainly not all, fractional royalty interests will be fairly small in both amount and percentage. Under these circumstances, we do not believe that an appearance of impropriety would arise

merely because a party appearing before a judge is making royalty payments to the judge on an unrelated fractional royalty interest owned by the judge, and we do not believe that the judge is required to recuse in that situation. Of course, the various factors set forth above need to be evaluated in each situation because of the potential variability that may exist in the actual relationship. If the judge is uncertain whether the various factors in his or her particular situation might give rise to a reasonable concern regarding the judge's impartiality, then the judge should consider utilizing the remittal procedure set forth in Canon 3D.

We then turn to the second question of whether a judge properly could hear a case when one of the parties, in an unrelated matter, entered into a mineral lease with the judge who held the executory rights to lease those minerals for production. The difference between this situation and the previous situation is that here the judge is likely to have signed a lease with the party and to have been more directly involved with the party. The judge holding the executory rights to lease typically will be both the surface landowner and an owner of a royalty interest in the minerals to be developed under the lease. The judge could be expected to have continued direct involvement with the lessee as the lessee enters upon the land to develop and produce oil and gas and as it markets those minerals in which the judge likely has a royalty interest. Further, there is often a reasonable possibility that controversy may arise concerning either the meaning of the lease or the parties' performance under the lease, and if such a controversy does arise, the judge likely will be directly involved.

Once again, Canon 3C(1)(c) is not implicated because the judge does not have a financial interest in the lessee. Similarly, the judge could not preside over the suit if the suit before the judge could substantially affect the judge's interests. Canon 3C(1)(c). Here, however, the judge's role as a contracting party with the lessee, the likelihood of ongoing relations directly with the lessee, the reasonable possibility that controversy may arise concerning the lease that will implicate the judge directly, and the nature of the judge's interests all suggest that the judge's impartiality might reasonably be questioned, implicating Canon 3C(1), if he or she were to preside over any suit involving that lessee. Therefore, the judge should ordinarily recuse in this situation, subject, of course, to the possibility of remittal upon full disclosure to all the parties. *See* Canon 3D. However, once again, each case must be examined on its own facts because of the potential variability that may exist in the actual relationship.

The second scenario raises one other consideration of which the judge should be aware. Although a judge may manage his or her own real estate investments and may even act as a fiduciary for family members, a judge may not act as a fiduciary for non-family members. Canon 4E; Judicial Conference Ethics Reform Act Regulations Concerning Outside Earned Income, Honoraria, and Outside Employment § 5(a)(3) and Commentary ¶ 10, set forth in *Guide to Judiciary Policy*, Vol. 2C, Ch. 10. It is not uncommon that non-family members will have fractional royalty interests in the oil and gas produced under the lease signed by the judge. If, under controlling state law, the judge's role as lessor of mineral rights in which non-family entities have an interest

imposes fiduciary obligations upon the judge toward such non-family entities, the judge should remove himself or herself from that role.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 95: Judges Acting in a Settlement Capacity

Concerns have arisen about the practice of judges acting in a settlement capacity in a case. In this opinion, the Committee considers the following facets of this issue:

(1) whether a judge presiding over a trial may properly participate directly in settlement discussions with the parties;

(2) whether the existence of an established local rule permitting the practice has any bearing on the propriety of the judge's action;

(3) whether it makes any difference if the case is to be tried before a jury rather than the judge; and

(4) whether a judge may act as a mediator in a state court case.

The Code of Conduct for United States Judges contains two provisions bearing on the subject of judges' involvement in settlement discussions. First, Canon 3A(4) advises that judges should not engage in *ex parte* communications on the merits of the case. As an exception to this general advice, Canon 3A(4)(d) provides that a "judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." Second, Canon 3C(1) sets out the standard for impartiality that judges must meet in the performance of their judicial duties, including participation in settlement discussions. Canon 3C(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ."

Nothing in the Code expressly addresses the practice of judges discussing settlement with all parties simultaneously or presiding over joint settlement conferences. Since the drafters of the Code believed it was necessary to expressly permit *ex parte* settlement discussions between judges and parties with their consent, it is reasonable to infer that joint settlement discussions do not contravene the Code. We read the Code to acknowledge that judges may engage in a range of permissible settlement activities, and that recusal follows from those activities only where a judge's impartiality might reasonably be questioned because of what occurred during the course of those discussions.

Discussion of the possibility of settlement is a common practice at pretrial and status conferences and is expressly sanctioned in general terms by the Federal Rules of Civil Procedure. Rule 16(a)(5) allows judges to convene pretrial conferences for the purposes of facilitating settlement. Rule 16(c)(2)(I) authorizes the court to "use dispute resolution procedures authorized by statute or local rule." The clear implication in Rule 16 is that judges will be involved in facilitating settlement. Rule 16 does not prevent a judge who engaged in settlement discussions from presiding over a trial.

The Committee advises that a trial judge's participation in settlement efforts is not inherently improper under the Code. As with any aspect of a judge's conduct of a case, particular actions may raise ethical concerns in some cases, but there is no *per se* impropriety in a judge's participation in settlement discussions or in a judge's conduct of a trial following participation in settlement talks. The existence of local rules explicitly permitting judges to preside over settlement discussions lends support to the propriety of a judge's actions in this respect. On the other hand, the existence of local rules prohibiting judges from handling successive settlement and trial responsibilities forecloses judges in some jurisdictions from exercising certain combinations of settlement and trial responsibilities (or from doing so without consent). In the absence of a local rule prohibiting the judge's participation, whether ethical concerns arise in a particular proceeding is a specific determination that depends on the nature of the judge's actions and whether the judge's impartiality might reasonably be questioned. Judges should evaluate their actions under the standards discussed in this opinion.

Ethical concerns are less likely to arise when a judge handles settlement negotiations and then presides over a jury trial, or when the parties consent to the judge's handling of successive settlement and trial phases. Concerns are more likely to arise in nonjury trials. In that scenario, a judge may be involved in settlement discussions, probe the parties' assessments of the value of the case, review the parties' settlement offers (and perhaps suggest to them specific settlement amounts), and then, when settlement talks fail, try the case and award damages. In the latter circumstances of a nonjury trial, it may be reasonable to question whether the trial judge can be an objective trier of fact, or whether the case should instead be tried by another judge unfamiliar with the settlement discussions.

The Code's ethical standards are not violated every time a judge in a nonjury case learns of inadmissible information as a result of settlement discussions and then tries the case. Judges (and juries, as well) periodically receive information that is not admissible and exclude it from their deliberations before rendering judgment. It is not unreasonable to credit their ability to be impartial in these circumstances. Nor does it necessarily offend Canon 3C(1) for a trial judge to comment on the strengths and weaknesses of the parties' case before trial. On the other hand, comments a judge makes in the course of settlement discussions may create an appearance of bias. Similarly, a trial judge's awareness of information obtained during settlement discussions that is otherwise unlikely to be made known to the judge during the trial may undermine the judge's objectivity as a fact finder and give rise to questions about impartiality. When a judge's impartiality might reasonably be questioned, Canon 3C(1) advises that the judge "shall disqualify." *See also* 28 U.S.C. § 455(a). "An appearance of impropriety occurs, when reasonable minds, with knowledge of all relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament or fitness to serve as a judge is impaired." Canon 2A.

Participation in settlement efforts in a state court matter raises concerns under the Code. Canon 4A(4) states that "[a] judge should not act as an arbitrator or mediator

or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law." The Commentary to Canon 4A(4) specifically observes that judges may not mediate state court matters, but contemplates an exception with respect to related matters: "This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter)."

In conclusion, the Committee advises that settlement practices must be examined on a case-by-case basis to determine their ethical propriety. Factored into this calculus should be a consideration of whether the case will be tried by judge or jury, whether the parties themselves or only counsel will be involved in the discussions, and whether the parties have consented to the discussions or to a subsequent trial by the settlement judge. Judges must be mindful of the effect settlement discussions can have not only on their actual objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts there may be instances where information obtained during settlement discussions could influence a judge's decision-making during trial. Parties who have confronted deficiencies in their cases, or who have negotiated candidly as to the value of their claims, may question whether the judge can set aside this knowledge in a case tried to the judge, whereas in a case tried to a jury, there may be less reason to question the judge's impartiality. The extent to which a judge's impartiality may be compromised, in either reality or appearance, will depend in part on the nature and degree of the judge's participation in settlement discussions and the extent to which the judge has become privy to information that relates directly to the issues the judge will be called upon to decide. In the end, a judge's recusal decision following involvement in settlement discussions will be specific to the facts of the situation and should be informed by an appropriate sensitivity to the requirements of maintaining impartiality and the appearance of impartiality.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 96: Service as Fiduciary of an Estate or Trust

The Committee frequently is asked to give advice regarding whether a judge may serve as a fiduciary of an estate or trust. This opinion will summarize the applicable principles.

Canon 4E of the Code of Conduct for United States Judges provides:

> E. *Fiduciary Activities*. A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:
>
> (1) The judge should not serve if it is likely that as a fiduciary the judge would 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.
>
> (2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

Canon 4E places substantial restrictions on the ability of judges to serve as a trustee or other fiduciary. Judges may not serve as fiduciaries in non-family situations, even where the amount of work involved is minimal. *See* Advisory Opinion No. 33 (judge should not serve as co-trustee of pension trust). Although judges are permitted to serve as fiduciaries in family situations, Canon 4E(1) advises against doing so if it would interfere with judicial duties or lead to litigation in the judge's court. Canon 4D(4) contains a relatively expansive definition of family member for these purposes: Residence in the judge's household is not required in order for a person to be considered a member of the judge's family, nor must the person be related by blood, adoption, or marriage. However, more is required than mere residence in the household, longstanding affective ties, or an underlying business relationship. Persons must be treated by the judge as a member of the judge's family in order to be considered family members under Canon 4D(4).

Newly appointed judges who are serving as fiduciaries when they are appointed should refer to the Applicable Date of Compliance provision set out at the end of the Code. The compliance provision advises newly appointed judges to "arrange their financial and fiduciary affairs as soon as reasonably possible to comply with" the Code and to do so in any event within one year following appointment. This means that judges should discontinue their service as nonfamily fiduciaries within a year of their appointment. However, the compliance provision provides for an exception to this advice in the following circumstances:

> If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

Under Canon 3C(1)(c), judges are required to recuse in any proceeding in which they know they hold a financial interest in a party, whether the interest is held individually or as a fiduciary. Canon 4E(2) confirms that judges acting as fiduciaries are subject to the same restrictions on financial activities that apply in their personal capacity. A judge who serves as a trustee is deemed to have a financial interest in all assets held by the trust and, therefore, is required to recuse in cases where a corporation whose securities are held by the trust is a party. In this event, the remittal provisions of Canon 3D are not available; in other words, the parties may not waive the judge's disqualification and permit the judge to serve. Judges have an obligation under Canon 3C(2) to keep informed about their fiduciary financial interests so they can recuse themselves when necessary.

Canon 4D(3) also bears on a judge's service as a trustee; it advises that judges "should divest investments and other financial interests that might require frequent disqualification" as soon as reasonably possible. A judge who serves as a trustee may be able to divest the trust of holdings whose retention would require the judge to recuse frequently, assuming this can be done consistently with the judge's fiduciary obligations as trustee. If not, and if the trust assets trigger frequent disqualifications that prove disruptive to the court, the judge should consider whether he or she may properly continue to serve or whether resignation would be appropriate, consistent with the judge's obligations under Canon 4D.

A judge who is permitted to serve as a trustee for a family trust may accept compensation for such service if the source of the compensation does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, if the compensation does not exceed a reasonable amount, and if it does not exceed what a person who is not a judge would receive for the same activity. Canon 4H. Such compensation must be reported on the judge's annual Financial Disclosure Form, and is subject to the limitations on outside earned income set forth in the Ethics Reform Act of 1989 and the regulations issued thereunder by the Judicial Conference. *See* Judicial Conference Regulations Concerning Outside Earned Income, Honoraria, and Outside Employment § 3 and Commentary ¶ 10. Although these regulations also prohibit judges from serving as a fiduciary for compensation, that prohibition "does not apply to service . . . as an executor or trustee of a family estate or trust as permitted by the Codes of Conduct where the [judge] does no more than provide the service that would be provided by a lay person in the same capacity." *See*

id. However, even in the limited circumstances where judges may continue to serve as a nonfamily trustee, as noted above, judges should not accept compensation for service as a nonfamily trustee.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 97: Disqualification of Magistrate Judge Based on Appointment or Reappointment Process

This opinion discusses the ethical obligations of a magistrate judge arising out of the relationship between members of the selection panel and the magistrate judge (1) following the initial appointment process, and (2) during and following the reappointment process.

We begin by briefly reviewing the appointment process. Magistrate judges are appointed and reappointed in accordance with the procedures set forth in 28 U.S.C. § 631 and regulations promulgated by the Judicial Conference of the United States. *See* *Guide to Judiciary Policy*, Vol. 3, Ch. 4. The active district judges appoint a selection panel with at least seven members consisting of lawyers and other members of the community. At least two members of the panel must be nonlawyers. The size and composition of panels varies from district to district, but the usual practice is to appoint active federal practitioners and prominent citizens of the community. Frequently United States Attorneys and Federal Defenders, or their designees, also serve on these panels.

When an appointment is being made to a vacant or newly created position, the panel is required to submit a list of five nominees to the court within ninety days of its creation. A majority of the active district judges selects a candidate from the list of five nominees. When a magistrate judge is being considered for reappointment, the panel reports to the court whether or not it recommends reappointment of the incumbent after the public and bar have been given notice and an opportunity to submit comments.

Throughout the appointment process, both the panel and the court are required to keep all information received, including the names of potential nominees and individuals recommended by the panel, in strict confidence.

The appointment and reappointment process for magistrate judges implicates Canons 2 and 3 of the Code of Conduct for United States Judges. Canon 2 provides:

> A judge should avoid impropriety and the appearance of impropriety in all activities.
>
> A. *Respect for Law*. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. . . .

Canon 3 provides:

> A judge should perform the duties of the office fairly, impartially and diligently . . . .
>
> C. Disqualification.
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .

Canon 3C(1) continues with a non-exhaustive list of circumstances under which a judge's impartiality might reasonably be questioned; however, none of these circumstances is applicable to this issue.

Canons 2 and 3 are designed not only to ensure against actual partiality, but also against the appearance of partiality. The critical consideration is whether reasonable persons would perceive the judge as partial. The Commentary to Canon 2A sets forth an objective test for the appearance of impropriety, and this test is also useful in evaluating the impartiality requirement under Canon 3, namely, whether "reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Of course, the perception of partiality will vary depending on the facts and circumstances of any particular situation.

We will consider several specific questions regarding ethical obligations during the different steps in the appointment and reappointment process.

Initial Appointment

1. Should a magistrate judge notify all parties of the fact that a lawyer or party in the case was a member of the panel that originally considered the judge's application?

2. If such notification is required, for what period of time must this notification be given?

3. Is a magistrate judge required to recuse whenever a member of the panel appears as either a lawyer or party to a case?

The panel fulfills its charge by recommending five nominees to the court and the court makes the appointment. While carrying out its responsibilities, the panel is under an obligation to conduct its activities in strict confidence. Therefore, the presumption is that a candidate has no knowledge of the views or positions of individual panel members with respect to any candidate. During the selection process, a candidate will undoubtedly be interviewed by members of the panel and may also be contacted by a member of the panel to obtain approval before third parties are contacted about the candidate.

In the opinion of the Committee, a magistrate judge is not obligated following initial appointment to notify the parties in a case that either a lawyer or a party in that case was a member of the panel that considered the judge's application since there is no reasonable basis for questioning the magistrate judge's integrity, impartiality, or competence. The selection process is a formalized one established in a way that encourages an objective evaluation of candidates based on merit. It is unlikely that an interpersonal relationship will develop between the candidate and any member of the panel during the selection process. Since the panel operates under a requirement of strict confidentiality, a candidate is not privy to the individual opinions of the panel members concerning any candidate. At best, a candidate who is selected can infer that at least a majority of the panel agreed to place the candidate's name on the list of nominees. The candidate assumes the office of magistrate judge after the panel has completed its work.

Under these circumstances, a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would not perceive a magistrate judge's ability to carry out judicial responsibilities with integrity, impartiality and competence to be impaired merely because an attorney or a party who was a member of the panel that considered the judge's application was appearing in a case before that judge. Of course, in the unlikely event that during the selection process something were to occur between a panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member, then the facts of that particular situation would have to be evaluated by the magistrate judge to determine if recusal is warranted and if notification should be provided to the parties.

Reappointment Process

1. Should the incumbent recuse from any matter in which an attorney who is a member of the panel represents a party? Should such a recusal apply to all members of the attorney's firm?

2. If recusal is required, for how long is it required?

3. If recusal is not required, is the incumbent required to notify all parties in a case that one of the attorneys serves on the nomination panel? If so, for what period of time is the incumbent required to advise the parties of this situation?

4. If the United States Attorney or Federal Defender, or their designee, is a member of the panel, must the incumbent recuse in any matters involving these agencies during the reappointment process?

5. Both the nonlawyer and lawyer members of the panel tend to be prominent citizens of the community who have investments in and sit on boards of a number of businesses and community organizations. Should the

incumbent recuse from any case in which a panel member has a financial interest? If so, how can the incumbent learn of the panel member's interests, since financial disclosures by panel members are not currently required?

6. May an incumbent advise attorneys and parties that the comment period is open and that they may make comments on the reappointment?

When a court is considering reappointing a magistrate judge, a panel is selected prior to the expiration of the incumbent's term, in the manner previously described. Public notice is given soliciting comments from the public and the bar. During the process, the incumbent continues to adjudicate cases. After the panel makes its recommendation on reappointment to the court, the court decides whether or not to reappoint. If the court decides not to reappoint the incumbent, the incumbent is notified and the selection procedures prescribed for filling a vacant position are commenced.

An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. In the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1), the magistrate judge is required to recuse in such a case. However, under Canon 3D, recusal in this situation would be subject to remittal should the magistrate judge decide to utilize the remittal procedure.

In the opinion of the Committee, recusal would be required only during that period of time when reappointment is under consideration by the panel and court. Following reappointment, the disqualifying factor is removed and recusal is not necessary unless, as previously noted, something occurred during the selection process between a panel member and the incumbent that directly related to the incumbent's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member.

A situation may also arise in which the incumbent is not reappointed. Due to the strict requirement of confidentiality, the recommendation of the panel presumably will not be known to the incumbent. However, since it is probable that failure to be reappointed is due at least in part to an adverse recommendation of some of the panel, a magistrate judge in such a situation should continue to recuse, subject to remittal, for the balance of the term of office.

When an attorney is a member of the panel, the magistrate judge need only recuse, subject to remittal, in those cases in which that attorney appears, and need not recuse in cases in which other members of that attorney's firm appear. The Committee believes the relationship between other members of the firm and the panel is sufficiently

indirect and attenuated that a reasonable person, with knowledge of the relevant circumstances set forth above, would not perceive the magistrate judge's ability to carry out judicial responsibilities impartially to be impaired.

Similarly, where a designee of the United States Attorney or Federal Public Defender is a member of the panel, the magistrate judge must recuse, subject to remittal, only in cases in which those designees appear and not in cases involving other attorneys from those offices. However, in those situations where the United States Attorney or the Federal Public Defender serves on the panel, recusal is necessary, subject to remittal, in all cases (criminal and civil) involving that attorney and that attorney's office due to the direct supervisory role those officials have over the attorneys and the cases in their respective offices.

If the magistrate judge knows that a lawyer or nonlawyer member of a panel, who is neither a lawyer nor a party in a case, has a financial or other personal interest that could be substantially affected by the outcome of a case, then the magistrate judge should recuse, subject to remittal. A reasonable person with knowledge of the relevant circumstances would perceive that the magistrate judge's ability to carry out judicial responsibilities impartially in such a case was impaired. The mere fact that a panel member is on the board of a business or community organization that is a party in a case is not necessarily in and of itself a sufficient basis to require recusal unless, for example, the panel member has a financial or other personal interest that could be substantially affected by the outcome of the case, or will be involved in the case as a witness or as a board member, trustee, or officer with a decision-making role concerning the litigation. Such determinations will necessarily be specific to the facts in any given case.

In the event that a magistrate judge is aware of or concerned about whether a panel member has a financial or other personal interest or role in a case, the magistrate judge should inform counsel and the parties about the reappointment process and disclose the names of the panel members. Counsel and the parties should be requested to notify the magistrate judge if anybody involved in the case is a member of the panel, and, if so, whether to their knowledge that individual has a financial or other personal interest in the case that could be substantially affected by its outcome or will participate in any way in the litigation. Once the magistrate judge has the requested information, a determination concerning recusal can be made. Any recusal would be subject to the remittal procedure, at the magistrate judge's discretion.

The magistrate judge may not advise attorneys and parties that the comment period is open and that they can make comments on the reappointment. No matter how well intentioned the magistrate judge might be in providing this information to attorneys and parties, there is a significant risk that they might feel pressured to comment favorably on the magistrate judge who is presiding over their case. Under Canon 2, a judge may not take advantage of the judicial office to promote personal interest. Any such action by a magistrate judge would run a significant risk of creating the appearance of impropriety.

Post Reappointment

After reappointment is the magistrate judge required to recuse or to notify the parties and attorneys in a proceeding in which a member of the panel is appearing as counsel or as a party?

In the opinion of the Committee, after reappointment the magistrate judge is not required to recuse or to notify the parties and attorneys in a proceeding in which a member of the panel is appearing as counsel or as a party for the same reasons that a magistrate judge is not required to do so after completion of the initial appointment procedure. The only exception to this would be if something occurred during the selection process between the panel member and the magistrate judge that bears directly on the magistrate judge's actual or perceived ability to be fair and impartial in a case involving that panel member. The particular facts of such a situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 98: Gifts to Newly Appointed Judges

Newly appointed judges frequently are offered gifts and benefits on the occasion of their investitures. These offers, arising at or near the time of the judge's appointment, warrant an early focus on ethical guidelines. This opinion provides guidance for new judges regarding the applicable restrictions.

The standards governing a judge's acceptance of gifts are set forth in Canon 4 of the Code of Conduct for United States Judges, the Ethics Reform Act, and the Judicial Conference Ethics Reform Act Gift Regulations. A "gift" is defined as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value." Gift Regulations § 3(e). Depending on the circumstances, the guidance contained in Canons 2 (avoid impropriety and appearance of impropriety) and 5 (refrain from political activity) of the Code may also bear on the propriety of accepting investiture-related benefits.

Canon 4D(4) requires that judges "comply with the restrictions on acceptance of gifts set forth in the Judicial Conference Gift Regulations." The Gift Regulations generally prohibit judges from accepting gifts unless the gifts fall within several enumerated exceptions:

> A judicial officer or employee shall not accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties.

Gift Regulations § 5(b)(a).

Sections 5(b)(1) and (b)(4) of the Gift Regulations describe relevant exceptions that may apply to investiture-related gifts:

> (b) Notwithstanding this general rule, a judicial officer or employee may accept a gift from a donor identified above in the following circumstances:
>
> > (1) the gift is made incident to a public testimonial and is fairly commensurate with the occasion;
> >
> > ***
> >
> > (4) the gift is from a relative or friend, if the relative's or friend's appearance or interest in a matter would in any event require that the officer or employee take no official action with respect to the matter, or if the gift is made in connection with a special occasion, such as a wedding, anniversary, or birthday, and the gift is fairly commensurate with the occasion and the relationship . . . .

In no event do the foregoing provisions permit a judge to solicit gifts on the occasion of an investiture or otherwise. The Ethics Reform Act, the implementing Gift Regulations, and the Code all prohibit the solicitation of gifts. 5 U.S.C. § 7353; Gift Regulations § 4; Canon 4D(4). As with any gift, judges should be aware that financial reporting provisions may require the disclosure of certain information. Canon 4H(3).

One benefit commonly extended to new judges is an offer by a private entity or individual either to sponsor or contribute to a reception in honor of the judge's investiture. Whether a judge may properly accept such an offer depends in part on the identity of the proposed donor and the donor's relationship to the judge. If the donor or sponsor is a former law firm, corporate employer, business client, or group of colleagues, the Gift Regulations recognize that the offer may be accepted as a gift from a friend on a special occasion, assuming the gift is fairly commensurate with the occasion and the relationship. It may also be accepted as a gift incident to a public testimonial. In addition, to the extent the judge plans to recuse for a period of time following appointment from cases in which the former employer, clients, or colleagues appear, the judge will not be taking any official action affecting the donors and thus no appearance of impropriety would be created.

Likewise, receptions sponsored by bar associations generally do not present ethical concern as they may properly be considered gifts incident to public testimonials. Also, as we have noted previously, "[w]hen hospitality is extended by lawyer organizations, the risk of an appearance of impropriety is markedly reduced, compared to hospitality conferred by a particular law firm or lawyer." Advisory Opinion No. 17 ("Acceptance of Hospitality and Travel Expense Reimbursements From Lawyers").

Concerns may arise with respect to other prospective donors. Where the proposed donor is a for-profit company that has no pre-existing or longstanding relationship with the judge, permitting the company to host an investiture reception would necessitate the judge's recusal from cases involving the company. This might also "permit others to convey the impression that they are in a special position to influence the judge," which would not be consistent with Canon 2B.

Some gifts may be impermissible because acceptance would be interpreted as endorsement of a donor or its activities, which may be inconsistent with a judge's independence and impartiality. Judges are advised not to associate themselves with entities that are publicly identified with controversial legal, social, or political positions or that regularly engage in adversarial proceedings in the federal courts. Canon 4B(1). Under Canon 5, judges are also advised to refrain from joining political organizations or engaging in political activities. Donors engaging in these sorts of activities should not be permitted to serve as a host or sponsor of a reception.

It is also common for judges to receive tangible gifts and mementoes in connection with their appointment and investiture. Judges may properly accept such gifts, consistent with the provisions outlined above. The Code and the Gift Regulations recognize the propriety of accepting appropriate gifts from friends, relatives, and

colleagues to mark this special occasion and serve as a form of public testimonial. Examples of gifts the Committee has found to be appropriate include: a judicial robe given by former law partners; a clock given by a bar association; a chair given by former state judicial colleagues; and a gavel and $500 monetary gift given by a former client.

Acceptance of a gift offered in connection with a judge's investiture may necessitate the judge's recusal from matters involving the donor. In many instances, the donors are likely to be persons whose appearance in a case would in any event necessitate the judge's recusal, at least for some period of time. These include former law partners, close friends, and former clients. Where the gift is given by a group and the cost is shared proportionately, recusal may not be required if the amount of each individual contribution is relatively small. A judge's determination whether to recuse, and for how long, should be guided by the standards set forth in Canon 3C(1).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 99: Disqualification Where Counsel Is Involved in a Separate Class Action in Which the Judge or a Relative Is a Class Member

In light of the number of class actions with very large classes, it sometimes happens that the attorneys in a case pending before a judge are involved in a separate class action in which the judge or one of the judge's relatives is a class member. This opinion addresses the considerations that bear on whether the judge should recuse in such a case.

Under Canon 3C(1) of the Code of Conduct for United States Judges, judges should recuse, subject to remittal, in cases in which one of the parties is represented by a lawyer who is a member of a firm that currently represents the judge in an unrelated matter. The same advice applies if, to the judge's knowledge, the lawyer's firm represents, in an unrelated matter, the judge's spouse or minor child residing in the judge's household. (The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.)

The question addressed here is whether, and to what extent, that general advice should apply to cases in which the representation of the judge or the judge's relative in an unrelated matter consists of representation in a Rule 23(b)(3) class action.

The Committee is of the view that there is no absolute requirement of recusal in cases in which the judge or the judge's relatives are represented in the unrelated matter solely in their capacity as class members. In some instances, the relationship between the judge (or the judge's relatives) and the attorney for the class may be quite similar to the relationship between attorney and client in a conventional setting and, in such cases, recusal would be required. However, where the class action is a large one, in which the judge (or the judge's relatives) are not lead plaintiffs or named plaintiffs, have had no role in selecting the attorney for the class, have not had – and do not expect to have – personal contact with the attorney, and have no reasonable expectation of a substantial personal recovery, the case for recusal is not nearly as strong. In that setting, the Committee is of the view that the mere fact that the judge, or a relative of the judge, is represented as a class member by the same attorney or firm that is appearing before the judge does not give rise to a reasonable question as to the judge's impartiality and therefore does not require recusal under Canon 3C(1).

A different case would be presented if the class of which the judge is a member is small, if the judge is a named plaintiff, or if the judge is playing an active role in the litigation, or if the judge has a reasonable expectation of a substantial recovery. In that setting, the judge would be required to recuse, subject to remittal, if an attorney appearing before the judge in the case in question is a member of the firm that represents the class in the class action.

Finally, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 100: Identifying Parties in Bankruptcy Cases for Purposes of Disqualification

Canon 3C(1)(c) of the Code of Conduct for United States Judges requires recusal when the judge knows that the judge, the judge's spouse, or a minor child residing in the judge's household "has a financial interest . . . in a party to the proceeding." (The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.) Similarly, Canon 3C(1)(d) requires a judge to recuse if the judge, the judge's spouse, "or a person related to either within the third degree of relationship, or the spouse of such a person is: (i) a party to the proceeding, or an officer, director, or trustee of a party." In most matters filed in the federal courts, it is easy to identify who is "a party to the proceeding" by reviewing the caption of the pleadings and proofs of service. However, bankruptcy cases are quite different because such cases regularly involve creditors who may have some interest in the proceedings, but no intention of participating in a capacity akin to a party.

Identifying who is "a party to the proceeding" for purposes of recusal in bankruptcy cases is important not only to the bankruptcy courts, but also to the district courts sitting as bankruptcy courts after withdrawal of the reference, to the district courts sitting as appellate courts, to the bankruptcy appellate panels, and to the circuit courts of appeal. The Committee consistently has taken the position that simply being a creditor or an interest holder of a bankruptcy estate is not a sufficient interest to make that creditor "a party to the proceeding." In that same vein, the acts of filing a proof of claim, or submitting a ballot on a proposed plan of reorganization, are not in themselves sufficient to raise the creditor or interest holder to the status of a party. It takes something more.

The Committee has advised that if a creditor accepts appointment to a committee of creditors, that change in status is sufficient to make each such creditor or interest holder "a party" because of the statutory responsibilities assumed by acceptance of such an appointment. In addition, the following participants in bankruptcy proceedings should be considered parties for these purposes: the debtor; a trustee; parties to an adversary proceeding; and participants in a contested matter. These entities occupy a central role in the proceedings or are actively involved in matters requiring judicial adjudication. As a consequence, we advise that they are sufficiently akin to parties that they should be treated as such for purposes of judicial disqualification.

Part of the ethical challenge in bankruptcy cases lies in the fact that the identity of "a party to the proceeding" may change with any motion, objection, or adversary proceeding. When the issue arises in this fashion, and a participant becomes a party for these purposes, the question of recusal must be considered. Judges sitting in bankruptcy matters should be vigilant to the possibility that a creditor or interest holder's status may at some time change to "a party." The Committee has advised, however,

that in the ordinary bankruptcy case a judge has no obligation to review the schedules of creditors and interest holders to look for possibly disqualifying circumstances.

Finally, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 101: Disqualification Due to Debt Interests

On their annual financial disclosure reports, judges must disclose various debt interests owned by themselves or their close relatives. This opinion addresses a judge's obligation to recuse due to ownership of a debt interest in a party. Debt interests include, for example, United States, state or municipal bonds, sewer revenue bonds, industrial development bonds, municipal transit authority bonds, and corporate bonds.

Canon 3C(1)(c) of the Code of Conduct for United States Judges provides as follows:

> (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 in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest . . . in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

These provisions are substantially identical to those found in 28 U.S.C. § 455(b)(4). While the Committee is not authorized to interpret § 455, the Committee does have authority to interpret the provisions of the Code.

Canon 3C(3)(c) defines financial interest as "ownership of a legal or equitable interest, however small." Under Canon 3C(1)(c), judges therefore must recuse when: (1) they or their spouses or minor children "own[] a legal or equitable interest, however small" in a party or, (2) they have any other interest that could be affected substantially by the outcome of the proceeding. (The Committee notes that, for purposes of recusal, "[r]ecusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.)

Judges must also disclose stock holdings on their annual financial disclosure reports. Ownership of any stock in a party, however small, automatically requires a judge's disqualification because it constitutes a financial interest in the party. Disqualification under these circumstances is not subject to remittal. *See* Canon 3D.

Debt interests are not considered to give rise to a financial interest in the debtor that issued the debt security because the debt obligation does not convey an ownership interest in the issuer. Therefore, disqualification is not required solely because a party in a matter before the judge is a corporation or governmental entity that has issued a debt security owned by the judge. Under the Code, governmental securities are an

exception to the definition of "financial interest": Canon 3C(3)(c)(iv) states that "ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities."

However, a convertible debt security, that is, one that may be converted to stock, should be considered as stock for the purpose of determining a financial interest in a party because the value of such a security is inextricably related to the value of the issuer's stock. As with stocks, ownership of a convertible debt security interest in a party, however small, requires a judge's disqualification and such disqualification is not subject to remittal.

Ownership of any type of debt interest, including government securities, may in some circumstances occasion disqualification if the judge's interest is such that it could be substantially affected by the outcome of the proceeding. Canon 3C(1)(c). In determining whether a debt interest could be substantially affected, what must be evaluated is not the size of the interest but the extent to which that interest could be affected. In those rare cases where there is a potential that the judge's debt interest could be substantially affected by the outcome of the proceeding, the judge may need to obtain relevant information from the litigants in order to make the determination. When a debt interest is disqualifying on this basis, the disqualification is not subject to remittal. *See* Canon 3D.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 102: Disqualification Issues Relating to Judge Being Sued in Official Capacity, Including Representation By Department of Justice

This opinion discusses recusal issues that arise when a judge is sued in an official capacity, particularly recusal questions vis-a-vis representation of the judge. When judges are sued in an official capacity, it is not uncommon for representation to be provided by an attorney from the Department of Justice ("DOJ"), which includes members of the local U.S. Attorney's staff. In the event a DOJ attorney is assigned to represent a judge, it is not necessary for the judge to recuse in unrelated litigation in which other DOJ attorneys appear. It may even be unnecessary to recuse from cases handled by the same attorney assigned to represent the judge, depending upon the nature of the representation and the judge's relationship with the attorney.

Judicial disqualification in this situation is guided by the standards in Canon 3C of the Code of Conduct for United States Judges, which provides in relevant part, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In the Committee's view, a judge's impartiality cannot reasonably be questioned in unrelated matters handled by the DOJ simply because the Department provides representation in a lawsuit naming the judge in an official capacity. When accepting representation by the Department, a judge is not choosing a personal attorney, and the DOJ is not the same as a private law firm. *See* Advisory Opinion No. 38 ("Disqualification When Relative Is an Assistant United States Attorney"). Under 28 U.S.C. §§ 516 to 519, the DOJ has the statutory function to represent officers and agencies of the United States sued in an official capacity.

Nor is disqualification always required in unrelated matters handled by the individual attorney assigned to represent the judge. Numerous lawsuits against judges are filed by disgruntled litigants and are patently frivolous; they are often dismissed promptly and without any discovery on the basis of the judge's absolute judicial immunity. In these instances, a judge often will have little personal contact with the government attorney providing representation. Thus, disqualification is not always required, but instead depends on the particular facts and circumstances of the case and the nature of the relationship the judge develops with the attorney.

Similar advice applies to the related question of whether a judge's colleagues should recuse when a judge is named in a complaint. When a judge is a named defendant, the other judges of that court are not necessarily and automatically disqualified. If the litigation is patently frivolous, or if judicial immunity is plainly applicable, recusal would rarely be appropriate.

When a judge is sued and representation is provided through a local U.S. Attorney's office, the question arises whether the judge should seek representation by an attorney from outside his or her own judicial district. In the Committee's view, the Code does not require judges to seek representation by government attorneys outside

of their districts. But when a judge accepts government representation, he or she must be attentive to situations that require disqualification under Canon 3C(1).

Although disqualification is not routinely required from unrelated matters handled by a government attorney assigned to represent a judge, it may be appropriate in some instances. This situation may arise because of the nature of the claims (i.e., those involving personal liability and not subject to absolute immunity) or because of the attorney-client relationship necessary to mount a proper defense (i.e., where extensive factual development or discovery is needed). Often this circumstance will be apparent when the complaint is filed. In these situations, assignment of an Assistant U.S. Attorney or DOJ lawyer from outside the judge's district would reduce the potential for disruption of the judge's docket stemming from multiple disqualifications that might otherwise occur if the assigned attorney had an extensive docket before the judge. Some judges might prefer an out-of-district attorney, notwithstanding the administrative inconvenience of dealing with geographically remote counsel. If the local U.S. Attorney's office is to provide representation, disruptive disqualifications can be minimized through assignment of an attorney who appears only infrequently before the judge.

The Committee notes, in closing, that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 103: Disqualification Based on Harassing Claims Against Judge

From time to time, the Committee receives inquiries from judges asking if they should recuse themselves from cases involving litigants who register complaints against judges in retaliation for unfavorable judicial decisions or setbacks in their legal proceedings. These complaints may take the form of a civil action, a complaint of misconduct or disability under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351 to 364, or other initiatives affecting judges' personal interests. Some litigants file repeated complaints naming the original judge, while others name additional judges with each succeeding setback. Occasionally, lawsuits are initiated naming all judges of a court. In some instances, a pattern of frivolous or vexatious filings may lead judges to enter protective orders restricting a litigant from submitting further filings without leave of court.

All of these situations – from initiation of a complaint against a single judge to review of successive pleadings under a protective order – can give rise to recusal considerations, which must be weighed carefully. Important reasons exist for a judge not to disqualify routinely, as this would permit and might even encourage litigants to manipulate and abuse the judicial process, which could undermine public confidence in the integrity of the judiciary. Automatic disqualification of a judge cannot be obtained by the simple act of suing the judge, particularly where the suit is primarily based on the judge's prior judicial rulings. On the other hand, a universal refusal to recuse could also lead to disrespect for and a loss of public confidence in the integrity of the judicial process.

This opinion summarizes the Committee's views concerning the decision to recuse in various situations involving harassing claims against judges. The Committee notes that the related recusal issues arising from a judge's representation by the U.S. Department of Justice in legal proceedings are addressed in Advisory Opinion No. 102.

Canon 3C(1) of the Code of Conduct for United States Judges governs many of the issues related to this type of harassing litigation. It provides, in relevant part:

> (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 in which:
>
> > (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
> >
> > (c) the judge knows that the judge . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be affected substantially by the outcome of the proceeding;

> (d) the judge . . . is:
>
> (i) a party to the proceeding . . .
>
> (iii) known . . . to have an interest that could be substantially affected by the outcome of the proceeding; or
>
> (iv) . . . likely to be a material witness in the proceeding.

When recusal is not mandated by one of the specifically enumerated categories in Canon 3C(1), the Committee has identified a number of non-exclusive factors to be considered in determining whether a "judge's impartiality might reasonably be questioned." These include the nature of the complaint, the applicable law, the possibility of factual issues involving the credibility of the named judge or judges, and any other circumstances that might provide a reasonable ground for questioning the impartiality of the assigned judge.

Civil Actions Against the Assigned Judge

A judge must recuse if he or she is named as a defendant in a proceeding that has been assigned to the judge. Canon 3C(1)(d)(i) provides that a judge shall recuse himself or herself when "the judge . . . is . . . a party to the proceeding."

Civil Actions Against Other Judges on the Assigned Judge's Court

If one or more of an assigned judge's judicial colleagues – but not the assigned judge – is named as a defendant in a civil action, the assigned judge need not automatically recuse from the case. This situation is governed by Canon 3C(1)'s general admonition against presiding over cases in which "the judge's impartiality might reasonably be questioned." Whether it would be appropriate for a judge to handle a matter naming judicial colleagues depends on the surrounding circumstances, including the factors identified above.

In typical harassing litigation, a claim against a judge is barred by the doctrine of judicial immunity, and the complaint is subject to prompt dismissal on judicial immunity or other grounds. Review of a complaint against a judicial colleague where the litigation is patently frivolous or judicial immunity is plainly applicable will not ordinarily give rise to a reasonable basis to question the assigned judge's impartiality, and disqualification would rarely be appropriate. Thus, the mere naming of a judicial colleague as a defendant does not require automatic recusal of every judge in the district or on the court under Canon 3C(1). Because each case must necessarily depend upon its own unique circumstances, however, it should be noted that if, after a review of all the surrounding circumstances, the assigned judge determines that his or her impartiality might reasonably be questioned, recusal would be appropriate.

Civil Actions Against All Judges on a Court

When all sitting judges of a court are named as defendants in a civil action, each defendant judge is ordinarily required to recuse from hearing the case under Canon 3C(1)(d)(i) because they are parties to the case. This situation may be addressed by assigning the matter to a newly appointed judge who joins the court after the filing of the complaint or by arranging for a judge from another district, or judges from another circuit, to handle the matter. Whether a judge may nevertheless handle such a matter under the rule of necessity is a question of law beyond the scope of this opinion. Judges should consult their circuit precedent on this question.

Unrelated Cases Involving Same Litigant

A litigant with a case pending before a judge may respond to an adverse ruling by initiating a complaint against the judge. The judge is disqualified from handling the new case against himself or herself for the reasons discussed above, but the question is whether the new complaint necessitates the judge's recusal from the pending, unrelated case he or she had already been handling.

A judge is not automatically disqualified from participating in other, unrelated cases involving the same litigant, whether they are filed before or after the complaint in which the judge is a defendant. Judicial immunity usually will be a complete defense against a new complaint of this nature, and the court in which the complaint is filed likely will dismiss it as frivolous. In such circumstances, the mere fact that a litigant has filed a new frivolous complaint against a judge based on the judge's official actions will not disqualify the judge from continuing to preside over the earlier, unrelated matter brought by the same litigant. The same holds true when a litigant who previously filed a complaint naming a judge subsequently files an unrelated case against others that is assigned to the named judge.

Although there might be some question regarding the impartiality of the judge in these situations, Canon 3C(1) requires that the basis for questioning a judge's impartiality must be "reasonable" for the judge to be required to recuse. The factors the judge should consider in making the reasonableness determination are identified above, i.e., the nature of the complaint, the applicable law, and other relevant circumstances. A complaint filed against a judge that is subject to prompt dismissal on judicial immunity grounds will not ordinarily give rise to a reasonable basis to question the judge's impartiality in unrelated cases filed against others by the same litigant. Such a nonmeritorious complaint, standing alone, will not lead reasonable minds to conclude that the judge is biased against the litigant or that the judge's impartiality can reasonably be questioned, and thus will not require the judge to recuse.

Issuance and Administration of Protective Orders

Some courts have entered protective orders against litigants who engage in a pattern of repeated frivolous filings, enjoining the litigants from future filings without the

approval of a designated judge. As a preliminary matter, the issuing of a protective order of broad applicability by a judge is not improper, even though it may indirectly or incidentally benefit the issuing judge.

For example, although any federal judge or federal employee may be a defendant in a future filing and may thus fall within the class of persons protected by the order, we do not believe a judge should refrain from entering the order solely on the basis that such relief could potentially extend to the judge. Of course, a judge's impartiality could reasonably be questioned if the judge issued an order – either at the request of others or on the judge's own initiative – naming or describing the judge individually, providing tangible relief for his or her own personal benefit, or otherwise directly protecting the judge's own personal interests.

Once a protective order is issued, a judge who has been sued by a litigant may be called upon to review that litigant's filings for compliance with the order. The actual review by a designated judge raises additional recusal issues. Again, Canon 3C(1)'s standard for assessing when a judge's impartiality might reasonably be questioned is the applicable standard. If the reviewing judge is named as a defendant in an action the litigant is attempting to file, that judge must recuse because one could reasonably question the judge's impartiality. If the assigned judge is not named as a defendant in the proposed filing, but is or was a defendant in another action brought by the same litigant, the judge ordinarily will not be prevented from assessing the litigant's compliance with the protective order. But the judge must still evaluate the factors enumerated above concerning whether his or her impartiality might reasonably be questioned. As in the situations described above, pending complaints against the designated judge that are subject to prompt dismissal on judicial immunity or other grounds will not ordinarily give rise to reasonable questions about the assigned judge's impartiality. Thus, generally speaking, a judge named by a litigant in one case is not disqualified in another case (not naming the judge) from assessing the litigant's compliance with an injunction restricting future filings.

Complaints of Misconduct or Disability Against the Assigned Judge

Harassing litigants occasionally file complaints of misconduct or disability against judges under the Judicial Conduct and Disability Act ("JCDA"), 28 U.S.C. §§ 351 to 364. When a JCDA complaint is filed, disqualification is governed by the same general principles as disqualification when a civil lawsuit is filed against the judge. In neither instance is a disgruntled litigant allowed to disqualify a judge from other cases by the simple expedient of filing a complaint. But judges must be attentive to the possibility that unusual circumstances may arise warranting recusal in individual cases.

When a complaint is filed against a judge under the JCDA, he or she is not required to recuse from a case involving the complainant unless, under the general principles of Canon 3C(1), the circumstances raise a reasonable question about the judge's impartiality. Such a reasonable question about the judge's impartiality arises if

there is a realistic potential for the complaint to lead to adverse consequences for the judge.

It may be possible for the judge to await an internal administrative decision on a JCDA complaint before making a recusal decision in a pending case involving the complainant. JCDA complaints are transmitted to the chief judge of the circuit, who is responsible for reviewing them and has the power to dismiss them on various statutory grounds. A dismissal may be appealed to the judicial council of the circuit. If a prompt dismissal is not ordered or the complaint is not otherwise concluded, the chief judge is required to arrange for an investigation and submission of a report to the judicial council. 28 U.S.C. § 353.

Thus, when a litigant files a JCDA complaint against a judge, it is preferable, if feasible, for the judge to await the initial decision of the chief judge before considering recusal from cases involving that litigant. If the chief judge declines to dismiss the complaint and an investigation begins, the judge should normally recuse immediately. But, if the chief judge dismisses the complaint, as occurs in most JCDA cases, the judge will not face the potential for any adverse consequences. No reasonable person would then question the ability of the judge to participate impartially in the complaining litigant's case. If the chief judge's dismissal is subsequently overturned by the judicial council, the judge should normally recuse upon receiving notice of that decision.

If it is not feasible to await the decision of the chief judge, it is appropriate for the judge who is the subject of the complaint to determine whether the complaint meets one of the statutory grounds for dismissal. If the judge determines that the complaint meets any of the statutory grounds for dismissal, the judge will not face an actual or apparent threat of adverse consequences from the complaint. In those circumstances, so long as the judge holds that view, no reasonable person would question the judge's impartiality in the complainant's case, and recusal is not necessary. If the chief judge thereafter decides that the complaint is not subject to dismissal and arranges for an investigation, the judge should re-evaluate his or her position and ordinarily recuse from the case.

Given that most misconduct complaints are dismissed by chief judges at the outset, the foregoing advice makes recusal unnecessary in most cases. With respect to complaints that are not dismissed by chief judges, we conclude that no across-the-board rule is appropriate. We do believe a relevant question in this situation is whether it appears that there is a realistic potential for a sanction of some kind to be ordered against the judge.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 104: Participation in Court Historical Societies and Learning Centers

Court historical societies have been established in many communities for the purpose of developing, preserving, and promoting historical information and materials pertaining to a court or circuit and its judges, attorneys, and notable litigation. In addition, learning centers have been established to perform educational and outreach functions to educate the public about the role of the federal courts in American society and to present the history of a court or circuit.

The involvement of judges and court personnel in court history preservation activities funded solely from court funds does not present ethical concerns under the Codes of Conduct. Often historical societies and learning centers are operated, however, by nonprofit corporations that raise funds to finance programs and activities. The society or center may employ staff to conduct its operations and to engage in fund raising. Their boards of directors and officers may include judges, judicial employees, and attorneys who practice in the court or circuit. This opinion addresses the ethical issues that may arise when judges and court personnel are involved in court historical societies or learning centers that engage in fund raising.

Under Canon 4A(3) and 4B of the Code of Conduct for United States Judges ("Judges' Code"), judges may participate in nonprofit organizations such as historical societies and learning centers, subject to certain conditions. Likewise, under Canon 4A of the Code of Conduct for Judicial Employees ("Employees' Code"), court personnel may participate in nonprofit organizations such as historical societies and learning centers, subject to restrictions.

The Codes place limitations, however, on how judges and employees may participate in fund-raising efforts by court historical societies and learning centers. Canon 4C of the Judges' Code sets out the restrictions for fund raising by judges on behalf of *any* organization:

> A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

Other Canons of the Judges' Code indirectly place restrictions on fund raising; for example, under Canon 2 a judge may not lend the prestige of office to a fund-raising effort (as is repeated in Canon 4C). Canon 2 also prohibits a judge from being involved with a fund-raising effort that would create an appearance of impropriety. *See also* Advisory Opinion No. 35 ("Solicitation of Funds for Nonprofit Organizations, Including Listing of Judges on Solicitation Materials").

Canon 4B of the Employees' Code states the restrictions on fund raising by court personnel:

> A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:
>
> (1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.
>
> (2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.
>
> (3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

Other provisions of the Employee's Code place independent restrictions on fund raising by court personnel. Like the Judges' Code, Canon 2 of the Employees' Code prohibits involvement with any fund raising that would raise an appearance of impropriety.

Judges and court personnel may therefore participate in fund raising efforts for court historical societies and learning centers only to the extent set out above. In light of these limitations, judges and court personnel should be sensitive to public perception of whether the court itself is engaged in fund-raising activities on behalf of a court historical society or learning center. Public perception of the court's involvement with fund-raising activities of a court historical society or learning center is affected by several factors including: (1) the extent of involvement of judges or court personnel as the organization's founders, incorporators, members of the governing board, chair, officers, or staff; (2) the physical location of the program inside the courthouse or in a separate facility; (3) the identification of the organization as independent of the court in its written materials and fund-raising activities; (4) the name chosen for the organization; and (5) the location of activities or of permanent plaques designed to recognize financial contributors to the organization.

The public may reasonably perceive that fund-raising activities conducted by a court historical society or learning center whose creation, governance, and staffing is dominated by judges or court employees or whose programs and materials are housed inside the courthouse rather than in a separate facility are fund-raising activities of the judges and court employees themselves rather than those of an independent organization. Likewise, the public may reasonably attribute the organization's fund-raising activities to the court's judges and employees if a reception honoring financial donors is conducted in the courthouse or a permanent plaque recognizing contributors is placed inside the courthouse. The judge or court employee should assess how the factors listed above, or any other such factors that surface, affect the permissibility of participating in a court historical society or learning center or of becoming involved in that organization's fund-raising activities.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 105: Participation in Private Law-Related Training Programs

In Advisory Opinion No. 87, the Committee provides guidance about judges' participation in continuing legal education programs and sets forth important caveats at the end of that opinion. This opinion focuses on judges' participation in private law-related training programs *other* than those offered by CLE providers, accredited institutions, or similar established educational providers. The caveats in Advisory Opinion No. 87 are equally applicable to the issues discussed here, and, although not repeated below, should be read in conjunction with this opinion.

The law-related training programs considered in this opinion include varied programs of instruction on trial and appellate advocacy, judicial procedure, and substantive law. Programs of this nature are offered to a select audience of attorneys and/or litigants, and are designed to improve attendees' legal skills or performance in judicial proceedings. However, the training in question is not offered by established educational providers (such as universities, law schools, and CLE firms) and is not available to a broad spectrum of attendees; rather, it is offered by entities seeking to train their own employees, clients, or associates. This opinion summarizes the Committee's earlier advice and discusses ethical issues that judges should consider before accepting an invitation to participate in such programs.[1]

Invitations to participate in private law-related training programs should be distinguished from the array of invitations judges may receive to provide law-related education, for outreach to the public, or to maintain relations with the bar. For example, judges may be asked to speak to students, to welcome new bar members, to address bar association meetings and international conferences, or to offer general remarks to gatherings of civic or community groups. Events of this nature do not generally involve providing instruction and training on matters of legal advocacy or substantive law and procedure. The Commentary to Canon 4 of the Code of Conduct for United States Judges specifically encourages judges' participation in such opportunities because judges are "in a unique position to contribute" to programs dedicated to improving the law and promoting public understanding of the legal system. Judges may participate in public outreach of this nature so long as they avoid concerns about improperly lending the prestige of their office under Canon 2.

Participation in private law-related training programs implicates several provisions of the Code. Canon 2 advises judges to act with integrity and impartiality and counsels against lending "the prestige of the judicial office to advance the private interests of the judge or others . . . ." Canon 4A states that a "judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." The Commentary to Canon 4 encourages judges to participate in law-related activities, either independently or through bar associations and other organizations, reflecting a recognition of the special contributions judges may make to the improvement of the law and the administration of justice. Canon 4D(1) mandates that a judge should "refrain from financial and business dealings that exploit

the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves." When speaking to an audience that predominantly includes attorneys or clients on one side of litigation, a judge should be mindful of not giving advice that would favor or assist that audience at the expense of their litigation adversaries to avoid an appearance of bias that could arise contrary to Canon 2A. A judge speaking to such an audience must be equally available to address the other litigation constituency.

The Committee has relied on several interrelated factors to distinguish permissible from impermissible law-related training activities. Because judges are invited to participate in such a broad range of programs—involving diverse sponsors, audiences, and subject matter—it is difficult to draw bright line rules in this area. This opinion focuses on situations in which the Committee has expressed caution, or alternatively, programs that generally do not raise ethical concerns. In general, the factors that may affect a judge's decision as to the propriety of participation in a law-related training program include:

1. the sponsor of the training program;
2. the subject matter;
3. whether there is a commercial motivation for the program;
4. the attendees, including whether members of different constituencies are invited to attend; and
5. other factors, including the location of the program and advertising or promotion of the event.

Below we discuss these factors in the context of specific types of programs.

Programs Sponsored by a Law Firm or Legal Department

Law-related training programs sponsored by law firms or business legal departments raise concerns on several levels. First, participation by a judge in a law firm's training program for its attorneys, or a similar program offered by a business legal department for in-house attorneys, provides direct assistance to a particular law firm or business entity in violation of Canon 2B. Involvement in such a program can create the impression of a special relationship between the judge and the sponsor—that the judge wishes to do the sponsor a favor, that the sponsor wishes to do the judge a favor, or that the firm or business entity has some special influence that enables it to enlist the judge's support for its private training programs. This can also be viewed as lending the prestige of judicial office to a private interest. Based on these same concerns, the Committee advised against participation in an educational program for in-house lawyers sponsored by a private, for-profit corporation. *See also* Advisory Opinion No. 87, [including "Important Caveats,"] Example 4 (the Committee questioned the propriety of judicial participation where there was significant involvement of lawyers from a single law firm in the organization and presentation of a seminar offering CLE credit to anyone willing to pay a fee to a separate third-party sponsor).

The location of the training program is also an important consideration. For example, a judge's participation in private educational programs that are held at the offices of attorneys appearing before the judge, and that are closed to other members of the bar, creates an appearance of a special relationship, favoritism, or partiality.

As with any commercial, for-profit activity, judges should avoid participating in law firm and legal department training activities that improperly exploit the judicial position or lend the prestige of judicial office to advance private interests. For example, judges are advised to refrain from teaching at for-profit programs about "the ins-and-outs of practice before that judge's court." *See* Advisory Opinion No. 87 ("Participation in Continuing Legal Education Programs"). Judges also should take steps to ensure that their names or positions are not exploited in advertising or used as an endorsement of the law firm or business sponsor. *See* Advisory Opinion No. 55 ("Extrajudicial Writings and Publications"); *see also* Advisory Opinion No. 87, [including "Important Caveats,"] Examples 1 & 2.

Business-related Programs

Requests to speak at seminars sponsored by consulting firms or other business entities raise concerns under Canon 2B regarding lending the prestige of office. While not ruling out altogether judicial participation in such circumstances, the Committee recommends a variety of checks on both the judge's and the sponsor's activities to limit the possibility that the judicial office will be improperly exploited.

When a program is sponsored by a business entity, a judge should consider whether the program is designed to promote the sponsor's business services to current or prospective clients, and whether the program is presented in a way that suggests that the participating judge has endorsed the sponsor's services. The Committee has advised that the judge may properly participate in a business program where the judge's appearance, and the program's brochures, do not imply an endorsement by the judge. In contrast, a judge's participation in a conference intended to attract litigators and sponsored by a group that provides witnesses for court proceedings strongly implicates the concern that the prestige of the judicial office is being employed to benefit a commercial endeavor. For similar reasons the Committee has advised against speaking at a program on discovery issues hosted by a for-profit company offering discovery services, where the company marketed its services in part through the training program.

Seminars sponsored by for-profit educational providers that are open to attendees for a fee present differing considerations. As noted above, it is inappropriate for a judge to sell his or her expertise about the local rules and practices of the judge's own court by lecturing on this topic at a program sponsored by a for-profit entity. But judges may lecture on other topics. For example, the Committee found no impropriety in a judge's lecture at a seminar sponsored by a for-profit entity on a law-related subject of interest to attorneys and lay persons alike, provided that the judge avoided exploitation of the judicial office in the advertising and promotional materials. Similarly,

the Committee advised that a judge could properly speak at a for-profit program for corporate and government attorneys on topics unrelated to the operations of the judge's court.

The Committee cautions judges to remain vigilant that the organizers of business-related programs do not exploit judicial participation by overemphasizing judges' participation, either in promotional materials for the event or by otherwise implying that the participating judge endorses the sponsor's commercial activities. It is therefore inadvisable for judges to provide blanket authorization to sponsors to use their names, positions, or likenesses for advertising and marketing purposes. Judges have a continuing obligation to monitor promotional activities associated with their participation in such programs to ensure that no improper exploitation of judicial office occurs. *See* Advisory Opinion No. 87, [including "Important Caveats,"] Examples 1 & 2.

Programs sponsored by a bar association or other nonprofit entity

Bar associations and other nonprofit entities on occasion offer law-related educational programs that are not part of a CLE curriculum (as noted above, CLE programs are addressed in Advisory Opinion No. 87). These programs raise fewer concerns than those sponsored by for-profit entities, mainly because the sponsors do not have a commercial motivation and the programs are generally open to a broad audience. The Commentary to Canon 4 specifically encourages judges to participate in law-related activities such as those sponsored by bar associations. Bar association training programs offer valuable opportunities for judges to share their experience and expertise with the legal community by making themselves available to a large and diverse group of practitioners. Accordingly, the Committee has advised that a judge could properly participate in a law-related forum sponsored by a not-for-profit civic organization and open to the public, even though the organization charged admission to defray its costs.

However, not all nonprofit groups have the same characteristics. Thus, there will be instances when the precise corporate or tax status of an entity must be disregarded for ethical purposes. *See, e.g.,* Advisory Opinion No. 87, [including "Important Caveats,"] Example 3 (a nonprofit entity will be treated as a for-profit entity when offering CLE credit if that seminar provider (a) acts as if it were a private business by aggressively emphasizing judicial participation as a marketing mechanism and (b) charges fees that are likely to be substantially in excess of the direct cost of providing CLE credit to the seminar attendees). Moreover, a judge's participation in a training program that will only benefit a specific constituency, as opposed to the legal system as a whole, cannot be characterized as an activity to improve the law within the meaning of Canon 4. For example, judge participation in legal training offered by an issue-specific advocacy group that appears regularly in the judge's court may be perceived as lending the prestige of the judicial office to advance the interests of the group.

Note for Advisory Opinion No. 105

[1] Judges who participate in the select programs addressed in this opinion should be aware that such law-related training activities (other than accredited teaching and CLE) generally do not constitute "teaching" for which compensation may be accepted (with proper approval). That is, compensation (beyond reimbursement for actual expenses) for such programs would instead likely constitute a prohibited "honorarium" under the *Judicial Conference Regulations On Outside Earned Income, Honoraria, and Outside Employment*; *Guide to Judiciary Policy*, Vol. 2C, Ch. 10 ("Regulations"). *Compare* Regulations § 4 (defining "honorarium") *with* § 5(b) (defining "teaching").

September 2010

Committee on Codes of Conduct Advisory Opinion No. 106: Mutual or Common Investment Funds

This opinion addresses recusal considerations related to ownership of mutual or common investment funds ("mutual funds"). Canon 3C is intended to set a standard for economic disqualification that assures impartiality and the appearance of impartiality, while also allowing judges to make non-disqualifying investments. We approach our analysis with the following principle firmly in mind: that the Code should be interpreted to the extent reasonably possible to enable judges to invest in funds without transgressing the Code or engaging in a conflict of interest.

Canon 3C(1)(c) requires a judge to disqualify himself or herself when the judge knows that he or she "has a financial interest in the subject matter in controversy or in a party to the proceeding," or when the judge has "any other interest that could be affected substantially by the outcome of the proceeding." However, "ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund." Canon 3C(3)(c)(i). These Code provisions, read together, provide that investments in a mutual fund will normally avoid triggering recusal concerns with respect to the securities that the fund holds, with some exceptions discussed below.

Consistent with the "safe harbor" concept, the Committee has advised that investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds. We also have advised that a judge who invests in a mutual fund has no duty to affirmatively monitor the underlying investments of the fund for recusal purposes. For these reasons, it is important for a judge to determine whether a particular proposed investment is a "mutual or common investment fund" and, therefore, qualifies under the safe harbor provision of Canon 3C.

Determining whether a fund is a "mutual or common investment fund"

Although the Code does not define "mutual or common investment fund," determining whether a fund qualifies for the safe harbor contemplated under Canon 3C(3)(c)(i) involves several related considerations, including: (1) the number of participants in the fund; (2) the size and diversity of fund investments; (3) the ability of participants to direct their investments; (4) the ease of access to and frequency of information provided about the fund portfolio; (5) the pace of turnover in fund investments; and (6) any ownership interest investors have in the individual assets of the fund.

The Committee concludes that most mutual funds that are registered with the Securities and Exchange Commission and sold to the public as mutual funds will likely meet the criteria above.

The Committee has advised, however, that certain financial investments, including some that are registered and sold to the public, do not qualify as "mutual or

common investment funds." For example, we have advised that a judge's former law firm's 401(k) retirement plan could not be considered a mutual fund under the Code because it was managed by the law firm, had a relatively small number of participants, and provided the participants with detailed access to investment information regarding the plan. Similarly, the Committee has advised that a judge's IRA did not meet the mutual fund exception where it owned units of an investment vehicle that held stock of 15 named corporations, the portfolio was not actively managed, and the securities would not be sold or exchanged before termination of the investment vehicle in ten years. In contrast, the Committee concluded that a law firm's retirement fund qualified for the mutual fund exception because there were a large number of participants, the participants could not directly control the investments, the participants could not easily access information about the fund's portfolio, and the fund's assets turned over frequently.

The Committee has also advised that the Code's mutual fund exception did not apply to a brokerage account in which stocks were held in the judge's name, the judge could receive immediate notice of transactions, and the judge controlled the asset mix and some investment decisions. Similarly, the Committee concluded that an investment program did not qualify as a mutual or common investment fund where title to securities was held in the judge's name, the judge had the legal authority to direct investment decisions, and the judge received regular information about the portfolio. Similarly, we advised that the mutual fund exception did not apply where a judge owned shares of stock purchased by the fund, and the judge had some control over the fund's investment decisions by designating areas of no investment and directing the sale of particular stocks from the judge's account.

Recusal considerations related to mutual or common investment funds

As discussed above, investment in a mutual fund normally will avoid recusal concerns because the judge is not considered to have a direct financial interest in the securities that the fund holds. However, there is an additional factor for a judge to consider in determining whether owning a particular mutual fund will effectively avoid recusal considerations related to that fund. In unusual circumstances, recusal may be required under Canon 3C(1)(c) because the judge has an "interest that could be affected substantially by the outcome of the proceeding."

For purposes of this analysis, the Committee assumes that a judge owning a particular mutual fund does not participate in the management of the fund or have authority to make investment decisions for it, and does not have an ownership interest in the individual assets of the fund. We also assume that a mutual fund is registered with the Securities and Exchange Commission and offered to the public.

The Committee notes that it is the value of the interest itself that must be substantially affected by the outcome of the proceeding; its effect on the judge's overall financial condition is irrelevant. For example, recusal may be required if a judge owns shares in a specific mutual fund that is involved in a matter before the judge and the

outcome of the litigation could substantially increase or decrease the value of the judge's investment in the fund. Ultimately, the judge must decide the potential effect on his or her financial interest in the mutual fund.

Whether litigation might have a substantial effect on the judge's interest in a mutual fund will often turn on the size and diversity of the fund's investments. The value of a mutual fund that invests in many companies in a variety of industries would rarely be substantially affected by the outcome of litigation involving one particular company. In contrast, a mutual fund that invests in only a few companies in a particular industry would be more likely to be substantially affected by certain types of litigation involving one of them. The same would be true if the outcome of the litigation might affect the value of non-party companies in the same industry, whose stock the fund also holds.

In recent years, certain types of mutual funds have raised these recusal considerations. These include funds that are "sector" or "industry" funds which specialize in an industrial sector, and certain types of exchange traded funds ("ETFs"). ETFs, a relatively new investment vehicle, differ principally from other mutual funds in that they are traded on an exchange all day, rather than being issued or redeemed by the fund itself based on the net asset value of the fund at the end of the day. ETFs hold assets such as stocks or bonds and are sometimes simply an exchange-traded version of a more conventional fund. They may also hold commodities or commodity-based instruments. Determining whether a particular sector fund, industry fund, or ETF qualifies as a "mutual or common investment fund" under the Code involves the same criteria applied to more conventional mutual funds, of which they are a species. We conclude that such funds normally should be treated as mutual or common investment funds under the Code, and are subject to the same recusal analysis as other funds.

At the same time, however, a judge who chooses to invest in such mutual funds should evaluate whether his or her "interest" in the fund might be affected substantially by the outcome of a particular case, which would require recusal under Canon 3C(1)(c). In purchasing shares of narrow industry or sector funds, judges also should be mindful of their obligation to avoid investments that might result in frequent recusal. Canon 4D(3) states that "[a] judge should divest investments and other financial interests that might require frequent disqualification." Thus, a judge who regularly hears matters involving a particular industry should carefully consider whether purchasing a mutual fund which focuses on that industry might result in frequent recusal.

Finally, Canon 3C(1) directs judges to disqualify if the judge's impartiality might reasonably be questioned. For example, if a case challenges the fees charged by the mutual fund management company to manage a particular fund, and the judge owns shares in that particular fund, then the judge's impartiality might reasonably be questioned and recusal would be required. Situations such as these are likely to arise only rarely and should be assessed on a case-by-case basis.

Issues related to investment management and advisory companies

Additional questions may arise when the management or investment advisory company for the judge's mutual fund is a party. These companies have managerial responsibility for investing the funds of participants and fiduciary responsibility for doing so in accordance with principles of trust and securities law.

Ownership of shares in a particular mutual fund does not give rise to an ownership interest in the company managing the fund or providing it with investment advice. Even if the management company is technically owned by the shareholders of all the mutual funds operated by the company, those shareholders do not have a financial interest in the management company. They do not receive dividends from the management company (only from the funds) or benefit from any increase in value of the shares of the management company. Instead, these situations are analogous to a savings account or a mutual insurance company policy, ownership of which does not give the account or policy holder an equity ownership interest in the bank or insurance company.

The same analysis applies to ownership of a mutual fund. Because an investment in a fund does not convey an ownership interest in the fund management or investment advisory company, the fact that the management or investment advisory company for the judge's fund appears as a party does not require the judge's disqualification. Under Canon 3C(3)(c)(iii), the proprietary interest of such an account or policy holder is considered a disqualifying financial interest in the bank or insurance company only if the outcome of the proceeding could substantially affect the value of the interest.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

March 2011

Committee on Codes of Conduct Advisory Opinion
No. 107: Disqualification Based on Spouse's Business Relationships

A spouse's business relationships with a party, law firm, or attorney appearing before a judge may result in the judge's disqualification under Canon 3C(1) of the Code of Conduct for United States Judges. For example, recusal is mandatory under Canon 3C(1)(c) and (d) when:

- the judge's spouse is an officer, director, or trustee of a party in a proceeding before the judge (Canon 3C(1)(d)(i));
- the judge's spouse is an attorney representing a party in a proceeding before the judge (Canon 3C(1)(d)(ii));
- the judge's spouse is known to have an interest that could be substantially affected by the outcome of a proceeding before the judge (as when the spouse is an equity partner at a law firm that appears before the judge) (Canon 3C(1)(c) and (d)(iii) and Advisory Opinion No. 58);
- the judge's spouse is to the judge's knowledge likely to be a material witness in a proceeding before the judge (Canon 3C(1)(d)(iv).

Recusal is not mandatory in other situations involving spousal business relationships that are less direct or consequential. Recusal in these situations will depend on a number of facts and circumstances that must be evaluated on a case-by-case basis to determine, in accordance with Canon 3C(1), whether "the judge's impartiality might reasonably be questioned."

This opinion offers guidance when a judge knows his or her spouse has a business relationship with a party, law firm, or attorney appearing before the judge in an unrelated proceeding. This opinion does not address situations described in Canon 3C(1)(c) or (d), above, which mandate the judge's recusal. The opinion also does not address situations in which the spouse or the spouse's business provides services in the proceeding before the judge. The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.

This opinion addresses two particular forms of business relationships: (1) client relationships, where the spouse or spouse's business provides services to a client and that client appears before the judge in an unrelated proceeding as a party, law firm, or attorney, and (2) service provider relationships, where a party, law firm, or attorney that appears before the judge provides services to the spouse or the spouse's business that are unrelated to the proceeding before the judge. As a general proposition, the fact that the spouse or the spouse's business has a business relationship with an entity that

appears in an unrelated proceeding before the judge usually does not require the judge's recusal.

I. Client Relationships

When a judge knows that a client of the judge's spouse or the spouse's business appears before the judge, the Committee has advised that the judge should evaluate certain factors to determine whether recusal is warranted. These factors include: (1) the spouse's personal role or lack of personal role in providing services to the client, (2) whether the services provided to the client are substantial and ongoing, (3) the nature of the client's relationship to the spouse or the spouse's business, and (4) the financial connection between the client, the business, and the judge's spouse (including the percentage of business revenue the client provides and the amount of compensation the spouse earns from the client). Additionally, judges should consider recusal whenever they become aware of circumstances suggesting that the hiring of the spouse or the spouse's business may have been influenced by the judge's position.

A. *Spouse Not Personally Engaged in Providing Services*. In the Committee's view, judges generally are not required to recuse from cases involving a current client of a spouse or a spouse's business if the spouse is not then personally engaged in work for that client. The spouse's connection to such a client is indirect and attenuated, and absent other factors a reasonable person would not question the judge's impartiality if the client appeared before the judge in an unrelated proceeding. This is true even if the spouse personally worked for the client in the past but is not currently engaged in work for the client.

B. *Spouse Personally Engaged in Providing Services*. When the judge knows that his or her spouse is personally engaged in providing services to a client appearing before the judge (including the supervision of services performed by other employees for the client), an additional consideration is the degree of involvement of the spouse or the spouse's business. If the relationship to the client involves only an occasional or isolated transaction, recusal is not required unless some other particular fact or circumstance gives rise to reasonable questions about the judge's impartiality.

The Committee has advised that a judge whose spouse was a clinical psychologist need not recuse when a law firm appearing before the judge had retained the judge's spouse on one or two occasions in an unrelated matter, where there was no ongoing relationship between the spouse and the law firm. The Committee gave similar advice where a spouse's notary business had an insubstantial, noncontinuous relationship with a client that appeared before the judge. The Committee has also advised that a judge whose spouse owned and operated a legal or executive recruitment business need not recuse merely because a law firm appearing before the judge engaged the judge's spouse, either currently or in the past, to recruit an additional lawyer, or because the spouse made preliminary overtures to recruit attorneys but no contract or employment negotiations resulted. Similarly, a judge need not recuse because an attorney spouse represented members of a class action who filed unrelated

actions in the judge's court, where the spouse had no close professional or personal relationship with the class members.

At the other end of the spectrum, when the spouse is personally engaged in providing services to a client who appears before the judge in an unrelated proceeding, recusal is appropriate if the judge knows that the spouse or the spouse's business has an exclusive arrangement, or a substantial and ongoing relationship, with a client that appears before the judge. For example, the Committee concluded that a current engagement of the spouse's executive recruitment business for the spouse to work on a law firm's merger would require the judge's recusal when the law firm appeared before the judge, as would other similar efforts that would result in a substantial change in the law firm and thus constitute an undertaking of similar importance for the future of the firm. A spouse who personally performed four high level executive recruitments in the same year for the same company for substantial fees for each recruitment would be considered to have a substantial and ongoing relationship with the company, requiring the judge's recusal, but if the work were spread out over a substantially longer period, recusal may not be required.

C. *Nature of Spouse/Client Relationship*. When a spouse is employed by or owns a business whose major or sustaining client appears before the judge, appearance concerns may arise even if the spouse personally performs no services for the client. These concerns are generally heightened when the spouse's business is small and the client is a significant client, so that the spouse is personally identified with the client, or the client can be reasonably perceived as the sustaining or sole client of the business.

The Committee has advised that if a judge knows a particular company appearing before the judge is the prime or sole client of the spouse's small business, and a ruling in the case could jeopardize the client's continued existence, the spouse would have an interest that could be substantially affected by the case and the judge should therefore recuse.

Concerns may also arise if a judge knows the spouse's business or law firm effectively serves as general counsel or in a managerial relationship to the client, rather than simply providing services in arms' length transactions. In a relationship of sufficient magnitude, the client may be considered equivalent to an employer of the spouse, in which case the judge should consider recusal based on the considerations applicable when a party or law firm before the judge directly employs the judge's spouse. *See, e.g.*, Advisory Opinion No. 58.

D. *Financial Considerations*. The nature and size of the client's financial connection to the spouse and the spouse's business can also affect the assessment of the judge's impartiality. A key consideration is the spouse's actual or potential financial benefit from the client. For example, the spouse's compensation may be paid by the spouse's employer and related only indirectly, insignificantly, or not at all to the fees paid by the client to the spouse's employer. In this regard, the Committee has advised

that a judge's impartiality could not reasonably be questioned because the judge was aware the spouse earned a relatively small sales commission, in an ordinary, arms' length contract, from a party appearing before the judge in an unrelated proceeding.

Alternatively, a spouse may receive a commission or direct payment from the client. The Committee concluded that a one-time payment made to a spouse for employment recruitment services rendered to a law firm did not require the judge's recusal, where the fee was but a small percentage of the spouse's compensation, was typical for the type of services rendered, was neither a major outlay nor a matter of great significance for the law firm client, and no other features of the transaction suggested impropriety. However, if the judge knew the spouse directly received a portion of client fees amounting to more than a small percentage of the spouse's income, the judge's impartiality might reasonably be questioned in a proceeding involving the client, in which case the judge should recuse. In situations of this nature, involving large fees paid by a client to the spouse, it is immaterial whether the spouse personally works for the client or collects fees in the nature of finders' fees or fees based on the services provided to the client by others.

The client's financial contribution to the spouse's business assumes more significance when the spouse is a partner, shareholder, or owner of the business. A major or sustaining client may provide more than a small percentage of the revenue of the spouse's business and, in turn, the spouse's income as a partner, shareholder, or owner. Departure of such a client could materially reduce the spouse's income or threaten the existence of the business. In such circumstances, the spouse's business, and the spouse as a partner, shareholder, or owner, may be so dependent upon the client that the judge's impartiality may reasonably be questioned in a proceeding involving the client. Additionally, the spouse who is a partner, shareholder, or owner may be so generally identified with the client that the judge's impartiality may reasonably be questioned in a proceeding before the judge involving the client. However, a judge is not automatically disqualified when a client of the spouse's business appears in a proceeding, even if the spouse is a shareholder, partner, or owner; this is simply one additional factor to consider. Further, if the client's financial contribution to the spouse's business is a relatively small percentage of the revenue of the spouse's business (and, in turn, of the spouse's income as a partner, shareholder, or owner), recusal is not required simply because the client appears before the judge in an unrelated proceeding.

If the judge's spouse is a salaried employee, rather than a partner or owner, and receives no bonus or commission based on the work performed for clients, the spouse will not be considered to have an interest in business clients that would require the judge's disqualification in an unrelated proceeding involving such clients. *See* Advisory Opinion No. 58 (a judge need not recuse from matters involving a relative's law firm, so long as the relative is not an equity partner and has not participated in the matter, and the relative's compensation is in no manner dependent upon the outcome). This conclusion is not affected by the spouse's involvement in a client's matters, so long as

matters in which the spouse is involved are not at issue in the proceeding before the judge.

II. Relationships with Service Providers

A spouse's business and professional employment may involve relationships with a variety of service providers, such as surety companies, landlords, banks or other lending institutions, and law firms. Companies that provide services to the spouse or the spouse's business may from time to time appear before the judge in unrelated proceedings. Whether such a business relationship warrants the judge's recusal depends on the nature of the relationship and services provided.

When a service provider's transactions with the judge's spouse or the spouse's business are in the regular course of business, routine in nature, and are unaccompanied by special circumstances suggesting that the selection of the spouse or the spouse's business may have been influenced by the judge's position, recusal is ordinarily not required. The Committee has advised against recusal in various situations where a party, law firm, or attorney appearing before the judge also provided services to the spouse's business. For example, the Committee advised that a judge need not recuse from proceedings involving banks and other lenders to the spouse's business where the relationship with the spouse's business involved traditional bank accounts and loans and no special circumstances were present (such as unusually favorable terms).

In other circumstances, the special character of the relationship between service providers and the spouse or the spouse's business may make recusal advisable should the service provider appear before the judge. In this regard, the Committee has advised that a judge should recuse from matters handled by a law firm subleasing space to the judge's spouse, because the judge's impartiality might reasonably be questioned. For similar reasons, the judge should recuse if the spouse's business is a tenant in the offices of a company that appears as a party before the judge.

Recusal considerations also arise when members of a law firm that provides services to a spouse's business appear before a judge in unrelated proceedings. In this situation, the Committee has advised that if the judge knows that the same attorney who represents the spouse's business even in a routine matter appears before the judge, the judge should recuse. The judge should also recuse if an attorney represents the judge's spouse's business in a matter that the judge knows could substantially affect the spouse's interest, and other members of the attorney's firm appear before the judge. However, if an attorney represents the spouse's business in routine matters that would have no substantial effect on the business or the spouse's interest therein, the judge's impartiality could not reasonably be questioned merely because another attorney from the same law firm appears before the judge.

III. Other Considerations

Most of the business relationships mentioned in this opinion do not fall within the definition of financial interest in Canon 3C(3)(c) and, consequently, judges have no obligation under Canon 3C(2) to ask their spouses about those business relationships. However, Canon 3C(2) does oblige judges to make a reasonable effort to keep informed about a spouse's personal financial interests. As defined in Canon 3C(3)(c), financial interest means a legal or equitable interest, such as stock ownership, or a relationship as director, advisor, or other active participant in the affairs of a party.

Further, if a judge is not aware that a party, law firm, or attorney in a proceeding before the judge has a business relationship with the spouse's business, the judge's impartiality could not reasonably be questioned. *See* Advisory Opinion No. 90 (advising that a judge need not investigate whether any relative is a member of a class action because "the *unknown* presence of a judge's relative as a party . . . does not create a risk of injustice to the parties, and does not undermine the public's confidence in the judicial process – so long as the judge recuses upon learning of the relative's status as a party"). If a judge nevertheless becomes aware that a client of or service provider to the spouse's business is involved in a proceeding before the judge, the judge should consider the facts presented and recuse under the circumstances set forth in this opinion.

When a spouse's business relationships with a party, law firm, or attorney appearing before the judge cause the judge's impartiality reasonably to be questioned, the judge must recuse, absent remittal. *See* Canon 3D. Remittal is not available for any of the mandatory recusal situations described in Canon 3C(1)(a)-(e), including when the judge knows the spouse has an interest that could be substantially affected by the outcome of the proceeding before the judge. In most of the circumstances described above, however, the judge's disqualification is pursuant to Canon 3C(1), and remittal is available.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 108: Participation in Government-Sponsored Training of Government Attorneys

Judges may participate in government-sponsored training of attorneys employed by a governmental entity subject to the following limitations:

1. Judges may appear at "closed" programs (open only to a one-sided audience), but should be willing and available to participate in training for interested attorneys representing the other side;

2. Judges should not provide guidance on the ins-and-outs of practice before their courts if the audience is closed and includes attorneys likely to appear before them;[1]

3. Judges should not suggest a particular interpretation of a disputed legal issue or other predilection as to the application of the law;

4. Judges should not provide direct assistance in a given case; and

5. Judges should avoid the appearance of bias or favoritism in the content of their presentations.

We note that this advisory opinion represents a change to some of the Committee's previous guidance on this topic. The Committee previously has advised judges not to participate in *government-sponsored* training of *government attorneys* based on the limited nature of the audience (e.g., only prosecuting or only defense attorneys) and the likelihood that members of the audience would appear before the judge in the future. The Committee has reconsidered that advice and now reaches the conclusions outlined above.

This opinion modifies the Committee's prior advice only to the extent that such advice relates to judicial participation in government-sponsored training of attorneys employed by the government. It does not modify prior advice limiting judicial participation in privately sponsored legal training or in the training of witnesses. *See* Advisory Opinion No. 105 (addressing judicial participation in privately sponsored legal training). The Committee continues to advise, for example, that judges should not participate in programs for expert witnesses or programs designed to teach law enforcement officers how to be more effective witnesses in federal court.

Other court personnel may participate in any training in which it would be appropriate for a judge to participate, as explained above. In addition, court personnel (other than chambers staff) may participate in closed-audience training of local attorneys relating to technical matters such as court rules or procedures (e.g., electronic filing procedures) so long as similar training is made available to other similar closed audiences.

Note for Advisory Opinion No. 108

[1] *See generally* Advisory Opinions 87 and 105 (discussing this limitation in the context of privately sponsored training programs).

June 2009

Committee on Codes of Conduct Advisory Opinion No. 109: Providing Conflict Lists to Departing Law Clerks

Judges sometimes receive requests from law firms for which their law clerks will work after the clerkships end. These firms ask, for the purpose of screening for conflicts of interest, the clerk or judge to identify the matters that the clerk worked on or that passed through chambers during the clerkship period. This opinion addresses whether a judge should provide law firms and clerks with a list of matters the clerk worked on while in chambers, as well as whether a judge should provide a list of all matters that were pending before the judge or the court during the clerk's tenure.

A. Matters the Clerk Worked on While in Chambers

Judges and clerks should generally decline to provide law firms with lists of matters the clerks worked on while in chambers. Granting such requests may result in the disclosure of confidential information. The assignment of a law clerk to a particular case is rarely revealed by any court, whether appellate, district, or bankruptcy. Moreover, assignment of particular appellate judges to an appeal may remain confidential until shortly before oral argument. *See, e.g.*, Practitioners' Guide to the U.S. Court of Appeals for the Fifth Circuit at 69 (Nov. 2011) ("About 30 days before the beginning of oral argument sessions, we post the case names and numbers, and the locations of the arguments on our internet site. The week before argument we post the names of the judges who will hear the cases."). Also, the involvement of particular judges in some internal appellate proceedings, such as certain aspects of en banc activity, inquiry to other panels, holding mandates, etc., is not publicly disclosed.

Canon 3D of the Code of Conduct for Judicial Employees mandates that a judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. This provision binds clerks even after their clerkships end. Canon 3D states, "[a] former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority." Employees' Code, Canon 3D. This provision is intended to protect the ability of judges to confer privately with their law clerks without fear that those interactions will later be revealed, thus chilling the ability of judges to receive assistance from their clerks. Canon 3D also ensures that present and former law clerks will not later use their privileged access to the judiciary for personal gain.

As a general matter, the Employees' Code respects the confidentiality owed by incoming law clerks to former employers or organizations by not requiring law clerks to provide a list of the cases they previously worked on or other confidential client information. Rather, the Employees' Code puts the onus on the law clerks to self-identify cases as to which they have disqualifying information due to personal relations, financial investments, or former employment at the outset of their clerkships without requiring any case list. Under Canon 3F,

> When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

Employees' Code, Canon 3F(3). Just as law clerks identify conflicts to their judges instead of being required to submit a list of their former employer's matters or cases that may include confidential information, former clerks who are employed by law firms should be trusted to recognize those cases whose very pendency is confidential but from which they should be isolated due to clerkship-related conflicts. This process can occur without resorting to a case list divulging confidential information in violation of the continuing confidentiality obligation under Canon 3D.

We assume that a former clerk must refrain from working on all cases in which he or she participated during the clerkship, and may be required by the judge, by court rule, or by attorney ethical rules to refrain from work on cases pending before the judge even if the law clerk had no personal involvement in them. *See, e.g.*, 9th Cir. R. 46-5 (2011) ("No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule. . . . An attorney who is a former employee may apply to the Court for an exemption."); *accord* Fed. Cir. R. 50 (2011) ("No former employee of the court may participate or assist, by representation, consultation, or otherwise, in any case that was pending in the court during the period of employment."); Federal Judicial Center, Maintaining the Public Trust—Ethics for Federal Judicial Law Clerks at p. 25 (3d ed. 2012) ("You may not participate in any matter that was pending before your judge during your clerkship."); Advisory Opinion No. 81 ("United States Attorney as Law Clerk's Future Employer"); Advisory Opinion No. 74 ("Pursuit of Future Employment by Law Clerks and Staff Attorneys").

The Committee is mindful not only of attorneys' ethical obligations regarding conflicts but also the desire of firms to avoid disqualification, disgorgement of fees, or other consequences resulting from a failure to screen lawyers who have ethical conflicts. Although the Committee is not authorized to interpret the ABA Model Rules of Professional Conduct, we are not aware of any provision in these rules that would require the disclosure of broad lists of all matters that a former clerk worked on. Indeed, law firms themselves have recognized the pitfalls and barriers in obtaining confidential information from lateral hires who are presumably subject to the ABA Model Rules or similar derivative rules. *See, e.g.*, Susan P. Shapiro, Tangled Loyalties: Conflict of Interest in Legal Practice 330 (U. of Mich. Press 2002) (quoting a Chicago law firm

hiring partner about how he might screen for conflicts: "See, I can't ask an associate, 'What clients have you worked on?' That would be a breach of ethics for them to disclose it to me."); *see also* Paul R. Remblay, Migrating Lawyers and the Ethics of Conflict Checking, 19 Geo. J. Legal Ethics 489, 491-93 (Spring 2006) (noting that, because the ABA Model Rules lack specific guidance about the scope of permissible conflict checks, law firms tend to ask proposed lateral hires about "the work that they did at their old firms, and about their former and existing clients" while observing the rule not to reveal presumptively confidential client information).

In light of these considerations, judges and clerks should generally decline law firms' requests for lists of all matters the clerks participated in, because such requests may call for the disclosure of confidential information, especially for clerks currently employed by the court. The concerns underlying the requests can be effectively addressed through less intrusive means. First, judges may suggest to clerks that they maintain a list of cases in which they have participated in order to facilitate the identification of conflicts of interest during their future employment (keeping in mind that such lists are not to be disclosed to anyone). Second, law firms can also provide to the former clerk who joins the firm a list of cases whose pendency before a specific judge or court is a matter of public record, and ask the clerk to identify those cases where there is a conflict (without identifying to anyone the cases the clerk worked on). Third, at the start of the former clerk's employment and for whatever time period deemed appropriate, firms can isolate former clerks from all cases pending before a particular judge or court (as identified from the public docket).

B. Matters Pending Before the Judge or the Court During the Clerk's Tenure

Some law firms have requested that judges and clerks provide a list of all matters pending before the particular court—or the particular district, bankruptcy, or magistrate judge—during the clerk's tenure, not simply those on which the clerk worked. Although these requests present fewer problems because they do not associate a clerk with work on a particular case, they can still create confidentiality concerns, as well as practical problems.

On one hand, it is possible a clerk will not have knowledge of all cases pending before his or her judge during the clerkship. One way to avoid future conflicts would be for the court to provide to the clerk upon departure a list disclosing only publicly available information about pending cases. Such a list would not run afoul of Canon 3D's prohibition on disclosing confidential information. On the other hand, depending on the caseload of the particular court, it could create an administrative burden for the Clerk's Office to generate such lists for each departing clerk. Further, the lists may not be comprehensive, as judges on the same court sometimes confer with one another on a given case even when not assigned to that case. In the appellate context, such a list should include cases considered by the court rather than by an individual judge, because the panel assigned to a case is often not publicly revealed until shortly before oral argument, and because non-panel judges may be involved in the resolution of cases, for instance in en banc considerations.

For the foregoing reasons, judges may decide on an individual basis to provide such lists to clerks of all cases assigned to the judge's court during the relevant time, or in the case of district, bankruptcy, or magistrate judges, all cases assigned to that judge. The Code does not preclude this. However, judges are under no obligation to provide such lists. The onus remains on the law clerks to identify cases as to which they have a disqualifying connection. Judges deciding to provide such lists should not provide them to law firms directly but instead to the individual clerk.

July 2012

Committee on Codes of Conduct Advisory Opinion No. 110: "Separately Managed" Accounts

This opinion addresses recusal considerations related to ownership of SMAs (sometimes known as "separately managed accounts," "single managed accounts," or "managed asset accounts"), an increasingly popular investment vehicle. SMAs are similar to mutual funds in many ways. Like mutual funds, SMAs are managed by investment firms; unlike mutual funds, however, investors own the underlying securities or assets. Such individual ownership permits investors to customize their SMAs, for instance, by exercising more or less control over the investment portfolios. *See, e.g.,* Nasdaq, Understanding Separately Managed Accounts (last visited July 8, 2025).

Some judges may assume that SMAs are functionally equivalent to mutual funds and therefore do not trigger any recusal obligations. This assumption misunderstands Canon 3C, which requires disqualification when a judge has a financial interest in the subject matter of the controversy or in a party, or has any other interest that could be affected substantially by the outcome of the proceeding. "Financial interest" means "ownership of a legal or equitable interest, however small." Canon 3C(3)(c). While the Canons create a safe harbor for mutual and common investment funds (hereinafter the "mutual fund safe harbor") by providing that "[o]wnership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund," Canon 3C(3)(c)(i), SMAs are not eligible for this safe harbor. We explore the safe harbor in Advisory Opinion No. 106 ("Mutual or Common Investment Funds"), in which we explain that "investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds." We have thus advised that an investment vehicle qualifies for the mutual fund safe harbor, inter alia, only if the fund, not the judge, owns the individual securities. In an SMA, the investor owns the individual securities, and this fact is dispositive. Whether or not a judge's SMA is otherwise similar to a mutual fund – for example, because both funds are managed – the judge's ownership of the underlying securities categorically precludes invocation of the safe harbor. (*See* Advisory Opinion No. 106 for a more detailed discussion of the mutual fund safe harbor.)

Although an SMA does not qualify for the mutual fund safe harbor, some judges may assume that an SMA structured like a "blind trust" triggers no recusal obligations. Generally, the beneficiary of a blind trust "has no knowledge of the trust's holdings and no right to participate in the trust's management." Black's Law Dictionary 1648 (9th ed. 2009). Thus, if a judge structures an SMA like a blind trust, the judge will not know – or control – what securities the SMA portfolio contains. Yet an SMA structured like a blind trust would remain ineligible for the mutual fund safe harbor, so the recusal obligations of Canon 3C would continue to apply. A judge's use of a blind trust does not obviate the judge's recusal obligations. *See* Canon 3C(2) ("A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.") The Committee has consistently advised

that the use of a blind trust would be incompatible with a judge's duty to "keep informed" about financial interests under Canon 3C(2).

We remind judges investing in SMAs to be mindful of both their recusal and their financial disclosure obligations. Under the Judicial Conference policy on conflicts screening [*Guide to Judiciary Policy*, Vol. 2C, § 410.30], JCUS-MAR 2022, at pp. 10-11, a judge has a continuing obligation to update the judge's list of financial interests that would require recusal, which would include securities held in SMAs. Similarly, because judges investing in SMAs own the underlying securities, the scope of their financial disclosure obligations may change as their SMA portfolio develops. The Committee does not address financial disclosure issues, however, so judges should consider the guidance in the filing instructions for financial disclosure reports and contact the Financial Disclosure Committee with any questions.

August 2013; November 2022 (minor technical changes)

Committee on Codes of Conduct Advisory Opinion
No. 111: Interns, Externs and Other Volunteer Employees

The Code of Conduct for Judicial Employees [*Guide to Judiciary Policy*, Vol. 2A, Ch. 3] ("the Employees' Code") was amended in 2013 to expressly cover interns, externs, and other volunteer court employees. JCUS-MAR 13, p. 9. The amendment was an extension of the Committee on Codes of Conduct's precedents that advised that these groups were subject to the Employees' Code even though they were not expressly included. *See* Advisory Opinion No. 83. The amendment was made to ensure that all those who perform substantive work (as opposed to mere observation) for the courts, even on a voluntary basis, were aware that they were bound by the same ethical restraints and considerations as compensated employees. The Committee also wanted to ensure that all judges, who are required by Canon 1 of the Code of Conduct for United States Judges [*Guide*, Vol. 2A, Ch. 2] to maintain and enforce high standards of conduct for themselves and members of their staffs, will take an active part in explaining and applying the parameters of the Employees' Code to interns, externs, and other volunteer court employees.

This opinion addresses ethics issues that may arise concerning the employment of volunteers, either from the employees' perspective under the Employees' Code, or from the judges' perspective under the Judges' Code. It is important to note that although chambers' staff members are subject to some of the more restrictive constraints of the Employees' Code, the provisions of the Employees' Code addressed here apply to all judicial employees.

Canon 4E of the Employees' Code prohibits a judicial employee from receiving a salary, or any supplementation of salary, as compensation for official government services from any source other than the United States. *See* Advisory Opinion No. 83 (advising that a volunteer employee such as an extern may not accept during the externship any payment or salary advance from a law firm, or any benefits such as health insurance paid for by a law firm). The Committee recognizes that various courts have historically used unpaid interns, externs, or other volunteer court employees who received educational stipends while they perform work for the courts. While such an arrangement would ostensibly be prohibited by Canon 4E, the Committee's opinion is that this limited circumstance, as more fully delineated below, does not run afoul of the spirit or intent of the Code, and, therefore, is not prohibited by Canon 4E.

The spirit of the Employees' Code is to preserve the integrity and independence of the judiciary and of the judicial employee's office by requiring judicial employees to observe high standards of conduct (Canon 1), avoid conduct that might lead to an appearance of impropriety (Canon 2), avoid conflicts of interest and the disclosure of confidential or sensitive information (Canons 3D & 3F), and not engage in prohibited political activity (Canon 5), violations of which could diminish public confidence in the judiciary and possibly prevent the swift and unbiased administration of justice.

As a general proposition, an intern, extern, or other volunteer court employee may accept an educational stipend or similar payment after checking with the court or the judge to ensure that certain conditions are met. This would involve an evaluation by the judge to determine whether the funding arrangement would raise ethical concerns under either the Employees' Code or the Judges' Code. In making this evaluation, the judge should consider questions including the source of the funds (i.e., whether the funds are from a politically-based organization, a group that regularly appears before the federal courts, or attorneys who regularly appear before the federal court) and the nature of the payment arrangement (i.e., whether the funding is for a short-term, educationally-based position).

Examples of the Committee's advice on similar issues provide some guidance in addressing the various circumstances that may arise.

The Committee has found that there was no appearance of impropriety under Canon 2 of the Judges' Code in a judge's accepting the volunteer services of an intern who received a stipend from a foreign government, assuming the government was not a litigant in the judge's court. In that matter, the Committee viewed the intern, who was a foreign attorney seeking an internship with the court as part of her training to become a judge, to be in a situation similar to a law student extern or a "cooperative education" student performing services in the court in exchange for academic credit. *See* *Guide*, Vol. 12, § 550.80 et seq. ("Volunteers") and § 550.70 et seq. ("Cooperative Education and Fellowship Programs"). The Committee found no ethical impediment to the arrangement, and directed the judge to the applicable requirements for volunteer service programs so the judge could ensure compliance with those rules and policies. *See* 28 U.S.C. § 604(a)(17)(A) (giving the Director of the Administrative Office of the United States Courts the authority to accept voluntary and uncompensated services to the court); *Guide*, Vol. 12, § 550.20(b) (indicating that the Director has delegated this authority to the heads of all units in the judiciary, including the Clerks of Court and Circuit Executives), § 550.70.20 ("Cooperative Education and Fellowship Program Roles and Responsibilities"), § 550.80.20 ("Roles and Responsibilities" governing court volunteers). Before commencement of such voluntary services to the court, the court unit executive must execute a Form AO 196A (Acknowledgment of Gratuitous Services), as provided in § 550.80.20(a)(1).

The Committee reached the same conclusion for a law school graduate who served as a volunteer law clerk and received a stipend through a law school fellowship program. The Committee found the fellowship program, being of limited duration (which to date has been found to include up to six months) and awarded through an academic institution, analogous to a cooperative educational program. The Committee opined that, assuming the law school was not a party to litigation in the judge's court or otherwise doing business with the court, there would be no appearance of impropriety in the intern accepting a modest stipend from the law school. Consequently, the Committee found that the arrangement was permissible under Canon 2A of the Judges' Code ("A judge. . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") The Committee also found no violation

of the Employees' Code Canon 4B(3) (prohibiting the acceptance of funds from someone "likely to come before the judicial employee or the court") or Canon 4C(2) (prohibiting the acceptance of funds from "anyone seeking official action from or doing business with the court" or "anyone whose interests may be substantially affected by the performance or nonperformance of official duties") because the prospective intern's nominal stipend was not being paid in anticipation of future employment by her law school, and did not give rise to concerns regarding undue influence or other impropriety. The Committee noted that nothing in the law school's program indicated a special or exclusive relationship between the judge and the law school such as giving that law school's graduates preferred access to the judge's chambers or others on the judge's court.

The Committee has advised, however, that a judge should not accept the services of a volunteer law clerk who would be privately compensated by the law school from which the clerk graduated, where the funds would be solicited from lawyers. The Committee noted that the circumstances differed from previous opinions because it did not involve a short-term, academically-based internship, but rather was for a full-time law clerk compensated by alternative means involving funds solicited by the law school from attorneys and law firms.

An intern's funding provided by a pool of local law firms is also inadvisable. Thus, the Committee has advised against allowing payment of a law student intern stipend from a local bar association, even when the funding came from pooled contributions by law firms, because the funding sources were a group of specific local law firms that were likely to come before the court and whose interests may be substantially affected by the intern's performance of official duties under Canons 4B(3) and 4C(2) of the Employees' Code. The controlling factor was the source of funding, which was mostly specific local law firms. The Committee also found that the proposal raised concerns for the judge under Canon 2A of the Judges' Code because the funding, being from lawyers, might raise an appearance of impropriety. The Committee also repeated that "judges are advised against appointing volunteer externs who are provided payments by law firms before, during or after the externship that are dependent on the individual serving as a judicial extern." Advisory Op. No. 83. On the other hand, where the funding for an intern's stipend derives from a blind source, such as funding through a national bar association, educational institution, or charitable organization, comprised of sources that are not likely to have interests that may be substantially affected by the intern's performance, such a funding arrangement would not violate Canons 4B(3), 4C(2), or 4E of the Employees' Code. Remember that a judge should not personally participate in fund-raising activities or solicit funds for such an organization or institution consistent with Canon 4C of the Judges' Code.

In light of the conclusions reached here and in the past, it is the Committee's opinion that, as a general proposition, an intern, extern, or other volunteer court employee may accept a stipend or similar payment for a short-term, academically-based (or other organizationally-sponsored) position after checking with the court or the judge to ensure that certain conditions are met. This would involve an evaluation by the

judge to determine whether the funding arrangement would raise ethical concerns under either the Employees' Code or the Judges' Code. The evaluation should examine, among other issues, the source of the funds, the purpose of the funds, and the duration of the anticipated volunteer services.

It is also important to stress that the application of the Employees' Code to interns, externs, or other volunteer court employees affects other aspects of their conduct, and affects the conduct of the judges who use their services. In particular, volunteer employees are subject to the ethical rules on conflicts of interest set forth at Canon 3F of the Employees' Code. Under those rules, for instance, these volunteers, like law clerks, may not work on cases involving future employers (Advisory Opinion No. 74), may not work on cases in which a party is represented by a volunteer court employee's spouse's law firm (Advisory Opinion No. 51), are bound by the prohibition against engaging in certain political activities (Advisory Opinion No. 92), and are limited in their conduct and representations on social media outlets (Advisory Opinion No. 112). Likewise, because interns, externs, or other volunteer court employees are now expressly treated the same as compensated employees, they are implicated in provisions of the Judges' Code that address staff employment matters. For example, these volunteer employees are covered by the judges' restraints against employing the child of another federal judge. *See* Advisory Opinion No. 64. This is not an exhaustive list of the application of the Employees' Code or the Judges' Code to interns, externs, or other volunteer court employees, but merely an illustration of the reach of those Codes to provide some guidance for the future.

The Judicial Conference has also issued policy guidance concerning the acceptance of volunteer services in the courts. See *Guide to Judiciary Policy*, Vol. 12, § 550.30.30 (Requirements for Gratuitous/Volunteer Services). The Judicial Conference policy emphasizes that conflict of interest rules and other related ethics guidance applies to volunteer court employees, and to courts when accepting services from volunteer employees. The policy also cautions against engaging in nepotism or favoritism in the hiring of volunteer employees, stating that courts may not accept volunteer services from individuals related to judges or a public official of the court, consistent with the limitation on the employment of certain relatives of a judge in 28 U.S.C. § 458(a)(1) and the limitation on the employment of certain relatives of a public official in 5 U.S.C. § 3110(a)-(c).

A judicial intern, extern, or other volunteer should not accept a simultaneous governmental appointment that has the potential for dual service with other branches of government or of the state government, in accordance with Canon 4A of the Employees' Code. For example, the Committee has advised that a judge should not appoint an intern who is paid by the Department of Justice. Similarly, a concurrent internship with a state attorney general's office or with an executive agency of the federal government would place the intern under the supervision of a federal judge and of a state attorney general or federal agency head, contrary to the required separation from other governmental units or court systems.

An intern may not engage in the practice of law under Canon 4D. Thus, the Committee has advised that a judicial intern should not be permitted to perform legal or paralegal work at a law firm, as the performance of legal tasks for lawyers is treated as practicing law, in violation of Canon 4D. Also, an internship that is concurrent with providing assistance to a pro bono legal non-profit organization is permissible under Canon 4D(3) if it does not present an appearance of impropriety, does not take place while on duty or in chambers, does not interfere with the intern's service to the court, is uncompensated, does not involve appearing in any court or administrative agency, does not involve a matter of public controversy, does not involve an issue likely to come before the court, and does not involve litigation against the federal, state, or local government. *See* Employee's Code, Canon 4D.

November 2015; September 2024 (minor technical changes)

Committee on Codes of Conduct Advisory Opinion
No. 112: Use of Electronic Social Media by Judges and Judicial Employees

This opinion provides the Committee's guidance on an array of ethical issues that may arise from the use of social media by judges and judicial employees, particularly members of a judge's personal staff. This guidance is intended to supplement information the Committee developed in 2011 to assist courts with the development of guidelines on the use of social media by judicial employees. *See* Resource Packet for Developing Guidelines on Use of Social Media for Judicial Employees. The Committee noted in the Resource Packet that "[t]he Code of Conduct for Judicial Employees applies to all online activities, including social media. The advent of social media does not broaden ethical restrictions; rather, the existing Code extends to the use of social media." The Committee also recognizes that electronic social media may provide valuable new tools for the courts, and that some courts have begun to use social media for official court purposes. This opinion is not intended to discourage the official use of social media by the courts in a manner that does not otherwise raise ethics concerns. Nor is this opinion intended to supplant any social media policy enacted within each judge's chambers which may govern that specific judge's internal chambers' operation. If an individual judge's personal chambers' policy is stricter than that set forth below, the individual judge's policy should prevail.

I. Ethical Implications of Social Media

The use of social media by judges and judicial employees raises several ethical considerations, including: (1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate. These considerations implicate Canons 2, 3D, 4A, and 5 of the Code of Conduct for Judicial Employees, and Canons 2, 3A(6), 4, and 5 of the Code of Conduct for United States Judges. The Committee recognizes that due to the ever-broadening variety of social media forums and technologies available, different types of social media will implicate different Canons and to varying degrees. For that reason, many of the proscriptions set forth in this opinion, like those set forth in the Employees' and Judges' Code, are cast in general terms. The Committee's advice is to be construed to further the objective of "[a]n independent and honorable judiciary." Canon 1.

Social media include an array of different communication tools that can mimic interpersonal communication on the one hand, and act as a news broadcast to a larger audience on the other. For example, some social media sites can serve primarily as communication tools to connect families, friends, and colleagues and provide for sharing private and direct messages, posting of photos, comments, and articles in a tight-knit community limited by the user's security preferences. The same media, however, can serve to broadcast to a broader audience with fewer restrictions.

Similarly, some social media sites can serve as semi-private communication media depending on how they are used, or can instantly serve as a connection to a large audience. Aside from social communication sites, users also have access to others' sites where they may comment on everything from the posting of a photograph, to a legal or political argument, or to the quality of a meal at a restaurant. This type of media can implicate other concerns since the user is now validating or endorsing the image, person, product, or service. Finally, there are media where the user is personally publishing commentary in the form of blogs. The Committee recognizes that the Canons cover all aspects of communication, whatever form they may take, and therefore offers general advice that can be applied to the specific mode. In short, although the format may change, the considerations regarding impropriety, confidentiality, appearance of impropriety and security remain the same.

II. Appearance of Impropriety

Canon 2 of the Employees' Code provides: "A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Similarly, Canon 2 of the Judges' Code states that "a judge should avoid impropriety and the appearance of impropriety in all activities." The Codes forbid judges and judicial employees from using, or appearing to use, the prestige of the office to advance the private interests of others. Canon 2 therefore is implicated when an employee or judge engages in the use of social media while also listing his or her affiliation with the court. For example, the Committee has advised that a law clerk who chooses to maintain a blog should remove all references to the clerk's employment. The Committee concluded that such reference would implicate Canon 2 concerning the use of the prestige of the office and the appearance of impropriety. The same can be true for a judge if she is using the prestige of the office in some manner in social media that could be viewed as advancing the private interest of another. For example, if the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies him/herself as a supporter, the judge has used the office to aid that establishment's success. Similarly, if a judge comments on a blog that supports a particular cause or individual, the judge may be deemed as endorsing that position or individual. The Committee therefore cautions judges to analyze the post, comment, or blog in order to take into account the Canons that prohibit the judge from endorsing political views, engaging in dialogue that demeans the prestige of the office, commenting on issues that may arise before the court, or sending the impression that another has unique access to the Court.

III. Improper Communications with Lawyers or Others

Another example of social media activity that raises concerns under Canon 2 is the exchange of frequent messages, "wall posts," or "tweets" between a judge or judicial employee and a "friend" on a social network who is also counsel in a case pending before the court. In the Committee's view, social media exchanges need not directly concern litigation to raise an appearance of impropriety issue; rather, any frequent

interaction between a judge or judicial employee and a lawyer who appears before the court may "put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Employees' Code, Canon 2. With respect to judges, communication of this nature may "convey or permit others to convey the impression that they are in a special position to influence the judge." Judges' Code, Canon 2B. A similar concern arises where a judge or judicial employee uses social media to comment—favorably or unfavorably—about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized so as not to constitute an ex parte communication. At all times, the Court must be screening for potential conflicts with those she communicates with on social media, and the Canon 3C provisions which govern recusal situations may be implicated and may require analysis.

The connection with a litigant need not be so direct and obvious to raise ethics concerns. The same Canon 2 concern arises, for example, when a judge or judicial employee demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a "fan" of an organization), or where a judge or judicial employee circulates a fundraising appeal to a large group of social network site "friends" that includes individuals who practice before the court.

IV. Extrajudicial Activities

Circumstances such as those described above also implicate Canon 4 of both the Employees' and Judges' Codes, which govern participation in outside activities. Canon 4 of the Employees' Code provides that "[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements." Canon 4 of the Judges' Code states that a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification. Invoking Canon 4 of the Employees' Code, the Committee has advised that maintaining a blog that expresses opinions on topics that are both politically sensitive and currently active, and which could potentially come before the employee's own court, conflicts with Canon 4. Such opinions have the potential to reflect poorly upon the judiciary by suggesting that cases may not be impartially considered or decided. This advice would also apply to judges' use of social media. A judge would be permitted to discuss and exchange ideas about outside activities that would not pose any conflict with official duties, (e.g., gardening, sports, cooking), yet the judge must always consider whether those outside activities invoke a potentially debatable issue that might present itself to the court, or an issue that involves a political position.

V. Identification of the Judge or Judicial Employee

Canons 2 and 4 are also implicated when a judge or judicial employee identifies him/herself as such on a social networking site. Through self-description or the use of a

court email address, for example, the judge or employee highlights his or her affiliation with the federal judiciary in a manner that may lend the court's prestige. The Committee has recommended that courts address in their social media policies whether judicial employees may identify themselves as employed by a specific court or judge. It is the Committee's view that social media policies should, at the very least, restrict judicial employees from identifying themselves with a specific court or judge on social networking sites, except that judicial employees, with the permission of their court or judge, may state their association with the court or judge on professional networking sites like LinkedIn. The Committee also advises against any use of a judge's or judicial employee's court email address to engage in social media or professional social networking. The court employee or judge should consult the court's policies on permitted and prohibited use of court email, and the court's guidance on the employee's conduct while using a court email server and court email address. Similarly, the court email address should not be used for forwarding "chain letter type" correspondences, the solicitation of donations, the posting of property for sale or rent, or the operation of a business enterprise. *See* *Guide to Judiciary Policy*, Vol. 15, § 525.50 ("Inappropriate personal use of government-owned equipment includes. . . using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity. . . ." This policy also prohibits use of the email system for "fund-raising activity, endorsing any product or service, participating in any lobbying activity, or engaging in any partisan political activity.")

VI. Dignity of the Court

Furthermore, Canon 4A of the Employees' Code provides that "[a] judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves." Certain uses of social media raise concerns under Canon 4A that are not within the ambit of Canon 2. For example, a judge or judicial employee may detract from the dignity of the court by posting inappropriate photos, videos, or comments on a social networking site. The Committee advises that all judges and judicial employees behave in a manner that avoids bringing embarrassment upon the court. Due to the ubiquitous nature of information transmitted through the use of social media, judges and employees should assume that virtually all communication through social media can be saved, electronically re-transmitted to others without the judge's or employee's knowledge or permission, or made available later for public consumption.

VII. Confidentiality

Canon 3D of the Employees' Code provides in relevant part that a "judicial employee should avoid making public comment on the merits of a pending or impending action. . . ." Canon 3D further states that a judicial employee "should never disclose any confidential information received in the course of official duties except as required in performance of such duties, nor should a judicial employee employ such information for personal gain." Canon 3A(6) of the Judges' Code provides that "[a] judge should not

make public comment on the merits of a matter pending or impending in any court." Canon 4D(5) of the Judges' Code provides that "a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties." Most social media forums provide at least one—and often several—tools to communicate instantaneously with anywhere from a few to thousands of individuals. Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D. Such communications need not be case-specific to implicate Canon 3; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality concerns and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the employee may not reveal any confidential, sensitive, or non-public information obtained through the court. The Committee further advises that judicial employees who are on the judge's personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that frequently litigates in court. Lastly, the Committee reminds that former judicial employees should also observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

VIII. Political Activity

Canon 5 of the Employees' Code specifically addresses political activity: "A judicial employee should refrain from inappropriate political activity." Similarly, Canon 5 of the Judges' Code states that a "judge should not. . . publicly endorse or oppose a candidate for public office" or "engage in any other political activity." Judges' Code, Canon 5A(2), 5(C). In the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, "liking" or becoming a "fan" of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate. Furthermore, the Committee advises that while there is not an obligation for a judicial employee to search out and modify or delete endorsements or statements of political views that predate the judicial employment, the Committee recommends that if such endorsements or statements appear to be current, they be modified to clarify that they predate the judicial employment. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting the following statement on the applicable website: "I have taken a position that precludes me from making further public political comments or endorsements and this site will no longer be updated concerning these issues." For example, on some social media it may be possible to remove one's political affiliation, and replace it with the above statement, when it is impractical or impossible to remove all posts or likes that appear to be current political endorsements or statements. The Committee reminds that while Canon 5B of the Employees' Code permits certain

nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges' personal staffs, and high-level court officers must refrain from all political activity.

IX. Conclusion

In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted, whether by the employee him/herself or by others on the employee's webpage, that may raise questions about the propriety of the employee's conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.

While the purpose of this opinion is to provide guidance with respect to ethical issues arising from the use of social media by judges and judicial employees, the Committee also notes that social media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of communication. There is no "one size fits all" approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.

Notes for Advisory Opinion No. 112

[1] The Code of Conduct for Judicial Employees ("the Employees' Code") defines a member of a judge's personal staff as "a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff." The term judicial employee also covers interns, externs, and other court volunteers.

April 2017

Committee on Codes of Conduct Advisory Opinion No. 113: Ethical Obligations for Recall-Eligible Magistrate and Bankruptcy Judges

Bankruptcy and magistrate judges who have retired or are considering doing so have several options to consider, depending on whether they continue to hear cases on recall status, practice law, or engage in pursuits outside the court system other than the practice of law. A retired judge's choice of status impacts whether that judge remains subject to both the Code of Conduct for United States Judges and the limitations on outside earned income. This advisory opinion sets out the options available to retired judges, as well as the effect of each on the retired judge's ethical obligations.

I. Judges serving on recall status

Retired judges may be recalled to service in accordance with regulations promulgated by the Judicial Conference under 28 U.S.C. § 155(b) (for bankruptcy judges) or § 636(h) (for magistrate judges). A circuit judicial council may recall a retired judge, but only with the judge's consent.

Retired bankruptcy judges recalled to serve, and almost all retired magistrate judges recalled to serve (the exceptions are described in Section IV below), are subject to the provisions of 28 U.S.C. §§ 153(b) and 632(a) and the Code of Conduct in the same manner as active judges. *See* *Guide to Judiciary Policy* (*Guide*), Vol. 3, §§ 920.25, 1020.25j, 1120.60, and 1220.60; Code of Conduct for United States Judges (*Guide*, Vol. 2A, Ch. 2), Compliance with the Code of Conduct. These judges are also subject to limitations on outside earned income. *See* 5 U.S.C. App. § 501(a)(1); *Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a). Recalled magistrate and bankruptcy judges do not qualify for an exemption from the outside earned income limitations for approved teaching. *See* 28 U.S.C. §§ 371(b) and 372(a); 5 U.S.C. App. § 502(b); *Guide*, Vol. 2C, § 1020.25(b)(7).

II. Judges eligible for recall status but not serving

Judges eligible for recall status but not serving are subject to the portions of the Code applicable to part-time judges. Compliance with the Code of Conduct ¶ C. Retired bankruptcy and magistrate judges who are eligible for recall to judicial service should review the Code of Conduct carefully, continue to follow the many parts of the Code that continue to apply to them, and conduct themselves accordingly during retirement. Many of the same ethics considerations that apply to sitting judges continue to apply to recall-eligible retired judges. The Compliance section of the Code provides that recall-eligible retired judges are subject to the provisions of the Code governing part-time judges. These include all sections of the Code other than Canon 4A(4) (arbitration and mediation), 4A(5) (practice of law), 4D(2) (business activities), 4E (fiduciary activities), 4F (governmental appointments), and 4H(3) (financial disclosures). For example, judges who are eligible to be recalled should:

- maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. Canon 1.

- neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 2.

- avoid membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Canon 2.

- not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. Canon 2.

- avoid testifying voluntarily as a character witness. Canon 2.

- refrain from public comment on the merits of a matter pending or impending in any court. Canon 3.

- avoid civic and charitable activities if it is likely that the organization will be regularly engaged in litigation. Canon 4B(1).

- avoid giving investment advice to civic and charitable organizations. Canon 4B(2).

- not serve on the board of a nonprofit organization if the judge perceives there is any other ethical obligation that would preclude such service (for example, if the organization takes public positions on controversial topics). Advisory Opinion No. 2.

- not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. Canon 4C.

- refrain from financial and business dealings that might exploit the judicial position or involve frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge served or may serve in the future. Canon 4D(1).

- comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations, and endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a

judge would be permitted to do so by the Judicial Conference Gift Regulations. Canon 4D(4).

- not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to official duties. Canons 2 and 4D(5).
- not act as a leader or hold any office in a political organization, make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office. Canons 5A(1) and 5A(2).
- refrain from soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate, or attending or purchasing a ticket for a dinner or other event sponsored by a political organization or candidate. Canon 5A(3).
- not become a candidate in a primary or general election for any office. Canon 5B.
- avoid engaging in any other political activity (but this provision does not prevent a judge from engaging in activities permitted by Canon 4). Canon 5C.

On the other hand, a retired judge who is eligible for recall is exempt from compliance with several parts of the Code, including the following:

- the restrictions on serving as an officer, director, active partner, manager, advisor, or employee of a nonfamily business set forth in Canon 4D(2).
- the prohibitions on engaging in various types of fiduciary activities for nonfamily members. Canon 4E.
- the restrictions on accepting certain types of governmental appointments. Canon 4F.
- the requirement to make and file financial disclosures. Canon 4H(3).

A judge who is eligible for recall service but not now serving is not subject to the outside earned income limitations. However, if such judge accepts a recall appointment during the year, that judge then becomes subject to the earned income limitations for such year. In some situations, that restriction may affect the timing of when during the year a judge accepts a recall appointment. In such a case, the outside income limitation is determined on a pro rata basis according to the method identified in the Outside Earned Income Regulations. *See* *Guide*, Vol. 2C, § 1020.50(c).

As noted below in Section V, if a recall-eligible judge files an election to practice law for compensation, then the judge is no longer subject to the Code, but the judge is

also no longer eligible for recall service. A recall-eligible judge is, however, exempt from the Canon 4A(5) prohibition on the practice of law. For that reason, a recall-eligible judge may be permitted to practice law pro bono and without compensation in certain limited circumstances.

A recall-eligible judge who is considering pro bono practice of law should be aware of certain important limitations in that regard. Most importantly, a judge "should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction. . . ." The Committee has interpreted "the court on which the judge serves" to include the judge's former courts. In addition, a judge should not "act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding." *See* Compliance With the Code of Conduct A(2).

III. Judges eligible for recall status but who have filed a statement saying they will not accept a recall appointment

Judges who are eligible for recall status but have filed a statement saying they will not accept recall are not subject to the Code or the outside earned income limitations. The filing of such a statement, once made, is irrevocable. Any judge wishing to exercise this option should file a signed notice stating that "in accordance with Judicial Conference Recall Regulations (*Guide*, Vol. 3, Chs. 9–12) and the Compliance Section of the Code of Conduct, I have decided that I will not now, or in the future, consent to recall service. I understand that this notice is irrevocable and that, as a result, I will no longer be subject to the Code of Conduct for United States Judges." Unlike an election to practice law (Section V below), exercise of the option not to accept recall service does not affect the annuity to which the judge is entitled under 28 U.S.C. § 377.

IV. Special Rules Regarding Certain Part-time and "When Actually Employed" Magistrate Judges

The sets of rules applicable to a recalled magistrate judge serving on a less than full-time basis depends on whether the judge served as a full- or part-time magistrate judge **prior to** retirement, as well as whether the judge retired under the Judicial Retirement System ("JRS") or the Civil Service Retirement System ("CSRS"). Almost all recalled magistrate judges, whether they serve "full-time" or "less than full-time" are intended to be covered by the entire Code. The only exceptions are (1) judges who served on a part-time basis, and therefore were during active service able to practice law and engage in other outside business activities; and (2) judges who retired under Title 5 (the Civil Service Retirement System or the Federal Employees Retirement System ("FERS")) and are later recalled under a "when actually employed" basis.

The small number of judges falling into these two categories are subject to the Code of Conduct for part-time judges, meaning that such judges may practice law, conduct mediations or arbitrations, serve as fiduciaries, and conduct business activities not permissible for other judges serving on recall. *See* *Guide*, Vol. 3, § 1120.60(b);

Compliance with the Code of Conduct. Such judges are also subject to the Conflict of Interest Rules for Part-Time Magistrate Judges. *See Guide*, Vol. 3, § 1120.60(b). They are not subject to limitations on outside earned income. *See Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a). We emphasize, though, that any recalled magistrate judge who retired pursuant to 28 U.S.C. § 377 is subject to the Code of Conduct for full-time judicial officers, as well as 28 U.S.C. § 632(a), which limits the outside activities of full-time magistrate judges, and the limitations on outside earned income. *See* Compliance with the Code of Conduct; *Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a); Vol. 3, §§ 1120.60 and 1220.60.

Magistrate judges who have retired under title 5 (the Civil Service Retirement System or the Federal Employees Retirement System) and are later recalled on a "when actually employed" (part-time) basis are subject to 28 U.S.C. § 632(b), the Code of Conduct governing part-time magistrate judges, and the Conflict of Interest Rules for Part-Time Magistrate Judges. *See Guide*, Vol. 3, § 1120.60; Compliance with the Code of Conduct. However, magistrate judges who have retired under the Judicial Retirement System and are later recalled on a "when actually employed" (part-time) basis are subject to the Code of Conduct for full-time judicial officers, as well as 28 U.S.C. § 632(a), which limits the outside activities of full-time magistrate judges; the judges are also subject to the limitations on outside earned income found in the *Guide*, Vol. 2C, Ch. 10. *See* 5 U.S.C. App. § 501(a)(1); *Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a), Vol. 3, § 1120.60. These recalled judges do not qualify for an exemption from the outside earned income limitations for approved teaching. *See* 28 U.S.C. §§ 371(b) and 372(a); 5 U.S.C. App. § 502(b); *Guide*, Vol. 2C, § 1020.25(b)(7).

V. Judges who have elected to practice law

Judges who have elected to practice law are not subject to either the Code or earned income limitations, but are no longer eligible for recall service.

A judge who retires under JRS [including "hybrid" JRS] and practices law without first filing an election to practice law, or practices law before the election becomes effective, forfeits the entire JRS annuity for life. 28 U.S.C. § 377(m)(1)(A). A judge who makes an election to practice law is entitled to receive a JRS annuity, but forfeits any future cost-of-living adjustments on that annuity after the election becomes effective. *Id.* at § 377(m)(1)(B)(i)(II). No such penalties apply to CSRS or FERS annuitants who practice law.

The election, once it takes effect, is irrevocable. *Id.* at § 377(m)(1)(B)(ii). A judge who retires under JRS and thereafter practices law for compensation is permanently ineligible for recall service. *Id.* at § 377(m)(2).

All rights to receive a JRS annuity are forfeited during any period in which compensation is received by a retired judge "for civil office or employment under the United States Government" (other than service as a recalled judge). *Id.* at § 377(m)(3). Under CSRS and FERS, a reemployed annuitant (including a recalled judge) generally

continues to receive an annuity, but his or her compensation is offset by the amount of that annuity.

Notes for Advisory Opinion No. 113

[1] Compliance with the Code of Conduct ¶ C has been revised to include the following language: "However, bankruptcy judges and magistrate judges who are eligible for recall but who have notified the Administrative Office of the United States Courts that they will not consent to recall are not obligated to comply with the provisions of this Code governing part-time judges. Such notification may be made at any time after retirement, and is irrevocable."

August 2018

Committee on Codes of Conduct Advisory Opinion
No. 114: Promotional Activity Associated with Extrajudicial Writings and Publications

This opinion provides guidance about judicial participation in book promotions. It expands upon the Committee's advice in Advisory Opinion No. 55, which addresses ethical considerations related to extrajudicial writings and publications.

As a general matter, the Code of Conduct for United States Judges provides that a judge may write on both law-related and nonlegal subjects, and may receive compensation and reimbursement for doing so. Canons 4 & 4H. In addition, the Commentary to Canon 4 specifically encourages judges to engage in law-related extrajudicial pursuits, because "a judge is in a unique position to contribute to the law, the legal system, and the administration of justice."

In line with these provisions, the Committee has consistently advised that judges may engage in dignified promotions of the substance of their extrajudicial writings and publications. However, judges should avoid conduct that violates the Code, whether by appearing to exploit or to detract from the dignity of the office, or by reflecting adversely on judicial impartiality. *See* Canons 2B & 4.

In this opinion, we evaluate these Canons in the context of participation by judges in promotions of their books. Although the opinion is framed in terms of book promotions, our advice also applies to other forms of extrajudicial writings and publications. We assess advertising, personal appearances, media interviews, and book reviews and forewords.

Advertising

As far as possible, judges should make certain that the advertisements for their publications do not violate the language, spirit, or intent of the Code. Advisory Opinion No. 55. This duty continues after a judge's book is published. *Id.* Accordingly, to ensure ongoing compliance with the Canons, judicial authors should contract to retain control over advertising for the books they write. Commentary to Canon 2B; Advisory Opinion No. 55.

The following restrictions apply to advertising materials. A judge may mention his or her judicial position, length of service, and court in a book jacket or in other similar straightforward author summaries, provided that the identification is without embellishment and appears in the context of other biographical information. However, the Committee has generally advised against using the same information in other advertising materials. In addition, the Committee has advised against preceding a judge's name with the title "judge" in any advertisements. Finally, in advertising for a personal appearance by a judge, it would be improper to suggest that attendees would obtain special access to or influence with the judge, or to suggest that attendees were expected to purchase the judge's book.

Judges should also avoid using government-owned equipment or systems, including court email systems, to promote judicial writings. *See* *Guide to Judiciary Policy*, Vol. 15, § 525.50 ("Inappropriate personal use of government-owned equipment includes . . . using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity, such as . . . selling goods or services.").

Personal Appearances

Judges who write books may appear as authors to speak about and to sign copies of their work. However, the intended composition of an audience affects the ethical considerations of an appearance.

On the one hand, a judge who writes books may appear as an author at bookstores and other public venues, assuming the events are free, do not interfere with the performance of official duties, and are not associated with marketing materials that violate the advertising guidelines identified in the previous section of this opinion. At these events, which may be labeled "book signings" or "discussions," a judge may sign copies of his or her work, which may also be available for sale. However, there should be no suggestion that attendees are required to purchase books, or that participants may enjoy special influence over the judge. During the events, the judge may read from and discuss the work in a dignified manner that focuses on the substance of the work and not merely on the author's status as a federal judge. Discussing the contents of the book, or how it came to be written, would generally be acceptable. Urging attendees to buy the book would not.

Assuming these guidelines are met, selling a book to an individual who happens to be an attorney or responding to a subsequent request for a signature does not amount to engaging in a prohibited transaction or continuing business relationship with a person likely to come before the court, particularly if the book has not been marketed to the particular legal constituency the person represents and the judge is unaware of the person's relationship (if any) to cases before the judge's own court.

However, conducting a book signing or a discussion directed to attorneys or to other members of the legal community has the potential to raise additional concerns under the Code. In those circumstances, a judge should assume that members of the audience know of the judge's current position, and should take particular care to ensure that neither the events nor their marketing exploits the judicial office or leads to an appearance of impropriety.

An event that includes only representatives from a particular legal constituency also raises concerns under the Code, particularly if the event is held at a non-neutral location. In those circumstances, discussing or signing a book the judge has written may lend the impression the judge has exploited the judicial office before a favored set of attorneys or litigants. For example, while it might be permissible for a judge to discuss a book during an event sponsored by a general membership bar association at

a neutral location, it might be improper to engage in the same activity on behalf of or on the premises of a private law firm or advocacy organization, particularly if the event were closed to opposing constituencies.

This advice is consistent with the guidance the Committee has provided in the related but distinct context of judges appearing as speakers before particular legal constituencies. In that context, the Committee has advised that it is rarely permissible to accept an invitation to address an individual law firm or advocacy group, particularly if the event occurs at the offices of the firm or advocacy group, because doing so may suggest that the judge favors the organization and the interests it represents. *See* Advisory Opinion Nos. 87 & 105. It may be acceptable for a judge to speak at a neutral location before attorneys who specialize in certain practice areas or represent particular legal viewpoints, but the judge must be available to address opposing or contrasting constituencies and should take care to avoid any appearance of impropriety. The rationale for these guidelines is that a judge who speaks before a particular legal constituency at a non-neutral location may lend the prestige of the office to the interests of the constituency and create the impression of a special relationship between the judge and the sponsor. These concerns of favoritism are reduced if the events are open to a variety of attendees and held at neutral locations, and if the judge is available to address opposing or contrasting constituencies. A judge's signing or discussing books during an event before a narrow legal constituency at a non-neutral location raises similar concerns because the choice of attendees and location may suggest the judge favors the organization and the interests it represents. Moreover, the activity involves the judge's commercial interests in the sale of books and may lend the impression the judge has exploited the office before a preferred set of attorneys.

Media Interviews

Judges who participate in media interviews to discuss their books should do so in a dignified manner, ensuring that the discussions and any mentions of the judicial position do not appear to exploit or to detract from the office. During the interviews, the judges may read from and discuss the substance of the work, although the judges should not discuss pending or impending cases, confidential information, or controversial matters.

Judges should approach live interviews with particular caution, especially if they anticipate being questioned about subjects whose public discussion might lead (even if unintentionally) to an appearance of impropriety. The duty of a judge to promote public confidence in the integrity and impartiality of the judiciary may be at risk when a judge voluntarily injects him or herself into the limelight of public controversy or discussions of sensitive matters, including confidential aspects of the judicial process. Related commentary to the press may generate further disputes, lead to disqualification, or embroil the judge in personal and professional disputes. Accordingly, judges should take care in their approach to press interactions, particularly live press interactions, although ultimately the judges themselves are in the best position to weigh the ethical

considerations that apply to a particular situation and to choose the manner in which they respond.

Book Reviews and Forewords

Judges are sometimes asked to review or to write forewords for books. These activities are acceptable so long as the writings are bona fide contributions addressing the substance of the volumes, and neither the books nor the judicial writings exploit or detract from the dignity of the office. With respect to the second of these points, judges should undertake reasonable efforts to guard against the subsequent use of their reviews or forewords in promotional materials that may tend to exploit the prestige of the office or violate the guidelines outlined above.

November 2014

Committee on Codes of Conduct Advisory Opinion
No. 115: Appointment, Hiring, and Employment Considerations: Nepotism and Favoritism

The Committee on Codes of Conduct receives a variety of inquiries concerning appointment and employment issues that arise in the operation of our courts. This opinion summarizes the Committee's guidance for judges and court employees when confronted with making a decision about whether a particular person may be "appointed to" or "employed in" a particular court, as such decisions relate to nepotism and/or favoritism. Additional guidance related to this topic may be found in Advisory Opinion No. 61 ("Appointment of Law Partner of Judge's Relative as Special Master") and Advisory Opinion No. 64 ("Employing a Judge's Child as Law Clerk").

Canon 3B(3) of the Code of Conduct for United States Judges (the "Code") provides the starting point for analysis of these issues. In pertinent part, it states that "[a] judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism." Similarly, Canon 3E of the Code of Conduct for Judicial Employees (the "Employees' Code") provides that judicial employees "should not engage in nepotism prohibited by law."

I. Nepotism

The anti-nepotism provisions in the Codes of Conduct reflect, in part, statutory prohibitions on nepotism found in 28 U.S.C. § 458 and 5 U.S.C. § 3110. Under 28 U.S.C. § 458, "[n]o person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." 5 U.S.C. § 3110 provides that "a public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion or advancement in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official."

Although interpretation of the statutory provisions on nepotism is beyond the jurisdiction of the Committee, the Committee considers those provisions in the context of providing guidance about whether certain workplace or employment relationships violate Canon 3B(3).

A. Employment decisions implicating Canon 3B(3) of the Code

Considerations of nepotism can arise in a variety of circumstances involving appointment and hiring. The Commentary to Canon 3B(3) indicates the range of situations that may implicate this canon: "A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants."

Applying Canon 3B(3), the Committee has concluded that appointing the husband of another judicial colleague to act as a special master is one type of "duty" or "office" implicating the Code and found such an appointment to be impermissible. Similarly, in Advisory Opinion No. 61, the Committee counseled that the appointment of a law partner of a judge's nephew as a special master was also improper. Further, the Committee advised that a judge should not hire as a judicial assistant the spouse of another judge within the same district.

Canon 3B(3) also applies to the appointment and hiring of volunteer employees, for example when a judge appoints a law student as an unpaid voluntary extern. *See* Advisory Opinion No. 111 ("Interns, Externs and Other Volunteer Employees" noting that volunteer employees are subject to the Code of Conduct); and *Guide to Judiciary Policy*, Vol. 12, § 550.30.30 (Requirements for Gratuitous/Volunteer Services) (courts may not accept volunteer services from individuals related to judges or a public official of the court).

The Committee has counseled against appointing a judge's child to serve as defense counsel under the Criminal Justice Act, but has concluded that colleagues on the court may appoint another judge's child to serve as defense counsel, so long as the appointment does not constitute de facto full-time service and so long as no other unusual circumstances create the appearance that the court is favoring the child of one of its own judges.

The Committee has also concluded that the spouse of a bankruptcy judge may be listed on a register of mediators for the bankruptcy court when no member of the court is involved in the selection for placement on the register or in the selection of the mediator in a particular case and provided the spouse does not serve as a mediator in a case assigned to the judge.

Advisory Opinion No. 64, which discusses the appointment of law clerks in considerable depth, indicates that while a judge may not appoint as a law clerk a person related to a judge of the same court, the judge may appoint as a law clerk a person who is related to a judge of another federal court within the same circuit. The Committee reached this conclusion even though a Comptroller General Opinion in 1936 held that law clerks are not an "office" or "duty" within the ambit of the nepotism statute. *See* 15 Comp. Gen. 765 (Mar. 6, 1936). Under Advisory Opinion No. 64, it is clear that the appointment or employment of law clerks is within the ambit of Canon 3B.

Advisory Opinion No. 64 also comprehensively addresses the distinctions that may be drawn between appointment or employment in a judge's own court compared with appointment or employment in a related court or in a totally separate court. Applying this guidance, the Committee has advised that it is ordinarily improper for a district judge to hire the relative of a magistrate or bankruptcy judge in the same district and vice-versa. Similarly, in the case of bankruptcy and magistrate judges within the same district, it is inadvisable for one judge to hire the relative of another. *See* Advisory

Op. No. 64. The Committee has also concluded that a district court judge should not hire the child or the spouse of a grandchild of a senior district judge of the same court.

B. Employment circumstances not strictly involving appointment

Canon 3B(3) and the relevant statutes may also encompass workplace situations other than initial appointment or employment decisions. 28 U.S.C. § 458, for example, states that "[n]o person shall be. . . *employed in* any office or duty in any court" if the person is related to a judge within the degree of first cousin (emphasis added).

In these situations, the Committee has advised that Canon 3B(3) relating to nepotism and favoritism applies to the appointment of employees, but generally does not prevent the continued employment of an existing court employee who, for example, becomes a relative of a judge of the court after being hired. Even so, the Committee has cautioned judges to avoid the appearance of impropriety in these situations by ensuring that the affected employee is not supervised by, and promotions are not dependent on, the actions of the judge. In other words, the duty to avoid nepotism applies not only to the initial employment decision but also to the continuing employment relationship.

For example, the Committee has advised that a judge does not violate Canon 3B(3) by continuing to employ a law clerk who is related to another judge on the same court, where the law clerk was selected before the other judge was nominated or appointed to the court, and where the law clerk does not work on cases handled by the relative/judge. *See* Advisory Op. No. 64.

Similarly, the Committee concluded that the marriage of a magistrate judge to a law clerk already employed by another magistrate judge would not preclude the continued employment of the law clerk, because under those circumstances, the power of appointment has not been implicated.

C. Nepotism by judicial employees

Similar to the Judge's Code, under Canon 3E of the Employees' Code, "[a] judicial employee should not engage in nepotism prohibited by law." To clarify what acts are prohibited by law, Canon 3E directs readers to two statutory provisions: 5 U.S.C. § 3110 and 28 U.S.C. § 458.

28 U.S.C. § 458 applies to appointment and employment of judges and their relatives. Under that statute, a judicial employee with appointment and employment authority may not appoint or employ someone "in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." *See id.* § 458(a)(1).

5 U.S.C. § 3110 broadly prohibits a judicial employee from appointing, employing, or promoting his or her own relative "to a civilian position in the agency in which he is serving or over which he exercises jurisdiction." Section 3110 also prohibits a judicial employee's relative from accepting or receiving compensation for such

appointment, employment, or promotion. "Relative" is defined as the public official's "father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister." 5 U.S.C. § 3110(a)(3).

The Committee has applied Canon 3E of the Employee Code to a broad range of situations involving appointments and employment. For example, the Committee has advised that a chief probation officer should not make or influence any personnel decision affecting his spouse, who was a probation officer within the same office.

Likewise, the Committee concluded that the daughter of a federal judge should not be hired as a United States probation officer to serve the district court in which that judge sits. The Committee has also advised that a chief probation officer should not hire the spouse of the deputy chief probation officer.

II. Favoritism

A. Issues arising under Canon 3B(3) of the Code

Canon 3B(3) requires judges to avoid not only nepotism, but also "favoritism." In contrast to nepotism, favoritism is not a concept that is limited to defined family relationships. Instead, the focus of the Canon is on the appearance that someone may gain an advantage in the appointment or employment process, for reasons other than merit, because of his or her broader connections to a judge or judicial employee.

As noted in Advisory Opinion No. 61, by including "favoritism" as an impermissible condition in the appointment or employment process, the scope of Canon 3B(3) exceeds the statutory ban on nepotism found in 28 U.S.C. § 458. In the context of the acts described in Advisory Opinion No. 61, the Committee observed that some "circumstances raise the question of when an appointment, even though initially proposed on the basis of merit, ought to be precluded because of relationships that either indicate or create the appearance of favoritism."

Applying these principles, for example, the Committee advised that a judge should not hire a person with whom the judge is in a serious romantic relationship. Further, the Committee advised against the appointment of a retired federal district judge as a special master charged with the responsibility of resolving claims for large amounts of attorney's fees sought in a complex lawsuit. Concerned that the court would be setting the special master's compensation, the Committee concluded that the appointment created the appearance of favoritism and might undermine public confidence in the impartiality of the judiciary. However, the Committee did not find an improper appearance of favoritism when a judge hired a law clerk who was the child of a legislative branch official, where it was clear that the appointment was based on a merit selection process.

Favoritism principles may also counsel against an appointment where the appointment poses a significant risk of ongoing conflicts of interest. In the context of a magistrate judge appointment, for example, the Committee advised that although the appointment of the spouse of the clerk of court as a magistrate judge in the same court would not violate the nepotism canon (where neither clerk nor the clerk's spouse are related to a judge on the court), each judge involved in the appointment process should evaluate whether, if selected, the judge's relationship to the clerk of court would give rise to the appearance of favoritism.

B. Issues arising under Canons 2A and 2B of the Code

The provisions of Canons 2A and 2B also bear on issues of favoritism in hiring and employment practices:

> CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES
>
> A. Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

Concerns under these Canons often arise when a judge is asked to recommend someone for appointment to a judicial or other office. The Commentary to Canon 2B is helpful when discerning a judge's role in the selection of other judges. That Commentary provides that "[j]udges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship." Commentary to Canon 2B. For example, responding to an inquiry from the ABA concerning a potential candidate's qualifications for appointment to the bench would be proper where the response is based on the judge's personal observations of the candidate. A judge may also respond to official inquiries concerning a person being considered for a judgeship but should not "initiate communications" on such topic. *See* Advisory Opinion No. 59 ("Providing Recommendations or Evaluations of Nominees for Judicial, Executive, or Legislative Branch Appointments").

April 2016; September 2024 (minor technical changes)

Committee on Codes of Conduct Advisory Opinion
No. 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates

This opinion considers the propriety of participation by a judge or law clerk (either current or future) in programs sponsored by research institutes, think tanks, associations, public interest groups, or other organizations engaged in public policy debates. Over time, the Committee has received multiple inquiries generally related to this topic, including requests related to organizations as varied as national bar associations; state and local bar associations; associations of lawyers, judges, and law students; advocacy groups; research institutes; public interest groups; and other organizations.

A. Background: The Organizations

In recent years, the types of organizations covered by this Advisory Opinion have played an ever-more prominent role in the public policy discourse of the nation. As a result, judges and judicial employees are more frequently called upon to decide whether participation in a particular educational seminar or conference is consistent with their role in the judiciary. Organizations that were once clearly engaged in efforts to educate judges and lawyers have become increasingly involved in contentious public policy debates. Gone are the days when it was possible for a judge to identify the sponsoring organization and know that the judge was within a bright-line “safe zone” for participation.

In assessing the propriety of participation in a conference or seminar (either as lecturer, panel member, or attendee), a number of important considerations confront the judge or judicial employee. The factors that relate to the sponsoring organization itself include: (1) its identity; (2) its stated mission, including any political or ideological point of view; (3) whether it engages in education, lobbying, or outreach to members of Congress, key congressional staffers, or policymakers in the executive branch; (4) whether it conducts outreach or educational programs for the media, academia, or policy communities; (5) whether it is actively involved in litigation in the state or federal courts, including the filing of amicus briefs, participating in moot courts or boards to prepare candidates or advocates; (6) whether it holds rallies, meetings, or appearances in conjunction with hearings or trials with a view towards influencing public opinion; (7) whether it advocates for specific outcomes on legal or political issues; (8) its sources of funding; and (9) whether it is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations.

Additional factors that relate to the educational program itself need to be considered by the judge or judicial employee, including: (1) whether the cost of attendance (including items such as scholarships, tuition waivers, and room and board) will be borne by sponsoring organization; (2) whether the sponsoring organization

requests that participation, materials, or subject matter be maintained secret or confidential; and (3) whether participation is limited to certain applicants based on criteria designed to screen out persons of particular backgrounds or points of view or is open for general participation.

B. Applicable Canons and Commentary Background

The activities of judges and judicial employees are governed by different codes of conduct, but many of the obligations under both the Code of Conduct for United States Judges ("Judges' Code") and the Code of Conduct for Judicial Employees ("Employees' Code") are the same for either a judge or law clerk participating in outside educational activities.

The foundational principle of the Judges' Code is found in Canon 1: "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." As explained in the Commentary to Canon 1, this foundational principle exists because "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges." A judge's compliance with the law and the Judges' Code preserves public confidence in the impartiality of the judiciary, whereas "violation of this Code diminishes public confidence in the judiciary and injures our system of government under law." Commentary to Canon 1. Indeed, Canon 2A directs that "[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Employees' Code mirrors the foundational Canon 1 principle of the Judges' Code. Canon 1 of the Employees' Code states: "An independent and honorable Judiciary is indispensable to justice in our society." Judicial employees must therefore "personally observe high standards of conduct so that the integrity and independence of the judiciary are preserved and the judicial employee's office reflects a devotion to serving the public." Id. All provisions of the Employees' Code should be construed and applied to further these objectives." Id. Notably, in addition to the standards called for under the Employees' Code, judicial employees are further subject to potentially "more stringent standards required by law, by court order, or by the appointing authority." Id. Canon 2 of the Employees' Code similarly directs that a judicial employee should not engage in any activities that would call into question the propriety of the judicial employee's conduct in carrying out the duties of the office.

Participation in outside educational activities also must be consistent with the Canon 2 principle, found in both the Judges' and Employees' Codes, mandating the avoidance of both impropriety and the appearance of impropriety in all activities. To that end, Canon 2B of the Judges' Code provides:

> A judge should not allow . . . social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige

> of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

In nearly identical terms, Canon 2 of the Employees' Code provides that "[a] judicial employee should not allow . . . social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or appear to advance the private interests of others."

In determining whether to attend or participate in an outside activity, judges also should be guided by Canon 3, which directs a judge to perform the duties of the office "fairly, impartially, and diligently." Canon 3A(1) admonishes that "a judge. . . should not be swayed by partisan interests, public clamor, or fear of criticism." The Commentary to Canon 3A(3) also reaffirms a judge's "duty under [the Judges' Code] to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all of the judge's activities," whether professional or personal. Likewise, law clerks should be guided by Canon 3 of the Employees' Code, which requires employees to "adhere to appropriate standards in performing the duties of the office." Specifically, Canon 3C mandates:

> A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner . . . [and] should never . . . perform any . . . function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

Of particular relevance to outside educational activities, Canon 4 of both the Judges' Code and Employees' Code offers guidance on participation in extrajudicial activities. For judges, Canon 4 allows that "a judge may engage in extrajudicial activities, including law-related pursuits . . . and may speak, write, lecture and teach on both law-related and nonlegal subjects" but cautions that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification." The Commentary to Canon 4 reflects that, because a judge is "a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice" and that, "[t]o the extent the judge's . . . impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law." For law clerks, Canon 4 directs that, "[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements." When considering outside activities that concern the law, the legal system, or the administration of justice, however, a judicial employee must "first consult with the appointing authority to determine whether the proposed activities are consistent with . . . [the] code."

Additionally, judges and employees must consider canons governing reimbursement for expenses. Canon 4H of the Judges' Code allows a judge to "accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety," subject to certain restrictions. However, judges must be cognizant of Canon 4D(4), which requires judges to "comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in [The Judicial Conference Ethics Reform Act Gift Regulations ("Gift Regulations")]." Canon 4E of the Employees' Code similarly reflects:

> A judicial employee may receive compensation and receipt of expenses for outside activities provided that receipt . . . is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source of the payment or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety.

Canon 4E further directs that expense reimbursement "be limited to the actual cost of travel, food, and lodging reasonably incurred by a judicial employee . . . . Any payment in excess of such an amount is compensation."

Lastly, outside activities also are governed by Canon 5 restrictions found in both the Judges' and Employees' Codes regarding the proscription against political activity. Canon 5A specifies that "[a] judge should not make speeches for a political organization" or attend any "event sponsored by a political organization." The Commentary to Canon 5 defines "[t]he term 'political organization' . . . [as] a political party, a group affiliated with a political party or candidate, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office." Canon 5(C) provides further that "[a] judge should not engage in any other political activity."

For law clerks, the Employees' Code likewise directs against engaging in political activity, whether partisan or nonpartisan. In particular, Canon 5A provides that "[a] judicial employee should refrain from partisan political activity; . . . should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; . . . and should not otherwise actively engage in partisan political activities." Canon 5(B) further provides that "[a] member of the judge's personal staff [or] a lawyer who is employed by the court and assists judges on cases . . . should refrain from nonpartisan political activity."

C. Summary of Prior Committee Advisory Opinions on Attendance or Participation in Privately Funded Seminars

The Committee has provided guidance on the permissibility of judicial participation in legal seminars in Advisory Opinion Nos. 67, 87, 93, and 105.

Advisory Opinion No. 67 addresses a judge's attendance at "seminars and similar educational programs organized, sponsored, or funded by entities other than the federal judiciary." Notably, this Advisory Opinion applies equally to law clerks, who are subject to nearly identical standards under the Employees' Code. As stated in Advisory Opinion No. 67, the education of judges (and law clerks) in various academic and law-related disciplines serves the public interest, except where particular circumstances make attendance inadvisable. That Advisory Opinion sets out six nonexclusive factors that may affect the propriety of attendance at a seminar:

(1) whether the sponsor is a recognized and customary provider of educational programs;

(2) whether an entity other than the sponsor is a substantial source of funding;

(3) whether the sponsor or a source of substantial funding of the seminar is currently involved or is likely to be involved as a party or attorney in litigation before the judge;

(4) the subject matter of the seminar, including whether contributors of seminar funding play a role in designing the curriculum or are involved as parties to litigation;

(5) the nature of the expenses paid or reimbursed or whether the seminar is primarily educational and not recreational in nature; and

(6) whether the seminar provider makes public disclosure about the sources of seminar funding and curriculum.

Advisory Opinion No. 67 specifically notes that the circumstances of the educational program may raise questions under Canons 2, 3, and 4 of the Judges' Code. If there is insufficient information for the judge (or law clerk) to decide whether attendance may run afoul of the Code, the judge (or law clerk) should decline the invitation or take reasonable steps to obtain additional information. Ultimately, if the necessary additional information is not available or if additional information obtained does not resolve questions concerning the propriety of attendance, the judge (or law clerk) should not attend. Finally, judges and law clerks should keep in mind that payment of tuition and expenses involved in attendance at an independent seminar constitutes a gift within the meaning of the Code, the Gift Regulations, and applicable statutes, and thus acceptance of such payment may be restricted or prohibited. It is the judge's or law clerk's obligation to ensure that acceptance of the payments is in compliance with all applicable rules.

Advisory Opinion Nos. 87 and 105 also provide guidance on the permissibility of judicial participation in legal seminars. Advisory Opinion No. 87 discusses participation in continuing legal education ("CLE") programs offered by "CLE providers, accredited

institutions, and similar established educational providers." In Advisory Opinion No. 87, the Committee opined that Canon 2 principles are implicated when a judge participates in legal training programs whether such programs offer CLE credit or not and whether the sponsor is a "for-profit" or "non- profit" entity. Thus, merely because a provider offers CLE credit or is a "non-profit" entity does not eliminate the requirement that a judge determine whether his or her participation runs afoul of Canon 2.

Advisory Opinion No. 105 focuses on "private law-related training programs other than those offered by CLE providers, accredited institutions, and similar established educational providers . . . offered to a selected audience of attorneys and/or litigants and designed to improve attendees' legal skills or performance in judicial proceedings." Advisory Opinion No. 105 identifies five factors that a judge should consider before participating in a private law-related training program:

(1) the sponsor of the training program;

(2) the subject matter;

(3) whether there is a commercial motivation for the program;

(4) the attendees, including whether members of different constituencies are invited to attend; and

(5) other factors, including the location of the program and advertising or promotion of the event.

In the case of programs offered by bar associations and other nonprofit entities, consideration of these five factors "raise[s] fewer concerns than [in programs] sponsored by for-profit entities, mainly because the sponsors do not have a commercial motivation and the programs are generally open to a broad audience." Id. However, "[a] judge's participation in a training program that will only benefit a specific constituency, as opposed to the legal system as a whole, cannot be characterized as an activity to improve the law within the meaning of Canon 4." Id. As an example, the Committee has said that "judge participation in legal training offered by an issue-specific advocacy group that appears regularly in the judge's court may be perceived as lending the prestige of the judicial office to advance the interests of the group." Id.

Advisory Opinion No. 93 addresses the ethical implications of a judge's or law clerk's extrajudicial, law-related activities arising under Canons 1, 2, 4, and 5:

> [T]o qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.

Advisory Opinion No. 93 further states that, while "[a] judge's participation in law-related activities is encouraged . . . not every activity that involves the law or the legal

system is considered a permissible activity." This is so because "[l]aw is, after all, a tool by which many social, charitable and civic organizations seek to advance a variety of policy objectives." Id. "A permissible activity . . . is one that serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or [a permissible activity is one that] enhances the prestige, efficiency or function of the legal system itself." Id. On the other hand, "judicial participation in organizations that advocate particular causes rather than the general improvement of the law is prohibited." Id.

D. Law Clerks Who Have Accepted an Offer but Not Yet Entered into Service

Concerns are also raised when a conference or seminar is directed to future law clerks. While the Employees' Code applies only to "employees of the Judicial Branch" and not to prospective employees, the Committee has counseled judges that they may impose limits on the pre-employment conduct of their future law clerks to avoid activities contrary to the Employees' Code, such as accepting a salary advance from a law firm prior to a clerkship. See, e.g., Advisory Op. No. 83 (advising that "[a] judge should not permit a law clerk to accept a salary advance from a law firm, either before or during the clerkship" because acceptance "could undermine public confidence in the integrity and independence of the court, and is contrary to [Canons] of the Employees['] Code"). The Committee also has recognized that judges may prohibit their future law clerks from engaging in conduct otherwise permissible under the Employees' Code. Id. (acknowledging that "some judges may prohibit their future . . . law clerks from accepting bonuses or payments that are [otherwise] permissible"). In directing advice to future law clerks, the Committee has restricted the term "future law clerks" to those persons who have accepted future employment in a judge's chambers but who have not yet entered into actual service. The conduct of persons who merely aspire to become employed as a law clerk at some future date are beyond the scope of the Employees' Code.

That said, the Committee is sensitive to the public perception that "law clerks are in a unique position since their work may have direct input into a judicial decision," and, "[e]ven if this is not true in all judicial chambers, the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge." Advisory Op. No. 51.

It is the Committee's view that a judge has the discretion to instruct a future law clerk regarding pre-employment educational opportunities that may have an impact on the clerkship. A future law clerk should consult his or her appointing authority for guidance. The appointing authority should recognize that future law clerks are not fully subject to the Employees' Code until they enter into service, so care should be taken by the judge to ensure that a directive not to participate in First Amendment protected activity be limited to the extent actually necessary to protect the judiciary from the identified harm.

E. Ethical Concerns for Participating in a Sponsored Educational Conference or Seminar

The Committee has counseled that it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis. As stated in Advisory Opinion No. 67, "[t]hat a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending," and a judge's determination whether to attend a particular seminar should be made considering the totality of the circumstances. (See also Note 1 below).

(1) *The identity of the seminar sponsor*

Concerns are raised when the sponsor is regularly engaged in contentious public policy debates. That is so even where the seminar or conference is an isolated offering of education. Additional concerns are raised where the seminar or conference specifically targets judges or judicial employees. See also, *Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs*.

One concern arises from the prohibition in Advisory Opinion No. 105 of "lending the prestige of the judicial office" to advance the interests of a special interest or issue specific group. In that Advisory Opinion, we cautioned that a judge's participation in legal training offered by an issue-specific advocacy group that would benefit only a particular constituency, as opposed to the legal system as a whole, could not be characterized as proper extrajudicial activity involving the law. The Committee has advised that participation in viewpoint-specific programs poses fewer ethical concerns if attendance is open to the general legal community. When the seminar or conference targets a narrow audience of incoming or current judicial employees or judges, the judge or employee must take care to ascertain that the program is not such that it could be seen to curry influence with the employee or judge or to impact the outcome of future cases. While it is undoubtedly true that neither judges nor judicial employees are likely to be influenced by a single seminar, both the Judges' Code and the Employees' Code prohibit participation in programs that might cause a neutral observer to question whether this type of influence is being sought by the sponsoring organization. Participation in a viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole, cannot be characterized as a permissible activity to improve the law.

(2) *Nature and source of seminar funding*

The Committee has advised that the existence of additional "private sponsors" at bar association CLE programs does not categorically prohibit a judge from participating as a speaker or panelist. However, the presence of such sponsors cannot be ignored by judges who participate. In fact, the presence of private sponsors likely increases the need for additional scrutiny. Thus, the Committee has advised in the past that a judge must factor funding and sponsorship information into the evaluation of whether to attend a particular educational program.

(3) *Whether a sponsor or a source of substantial funding is involved in litigation or likely to be involved*

Even if the sponsoring organization is not engaged in litigation, issues are raised if the funding to sponsor the seminar is from sources that are involved in litigation or political advocacy. Where the funding sources are unknown or likely to be from sources engaged in litigation or political advocacy, judges and judicial employees should not participate. The Committee has cautioned that, if there is insufficient information for the judge to decide whether to attend a seminar, then the judge should decline the invitation or take reasonable steps to obtain additional information. Advisory Op. No. 67.

(4) *Subject matter of the seminar*

Ordinarily, the subject matter of seminars is not an issue unless the judge or judicial employee is aware that the sponsor or source of substantial funding for the seminar is a litigant before the judge and that the topics covered in the seminar are directly related to the subject matter of the litigation. Advisory Op. No. 67. When the judge or judicial employee is unable to determine the sources of funding, the Committee cautions potential speakers or applicants against participation.

Further, Canon 4A of the Employees' Code reminds judicial employees that, as a general matter, their outside activities "should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves." The Committee has previously advised that these concerns may be present when an advocacy organization takes positions on legal issues that frequently come before the federal courts. Where the participation of a judge or judicial employee in a seminar could create the impression of a predisposition regarding a legal issue or could suggest that a proposed decision may be influenced by the relationship with the advocacy group, participation is likely inappropriate. The Committee previously has advised that, although attendance at a seminar that emphasizes a particular viewpoint could be perceived as merely legal training, attendance that requires the attendee to form a lasting association with the sponsoring organization is impermissible.

(5) *Nature of expenses paid*

Payment of tuition and expenses involved in attendance at an independent seminar constitutes a gift within the meaning of the Code, the Gift Regulations, and applicable statutes, and thus acceptance of such payment is subject to restrictions.

The Gift Regulations, which implement 5 U.S.C. §§ 7351 and 7353, prohibit judicial officers and employees from soliciting or accepting a gift from any person (1) who is seeking official action from or doing business with the court or (2) whose interests may be substantially affected by the performance or nonperformance of the judge's or employee's official duties. *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, §§ 620.30, 620.35. The acceptance of gifts by judges and judicial employees implicates

Canons 1, 2, 3, 4, and 5 of the Judges' and Employees' Codes regarding preserving the integrity and independence of the judiciary, avoiding even the appearance of impropriety, and discharging the duties of their offices with respect, dignity, and impartiality. See also Advisory Op. No. 67.

The Gift Regulations preclude a judicial officer or employee from accepting a gift "if a reasonable person would believe it was offered in return for being influenced in the performance of an official act or in violation of any statute or regulation." *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.45. The Committee has previously opined that judges and law clerks may accept a waiver of tuition and reimbursement of expenses to attend independent, law-related seminars where neither the sponsor nor the source of the funding for such activities (1) is involved in litigation before the court, (2) is likely to come before the court, (3) is seeking to do business with the court, or (4) has any interests that may be substantially affected by the performance or nonperformance of the judge's or law clerk's official duties. In addition, where the sources of the funding for the event are unknown, judges and law clerks should inquire as to the specific sources to ensure that there is no actual or potential conflict or appearance of impropriety.

(6) *Other Factors*

One additional factor meriting further consideration is political activity. Canon 5 of both the Judges' Code and the Employees' Code prohibits political activity by judges and law clerks. The Committee has broadly interpreted "political activity" to include any activity involving "hot-button issues in current political campaigns" or which is "politically-oriented" or has "political overtones." For instance, the Committee has advised law clerks to avoid outside activities that involve contentious political issues and has advised law clerks not to attend a legal training program sponsored by an issue-specific advocacy group that may be involved in federal litigation.

When a judge engages in law-related activity with political overtones, a judge should consider whether the express or implied values of other canons will be contravened. "A judge should be sensitive to the nature and tone of the activity, and should not be drawn into an activity in a manner that would contravene Canon 2's goals of propriety and impartiality or Canon 5A's prohibition of activities pertaining to political organizations and candidates." Advisory Op. No. 93. Where participation would undermine public confidence in the impartiality of the judiciary, would give rise to an appearance of engaging in political activity and of undue influence on the judge, or would otherwise give the appearance of impropriety, the Committee has advised against attending a seminar or conference.

Notes for Advisory Opinion No. 116

[1] Although Advisory Opinion No. 67 provides guidance to judges, this guidance is equally applicable to law clerks. As members of a judge's personal staff, law clerks must be more circumspect in their activities than other court employees due to their direct association with a single judge.

Because of this close association and the application of similar ethical standards, the Committee's evaluation of whether a judge may participate in a seminar or conference also incorporates whether a law clerk may participate, except as otherwise noted.

February 2019

Committee on Codes of Conduct Advisory Opinion
No. 118: Ethics Considerations Related to Public Speech and Civic Engagement by Judges

As the role of the federal judiciary within the American system of government is often a topic of public discussion and debate, judges are rightly concerned about the appropriate ethical boundaries to be observed when they are called upon, or desire to, speak or otherwise engage publicly about a broad range of issues. This advisory opinion summarizes the Code of Conduct principles that provide guidance related to civic engagement by judges. Necessarily, each situation depends on the context, and the question of whether to participate in public discussion or other civic engagement must be decided by the conscientious judge exercising sound judgment. But the Code of Conduct, its Commentary, and several other advisory opinions provide judges with helpful guiding principles.

Canon 4 provides, broadly, that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." Regarding law-related activities in particular, the Commentary to Canon 4 explains that "as a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice." The Commentary encourages both law-related and non-law-related extrajudicial activities "to the extent that the judge's time permits and impartiality is not compromised," noting that "complete separation of a judge from extrajudicial activities is neither possible nor wise."

It does not follow, however, that every activity that involves the law or the legal system is considered permissible activity. Interpreting these provisions of the Code, Advisory Opinions No. 50 ("Appearance Before a Legislative or Executive Body or Official") and No. 93 ("Extrajudicial Activities Related to the Law") provide important guidance regarding ethically acceptable civic engagement and judicial speech. In Advisory Opinion No. 93, the Committee explained that "to qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or legal system as a means to achieve an underlying social, political, or civic objective." It follows, the Committee concluded, that "permissible law-related activities are limited to the kinds of matters a judge, by virtue of the judge's judicial experience, is uniquely qualified to address," and that either "serve[] the interests generally of those who use the legal system, rather than the interests of any specific constituency," or "enhance[] the prestige, efficiency or function of the legal system itself." In addition to activities addressing the legal process, permissible law-related activities may include those that are "directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group." Advisory Opinion No. 93 notes that, "[w]hether an activity benefits a specific constituency or the legal system as a whole will sometimes be a close question" related

to "how closely related the substance of the activity is to the core mission of the court of delivering unbiased, effective justice to all."

In Advisory Opinion No. 50, the Committee interpreted Canon 4A(2), which provides that "a judge may consult with. . . an executive or legislative body or official. . . to the extent that it would generally be perceived that a judge's judicial experience provides expertise in the area." The Committee explained that "a judge properly may appear before a legislative or executive body or official. . . with respect to matters concerning the administration of justice. Examples would be matters relating to court personnel, budget, equipment, housing, and procedures. These matters are all vital to the judiciary's housekeeping functions and the smooth operation of the dispensation of justice generally." The Committee cautioned, however, that "a judge may appear at a public hearing before or consult with an executive body or official relative to matters *not* concerning judicial administration only to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in that area." Advisory Opinion No. 50 counsels that when a subject matter "falls close to the line between the permissible and impermissible categories for consultation with public bodies," a judge should consider "the basic purpose and intent of the canon, and the likelihood that litigation relating to the subject matter will come before the judge."

The Code and related advisory opinions confirm that judges may speak about the history and role of the federal courts in our society, their operation and governance, the importance of jury service, suggestions to improve the legal system, and related topics. This includes, for example, public statements about the need for judicial security and funding sufficient for the courts to carry out their responsibilities. Such communications are by their nature "consistent with the obligations of judicial office" under Canon 4. These ethics principles also permit judges to speak or write about the independence of the judiciary, or advocate for the rule of law in general, including why both values are crucial to our system of government.

In addition, the Commentary to Canon 4 provides that "[w]ithin the boundaries of applicable law. . . a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government." Although this Commentary addresses persecution specifically, the Committee believes the Code and its previous advisory opinions leave room, in at least some circumstances, for the measured defense of judicial colleagues from illegitimate forms of criticism and attacks that risk undermining judicial independence or the rule of law, whether or not they rise to the level of persecution. *See, e.g.*, Chief Justice's 2024 Year End Report on the Federal Judiciary, at p.5 (noting "four areas of illegitimate activity that. . . threaten the independence of judges on which the rule of law depends: (1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments").

The Code and related Committee guidance also suggest a range of prudent limits judges should consider with respect to their civic engagement and extrajudicial activities. Canon 4, for example, cautions judges to avoid activities that "detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification." Canon 2A counsels that "a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary." Canon 3A(6) provides that judges should avoid "public comment on the merits of a matter pending or impending in any court." Canon 5 prohibits a range of specifically political activity, including making speeches for political organizations or candidates, publicly endorsing or opposing candidates for political office, or making political contributions.

These general cautions in the Code do not lend themselves well to precise definitions, and even seemingly clear limits permit a variety of exceptions. For example, restrictions on "public comment" do not limit judges from explaining the legal process in general, promoting improvements to the law, discussing court procedures, or making "scholarly presentations made for purposes of legal education." *See* Canon 3A(6). Likewise, the extrajudicial activities permitted under Canon 4 are not considered to be "political activity" as defined in Canon 5, *see* Canon 5C, though in Advisory Opinion 93 the Committee cautioned that "because of the ethical risks associated with any politically oriented activity, we construe permissible Canon 4 activities in this context narrowly, restricted to those activities most directly related to the law and legal process."

The Committee's past advice on related topics also suggests that considerations of tone, context, and form should inform a judge's assessment concerning the propriety of civic engagement and judicial speech in general—including speech not intended for public attribution to the judge. And, as noted above, the Code suggests the need for greater caution and discretion when judges choose to speak or write publicly about topics further removed from the development of the law or the core functions of the judiciary.

Regarding the tone of extrajudicial writing, for example, the Committee has advised that judges "should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the office." *See* Advisory Opinion No. 55 (Extrajudicial Writings and Publications). It follows that, when addressing matters of public controversy or expressing critical commentary on a legal issue, a judge should favor reasoned discourse and respectful language over demeaning rhetoric or acerbic criticism that could "detract from the dignity of judicial office." Further, advocacy by a judge that is directed towards people who are not judges may risk lending the prestige of office to a judge's particular cause and may lead to questions about impartiality.

Regarding the context of civic engagement, Advisory Opinion No. 93 counsels that the need to protect impartiality "may preclude a judge's participation in law-related activities or organizations concerning highly controversial subjects." The Committee has advised, for example, that a judge may write a letter to the editor of a newspaper

but should avoid subjects that could raise doubts about impartiality in cases that may come before the judge. Similarly, choosing to speak at an event sponsored by a group that is clearly associated with one side of a controversial issue risks creating questions about impartiality. These concerns may be amplified when a judge's public statements also seek to influence the conduct of private parties. Because of the power and stature of federal judges, communications requesting that others adopt a judge's views or act in ways a judge approves may implicate Canon 2B, which provides that a judge must not "lend the prestige of the judicial office to advance the private interests of the judge."

Judges should also consider whether the chosen form, or method, of their civic engagement may lead to the public perception that the judicial position is being exploited to advance the private interests of the judge or others. In the context of judicial writing, for example, the Committee has advised that judges should "retain a measure of control" over the promotion of their writing to avoid exploitation of the judicial position for private gain. In general, civic engagement activity over which a judge retains a measure of control will create less ethical risk, for example, than writings or public statements that have been solicited by others for their own use or purposes. With respect to some particularly controversial topics, judges should be mindful that simply addressing certain topics might be viewed as taking a partisan position or reflecting a lack of impartiality.

In summary, the Code of Conduct and relevant Committee advisory opinions affirm that judges may choose to engage in a wide range of civic engagement activities, including speaking and writing on core judiciary matters such as advocacy for the rule of law and judicial independence. At the same time, judges should always exercise caution when expressing their personal views to preserve the integrity of the judiciary and to promote public confidence in the courts. The core principle unifying this guidance is, as provided in Canon 1, that judges should "uphold the integrity and independence of the judiciary" in all their activities, both on and off the bench.

February 2026

Committee on Codes of Conduct Advisory Opinion
No. 119: Law Firm Payments to Volunteer Interns and Externs Working in Chambers

Many judges appoint volunteer interns or externs to assist with the work of the courts as part of their legal education. One common scenario involves a law student volunteering to serve in chambers and assist the judge and law clerks by researching, writing, or performing similar tasks. Although unpaid, the student obtains valuable work experience, a better understanding of the courts, and mentorship. The student may also receive academic credit. This opinion addresses whether the intern or extern may additionally receive a payment from a future law firm employer.

As an initial matter, 28 U.S.C. § 604(a)(17)(A) authorizes the Director of the Administrative Office of the United States Courts to "accept and utilize voluntary and uncompensated (gratuitous) services." To ensure that volunteers are "bound by the same ethical restraints and considerations as compensated employees," Advisory Opinion No. 111 ("Interns, Externs and Other Volunteer Employees"), the Code of Conduct for Judicial Employees ("Employees' Code") expressly applies to "interns, externs, and other volunteer court employees." *Guide to Judiciary Policy*, Vol. 2A, § 310.10(a); see also Advisory Op. No. 83 ("Payments to Law Clerks from Future Law Firm Employers"); *Guide to Judiciary Policy*, Vol. 12, § 550.30.30(a) ("A volunteer is an uncompensated judiciary employee. This is designed to protect both the volunteer and the judiciary."). Most relevant here is Canon 4E of the Employees' Code, which prohibits a judicial employee from "receiv[ing] any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States." See also 5 U.S.C. § 7353(a) (prohibiting employees from receiving "anything of value" from those who do business with the courts). In a prior opinion, the Committee advised that this canon may permit an intern or extern to accept a modest "educational stipend" under certain limited circumstances. See Advisory Op. No. 111.

When the source of funds is a law firm, however, the Committee has advised that judges should not appoint volunteer interns or externs "who are provided payments by law firms before, during or after the [internship or] externship that are dependent on the individual serving as a judicial [intern or] extern." Advisory Op. No. 83. The Committee has also advised against appointing an intern who will be paid from funds "provided by a pool of local law firms." Advisory Op. No. 111 ("[A] judge should not accept the services of a volunteer law clerk who would be privately compensated by the law school from which the clerk graduated, where the funds would be solicited from lawyers."). Such payments implicate Canon 2 of the Code of Conduct for United States Judges ("Judges' Code"), which requires judges to "avoid impropriety and the appearance of impropriety in all activities."

Therefore, judges should inquire whether their interns or externs will receive a stipend or any other payment from a future law firm employer. Similarly, interns and externs should advise their judges whether they intend to accept a stipend or payment from a future law firm employer. If so, the judge should examine the circumstances surrounding the payment. If the payment is tied in any way to the intern's or extern's

service with the court, then the judge is advised against proceeding with the appointment. For example, if a law firm intends to pay a summer stipend to a first-year law student on the condition that the student intern or extern for a judge, then the payment would violate Canon 4E of the Employees' Code and raise an appearance of impropriety. It does not matter if the payment is made before the internship or externship begins or after it ends. See Advisory Op. No. 83. Nor does it matter if the law firm conditions the payment on obtaining any public-service position—even a position outside the judiciary—because the stipend would still be provided as a result of the individual's service as a judicial intern or extern.

If, however, the stipend or payment is *not* tied in any way to the intern's or extern's service with the court, then the payment may be permissible under the Employees' Code and the Judges' Code. If, for example, a law firm offers a stipend or other payment to a future summer associate conditioned only on a promise not to work for a competitor firm, then the payment is arguably not tied to that associate's service with the court. Even then, however, the payment may not be made during the internship or externship. Cf. Advisory Op. No. 83 ("A law clerk may not, during his or her service as a law clerk, accept any payment or salary advance from a law firm . . . ."). Decisions regarding payments made before or after an internship or externship are best left to each judge applying sound judicial discretion to the facts. In examining such payments, the Committee encourages judges to consider whether the payment is, or appears to be, compensation for an intern's or extern's work with the judiciary. The judge must be satisfied that the funding arrangement complies with applicable ethical standards, including the Employees' Code, the Judges' Code, and relevant Committee guidance, before appointing the student as an intern or extern. The Committee also recognizes that some judges may prohibit interns and externs from accepting any stipend or similar payment, regardless of the payment timing or other circumstances. Finally, an intern or extern who receives a permissible payment from a future employer should not work on any matter in which the employer appears as counsel. See Advisory Op. No. 74 ("Pursuit of Future Employment by Law Clerks and Staff Attorneys"); Advisory Op. No. 111.

Importantly, the stipends or other payments addressed here are distinct from ethically permissible clerkship bonuses and signing bonuses, which are specifically addressed in Advisory Opinion No. 83. A clerkship bonus is tied to the individual's experience as a law clerk—experience for which the clerk has been or will be compensated by the United States. It is not, as such, payment for the clerk's actual work. Similarly, a signing bonus offered uniformly to all new associates of the firm, paid when the offer of employment is accepted, is distinct from the stipends addressed here. A signing bonus is not dependent on an individual's judicial service and is not at risk of being perceived as compensation for unpaid work for the judiciary. By contrast, a judicial intern or extern is not paid, and therefore a stipend from a law firm for financial support is more likely to be perceived as a payment or salary for work done on behalf of the judiciary in contravention of Canon 4E.

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Guide to Judiciary Policy

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*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

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COMPENDIUM OF SELECTED OPINIONS (February 2026)

Introduction

This Compendium contains a summary of selected published and unpublished opinions issued by the Committee on Codes of Conduct. To address an ethical issue, the reader should consult the current Codes of Conduct, the Ethics Reform Act of 1989, and the regulations promulgated thereunder, other relevant statutes such as 28 U.S.C. § 455, the published advisory opinions of this Committee, and this Compendium.

This Compendium contains summaries of the advice given in response to confidential fact-specific inquiries over a period of several decades. This may result in some seeming inconsistencies between entries. While these summaries are intended to provide general guidance, the factual circumstances of each inquiry inevitably vary, and the advice given previously may not be applicable to a current question. Accordingly, the reader is encouraged to consult the Committee or one of its members with respect to any specific factual situation he or she is confronting. Each member of the Committee has a set of the Committee's unpublished opinions and can answer any questions the reader may have regarding a particular one, without, of course, disclosing the identity of the person who solicited the advice. The procedures for obtaining an advisory opinion from the Committee are set forth in the "Introduction" section of each code of conduct in Part A of this volume.

The Compendium has three Parts. Part One contains opinions interpreting the Code of Conduct for United States Judges, including some opinions interpreting the Codes that cover various judicial employees. Sections 1 through 5 of Part One correspond to Canons 1 through 5 of the Code of Conduct for United States Judges. Each section begins with the applicable Canon and Commentary. It should be remembered that an activity which is permissible under a particular section may be subject to one of the more general caveats of the canons (e.g., appearance of impropriety). Similarly, the Ethics Reform Act of 1989 and the regulations promulgated thereunder by the Judicial Conference impose additional restrictions, in particular with respect to the receipt of gifts or compensation.

Throughout Part One, opinions based on the Code of Conduct for Judicial Employees are found in separate sections immediately following similar materials related to judges.

Part Two contains opinions interpreting the Ethics Reform Act of 1989 concerning gifts, 5 U.S.C. §§ 7351 and 7353 and the regulations thereunder promulgated by the Judicial Conference. The headings and the chronology of Part Two follow generally that of the gift regulations. Activities that are said to be permissible in Part Two may nevertheless be subject to restriction under the Codes of Conduct.

Part Three contains opinions interpreting the Ethics Reform Act of 1989 concerning outside earned income, honoraria, and outside employment, 5 U.S.C. §§ 13141-13146, and the regulations thereunder promulgated by the Judicial Conference. The headings and chronology of Part Three follow generally that of the outside employment regulations. Activities that are said to be permissible in Part Three may nevertheless be subject to restriction under the Codes of Conduct.

This Compendium may be cited as follows: Compendium § (month + year).

PART ONE: CODE OF CONDUCT FOR UNITED STATES JUDGES

CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

COMPENDIUM OF SELECTED OPINIONS CONCERNING CANON 1

§ 1. Preserving the Integrity and Independence of the Judiciary

§ 1.1 Duty To Report Misconduct

(a) A judge may report to the appropriate authorities perceived professional misconduct by a physician-witness.

(b) Where a judge in the course of judicial duties obtains information suggesting that a crime has been committed in a foreign country, it is appropriate to report the matter to the United States Attorney's Office for such referral as the latter may deem warranted.

(c) A judge should not assume a prosecutorial role, nor chill public access to the courts by assuming the role of a policeman. The Code of Conduct neither prohibits nor requires judges to report perceived criminal misconduct to the appropriate authorities. But if the perceived transgression is of such a nature as to create a likelihood that failure to report it would reflect adversely upon the judiciary, a judge should take appropriate steps to bring the matter to the attention of the authorities. *Cf.* 18 U.S.C. §§ 4, 3057.

(d) When a judge decides to take action in response to perceived misconduct, the reference to appropriate authorities should be made in a neutral fashion. It is preferable simply to supply a copy of pertinent portions of the transcript of judicial proceedings.

§ 1.2 Integrity and Independence of Judiciary: General

- Advisory Opinion No. 93 (extrajudicial activities).

(a) Canon 1 (integrity and independence of judiciary) and Canon 2 (lending prestige) would be implicated by a judge's testimony about the judge's own thought processes in a decision in a previous case. It is not inappropriate to solicit assistance of United States Attorney in effort to quash subpoena.

(b) The participation of bankruptcy judges in a procedure to review records and prepare proposed orders in social security cases for district judges, even if legal, would be inappropriate in the absence of full disclosure to the parties. Canon 1 (integrity of the judiciary).

(c) A judge should not accept appointment by the FBI Director to a board established to advise the FBI on DNA testing; such an appointment would risk sacrificing independence of the judiciary concerns expressed in Canon 1 and the second sentence of Canon 4F.

(c-1) A judge should not participate in a training course designed to teach law enforcement officers how to be more effective witnesses in federal court. Similarly, a judge should not attend a closed-door presentation by the United States Attorney's Office and FBI on the technology of electronic surveillance. Similarly, a bankruptcy judge should not assist in training U.S. trustee staff, or other small, specialized groups of advocates, in the judge's own district, but may permit use of courtroom facilities by such groups (assuming no legal or practical impediments). Similarly, a judge should not participate in a conference organized by the agency appearing in all the court's cases and designed to improve the agency's operations and practices in that court. See Advisory Opinion No. 108.

(c-2) A judge should not serve as president of a national organization designed to promote the authority and independence of prosecutors.

(c-3) A judge should not serve on the board of an organization that assists government and private entities to improve leadership in law enforcement organizations.

(d) Where Congress requires a court to fund a pro bono program out of the court's operating budget, leading to potential administrative conflict between the court's and litigants' needs, judges' exercise of statutory responsibilities in deciding to fund (or not to fund) the program does not impinge on the integrity or independence of the judiciary.

(e) Where court rules impose a confidentiality requirement, a judge should not issue a public statement that would breach confidentiality.

(f) Due to Canon 1 and Canon 5 concerns, judge should not serve on a city council committee responsible for drafting city ordinances for possible enactment.

(g) Although there is no express ethical prohibition against a judge's service on a state court jury, and, depending on the circumstances, such service may implicate several Canons of the Code of Conduct, the Canon 2A command that judges "should respect and comply with the law" permits a judge to appear for jury service unless exempt or excused from such service, assuming that the jury service is not so potentially prolonged as to take away from the judge's duties. A judge serving as a juror should respectfully avoid answering voir dire questions that address the judge's practices and beliefs as a federal judge. Receipt of payment for service as a state court juror should not raise any concerns under the Code of Conduct, and it is unnecessary to decline such payment.

(h) Judges are permitted to discuss ethical standards with their law clerks and instruct them on the requirements in the Code of Conduct "to maintain and enforce high standards of conduct."

§ 1.2-1 Integrity and Independence of Judiciary [Judicial Employees]

(a) Probation Office should not invite contractor employees to government training programs, but may offer training to contractors if it is available to other prospective service providers.

§ 1.3 Service in State Government Positions

- Advisory Opinion No. 76 (service of state employees as part-time United States Magistrate Judges).
- Advisory Opinion No. 93 (extrajudicial activities).
- Compendium §4.6.

(a) A judge should not serve as member of a state Board of Law Examiners. Same for bankruptcy judge. It is inappropriate for a federal judge, who will regularly be called upon by litigants in habeas corpus matters to indirectly review the decisions of the highest court of state, to serve at the appointment and direction of that court on one of its committees. See Compendium § 4.6-5.

(a-1) Nor should a magistrate judge serve on an attorney grievance committee of the state bar.

(a-2) Nor should a judge serve on a state supreme court's committee developing standard civil jury instructions, but federal judges may work closely with the committee in a coordinated endeavor assuming the state court neither appoints them nor directs their participation. Similarly, a judge should not serve on a state bar committee that reviews and prepares proposals for changes to the state court rules of procedure.

(a-3) A judge may teach a legal education seminar to state appellate court judges within judge's circuit because teaching did not involve policymaking for an arm of the state government, but should not accept compensation.

(a-4) A judge should not serve on a CLE board appointed by the state supreme court and exercising rulemaking, budget and subpoena power for the court. Same, for a commission appointed by the state supreme court to develop strategies for providing legal services to the poor.

(b) A part-time magistrate judge may not also serve in a state judicial position. See also Advisory Opinion No. 76. Similarly, judge who previously served on state court should not accept appointment as senior judge of that court, even in inactive status. Similarly, a part-time magistrate judge should not simultaneously serve as a staff attorney for a state court. Similarly, a part-time magistrate judge should not serve as a member of a hearing committee appointed by the state supreme court to address attorney grievances and discipline.

(b-1) A part-time magistrate judge assigned exclusively criminal matters may serve from time to time as a contract hearing officer with respect to specific and narrow legal issues involving local planning and zoning matters. See Code of Conduct for United States Judges, Compliance, Part A. Such contract service does not constitute the dual employment that Advisory Opinion No. 76 found to implicate concern for the independence of the judiciary, and does not involve duties that would overlap the magistrate judge's duties. See also Compendium § 2.15.

(b-2) A judge may hire as a part-time law clerk a person who has taken a leave of absence from previous work on a contract, hourly paid basis serving as a state hearing officer for unemployment benefits.

(b-3) Judge who formerly served on state court should not enter supplementary findings in remanded state criminal case previously handled by judge, even though state law authorizes this.

(b-4) Judge who formerly served on state court should not agree to serve as special consultant to the state as a condition of receiving cost of living increases in state annuity, even though the likelihood of actually serving is small.

(b-5) A judge should not preside, even ministerially, over proceedings in a state-established diversionary program for juvenile offenders.

(b-6) Volunteering as a judge pro tem or serving as a volunteer small claims judge in state court is not a permissible activity for a law clerk. Same for federal public defender employees.

(c) A judge should not serve on investigative, fact-finding ethics advisory panel of state senate.

(d) A judge may be appointed as a state superior court judge pro tempore for one day for the limited purpose of performing, without compensation, the wedding ceremony of the judge's law clerk, where the service performed in the role of state judge is strictly ceremonial in nature. However, a judge should not accept a one-day state judicial appointment for the purpose of admitting an attorney to the state bar, where the state judicial service involves exercising the judicial authority of a state judge.

(e) A judge may serve on a state court commission intended to promote and advance civic education for students and citizens when the judge will not be appointed by a state government official and membership on the commission will not enmesh the judge in state or local government.

§ 1.3-1 Service in State Government Positions [Judicial Employees]

(a) A law clerk should not serve on a state court's disciplinary board hearing panel.

(b) Under the Code of Conduct for Federal Public Defenders, federal public defender may serve on a state bar advisory committee and conduct investigations of federal bar disciplinary matters without compromising independence of office, interfering with official duties or adversely reflecting on his or her role as an advocate.

(c) A federal public defender should not serve in a temporary, nonpaying position as part of a transition team for the attorney general of the state. See Advisory Opinion No. 76.

(d) Canon 4D of the Code of Conduct for Judicial Employees does not permit judicial employees to serve as arbitrators in state court arbitration programs, which would entail active involvement in state court proceedings. Similarly, Canon 4D prevents a law clerk from serving as a state court-appointed arbitrator or mediator. Similarly, a law clerk should not serve on a state court commission that reviews crime victims' claims for compensation from a state reparations fund.

(e) A law clerk should not accept a state court appointment to serve as a volunteer guardian ad litem for children in the juvenile court system. *But see* Compendium § 4.1-3[4] (advising that membership on the *board* of CASA-like organizations is permissible under Canon 4A of Code of Conduct for Judicial Employees). A judicial employee may file a petition in state court for the appointment of a guardian ad litem without raising concerns for the potential of dual service to or supervision by different governments during judicial employment.

(f) A law clerk should not accept appointment to a state government ethics commission, due to concerns under Canons 2, 4, and 5. Same, for service by a judicial employee on a committee that evaluates character and fitness for state bar admission.

(g) A judicial employee should not serve on the board of a public charter school because it would likely create the potential for dual service to and/or supervision by different governments during judicial employment.

(h) A judicial employee may contract with a state court to rate oral interpretation exams on an infrequent basis.

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

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

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

COMPENDIUM OF SELECTED OPINIONS CONCERNING CANON 2

§ 2. Avoiding Impropriety and the Appearance of Impropriety

- Advisory Opinion No. 51 (propriety of judge's law clerk working on a case in which a party is represented by the spouse's law firm).
- Advisory Opinion No. 53 (political involvement of judge's spouse).
- Advisory Opinion No. 76 (service of state employees as part-time United States magistrate judges).

§ 2.1 Recommendations and Endorsements

- Advisory Opinion No. 59 (propriety of a judge giving evaluation of judicial candidate to screening or appointing authority).
- Advisory Opinion No. 65 (judge's recommendation for pardon or parole).
- Advisory Opinion No. 73 (requests for letters of recommendation and similar endorsements).
- Compendium §§ 2.12, 2.13.

(a) A judge should not attempt to use "influence" or the prestige of judicial office to advance the private interests of the judge or others, nor improperly intrude upon or interfere in the judicial proceedings or other legal proceedings being conducted by other officials.

(b) A judge should not recommend a pardon, but may provide factual information in response to requests from appropriate federal or state authorities, or may make a recommendation in response to a Justice Department request (addressed, for example, to the sentencing judge). Advisory Opinion No. 65. Similarly, a judge should not volunteer information in connection with a defendant's application for release on bond. Nor should a judge submit a letter supporting expungement of a friend's state criminal record.

(b-1) A judge may respond to a request for information from a state disciplinary authority about an attorney.

(b-2) When a state parole or pardon or clemency authority is considering an individual's application, a judge should not take the initiative of writing to the state authority to communicate information or opinions about the application, including when the information or opinions have their source outside the judge's work as a judge, such as through pre-judgeship legal representation of the applicant or the crime victims. Upon receiving a request from the state authority, the judge may respond, but the judge should avoid recommendations about the

application outcome, one way or the other, and should limit the response to furnishing factual, objective information of potential relevance to the state authority's decision that the authority might not already know.

(c) A judge should not initiate communications with the sentencing judge, on behalf of relatives, friends, or other persons about to be sentenced; the judge may, however, provide factual information in response to appropriate requests for such information.

(c-1) A judge should not initiate communications with a sentencing judge about the character of a lawyer who is a criminal defendant and about whether the conduct alleged constitutes a felony.

(d) A judge should not furnish endorsements or "blurbs" that will be used to promote sales of books or services. Similarly, a judge should not endorse or permit use of the judge's photo in a commercial brochure for a fitness school. Similarly, a judge should not provide a letter of recommendation to assist the courthouse builder's marketing efforts. Similarly, a judge should not write a letter in support of a new postage stamp honoring an individual when a letter of recommendation is not required as part of the selection process. Also, a judge should not participate in a promotional video for the judge's high school. The critical inquiry is whether the judge's action could reasonably be seen to constitute an official endorsement of the activities of a private person.

(d-1) A judge may write a "foreword" for a new book, but any use of the judge's name or office in the contemplated television advertisements would have a tendency to use the prestige of office. See Advisory Opinion No. 55.

(d-2) A judge may write a review of a book on a legal topic, but use of the judge's name or office for promotional purposes may tend to exploit the prestige of judicial office. See Advisory Opinion No. 55.

(d-3) A judge may preside at a mock trial, but may not allow exploitation of his or her name or office in the marketing of the trial seminar or its published record.

(d-4) A bankruptcy judge may generally encourage debtors to seek financial management services, but should not provide lists of entities providing such services.

(d-5) Judges should not authorize the use of their name, office, or comments to publicize or promote the sale of particular commercial products used by the court, but they may speak or write generally about new technologies and offer their views to colleagues within the judiciary.

(d-6) It is not improper to mention a judge's position on a book jacket statement about the author. Similarly, a judge may engage in activities to promote sales of a book authored by the judge, provided that those activities do not exploit the judicial office. See Advisory Opinion Nos. 55 and 87.

(d-7) A judge may permit an artist to use the judge's likeness in a portfolio or art show, but the judge should not endorse the artist nor should this be implied.

(d-8) Due to Canon 2 concerns, a judge should not speak at a program on discovery hosted by a for-profit company offering discovery services, where the company plans to market its services at the program and advertise the program to current and future clients.

(e) A judge should not permit his or her name to appear on a list of names supporting the election of a lawyer to the ABA House of Delegates, even though the judge's title would not appear, where many of the recipients of the list would know he or she was a federal judge and where it may reasonably appear to many recipients that the endorsement was sought primarily because of the prestige of office. Advisory Opinion No. 73.

(f) A judge may not voluntarily appear and give character testimony, whether in person or by affidavit, but may respond to valid subpoenas for such testimony. Similarly, a judge should not submit a character letter on behalf of a bar reinstatement applicant. Nor should a judge submit a character letter to a regulatory agency considering a friend's license reinstatement. See also Compendium § 2.13.

(f-1) A judge should not send a letter praising a colleague to a legislative committee investigating alleged judicial misconduct.

(g) A bankruptcy judge's service on the Board of Directors of a nonprofit corporation formed for the purpose of certifying lawyer specialization in the field of bankruptcy law would be contrary to Canons 2A and 2B. See Compendium § 2.10(b); see also Advisory Opinion No. 73. Same for judge's service on state court board authorized to certify attorneys.

(h) A bankruptcy judge should not submit a letter of recommendation for an attorney applying for certification by American Bankruptcy Board of Certification, a Virginia nonprofit organization, although recommendation by a bankruptcy judge is a requirement for certification. See also Advisory Opinion No. 73.

(h-1) Bankruptcy judge should not participate in certifying attorneys as bankruptcy specialists as part of state bar advisory committee process.

(i) It is not inappropriate for a judge's recommendation of a former law clerk to appear in a pamphlet prepared by a law school, along with the recommendations of all

other graduates of the law school seeking placement at the hiring conference sponsored by the Association of American Law Schools. The pamphlet is prepared for the hiring conference, which is the traditional venue for initial interviewing for teaching positions at law schools.

(j) There is no impropriety in a judge attending a reception honoring Congressional Black Caucus, where it is neither a fundraising affair nor a "political gathering" intended to promote a party or candidate (Canon 5A(3)) and the judge's mere attendance as a guest of a friend does not lend the prestige of office.

(k) A judge may write letters of recommendation for law clerks and law students and be listed as a reference for an individual attorney, where the judge has special knowledge of the individual based on a long-standing or close working relationship. See Advisory Opinion No. 73. Similarly, a judge may serve as a reference for a bar applicant.

(k-1) Similarly, a judge may initiate contacts with employees of the legislative and executive branches of the federal government on behalf of a relative seeking employment in both federal and nonfederal sectors, where the judge merely communicates information regarding the relative's qualifications for employment and avoids contacting persons or agencies that may have matters before the judge's court.

(k-2) Judges should not initiate such communications, but may respond to requests from an appointing officer or screening committee with objective information about state or federal judicial candidates. Similar considerations apply with respect to communications on behalf of a nominee for an executive branch appointment. See Advisory Opinion No. 59.

(k-3) There is no appearance of impropriety in a judge agreeing to answer prospective applicants' questions concerning the judicial selection process and encouraging qualified individuals to apply for judgeships.

(l) A judge should not provide a statement about the quality of law clerks from a particular law school for use in the law school's promotional brochure.

(m) A judge may be photographed for a law school's admissions catalog with the judge's law clerk, who attended the law school.

(n) A judge should not appear in a video prepared by a private foundation to honor a law firm, as the video might be used for fundraising, commercial, or promotional purposes and would appear to be an endorsement of the firm and the foundation. Similarly, a judge should not appear in a video that will be used by a non-profit organization to honor an attorney whose law firm practices before the judge's court.

(o) A judge's participation in selecting for-profit companies to receive ethics awards improperly lends the prestige of office to commercial ventures.

(p) A judge should not write a letter in support of a friend's application for citizenship, but may be listed as a reference on the application. See Advisory Opinion No. 73.

(q) A judge should not participate in a bar association meeting to advocate naming a courthouse after a judicial colleague, due to Canon 2 concerns. Similarly, a judge should not sign a letter recommending that a group of private attorneys grant a non-monetary award to a law-related program with which the judge is associated.

(r) A judge may write a letter of recommendation for an attorney seeking appointment to a Criminal Justice Act panel to represent indigent defendants, provided that the letter is not a character reference and describes the attorney's skills based on the judge's professional experience with the attorney.

(s) A judge should not provide an employment reference for an individual who is participating in a court-sponsored reentry program, if the relationship between the judge and the person seeking the reference is such that the judge is in no better position than others would be to evaluate that person. See Advisory Opinion No. 73.

(t) A judge should not issue a "certificate of rehabilitation" or other similar recommendation for a convicted defendant, due to concerns under Canon 2B.

§ 2.1-1 Recommendations and Endorsements [Judicial Employees]

(a) Due to Canon 2 concerns, a judicial assistant should not sign a petition in opposition to a parole request of a state prisoner.

(b) Clerks of court should not authorize the use of their name, office, or comments to publicize or promote the sale of particular commercial products used by the court, but they may speak or write generally about new technologies and offer their views to colleagues within the judiciary.

(c) A law clerk should not provide a character letter to a sentencing judge on behalf of a friend, due to concerns under Canons 1 and 2.

(d) A judicial employee should not permit a non-profit organization to use the employee's comment about one of its programs in its promotional materials along with the employee's name and court. However, the employee may allow the non-profit organization to use the comment anonymously.

§ 2.2 Additional Compensation for Performing Judicial Duties

(a) A judge may neither charge nor accept a fee or other compensation for performing a wedding.

(a-1) Reimbursement of expenses necessarily incident to judge's performance of marriage ceremony is neither honorarium nor compensation for official activity, and is not otherwise inappropriate. Reimbursement of expenses for judge's spouse to attend the wedding also raises no appearance of impropriety.

§ 2.3 Financial Dealings with Members of the Judge's Staff

(a) A judge may lend money to a member of the judge's staff, so long as the transaction is a genuine loan, and is not viewed by either party as supplying additional compensation for the services rendered by the staff member.

§ 2.4 Defense Funds

(a) A judge facing criminal prosecution may not solicit or accept, from attorneys or persons whose interests have or are likely to come before the court, financial contributions to a defense fund.

(b) A judge facing criminal prosecution may permit others (excluding the judge's family, staff or counsel) to solicit contributions to a "blind" defense fund on the judge's behalf, provided no contributions are solicited or accepted from attorneys who regularly appear before the judge, or from persons whose interests have or are likely to come before the judge's court or whose interests may be substantially affected by the performance or nonperformance of the judge's official duties, or from persons who have sought or are seeking to do business with the judge's court; and provided the identities of the persons solicited and of the persons contributing are not disclosed to the judge. Contributions in excess of the reasonable cost of defense may be either refunded to the donors, pro rata, or donated to an appropriate charitable organization. Same for judicial employee whose child faces criminal or quasi-criminal prosecution.

(c) A judge may contribute to the defense fund of a friend facing criminal prosecution, provided the fact of the judge's contributions is not used to encourage contributions from others.

(d) It is permissible for judge to contribute to legal defense fund of former political appointee facing criminal prosecution, provided contribution is divorced from judge's official position, criminal matter could not come before judge's court, and fact of judge's contribution is not used to solicit contributions from others.

§ 2.5 Future Employment of Judges

- Advisory Opinion No. 97 (recusal due to appointment or reappointment of a magistrate judge).
- Advisory Opinion No. 84 (judge's pursuit of post-judicial employment).

- Advisory Opinion No. 83 (law clerks' bonuses and reimbursement for relocation and bar-related expenses).

- Advisory Opinion No. 74 (pursuit of future employment by law clerks and staff attorneys).

- Advisory Opinion No. 70 (disqualification when former judge appears as counsel).

(a) It is permissible for a judge who is considering leaving the bench, to explore future employment possibilities with law firms, on a private, dignified, basis. The judge must, of course, recuse from all cases handled by any such law firm during any such negotiations, and for a reasonable period after the negotiations terminate (the exact length of time depending upon the nature of the discussions, the reasons for termination, etc.). Because of this recusal problem, it is advisable to confine such discussions to a limited number of law firms, and over a brief period of time. Advisory Opinion No. 84.

(a-1) It would be inappropriate, in such circumstances, for an active judge to announce his or her intention to resign, and to accept no new case assignments in the interim.

(b) When a judge retires from office to affiliate with a law firm, it is not improper for the formal announcement of affiliation to identify the office and court from which the judge retired.

(b-1) A judge should not permit a law firm to advertise the judge's future employment with the firm while the judge remains in office, due to concerns under Canon 2B and 4D(1).

(c) Newly appointed magistrate judges, and reappointed magistrate judges (after reappointment), need not recuse or notify parties that an attorney or party served on the panel that considered the magistrate judge's application. Sitting magistrate judges seeking reappointment should: (1) recuse (subject to remittal) from cases involving a party or an attorney serving on the selection panel, while reappointment is under consideration or (on failure to be reappointed) for the balance of the term; (2) recuse (subject to remittal) if they know a panel member has a financial or other interest that could be affected substantially by the outcome of a case; and (3) not advise attorneys or parties that comments may be made on the reappointment.

(d) A judicial officer who seeks employment with a government entity that is the named respondent in all cases before the judicial officer should recuse, but may use the remittal process. Whether it is proper to seek such employment depends on whether recusal would unduly affect the litigants or the court's docket; considerations include the availability of other judicial officers, the parties' agreement to remittal, and the length of the hiring process. Advisory Opinion No. 84.

(e) A judge should not attend a partnership retreat with the law firm that is the judge's future employer, even if the judge does not accept reimbursement of travel expenses from the firm. Similarly, a judge who is seeking future employment with an alternative dispute resolution provider should not attend a training seminar or meet with company officers. Similarly, a judge should not engage in communications with a future law firm employer regarding general firm business matters or the judge's future law practice at the firm, meet with firm clients, or attend social events sponsored by the firm.

(f) A magistrate judge should recuse, subject to remittal, where the judge is under consideration for a district court appointment and a member of the appointment screening committee appears as an attorney.

(g) A judge who is seeking post-judicial employment with a law school should not attend law school functions at which the judge's future employment would be announced, perform any public duties related to the future employment, or permit the school to engage in advertisement or marketing related to the judge's future employment.

§ 2.5-1 Future Employment [Judicial Employees]

- Advisory Opinion No. 83 (law clerks' bonuses and reimbursement for relocation and bar-related expenses).

- Advisory Opinion No. 74 (pursuit of future employment by law clerks and staff attorneys).

(a) A law clerk planning self employment after a clerkship ends may, while still clerking (and with judge's approval), form a professional corporation and announce plans to friends and family, but should not undertake overt activities to procure clients and establish a practice and should not: (1) distribute business cards; (2) make public announcements; (3) meet with or provide materials to attorneys; (4) enter into contracts to provide services after clerkship ends.

(b) Law clerk who will work for a law firm before and after clerkship should not be permitted to work during the clerkship on a massive lawsuit that could have a substantial effect on the law firm's major client; insulating law clerk from working for that client while at the law firm may not adequately avoid appearance of impropriety.

(c) A law clerk may occasionally go to lunch or dinner with law firms that are considering extending employment offers, and it is not inappropriate for the law firms to pay for the law clerk's meal.

(d) A law clerk may attend social events sponsored by spouse's law firm, but should avoid accepting such hospitality if the firm has a case pending before the judge.

(e) A prospective law clerk may accept, prior to commencement of the clerkship, a clerkship, signing, or other bonus from a future employer. No signing bonus of any kind may be accepted during the clerkship, but bar-related and relocation expenses may be reimbursed. See Advisory Opinion No. 83. A bonus should not be accepted during a clerkship from a firm that appears occasionally in that court, even if the firm does not appear before the clerk's judge.

(e-1) A law clerk may accept from future employer reimbursement of the costs of a bar review course and related fees, as well as a stipend to permit a period of study for the bar examination prior to commencement of the clerkship. Compensation offered by law firm in excess of relocation and bar-related expenses may not be accepted during the clerkship.

(e-2) A law clerk may accept a bonus that is not connected to the performance of official duties and that is offered by a prospective employer who is not an attorney or litigant in the court.

(e-3) A law clerk may not accept, during a clerkship, a paid trip to a retreat with the law firm that is the clerk's future employer.

(e-4) Law clerk may accept, during a clerkship, payment of a referral fee from the law clerk's former firm to compensate the law clerk for referring an attorney who was hired by the firm during the law clerk's tenure with the firm, but law clerk may not accept an additional referral fee that is contingent on the law clerk's agreement to return to the firm after the clerkship ends.

(e-5) Law clerk may not accept, before or during the clerkship, a salary advance from the law firm that is the law clerk's future employer, even though the advance must be repaid from the law clerk's future salary. Advisory Opinion No. 83.

(f) A volunteer law clerk may not accept any financial benefits from a law firm, including health benefits through the firm's benefit plan, during the term of the clerkship. This guidance would not prohibit a volunteer clerk from accepting financial benefits from the firm before or after the term of the clerkship, assuming the specific arrangements are otherwise appropriate under Canon 4 of the Code of Conduct for Judicial Employees and Canon 2 of the Code of Conduct for United States Judges. See Advisory Opinion No. 83.

§ 2.6 Former Judges

- Advisory Opinion No. 70 (disqualification when former judge appears as counsel).
- Advisory Opinion No. 72 (use of title "Judge" by former judges).

(a) A judge should not permit former judges appearing as counsel to use the title "judge" in any court proceeding. Advisory Opinion No. 72.

(b) A judge should not permit a former judge to appear as counsel in any case that was pending in the court during the former judge's tenure.

(c) A judge should recuse in cases in which a former colleague appears as counsel for a reasonable period of time after the former judge leaves the bench. The exact length of time depends upon the length of the prior association and the closeness of the relationship with the former colleague (rule of thumb: two years or longer). Advisory Opinion No. 70.

(d) In circumstances where a bankruptcy judge is under no obligation to recuse because of the appearance of a former bankruptcy judge as counsel, it is permissible to appoint the former judge as receiver or trustee where the frequency of appointment is consistent with that of other bankruptcy lawyers.

(e) A retired bankruptcy judge no longer eligible for recall to judicial service is not covered by the Codes of Conduct.

(e-1) A retired bankruptcy judge who is not eligible for recall is no longer subject to the Code of Conduct, and the Code therefore does not restrict the former judge's employment as a mediator. If the retired judge's former colleagues on the court are required to address an issue related to the mediator, the judges should consider whether recusal might be appropriate under the guidance in Advisory Opinion No. 70.

(f) Where former member of court returned to the practice of law, court may hang portrait of former judge in library but should refrain from holding ceremony for this purpose while former judge has any cases pending before the court. Similarly, a portrait of a former judge should not be displayed in a courtroom when a case is being heard if the former judge has entered an appearance as counsel in the case.

§ 2.7 Withdrawing from Law Practice To Become a Judge or Judicial Employee

- Advisory Opinion No. 24 (financial settlement and disqualification on judge's resignation from law firm).

(a) Judges may receive appropriate payment for their interests in a law firm and compensation for legal services they rendered before becoming judges. It is inappropriate for judges to share in compensation for legal services rendered by the former law firm after the judge's departure, or to share in the post-departure earnings of the firm; and payments received by the judge from his or her former law firm may not be conditioned, or measured in any way, upon the post-departure fortunes of the firm. Same for a judge who was previously employed by a public entity.

(a-1) When a judge is entitled to retirement benefits from a former firm, it is preferable that the amount be fixed, but a judge may receive vested retirement benefits that are by contract tied to firm earnings if restructuring the benefits is not legally or economically practicable.

(a-2) A judge who leaves a law firm during a calendar year may apportion firm income based on the portion of the year worked.

(a-3) After taking the bench, a judge may continue to negotiate with the judge's former law firm concerning the judge's share of fees that were earned but not collected before the judge's departure from the firm.

(b) It is permissible for the departing judge to share in contingent fees received at the end of the litigation, provided a fixed percentage or fixed ceiling is agreed upon, and reasonably reflects the value of services previously rendered by the departing judge.

(b-1) While it is permissible for a judge to share in future contingent fees under the circumstances previously set forth, the judge should first attempt to reach agreement with his former partners on a fixed sum.

(b-2) The Code does not prohibit a judge from seeking disputed fees through settlement or adjudication, so long as the fee received reasonably reflects services rendered and the judge recuses during the dispute.

(b-3) A contingency fee agreement with a public entity raises issues pertaining to judicial independence under Canon 1 and the appearance of impropriety under Canon 2 if it creates a perception that the judge is receiving additional public compensation beyond a previously negotiated salary or if the contingency fee payment exceeds the value of the judge's prior contributions to the litigation. These concerns are mitigated when the contingency fee agreement was established prior to the judge's nomination, it is exclusively for past services, and it does not require any ongoing advice or contribution from the judge.

(c) A judge who was a sole practitioner, or who otherwise has no single successor to the law practice, may distribute pending cases, including contingent-fee cases, to various lawyers or law firms, and thereafter receive fixed amount or a fixed percentage that is reasonable in light of the services previously rendered by the departing judge. A judge who in private practice referred a matter to another firm may receive similar fees under the referral agreement.

(d) Where cases handled before appointment as judge are transferred to other attorneys, and fees for judge's prior services are payable at end of litigation, the judge must recuse in all cases handled by successor law firms or attorneys, until all

transferred cases are ended and fees paid. Same where judge has a fee-sharing agreement with co-counsel from other firms.

(e) When, long after the judge's departure, additional assets are discovered that should have been transferred to the judge at the time of departure (delayed refund under health insurance plan), there is no ethical impediment to the judge's receipt of the appropriate distribution.

(f) Because of an appearance of impropriety, a judge should recuse, subject to remittal, in all cases involving members of the former law firm when the judge has left a retirement account in the former law firm's profit sharing trust. Similarly, a judge should recuse in all matters involving the firm, subject to remittal, even where a judge's retirement payments are fixed and not contingent on the firm's income or the performance of the firm's investment assets.

(g) A judge who prosecuted a case before appointment may not actively assist former colleagues in the appeal of the case and may not render advice, counsel or opinions about legal issues or the conduct of the appeal. However, the judge may respond to questions from successor counsel as to historical facts not readily apparent from the file, factual details in the judge's peculiar knowledge, and similar matters of clarification.

(h) A judge should not permit a former law firm to continue using the judge's name; where the firm plans to remove the judge's name that year, the judge need not take steps to compel an immediate change.

§ 2.7-1 Withdrawing from Law Practice to Become a Judge or Judicial Employee [Judicial Employees]

(a) Before starting a clerkship, a law clerk should end a relationship as a named partner in a professional limited liability company providing legal services, remove his or her name from the company's name, and arrange to receive any compensation owed by the company.

(a-1) A law clerk should not use a former law firm's office and secretary while clerking, should not permit the firm to use his or her name, and, while leasing space to the law firm, should not work on cases handled by the firm.

(b) A judicial employee may receive compensation for services provided to the employee's former law firm, but only if it is clear that the employee is not sharing in profits of the firm earned after the employee's departure from the firm.

§ 2.8 Avoiding Nepotism and Favoritism

- Advisory Opinion No. 60 (appointment of the spouse of an assistant United States attorney as part-time magistrate judge).

- Advisory Opinion No. 61 (appointment of a law partner of the judge's nephew as a special master).
- Advisory Opinion No. 64 (employing judge's child as law clerk).
- Advisory Opinion No. 115 (appointment, hiring, and employment considerations: nepotism and favoritism)
- Compendium § 3.10-2.

(a) A judge may not appoint as law clerk a person who is related within the third degree of consanguinity to another judge of the same court, but may appoint as law clerk a person who is related to a judge of another federal court within the same circuit, including a court bearing a hierarchical relationship to the court on which the appointing judge sits, if appropriate safeguards are adopted. Advisory Opinion No. 64.

(b) A judge may appoint as law clerk a person whose spouse is the niece of the spouse of a judge who serves on the same court but in a different city.

(c) A judge may appoint as law clerk the child of the first cousin of the spouse of another judge on the same court.

(d) A judge may not appoint as law clerk the niece or nephew or other relative within the third degree of kinship of another judge on the same court. Similarly, even when the nepotism canon is not applicable, in making appointments a judge should avoid the appearance that someone may gain an advantage in the appointment or employment process, for reasons other than merit, because of his or her broader connections to a judge or judicial employee.

(d-1) Judge does not violate Canon 2 or 3B(3) by employing law clerk who is related to another judge on the same court, where law clerk was selected before judge was nominated or appointed to the court and where law clerk does not work on cases handled by relative. See Advisory Opinion No. 64. Same, where law clerk's spouse is appointed as a magistrate judge.

(d-2) A judge should not hire a step-sibling's child as a law clerk.

(e) For purposes of Advisory Opinion No. 64 and related nepotism/favoritism rulings, bankruptcy judges and magistrate judges are regarded as part of the district court for that district.

(e-1) It is ordinarily improper for a district judge to hire the child of a magistrate or bankruptcy judge in the same district, and vice versa. Similarly, in the case of bankruptcy and magistrate judges in the same district, it is inadvisable for one judge to hire the child of another. Advisory Opinion No. 64.

Similarly, a judge should not hire the child of the judge's law clerk as an unpaid intern due to the special relationship between a judge and a law clerk.

(f) A judge may not appoint as secretary the spouse of a magistrate judge in the same district.

(g) Where a judge appoints a law student as a voluntary extern, even though compensation is waived, the nepotism canon applies. Same, for the appointment of a volunteer to work for a district's re-entry court.

(h) Canon 3B(3) relating to nepotism and favoritism applies to the appointment of employees, and does not apply to prevent the continued employment of an existing court employee who marries the child of a judge of the court. Appearance of impropriety concerns can be avoided if the employee is not supervised by, and promotions are not dependent upon the actions of, the judge who is also the parent-in-law. See also 28 U.S.C. § 458; 5 U.S.C. § 3110.

(h-1) Since the nepotism provision of Canon 3B(3) relates only to the appointment of employees, the provision is not violated when a judge's secretary and the judge marry and the secretary continues in the employment. The continued employment presents no appearance of impropriety so long as the judge does not directly or indirectly cause or contribute to any promotion or salary increases (other than within-grade salary increases received in the normal course) and so long as the judge and the judge's influence is removed from other personnel decisions affecting the employment.

(i) Judge should not appoint the judge's child to serve as defense counsel under the Criminal Justice Act, but colleagues on the court may appoint judge's child to serve as defense counsel so long as the appointments do not constitute de facto full time service and so long as no other unusual circumstances create the appearance that the court is favoring the child of one of its judges.

(i-1) Where a division of court has only one judge, the court may omit from the panel of attorneys eligible for CJA appointment a partner of the judge's child, to avoid the necessity for the judge to recuse.

(i-2) A judge should not appoint the spouse of another judge to serve as a special master, due to concerns under Canon 2A and 3B(3).

(i-3) Due to Canon 2 concerns, a former judge should not be appointed as a compensated special master in any case in which the judge also served as the presiding judge.

(j) A bankruptcy judge must determine whether deciding on the fee application of a colleague's spouse, appointed as special counsel by the trustee pursuant to the judge's authorization, would create an appearance of impropriety in light of the amount

of the fee requested and the relationships between the judge and the colleague and between the judge and the colleague's spouse.

(k) The spouse of a bankruptcy judge may be listed on a register of mediators for the bankruptcy court, when no member of the court is involved in the selection for placement on the register or in the selection of the mediator in a particular case, and provided that the spouse does not serve as mediator in a case assigned to the judge.

(l) The provision in Canon 3B(3) that judges avoid nepotism and favoritism in appointments precludes a district judge from hiring the child, or the spouse of a grandchild, of a senior district judge of the same court. Same, with respect to the appointment of a senior judge's child to a magistrate judge position on the same court.

(m) A part-time magistrate judge should not hire spouse as judicial secretary.

(n) A judge should not appoint as special master an attorney from a firm with which the judge has an ongoing financial relationship.

> (n-1) In exceptional circumstances, there is no appearance of impropriety in judge appointing as special master a person who has a business relationship with the judge's son, where appointment does not arise from the business relationship or benefit judge's son, the parties jointly request the appointment, the individual to be appointed had earlier served as special master in the same case, and it was difficult to find another qualified master.

(o) Although appointment of the spouse of the clerk of court as a magistrate judge in the same court does not violate the nepotism canon (where neither clerk nor spouse are related to a judge on the court), each judge involved in the appointment should evaluate whether the judge's relationship to the clerk of court would give rise to the appearance of favoritism if the spouse were selected. See Advisory Opinion No. 64. Similarly, appointment of the spouse of a magistrate judge as a bankruptcy judge in the same district could give rise to an appearance of favoritism, even if it does not violate the nepotism statute. To avoid an appearance of favoritism, no district judge who serves on the same court as the magistrate judge should be involved with the process to select the bankruptcy judge.

(p) Probation office should not hire the child of a judge on the court as a probation officer, due to nepotism and favoritism concerns under Canons 2 and 3B(3).

§ 2.8-1 Avoiding Nepotism and Favoritism [Judicial Employees]

(a) Due to appearance concerns, a chief probation officer should not hire the spouse of the deputy chief probation officer.

(a-1) Chief probation officer who is married to a probation officer in the same office is prohibited from making or influencing any personnel decision affecting spouse.

(b) Federal public defender may employ, as an investigator/paralegal, the son of a judge who sits in the division of the court where the son would be employed, subject to appropriate ethical safeguards. See Advisory Opinion No. 64.

(b-1) Marriage of assistant public defender to federal customs officer poses no actual or apparent conflict of interest where office to which assistant is assigned has infrequent involvement in customs office cases and steps are taken to insulate the assistant from involvement in such cases.

(b-2) Hiring the spouse of the chief probation officer for the position of federal public defender in the same judicial district would lead to a violation of Canon 3F, and raises concerns under Canon 1 and 2, of the Code of Conduct for Federal Public Defender Employees.

(c) Probation office should not hire the child of a judge on the court as a probation officer, due to nepotism and favoritism concerns under Canons 2 and 3B(3).

(d) It is a violation of Canon 3E of the Code of Conduct for Federal Public Defender Employees to advocate for the employment of a relative. Although the Code does not provide for any specific remedial actions when a violation of Canon 3E has occurred, the Committee advises against hiring an employee's relative under such circumstances.

§ 2.9 Benefits Received from Entities Doing Business with the Courts

- Advisory Opinion No. 3 (participation in a seminar of general character).
- Advisory Opinion No. 17 (travel and hotel expenses – judge and a family member).
- Advisory Opinion No. 27 (financial interest – judge's spouse beneficiary of a trust from which Defendant leases property).
- Advisory Opinion No. 88 (receipt of mementos or other tokens under the prohibition against receipt of honoraria for any appearance, speech, or article).
- Advisory Opinion No. 91 (solicitation and acceptance from persons doing business with the court of funds to defray expenses of conference for improvement of the law).
- Advisory Opinion No. 98 (gifts to newly appointed judges).

- Advisory Opinion No. 107 (judge's recusal due to a spouse's business relationships).

- Compendium §§ 25.1

(a) Judges may attend bar association events such as receptions where a legal publishing firm has donated the hors d'oeuvres and beverages to the bar association. It is not appropriate, however, for a group of judges or judicial personnel to allow a legal publishing firm or any other vendor doing business with their court to donate food and beverages for a meeting of the judges or judicial employees.

(a-1) Neither Canon 2 nor the Ethics Reform Act prohibits a judge whose part-time teaching at law school has been approved from using service provided by Westlaw free of charge to all full and part-time faculty members of the law school, if that use is incidental to the judge's teaching duties and otherwise uncompensated scholarly research.

(a-2) Ethics provisions do not prohibit a law firm from sponsoring a reception, after a naturalization ceremony, that is not affiliated with the court; judges and court employees may attend.

(b) Judge may accept, from an organization devoted to improvement of the law, an award in the form of a framed certificate and reimbursement of travel expenses to attend the organization's meeting at which the judge will be honored, although the organization will purchase the framed certificate and make the reimbursement with funds donated to it by a legal publishing company doing business with the courts.

(b-1) A judge who receives a prestigious distinguished service award honoring service to the public and to the administration of justice may also accept the accompanying substantial cash award, where the award is funded by a company doing business with the courts but is administered by an entity that does not do business with, or frequently appear before, the courts.

(c) No appearance of impropriety in judges' accepting invitation to attend free mediation training session offered by organization selected by court to provide training to court mediators, where invitation to judges was issued after organization was selected and where training will assist in implementing mediation in the court.

(d) Judge may accept a non-monetary award from former employer (Department of Justice) for a case the judge worked on during tenure there.

§ 2.9-1 Benefits Received from Entities Doing Business with the Courts [Judicial Employees]

(a) Although mere attendance (along with others similarly situated) without paying registration fee would not create an appearance of impropriety, it would create

an appearance of impropriety for employees of the Administrative Office to accept from a legal publishing firm a gift of transportation, lodging and meals in connection with a professional training program sponsored by the firm.

(b) Clerks of court are precluded from soliciting contributions for annual conference from vendors doing business with court. See Advisory Opinion No. 91. Judicial employees should not accept benefits solicited by a private foundation for this purpose unless the foundation is truly separate, functions independently, is not under the guidance or control of judicial employees (or so perceived), and no judicial employee participates in the arrangements.

(c) Professional association of law clerks should not accept free use of legal publisher's staff or other gratuitous administrative services. 5 U.S.C. § 7353(a)(2).

(d) Judicial employees may not solicit or arrange for gifts at a meeting from companies that do business with the courts, but may accept unsolicited gifts of food, beverages, and promotional items of minor value, assuming no Canon 2 concerns are presented (e.g., donor doing substantial business with the courts; employees with significant official responsibilities affecting the donors).

(e) It would create an appearance of impropriety for a judicial employee to accept a very large monetary prize in a random drawing from an entity that transacts much business with the employee's court and office.

§ 2.10 Relationships with Entities Likely To Appear Before Courts

- Advisory Opinion No. 51 (propriety of judge's law clerk working on case in which a party is represented by the spouse's law firm).
- Advisory Opinion No. 52 (judge not required to disqualify in a case where the American Bar Association or another open-membership bar association is a party).
- Advisory Opinion No. 97 (recusal due to the appointment or reappointment of a magistrate judge).
- Advisory Opinion No. 107 (judge's recusal due to a spouse's business relationships).

(a) Applicant for judicial appointment should not solicit support from lawyers or others likely to appear before the judge.

(b) Although the organization is devoted to the improvement of the administration of justice, a bankruptcy judge's service on the Board of Directors of a nonprofit corporation formed for the purpose of certifying specialization in the field of bankruptcy law would be contrary to Canons 2A and 2B. See Advisory Opinion No. 73.

(c) It would create an appearance of impropriety for a judge to permit a for-profit company to host a reception following the judge's investiture, where the judge had no preexisting relationship with the company, would not otherwise have been required to recuse, and the circumstances would convey the impression that the company was in a special position to influence the judge. Canon 2B. See Compendium § 25.1 (gift regulations).

(c-1) Judge should not permit organization to host reception following investiture where the organization is identified with particular legal, social or political positions likely to be advanced in the courts or where the judge has no preexisting relation with the organization and sponsorship could reasonably be viewed as putting the organization's members in a special position of influence.

(c-2) Although the gift regulations permit a judge to accept a gift commemorating years of service on the bench (as a gift incident to a public testimonial), it would present an appearance of impropriety under Canon 2 to accept a very expensive gift from a small, specialized bar association whose members will continue to appear before the judge.

(d) Although judge should not attend "brown bag" lunch with members, associates or clerks of a law firm in the law firm's offices because of Canon 2 implications (special influence), a judge may do so in the courthouse if the judge makes known a willingness to do this with interested groups. Similarly, a judge may speak at a reception sponsored by multiple law firms to encourage minority law students to consider law firm careers. Similarly, a judge should not participate in a bar association program to be a mentor to an individual attorney concerning, among other things, client relations, law office management, and practical skills in a substantive area of the law, especially when the attorney works for a firm that regularly appears before the judge.

(d-1) Judges may accept invitations to receptions and dinners at law-related functions sponsored by organizations that litigate regularly before the court, where judges' attendance will be educational and informative, the event provides an appropriate forum for public outreach by the court, a diverse group of litigants attends, and judges are willing to offer similar outreach to others.

(d-2) Judge should not attend, as guest of honor, a law firm's reception to promote the retention, mentoring, and professional development of the firm's minority attorneys.

(d-3) A court may permit a law firm to take a group photograph in a courtroom, provided that the court would make the same opportunity available to other firms and attorneys on request.

(d-4) A judge may, in his or her official capacity, participate in a panel presentation about the importance of pro bono practice for lawyers and

paralegals at a law firm, provided that the judge is willing to do similar presentations for other firms and for the bar generally.

(e) No appearance of impropriety arises when a judge's former law clerks solicit law firms and lawyers to contribute to a scholarship bearing the judge's name. Judge should make reasonable efforts to remain unaware of the identities of contributors and those who declined to contribute, and neither the judge nor current law clerks or staff should participate in or encourage the solicitations.

(e-1) Same, when law school establishes and solicits for the scholarship.

(e-2) Same, when bar association members contribute funds for portrait of judge to be donated to the court, in honor of judge's lengthy service.

(f) A judge may not accept an endowed adjunct professorship where the professorship is endowed by and named after a local law firm or lawyer who practices before the judge's court.

(f-1) A judge should not accept the honor of having a library named for the judge by a federal public defender office whose attorneys appear before the judge.

(g) Judges should not conduct private educational seminars where the "educators" are lawyers who practice before the court, the programs are directed to areas of law that are likely to arise before the court, and the only persons present are judges, law clerks, and the invited educators. But judges may attend seminars for state and federal judges sponsored by bar associations, and this should not disqualify attending judges from cases handled by the attorney-lecturers. See also Compendium § 4.8-7.

(h) A court's bankruptcy judges and Chapter 13 trustees may consult and meet together in connection with the design and implementation of administrative policy, plans and procedures. However, topics of substantive law that may be subject of proceedings under Chapter 13 should be avoided.

(i) No appearance of impropriety in judge's attending and speaking at former law firm's 125th anniversary celebration.

(j) A judge may participate in periodic social gatherings at participants' homes with a group including an attorney acquaintance who appears in the judge's court, if the judge does not attend when the attorney appears before the judge. See also Compendium § 3.6-8(g-2).

(j-1) Similarly, a judge may attend wedding of an attorney, but if the attorney then has matters pending before the judge, the judge should consider recusing or not attending.

(k) Judge may serve on a panel that reviews and rates grant applications from local hospitals and community organizations engaged in breast cancer education and treatment; if grant applicant appears before the judge, then judge should either recuse or avoid participation in the relevant grant application review.

(l) There is no appearance of impropriety in judge's accepting the volunteer services of an intern who receives a stipend from a foreign government, assuming the government is not a litigant in the judge's court. Same, for a law school graduate who serves as a volunteer law clerk and receives a stipend through a law school fellowship program that is analogous to a cooperative educational program. See also Guide to Judiciary Policy, Vol. 12, Ch. 5, § 550.50. However, a judge should not accept the services of a volunteer law clerk who would be privately compensated with funds solicited from lawyers by the law school from which the clerk graduated. Similarly, a judge should not accept the services of a volunteer law clerk who would be compensated through a bar association fund that consists of contributions from law firms.

§ 2.10-1 Relationships with Entities Likely To Appear Before Courts [Judicial Employees]

- Advisory Opinion No. 51 (propriety of judge's law clerk working on case in which a party is represented by the spouse's law firm).

(a) Where it is widely known that clerk's office personnel are generally and equally available for this purpose to lawyers and law firms, their attendance at law firm "brown bag" luncheons as part of a program of educating the bar as to the procedures and workings of the clerk's office should not present an unacceptable risk of lending the prestige of the clerk's office or conveying the impression that a law firm is in a special position to influence the clerk.

(b) A law clerk who is serving a temporary clerkship on leave of absence from a law firm should not during the term of his or her clerkship work on cases handled by or receive any compensation or benefits from the law firm. But group health insurance coverage may be retained if the law clerk reimburses the firm for any expense.

(c) Proposal by judge's secretary to seek assignments from court to type transcripts of electronically recorded court hearings requested by parties presents concerns under Canon 2 (appearance of favoritism) and Canons 4C and 4D (financial relationships with lawyers likely to come before the court) of the Code of Conduct for Judicial Employees.

(d) It would lend the prestige of office for a bankruptcy clerk to accept an invitation and expenses to speak on bankruptcy issues at a seminar for outside counsel sponsored by a for-profit company that is a litigant in the clerk's court.

§ 2.11 Doing Business with Parties Before the Court

- Advisory Opinion No. 91 (solicitation and acceptance from persons doing business with the court of funds to defray expenses of conference for improvement of the law).

- Advisory Opinion No. 107 (judge's recusal due to a spouse's business relationships).

(a) Generally, a bankruptcy judge should not trade with parties before the judge. However, no impropriety in occasional purchases from public utility, governmental unit, other de facto monopoly, or other situations where judge has no other reasonable alternative and purchase is in regular course of business. See also 18 U.S.C. § 154.

(a-1) Because of appearances of impropriety, a judge should not purchase at a public sale conducted by the United States Marshal. Similarly, it would be improper to purchase assets from an estate in bankruptcy. However, where an independent party purchases the asset from the bankrupt estate, and is not acting as agent or nominee for the judge, there is no impropriety in the judge's subsequent arm's length purchase from the independent party.

(b) Because of appearance of impropriety, a judge who has contracted with a party or parties for use of a service mark created by the judge must recuse from all cases involving such parties or their counsel so long as the royalty agreement remains in effect.

(c) Assuming the court is not receiving special treatment in terms of rates or amenities, there is no appearance of impropriety in conducting a meeting at a hotel that has cases pending before the court, and judges who attend the meeting need not recuse in pending matters involving the hotel.

§ 2.11-1 Doing Business with Parties Before the Court [Judicial Employees]

(a) Canon 2 does not prohibit a bankruptcy court employee from purchasing property from a bankruptcy debtor, where the property was abandoned by the trustee and no longer part of the bankruptcy estate, and where the employee did not use his or her official position to identify or assess the property.

(b) Clerk's office employees may make personal purchases from a company in bankruptcy, assuming no violation of 18 U.S.C. § 154.

(c) Judicial employees should not purchase property through the United States Marshals Service or a real estate agent, whether by auction or private sale, if the employee's court is involved in any capacity in the authorization or supervision of the sale, including the disposition of the sale proceeds. But, if an independent party first purchases the property in conjunction with a federal judicial order, a judicial employee is

not precluded from buying the property from that party provided the party was not acting as the judicial employee's agent at the time of the original purchase.

§ 2.12 Lending Prestige of Office

- Advisory Opinion No. 2 (service on governing boards of nonprofit organizations).
- Advisory Opinion No. 19 (judge's membership in a political club).
- Advisory Opinion No. 55 (judicial writings and publications).
- Advisory Opinion No. 89 (judge's acceptance of honors funded through voluntary contributions).
- Advisory Opinion No. 104 (court historical societies and learning centers).
- Advisory Opinion No. 105 (participation in private law-related training programs).
- Advisory Opinion No. 114 (promotional activity associated with extrajudicial writings and publications).

(a) Writing or lecturing on how to practice before a judge's court may be appropriate (notwithstanding the inevitable lending of prestige to the program) when the program is sponsored by a bar association or other nonprofit devoted to improvement of the legal system, but it is inappropriate when a for-profit entity stands to profit. Canon 2B. See Advisory Opinion Nos. 87 and 105.

(a-1) Although illustrations from a judge's own experience are appropriate during a judge's writing or lecturing on general substantive or procedural issues, it is inappropriate for a judge to sell his or her expertise on how to practice before the judge's court.

(a-2) To avoid lending the prestige of judicial office to a commercial endeavor, a judge should not speak at a conference for litigators run by a for-profit consulting firm whose business includes providing expert testimony in court.

(a-3) A judge's appearance in a video to be shown at a fundraising event for a legal aid organization would lend the prestige of office, and might suggest the organization's attorneys enjoy a special relationship with the court.

(a-4) No matter how worthy the cause being promoted, a judge should not appear in a television commercial, robed or otherwise identified as a judge. A judge may not participate in television commercials on behalf of a charity. A judge should not appear in an advertising campaign promoting a local university.

(a-5) Due to Canon 2 concerns, a judge should not participate as an actor in commercial advertisements or corporate training videos.

(b) A judge should not permit a vendor to use the judge's courtroom for commercial product demonstrations.

(b-1) A bankruptcy judge may generally encourage debtors to seek financial management services, but should not provide lists of entities providing such services.

(b-2) A court may permit a law firm to take a group photograph in a courtroom, provided that the court would make the same opportunity available to other firms and attorneys on request.

(c) It would create an appearance of lending the prestige of office for three federal judges to serve as a committee to recommend revisions in disciplinary procedures for an athletic association.

(d) An appellate judge with appointment and review authority over the bankruptcy court should appear personally in the bankruptcy court only to the extent that circumstances require the judge's appearance in addition to that of the judge's attorney (e.g., as a litigant or witness).

(e) A judge may serve on a board to advise a law school on matters relating to the judiciary, in connection with the law school's proposed bid to an agency of the federal government for the contract to develop a program to improve the legal system in the former Soviet Union, so long as the judge's name and position are listed in the same manner as all other participants, so that there is no impermissible lending of the prestige of office.

(f) A judge may join a Committee that is requesting a county Board of Supervisors to name a newly constructed Hall of Justice after a recently deceased member of the local bar, and judge may allow his or her name to be used so long as the judge's name and position are listed in the same manner as all other committee members.

(g) Judge should not be designated as company representative for nonfamily business, even for limited purpose of using company's sports club membership, when such designation suggests an employee or agency relationship with the company. See Canon 2 (lending prestige of office) and Canon 4D.

(h) Where judge's spouse is offered a financial opportunity with minimal investment, no risk, and large return, the judge should consider whether the offer implicates Canons 2A (public confidence in integrity of the judiciary), 2B (lending prestige of office), or 4D (exploitation of judicial position).

(i) A judge may record music for sale and perform live music, so long as it does not detract from the dignity of the court. The judge's name and photo (not in judicial robe) may be used in promotional material, but the judge's position or title may not be used to promote sales. Same, for promotion of judge's book. See Advisory Opinion No. 114.

(j) Donors to independent court-related organizations (i.e., historical societies, public education groups) should not be recognized in the courthouse. See Advisory Opinion No. 104.

(k) A judge may host social events to introduce an attorney friend to local attorneys, but should not do so to assist the friend's employment, business, or commercial purposes.

(l) Service on the board of an organization devoted to advancing positions on controversial environmental policy issues that are frequently litigated in federal court lends the prestige of office to a private entity, in contravention of Canon 2.

(m) Permitting attorneys to withdraw from a mandatory appointment program for *in forma pauperis* cases by contributing to a legal services organization approved by the court violates Canon 2B by suggesting that the organization is in a special position to influence the court.

> (m-1) Soliciting lawyer volunteers for a charitable project in which judges and court employees plan to participate lends the prestige of the court to a private endeavor in violation of Canon 2, and involves the court and its judges in membership solicitation on behalf of a charitable organization in violation of Canon 4C. Likewise, using court resources to inform the bar about non-judicial branch employment opportunities (including in the U.S. trustee program), or to advertise CLE programs that are not sponsored by the court, raises similar concerns under Canons 1 and 2. Similar considerations apply to court employees engaging in such activities under Canons 2 and 4B3 of the Code of Conduct for Judicial Employees.
>
> (m-2) Similarly, a court should not permit the use of the court's email system to distribute an announcement of a fundraising event for a pro bono legal organization. Similarly, a court should not display flyers in the courtroom vestibule or provide a link on the court's website to publicize the educational offerings of a non-profit law-related organization.

(n) Judge should not assist a management consulting firm in its efforts to obtain a contract for a state court improvement project, or serve as a consultant on the project; such assistance or service would raise concerns under Canon 2 and 4D.

(o) It would raise concerns under Canon 2 for judges to collect funds from members of the bar practicing in that court for the installation of computer equipment for

use by the bar. Such a fundraising project, even by non-judges, would violate Canon 2 if the project is, or is reasonably perceived to be, controlled by the judges or the court.

(p) Judge may express public support, and encourage others to support, a nonprofit organization's effort to promote cooperation in the electronic discovery process, provided that the judge avoids Canon 2 concerns about lending the prestige of office.

(q) Judge may employ as the judge's personal driver a person who is also seeking (or who has obtained) employment with a company that provides courthouse security services. Similarly, a judge may employ courthouse custodians to clean the judge's home periodically, but should avoid any impropriety or the appearance of impropriety under Canon 2.

(r) A judge should not engage in negotiations with an administrative agency on behalf of the judge or a family member if the agency frequently appears before the judge.

(s) Due to Canon 2 concerns, a former judge should not be appointed as a compensated special master in any case in which the judge also served as the presiding judge.

(t) A judge should not serve as an evaluator, "judge," or similar official in a law-related competition or contest that offers a significant monetary prize due to Canon 2 concerns. A significant prize purse distinguishes such a contest from purely academic competitions such as moot court or mock trial competitions and tends to foster an "appearance of impropriety" to judicial participation.

§ 2.12-1 Lending Prestige of Office [Judicial Employees]

(a) It would lend the prestige of the court to permit a bank to make sales presentation to court employees offering a special package deal. See also 41 C.F.R. § 102-74.500 and § 102-74.505.

(b) An association of court employees may contract with a private company to provide benefits to members and may receive standard fees from the company, but court employees should not agree to promote the company or endorse its products.

(c) Professional association of law clerks lends prestige of office by giving special privileges to and by adopting the official publications of a legal publisher.

(d) It is inappropriate for a law clerk to serve on the governing board of an advocacy organization that actively lobbies state officials on issues that are subject to debate in the political arena. Such service would be likely to lend the prestige of the law clerk's office to the organization and the positions it espouses.

§ 2.13 Testimony

- Advisory Opinion No. 9 (judge testifying as a character witness).

(a) Canon 1 (integrity and independence of judiciary) and Canon 2 (lending prestige) would be implicated by a judge's testimony about the judge's own thought processes in a decision in a previous case. It is not inappropriate to solicit assistance of United States Attorney in effort to quash subpoena.

(a-1) If subpoenaed, judge may testify about statement made in previous case, but should avoid testimony about thought processes and deliberations and should not provide a voluntary statement to one party.

(a-2) Without exception, a judge should not testify voluntarily as a character witness and should testify only under subpoena. See Canon 2B and Commentary.

(b) Canon 2 does not preclude or excuse a judge from testifying as a fact witness in an attorney disciplinary proceeding, pursuant to subpoena. Similarly, a judge is not precluded or excused from honoring a subpoena to provide fact testimony in a legal malpractice case, but should only testify in response to a subpoena. Similarly, a law clerk may testify as a fact witness when subpoenaed to do so, but he or she should make clear that the testimony is not being offered in his or her capacity as a law clerk.

(c) A judge should discourage a friend from subpoenaing the judge as a character witness if testimony is being sought primarily because of the judge's office and potential influence, but where testimony is uniquely material and therefore necessary in the interests of justice, the judge may testify pursuant to subpoena.

(d) A judge may not voluntarily appear and give character testimony, whether in person or by affidavit, but may respond to valid subpoenas for such testimony.

(e) A judge should not serve as an expert witness in a legal malpractice case, as this could lend undue weight and the prestige of office to a private interest. Similarly, a judge who previously represented a criminal defendant should not voluntarily provide a declaration about whether certain evidence would have been helpful to the defense in a habeas case.

(f) A judge may testify or provide an affidavit as to disputed facts in a child's insurance claim, but should not describe the judge's position or judicial experience and should not offer legal opinions.

(g) Unless authorized by law, a judge should not meet with the Department of Justice to discuss the conduct of prosecutors who handled a case before the judge. Similarly, a judge should not write a letter on behalf of a government attorney whose conduct is under investigation.

(h) A judge may respond to an investigator's questionnaire in a child custody matter to the extent that the judge can provide responsive factual information, but the judge should not provide opinions or character testimony.

(i) A judge should not voluntarily present testimony against a defendant arising from statements the judge made while presiding at a confidential, voluntary plea negotiation conference.

§ 2.14 Membership in Discriminatory Organizations

- Advisory Opinion No. 67 (attendance at educational seminars).
- Advisory Opinion No. 82 (joining organizations).

(a) Judge should not belong to an organization that practices invidious discrimination.

(b) Masonic Order, represented to be fraternal organization devoted to charitable work with religious focus and not providing business or professional opportunities to members, is not considered to be an organization practicing invidious discrimination although women are not permitted to be full-fledged members. Organization is considered to be dedicated to the preservation of religious and cultural values of legitimate common interest to members. Commentary to Canon 2C.

(c) Membership in all male local club that meets once a year for purposes of fellowship and to decide on gift to a local charity and that provides no business or commercial advantage does not violate Canon 2C prohibition of membership in organizations that practice invidious discrimination.

(c-1) All male club with purely social purpose, limited membership chosen according to selective criteria, no business or commercial purpose, and not in violation of state or local law, cannot be said to practice invidious discrimination; judge need not resign from club but should periodically reevaluate club membership policies for conformance with Canon 2C.

(c-2) Female health club that does not confer any professional or business advantages does not practice invidious discrimination.

(d) A judge who had resigned membership in a club because it practiced invidious discrimination may rejoin that club when it has amended its bylaws to preclude discrimination and has, in fact, admitted a significant number of women and minorities into membership.

(e) Judge is advised not to join social club having no minority members where the membership criteria may be perceived as racially exclusionary.

(f) Membership in the Junior League, a nonprofit social and charitable group limited to women, is not inconsistent with Canon 2; the membership restriction is directly related to the organization's primary and legitimate goal of assisting young women.

(g) A church-founded organization's preference that Christians serve on its board does not constitute invidious discrimination; the organization preserves religious values of legitimate common interest to its members.

(h) Judge's service on committee to select a minister for judge's church does not constitute invidious discrimination even though women and non-church members are unlikely to apply or be chosen for the position.

§ 2.15 Conflict-of-Interest Rules for Part-time Magistrate Judges

- Advisory Opinion No. 48 (conflict-of-interest rules for part-time magistrate judges, including permissible office arrangements).

- Advisory Opinion No. 76 (service of state employees as part-time United States magistrate judges).

(a) Part-time magistrate judges and their partners may appear as counsel in civil cases in any court, including the court in which the part-time magistrate judge serves, as permitted under Rule 1 of the Conflict-of-Interest Rules for Part-Time Magistrate Judges. Rule 7, which prohibits part-time magistrate judge who accepts additional duties under 28 U.S.C. § 636(b) or (c) from appearing in any case, civil or criminal, in the court for which the part-time magistrate judge is appointed, does not prohibit appearance in civil cases in the court by part-time magistrate judge's partners. When § 636(b) or (c) is widely used, recommend consideration, in consultation with district court, of procedures to reasonably insure against participation in any pending matter in which the part-time magistrate judge's partners have appeared or are likely to appear.

(a-1) Rule 4 of the Conflict-of-Interest Rules for Part-Time Magistrate Judges does not permit law partner of a part-time magistrate judge to remain counsel in a criminal case in the district in which the part-time magistrate judge serves.

(b) A part-time magistrate judge should not review the decisions or actions of state court judges before whom the magistrate judge appears as an attorney.

(c) Part-time magistrate judges may arbitrate or mediate private and state court matters and need not recuse from unrelated federal cases involving the same attorneys, so long as the magistrate judge is not personally involved in contractual dealings with the attorneys and the matters do not involve unusual or nonstandard fees.

(d) A part-time magistrate judge who performs duties under § 636(a) may represent a client in a civil forfeiture action in district court, provided the judge had no involvement in the matter as part of official duties.

(e) A part-time magistrate judge may represent municipalities, may serve occasionally as counsel for indigent defendants due to state public defender conflicts, and may handle municipal code violations that are more civil than criminal in nature and are not reviewable in federal court. These activities are not inconsistent with Advisory Opinion No. 76. See also Compendium §§ 1.3(b), (b-1).

(f) A part-time magistrate judge may continue service as an attorney in the military reserve, provided that conflicts of interest can be avoided.

(g) Although part-time magistrate judge may serve as administrator of a nonfamily member's estate, judge should consider discontinuing such service when the estate and the administrator are involved in significant litigation.

(h) A part-time magistrate judge should not simultaneously serve as a staff attorney for a state court. Similarly, a part-time magistrate judge should not serve as a member of a hearing committee appointed by the state supreme court to address attorney grievances and discipline.

§ 2.Z Miscellaneous Canon 2 Issues

(a) A judge who is disqualified from hearing an en banc appeal because of the judge's personal knowledge of the facts of that case, by virtue of the judge's former position in state government, may not sit on a parallel en banc appeal presenting essentially the same questions of law where the two cases are to be heard and decided together. There is a reasonable perception that the judge's participation in argument and conference in one appeal will directly affect the court's deliberation in the other appeal from which the judge is recused.

(b) Judge should exercise caution in accepting an award with a substantial monetary gift, to ensure that the donor is not identified with controversial positions or questionable practices and does not exploit the judge's acceptance of the award to advance its own interests.

(b-1) Same for a gift of substantial value; judge or judicial employee may accept a trip paid for by a personal friend who does not engage in litigation or appear before the judge or judicial employee, where the trip is entirely social and gives no appearance of exploitation of office for the donor's or others' private interests. However, a judge should not accept a gift of travel from a personal friend where gift provides a substantial pecuniary benefit and entity providing the free or discounted travel appears in cases before the judge.

(c) No impropriety in a judge's acceptance of a plaque from a bar association at a joint reception also honoring a U.S. Senator.

(d) Where use of government resource does not result in incremental costs, Canon 2 does not require an absolute ban on personal use no matter how insubstantial; but individual courts may impose such a ban.

(e) A judge should not invest in a gaming operation, where the operation must be approved by the state and the judge's role would be publicly disclosed, because of appearance considerations under Canon 2A. See also Compendium § 3.2-2(h).

(f) A judge may thank jurors for their service in off-the-record meetings or by letter and may send letters on official stationery and at government expense, but should avoid suggesting approval of the jury's decision.

(g) A judge may authorize another person to affix the judge's electronic signature on court documents approved by the judge.

(h) A court should not donate attorney admissions funds to a for-profit educational entity partly owned by judges of the court, even if those judges do not participate in the decision. A district court may donate bench and bar funds to all law schools within the district for a scholarship in a fair and equitable manner, but a judge who is a trustee of a law school in the district should not participate in the decision to donate funds to that school.

(i) Although the Code does not prohibit holding a court meeting in a facility that legally offers gambling, the Committee recommends serious consideration of related appearance concerns under Canon 2.

§ 2.Z-1 Miscellaneous Canon 2 Issues [Judicial Employees]

(a) Where law clerk has significant interest in company seeking to do business with the court, clerk of court should ensure that any agreement between the court and the company satisfies applicable contracting requirements and does not present an appearance of impropriety; clerk should consider public bidding process and other procedures to minimize any appearance that an agreement resulted from clerk's relationship with law clerk.

(b) Clerk of court should decline appointment to state medical licensing board because of concerns under Canon 2 (appearance of impropriety) and Canon 4C(1) (frequent transactions with persons likely to come before the court).

(c) Court reporter's activities for a private reporting firm should be "wholly disassociated" from official court work, and the court reporter should not use the private firm name and address on official court transcripts.

(d) Pretrial services employees should not join a sports team sponsored by and using the name of a defense attorney practicing in that district.

(e) No appearance of impropriety if spouse of chief probation officer obtains employment with a mental health agency with which the probation office has a contract.

(f) Federal Defender does not violate Canon 1 or 2 by giving token gifts to thank judges and judiciary employees for participating in a training seminar for CJA panel attorneys.

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

A. *Adjudicative Responsibilities*.

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities*.

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge

should hold court personnel under the judge's direction to similar standards.

(5) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(6) A judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.

C. *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 in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal 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 or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

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

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

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

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

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

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

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

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(4). A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The duty to refrain from retaliation includes retaliation against former as well as current judiciary personnel.

Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others. See Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(2) (providing that "cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees") and Rule 4(a)(3) (providing that "cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability").

Canon 3B(6). Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. A judge, in deciding what action is appropriate, may take into account any request for confidentiality made by a person complaining of or reporting misconduct. See Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(6) (providing that "cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably

likely to constitute judicial misconduct or disability. A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary. A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge. Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.").

Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise cooperating with or participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

COMPENDIUM OF SELECTED OPINIONS CONCERNING CANON 3

§ 3. Fair, Impartial and Diligent Performance of Judicial Duties; Recusal and Disqualification

§ 3.0 Recusal: General

(a) Canon 3A(2) imposes on all judges a duty to sit and hear assigned cases to completion, absent a legitimate basis for disqualification. Likewise, frequent recusal after case assignment without a legitimate basis for recusal needlessly delays the judicial process, raising concerns under Canon 3A(5) ("A judge should dispose promptly of the business of the court."). Any judge's retention of preferred cases, while avoiding matters the judge subjectively deems less desirable, may create the appearance of a biased tribunal and may engender a perception of favoritism.

§ 3.0-1 Activities Requiring Frequent Recusal

- Advisory Opinion No. 84 (judge's pursuit of post-judicial employment).

§ 3.0-2 Bias, Prejudice or Personal Knowledge

(a) Where an organization's leadership generally criticized a judge's court, leading the judge to resign from the organization, the judge need not recuse due to bias or prejudice merely because a party belongs to the same organization; nor can the judge's impartiality reasonably be questioned in this situation.

(b) Bias or prejudice do not inevitably arise because a former employee practicing before a judge departed in acrimony and filed claims that were subsequently resolved. See also Compendium § 3.6-1(i).

(c) Judge should recuse where judge attended the event on which a case is based, either because the judge may have become aware of disputed facts or because the judge's impartiality may reasonably be questioned.

(d) Personal knowledge regarding the law at issue (including its history), as opposed to disputed evidentiary facts, does not trigger recusal under Canon 3C(1)(a).

(e) Conduct that arises in a judicial context does not serve as a proper basis to show bias or partiality within the meaning of Canon 3C(1)(a). See Advisory Opinion No. 66.

§ 3.1 Recusal: Financial Interests

(a) Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship. Commentary to Canon 3C.

(b) The Code requires recusal when a judge has a financial conflict, regardless of the substance of the judge's actual involvement in the case.

§ 3.1-1 Stock Ownership and Other Ownership Interests

(a) When the judge, the judge's spouse, or a minor child residing in the judge's household has a beneficial interest in, or the judge is a fiduciary of, a trust or estate, the judge is disqualified from cases in which a corporation in which the trust holds stock or a similar ownership interest is a party.

(a-1) A judge serving on the board of directors of a charitable foundation is not disqualified from cases in which one of the parties is a corporation whose stock the foundation holds in its investment portfolio.

(a-2) A judge does not have a "financial interest" and thus has no duty to keep informed about the underlying securities held by a trust in which the judge has only a contingent remainder interest (i.e., one that could be divested by the judge's parent by the exercise of a special power of appointment). Same where the judge's spouse or minor child is a contingent beneficiary. An interest is contingent if there is no present right or ability to any income or principal, the future is uncertain either by survivorship or otherwise, and the judge has no control or management over the assets of the trust.

(a-3) Same where the judge is only a potential beneficiary of the exercise by an independent trustee of its sole and absolute discretion to distribute income or corpus and where it is unlikely the judge will actually receive such distributions.

(a-4) Same where judge has no present interest in a trust, receives no income or principal distributions, is not a trustee or manager of the trust, and will inherit only if the judge survives the parent beneficiary of the trust. Same where judge's spouse does not receive income from the trust, is not involved in the trust's management, and settlor has the authority to revoke or alter trust.

(a-5) A judge who inherited a share of a parent's estate is disqualified from cases in which a company in which the estate holds stock is a party. However, an expectation of inheritance does not create a present financial interest requiring recusal.

(b) A judge has a duty to take reasonable steps to keep informed of the investments of trusts in which the judge's spouse or minor children residing in the judge's household have a legal or equitable interest.

(b-1) A judge's Canon 3C(2) duty to keep informed about a spouse's personal financial interests does not require the judge to inquire about interests held in a fiduciary capacity only.

(c) A convertible debenture or other security convertible into corporate stock is to be treated as stock for recusal purposes.

(d) For recusal purposes, every member of the class in a class action is deemed to be a party.

(e) The fact that the judge's spouse owned the stock before marriage, or that recusal would involve great inconvenience, is immaterial; recusal is mandatory.

(f) A judge who owns stock in a parent corporation must recuse when a subsidiary is a party. Advisory Opinion No. 57. When a parent company does not own all or a majority of stock in the subsidiary, the judge should determine whether the parent has control of the subsidiary, necessitating recusal. The 10% disclosure requirement in Fed. R. App. P. 26.1 creates a rebuttable presumption of parental control. Same analysis for multidistrict litigation case.

(f-1) When a judge, individually or as a fiduciary, owns stock, whether recusal is required when a sister corporation is a party depends upon whether the judge's stock could be substantially affected by the outcome.

(f-2) A judge who owns stock in a subsidiary company does not have a financial interest in the parent company and must recuse when the parent is a party only if the interest could be substantially affected by the proceeding.

(g) A judge who owns stock in a bank is disqualified in litigation in which the bank is a party, even though the bank is acting in a fiduciary capacity in that litigation. Recusal is under Canon 3C(1)(c) and therefore the remittal provisions of Canon 3D are not available.

(h) A judge must recuse if the corporation in which the judge or the judge's spouse owns stock is a real party in interest in the litigation. Advisory Opinion No. 20.

(i) A judge who is a participant in a law firm's KEOGH plan has a financial interest in all of the corporations whose stock is owned by the plan, and must keep informed of the plan's investments, unless the plan is a common fund. See Compendium § 3.1-3(b), (c), and (e).

(j) Where stock is in the name of judge's spouse and spouse's parent as joint tenants with right of survivorship, judge's spouse has a "financial interest."

(k) A judge owning stock in a company that is not a party but produces the product that is the subject of litigation should recuse where the judge's verdict could influence the initiation of subsequent claims against the company or otherwise affect the value of the company's stock; judge has "a financial interest in the subject matter in controversy . . . or any other interest that could be affected substantially by the outcome of the proceeding." Canon 3C(1)(c).

(l) Judge should recuse if he or she knows that a parent's interest in a trust owning stock in companies involved in a proceeding before the judge could be substantially affected by the outcome of the proceeding. Canon 3C(1)(d)(iii).

(m) Where a judge owns stock in a company that has formally agreed to merge with a company that may seek restitution in a criminal case, the judge should recuse from the criminal case only if the judge's interest could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii), or if the judge's impartiality might reasonably be questioned under Canon 3C(1).

(n) A judge does not have a financial interest in an investment company that manages the judge's assets and need not recuse from all cases involving the company, but the judge should recuse under Canon 3C(1) (subject to remittal) if the relationship with the company raises reasonable questions about impartiality. Same analysis applies when a judge owns mortgage securities issued by an investment company.

(o) A party's agreement to purchase goods from a company in which the judge's spouse owns stock does not give rise to a financial interest in the party.

(p) Cryptocurrencies constitute a "financial interest" for purposes of Canon 3C because owners of cryptocurrencies have a "legal or equitable interest" in the asset.

§ 3.1-2 "Blind Trust" Unavailing To Obviate Recusal; Other Trust Issues

- Advisory Opinion No. 96 (service as fiduciary of an estate or trust).

(a) A judge's use of a "blind trust" does not obviate the need to recuse.

(b) See Compendium §§ 3.1-1(a), (b).

(c) A judge does not have a "financial interest" and thus has no duty to keep informed about the underlying securities held by a trust in which the judge has only a contingent remainder interest (i.e., one that could be divested by the judge's parent by the exercise of a special power of appointment).

(d) Same where the judge is only a potential beneficiary of the exercise by an independent trustee of its sole and absolute discretion to distribute income or corpus and where it is unlikely the judge will actually receive such distributions.

(e) Judge's entitlement to receive periodic payments of a percentage of the fair market value of a trust constitutes a financial interest under Canon 3C(3)(c); judge must keep informed as to holdings of the trust and must recuse in cases involving companies whose stock is held by the trust.

(f) A judge whose name is on a parent's brokerage account to assist in administering the parent's affairs has a financial interest, as a fiduciary, in the account

assets and must recuse from cases involving companies whose stock is held in the account.

(f-1) A judge holding a power of attorney does not have a disqualifying financial interest unless under state law the power conveys a legal or equitable ownership interest in property subject to the power, but the judge's impartiality might reasonably be questioned if the judge exercised the power to buy or sell stock in companies appearing before the judge.

(g) Where friends establish a trust in memory of a judge's deceased spouse, for the benefit of the judge's children, the judge should make reasonable efforts to keep informed of the trust's financial interests and recuse where necessary (no remittal). The judge should also recuse where the trustee's law firm serves as counsel (absent remittal).

§ 3.1-3 Mutual Funds and Other "Common Funds" Excepted

- Advisory Opinion No. 106 (Mutual or Common Investment Funds).

(a) An interest in a mutual fund or other similar "common fund" does not constitute an interest in the corporations whose stock is owned by the mutual fund. The mere fact that a judge's mutual fund owns stock in a company appearing before the judge does not necessitate the judge's disqualification. Advisory Opinion No. 106.

(a-1) A judge has no duty to monitor investments of a mutual fund unless the judge is active in the management of the fund. If the fund itself is a party or if the outcome of the case could substantially affect the judge's interest in the fund, then the judge should recuse.

(a-2) A judge who owns a mutual fund limited to the health care industry need not recuse from cases involving health care companies unless the judge knows that the outcome of a case could substantially affect the judge's interest.

(a-3) Investment in a mutual fund does not convey an ownership interest in the fund's management or investment advisory company, and the appearance as a party of the management or advisory company for the judge's mutual fund does not necessitate the judge's disqualification.

(a-4) When a judge owns shares in a mutual fund and the judge or the judge's spouse is involved in management of the fund, recusal is required under Canon 3C(1)(c) in cases involving corporations whose stock is owned by the mutual fund.

(a-5) A judge who invests in a narrow industry or sector mutual fund should evaluate whether his or her interest in the fund might be affected substantially by the outcome of a particular case, which would require recusal

under Canon 3C(1)(c). Whether litigation might have a substantial effect on the judge's interest in a mutual fund will often turn on the size and diversity of the fund's investments. See Advisory Opinion No. 106.

(b) A judge who is covered by the American Bar Association retirement plan administered by an insurance company does not have a disqualifying interest in the corporations in which the plan invests. Same where judge's spouse's municipal retirement system owns stock in corporations appearing before the judge.

(c) A law firm's KEOGH plan or 401k plan (managed by the firm, small number of participants, ready access to investment information) does not qualify for the "common fund" exception.

(c-1) A law firm's retirement fund qualifies for the "common investment fund" exception where the financial interest is indirect (due to the number of participants and the size and diversity of investments), directed investment by participants is not available, and the participants do not know and cannot easily find out about a fund's portfolio, which turns over frequently.

(d) An interest in a limited partnership designed to engage in particular investment strategies can fall within the concept of a "common investment fund" even when there are only a small number of limited partners (30 in this case) when the judge has no control or influence over the general partner or over the investment decisions. The investment vehicle is sufficiently similar to a mutual fund to be accorded the same status. Similarly, an interest in a private hedge fund may fall within the concept of a "common investment fund," but a judge's ability to direct the fund's investments or a judge's ownership interest in individual assets held by the fund renders the investment categorically ineligible.

(d-1) Stocks owned by family partnership in which judge is limited partner do not fall within "common fund" exception where judge has ability to obtain information about and influence partnership investments. Same, for a family organization structured as a limited liability company. Same, for private equity funds that have limited investors, provide ease of access to information, and lack the size and diversity of traditional mutual funds.

(e) Judge has a "financial interest" in each of the named underlying equity securities when the judge's IRA owns units of an investment vehicle which holds 15 named corporations, the portfolio is not actively managed, and it is not contemplated the securities will be sold or exchanged prior to termination of the investment vehicle in ten years. Investment vehicle does not qualify as "mutual fund or common investment fund" under Canon 3C.

(e-1) The mutual fund exception does not apply to a brokerage account in which stocks are held in the judge's name, the judge can receive immediate notice of transactions, and the judge controls the asset mix and some investment

decisions. Same, for a managed account in which stocks held in the account are personally owned by the account holder.

(f) An investment program is not a "common fund" where title to securities is in the judge's name, the judge has the legal authority to direct investment decisions (even though the judge does not intend to do so), and the judge receives regular information about the portfolio. Same, where judge owns shares of stock purchased by the fund and has a measure of control over the fund's investment decisions by designating areas of no investment and directing the sale of particular stocks from the judge's account.

(g) An account qualifies as a "common investment fund" where it does not own shares directly but is invested in portfolios that own stock in numerous companies, the investor has no control over purchase or sale of stock in the portfolios, and the portfolios are managed on behalf of all brokerage customers. Examples include funds tracking the S&P 500 stock index.

(h) A judge who owns mutual funds is not disqualified from cases involving the fund management company in which the judge has no financial interest.

(i) An exchange-traded fund that is registered under the Investment Company Act of 1940 and is diversified would meet the definition of "mutual fund" and would, for that reason, generally qualify as "permitted property" under the judiciary's regulations concerning Certificates of Divestiture.

§ 3.1-4 Debt Securities

- Advisory Opinion No. 101 (disqualification due to debt interests).

(a) Debt securities do not give rise to a financial interest in the debtor which issued the securities. Hence, recusal is not necessary by virtue of ownership of debt securities, unless the outcome of the litigation could substantially affect the value of the investment. If the judge is unsure of whether the litigation could have a substantial effect on the debt securities, the judge may ask the litigants about the possible effects of the litigation on the securities.

(b) Examples of debt securities include: sewer revenue bonds; municipal bonds; state bonds; money on deposit; debt security; industrial development bonds; corporate bonds; and bonds of a municipal transit authority.

(c) A judge who is indebted to a bank in a routine loan transaction is not thereby disqualified from cases in which the bank is a party.

(d) A debt security which is convertible into stock should be treated as stock for recusal purposes.

(e) Because depositary shares will automatically convert to common stock on a date certain, they are considered to be convertible debt securities. Therefore, a judge who owns depositary shares issued by a given corporation has a financial interest pursuant to Canon 3C(1)(c), and must recuse in any matter involving that corporation as a real party in interest. Depositary shares are a hybrid type of instrument. They are similar to debt securities since they contain a fixed rate of return until converted, and are automatically converted into common stock at a fixed future date, or earlier at the issuing corporation's option but only upon paying a price which represents a significant capital appreciation.

§ 3.1-5 Convertible Securities

(a) Convertible securities are treated as stock for recusal purposes.

(b) Because depositary shares will automatically convert to common stock on a date certain, they are considered to be convertible debt securities. Therefore, a judge who owns depositary shares issued by a given corporation has a financial interest pursuant to Canon 3C(1)(c), and must recuse in any matter involving that corporation as a real party in interest. Depositary shares are a hybrid type of instrument. They are similar to debt securities since they contain a fixed rate of return until converted, and are automatically converted into common stock at a fixed future date, or earlier at the issuing corporation's option but only upon paying a price that represents a significant capital appreciation.

§ 3.1-6 Financial Interest in Subject Matter or Party to the Proceeding: Defining "Subject Matter," "Party" and "Proceeding"

(a) Stock ownership is an automatic ground for recusal only if the company is a party to proceedings over which the judge presides. If a company was a party in an earlier proceeding but is no longer, the judge must recuse only if the outcome of the case could substantially affect the judge's interest.

(b) A financial interest in an insurance carrier that must indemnify a party is not a "financial interest in the subject matter," nor is the insurance company a party necessitating recusal, but recusal is required if the judge knows his or her interest in the company could be substantially affected. See Compendium § 3.1-9(b).

(c) A judge need not recuse where a party is an independent company managing facilities owned by members, and the judge owns stock in members that have less than a 10% interest and no role in management of the party.

(d) A judge who owns stock in a company whose records are subpoenaed by a grand jury does not have a financial interest in a party or the subject matter of the proceeding, but recusal could be required if the judge's interest could be substantially affected or if the company's status changed (i.e., becoming a target, moving to quash,

or defending contempt proceedings). Same, with respect to a judge's consideration of search warrant applications directed at a company in which the judge owns stock.

(e) Recusal is not required when a judge has a financial interest in a non-party corporation whose interests could be affected by the litigation, unless the judge knows that his or her financial interest may be substantially affected by the outcome of the litigation.

§ 3.1-6[1] Amicus Curiae

(a) For purposes of recusal decisions on a financial interest, an *amicus curiae* is not regarded as a party to the litigation. Recusal is required if the interest of the judge could be substantially affected by the outcome of the proceedings or if the judge's impartiality might otherwise reasonably be questioned. Advisory Opinion No. 63.

(a-1) A judge need not recuse, even when an amicus has a real institutional stake in the outcome of a case, if the judge's financial interest in the amicus would not be substantially affected and no other facts raise reasonable questions about the judge's impartiality.

(b) A judge should recuse from a case when judge's spouse is the executive director of an advocacy organization that has filed an *amicus curiae* brief before the court, unless the judge can obtain remittal of disqualification.

(c) In a case remanded to appellate judge's court, the judge should recuse, subject to remittal, where judge's spouse is an equity partner in a law firm that filed an amicus brief in the Supreme Court or filed an amicus brief after remand.

(d) A judge's impartiality in a matter might reasonably be questioned under Canon 3C(1) when a former law clerk who recently worked for the judge represents an *amicus curiae*.

(e) A judge need not recuse because an amicus brief is submitted by law professors from the school with which the judge is associated, unless the specific circumstances cast reasonable doubt on the judge's impartiality. Same where a law professor whom a judge knows in a professional capacity is part of a group that appears as *amicus curiae*.

§ 3.1-6[2] Fiduciary Capacity

(a) A judge who owns stock in a bank is disqualified in litigation in which the bank is a party, even though the bank is acting in a fiduciary capacity in that litigation. Recusal is under Canon 3C(1)(c) and therefore the remittal provisions of Canon 3D are not available.

(b) Judges are not automatically disqualified when a spouse has a financial interest, in a fiduciary capacity only, in a party to a proceeding before the judge.

§ 3.1-6[3] Official Capacity Suits

(a) In some circumstances, an interest or personal relationship which would ordinarily be disqualifying is of no moment when a party is suing or being sued in his or her official capacity only.

(b) Where a judge's spouse is an associate, and a partner in the law firm is sued in an official capacity unrelated to the law firm, recusal is not required.

§ 3.1-6[4] Class Actions

- Advisory Opinion No. 99 (judge's obligation to recuse where one party's attorney is involved in a separate class action in which the judge or a relative is a member of the class).

- Advisory Opinion No. 90 (judge's duty to inquire when relatives may be members of class action).

(a) All members of the class are parties, whether named or unnamed, so long as they have not opted out of the class.

(a-1) Where a class has not been certified, the only parties are those named in the complaint or otherwise joined. A judge who is a putative member of an uncertified class, but who does not have a pre-existing asset, property interest, or contractual relationship linked to the proceeding, does not have a financial interest in the subject matter or other interest that could be substantially affected (Canon 3C(1)(c)). However, if the judge's interest is the same as any putative class member, the judge's impartiality may reasonably be questioned under Canon 3C(1), and the judge should either recuse (subject to remittal) or renounce putative class membership and waive any future claim. Similarly, when a member of a judge's personal staff learns that he or she is a putative class member and wishes to so remain, the judge does not need to recuse, but the staff member should be isolated from the case.

(a-2) Appellate judges who are class members must recuse where judges disclosed the basis of class membership and waived any interest in the class before oral argument, but after investing substantial time on the case; recusal not required if waiver occurs immediately on assignment of the case.

(b) A judge who is a member of the plaintiff class challenging the applicability of FICA to federal judges need not recuse from other cases to which the United States government or an agency thereof (including the Social Security Administration) is a party.

(c) If a judge or any person within the third degree of relationship remains a member of a class entitled to receive damages as a customer of a public utility, the

judge should recuse. However, if the judge and such persons within the third degree of relationship opt out of the class, the judge is not required to recuse merely because of the judge's status as a utility customer, notwithstanding the possible beneficial effect on future utility bills, unless the savings as a customer might reasonably be considered to be substantial. In this case, 60 cents per month as of 1984 plus normal increases is not considered substantial. See Advisory Opinion No. 78.

(d) A judge's inclusion as a class member in a Rule 23(b)(2) class action seeking only injunctive and declaratory relief, in which a substantial segment of the general public are also members, does not require recusal, unless the judge has an interest in the action unique from that of members of the general public included in the class. Same for a facial challenge to constitutionality of a statute that applies to a judge's family business, of which the judge is a limited partner.

(e) A judge who releases any potential claims and opts out of the class need not recuse from a class action. Nor must the judge recuse where the court is a member of the class but any recovery will go to the general treasury and not the court. Same for judge assigned multidistrict litigation that includes class actions. A judge who opts out of the class should disclose to the parties and their counsel both the facts giving rise to the disqualification and the actions taken to remove the disqualification. A member of a judge's personal staff may also opt out of a class and waive any future claim to avoid a conflict, but it would be improper for a judge to ask the parties to exclude staff members from the class definition.

(e-1) Judge should recuse (subject to remittal) when the clerk of court is a putative class member and any future recovery is likely to benefit the court as a whole.

(e-2) After the time for opting out of the underlying class action has expired, a judge may cure potential conflicts by filing a written waiver and release of all potential claims that could be made in the underlying class action.

(f) A judge who is a member of a large class action need not recuse when an attorney or law firm representing the class appears before the judge in other matters, where the judge is not a named plaintiff, had no role in selecting attorneys for the class, has no personal contact with attorneys for the class, and has no reasonable expectation of substantial recovery. Judges have no duty to inquire whether attorneys appearing before them represent members of a class in unrelated cases that may include the judge (or relatives).

(g) In the unusual situation where a judge is an unnamed member of a class comprising all federal judges with respect to judicial compensation, the judge need not recuse when class counsel appears before the judge in an unrelated matter.

§ 3.1-6[5] Bankruptcy Proceedings

- Advisory Opinion No. 100 (identifying bankruptcy parties for purposes of recusal).

(a) For purposes of recusal decisions in bankruptcy proceedings, the following are deemed to be parties: the debtor, all members of a creditors committee, and all active participants in the proceeding; but merely being a scheduled creditor, or voting on a reorganization plan, does not suffice to designate an entity a "party." Bankruptcy judges are expected to keep informed as to their investments in firms which are active participants in the proceeding, but ordinarily need not familiarize themselves with the scheduled creditors.

(a-1) Where the judge's sibling is an officer of a bank that is a member of the creditor's committee or active in the litigation, the judge must recuse under Canon 3C(1)(d)(i) (no remittal), but an officer of a bank advisory board is not an officer of the bank for these purposes. Nor is a member of a bank's community advisory board an officer of the bank.

(a-2) An accounting firm employed by a party is not a party in bankruptcy, and recusal is not required when a judge's third degree relative works for the firm unless the relative works on the matter, is a material witness, or has an interest that could be substantially affected by the outcome.

(a-3) A company owning substantial stock in a creditor is not a party to the bankruptcy proceeding; the judge need not recuse because the judge's spouse's law firm represents the company in unrelated matters.

(b) In advice to rules committee of circuit court with respect to disclosure of interested parties, in context of bankruptcy appeals, appellate judges should know the identity of (1) the debtor; (2) the members of the creditor's committee; and (3) any entity which is an active participant in the proceeding before the judge. In addition, it was suggested that the rules committee might consider requiring a fourth disclosure, any other entity known to declarant whose stock or equity value could be substantially affected by the outcome of the proceeding.

(c) Assistant United States trustee appointed to bankruptcy judgeship required to recuse in all cases in which the Trustee's Office made an appearance, filed a disputed motion, or otherwise exercised discretion. Recusal not required for perfunctory administrative matters. Same for bankruptcy administrator appointed as bankruptcy judge.

(c-1) A judge who formerly served as assistant U.S. trustee and handled more than perfunctory administrative matters in a bankruptcy case should recuse from any adversary proceedings in the case.

(d) Judge need recuse only in cases in which U. S. Trustee spouse or spouse's subordinates are actually litigating an appeal; judge need not recuse in cases in which the spouse has exercised supervisory control in a clerical manner, such as sending out pre-printed guidelines for debtors, but may need to recuse in cases in which the spouse has exercised supervisory discretionary control.

(e) Where a bankruptcy judge's relative is a partner in a law firm, the judge should recuse if the firm files motions or actively participates in proceedings before the judge, but need not recuse if the firm represents secured creditors who take no action other than voting on any proposed reorganization plan.

(f) A judge whose third degree relative is a partner in an accounting firm should not approve a party's appointment of the firm or amount of fees.

§ 3.1-6[5][i] Bankruptcy Proceedings [Judicial Employees]

(a) A bankruptcy law clerk should not work on an adversary proceeding on which the law clerk worked while at a law firm, nor should the law clerk work on other matters initiated by the law firm during the law clerk's tenure there, but the law clerk may work on other adversary proceedings in that bankruptcy proceeding, so long as he or she does not possess disqualifying knowledge or information. See Code of Conduct for Judicial Employees, Canon 3F(2)(a)(i), (ii).

§ 3.1-6[6] Trade Associations

(a) The fact that a judge owns stock in or is doing business with a member of a trade association does not disqualify the judge from hearing a case in which the trade association is a party. Advisory Opinion No. 49. However, recusal is required if the judge concludes that the outcome of the case could substantially affect the value of the stock owned by the judge, the judge's spouse, or the judge's minor child.

> (a-1) A judge is not required to recuse in a case involving the American Bar Association or some other open-membership bar association of which the judge is a member, so long as the judge has not participated in the development of the bar association position on the matter in question in the suit and is not an officer of, or on the governing board of, the association. Advisory Opinion Nos. 52, 85.

(b) A union pension fund is not to be considered as a party to litigation merely because one of the constituent unions is a party.

(c) Where a judge's spouse is general counsel to a trade association, the judge should recuse if the association is a party, or if an association member is a party and the spouse worked on the matter or the outcome of the matter could substantially affect the spouse's financial, employment or property interests. The judge should also recuse

(subject to remittal) if the spouse or the association is so closely identified with the matter as to raise reasonable questions about the judge's impartiality.

§ 3.1-6[7] Criminal Victims

(a) If the sentencing judge owns stock or has any financial interest in a corporation that would be entitled to restitution from the defendant, the judge must recuse only if the judge's interest could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii), or if the judge's impartiality might reasonably be questioned under Canon 3C(1). See Commentary to Canon 3C(1)(c). Also, recusal is not required solely because a judge has a routine loan from a bank that may receive restitution.

(b) Where judge's spouse owns (or is beneficiary of trust that owns) stock in bank that may be entitled to restitution, the judge must recuse only if the judge's interest could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii), or if the judge's impartiality might reasonably be questioned under Canon 3C(1).

§ 3.1-7 Other Interests Which May Be Substantially Affected by the Outcome of Litigation

(a) A judge owning stock in a corporation named as a co-conspirator, but which is not a party in the pending anti-trust case, should recuse if the judge's interest could be substantially affected by the decision.

(a-1) A judge owning stock in a company that is not a party but produces the product that is the subject of litigation should recuse where the judge's award could influence the initiation of subsequent claims against the company or otherwise affect the value of the company's stock; judge has "a financial interest in the subject matter in controversy . . . or any other interest that could be affected substantially by the outcome of the proceeding." Canon 3C(1)(c).

(a-2) A judge handling consolidated cases should recuse if rulings in those cases will have a substantial effect on the judge's stock interest in a party to a similar case, not before the judge.

(b) A judge who is a member of the American Bar Association but who is not insured under the American Bar Association endowment policy is not disqualified in litigation brought by the endowment to obtain a tax refund.

(c) A judge whose investment portfolio consists mainly of tax-free municipal bonds should recuse from litigation concerning the tax-exempt status of such bonds.

(d) The fact that a judge or a judge's spouse has an account with or owes money to a bank does not necessitate recusal in cases in which the bank is a party,

absent some special circumstances (e.g., a pending, dubious, loan application; unusually favorable terms; loan in default; etc.). Same, where bank is a party in multidistrict litigation. A financial interest under the Code of Conduct means "ownership of a legal or equitable interest, however small," but a judge has no financial interest in a financial institution that merely acts as a custodian of the judge's money or property. Same, where judge is the conservator rather than the account holder.

(e) A judge who is a guarantor of the notes of a corporation should recuse in any case in which the corporation is a party.

(f) A judge owning stock in a financial corporation that is not itself a party to bankruptcy proceedings need not recuse merely because it is owed money by the debtor or has other interests in the proceeding, unless the outcome of the proceeding could substantially affect the value of the judge's investment.

(g) A judge who is a member of the plaintiff class challenging the applicability of FICA to federal judges need not recuse from other cases to which the United States government or an agency thereof (including the Social Security Administration) is a party.

(h) A judge who owns a fractional mineral royalty interest does not have a "financial interest" in the purchaser of those minerals, and need not recuse when the purchaser is a party, as long as the case could not "substantially affect" the value of the judge's interest. Where the royalty interest is small, the judge's impartiality cannot reasonably be questioned. However, a judge who holds the executory rights to lease minerals for production must recuse subject to remittal when the lessee is a party, because the judge's impartiality could reasonably be questioned.

(i) Where a bankruptcy judge must determine if a debtor's retirement account is exempt from creditors, and the judge and spouse have the same retirement account, the judge has an interest that could be affected substantially by the outcome of the proceeding and should recuse.

(j) A bankruptcy judge entitled to additional payments for pre-appointment work on a case should recuse from matters handled by an attorney who may be required to disgorge fees in order to redistribute payments to all attorneys in the case; the judge has an interest that could be substantially affected because rulings on fees payable to the attorney in other cases could affect the attorney's ability to disgorge prior fees.

(k) Recusal is not required where a proceeding could affect the spouse's municipal retirement benefit in an insubstantial manner (i.e., in an amount less than 0.2 percent).

(l) Recusal not required where both the judge and the plaintiff experienced a financial loss resulting from ownership of the same company's stock, where the

company is not a defendant and the judge does not have a financial interest in any defendant.

(m) More than mere speculation about the potential effect of litigation on a judge's interest in a non-party is normally necessary to support a conclusion requiring recusal.

§ 3.1-7[1] Policyholder of Insurance; Utility Ratepayer; Taxpayer

(a) A judge who holds a life insurance policy need not recuse when the mutual insurance company appears unless the policy could be substantially affected by the outcome. Same for a medical insurance policy.

(b) A judge to whom an insurance policy has been issued by a mutual insurance company or other insurance company need not, for that reason alone, recuse in cases to which the insurance company is a party. Nor is recusal required from an unrelated action against an insurer because the judge's (or family member's) care provider is a member of the class suing the insurer, absent a close personal relationship or other special factors affecting the judge's impartiality.

(b-1) A judge holding a Blue Cross policy need not for that reason alone recuse in an antitrust case in which a local Blue Cross organization is a party. Advisory Opinion No. 26.

(b-2) A judge insured under a Government-Wide Indemnity Plan written by Aetna Company need not for that reason alone recuse in a case in which Aetna is a party. Advisory Opinion No. 26.

(c) If a judge or any person within the third degree of relationship remains a member of a class entitled to receive damages as a customer of a public utility, the judge should recuse. However, if the judge and such persons within the third degree of relationship opt out of the class, the judge is not required to recuse merely because of the judge's status as a utility customer, notwithstanding the possible beneficial effect on future utility bills, unless the savings as a customer might reasonably be considered to be substantial. In this case, 60 cents per month as of 1984 plus normal increases is not considered substantial. See Advisory Opinion No. 78.

(d) A judge who holds a VA life insurance policy is not thereby disqualified from cases involving the VA or other federal agencies or instrumentalities.

(e) A judge's status as a utility customer does not indicate recusal in cases involving the utility, unless the outcome of the case could substantially affect the judge's utility bill. A ten dollar per month increase is one which might reasonably be considered substantial, and accordingly recusal was suggested. Recusal is not necessary where the proceeding will likely affect rates only remotely or not at all.

(f) A judge's mere status as a resident/taxpayer of a city filing for bankruptcy is not an interest that could be substantially or uniquely affected by the outcome of the proceeding, requiring recusal.

§ 3.1-7[2] Pensions

(a) A judge who receives a military or other governmental pension is not thereby disqualified from cases involving the respective governmental entity. Advisory Opinion No. 75. Same when judge has a deferred compensation retirement plan sponsored by a state or local government.

§ 3.1-7[3] Holdings of Judges' Relatives

(a) A judge whose spouse owns shares of stock in a corporation is not disqualified in litigation in which the political action committee of that corporation is one of 11 such PACs whose election activities are being challenged.

(b) A judge whose son is employed by a union pension fund need not recuse from a case in which one of the constituent unions, but not the pension fund, is a party.

(c) A judge has no financial interest in stock owned by judge's parent and should recuse only if judge knows that the parent's stock could be substantially affected by the outcome. Canon 3C(1)(d)(iii).

(c-1) Judge should recuse if he or she knows that a parent's interest in a trust owning stock in companies involved in a proceeding before the judge could be substantially affected by the outcome of the proceeding. Canon 3C(1)(d)(iii).

(d) A judge whose spouse owns AT&T stock need not recuse in cases involving AT&T ERISA plans where neither AT&T nor AT&T Information Systems is a named party or real party in interest (e.g., responsible for relief requested).

§ 3.1-8 Financial Conflicts [Judicial Employees]

(a) An automation employee owning stock in a software company does not have a conflict of interest unless the stock interest causes reasonable persons to question the employee's ability to perform official duties impartially.

§ 3.1-9 Duty to Keep Informed of Financial Interests

- Advisory Opinion No. 107 (Judge's Recusal Due to a Spouse's Business Relationships).

(a) A judge's Canon 3C(2) duty to keep informed about a spouse's personal financial interests does not require the judge to inquire about interests held in a fiduciary capacity only.

(b) A judge has no duty to inquire whether an insurance company indemnifies a party, but if the judge has an interest in a company known to be indemnifying a party, recusal is required if the judge knows the interest could be substantially affected.

(c) The Code of Conduct does not require judges to investigate corporate parents of parties before corporate parent disclosure statements are filed, nor does the Code prohibit judges from ruling on preliminary motions before disclosure statements are received.

§ 3.1-9[1] Duty to Keep Informed of Financial Interests [Judicial Employees]

(a) A law clerk has the same duty as a judge to disqualify from cases involving corporations in which the law clerk (or law clerk's spouse) owns stock and to keep informed about the personal financial interests of a spouse. The judge need not recuse, but the law clerk should be isolated from the case.

§ 3.2 Recusal: Family Relationships

- Advisory Opinion No. 90 (judges' duty to inquire when relatives may be members of class action).

§ 3.2-1 Judge's Relatives (Definition)

(a) "Relative" in this context includes all persons within the third degree of consanguinity, measured according to the civil law system. If the relative is personally involved in handling the case, or if the relative's interests could be substantially affected by the outcome of the case, the judge is disqualified, and the Canon 3D remittal procedure is not available. Thus, if the relative is a partner in the law firm, recusal is mandatory, regardless of whether the relative is actually familiar with or involved in the litigation. If the relative is an associate or other employee of the firm who is paid a salary and does not share in the profits of the firm, and the relative is not personally involved in the case, the only issue is whether the surrounding circumstances are such that the judge's impartiality might reasonably be questioned. Where the judge's impartiality might reasonably be questioned, the judge must recuse unless there is a waiver pursuant to Canon 3D. Advisory Opinion No. 58.

(a-1) A judge whose child is an assistant United States attorney need not for that reason alone recuse from all cases in which the United States Attorney appears as counsel, although the child may not participate in cases before the parent. Advisory Opinion No. 38.

(a-2) A judge whose relative is employed privately by the U.S. Attorney in a non-legal position need not recuse from cases in which the U.S. Attorney appears as counsel.

(b) A judge has a duty to be informed about personal "financial interests," individually and as a fiduciary, and must make a reasonable effort to keep informed about personal financial interests of the judge's spouse and minor children residing in the judge's household. Canon 3C(2). With respect to other relatives, the judge has no such duty.

(c) Where circuit court judge's child serves a one-year term as law clerk for a district judge within the circuit, it is appropriate for the circuit judge to devise a practical procedure that would be reasonably calculated to trigger the circuit judge's recusal from cases that were under active consideration by the district judge during the child's law clerk tenure. See Advisory Opinion No. 64.

(d) Judge need not recuse where the spouse of the judge's child works as a middle manager for a party but has no involvement in the case, unless the spouse's interests could be substantially affected by the outcome of the case (no remittal) or the judge's impartiality might reasonably be questioned (remittable).

(e) Recusal is not required when a judge's third degree relative works for an accounting firm employed in a bankruptcy case unless the relative works on the matter, is a material witness, or has an interest that could be substantially affected by the outcome.

(f) Recusal is required under Canon 3C(1)(d)(i) when a judge's spouse's sibling is appointed to state office and added as a defendant in an official capacity.

(g) A judge need not recuse from unrelated cases involving a government agency with which the judge's sibling filed a claim. Same, where a judge's relative is involved with a government investigation that is unrelated to the case before the judge, absent circumstances that suggest the judge's impartiality may reasonably be questioned.

(h) A judge's same-sex marriage partner should be treated as a spouse for purposes of complying with the Code of Conduct, notwithstanding the legal status of the partner. See Commentary to Canon 3C.

(i) Absent other facts, a judge's impartiality may not reasonably be questioned because a child was occasionally treated at a clinic owned by a party.

§ 3.2-2 Spousal Relationships

- Advisory Opinion No. 107 (Judge's Recusal Due to a Spouse's Business Relationships).

- Commentary to Canon 3C (recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship)

(a) A judge whose spouse is a member of city council must recuse in all cases to which the city is a party, if the city council actively participates in litigation involving the city. Otherwise, the judge's recusal depends on the level of city council involvement with the issues in the case.

(a-1) A judge whose spouse serves as chairman of state housing authority must recuse in all cases to which the housing authority is a party.

(a-2) A judge whose spouse serves on a board of a federal agency need not recuse from other agency matters not involving the board, as long as the spouse played no role in the matter before the judge.

(a-3) A judge whose child is a legislator should recuse, subject to remittal, in any case involving a challenge to legislation for which the judge's child served as a sponsor or author.

(a-4) A judge whose spouse serves as the director of the state department of corrections must recuse in habeas cases brought against a state detention facility. Similarly, a judge should recuse in cases when an individual may be placed in a facility where the judge's spouse serves as director of the facility.

(b) Neither a judge nor the judge's spouse should participate in the management of a family-owned business that does business with attorneys appearing before the judge.

(c) A judge should recuse from a case in which the chief executive officer of one of the parties is co-chair of the election campaign committee of the judge's spouse.

(d) No recusal is required where a judge's spouse (psychologist) is retained in an unrelated case by a law firm appearing before judge. The result would be different if the spouse were regularly retained by the law firm.

(d-1) Where judge's spouse operates legal search firm, judge need not recuse merely because a law firm appearing before judge has engaged the judge's spouse, either currently or in the past, to recruit an additional lawyer. Same where judge's spouse performs executive recruiting for companies that appear before the judge in unrelated cases. However, recusal (subject to remittal) would be appropriate in other circumstances, e.g., an exclusive arrangement, a substantial ongoing relationship, or a current engagement with respect to a merger effort or other effort of similar import to the law firm. Same where judge's spouse is a partner in an accounting firm whose clients appear before the judge.

(d-2) Where parties before the judge are, in other matters, clients of the judge's spouse, and the spouse (or the spouse's law firm) regularly represents

the clients in other matters, the judge should recuse, subject to remittal; judge need not recuse if representation is only in isolated circumstances and spouse's interest in the pending litigation is minimal.

(d-3) Recusal is not required when insurers or creditors used by the judge's spouse's business, or clients of the business, appear before the judge in unrelated matters, absent an exclusive, substantial, and ongoing relationship. Where the nature of the relationship, the size of commissions, or other factors require recusal, the judge must recuse (absent remittal) from all matters in which the client appears as a party within the meaning of Advisory Opinion No. 100.

(d-4) Recusal is not required when a client of the spouse's business appears before the judge, where the spouse is a salaried employee and does not receive client-related bonuses or commissions.

(d-5) Recusal is not required where a party or attorney before the judge is a client of an accounting firm in which the judge's spouse is a partner but the spouse does not work for the client, unless particular circumstances raise impartiality concerns (e.g., large client whose fees are more than a small percentage of firm revenue; spouse shares client fees that are more than a small percentage of spouse's income).

(e) A judge need not recuse when city is party even though judge's spouse represents city in unrelated matters. Same when judge's spouse represents the governor and the state (or a state entity) is a party in unrelated matters.

(f) Employment of a judge's spouse as a program coordinator in the state Office of Substance Abuse does not require recusal in all cases in which the state is a party, only those in which the spouse was personally involved in any way or which involved the particular governmental entity the spouse works for. Similarly, a spouse's employment by a city library does not disqualify the judge from matters involving the city; same for matters involving the library, unless the spouse is personally involved or could be substantially affected by the matter. Similarly, spouse's employment as a university professor does not disqualify the judge from all matters involving the university. Similarly, a spouse's employment as a school teacher does not disqualify the judge from all matters involving the school district.

(g) Per Canon 3C(1)(d)(ii), a judge must recuse in any matter arising in the judge's court wherein a federal agency is a party and the judge's spouse is acting as counsel for the agency or where the spouse has any knowledge of the case or is involved in any way with the preparation of the case. The judge is not otherwise obligated to recuse from cases in which the agency is a party. See Advisory Opinion No. 38. It is recommended, however, that a judge disclose on the record that the spouse is employed as staff attorney by the agency but is in no way involved in the matter before the judge.

(h) A transfer to the judge's spouse of investment in gaming corporation that is legal under law of jurisdiction in which the judge resides does not affect the judge's Canon 3 obligations concerning recusal or Canon 2's obligation to avoid the appearance of impropriety.

(i) A judge need not recuse in a case merely because a lawyer who resides with a deputy clerk appears therein. The circumstances may require isolation of the clerk from the case and an appropriate record notation.

(j) Perceiving that the judge's impartiality might reasonably be questioned, a judge recused from a pending case involving an insurance company as a party because the judge's spouse had an unrelated coverage dispute with the insurance company. After settlement of the spouse's dispute, a judge need only recuse for a reasonable time, taking into consideration the circumstances of the unrelated dispute and any hostility engendered.

(k) A magistrate judge may not preside in a case where the judge's spouse appears as a witness or where the spouse worked on the case as a law enforcement officer, but the magistrate judge may hear cases involving other officers in the spouse's agency so long as the spouse has neither direct nor supervisory involvement in that case.

(k-1) Similarly, magistrate judge married to law enforcement officer may hear cases involving law enforcement agencies other than spouse's.

(k-2) A judge whose spouse is the head of a law enforcement agency should recuse, subject to remittal, in all cases involving officers from that agency.

(l) A judge should recuse from a case when judge's spouse is the executive director of an advocacy organization that has filed an *amicus curiae* brief before the court, unless the judge can obtain remittal of disqualification. Same, where judge's spouse holds a leadership position in an organization that has taken a public position on an issue in litigation pending before the judge.

(m) Judge should recuse (subject to remittal) when attorney appearing before judge represents judge's spouse's business in any matter. Judge should also recuse (subject to remittal) when attorney appearing before judge is partner of attorney who represents judge's spouse's business in matter that could substantially affect spouse's interests; but recusal is not indicated where partner represents spouse's business in routine matters unlikely to affect business substantially.

(n) A judge should recuse from cases in which the judge's spouse is serving or has served as a mediator.

(o) Judge need not recuse from unrelated cases brought by prisoners who are members of a class represented by the judge's spouse, where the spouse is not

involved in the cases, the cases do not raise claims related to the class action, and the spouse has no special relationship to the attorneys or parties appearing before the judge.

(p) A judge whose spouse works for a nonprofit legal aid office is disqualified from matters in which the spouse participates, but not from other matters handled by the office. If the spouse is chief attorney for the office, the judge should recuse (or remit) from all matters. Similarly, when a judge's spouse steps down as the chief attorney for a nonprofit organization, the judge should continue to recuse from all matters where the spouse had general supervisory authority, but is not required to recuse from matters that the nonprofit organization became involved with after the spouse left his or her position.

(q) A judge should recuse (or remit) when the spouse is executive director of a nonprofit entity whose executive committee member or legal advisor appears as a party or attorney. The judge need not recuse because an executive committee member or legal advisor has a financial interest in a party or is employed by a law firm appearing before the judge, absent reasonable questions about the judge's impartiality due to substantial involvement of the member or advisor, or likely effect on the spouse's position, etc.

(q-1) A judge should recuse, subject to remittal, from cases involving a nonprofit organization when the judge's spouse serves as a volunteer board member for the organization and plays a role in reviewing and approving cases.

(r) Where judge's spouse's law firm won a civil judgment against a defendant, judge should recuse from subsequent criminal case against the same defendant arising out of the same factual circumstances.

(s) A judge should recuse (or remit) when the judge's spouse has personally solicited or overseen the solicitation of a donation from a party as part of the spouse's employment, the party is a major or sustaining donor of the spouse's employer, or the compensation of the spouse may be affected by the donation.

(t) Recusal in multidistrict litigation is not required where one law firm is adverse to the judge's spouse in other litigation due to the sheer volume of participants, but the judge should seek remittal for individualized rulings that could directly affect the firm's interests (e.g., appointment of defense management committee or liaison counsel, designation of bellwether cases).

(u) A law firm's unilateral recruitment of a judge's spouse does not raise a recusal obligation on the part of the judge, unless the spouse receives a bona fide offer of employment or undertakes to negotiate employment with the firm.

§ 3.2-2[1] Spousal Relationships [Judicial Employees]

(a) Marriage of assistant public defender to federal customs officer poses no actual or apparent conflict of interest where office to which assistant is assigned has infrequent involvement in customs office cases and steps are taken to insulate the assistant from involvement in such cases.

(a-1) The Code of Conduct for Federal Public Defender Employees is not violated where the chief assistant public defender avoids all contact with cases in which appears an assistant United States attorney with whom the defender has lived for ten years, where the defender advises all those the defender personally represents of the relationship and where, due to the large size of the offices in question, the administrative burdens of avoiding conflict are minimal.

(a-2) Same, where attorney in Federal Defender office and probation officer in same district are married, but defender should inquire of spouse whether they are involved in the same cases and advise the defender's supervisor of any potential conflicts, and must immediately withdraw from cases to which spouse is assigned.

§ 3.2-3 Partner Related to Judge or Judge's Spouse

- Advisory Opinion No. 58 (disqualification in case where relative is employed by a participating law firm).
- Advisory Opinion No. 107 (recusal due to spouse's business relationships)

(a) A judge should recuse where the spouse of the judge is a partner in firm appearing before the judge. Same where the judge's brother or brother-in-law is a partner. Same where the judge's brother-in-law is a partner at a firm representing a party in multidistrict litigation. This advice is not altered by the nature of the proceeding (i.e., civil or criminal), the significance of the case, or the size of the firm.

(a-1) Judge need not recuse where spouse's law firm was contacted by a party but did not accept employment and never entered an appearance.

(a-2) A judge should recuse, subject to remittal, from cases handled by an attorney practicing as a solo practitioner who also shares a law partnership, office, and employees with the judge's brother; recusal is not required if the attorney's solo practice is wholly independent of the brother.

(a-3) A judge need no longer disqualify from law firm matters when the judge's sibling, who was formerly a partner, retires and no longer has an equity interest in the firm.

(a-4) A judge should consider recusal under Canon 3C(1) when the law firm of the judge's "significant other" appears before the judge. See Commentary to Canon 3C.

(b) A judge should recuse when the judge's brother-in-law is a partner, even though in a distant branch of the law firm. Same for judge's son-in-law. Same for judge's stepson-in-law.

(c) A judge should recuse where a nephew (by blood or marriage) of the judge or the judge's spouse is a partner.

(d) A judge need not recuse, absent a close personal relationship or other similar circumstances, where the son of the fiancé of the judge's father-in-law is a partner (i.e., the judge's prospective stepbrother-in-law).

(e) A judge is not disqualified when a nephew of the judge's deceased spouse is a partner in a firm appearing before the judge. Relations of a former spouse are not within the relations described in Canon 3C(1)(d). Same for the former spouse of a judge's sibling.

(f) A judge should recuse in criminal case in which defendant is represented by an associate in the firm in which judge's spouse is a partner.

(g) A judge is not required to recuse where a lawyer is godfather of judge's child unless the lawyer is treated as a member of judge's family. Advisory Opinion No. 11; see Compendium § 3.6-8(g).

(h) A judge is not disqualified because a sibling's law firm represents parties in a state case closely related to a matter before the judge involving the same parties, but the judge should recuse if the sibling's firm acts as counsel and provides advice in the federal multidistrict litigation.

§ 3.2-4 Government Attorneys Related to the Judge

- Advisory Opinion No. 60 (appointment of spouse of assistant U.S. attorney as part-time magistrate judge).

(a) Judges whose relatives are attorneys in government employment must recuse in all cases handled by such relative, or for which the relative bore some responsibility; but recusal is not necessary in other cases involving the federal agency. Advisory Opinion No. 38. Same where judge's relative is a summer law clerk in the government's employ. A judge is not required to inquire whether a relative employed as a government attorney participated in a case before the judge, but the judge must recuse if the judge becomes aware of facts indicating participation by a relative within the third degree of relationship.

(a-1) A judge should recuse where spouse or third degree relative is attorney in government employment and has supervisory authority over attorney appearing before the judge. However, if the government office implements a procedure that relieves the relative of supervisory responsibility, and the screening mechanism or other procedure requires minimal effort to implement and can be easily explained to the public, then recusal is not required.

(a-2) Where a judge's spouse is a federal public defender, the judge need not disqualify from criminal cases handled by other federal public defenders in which the spouse has no involvement.

(a-3) Judge whose relative is serving in a supervisory position in a law enforcement agency must recuse in all cases handled by such relative, or for which the relative bore some responsibility.

(a-4) A judge whose relative merely accepts service of process on behalf of the government is not acting as a lawyer in the proceeding.

(b) Per Canon 3C(1)(d)(ii), a judge must recuse in any matter arising in the judge's court wherein a federal agency is a party and where the judge's spouse or a person within the third degree of relationship to the judge, or the spouse of such a person is acting as counsel for the agency or has any knowledge of the case or is involved in any way with the case. A judge is not otherwise obligated to recuse from all cases in which the agency is a party. See Advisory Opinion No. 38. It is recommended, however, that the judge disclose on the record that the spouse is employed as staff attorney by the agency but in no way involved in the matter before the judge.

(c) Where judge's spouse or third-degree relative or spouse of such person (Canon 3C(1)(d)) is working as an attorney in a government agency, but is not personally involved and has no knowledge of the case before the judge, but does have supervisory responsibility over the attorney handling the case before the judge, then only Canon 3C(1) requires recusal and Canon 3D remittal is available. But if the agency creates a wall so the relative does not supervise an attorney's work on a specific case, and the judge's impartiality cannot otherwise be questioned, recusal is not required.

(c-1) If the government office implements a procedure that relieves the judge's relative of such supervisory responsibility, then recusal is not required.

(d) Where judge's spouse or third-degree relative or spouse of such person (Canon 3C(1)(d)) works as an attorney for the state Attorney General, Canon 3C(1) (remittal available) governs the judge's decision to recuse in a case in which the Attorney General is a real party in interest, but recusal is not required where a habeas petitioner mistakenly names the Attorney General as party defendant or where the Attorney General is named party defendant only for the technical reason required by

Rule 2(b), Rules Governing 28 U.S.C. § 2254. Nor is recusal required where the Attorney General is named as a party in an official capacity due only to that officer's law enforcement role.

(e) Where judge's third degree relative is a U.S. attorney who recused from a case, never participated in a case, and will not supervise the conduct of a case before the judge, the judge need not recuse under Canon 3C(1)(d)(ii) but should consider recusal under Canon 3C(1) (to the extent impartiality could reasonably be questioned) and remittal under Canon 3D.

(e-1) Where a judge's spouse is a U.S. Attorney, the judge's impartiality could reasonably be questioned in all matters handled by that office; the judge should recuse, subject to remittal.

§ 3.2-5 Relative Is an Associate or Other Employee

- Advisory Opinion No. 58 (disqualification in case where relative is employed by a participating law firm).
- Advisory Opinion No. 107 (disqualification due to spouse's business relationships)

(a) Where a judge's child is employed by a law firm in a salaried position (e.g., clerical, paralegal, associate), this fact by itself is not sufficient to raise a reasonable question regarding the judge's impartiality in cases in which the law firm appears. However, a reasonable question as to impartiality would be raised if the child actually worked on the matter before the judge or if the matter otherwise involved the child's duties. In addition, other circumstances could combine to raise a reasonable question as to impartiality. The more responsibility held by the child within the firm, the greater likelihood that a reasonable question as to impartiality would be raised. Similar considerations apply where a judge's spouse is employed by a law firm. Similar considerations apply where a judge's close relative is a private investigator who is hired by law firms to work on particular cases.

(a-1) No reasonable question as to impartiality would be raised when a judge's child holds a position as a runner, messenger, or file clerk with the firm.

(a-2) Where judge's spouse is an independent contractor with a firm and receives a set salary plus a percentage of new client billings, the judge should recuse from all cases handled by or brought to the firm by the spouse.

(a-3) Recusal is not required from matters handled by a law firm with which the judge's parent is associated, where the parent receives no salary or employee benefits and was never a partner.

(a-4) Recusal is not required when a judge's sibling is employed in a separate business of an attorney who appears before the judge.

(a-5) No recusal is required where a judge's child contracts to make individual business presentations to law firms, some of which appear before the judge. The result would be different if the child had a substantial or ongoing relationship with a law firm. See also Compendium § 3.2-2(d).

(b) A judge's relative who, although designated as a "partner" in a law firm, is paid a fixed salary and does not share in the firm's profits, is regarded as an associate or employee, for purposes of the judge's recusal decisions.

(b-1) A judge's brother-in-law is an "income" partner, and thus like an employee or associate. Recusal is not mandated when brother-in-law's firm (e.g., lawyer other than brother-in-law) appears.

(b-2) A bankruptcy judge may preside over cases handled by an attorney associated with the judge's sibling, where the sibling shares office space and receives a percentage of the attorneys' fees in non-bankruptcy cases.

(c) Where a judge's relative is an officer at a bank that is likely to appear before the judge, recusal is mandatory if the judge's relative holds an equity position at the bank, sharing in the bank's profits, and the bank is a party to the proceeding (i.e., is a member of the creditors' committee, a debtor, or a creditor actively involved in litigating an issue). However, where the relative is an employee receiving a salary, recusal is generally not required if the relative would not profit or lose from the judge's action in the case, either financially or otherwise. Finally, if any case arises involving a loan for which a judge's relative is accountable, recusal is required since under the circumstances the judge's impartiality might reasonably be questioned. Similar considerations apply when judge's relative is an employee of a company that appears as a party in a case before the judge. Similarly, a law clerk does not need to be isolated from a case when the law clerk's relative is employed by a party but has no interest that could be affected by the litigation.

(d) Judge need not recuse from cases involving government agency that employs spouse of judge's child unless spouse has gained privileged knowledge or has been involved in the case, either personally or as supervisor. Same when a judge's child applies for or accepts a job with a city agency.

(e) Judge need not recuse due to child's previous employment by large accounting firm that is a party, where child did no work on the matter, had no financial interest in the firm, and left the firm's employment before the case was assigned to the judge.

(f) A judge's impartiality is not reasonably questioned because the judge's stepchild was hired by a party, where the stepchild previously worked as a long-term

contractor for the party and the position is unrelated to the litigation. Same where judge's relatives work as director and employee of a non-profit organization that has a contract with a party.

§ 3.2-6 Relative Is a Member of the Judiciary

(a) Federal judge's impartiality might reasonably be questioned, in violation of Canon 3C(1), if the judge were to consider habeas corpus petitions from state inmates where the judge's child was a state judge and had participated in the state judicial action challenged in the federal habeas action.

(b) A judge whose spouse serves as a state court judge should recuse (subject to remittal) in cases seeking review of the state court's opinion or order.

§ 3.3 Recusal: Former Employment

- Advisory Opinion No. 24 (financial settlement on judge's resignation from law firm and disqualification in cases in which former firm appears).

§ 3.3-1 Withdrawal from Firm; Former Firm Appearing in Case

- Compendium § 2.7.

(a) When the judge's former law firm is being sued for malpractice, based upon events that occurred while the judge was in the firm, the judge should recuse. But recusal is not required due to the judge's potential residual liability with a former firm for taxes, where no claim is pending or likely.

(b) A judge must recuse in all cases handled by the former law firm until all payments due the judge have been received, and for a reasonable period of time thereafter. Same with respect to a law firm to which judge upon appointment refers cases. Recusal after payments end is necessary only if the reasonable period needed to allay impartiality concerns (generally, at least two years) exceeds the financial payment period.

(b-1) There is no impropriety in a judge's negotiating with his or her former law firm for prepayment of a fixed amount in lieu of collecting amounts payable from the firm as they become due in future years.

(c) The fact that a party to litigation is, in other matters, a client of the judge's former law firm does not necessitate recusal.

(d) The fact that the judge's former law firm represents certain state agencies does not necessitate recusal from litigation in which other state agencies, not represented by the firm, are parties.

(e) After 15 years on the bench, a judge need not recuse from cases handled by the judge's former law firm. A judge should recuse as long as the judge is receiving payments attributable to his or her partnership interest and so long thereafter as necessary to avoid having the judge's impartiality reasonably questioned.

(f) When, following the judge's withdrawal, the law firm breaks up, and former members affiliate with various other law firms, recusal decisions should be based upon a realistic assessment of the connection between the judge's old law firm and the new law firms as to the particular case or matter, the duration and closeness of personal relationships between the judge and former partners and associates, etc.

(g) Where a judge's arrangement with former law firm upon appointment to the bench includes a financial incentive to return to the firm should the judge ever leave the bench, the judge should recuse whenever the former firm appears unless the chances of leaving the bench are remote.

(h) A bankruptcy judge has a payout agreement with former firm that is adequately secured by real estate, although partners are also liable. One former partner has joined a new and unrelated firm. A judge should recuse when former partner appears, but not in all cases in which new firm appears.

(i) A judge should recuse under Canon 3C(1)(b) when a case is so closely related to a matter handled by the judge's former firm while the judge was there that it should be considered the same matter in controversy (i.e., common parties, overlapping factual issues, or the decision will have preclusive effect). Same, where judge's former firm represented a party to a federal agency proceeding and the agency's decision is under review by the court. Same, where judge is assigned multidistrict litigation and judge's former firm represented some of the parties in the case while judge worked there.

(j) A judge is not disqualified from a matter handled by public interest law firms for which the judge handled similar matters nine years ago, where the judge did not participate in the pending matter or take a position on the merits.

§ 3.3-1[1] Former Firm Appearing in Case [Judicial Employees]

(a) A bankruptcy law clerk should not work on an adversary proceeding on which the law clerk worked while at a law firm, nor should the law clerk work on other matters initiated by the law firm during the law clerk's tenure there, but the law clerk may work on other adversary proceedings in that bankruptcy proceeding, so long as he or she does not possess disqualifying knowledge or information. See Code of Conduct for Judicial Employees, Canon 3F(2)(a)(i), (ii).

(b) A law clerk who has applied for or received a fellowship to work at a public interest organization's local office, and who is a member and former employee of the organization, should not handle matters in which the national or local office is a party or

amicus, but the clerk may handle such matters if he or she does not accept the fellowship and discontinues membership.

(c) A district court law clerk who previously worked for a firm may not participate in chamber's handling of any case the law clerk knows the firm handled while the law clerk was employed there. Facts should be placed on record and the law clerk should be isolated from the case. Same where the law clerk is a contract attorney, which is functionally equivalent to a firm associate.

(c-1) A law clerk who is serving a temporary clerkship on leave of absence from a law firm should not during the term of his or her clerkship work on cases handled by or receive any compensation or benefits from the law firm.

(c-2) Law clerk who will work for a law firm before and after clerkship should not be permitted to work during the clerkship on a massive lawsuit that could have a substantial effect on the law firm's major client.

(c-3) Where a law clerk worked for a judge, then worked for a law firm handling a case before the judge, then resumed working for the judge, the law clerk should not be permitted to work on the case.

(c-4) Law clerk should not work on case a former law firm handled when the law clerk was associated as counsel with the firm. See Code of Conduct for Judicial Employees, Canon 3F(2)(a)(ii).

(c-5) A law clerk should not be permitted to work on a case in which the law clerk's former firm was, or is likely to be, a material witness.

§ 3.3-2 Other Business Relationships with Former Law Firm or Its Members and Associates

(a) A judge who has sold a building to his or her former law firm and holds a mortgage on the property should recuse from all cases handled by that firm so long as the mortgage remains outstanding.

(b) A judge should recuse (subject to remittal) from cases handled by a former law firm that continues to manage the judge's pension and retirement accounts. Same for the former law firm that established and is contingently liable for the judge's spouse's vested pension benefit. Same while the spouse's former firm is repaying the spouse's capital contribution in monthly installments. Similarly, a judge should recuse in all matters involving the firm, subject to remittal, even where a judge's retirement payments are fixed and not contingent on the firm's income or the performance of the firm's investment assets. The Pension Benefit Guaranty Corporation's ultimate contingent liability for a pension does not affect this analysis.

(b-1) Where a firm buys an annuity to fund the judge's pension benefit, but the firm holds the annuity and remains contingently liable for the pension, the judge should recuse from all matters handled by the firm. Recusal is not necessary where the judge rather than the firm owns the annuity and the firm has no continuing liability, except that the judge should recuse in any case pending prior to the purchase of the annuity if the firm appears therein.

(b-2) A judge should recuse (subject to remittal) when the judge's former corporate employer or parent company, which administer the judge's retirement plan, appear as a party. However, recusal is not required when a judge's relative receives a small pension from a party, which is generally available to all who qualify and was structured before the pending litigation, and the payments are not part of the judge's (or the judge's spouse's) income stream.

§ 3.3-3 Prior Government Employment

(a) A judge who formerly served as United States Attorney is disqualified pursuant to Canon 3C(1)(e) (no remittal) in all cases involving investigations or prosecutions that were pending in the United States Attorney's Office during the judge's tenure, and from all cases involving matters that came under the judge's supervision during the judge's tenure as United States Attorney. Similar principles are applicable for judges who previously served at higher levels of the Department of Justice with respect to "participation" within meaning of Canon 3C(1)(e). Same for judge who served as state solicitor general for cases where the judge was personally involved or the solicitor general's office bore some responsibility.

(a-1) The disqualification of the former United States Attorney (now judge) is pursuant to Canon 3C(1)(e) (no remittal) with respect to cases that were litigated in the judge's name during the judge's tenure as United States Attorney, notwithstanding the judge's lack of personal involvement.

(a-2) With respect to matters that were pending in the office but never ripened into cases and thus were never litigated in the name of the former United States Attorney (now judge), the judge is disqualified pursuant to Canon 3C(1)(e) (no remittal) if the judge was personally involved, but only 3C(1) disqualification applies (remittal available) if the judge was not personally involved and the matter was handled exclusively by subordinates and was not litigated in the judge's name.

(a-3) Canon 3C(1)(e) (no remittal) requires a judge to disqualify from a civil case that arises out of the same fact situation and involves the same defendants that were involved in a criminal investigation in which the judge was personally involved during the judge's previous tenure as United States Attorney. Canon 3C(1)(a) also requires recusal because the judge has personal knowledge of disputed facts relevant to the civil cases. Similarly, Canon 3C(1)(e) (no remittal) requires a judge to disqualify when the legal and factual disputes in a

case substantially overlap with a related case in which the judge's name appeared on the briefs as the Acting Assistant Attorney General.

(a-4) A judge who formerly served as the Federal Public Defender should disqualify in all cases in which the Federal Public Defender's Office represented defendants in investigations or prosecutions pending during the judge's tenure in that office. (Canon 3C(1)(e) no remittal). The judge should also consider whether a blanket recusal (Canon 3C(1) remittal available) for a period of time in all Federal Public Defender cases is necessary to avoid the judge's impartiality being reasonably questioned. The appropriate length of time depends upon such factors as the judge's length of service in the office and relationship with former colleagues and subordinates.

(a-5) In view of the responsibilities and role of principal assistant U.S. attorney, similar advice applies; judge should recuse (absent remittal) from unrelated civil case involving activities that were under investigation during the judge's tenure, though judge did not handle investigation and no criminal case resulted.

(a-6) Judge who formerly headed a Justice Department Division need not recuse from U.S. attorneys' office matters that the judge did not personally handle, approve, or supervise.

(b) A judge who formerly served as Assistant or Deputy United States Attorney should recuse from all cases involving matters with which the judge came in contact during the judge's tenure, or for which the judge bore some responsibility, but need not recuse from cases in which the judge did not participate. Same, for a judge who formerly served as Assistant Federal Public Defender. Same, for a judge who formerly served as Deputy Solicitor General in state government. Similarly, judge who participated in investigation of a defense contractor need not recuse from unrelated cases involving the contractor, where the subject and issues are completely unrelated.

(c) A judge is not required to recuse merely because agency that the judge headed at the time filed an amicus brief in another case addressing the same issue now before the court. The judge did not prepare the brief and remembers the agency's involvement in the issue only vaguely.

(d) Assistant United States trustee appointed to bankruptcy judgeship required to recuse in all cases in which the assistant or a subordinate made an appearance, filed a disputed motion, or exercised discretion through motions to convert or dismiss for lack of progress or failure to comply with operating instructions. Recusal not required for assistant or subordinate's work in other clerical matters, including issuance of operating instructions to debtors or initial appointment of creditors' committees.

(d-1) However, Chapter 13 Standing Trustee appointed to bankruptcy judgeship required to recuse in all cases in which he or she served as trustee.

(e) A judge who formerly served as a state assistant attorney general should recuse in cases in which former associates appear only so long after the relationship has terminated as is necessary to avoid having the judge's impartiality reasonably questioned, and the judge's selection of two years would be a reasonable period for Canon 3C(1) recusal. The appropriate length of time may vary based on the facts and circumstances. Same for bankruptcy judge who formerly worked in the U.S. Trustee's Office. Same for judge who served in state solicitor general's office or at the Department of Justice. While many judges automatically disqualify themselves for a time period from cases involving their former employer, the matter is ultimately within each judge's discretion.

(f) A judge who is disqualified from hearing an en banc appeal because of the judge's personal knowledge of the facts of that case, by virtue of the judge's former position in state government, may not sit on a parallel en banc appeal presenting essentially the same questions of law where the two cases are to be heard and decided together. There is a reasonable perception that the judge's participation in argument and conference in one appeal will directly affect the court's deliberation in the other appeal from which the judge is recused.

(g) Legal arguments made as a lawyer on behalf of clients do not call into question a judge's impartiality when presiding over a later, different case, even if it involves related legal issues.

(h) A judge who served in a state legislature is not disqualified under Canon 3C(1)(a) (knowledge of disputed evidentiary facts) or 3C(1)(d) and (e) (material witness or expression of opinion) from challenges to legislation for which the judge voted; nor is it reasonable to question the impartiality of a judge who did not sponsor or author the legislation and whose previous actions do not otherwise raise doubts about his or her ability to preside fairly. Nor is a judge disqualified because of a spouse's similar legislative service.

(i) Recusal not required under Canon 3C(1)(e) where a judge served as counsel to a congressional committee that was involved in drafting a statute and legislative history related to a case before the judge's court, but the judge was not involved in the drafting process during the congressional employment.

(j) A former state court judge should recuse from reviewing federal habeas petitions of prisoners whose direct appeals or habeas petitions the judge adjudicated while on the state court, but recusal is not required when a prisoner whose conviction or sentence the judge adjudicated as a state court judge files an unrelated claim in federal court.

(k) A federal judge's prior service as a state court judge does not categorically require the judge to recuse from any state court cases removed to federal court that were initially filed in the state court after completion of the judge's state judicial service. Similarly, a federal judge's service as a municipal court judge ten years prior does not

require the judge to recuse from cases where the municipality is a party when the judge did not participate in the proceeding as a municipal court judge and the judge is no longer receiving compensation or benefits from the municipality.

(l) A judge who formerly served as an Assistant United States Attorney should recuse for a reasonable time period from cases where law enforcement officers with whom the judge had a close working relationship appear as witnesses or sign affidavits.

§ 3.4 Recusal: Other Miscellaneous Business and Personal Relationships

(a) A judge may accept the honor of a state legislature naming a public work for the judge; this is unlikely to necessitate the judge's recusal.

(b) A judge who belongs to an alumni association is not disqualified from handling matters involving the school, absent circumstances reasonably calling into question the judge's impartiality.

(c) Accepting a valuable vacation trip from a close friend who is a law firm partner would necessitate the judge's recusal from matters handled by the firm.

§ 3.4-1 Co-Authors

(a) A judge who, with a lawyer, has co-authored a book from which both are entitled to receive royalties should recuse from all cases handled by that lawyer or the lawyer's law firm, so long as the royalty arrangement continues. Same for a bankruptcy judge who co-authors a book with a bankruptcy trustee. Same, even if the lawyer co-author has waived any claim to royalties, but not if the co-authorship has ceased for revisions of the book.

(a-1) However, a judge need not recuse from cases handled by the co-author's law firm where the law firm does not share in royalties or have a financial interest in the book.

§ 3.4-2 Landlord-Tenant

(a) A judge who is receiving benefits from a law firm (free storage space) should recuse from cases handled by that firm so long as the relationship continues.

(b) Where judge's spouse is the owner of a shopping center and a party defendant is one of the tenants paying rent, judge's spouse does not have a financial interest; and Canon 3C(1)(c) would apply only if the outcome of the case could substantially affect the payment of rent; but the judge's impartiality could reasonably be questioned (Canon 3C(1)) and thus the judge should disqualify subject to remittal. Advisory Opinion No. 27. Similar principles apply where a lawyer appearing before the judge is a tenant of a building owned by the judge or the judge and his or her children.

(b-1) A judge should recuse from cases in which law firm appears where judge is tenant in residential building owned by spouse of partner in law firm.

(b-2) Judge should recuse from cases in which law firm leasing space to judge's spouse appears, subject to remittal.

(c) A judge, as landlord, may receive rent from tenant subsidized by Section 8 as Section 8 requires tenant, not landlord, to apply. A judge who is a landlord of a tenant subsidized by Section need not recuse in all cases where HUD is a party, only where the case deals directly with the Section 8 program because the judge's impartiality might reasonably be questioned. Where the Section 8 Program is involved, recusal is required under 3C(1) subject to remittal under Canon 3D.

(d) A bankruptcy judge whose tenant files for bankruptcy has a "financial interest in the subject matter" and should recuse from the case.

§ 3.4-3 Law School Teaching

(a) A judge who teaches at a law school should recuse from all cases involving that educational institution as party. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality might reasonably be questioned in view of the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case, and related factors. Similar factors govern recusal of judges serving on a university advisory board. Teaching at a state law school does not necessitate recusal from all cases involving the state or its agencies.

(b) The fact that a chief judge teaches at the law school involved does not disqualify the chief judge in reviewing requests from judges for prior approval of compensated teaching at that school, because impartiality cannot reasonably be questioned.

(c) Judge who teaches at law school generally need not recuse where law school's nonprofit clinical program represents party in case, except where judge's impartiality could reasonably be questioned due to significance of case or judge's close relationship to clinical program or participants. Where clinical program's professor is involved in approving judge's teaching contract, reasonable person might question judge's impartiality depending on facts, but ordinarily such involvement would be insufficient to raise ethical concerns.

(d) A judge need not recuse because an amicus brief is submitted by law professors from the school with which the judge is associated, unless the specific circumstances cast reasonable doubt on the judge's impartiality. Same where a law professor whom a judge knows in a professional capacity is part of a group that appears as *amicus curiae*.

(e) A judge need not recuse under Canon 3C(1) when the government agency where the judge's co-teacher works represents a party to a case before the judge and the co-teacher has no personal knowledge or involvement in the case.

§ 3.4-4 Co-Owners

(a) A judge should recuse from cases in which a business partner of the judge (passive investment) is a party or counsel, so long as the business relationship continues. On the other hand, a judge who is a passive investor in a project, along with numerous other persons whose identities are unknown to the judge, need not recuse from cases handled by a lawyer who is also a co-investor in the project, absent a general partnership relationship or frequent business dealings between them.

(b) A judge who previously participated in a joint venture with an attorney should recuse from any cases in which the attorney appears during the joint venture relationship and for a reasonable period of time after it concludes.

(c) A judge may be a passive investor in a general partnership, but should obtain the names of the judge's general partners and recuse from cases where any general partner appears as a party to avoid an appearance of impropriety.

§ 3.4-5 Parties to a Contract

- Advisory Opinion No. 94 (recusal when a party before the judge pays mineral royalties to or leases mineral rights from the judge)

(a) Because a judge's impartiality might reasonably be questioned, a judge who has contracted with a party or parties for use of a service mark created by the judge must recuse from all cases involving such parties or their counsel so long as the royalty agreement remains in effect.

(b) A judge who owns a fractional mineral royalty interest does not have a "financial interest" in the purchaser of those minerals, and need not recuse when the purchaser is a party, as long as the case could not "substantially affect" the value of the judge's interest. Where the royalty interest is small, the judge's impartiality cannot reasonably be questioned. However, a judge who holds the executory rights to lease minerals for production must recuse subject to remittal when the lessee is a party, because the judge's impartiality could reasonably be questioned.

(c) A judge's purchase of an attorney's vehicle, for market value in an arm's length transaction, does not necessitate recusal and need not be disclosed if the attorney appears.

(d) A judge whose spouse has a contractual right to receive income from the spouse's former employer is not required to recuse when the spouse's former employer is a party, where the terms of the contract are fixed, the contract derives from a long-

terminated employment relationship, and no unique characteristics of the transaction suggest the judge's impartiality might reasonably be questioned. Advisory Opinion No. 94. Similarly, recusal is not required when a judge's relative receives a small pension from a party, which is generally available to all who qualify and was structured before the pending litigation, and the payments are not part of the judge's (or the judge's spouse's) income stream.

§ 3.4-6 Charitable and Religious Organizations

(a) A judge serving on the board of directors of a charitable foundation is not disqualified from cases in which one of the parties is a corporation whose stock the foundation holds in its investment portfolio.

(b) A judge need not recuse merely because lawyers who accept appointments as counsel for the poor by legal service associations to which the judge has contributed financially appear as counsel of record in cases before that judge.

(c) A judge may serve as president of a local council of the Boy Scouts, subject to recusal when any council of the Boy Scouts appears as a party.

(d) Judge who has been involved for many years as a volunteer leader for a charitable organization should recuse in a case involving a constitutional challenge to the organization's activities.

(e) A judge's former membership in an organization does not preclude the judge from sitting in cases involving the organization, absent factors that suggest a reasonable basis to question the judge's impartiality under Canon 3C(1).

§ 3.4-6[1] Charitable and Religious Organizations [Judicial Employees]

(a) A judicial employee serving on a distribution committee of a foundation whose sole responsibility is making grant decisions need not be isolated from cases in which one of the parties is a corporation whose stock the foundation holds in its investment portfolio.

(b) A law clerk is not disqualified from working on a bankruptcy case involving a religious organization simply because the law clerk is a member of that religion, but the law clerk should not participate if the case could significantly affect the law clerk's local church or child's school.

§ 3.4-7 Judges Negotiating for Future Employment

- Compendium § 2.5.

§ 3.4-7[1] Future Employment [Judicial Employees]

(a) Where judge's law clerk has merely submitted application for employment, the clerk need not necessarily be isolated from cases where potential employer appears, but the judge may feel it is desirable in some circumstances, e.g., likely that clerk will eventually be employed. See Advisory Opinion Nos. 74 and 81.

(b) A law clerk who has applied for or received a fellowship to work at a public interest organization's local office, and who is a member and former employee of the organization, should not handle matters in which the national or local office is a party or amicus, but the clerk may handle such matters if he or she does not accept the fellowship and discontinues membership.

(c) Although Code of Conduct for Judicial Employees does not contain a remittal provision, judge may, in unusual circumstances, consider using remittal procedure to permit law clerk to continue working on a case in which clerk's future employer appears (unusual circumstances included that the firm appeared in a criminal case for a limited purpose, clerk worked extensively on case before future firm became involved, and clerk would not be employed as a firm partner).

(d) Following judicial employment, a former probation officer should avoid representing a client whom he or she supervised or on whose file he or she worked due to concerns about confidentiality under Canon 3D of the Code of Conduct for Judicial Employees. Compare Advisory Opinion No. 109.

§ 3.5 Recusal: Members of the Judge's Staff; Former Staff and Their Relatives

(a) A judge must recuse from cases in which the spouse of the judge's secretary appears as counsel. But see Compendium § 3.5(a-2). Recusal is not required when spouse of chief probation officer, or members of spouse's firm, appear as counsel, absent special circumstances affecting the judge's impartiality.

(a-1) Where spouse of judge's secretary is employed by law firm, judge must recuse where spouse actually participates in case through appearance or supervision of others who appear. Where spouse's firm appears (but spouse does not actually participate), judge must recuse if spouse has a significant financial interest in the case. Spouse who is partner in firm may be presumed to have significant financial interest, except for routine cases unlikely to affect firm reputation or finances. Spouse who is associate in firm may be presumed *not* to have significant financial interest, except in rare cases likely to have major effect on firm reputation or finances.

(a-2) Where spouse of judge's secretary is employed by law firm, but spouse does not participate in case and does not have significant financial interest, judge need not recuse if steps are taken to minimize appearance of

impropriety (e.g., remove secretary from direct involvement in case, caution staff that secretary is to be isolated from case, and disclose on the record).

(a-3) Upon a secretary's termination of employment, a judge may hear cases involving the former secretary's spouse.

(b) A judge need not recuse where spouse of an outgoing law clerk is attorney in the case, where the law clerk did no work on the case.

(c) A judge need not recuse where the spouse of the judge's secretary is an assistant United States attorney, but the secretary should not be permitted to do any work on any case in which the spouse is or was involved. Same where law clerk's spouse is an assistant United States attorney.

(d) A judge need not recuse where the spouse of the judge's law clerk or the spouse of a deputy clerk of court appears as counsel, but must ensure that neither the law clerk nor the deputy clerk does any work on the case; the same ruling applies where the law clerk's spouse is also a former law clerk of the judge. It is advisable not only to isolate the current law clerk from that case, but also to inform the parties that this is being done.

(d-1) A judge should not appoint as law clerk the child of a lawyer who regularly appears before the judge unless the law clerk can be isolated in those cases.

(e) Where a law clerk worked for a judge, then worked for a law firm handling a case before the judge, then resumed working for the judge, the law clerk should not be permitted to work on the case, but the judge need not recuse absent additional facts.

(f) A judge need not recuse in a case merely because a lawyer who resides with a deputy clerk appears therein. The circumstances may require isolation of the clerk from the case and an appropriate record annotation.

(g) Judge should recuse where spouse of judge's secretary did investigatory work for a criminal defendant and was a potential witness at trial.

(h) A law clerk whose spouse is a member of a state retirement plan has a financial interest in a party and/or the subject matter of a lawsuit filed by the plan seeking recovery for members. Where other relatives are plan members, a law clerk may work on the case unless the relative's interest in the plan could be substantially affected by the outcome.

(i) Judge should recuse where judge's law clerk was previously employed by a law firm, the firm handled the case before the judge while the law clerk was employed by the firm, and the judge permitted the law clerk to work on the case. In addition to the law clerk's actual conflict, the law clerk's shared law teaching position with a member of

the law firm on a topic related to the case before the judge raises a reasonable question about the judge's impartiality under Canon 3C(1) of the Code of Conduct for U.S. Judges.

(j) A judge need not recuse when a party is represented by an attorney who formerly employed the judge's administrative assistant, who is not a lawyer and ended employment with the attorney before the attorney began handling the case.

(k) Subject to the discretion of the individual judge and the employing court, and pursuant to Canon 4D of the Code of Conduct for Judicial Employees, there should be a reasonable period of time before a former law clerk is permitted to appear before the judge. The Code places the responsibility on the former law clerk to determine what limitations will be imposed following the conclusion of judicial employment. In addition, pursuant to Canon 3D of the Code of Conduct for Judicial Employees, a former clerk must refrain from working on all cases in which he or she participated during the clerkship, and may be required by the judge, by court rule, or by attorney ethical rules to refrain from work on cases pending before the judge even if the law clerk had no personal involvement in them. See Advisory Opinion No. 109.

(l) Whether recusal is appropriate when a future law clerk appears before the judge as counsel depends on the circumstances. A judge who has hired a future law clerk who is an associate in a law firm should recuse, subject to remittal, in cases in which the future law clerk appears as counsel in a trial before the judge. However, recusal is not required when the future law clerk plays a minor role in a case, such as contributing to an appellate brief as a member of a large team, but the judge should disclose the fact of the hiring to the parties. Disclosure (without seeking remittal) may prompt additional facts to develop and allow any party to file a recusal motion if the judge does not recuse.

(m) A judge who recused due to a law clerk conflict in a matter is not required to recuse in a related case if the law clerk is no longer employed by the judge.

(n) A judge's impartiality in a matter might reasonably be questioned under Canon 3C(1) when a former law clerk who recently worked for the judge represents an *amicus curiae*.

§ 3.5-1 Isolating Judge's Staff When Relatives or Relatives' Interests are Involved in Litigation [Judicial Employees]

- Advisory Opinion No. 74 (pursuit of future employment by law clerks and staff attorneys)

(a) Where the spouse of the judge's secretary is an assistant United States attorney, the judge need not recuse but the secretary should not be permitted to do any work on any case in which the spouse is or was involved. Same where law clerk's spouse is an assistant United States attorney.

(a-1) Law clerk whose spouse is, or has been, the U.S. Attorney may not work on any case in which the spouse has been directly or indirectly involved, including any case that was investigated or prosecuted, or otherwise litigated, by the U.S. Attorney's office during the spouse's tenure as the U.S. Attorney.

(b) Where a judge's law clerk has accepted employment with Civil Rights Division of Justice Department, the law clerk should be isolated from any case involving the Civil Rights Division, but may work on other Department of Justice cases. Same, where law clerk will be employed in Office of the Deputy Attorney General. Same where law clerk will work for the Civil Division, which handles majority of cases in that court. Same where law clerk will work for INS. Law clerk who will work for U.S. attorney's office in another district may work on criminal cases in judge's district. Law clerk who will work for U.S. trustee in another region may not work on cases in which that trustee's office appears.

(c) Law clerk whose father is an assistant United States attorney may not work on any case in which the father is involved, but judge need not recuse from cases in which the father appears. Same, where law clerk's husband is an assistant federal public defender.

(d) Where the spouse of the judge's law clerk or the spouse of a deputy clerk of court appears as counsel, the judge must ensure that neither the law clerk nor the deputy clerk does any work on the case; the same ruling applies where the law clerk's spouse is also a former law clerk of the judge. It is advisable not only to isolate the current law clerk from that case, but also to inform the parties that this is being done.

(e) A judge's law clerk who is married to FBI agent is only disqualified from working on those cases in which spouse actually had some participation.

(f) A law clerk whose spouse is an associate in a firm should be isolated from any case handled by that firm, whether the spouse actually participates in the representation or not. The judge may wish to inform the parties of the relationship and the insulation of the clerk. See Advisory Opinion No. 51. Same where the judge's court reporter's spouse works for a law firm appearing before the judge. Same, where spouse of clerk of court, or spouse's law firm, appears before the judges of the court. But an electronic court reporter may work on matters handled by spouse's firm as long as the spouse is not a partner or personally involved.

(f-1) Per se rule of recusal outlined in Advisory Opinion No. 51 is not required where law clerk is not yet married and future spouse is not yet employed by law firm, absent special circumstances.

(g) A judge need not recuse in a case merely because a lawyer who resides with a deputy clerk appears therein. The circumstances may require isolation of the clerk from the case and an appropriate record annotation.

(h) A law clerk who, after doing substantial work on a complex bankruptcy case, comes into a conflict of interest (by virtue of a spouse's employment) on a confirmation matter, may not work on any part of the bankruptcy; confirmation issues can always reasonably be perceived as inseparable from other aspects of the case. Similarly, a law clerk who has done substantial work on a complex civil case should not continue working on the case if a nonparty represented by the spouse's law firm has a financial stake in the matter that could create an appearance of partiality, but the law clerk need not be removed from the entire case if the nonparty's involvement relates to an isolated discovery dispute and the law clerk can be insulated from the dispute. *Cf.* Advisory Opinion No. 51.

(i) Judge should preclude a court reporter from working on any case in which the court reporter's spouse appears as counsel. Similarly, judge should preclude probation officer from working or supervising work on any case in which the officer's spouse appears as counsel. See Canon 3F(2)(c), Code of Conduct for Judicial Employees. Similarly, judge should preclude courtroom deputy from working on any case in which the courtroom deputy's child appears as counsel.

(j) Law clerk whose first cousin is a U.S. attorney need not automatically be isolated from cases from that office, because the first cousin relationship is not within the third degree; but appearance of impartiality concerns might be implicated if the relationship between the two first cousins is particularly close, and also in high profile cases and in cases in which the first cousin/U.S. attorney personally appears or plays a significant role.

(k) A law clerk whose spouse is a member of a state retirement plan has a financial interest in a party and/or the subject matter of a lawsuit filed by the plan seeking recovery for members. Where other relatives are plan members, a law clerk may work on the case unless the relative's interest in the plan could be substantially affected by the outcome.

(l) A judicial employee who has retained an attorney may work on cases in which the attorney appears, where it is clear that the judicial employee is not in a position to benefit the attorney.

(m) A staff attorney who previously held a supervisory attorney position in state government should not work on cases in which he or she participated or provided substantive advice.

(n) Where a lawyer is representing the estate of a law clerk's parent, a judge should not permit the law clerk to work on cases in which the attorney appears, but may permit the law clerk to work on cases involving other lawyers from the attorney's firm.

(o) Where a law clerk's relative works for a company that is a party in a multidistrict litigation case before the judge, there is no conflict of interest unless the

relative has an interest that could be substantially affected by the outcome of the proceeding or if the relative is likely to be a witness.

(p) A former law clerk should not appear as an attorney in a state court matter that is closely related to a case that was pending with the law clerk's judge during the clerkship; the confidentiality restrictions of Canon 3D apply to former judicial employees and are intended to protect the confidentiality of judges' discussions with law clerks and to prohibit former employees from profiting as a result of those discussions.

(q) Judge and law clerks (both current and former) should decline to comply with a law firm's request for a list of matters that a clerk worked on or that passed through chambers during the period of the clerkship, because responding would improperly implicate the disclosure of confidential information.

(r) A law clerk should not be permitted to work on a case in which the law clerk's former firm was, or is likely to be, a material witness.

(s) A law clerk should not be permitted to work on any case in which the law clerk's former firm was involved during the law clerk's tenure with the firm. Under Canon 3F(2)(a) of the Code of Conduct for Judicial Employees, a law clerk may not work on a case even if the former firm's involvement was de minimis, subject to the specific exceptions set forth in the Code.

§ 3.6 Recusal: Reasonable Basis for Questions of Impartiality

§ 3.6-1 Litigation Involving the Judge

- Advisory Opinion No. 102 (representation by the Department of Justice).
- Advisory Opinion No. 103 (recusal considerations arising from harassing claims against judges).

(a) A judge who is personally involved in litigation to which the United States is a party should recuse from cases involving the governmental agency that is the party in interest. However, the judge is not disqualified as to other cases to which the United States or some other governmental agency is a party.

(a-1) Similarly, where judge's spouse is involved in litigation against a governmental agency, judge should recuse from cases involving that agency but need not recuse from cases involving other governmental agencies.

(a-2) A judge who joins a class action arising from former employment with the Department of Justice should recuse (subject to remittal) from: (1) cases where DOJ is a named or real party in interest or where DOJ administrative actions or policies are at issue and (2) cases handled by a DOJ attorney directly involved in the class action or the underlying administrative decisions leading to it, a class plaintiff active in the class action, or an attorney with the law firm

representing the class. The judge need not recuse from unrelated cases involving other agencies (including subsidiary agencies of DOJ) where DOJ appears only in a representative capacity, absent special circumstances.

(a-3) A judge who is a plaintiff in litigation against the U.S. Attorney's office that is the judge's former employer should recuse under Canon 3C(1)(a) (no remittal) in all cases involving that office until the litigation is completed.

(a-4) A magistrate judge who is a defendant in a lawsuit arising from former government employment should recuse, subject to remittal, in cases that are referred to the magistrate judge by the district judge who is presiding over the case involving the magistrate judge, unless the case involving the magistrate judge is patently frivolous or barred by absolute immunity.

(b) A judge who is a co-defendant with a state agency that is paying for the judge's defense should recuse from cases involving that agency during the pendency of the litigation. The judge is not disqualified in other cases to which the state or another of its agencies is a party.

(c) A judge who is personally involved in litigation with the IRS should recuse, subject to remittal, from cases in which IRS investigative persons will appear as witnesses before the judge; from cases where the investigative agents are the same persons investigating the judge's dispute with the IRS; and from cases in which the assistant United States attorneys appearing before the judge are also litigating the judge's dispute with the IRS.

(d) A judge who is named in a pending action is not precluded from reviewing a new complaint by the same plaintiff (not naming the judge) to determine whether it complies with an injunction prohibiting frivolous, vexatious filings; the judge's impartiality cannot reasonably be questioned.

(e) A judge who is seeking action from a city zoning commission should recuse from cases involving the zoning commission, but need not recuse from cases involving other city agencies. If the matter is appealed to the city council, the judge should recuse from cases involving the city and may need to recuse from cases involving other city agencies, depending on their involvement in the matter. A judge who has a dispute with a county agency should recuse, absent remittal, for a reasonable time after the dispute is fully resolved.

(f) When a state has asserted malpractice claims against a judge's former law firm and, though not personally involved, the judge could be liable under state law, reasonable persons might question the judge's ability to remain impartial in matters involving the state or any of its agencies; the judge should therefore recuse, subject to remittal.

(g) Judges are disqualified from hearing any case in which they are named as defendants by a pro se litigant (Canon 3C(1)(d)(i)), but they are not required to recuse in other cases brought by the same litigant involving other parties or other judges on the same court, unless their impartiality could reasonably be questioned (Canon 3C(1)). Similarly, a frivolous complaint that names the court as a defendant does not create a reasonable basis to question the impartiality of a judge of the court, but each judge should consider whether there are any unique circumstances that would raise a question under Canon 3 as to the judge's impartiality.

(g-1) An appellate judge's impartiality cannot reasonably be questioned for hearing appeals from a district judge who previously disposed of an uncontested, frivolous matter involving the appellate judge.

(g-2) A judge is not disqualified from a government action seeking injunctive relief against vexatious litigants even though the judge could potentially benefit (as all judges could theoretically benefit). Recusal is advisable if the government seeks relief in the judge's name.

(h) A judge is not foreclosed from pursuing a minor child's claim against government officials, which must be brought in that district, even if this causes colleagues to recuse and leads to the judge's recusal in matters involving that government entity.

(i) A judge's impartiality may reasonably be questioned when a former employee, who departed in acrimony and filed claims that were subsequently resolved, appears before the judge; recusal for one year is advisable. Judges who were not involved need not recuse.

(j) A judge who was named without permission as plaintiff in a lawsuit, and then immediately dismissed, need not recuse from cases involving the defendants or counsel or disclose these facts; but the judge should recuse from cases involving the plaintiff law firm if the judge refers the firm or its attorneys for disciplinary action.

§ 3.6-1[1] Official Capacity Defendant Associate of Spouse

(a) A judge need not recuse where spouse is a partner or associate of a defendant sued in unrelated official capacity as a member of the state board of elections.

§ 3.6-2 Where Judge (or Judge's Spouse) Is or Has Been a Client of Lawyer or Law Firm Appearing in the Case

- Advisory Opinion No. 102 (representation by the Department of Justice).
- Advisory Opinion No. 107 (disqualification due to spouse's business relationships).

(a) Where an attorney-client relationship exists between the judge and a lawyer whose law firm appears in the case, the judge should recuse absent remittal. Same where an attorney represents the court in personnel matters. Same where a private attorney represents the court in mandamus proceedings. Same where an attorney represents a non-party that is actively involved in matters requiring judicial adjudication.

(a-1) After a pending bankruptcy case was disposed of, the judge hired (for personal, unrelated matter) another lawyer in the firm that had represented the debtor. Motion for reconsideration was filed, and the debtor changed lawyers. The judge need not recuse because a law firm formerly involved in the case now represents the judge, unless particular circumstances would indicate an appearance of partiality.

(a-2) A judge's impartiality could reasonably be questioned if the judge presided in a matter handled by the attorney (or law firm) representing the clerk's office in an employment dispute; each judge should recuse, subject to remittal.

(a-3) With respect to an attorney who is retained to assist with an investigation related to potential judicial misconduct, recusal is required, absent remittal, as to the subject judge and any judge who serves on the investigating committee.

(b) A judge should recuse absent remittal if a lawyer appearing in the case represents, in other matters, a class of which the judge is a member. But see Compendium § 3.1-6[4](f).

(c) Where there is no existing or continuing attorney-client relationship, recusal is not required because a lawyer appearing in the case previously represented the judge; same where lawyer or law firm previously represented the judge's minor child.

(c-1) A judge who has an initial consultation with a law firm, but has not yet retained the law firm, need not recuse from matters in which the law firm appears because no attorney-client relationship has been formed.

(d) The fact that a lawyer appearing in the case represents the judge's former law firm in other litigation is not disqualifying, unless the judge's personal interests are at stake in that other litigation.

(e) A judge need not recuse merely because, in other litigation, the judge has appointed the lawyer as a trustee or receiver, and will be required to pass upon the lawyer's compensation in that case. Similarly, a judge need not recuse merely because the judge has appointed the lawyer as a monitor in other, unrelated litigation, but the judge may want to consider disclosing the appointment to avoid any concerns under Canon 2B.

(f) Where an attorney from the Justice Department has been assigned to represent the judge in litigation, the judge need not recuse in other cases in which the Justice Department appears; and, depending on the precise nature of the representation and relationship, it may not be necessary for the judge to recuse even from cases handled by the same attorney who is representing the judge. Though not required, it is good practice to disclose the representation to parties in cases in which the attorney appears. Similarly, a judge who refers a threatening communication to the United States Attorney does not need to recuse from matters handled by the Department of Justice.

(g) A judge should recuse absent remittal if a lawyer who represents the judge's child appears in the case, but not recuse if the lawyer represents the child's employer.

(h) Where a lawyer is performing extensive estate-planning services for a wealthy grandparent of the judge, the judge should recuse absent remittal from cases handled by that lawyer or the lawyer's law firm if, as appears likely, the estate-planning services being performed may significantly affect the interests of the judge and other close family members.

(h-1) Canon 3C(1)'s general provision (judge's impartiality might reasonably be questioned) applies where judge's spouse is represented (in unrelated matters) by law firm appearing before judge, but is subject to the remittal procedures. The standard is fact specific and may not give rise to a reasonable question of partiality where the representation does not relate to significant matters, is of short duration, or is otherwise minimal and casual.

(i) A judge is not required to recuse in matters handled by an attorney who represents the widow of the judge's brother-in-law in unrelated matters.

(j) Under ordinary circumstances of lawyers donating services to court committee, judges are not required to recuse because impartiality could be questioned. Canon 3C(1).

(k) Judge should recuse (subject to remittal) when attorney appearing before judge represents judge's spouse's business in any matter. Judge should also recuse (subject to remittal) when attorney appearing before judge is partner of attorney who represents judge's spouse's business in matter that could substantially affect spouse's interests; but recusal is not required where partner represents spouse's business in routine matters unlikely to affect business substantially.

(l) A judge should recuse (subject to remittal) from cases handled by the law firm hired by the judge's professional association to provide legal and legislative counsel if the judge is an officer or Board member of the association actively involved in negotiating the agreement or in regular contact. Others (including officers and Board members not interacting with the firm and nonmember judges) need not recuse.

(l-1) Similar factors apply to homeowner's associations. Where the association is small, was formed to initiate a legal challenge, and most members are active in the selection of and interaction with its attorneys, a judge who is a member should recuse, subject to remittal, from matters handled by the association's law firm.

(l-2) In the unusual situation where a judge is an unnamed member of a class comprising all federal judges with respect to judicial compensation, the judge need not recuse when class counsel appears before the judge in an unrelated matter.

(l-3) A judge should recuse (subject to remittal) from cases handled by a law firm for the duration of the attorney-client relationship when the judge serves on the board of directors for a nonprofit corporation that has hired an attorney from the firm and the judge has had direct contact with the attorney.

(m) Judge need not recuse from matters handled by the spouse of an attorney who previously represented the judge's spouse.

§ 3.6-3 Lawyer Representing Party Opposing Judge in Other Litigation

(a) A judge should recuse from cases handled by a law firm, one of whose members or associates represents a party adverse to the judge in other litigation. Similarly, a judge who joins a class action arising from former employment with the Department of Justice should recuse (subject to remittal) from cases handled by a DOJ attorney directly involved in the class action or the underlying administrative decisions leading to it.

(b) Recusal is not required when a lawyer or law firm previously represented an adverse party in litigation to which the judge or the judge's minor child was a party, after the matter has been finally closed. Same where a law firm previously represented an adverse party in litigation to which the judge's parent was a party and the case was resolved more than 20 years ago.

(b-1) Recusal in multidistrict litigation is not required where one law firm is adverse to the judge's spouse in other litigation due to the sheer volume of participants, but the judge should seek remittal for individualized rulings that could directly affect the firm's interests (e.g., appointment of defense management committee or liaison counsel, designation of bellwether cases).

(c) Judge should recuse, subject to remittal, from cases in which the bankruptcy trustee's counsel is an attorney in a firm whose partner is suing the judge in unrelated litigation.

(d) When a former law firm is involved in litigation that may result in the judge's personal liability, the judge should recuse (absent remittal) where the following persons

appear: lawyers who are parties against the law firm; law firms representing plaintiffs against the law firm; lawyers who are lay and expert witnesses against the law firm; specific lawyers representing the law firm; other members of the firms representing the law firm.

(e) A judge should recuse from matters handled by a law firm representing a developer, where the judge's property value would be diminished substantially by the development, the judge has publicly opposed it, and the matter is in litigation (though the judge is not a party).

(f) A judge's impartiality cannot reasonably be questioned because a party moved, in unrelated litigation, to add as a defendant a company in which the judge had a financial interest, but then withdrew the motion.

§ 3.6-4 Attorneys and Law Firms Who Are Clients of a Relative of the Judge

- Advisory Opinion No. 107 (Judge's Recusal Due to a Spouse's Business Relationships).

(a) A judge should recuse when spouse is retained to represent, in an unrelated matter, an attorney in a firm appearing before the judge.

(b) When a judge's spouse represents a client in a malpractice suit against an attorney, and that attorney is among the nominees to a plaintiffs' steering committee to be appointed by the judge, the judge should recuse from making any appointments to the plaintiffs' steering committee. The judge need not recuse from the multidistrict litigation if the attorney is appointed.

§ 3.6-5 When Former Client Is a Party

(a) When former client is a party to litigation and former representation is in any way related to the current litigation, recusal is mandatory no matter how long ago the representation ended, e.g., 18 years ago. Recusal is not required because a debtor in a bankruptcy proceeding was represented by the judge in a different bankruptcy proceeding 20 years earlier.

(b) If a former client of the judge is a party, but the litigation is totally unrelated to the earlier representation, whether recusal is required depends upon such factors as the length of time since the earlier representation ended; the nature, duration, and intensity of the earlier representation; the presence or absence of ongoing personal relationships; etc.

(b-1) Similar factors apply when a party before the judge was a party adverse to the judge's former client in an unrelated matter handled by the judge.

(b-2) Judge who represented a client decades earlier, with no continuing relationship, need not recuse from an unrelated matter involving the former client's child.

(c) A judge who formerly represented various law firms in defending malpractice suits should recuse from all cases handled by such firms for a reasonable period (two to five years), regardless of whether the fees were paid by the firm or its insurance carrier.

(d) Recusal is required when a party before a judge was represented in the same matter by judge's former firm while judge was associated with firm, even though the party now is represented by a new firm.

(e) Although a criminal defendant was judge's client in civil matters nearly 20 years ago, a judge should recuse because the judge would be required to sentence the defendant if convicted and the judge has personal knowledge regarding the defendant's background.

(f) A judge need not recuse because a former client of the judge's firm appeared as a witness in an unrelated case, where the judge had no personal or professional involvement with the client and the firm's representation ended ten years earlier.

§ 3.6-6 Involvement of Present or Former Judicial Colleagues

(a) A judge should recuse when a judicial colleague appears as a witness and the case requires the judge to assess the colleague's credibility or evaluate the colleague's performance as a lawyer (e.g., a habeas case).

(b) A judge should recuse in cases in which a former colleague appears as counsel, for a reasonable period of time after the former judge leaves the bench. The exact length of time depends upon the length of the prior association and the closeness of the relationship with the former colleague (rule of thumb: two years or longer). Advisory Opinion No. 70. Same advice applies when a former colleague appears, or is likely to appear, as a witness.

(b-1) The two-year rule of thumb does not apply to a district judge's recusal when a former bankruptcy judge colleague appears; recusal there should be considered on a case-by-case basis.

(c) Magistrate judge should not, absent remittal, review the decisions of a former state judge who is now a district judge with authority over the magistrate judge's reappointment.

(d) A retired bankruptcy judge who is not eligible for recall is no longer subject to the Code of Conduct, and the Code therefore does not restrict the former judge's employment as a mediator. If the retired judge's former colleagues on the court are

required to address an issue related to the mediator, the judges should consider whether recusal might be appropriate under the guidance in Advisory Opinion No. 70.

§ 3.6-6[1] Other Judges as Parties

(a) A judge should not award counsel fees to the former law firm of a colleague, if the colleague will share in the award; the judge should recuse, and seek designation of a judge from another court to hear the matter. Similarly, a judge should recuse, subject to remittal, in a class action case in which class counsel includes a nominee for a seat on the judge's court.

> (a-1) Similarly, a judge should recuse, subject to remittal, in a case involving an award of attorney's fees to the spouse of a judicial colleague where the judge's decision would have a notable and direct financial impact on the spouse of the fellow judge, with whom the judge regularly works and communicates. See also Compendium § 2.8(j) (advising that a judge should consider whether deciding on a fee application of a colleague's spouse would create an appearance of impropriety in light of the amount of the fee requested and the relationships between the judge and the colleague and between the judge and the colleague's spouse).

(b) When a judge or judicial nominee is named as a defendant and his credibility or personal or financial interests are at issue, all judges of the same district should recuse, unless the litigation is patently frivolous or judicial immunity is clearly applicable. Similar considerations apply to a judicial colleague's involvement in a class action case. Similar considerations apply when the spouse of a judicial colleague is a party.

> (b-1) The fact that a bankruptcy judge files a claim or seeks relief from the automatic stay in a bankruptcy case does not per se require other bankruptcy or district judges in the district to recuse, but their participation might be inadvisable to the extent the claimant judge has a financial interest and seeks discretionary relief.

(c) When all judges in the district are named as defendants in a lawsuit, the general rule is that all must recuse and a visiting judge be obtained. However, a frivolous complaint that names the court as a defendant does not create a reasonable basis to question the impartiality of a judge of the court, but each judge should consider whether there are any unique circumstances that would raise a question under Canon 3 as to the judge's impartiality.

§ 3.6-7 Complaints Against Judge; Complaints Made by Judge

(a) Automatic recusal is not necessary when a 28 U.S.C. § 351 complaint is filed. Recusal is not necessary if a chief judge dismisses the complaint as frivolous, related to the merits, etc. If a judge cannot await a chief judge's dismissal, the judge should determine whether the complaint is frivolous, related to the merits, etc., and if so,

recusal is not necessary. A judge should normally recuse if the complaint is not dismissed. If sanctions are imposed against a judge, the judge should recuse from matters involving the complainant for a reasonable period of time during which the judge's impartiality might reasonably be questioned.

(a-1) Judge need not recuse from a case involving a party that filed suit against the judge, where judicial immunity will be a complete defense to the action against the judge.

(b) A judge's findings of unprofessional conduct by an attorney appearing before the judge and forwarding same to the state disciplinary counsel does not by itself mandate disqualification, provided the judge feels he or she can treat the attorney impartially. It is also unnecessary to recuse in a subsequent case because attorney informs judge of intention to take some "action" against the judge. Advisory Opinion No. 66.

§ 3.6-8 Other Reasonable Bases for Questions of Impartiality

(a) Where an appellate judge initially recused from case, but when case voted *en banc* a close examination revealed that the judge was not in fact disqualified, the judge need not recuse merely because of the earlier erroneous recusal. If original recusal has become public, the judge should place foregoing facts on the record. Similarly, judge need not recuse from reopened case when basis for recusal from original case no longer exists and judge explains on the record.

(b) Canon 3 rules on disqualification apply to all of judge's judicial duties (including designating cases for oral argument or presiding over initial appearance of criminal defendant appearing without counsel). Same, for service as a mediator as part of judicial duties under Canon 4A(4).

(c) A judge need not recuse when spouse of another judge on that court appears as counsel before the inquiring judge. Same, when spouse of the clerk of court, or spouse's law firm, appears as counsel in cases before the court.

(d) A judge's findings of unprofessional conduct by an attorney appearing before the judge and forwarding same to the state disciplinary counsel does not by itself mandate disqualification, provided the judge feels he or she can treat the attorney impartially. It is also unnecessary to recuse in a subsequent case because the attorney informs the judge of an intention to take some "action" against the judge. Advisory Opinion No. 66.

(e) A judge on the Court of Appeals for the Armed Forces who is seeking a recommendation from the Department of Defense for reappointment should recuse under Canon 3C(1) when Department of Defense is a named party or the real party in interest, but the judge need not recuse in ordinary criminal cases or associated requests for extraordinary writs.

(f) Facts of a proceeding solely obtained by a judge in his or her judicial capacity are not personal knowledge resulting in disqualification under Canon 3C(1)(a).

(g) Because a judge's impartiality could reasonably be questioned, a judge should recuse when attorney who appears before the judge is the godparent of the judge's minor child and makes periodic gifts of $500 to $1000 to be held for child's college education. See Compendium § 3.2-3(g). Same, where judge appointed personal friend as receiver and also made plans to spend vacation with friend one month before trial, due to Canon 2 and 3 concerns.

(g-1) A judge should consider the effect on his or her impartiality when a close personal friend (who is also the spouse of the judge's law clerk) appears in a case; disqualification under Canon 3C(1) may be remitted but not under 3C(1)(a). Same for a longstanding friend who is a former co-clerk and regular social and travel companion. Same for close personal friends who work in the United States Attorney's Office. Similarly, a judge should consider whether a reasonable person would question the judge's impartiality when a pending matter implicates the personal conduct of the judge's friend.

(g-2) A judge need not recuse from cases handled by an attorney acquaintance who participates in periodic social gatherings at the judge's and others' homes, where the judge does not attend when the attorney appears before the judge; but if over time the relationship becomes close, reasonable minds may question the judge's impartiality, in which case the judge should recuse (or seek remittal). See also Compendium § 2.10(j).

(g-3) Absent exceptional circumstances that would suggest a reasonable basis to question a judge's impartiality, a judge is not required to recuse when a former probation officer is appointed as a sentencing guidelines consultant to a party in a case before the judge.

(h) A judge's impartiality cannot be reasonably questioned merely because an attorney opposed the judge's Senate confirmation. Same when an attorney submitted an unsolicited, informative letter in connection with an investigation of the judge.

(i) Based on judge's pending veteran's injury claim, judge recused from hearing cases involving similar injury. Without judge's knowledge, agency *sua sponte* expanded the injuries covered by the judge's personal claims. As a result, after his personal claims had been expanded, but before the judge became aware of the expansion of claims, the judge heard other claims similar to the injuries his claim had been expanded to include. No appearance of impropriety or remedial action necessary in light of judge's lack of knowledge.

(j) Receipt of honorary degree many years ago from college with which judge has no other affiliations does not require judge to recuse from case in which college is a party.

(k) A judge who served on a three-judge district panel and decided one claim in a case should recuse under Canon 3C(1) from hearing the appeal of a decision on another claim in the case, even though the claims were severed and the judge took no part in the decision that is on appeal. Similarly, a judge handling multidistrict litigation who severs claims involving a party in which the judge owns stock is nevertheless disqualified from the remaining cases when the party has a contractual interest in any recovery in those cases. See also Compendium § 3.3-3(f).

(l) Judge's appointment of attorney to represent party in court proceeding does not present an appearance of partiality towards the attorney necessitating judge's recusal.

(m) A part-time magistrate judge should not review the decisions or actions of state court judges before whom the magistrate judge appears as an attorney.

(n) Whether a judge should try a case following participation in settlement discussions depends on factors such as whether the case will be tried by judge or jury, whether the parties consent to trial by the judge, and the nature and extent of the judge's involvement in the discussions. See Advisory Opinion No. 95.

(o) A judge should recuse, subject to remittal, for a reasonable time following contributions made by an attorney or law firm that established a scholarship in the judge's name.

(p) A judge's impartiality cannot reasonably be questioned in a case involving a government entity because the judge invested in a company whose subsidiary is involved in unrelated litigation with the government entity.

(q) A judge who received political contributions in a state election five years earlier need not recuse in cases where contributors appear. See Compendium § 5.3(b). Nor is recusal required because a party or attorney before the judge contributed to or received funding from a PAC run by the judge's spouse's employer.

(r) A judge's impartiality cannot reasonably be questioned because 20 years previously the judge had a nodding acquaintance with a party due to their residence in the same apartment building.

(s) Recusal not required in antitrust case involving several hospitals as parties, where judge had once complained about an unsatisfying experience with a physician who was associated with one of the defendant hospitals, and where there was some possibility that the physician would be called as a witness on an unrelated issue.

(t) Absent unique circumstances that would give rise to a reasonable public perception that a judge is incapable of deciding a particular case impartially, a recently-appointed judge is not required to recuse in a case that has electoral or partisan implications.

(u) When a judge's former law clerk is employed by a government agency and has no personal knowledge or involvement in a case assigned to the judge, the situation falls outside the ambit of Canon 3C(1), and disqualification is unnecessary.

(v) A judge's religious faith or ethnic heritage does not create any reasonable grounds to question the judge's impartiality.

(w) When a doctor who has been hired by the circuit as a Consulting Medical Professional (CMP) appears as an expert witness in a case, a judge's recusal obligation depends on the nature of the judge's relationship with the CMP (e.g., the degree to which the judge contributed to the decision to retain the CMP and the nature and frequency of the judge's personal consultations with the CMP).

§ 3.7 Belated Discovery or Appearance of a Disqualifying Interest

- Advisory Opinion No. 90 (judges' duty to inquire when relatives may be members of class action).

- Advisory Opinion No. 71 (disqualification after oral argument).

(a) Upon learning of a disqualifying interest, a judge should immediately (1) recuse, and (2) make full disclosure to parties through counsel. But see Canon 3C(4) (permitting divestiture of the disqualifying interest in lieu of recusal in certain circumstances).

(a-1) No violation of Canon 3C(1)(c) occurs where judge fails to recuse because judge was misinformed about investments held by family limited partnership; however, upon learning of possibly disqualifying investments, judge should review all investments and make appropriate disclosure on the record.

(b) Upon learning of a spouse's disqualifying financial interest, the judge must recuse but may, particularly when requested to do so by all parties, grant a certification of finality under Fed. R. Civ. P. 54(b), and enter other similar orders clarifying earlier rulings.

(c) When an appellate judge learns of a disqualifying interest after argument but before decision, other members of the panel need not recuse; written work prepared before learning of the disqualifying interest may be shared with the other panel members, but there should be no further participation by the recused judge. But see Canon 3C(4) (permitting divestiture of the disqualifying interest in lieu of recusal in certain circumstances).

(d) Under Canon 3C(4), judge need not recuse from matters to which substantial judicial time has been devoted where an otherwise disqualifying financial interest (which would not be substantially affected by the outcome of any such matter) "appears" through the judge's inheritance of stock, because the stock was divested within one

week of inheritance. Judge also need not recuse from matters with respect to which no judicial time had been devoted, since judge could simply recuse and then be reassigned matters after divestment; such a futile act is not required. See Commentary to Canon 3C(4)

(d-1) The Canon 3C(4) exemption from disqualification does not apply when the judge's disqualifying interest could be "substantially affected" by the matter under advisement. In deciding whether an interest is "substantially affected," the issue is the effect on the interest.

(e) A judge inadvertently heard a case involving a defendant in which the judge owned stock, and plaintiff has moved to vacate judgment. Even if the judge no longer owns the stock, reasonable persons may question whether the judge can rule impartially on a motion seeking relief based on the judge's own admittedly improper actions; recusal is recommended.

(f) Judge who suspects he or she had a financial interest in a party to a closed case ought to investigate and, if the judge did have a financial interest, disclose this to the parties. If the parties attempt to reopen the case by asserting that the judge acted improperly in handling the case while holding the financial interest, the judge should recuse. Same for judge presiding over multidistrict litigation who dismissed party in which the judge had a financial interest.

(g) If a judge learns that he or she acted in a case in which the spouse had a financial interest, the judge should disclose to the parties that the judge unknowingly acted in a matter when the judge was disqualified. If a party seeks to reopen the case because of this disqualification, another judge should decide the matter.

§ 3.8 Remedying Disqualifications

- Advisory Opinion No. 71 (disqualification after oral argument).
- Advisory Opinion No. 70 (judge should recuse when former judicial colleague appears as counsel for reasonable period after former judge left bench).

§ 3.8-1 Disposing of a Disqualifying Interest

(a) See Advisory Opinion No. 69, as modified by the directives of 28 U.S.C. § 455(f), for remedying a disqualification by disposing of the subject interest.

(b) Judge who recused from a matter because close relative's law firm was involved is no longer disqualified when the law firm's involvement ends; matter may be reassigned to judge when the disqualifying interest is removed, so long as this does not affect appearance of impartiality.

(c) Judge who belatedly discovered ownership of stock in a party and then sold the stock is not disqualified from handling the ongoing case, so long as the interest

divested was not one that could be substantially affected by the outcome of the case, and so long as other circumstances do not reasonably call into question the judge's impartiality; judge should disclose relevant facts on the record. In assessing whether an interest might be substantially affected, the issue is not the size of the interest but the effect on it, whatever its size. See Compendium § 3.1-7[1](c), (e).

(d) A bankruptcy judge who owns bonds issued by a frequent claimant need not dispose of the bonds; recusal would be required only if the bonds' value could be substantially affected, which, based on the facts involved in the inquiry, was unlikely to occur.

§ 3.8-2 Obtaining Waivers of Disqualification for Appearance of Impropriety

§ 3.8-2[1] Procedure for Remittal Pursuant to Canon 3D

(a) Where a district judge seeks remittal, it is appropriate for the Clerk of Court to send the request to counsel in a memo detailing the specifics of the situation and asking that each party respond to the judge's request.

(b) After a judge has recused, if it becomes apparent that the recusal was unnecessary and should not have occurred, it is permissible for the judge to reverse the decision and continue with the case, but only with full explanation to the parties.

(b-1) Once a judge has determined that there is a reasonable appearance of impropriety and invoked the Canon 3D waiver, the judge cannot withdraw the waiver; if any party fails to consent, the judge must recuse.

(c) The decision as to whether there is or is not a reasonable appearance of impropriety is a decision to be made by the judge; counsel or parties should not be consulted on that issue. If the judge determines that there is a reasonable appearance of impropriety, the judge must either recuse, or invoke the Canon 3D procedure in full.

(d) A judge who has decided to recuse because of a spouse's financial or other interest giving rise to an appearance of impropriety need not thereafter supply any additional information concerning the spouse's investments.

(e) Remittal of a disqualification under Canon 3D is unworkable if the disqualifying circumstance would be present in substantial numbers of existing or future incoming cases on the judge's docket.

§ 3.9 Adjudicative Responsibilities

§ 3.9-1 Avoid Comment on Pending Matters

- Advisory Opinion No. 55 (judicial writings and publications).

(a) A judge should abstain from public comment about a pending or impending proceeding in any court.

(b) A judge may cooperate with a commercial film company in making a film based upon the judge's life, and may receive reasonable compensation for the time spent in that effort (but not a share in the proceeds from distribution of the film), provided (1) the company is not a litigant or likely to become a litigant before the judge, (2) discussion of specific past or pending cases is limited to general terms that do not identify litigants, and (3) the judge reserves the right to review and monitor promotional activities, to ensure there is no exploitation of the judicial office.

(c) Following the trial of a criminal case that is on appeal, the trial judge should not meet privately with the Justice Department Office of Professional Responsibility to discuss allegations of prosecutorial misconduct where the same issues may be raised in the appeal.

> (c-1) A judge should not consent to an *ex parte* interview with the Office of Professional Responsibility absent an agreement by the other parties with an interest in the matter, and if a meeting occurs the judge should only provide factual information.

(d) Following published reports criticizing a judge's actions in a case and indicating some parties may move to overturn the actions, a judge should not comment publicly out of court about the merits of the impending motions. Canon 3A(6) does not bar comment in final, completed cases, so long as judges refrain from revealing deliberative processes and do not place in question their impartiality in similar future cases.

> (d-1) Similarly, a sitting judge should refrain from discussing a pending case during Senate confirmation hearing to fill a vacancy on another court, but may respond to allegations of insensitivity to particular groups or parties related to the case.

(e) A court policy limiting press releases to announcing the caption, case number, and availability of an order or opinion is consistent with and should prevent inadvertent violation of Canon 3A(6) (restricting public comment on the merits of cases).

(f) Judges may respond to a congressional inquiry about pending cases by providing information about matters of public record and court procedure, but should avoid comment on the merits or discussion of the judges' deliberative process.

(g) District judge's proposal to send letter to court of appeals (with copy to the parties) regarding possible misstatement of facts by counsel at oral argument raises Canon 2 concerns about the judge's impartiality.

(h) A judge should not agree to speak at a conference about the effect of a decision in a pending case and how other judges might assist in the implementation of the decision in their courts. Any such comments should be made on the record in open court while the case is pending.

(i) Neither a judge nor the court of which the judge is a member should file an *amicus curiae* brief in a matter pending before a state supreme court where the judge is closely connected to the appeal but is not a litigant. The prohibition against public comment on pending litigation under Canon 3A(6) applies with equal force to a collective judicial statement by the judge's court in the form of an amicus curiae brief.

(i-1) An association of judges should not file an *amicus curiae* brief in an appeal where no members of the association are parties to the appeal.

(j) A judge may write a law review article discussing pending or impending matters under Canon 3A(6)'s exemption for "scholarly presentations made for purposes of legal education," so long as the discussion is limited to stating the procedural history and does not opine on the merits.

§ 3.9-1[1] Avoid Comment on Pending Matters [Judicial Employees]

(a) A law clerk must receive authorization from his or her judge before providing information to legal publisher regarding pending matters or matters already decided.

(b) A law clerk may establish an online discussion forum on legal issues, for compensation and outside of working hours, but should not be identified as a law clerk and should not provide information about cases pending or likely to arise before the court.

§ 3.9-2 Ex Parte Communications

- Advisory Opinion No. 95 (judges acting in a settlement capacity).

(a) Where judge's non-party friend initiated ex parte communications, judge properly informed friend of impropriety of discussing matter, terminated conversations, and disregarded statements made. If the communication had any bearing on the substance of the matter before the judge, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. Canon 3A(4)(d). Judge need not recuse unless judge believes impartiality might reasonably be questioned.

(b) Unless authorized by law, a judge's response to a request from the Department of Justice for juror contact information (without disclosing the communication with DOJ to the parties) constitutes an ex parte communication under Canon 3A(4). Whether an ex parte communication is "authorized by law" is a legal issue for the judge to decide.

(c) Court practice of making telephone inquiries seeking trial status information, when addressed solely to the government's counsel, does not violate Code prohibition on ex parte contacts but does create an appearance of impropriety under Canon 2.

(d) Unless authorized by law, a judge should not meet with the Department of Justice to discuss the conduct of prosecutors who handled a case before the judge.

(e) Where a judge received a letter containing an apparent confession to a murder from a criminal defendant in a past unrelated case the judge presided over, the judge should treat the letter as an ex parte communication, file the letter under seal, and direct the clerk of court to send a copy to the United States Attorney and defense counsel.

§ 3.10 Administrative Responsibilities

§ 3.10-1 Maintaining Professional Standards

(a) In accordance with Canon 3B provision requiring faithfulness to the highest professional standards, assistant federal public defender should disclose to prospective clients fact that defender is subject of nonfrivolous inquiry to determine whether federal law was violated in unrelated proceeding.

§ 3.10-2 Appointments

- Advisory Opinion No. 76 (state employee should not be appointed as part-time magistrate judge).
- Advisory Opinion No. 64 (hiring a judge's child as law clerk).
- Advisory Opinion No. 61 (judge should not appoint law partner of judge's relative as special master).
- Advisory Opinion No. 60 (appointment of spouse of assistant U.S. attorney as part-time magistrate judge).
- Advisory Opinion No. 111 (Interns, Externs and Other Volunteer Employees).
- Advisory Opinion No. 115 (appointment, hiring, and employment considerations: nepotism and favoritism)
- Compendium § 2.8.

(a) A judge may hire as a part-time law clerk a person who has taken a leave of absence from previous work on a contract, hourly paid basis serving as a state hearing officer for unemployment benefits

(b) Canon 3B(4)'s injunction to avoid favoritism in appointments is not limited to appointment of persons who are relatives by affinity or consanguinity but includes other similarly close relationships. Similarly, even when the nepotism canon is not applicable, in making appointments a judge should avoid the appearance that someone may gain an advantage in the appointment or employment process, for reasons other than merit, because of his or her broader connections to a judge or judicial employee.

(c) Several statutes address the issue of nepotism and place restrictions on the appointment powers of judges and court officers. See *Guide to Judiciary Policy*, Volume 2C, Chapter 9.

(d) No ethical impropriety in a judge's hiring as a law clerk the child of a legislative branch official responsible for judicial legislation, where the child is an excellent candidate and appointment would be based on merit and not favoritism. If the judge has legislative responsibilities for the court, the judge should take appropriate steps to avoid conflicts of interest.

(e) Court should not consider appointing as magistrate judge the child of an active senior judge on the court.

(e-1) Although appointment of the spouse of the clerk of court as a magistrate judge in the same court does not violate the nepotism canon (where neither clerk nor spouse are related to a judge on the court), each judge involved in the appointment should evaluate whether the judge's relationship to the clerk of court would give rise to the appearance of favoritism if the spouse were selected. See Advisory Opinion No. 64.

(f) A judge should not appoint as an unpaid intern an attorney paid by the Department of Justice. Similarly, a judge should not appoint an active-duty Judge Advocate paid by the military as an unpaid volunteer employee. See also Advisory Opinion No. 111. Similarly, a federal public defender office should not hire an active duty Judge Advocate who is on "terminal leave" from the military because it would conflict with a defender employee's role as an advocate under Canon 1.

(g) A judge should not appoint a volunteer law clerk who is receiving any financial benefits from a law firm, including health benefits through the firm's benefit plan, during the term of the clerkship. This guidance would not prohibit the appointment of a volunteer clerk who receives financial benefits from the firm before or after the term of the appointment, assuming the specific arrangements are otherwise appropriate under Canon 4 of the Code of Conduct for Judicial Employees and Canon 2 of the Code of Conduct for United States Judges. See Advisory Opinion No. 83.

§ 3.10-3 Diligently Discharging Administrative Responsibilities

(a) Where Congress requires a court to fund a pro bono program out of the court's operating budget, leading to potential administrative conflict between the court's

and litigants' needs, judges' exercise of statutory responsibilities in deciding to fund (or not to fund) the program does not violate Canon 3B.

(b) It would not violate the Code of Conduct for judges responsible for court administration to arrange for independent court-related organizations (i.e., historical societies, public education groups) to use court space in accordance with applicable legal requirements, but judges or judicial employees serving in such organizations should refrain from participating in related court administrative decisions. See Advisory Opinion No. 104.

(c) A court should not donate attorney admissions funds to a for-profit educational entity partly owned by judges of the court, even if those judges do not participate in the decision.

(d) It is not improper for judges voluntarily to share the cost of lunch when meeting with members of Congress in furtherance of the administration of justice.

§ 3.10-4 Unprofessional Conduct

(a) A judge who has reliable evidence that a colleague engaged in unprofessional conduct should "take appropriate action" under Canon 3B(3), which may be done by discussing it with the colleague, reporting it to the circuit chief judge or circuit judicial council, filing a written complaint with the clerk of the court of appeals, or making a confidential referral to an assistance program when the judge believes that the misconduct is caused by drugs, alcohol, or a medical condition. See Commentary to Canon 3B(3).

(b) Attorney's implicit offer to dismiss judge's relative from case so judge could continue presiding may constitute unprofessional conduct that judge should consider reporting to appropriate disciplinary authorities.

(c) The Committee generally does not advise one judge as to the propriety of another judge's conduct or assess the propriety of prior activities.

(c-1) Similarly, the Committee ordinarily will not advise judges about the propriety of prior activities by clerks' office employees, but will provide advice to chief judges with supervisory authority.

(d) A judge's intentional public disclosure of confidential, internal court communications may violate several provisions of the Code of Conduct, including Canon 4D(5) ("A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.").

(e) The duty of confidentiality in Canon 3D of the Code of Conduct for Judicial Employees, which applies to current and former employees, encompasses only

information "received in the course of official duties" and does not prevent the reporting or disclosing of misconduct by a judge, supervisor, or other person.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities*.

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. Financial Activities.

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would 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.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does

not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

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

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Canon 4. Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

Canon 4A. Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board.

Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

Canon 4A(4). This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 4B. The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

Canon 4C. A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

Canon 4D(1), (2), and (3). Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 4D(5). The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Canon 4E. Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

Canon 4F. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

Canon 4H. A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

COMPENDIUM OF SELECTED OPINIONS CONCERNING CANON 4

§ 4. Extrajudicial Activities

§ 4.1 Law-related Activities

- Advisory Opinion No. 93 (extrajudicial activities).
- Advisory Opinion No. 7 (judge may participate as faculty member of national college of state trial judges).

§ 4.1-1 Speaking, Writing, and Teaching

- Advisory Opinion No. 55 (Judicial writings and publications).

- Advisory Opinion No. 87 (Participation in continuing legal education programs).
- Advisory Opinion No. 93 (extrajudicial activities).
- Advisory Opinion No. 105 (Participation in private law-related training programs).
- Advisory Opinion No. 108 (Participation in government-sponsored training of government attorneys).
- Advisory Opinion No. 116 (participation in educational seminars sponsored by research institutes, think tanks, associations, public interest groups, or other organizations engaged in public policy debates).

§ 4.1-1[1] Teaching and Lecturing (Law School, Bar and CLE)

(a) Compensation received by judges for extrajudicial activities must be reasonable in amount, and not in excess of what would be paid to other nonjudge professionals for similar services.

(a-1) Judges may be paid at a higher rate than other adjunct professors but a lower rate than full-time and emeritus professors.

(b) Judges may teach in law schools. However, no lawyer who serves on the body setting the judge's teaching salary should appear before the judge. Also, the judge should not participate in any case in which the school or its employees are parties. Similarly, a judge may teach other judges through a law school's judicial education program and receive compensation, subject to prior approval from the chief circuit judge.

(b-1) While a judge may teach in a law school, the Code does not suggest that a judge may also be considered an "employee" of the school.

(c) Judges may teach in bar-review and CLE courses, including teaching via videotape or by discussing legal subjects on radio or television.

(d) Judges may be compensated for preparing bar examination questions.

(f) A judge may not accept an endowed adjunct professorship where the professorship is endowed by and named after a local law firm or lawyer who practices before the judge's court.

(g) A judge may accept compensation for teaching where the subject matter only incidentally relates to practice before the judge's court. See Advisory Opinion No. 87.

(h) A judge may participate in an educational videotape that is an activity to improve the legal system.

(i) A judge should not participate in a CLE program concerning practice in the judge's court that is sponsored by a law firm that appears in the judge's court, due to concerns that the firm is in a special position to influence the court.

(j) A judge should not participate in a CLE or other legal training program that is aggressively marketed to focus on federal judge participants, and where the sponsor implies that attendees will enjoy special access to "network" with the judges, judicial participation is expressed in non-neutral terms, and the programs are primarily attended by attorneys with a particular practice orientation (e.g., the defense or plaintiffs' bar). *See* Advisory Opinion No. 87.

(k) Although a judge may teach a course in appellate advocacy, a judge should not participate in a legal clinic that is directly involved in advocacy on behalf of particular clients whose cases are before the federal courts, due to concerns under Canon 4A(5) (practice of law) and Canon 2 (appearance of impropriety).

(k-1) A recall-eligible judge may teach a law school course on mediation involving classroom lectures, simulation exercises, and supervision of uncompensated student mediators.

§ 4.1-1[2] Teaching and Lecturing (Other Than Law School, Bar and CLE)

- Advisory Opinion No. 105 (participation in private law-related training programs).
- Advisory Opinion No. 108 (participation in government-sponsored training of government attorneys).
- Advisory Opinion No. 116 (participation in educational seminars sponsored by research institutes, think tanks, associations, public interest groups, or other organizations engaged in public policy debates).

(a) A judge should not participate in a training course designed to teach law enforcement officers how to be more effective witnesses in federal court. Similarly, a bankruptcy judge should not assist in training U.S. trustee staff, or other small, specialized groups of advocates, in the judge's own district, but may permit use of courtroom facilities by such groups (assuming no legal or practical impediments). Similarly, a judge should not participate in a conference organized by the agency appearing in all the court's cases and designed to improve the agency's operations and practices in that court. See Advisory Opinion No. 108.

(b) Writing or lecturing on how to practice before a judge's court may be appropriate (notwithstanding the inevitable lending of prestige to the program) when the program is sponsored by a bar association or other nonprofit devoted to improvement of the legal system, but it is inappropriate when a for-profit entity stands to profit. Canon 2B. See Advisory Opinion Nos. 87 and 105.

(b-1) Although illustrations from a judge's own experience are appropriate during a judge's writing or lecturing on general substantive or procedural issues, it is inappropriate for a judge to sell his or her expertise on how to practice before the judge's court.

(b-2) To avoid lending the prestige of judicial office to a commercial endeavor, a judge should not speak at a conference for litigators run by a for-profit consulting firm whose business includes providing expert testimony in court.

(c) A judge may be a panelist or participant at a seminar and receive reimbursement of expenses. It is also permissible for a judge to attend social events sponsored by businesses or law firms in conjunction with the seminar. No compensation may be accepted unless the activity qualifies as teaching under the Ethics Reform Act and outside employment regulations.

(c-1) A judge may lecture at a seminar organized by a nonprofit foundation with corporate sponsors and may accept reimbursement of expenses but not compensation. See Compendium § 34.1-2(k). Same, for lecturing at a continuing education program for physicians. Same, for participation in an international conference geared towards improvement of a foreign court system.

(d) A judge should not participate in training lawyers at a particular law firm. Same for a law clerk. Nor should a judge participate in an educational program for a company's in-house lawyers.

(d-1) A judge may participate in an advocacy training program for young women attorneys attended by prosecutors and defense counsel. Same for speaking at a conference sponsored by a law-related organization that seeks to enhance the professional status of women when membership in the organization is open to persons of any gender and the organization does not seek to promote quotas or preferences based on sex.

(d-2) A judge may speak on appellate advocacy at national conference for state attorneys general. Same, for seminar sponsored by a national organization primarily composed of members of the defense bar.

(d-3) A judge may participate in a fellowship for a nonprofit organization that offers law-related courses to law students from a particular religious faith, provided that the organization does not engage in issue advocacy that benefits only a particular constituency or seeks to advance a specific and contentious social, political, or civic objective.

(e) A judge should not lead a panel discussion focusing on issues that could arise in the judge's cases at a conference sponsored by a nonprofit special interest advocacy group.

(f) A judge may participate in a training program for prosecutors at the Department of Justice's National Advocacy Center, provided that the judge makes reasonable efforts to provide similar training to the opposing constituency (e.g., federal public defenders, CJA panel attorneys, and other defense attorneys).

(g) A judge may appear on a panel at a legal conference sponsored by a for profit company and may accept reimbursement of expenses; but the judge should ensure promotional materials used at the conference do not overemphasize the judge's participation or imply the judge's endorsement of the company's commercial services.

(h) A judge's uncompensated speech on a legal topic unrelated to the operations of the judge's court does not improperly lend the prestige of judicial office to the private interests of the sponsoring for-profit entity, but the judge should monitor promotional activities to ensure that no improper exploitation of the judicial office occurs.

(i) Due to Canon 2 concerns, a judge should not speak at a program on discovery hosted by a for-profit company offering discovery services, where the company plans to market its services at the program and advertise the program to current and future clients.

(j) A judge should not speak at a training seminar organized by a law firm for business entities that represent only one side of litigation before the judge and where the topics would exploit the judicial office to advance private interests.

(k) To avoid lending the prestige of judicial office to a commercial endeavor, a judge should not speak at a conference for litigators run by a for-profit consulting firm whose business includes providing expert testimony in court. Same for speaking at a private conference for an association of companies.

(l) Judge may participate as panelist in public forum addressing law-related issues, sponsored by nonprofit organization that charges admission and solicits contributions to defray costs of forum, where admission charge and contributions reflect only cost of producing event and judge does not participate in solicitation of contributions.

(m) A judge may speak on legal ethics at a program sponsored by a for-profit organization, where the sponsors do not exploit the judicial office through improper promotion, the program does not provide special access to one constituency, and the judges will not discuss the ins-and-outs of practice in the judge's court.

(n) While a judge's general remarks on constitutional and statutory interpretation must comport with Canons 2 and 3, if those standards are met, the judge's expression of those views in a speaking engagement would not reasonably be understood as an endorsement of the sponsoring organization simply because those general remarks coincide with some positions promoted by the organization. See also Advisory Opinion No. 116.

§ 4.1-1[3] Writing and Editing

(a) A judge may write books and permit law clerks to do so provided the prestige of the office is neither exploited nor used to advance the interests of the publisher. A judge should retain control over the advertising and promotion of a judge's writings to avoid exploitation of the judge's office. Same for circuit librarian, who should take care to prevent exploitation of the official position for private gain. See Advisory Opinion No. 55.

(b) A bankruptcy judge may write an article concerning general substantive law and relevant statutes, in co-authorship with an attorney who practices before the judge's court; depending on the personal or financial relationship with the attorney co-author, the judge should consider recusal from cases handled by that attorney.

(c) To avoid exploitation of office, a judge who authors a legal book may include a factual statement about the judge's length of service and court but should not use this information in the book title or in marketing.

(d) A judge should not write an article discussing a high-profile case recently completed and still on appeal.

(e) A judge may write an introductory preface to a book written by another or contribute to a trial manual, provided it is a genuine contribution to the work, and not a "blurb" or promotional effort exploiting the judge's name and position.

(f) A bankruptcy judge may serve as editor of a law journal published by the National Conference of Bankruptcy Judges or of a bankruptcy newsletter.

(g) A judge should not serve as editor of, or advisor to, a Department of Justice publication.

(h) Although illustrations from a judge's own experience are appropriate during a judge's writing or lecturing on general substantive or procedural issues, it is inappropriate for a bankruptcy judge to sell his or her expertise on how to practice before the judge's court. Canon 4D(1). Although writing/lecturing on how to practice before a judge's court is appropriate (notwithstanding the inevitable lending of prestige to the program) when the program is sponsored by a bar association or other nonprofit devoted to improvement of the legal system, it is inappropriate when a for-profit entity stands to profit. Canon 2B. See Advisory Opinion No. 87; Compendium § 2.12(a).

(i) A judge may write a "foreword" for a new book, but any use of the judge's name or office in the contemplated television advertisements would have a tendency to use the prestige of office. See Advisory Opinion No. 55.

(j) A judge may write a review of a book on a legal topic, but should not authorize use of the review for promotional purposes. See Advisory Opinion No. 55.

(k) As part of a grant process, a judge may evaluate and provide a report about a law school program. See Canon 4A(3).

(l) Although there is no per se prohibition against writing letters to the editor, judges should avoid expressing personal opinions on the merits of cases or on contentious public issues and should avoid actions that could raise reasonable doubts about their impartiality.

(m) A judge may discuss the judge's experience as a former prosecutor in the investigation and trial of a case with the author of a proposed book, but should take care to avoid Canon 2 concerns (undermining public confidence in the courts and lending prestige of office) and should avoid public comment on merits of pending or impending action under Canon 3A(6), even where there has been a final disposition in the case. Similarly, a judge may be the subject of a children's book that will be used for civics education, but should not discuss pending or confidential matters.

(n) Judge's proposal to write a work of fiction based on a well-known criminal case the judge presided over would raise insurmountable concerns under Canons 2, 3, and 4. Similarly, a judge should not participate in an interview for a documentary film concerning a prior case.

(o) A judge may participate as co-author in an academic research project on juror bias, using former jurors as subjects of the study, provided that concerns related to Canons 2A (diminishing public confidence in the courts), 2B (lending prestige of office), and 4C (involvement in fundraising) can be avoided.

(p) A judge should not participate in a television interview, or documentary film, about a case the judge handled either as a judge or during prior employment, where it is clear that the production is commercial in nature, rather than educational, and the judge's participation would primarily be used to advance the private interests of the filmmakers or potential advertisers. Moreover, public confidence in the integrity and impartiality of the judiciary could be put at risk if a judge's public comments or contributions to a television program or film are likely to generate public controversy or draw the judge into providing a further defense or explanation of the judge's initial comments.

(q) A judge's proposal to use internal court documents in a judge's extrajudicial publication raises concerns under the Code about preserving the confidentiality of judicial decision-making in the court as a whole. The integrity of the judiciary would be undermined if confidential work and communications between staff attorneys and judges are unilaterally disclosed to the public. Such use of internal court materials would also be inappropriate under Canon 4D(5).

(r) A newly-appointed judge should take reasonable steps to ensure that blog or social media posts that pre-date judicial appointment are not viewed as current assertions of the judge's views on political issues. However, due to the judge's and the

judiciary's interests in maintaining the historical record, the judge is not required to delete or remove such posts. See also Advisory Opinion No. 112 (advising that, if political endorsements or other statements on social media appear to be current, a judicial employee should clarify that they predate judicial employment, including, for example, by posting a statement that the employee has taken a position that precludes making further public political comments or endorsements and that such postings will no longer be updated concerning those issues).

§ 4.1-1[4] Speaking, Writing, and Teaching [Judicial Employees]

(a) Subject to consulting with the appointing judge, a law clerk may teach at a law school or college, may receive compensation and reimbursement of expenses, and may accept legal research services provided to all teachers. A law clerk should not use as teaching materials cases the judge or the law clerk worked on during the clerkship; the law clerk may use other cases from the same court but should avoid disclosing confidential information.

(b) A bankruptcy clerk should not accept an invitation and expenses to speak on bankruptcy issues at a seminar for outside counsel sponsored by a for-profit company that is a litigant in the clerk's court.

(c) A law clerk may write an article on the law with the judge's permission, provided the prestige of the office is neither exploited nor used to advance the interests of the publisher.

(d) A circuit librarian may write a book on legal research, but should take care to prevent exploitation of the official position for private gain.

(e) A judicial employee proposing to write a chapter for a bar association publication should consult in advance with his or her appointing authority.

(f) A law clerk may write a book of fiction on the federal judiciary based on public records of the court as long as the law clerk does not use confidential information received in the course of the law clerk's duties in the book. See Canons 3D and 4D, Code of Conduct for Judicial Employees.

(g) A law clerk may accept a fellowship to study foreign affairs offered by a nonpartisan group that does not take legal positions or litigate in federal court.

(h) A law clerk may establish an online discussion forum on legal issues, for compensation and outside of working hours, but should not be identified as a law clerk and should not provide information about cases pending or likely to arise before the court. Same for online CLE course, but the law clerk should remain anonymous and avoid interactive communication with attorney/students who appear in the clerk's court.

(i) A new law clerk may accept, either before or during the clerkship, a monetary grant for the publication of a law journal article where the article was completed and selected for publication prior to the start of the clerkship.

(j) Law clerks should consult their court's social media policies before engaging in online activity. The Committee recommends that law clerks not identify the judge for whom they work when engaging in online activity. Any online postings should avoid personal opinion about political issues or matters likely to come before the courts.

§ 4.1-2 Consultation With or Hearings Before Executive or Legislative Bodies or Officials

(a) Judge with special expertise may testify in public hearings before Congress in favor of a constitutional amendment if the substance and manner of the testimony is within the contours of the judge's special expertise and if the circumstances rule out the appearance of endorsing or opposing any candidate or political organization. The judge should not otherwise speak publicly in support of (or against) the proposed amendment. Similarly, a judge may testify at a Congressional hearing regarding proposed legislation when testimony draws on judicial expertise and would be limited to the judge's views on how existing law may be improved.

(b) Judge may employ a professional representative to consult privately with Congress about legislation affecting the judge's court and benefits, to the same extent the judge could permissibly do so directly. See Advisory Opinion No. 50.

(c) Judge may write to the President and Congress about government funding for a law-related organization, but should limit communication to areas where the judge's judicial experience provides special expertise and should avoid stating a personal position or opinions based on prior nonjudicial experience; judge should also avoid any appearance of endorsing or opposing any candidate or political organization identified with the issue.

(d) A judge may consult with a member of Congress concerning a matter involving the judge's personal interest, taking care to avoid lending the prestige of office. See Advisory Opinion No. 50.

(e) Judges may consult with, or participate in facilitated discussions with, legislative branch officials on matters concerning the administration of justice.

(f) Consulting under Canon 4A(2) is generally limited to law-related activities. It does not involve private conversations with public officials.

(g) A judge should be cautious before circulating or signing a law-related petition calling for action by legislative or executive branch officials because it could detract from the dignity of the office or reflect adversely on the judge's impartiality.

§ 4.1-3 Nonprofit Organizations Devoted to the Law, Legal System, or Administration of Justice

§ 4.1-3[1] Participation in Bar Association Activities

➢ Compendium § 1.3.

(a) Federal judges are not required to be members of any bar association; such membership is permitted, even encouraged; and bar association membership and participation in bar association activities do not constitute the practice of law.

(b) A judge may serve on a committee of the state bar association. Same for service on a commission to evaluate the structure of the state bar.

(c) A judge may chair a section of the American Bar Association, provided this does not repeatedly involve the judge in issues that are likely to come before the court.

(c-1) A judge should not chair an American Bar Association section responsible for developing positions on controversial political and social matters that are frequently the subject of federal court litigation, where the judge could not advocate such policies individually and cannot as a practical matter be disassociated from the section's positions.

(c-2) A judge may serve in the ABA House of Delegates, so long as the judge abstains from debating and voting on matters in which judges cannot participate and a record of abstentions is available to interested persons upon reasonable inquiry.

(d) A judge should not engage in efforts to recruit lawyers to join the American Bar Association or any of its sections.

(e) A judge may serve as secretary of a bar foundation, but may not personally engage in fundraising.

(f) A judge may serve as an officer of a state bar association, but may not campaign for election to that office. See Advisory Opinion No. 34.

(f-1) A judge should not accept office in a bar association if the selection is likely to be contested, as opposed to noncontested or appointed. In situation where opposition arose after judge indicated a willingness to accept, but where the judge's withdrawal was still feasible, Committee concurred in judge's judgment to withdraw.

(f-2) A judge should not serve as an officer of a mandatory state bar, due to concerns of dual service to a state government, potential entanglement in litigation and other matters of public controversy, and potential interference with the performance of judicial duties.

(g) Federal public defender may serve on a state bar advisory committee and conduct investigations of federal bar disciplinary matters without compromising independence of office, interfering with official duties or adversely reflecting on his or her role as an advocate.

(h) A judge should not serve as a bar association's audit and compliance officer responsible for investigating allegations of fraud and other law violations. Similarly, a judge should not serve as an advisory member of a state bar ethics committee that considers legal ethics opinions and proposed amendments to the state rules of professional conduct. The same concerns do not apply, however, to a judge's service on a bar association committee responsible for drafting non-binding model rules of conduct for judges and attorneys.

(i) A judge may urge other judges (but not lawyers) to join the American Bar Association or a section thereof.

(j) A judge should not publicly support a candidate for bar association office.

(k) A judge who is a member of the American Bar Association is not regarded as personally supporting positions taken by the Association without the judge's involvement (here, abortion issues), need not resign on that account, and need not recuse on that account. Advisory Opinion No. 85.

(l) A judge should not continue membership in an organization that champions the cause of civil defense lawyers as this could raise concerns about the judge's capacity to decide issues impartially. Same for organization of former prosecutors. Same for organization that requires members' law practice to be "congruent with or at least not opposed to" the interests of institutional mortgage lenders and their attorneys.

(m) A judge's membership in a legal organization whose members address issues related to all aspects of the construction industry does not raise reasonable doubt about the judge's capacity to decide cases impartially. Same, with respect to an open-membership legal and educational organization that does not engage in lobbying or federal litigation.

(n) A judge may accept membership as a judicial fellow in a selective honorary society for attorneys, provided the judge can avoid appearance of impropriety that may arise from the small and selective nature of the organization.

(o) A judge may serve on a bar association committee that makes occasional grants to legal services organizations, but should consider recusal if the grantee appears before the judge soon thereafter; the judge should abstain from grants to entities that the judge is not permitted to support individually (e.g., political candidates and organizations).

(p) A judge may serve on a bar committee that recommends recipients of awards for public service and jurisprudence.

(q) A judge should not allow his name to be placed on the ballot in a contested election to a regional board of trustees of an organization dedicated to the improvement of the law and the administration of justice whose membership includes judges, lawyers, law professors and law students.

(r) A judge should not serve as a member or chairman of a bar committee to review, and recommend amendments to, a state constitution. Similarly, a judge should not serve on a state bar committee that reviews and prepares proposals for changes to the state court rules of procedure.

(s) A judge may serve on a committee established to address access to the courts and to recommend ways to expand pro bono activities of the private bar, provided that the committee's activities are sufficiently removed from litigation to make membership in it permissible under the Code.

(t) A judge should not serve on a bar association task force on human trafficking issues that is developing guidance for employers, law enforcement officials, and prosecutors. Similarly, a judge should not serve on a bar committee that serves as a resource for attorneys who provide legal assistance to a particular constituency or group.

(u) A judge should exercise caution when asked to participate in a bar association's judicial clerkship pipeline program that is expressly or practically limited to certain categories of minority participants because it may be seen as benefiting a specific constituency rather than the law more broadly. A judicial clerkship pipeline program that is open to all who do not yet have a clerkship would alleviate the concern that it seeks to benefit a specific constituency rather than the law as a whole.

§ 4.1-3[2] Service on Boards and Committees — Permissible Activities

- Compendium §§ 1.3.

(a) A judge may serve on the advisory board of a nonprofit organization for the advancement of liberty and equality through law.

(b) A judge may serve on the advisory council of the National Center for State Courts.

(c) A judge may serve on the board of directors and otherwise participate in organizations devoted to the observance of the Bicentennial of the Constitution.

(d) A judge may serve on the board of an organization that supports the merit selection of state judges, and to contribute funds to it.

(e) A judge may serve on the board of directors of the "Women Judges' Fund for Justice," a nonprofit organization essentially aimed to reduce gender bias in the state and federal judiciary.

(f) Service as a member of the Advisory Board of a nonprofit dispute settlement organization created by the American Arbitration Association, is permissible so long as the judge does not serve as an arbitrator or mediator, raise funds or recommend the employment of particular arbitrators.

(g) Judge may serve on short-term special advisory board in Department of Defense whose purpose is to consider *procedures* to insure the accuracy, efficiency and integrity of the investigative function of the Department and report recommendations to the Secretary of Defense where the investigative functions in question ordinarily are directed to matters governed by the Uniform Code of Military Justice.

(h) A judge may serve on the board of an organization dedicated to the improvement of the law and the administration of justice; and if the Board takes a position on occasion with respect to which the judge would prefer not to be identified, the judge could abstain. Further, if the organization is appointed as a facilitator in a federal case, the judge should consider discontinuing board service if such service could raise reasonable questions about the judge's impartiality in similar cases. Similarly, a judge may serve as the director of an organization dedicated to improving the law, but is prohibited by the Ethics Reform Act of 1989 from receiving compensation for such service.

(h-1) A judge may serve as president of a nonprofit bankruptcy organization, but should comply with Canon 4C restrictions on fundraising and fund management. Similarly, a law clerk may volunteer for a nonprofit bankruptcy organization by writing case summaries and articles for its journal and serving on a committee.

(i) A judge may serve on the National Conference of Commissioners on Uniform State Laws and as a member of the American Law Institute without violating Canons 4A(2), 4A(3), and 4F provided that the judge does not personally engage in activity designed to promote particular legislation or a rule of law before any official governmental agency.

(j) A judge may serve on a private, bipartisan commission examining continuity of government operations after disasters, but should refrain from policy discussions pertaining to the executive and legislative branches, controversial matters that might jeopardize impartiality, and advocating proposals to the executive and legislative branches.

(k) A judge may serve on a board to advise a law school on matters relating to the judiciary, in connection with the law school's proposed bid to an agency of the federal government for the contract to develop a program to improve the legal system in

the former Soviet Union, as long as the judge's name and position are listed in the same manner as all other participants, so that there is no impermissible lending of the prestige of office.

(l) A judge may serve on a law school's Board of Visitors (an advisory group to assist the law school dean), without restriction based on whether the law school is a private or public institution. A judge may also serve on the Board of Trustees of a law school.

(m) A judge may serve on an advisory board for a law school's judicial education program, where the board's purpose is to provide advice on suitable programs and to encourage attendance by judicial colleagues. Similarly, a judge may serve on the advisory board of a law school journal.

(n) A judge may serve as an elected board member of a non-profit educational organization, provided the judge is careful to avoid lending the prestige of office through participation in the board election.

§ 4.1-3[3] Service on Boards and Committees — Impermissible Activities

(a) A judge should not serve on judicial selection advisory board established by governor because of political implications. Same for U.S. Senator's judicial screening committee. Same for bar association committee that selects candidates to be appointed by the mayor.

(a-1) A judge should not serve on a state Board of Law Examiners that is appointed and supervised by state's highest court. The judge's habeas cases involve indirect review of decisions of that state court, creating Canon 1 concerns relating to an independent federal judiciary.

(a-2) A judge should not serve on an investigative, fact-finding ethics advisory panel of a state senate.

(a-3) A judge should not serve on a state court task force examining the causes of wrongful criminal convictions. Same, for an advisory committee to assist a state task force studying capital punishment.

(b) Although the organization is devoted to the improvement of the administration of justice, a bankruptcy judge's service on the Board of Directors of a nonprofit corporation formed for the purpose of certifying specialization in the field of bankruptcy law would be contrary to Canons 2A and 2B.

(b-1) Bankruptcy judge should not participate in certifying attorneys as bankruptcy specialists as part of state bar advisory committee process. Similarly,

a judge should not serve on a bar association committee that selects the recipients of the "best" lawyer award for a particular category.

(c) A judge should not serve on the Board of Directors of an organization whose primary purpose is to represent in litigation abused and neglected children. Same with respect to a nonprofit organization providing legal services to low-income individuals.

(d) A judge should not work with a private group to design proposed amendments to a controversial law that addresses issues other than the administration of justice and that raises constitutional issues likely to come before the judge's court.

§ 4.1-3[4] Participation in Bar Association Activities, and Service on Boards and Committees [Judicial Employees]

(a) A judicial employee may contact others in support of a friend's bid for election to bar association office, but should do so using own time and resources, should ensure that the friend does not imply court endorsement, and should consider whether a restricted role is advisable due to controversial bar association issues or litigation.

(b) A law clerk should not serve as bar association liaison to a legal services provider that litigates in the law clerk's court.

(c) A law clerk may serve on the board of a national organization that identifies and trains volunteers to serve as guardians ad litem for children in state juvenile court. But see Compendium § 1.3-1(e) (advising that a law clerk should not accept appointment to serve as a volunteer guardian ad litem, but that a judicial employee may file a petition in state court for the appointment of a guardian ad litem). Similarly, a probation officer may serve on the board of a nonprofit organization that assists ex-offenders with re-entry into society.

(d) A law clerk may serve as a member, officer or director of professional association of law clerks.

(e) A judge's law clerk should not hold a leadership position in a lawyer's association that will be involved in litigating controversial social and political issues likely to come before the courts and should not publish an interview about the association and its purpose.

(f) A law clerk should avoid engaging in fundraising efforts that are directed towards law firms, legal vendors, and individuals who are likely to appear before the court.

(g) Probation officers should avoid involvement in staffing, marketing, or soliciting resources for nonprofit organization assisting at-risk youth, where participants may involve federal offenders, due to potential conflicts of interest.

§ 4.1-4 Arbitration, Mediation, and Judicial Activities in Other Courts

- Compendium § 1.3.

- See Commentary to Canon 4A(4): This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (e.g., when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

(a) A court of appeals judge should not conduct settlement negotiations in a district court case, unless duly designated and authorized to sit in the district court for that purpose.

(b) Canon 4A(4) precludes a judge from serving as a mediator for cases in state court.

(c) Federal judges, including judges on senior status, may not serve as arbitrators or mediators in cases not on the docket of that judge's court or a court upon which the judge is designated to sit unless expressly authorized by law. Similarly, judges should not sit as settlement judges in state court.

(c-1) Similarly, Canon 4A(4) precludes a retired judge of the Court of Federal Claims who is subject to recall, or who is serving in recall status, from engaging in mediation or arbitration apart from the judge's official duties.

(d) A senior judge designated to a particular federal district court may offer his services to settle cases and may serve as a mediator in that court, without additional compensation.

(e) Judges may participate in and support efforts to promote alternative dispute resolution, with knowledge that such support is probably a condition of future federal funding of such programs.

(f) Service as a member of the Advisory Board of a nonprofit dispute settlement organization created by the American Arbitration Association is permissible, provided that the judge does not serve as an arbitrator or mediator, raise funds or recommend the employment of particular arbitrators.

(g) A judge may participate in establishing nonprofit international arbitration organization for resolving sports disputes so long as the judge is not involved in the operation or delivery of arbitration services to resolve private disputes or to advance private interests.

(h) Serving as fact-finder with respect to disciplinary matters for athletic association is comparable to serving as an arbitrator.

(i) Canon 4D(2) (prohibiting service as officer, etc., of nonfamily business) and 4A(4) (prohibiting service as arbitrator or mediator) preclude a judge from serving for compensation on a committee of a national stock exchange when the jurisdiction of the committee is to rule upon proposed ethical violations of members of the exchange.

(j) A judge may assist the parties in structuring an arbitration agreement on a matter that is not pending before the judge, but that is ancillary and related to the pending matter, provided that the judge is mindful of potential recusal issues. *See* Canon 3A(4) and Advisory Opinion No. 95.

§ 4.1-4[1] Arbitration and Mediation [Judicial Employees]

(a) Canon 4D of Code of Conduct for Judicial Employees does not permit judicial employees to serve as arbitrators in state court arbitration programs, which would entail active involvement in state court proceedings.

(b) Canon 4D of the Code of Conduct for Judicial Employees prevents a law clerk from serving as a state court-appointed arbitrator or mediator.

(c) Although the Code of Conduct for U.S. Judges allows a judge, with the consent of the parties, to act in a settlement capacity in matters pending before his or her court, the Code of Conduct for Judicial Employees contains no similar provision suggesting that a law clerk may conduct a settlement conference in a case that may be heard by the law clerk's appointing judge.

§ 4.1-5 Practice of Law

- Advisory Opinion No. 36 (judge should not comment on legal issues arising before college board of trustees of which judge is member).

(a) Judge may not seek *pro hac vice* authority to practice in a court in order to represent a child in state court traffic violation proceeding.

(b) A judge who prosecuted a case before appointment may not actively assist former colleagues in the appeal of the case and may not render advice, counsel or opinions about legal issues or the conduct of the appeal. However, the judge may respond to questions from successor counsel as to historical facts not readily apparent from the file, factual details in the judge's peculiar knowledge, and similar matters of clarification.

(c) Judge should not consult with attorney or with executor of a will in order to advise a friend (who is a beneficiary of the will) how to proceed; this is tantamount to practicing law. Judge may suggest that friend retain counsel for assistance but should not recommend a particular lawyer.

(d) A judge may represent self before a city zoning commission but may not represent neighbors or a developer. Similarly, a judge who was sole owner of a law firm

may represent self pro se in collecting accounts receivable but may not represent the firm.

(e) A judge serving as executor of a parent's estate may appear in a wrongful death action if under state law the appearance is considered pro se and not representative.

(e-1) Similarly, a judge may represent his or her own personal interests but may not represent a spouse or trustee.

(e-2) When a judge's interests are synonymous with the interests of the judge's family members due to a joint ownership arrangement, the judge may act *pro se* in a way that incidentally benefits the family's interests, but should not act or claim to be the family's legal representative.

(f) A judge should not accept a JAG position to develop an international procedure for handling civilian misconduct on foreign bases, as this would inherently entail resolving legal issues and providing legal advice.

(g) Assisting a charity to negotiate a media contract is likely to involve reviewing and drafting contract provisions, offering legal advice, and representing the client's legal interests, which constitute the practice of law. After a contract is executed, a judge may consult with the contractor about improving services, so long as the judge does not lend the prestige of judicial office.

(h) A judge may represent self and spouse in purchasing a residence and may also accept a broker's commission on the transaction as permitted to attorneys under state law.

(i) Although a judge may teach a course in appellate advocacy, a judge should not participate in a legal clinic that is directly involved in advocacy on behalf of particular clients whose cases are before the federal courts, due to concerns under Canon 4A(5) (practice of law) and Canon 2 (appearance of impropriety).

§ 4.1-5[1] Practice of Law [Judicial Employees]

(a) It would constitute the practice of law for federal public defender to accept a referral fee for recommending a lawyer. Serving as arbitrator would also constitute the practice of law. Federal public defenders may not engage in the private practice of law, even on their own time and without compensation.

(a-1) An assistant federal public defender may not accept appointment as an arbitrator; such action would violate the proscription against the practice of law in Canon 5D of the Code of Conduct for Federal Public Defender Employees.

(a-2) Law clerk may not serve as arbitrator or mediator under state court program of binding arbitration. Service as a mediator or arbitrator, though not expressly prohibited by the Code of Conduct for Judicial Employees, would be perceived as the practice of law and in violation of Canon 4D. Such service would also raise problems of independence under Canons 1 and 2. Similarly, Canon 4D prevents a law clerk from serving as a state court-appointed arbitrator or mediator. Similarly, a law clerk may not, separate from official duties, conduct a mediation or settlement conference in a case assigned to the judge or court.

(a-3) Assistant federal public defender may not maintain private law practice, even though appointment as assistant federal public defender is temporary.

(a-4) It would be considered the practice of law for a law clerk's name to be used by a professional limited liability company providing legal services and for the law clerk to have a continued fiduciary duty to company clients and a continued right to share in profits.

(a-5) A law clerk should not serve as a municipal judge, presiding at hearings and taking pleas, which would constitute the practice of law.

(a-6) An assistant federal public defender's representation of a state criminal defendant constitutes the private practice of law and is not permitted. Same, for representation of minors in state court name-change proceedings.

(a-7) It would violate Canon 5D of the Code of Conduct for Federal Public Defender Employees for an assistant federal public defender to take a position as an adjunct supervisor of a law school clinical program that reviews cases of felons who claim innocence.

(a-8) A judicial employee may serve as an uncompensated arbitrator or mediator for a nonprofit organization, subject to the standards applicable to pro bono practice of law in Canon 4D.

(b) Canon 4D of the Code of Conduct for Judicial Employees imposes a less stringent ban on the practice of law than does the Code of Conduct for United States Judges. Thus, subject to such additional limitations imposed by the law clerk's judge, the Canon itself would not prohibit a law clerk's service without remuneration as a volunteer at a community family law center.

(b-1) The phrase "in a court of the United States" in Canon 5D(2) of the Code of Conduct for Law Clerks means a court of the federal government, and not more broadly any court within the United States. Thus, a law clerk performing necessary legal work for a member of the law clerk's family may appear before state or local courts so long as the other requirements of Canon 5D are met. [Refers to law clerks code that was withdrawn; compare to

current Canon 4D, Code of Conduct for Judicial Employees.] Similarly, Canon 4D of the Code of Conduct for Judicial Employees permits a law clerk to file documents and provide legal advice on behalf of a sibling named in a civil action in state court. Same for a law clerk representing a parent in a state malpractice action.

(b-2) Canon 4D of the Code of Conduct for Judicial Employees prohibiting pro bono law practice in federal, state and local courts does not prohibit pro bono work in foreign countries. However, a judicial employee should not engage in pro bono legal work in a foreign country or court that involves a matter of public controversy and/or that may implicate the Canon 5 prohibition on partisan or nonpartisan political activity.

(b-3) A law clerk may not continue pro bono representation of a criminal defendant after the clerkship begins. See Canon 4D.

(b-4) Law clerk may serve as uncompensated member of a committee that advises board of a credit union; to the extent such service requires legal skills it is permitted as pro bono legal service.

(b-5) A judicial intern may accept a concurrent internship with a pro bono legal non-profit organization, provided that it is consistent with the practice of law restrictions of Canon 4D(3). Similarly, a judicial employee may participate in a law school's clinical program so long as it is consistent with the practice of law restrictions.

(c) Law clerks, including part-time law clerks, may practice law only under the circumstances expressly permitted by the Code of Conduct for Judicial Employees.

(c-1) The Code of Conduct for Judicial Employees does not exempt part-time law clerks from Canon 4D, prohibiting the practice of law.

(c-2) A judge's part-time law student intern should not be permitted to perform paralegal work at a law firm; the performance of legal tasks for lawyers in these circumstances should be treated as practicing law, which is not permitted under Canon 4D of the Code of Conduct for Judicial Employees. Similarly, a judicial employee should not simultaneously work as an independent legal document assistant because it would require the performance of duties that are closely tied to the practice of law. Similarly, a judicial employee should not work as a notary public when such service qualifies as the practice of law in the applicable jurisdiction.

(c-3) A law clerk should not be permitted to work for a law firm editing attorney writings and filings and performing legal research, as that would involve the practice of law.

(c-4) A law clerk may not file a brief in a U.S. Court of Appeals as pro bono counsel in an immigration matter as such would involve an appearance in federal court and litigation against the federal government in violation of the Code of Conduct for Judicial Employees. Even though pro bono service would begin one week before the end of the clerkship, practice of law restrictions are not subject to a *de minimis* exception.

(c-5) A probation officer should not be permitted to accept a position assisting attorneys with real estate closings in a state where such activity is considered the practice of law.

(d) A part-time pretrial services officer attending law school may practice law for the summer after a grant of leave without pay if all conflicts are avoided.

(d-1) An assistant federal public defender (who like a pretrial services officer is not subject to Ethics Reform Act, 5 U.S.C. § 13143(a) imposing a 15% cap or § 13144(a) limiting outside employment) may teach at a law school, open a law clinic for poor persons and supervise law students in connection therewith, so long as this is done only during an extended (6 months here) leave of absence from the Public Defender's Office without pay, so long as care is taken to avoid any conflicts of interest, and so long as the nature of the activity does not present inherent conflicts of interest or otherwise detract from the independence and integrity of the Public Defender's Office.

(d-2) An assistant federal public defender may take an extended leave (here, almost a year) to serve as a state judge, so long as conflicts are avoided and the position does not present inherent conflicts or otherwise detract from the defender office.

(e) Law clerk's service on state board of law examiners does not constitute the practice of law.

(f) A law clerk planning self employment after a clerkship ends may, while still clerking (and with judge's approval), form a professional corporation and announce plans to friends and family, but should not undertake overt activities to procure clients and establish a practice and should not: (1) distribute business cards; (2) make public announcements; (3) meet with or provide materials to attorneys; or (4) enter into contracts to provide services after clerkship ends.

(g) Preparing returns for a tax preparation service, without holding oneself out as an attorney, is not the practice of law; a law clerk may do this with judge's approval.

(h) A law clerk is permitted to accept compensation for part-time employment writing case law summaries for a legal news service.

(h-1) A law clerk should not write blog posts on legal topics for a law firm; the performance of such tasks should be considered the practice of law under Canon 4D.

(i) A part-time law clerk may assist with the non-legal work of a spouse's sole-proprietor law firm.

(j) [Note: Prior guidance on the practice of law by judicial employees in the military reserves has been removed due to the amendment to Canon 4D of the Code of Conduct for Judicial Employees in March 2022. As amended, Canon 4D permits the practice of law by judicial employees in the military reserves so long as the work does not involve the entry of an appearance in any civilian federal, state, or local court or administrative agency and does not involve a matter of public controversy or an issue likely to come before the judicial employee's court.]

§ 4.2 Nonprofit Civic, Charitable, Educational, Religious, or Social Organizations

§ 4.2-1 Participation in Civic, Charitable, and Other Non-Business Activities

- Advisory Opinion No. 28 (service as officer or trustee of hospital or hospital association).

(a) A judge may serve on the board of a charity that is not extensively involved in litigation or sponsoring litigation. Same for service on the board of a church-affiliated retirement center.

(b) A judge may serve as advisor to an organization sponsored by the Ford Foundation for the "study of national service"; a local unit of the American Cancer Society; or a local symphony society.

(c) A judge may serve on the board of the Urban League.

(d) A judge may serve on the board of directors of an education and research foundation, if satisfied that the organization does not advocate positions on issues likely to come before the court, that the judge would not be so identified with the views of the organization as to undermine the public perception of the judge's impartiality, and that frequent recusals would not be required.

(e) A judge may not participate in television commercials on behalf of a charity.

(f) A judge may serve as a trustee of a charitable trust established by the will of a close family friend and spouse of former law partner, where the judge's participation is limited to overseeing charitable activities and does not include fundraising or the rendering of investment advice.

(g) A judge may serve on the board of directors of a nonprofit community housing organization that is unlikely to engage regularly in litigation; same with respect

to nonprofit youth counseling organization. The same considerations govern a judge's service on a health system ethics committee. Similarly, a judge may serve on the board of trustees for a local library where the board appoints its own members without local government input and acts only in an advisory capacity.

(h) A judge who serves on the board of a charity may accept reimbursement of travel expenses to inspect the charity's research program from a for-profit company that donates supplies for the research, where the judge has recused from all cases involving the company and the judge's role will not be publicized.

(i) A judge may serve on the board of a nonprofit art museum.

(j) A judge may serve on the board of a nonprofit company operating an endangered species park. Same, for service on the board of a nonprofit organization dedicated to protection and restoration of a state historical site.

(k) A judge may participate in a children's health initiative aimed at preventing underage drinking, whether or not the request to participate is due to the judge's position as spouse of an elected official.

(l) A judge may serve without compensation on the board of a nonprofit, nongovernmental organization providing humanitarian aid, subject to restrictions on fundraising, litigation, advocacy, and political activity.

(m) A judge may speak at a student scholarship awards luncheon that is not a fundraiser.

(n) A judge may serve as president of a local council of the Boy Scouts, subject to Canon 4 restrictions on fund raising, litigation, etc. Same, for service as a county district chairman of the Boy Scouts.

(o) Judge may serve on a panel that reviews and rates grant applications from local hospitals and community organizations engaged in breast cancer education and treatment; if grant applicant appears before the judge, then judge should either recuse or avoid participation in the relevant grant application review.

(p) Judges and judicial employees are generally permitted to participate in charitable activities, including making donations to charitable organizations, subject to certain restrictions on fundraising and other issues. During a government furlough or similar event, a judge may contribute funds to a non-profit organization, such as a bar association, that offers assistance to affected judicial employees, provided that the organization is not likely to appear in court, and the assistance is offered to affected federal employees in general (i.e., not only to judicial employees). Judicial employees may accept such assistance consistent with the Code of Conduct for Judicial Employees.

(q) A judge may participate in a walk organized by a non-profit organization to commemorate a historical event, but should avoid any activity that has political overtones and not lend the prestige of office to the event.

(r) It is permissible for a judge to participate in a humanitarian program that is facilitated and overseen by a government agency when the judge would not receive any benefit or compensation from the program.

§ 4.2-2 Organizations That Sponsor or Fund Litigation, or That Are Likely To Be Frequent Litigators

- Advisory Opinion No. 40 (service on governing board of nonprofit organization that tends to become involved in court proceedings).
- Advisory Opinion No. 28 (service as officer or trustee of hospital or hospital association).
- Advisory Opinion No. 116 (participation in educational seminars sponsored by research institutes, think tanks, associations, public interest groups, or other organizations engaged in public policy debates).

(a) A judge should not serve as director of a foundation that funds numerous organizations' litigation efforts.

(b) A judge should not serve on the "council on legislation" of Rotary International.

(c) A judge should not serve on the board of directors of a nonprofit hospital because the hospital "will be regularly engaged in adversary proceedings in any court." Canon 4B(1).

(d) A judge should not serve on the Board of Directors of an organization whose primary purpose is to represent in litigation abused and neglected children. Same with respect to a nonprofit organization providing legal services to low-income individuals. Same with respect to a religious charity providing legal services to immigrants. Same with respect to a legal services provider representing low-income families in bankruptcy, in the judge's district or elsewhere. Same with respect to a bar association board established to provide legal services to low-income clients. Same, with respect to a judge's service on an advisory board of an organization that engages in litigation in federal courts and before administrative agencies.

(d-1) A judge may serve on a bar committee that makes occasional grants to legal services organizations. See Compendium § 4.1-3[1](o).

(d-2) A judge should not volunteer as an intake worker for an organization providing legal services to indigent clients.

(e) Canons 2 and 4 advise against assisting a law firm that appears before the judge in selecting firm scholarship recipients.

(f) A current law clerk or a future law clerk who has accepted an offer but not yet entered into service should consult his or her appointing authority for guidance regarding educational opportunities that may have an impact on the clerkship. A current law clerk should avoid participating in an educational seminar that is sponsored by an organization that is actively involved in litigation before state or federal courts, including the filing of amicus briefs or participating in moot courts to prepare advocates, or whose mission is to advance a political or ideological point of view. See Advisory Opinion No. 116.

§ 4.2-3 Organizations Devoted To Espousing Positions on Public Issues, or on Issues Likely To Be the Subject of Litigation

- Advisory Opinion No. 82 (joining organizations).
- Advisory Opinion No. 46 (judges' acceptance of public testimonials or awards).
- Advisory Opinion No. 40 (service on governing board of nonprofit organization that tends to become involved in court proceedings).
- Advisory Opinion No. 116 (participation in educational seminars sponsored by research institutes, think tanks, associations, public interest groups, or other organizations engaged in public policy debates).

(a) A judge should not serve as a director of the Lawyers Alliance for Nuclear Arms Control. Same for service on the board of the ACLU.

(b) Whether a judge should serve on the national board of an ethnic group depends upon the extent to which the group is likely to be involved in litigation, whether the group principally espouses particular points of view on public issues, and whether the judge would reasonably be perceived as personally and publicly supporting those positions. The same considerations govern a judge's service on a health system ethics committee.

(c) A judge who is a member of the National Rifle Association should recuse from cases in which the NRA is a party, and from cases involving issues on which the NRA has taken a public position. See Advisory Opinion No. 40

(d) A judge may serve on the council of academic advisors of the American Enterprise Institute, unless the judge concludes that such service would reasonably be viewed as endorsing the views of that organization on issues that are likely to come before the court.

(d-1) Similarly, a judge may serve on the Advisory Board of the National Alumni Forum under the same circumstances.

(e) A judge may remain a member of the American Bar Association, notwithstanding its stated position on certain controversial issues such as abortion.

(f) A judge should not accept an award from the ACLU, an organization which is likely to come before the judge's court; however, it is permissible where the judge has retired and will hear no more cases.

(f-1) Similarly, a judge should not accept an award from a legislative caucus that embodies a clearly defined view on a controversial issue that is the subject of litigation in state and federal courts.

(g) A judge may contribute financially to legal service associations that provide counsel for the poor. A judge need not recuse merely because lawyers who accept appointments by such associations are also counsel of record in cases before that judge. Similarly, a judge may donate funds to sponsor an academic achievement award for a law student who intends to pursue a career as a public defender.

(h) A judge may participate in an international conference focusing on improving the administration of justice with respect to crimes against journalists, where the judge's participation will not entail taking any positions on governmental policies.

(i) Judges should avoid public expressions of personal opinion regarding contentious social or political issues that may arise in federal cases and therefore should not sign petitions raising such issues.

(j) Service on the board of an organization devoted to advancing positions on controversial environmental policy issues that are frequently litigated in federal court would reasonably be seen as personal advocacy of those positions and as impairing the judge's impartiality in environmental cases.

(k) Service on the board of an organization devoted to fostering particular positions on controversial issues of constitutional law and public policy that are frequently litigated in federal court would reasonably be seen as personal advocacy of those positions and as impairing the judge's impartiality on matters of constitutional law. Same, with respect to serving as an organizer of a local chapter of such organization, or being identified in the organization's mailings as an officer, board member, or chapter organizer.

(l) A judge should not participate in an organization's advocacy campaign by being listed on a public website that takes a position regarding a contentious social or political issue that may arise in federal cases, due to concerns about impartiality.

(m) A current law clerk or a future law clerk who has accepted an offer but not yet entered into service should consult his or her appointing authority for guidance regarding educational opportunities that may have an impact on the clerkship. A current law clerk should avoid participating in an educational seminar that is sponsored by an

organization that is actively involved in litigation before state or federal courts, including the filing of amicus briefs or participating in moot courts to prepare advocates, or whose mission is to advance a political or ideological point of view. See Advisory Opinion No. 116.

§ 4.2-4 Educational Organizations

- Advisory Opinion No. 87 (participation in CLE programs)
- Advisory Opinion No. 44 (judge should not serve as trustee of state supported college or university).
- Advisory Opinion No. 36 (judge should not comment on legal issues arising before college board of trustees of which judge is member).
- Advisory Opinion No. 3 (participation in a seminar of general character).

Note: Title VI of the Ethics Reform Act of 1989 bars compensation for service as an officer or member of a board.

(a) A judge may serve on the board of regents of a university, where that board is not a governing body, but not on a state board of regents that is responsible for the operation of state colleges and universities. Also, a judge may serve on the advisory council of a state university's business school.

(a-1) Canon 4F does not bar a judge's service on a committee whose function is to recommend for final selection by the board of trustees of the university three to five candidates for president of a public university. The judge's service on the committee would not involve the judge in the governance of the university, and the circumstances did not indicate a highly visible or controversial matter.

(a-2) A judge may serve on the governing board of a private college, subject to the limitations in Canons 4B(1), 4C and 4B(2).

(b) A judge may serve on the board of trustees of a university foundation (no fundraising involved). Same for service on a university advisory board.

(c) A judge may serve as principal speaker at a university's "founder's day."

(d) A judge may serve on the board of directors of a private college. Same for board of trustees of private, nonprofit charter school. Same for board of regents of private high school, but the judge may not advise the board on legal issues.

(d-1) Due to concerns arising under Canon 1 (judicial independence) and Canon 4F (governmental appointments), a judge should not serve on the board of a public charter school because of the school's connection to state and local

government. Similar concerns apply when a judge serves on the board of a nonprofit organization that sponsors public charter schools, but the judge retains discretion to decide if the risks of service are manageable.

(e) A judge may serve on a panel to evaluate curriculum proposals for a law school.

(e-1) A judge may serve on a site evaluation team preparing law school accreditation recommendations, may attend associated training, and may accept reimbursement of expenses.

(e-2) The following is also within the Canon 4F exception relating to the improvement of the legal system: A judge's service on a committee organized by a prominent law school in the United States; the function of the committee is to review proposed legislation for the reorganization of the court system in Russia.

(f) A judge may serve as trustee of a foundation to fund a religious school for children.

(f-1) Similarly, a judge may serve as trustee of a university foundation, so long as the judge does not personally engage in fundraising.

(g) A judge may serve on a committee to nominate recipients of foundation-supported fellowships to be chosen by a separate Selection Committee.

(h) A judge should not serve on the "development council" of a university, where such service would implicate the judge in fundraising.

(i) A judge should not serve on the board of a private foundation established to provide service and benefits to state-supported community college.

(j) A judge should not serve as regional vice-president of his or her college's "athletic education foundation" if it might involve personal fundraising or exploitation of judicial office; or on a university's "development council" if it would involve the judge in similar fundraising activities; the judge should not "introduce" fund-solicitors to others.

(k) A judge can sit on the board of directors of a foundation that fosters the cultural and academic interests of the Chinese community, so long as fundraising and exploitation of office are avoided.

(l) Use of a judge's name to designate a scholarship fund established at a law school does not violate Canon 4 prohibition of a judge's permitting the prestige of the judicial office to be used in the fundraising efforts of an educational organization, so long as the identities of contributors and those who decline to contribute are not revealed, and neither the judge nor current law clerks or staff participate in or encourage the solicitations.

(I-1) Where a university names a scholarship fund for a judge's late spouse, the judge may attend the event where the award is made but should not permit use of his or her name on solicitations or announcements of fundraising and should ask the university not to disclose names of donors to the judge.

(I-2) A judge may not serve as sole trustee of a scholarship fund named in the judge's honor since this would require the judge to know the identity of donors and to invest and manage the funds, but the judge may be empowered to designate the recipients of the scholarship.

(m) Judge may accept nomination for and serve as president of an alumni association for former state university students, but judge should refrain from any lobbying or fundraising activities. A judge may also serve on the board of a nonpartisan, nonprofit alumni association for former White House fellows, with the same restrictions. Same for the board of a nonprofit organization supporting a public school.

(n) A judge may serve on an advisory board for a law school's judicial education program, where the board's purpose is to provide advice on suitable programs and to encourage attendance by judicial colleagues. Similarly, a judge may serve on the advisory board of a law school journal.

§ 4.2-5 Church Activities

- Advisory Opinion No. 42 (judge should not participate in every-member canvass fundraising of local church).

Note: Title VI of the Ethics Reform Act of 1989 bars compensation for service as an officer or member of a board.

(a) A judge may serve on the board of directors of a church foundation. A law clerk may serve on a church board; service is not improper because the church board sponsors a housing project seeking government funding. A judicial employee may serve as the board president for an ecumenical organization.

(b) A judge may serve on a committee on world peace and social development of the United States Catholic Conference.

(c) A judge may serve as deacon of a church.

(d) A senior judge may serve as a missionary of his or her church. Similarly, a judge may go on a religious/humanitarian mission with license approval required for travel to Cuba.

(e) A judge may serve on the long-range planning committee of his or her church. Same, for committee to select a minister for judge's church. Same, for

participation in church-sponsored programs on conflict resolution for families and individuals.

(f) Where a judge indicates that he or she need not personally participate in either planning or actual solicitation of funds and need not give investment advice and would not personally be identified as the fund raiser, no impropriety for judge to serve as vice- president or president of his or her church council.

(g) Judge should not accept church leadership position with responsibility for soliciting and collecting contributions from church members.

> (g-1) However, a judge may serve as a church usher and pass the collection plate as part of that service, provided that the judicial title is not associated with the process and the judge takes reasonable steps to avoid learning who contributed or in what amount.

(h) A judge may accept appointment to the Order of Malta, a religious order that provides aid to the sick and poor, but should take care to avoid personal involvement in any disputes with the U.S. government or in activities in which the organization's position that it is a sovereign state is central to such activities.

(i) Attending the annual Red Mass does not raise an ethical concern under the Code, but in order to promote public confidence in the independence of the judiciary a judge should consider attending in regular business attire, not in judicial robes.

(j) A judge may participate as a speaker to say a prayer on an assigned topic related to the observance of a National Day of Prayer or similar event, provided that the judge is not representing the judiciary, the event is not exclusive, and the judge is not aware of any controversial issues surrounding the ceremony that might detract from the dignity of the court or the independence of the judiciary.

(k) A judge may serve as an advocate before a religious tribunal that adjudicates matters of Church law, not civil law, approaching the issue in religious and not legal terms, but should exercise prudence in considering whether a matter might at some point proceed to civil courts. Same for a judge's service on a church disciplinary board.

(l) A judge may participate in a fellowship for a nonprofit organization that offers law-related courses to law students from a particular religious faith, provided that the organization does not engage in issue advocacy that benefits only a particular constituency or seeks to advance a specific and contentious social, political, or civic objective.

§ 4.2-6 Social and Avocational Activities

§ 4.2-7 Nonprofit Civic, Charitable, Educational, Religious, or Social Organizations [Judicial Employees]

(a) A clerk's participation in historical Civil War reenactments does not detract from the dignity of the court or adversely reflect on the operation of the court, where the clerk's participation is limited to reenactments and does not address political or social controversies.

(b) Judicial employees may work with court historical society to develop historical information about their courts.

(c) A judicial employee should not serve on the board of a legal services organization if it litigates in federal court, but may serve if litigation is confined to state or local venues. The employee may not litigate except as permitted under Canon 4D of the Code of Conduct for Judicial Employees.

(d) It is inappropriate for a law clerk to serve on the governing board of an advocacy organization that actively lobbies state officials on issues that are subject to debate in the political arena. Such service would be likely to lend the prestige of the law clerk's office to the organization and the positions it espouses.

(e) Staff attorneys should avoid involvement with advocacy groups if the association suggests a predisposition as to legal issues or influence due to the relationship; concerns increase with the attorney's level of involvement (i.e., attendee, contributor, member, officer), the group's degree of advocacy, and any overlap between the group's activities and the attorney's official duties. Similar considerations govern involvement in public protests.

(f) Judicial employees may contribute through the Combined Federal Campaign ("CFC") to public policy advocacy groups that are not political organizations.

(g) A new judicial employee should not continue service as chair of the board of an organization that advocates positions on controversial public issues that are frequently the topic of litigation in federal courts.

(h) A law clerk should not attend a legal training program sponsored by an issue-specific advocacy group that may be involved in federal litigation.

(i) A probation officer may join a gun club that requires its members to be members of the National Rifle Association, provided that the officer avoids participation in the association's work on controversial policy or political issues.

(j) As members of a judge's personal staff, law clerks must be more circumspect in their activities than other court employees due to their direct association with a single judge. Law clerks should exercise caution and seek approval from their judges when

contemplating membership in groups that take positions on particularly contentious subjects and on issues likely to arise in the federal courts.

(k) A judicial employee may be a member of a law enforcement oriented fraternal organization.

(l) A law clerk should not form or become part of an extra-governmental working group relating to criminal justice systems generally or treatment of juveniles within a criminal justice system, state or federal, while serving as a law clerk.

(m) A law clerk should not serve as a "judicial observer" and attend Military Commission proceedings on behalf of a non-profit organization that is often involved in federal litigation and takes public positions on contentious issues, including those related to the Military Commission.

§ 4.3 Fundraising

§ 4.3-1 Fundraising Activities

- Advisory Opinion No. 104 (court historical societies and learning centers).
- Advisory Opinion No. 89 (judges' acceptance of honors funded through voluntary contributions).

(a) Judges may not personally participate in fundraising for law-related activities, and judicial employees acting under the direction and control of a committee of judges may not solicit donations or seek to raise funds from private entities in order to provide financing for law-related activities sponsored by the judges' committee.

(a-1) Solicitation of funds on behalf of a court task force that is reasonably perceived as an activity or function of the court, under its guidance and control, will inevitably be attributed to the court and its judges, which is inconsistent with the Code of Conduct. If the task force is truly independent, under the guidance and control of entities other than the court, judges may participate in its activities so long as they do not personally engage in fundraising.

(a-2) Same advice applies where judges establish and control a court historical society, unless the society is truly independent of the court; factors demonstrating independence include: non-judge incorporators, board members, and chair; independent staffing; physical separation from the court; and statements in society fundraising and other literature distinguishing the society from the court. Same for an organization to educate the public about the courts. See Advisory Opinion No. 104.

(a-3) Permitting attorneys to withdraw from a mandatory appointment program for *in forma pauperis* cases by contributing to a legal services

organization approved by the court is contrary to the Canon 4C prohibitions on fundraising and membership solicitation by judges.

(a-4) Judges and court employees may assist in organizing a nonprofit organization for the benefit of participants in a "support court" or similar entity, provided that the organization is independent from the court and judicial employees are not involved in soliciting or disbursing funds for the organization. Same advice applies when judges and court employees seek to create a food pantry for the benefit of criminal defendants who are food insecure.

(b) A judge should not solicit funds from judges in the state judicial system, even though the beneficiary is a law school.

(c) Canon 4A(3) permits judge to submit letter to public agency in support of grant application for program focusing on legal and ethical issues of medical research.

(d) See Compendium § 2.4 pertaining to fundraising for legal defense funds. See Compendium §§ 2.10(e) pertaining to fundraising for scholarships and honors.

(e) A judge who is past president of a bar association may be listed in the association's fundraising materials, with other past presidents and without selective emphasis, as a member of a committee to restore a courthouse lobby; such use of the judge's name does not constitute "personal participation" in fundraising. The judge also may be listed on courthouse plaque after fundraising is completed.

(f) Even if use of a judge's name to designate a scholarship fund established at a law school constitutes assistance in raising money for the fund, Canon 4 does not require the judge to request that judge's name not be used. The judge should not authorize use of the judge's or court's name to solicit funds, should make reasonable efforts to remain unaware of those who do and do not contribute, and should ask the school to avoid public display of donor names and to indicate that the judge will not be advised of donors.

(g) A judge may help establish a university fellowship program by asking attorneys to raise funds, where neither the judge's nor the court's name will be associated with the fundraising and the attorneys are retired and thus unlikely to appear before the judge.

(h) A judge may serve on a panel of a bar association program where any excess proceeds will go to a pro bono project; fees are based on estimated costs and not to generate funds, the program is not advertised as a fundraiser, and fundraising will not occur there. Similarly, the fact that an organization derives revenue from its seminars does not make a particular seminar a fundraiser, where it is not advertised or designed for that purpose.

(h-1) Participation by judges and law clerks in CLE program for which the provider would charge a fee that exceeds the costs associated with producing the program and donate the proceeds to a legal aid organization would violate Canon 4C prohibition on personal participation in fundraising activities. Same, with respect to service on a committee to plan a dinner promoting diversity in the legal profession, where a portion of the dinner ticket fee will be donated to a scholarship fund.

(i) A judge (or senior judge) should not appear in a video to be used primarily in fundraising for a legal services organization, but the judge may provide factual and historical information to use in the video.

(j) A judge should not donate to a law foundation auction a dinner to be prepared and served at the judge's home.

(k) It is not improper for a civic organization chaired by a judge to endorse an independent effort by attorneys to raise funds for legal services.

(l) A judge may donate the judge's signed artwork to a charity auction, provided that the judge's title is not associated with the auction process, and the judge takes reasonable steps to avoid learning the names of persons bidding for or buying the artworks. Similarly, a judge may donate the proceeds from the sale of a book to a non-profit entity so long as the judge does not use the prestige of the judicial office to encourage sales and takes steps to avoid learning the names of those who purchase the book.

(m) Judges and judicial employees may participate in a fundraising walk-a-thon or similar event in their personal capacity, without reference to their official titles, but should not participate together as a group identified as being from the court (for example, by using banners or other displays naming the court).

§ 4.3-2 Organizations and Events Involved in Fundraising

- Advisory Opinion No. 89 (judges' acceptance of honors funded through voluntary contributions).
- Advisory Opinion No. 46 (judges' acceptance of public testimonials or awards).
- Advisory Opinion No. 42 (judge should not participate in every-member canvass fundraising of local church).
- Advisory Opinion No. 37 (judge may serve as officer or trustee of professional organization receiving governmental or private grants).
- Advisory Opinion No. 35 (judge's name may appear on letterheads and other solicitation material of charitable organization).

- Advisory Opinion No. 32 (judge should not solicit funds for Boy Scouts).
- Advisory Opinion No. 2 (service on governing boards of nonprofit organizations).

§ 4.3-3 Permissible Fundraising Activities

(a) Newly appointed judge may accept an award at a fundraiser occurring shortly after appointment, where arrangements were made before appointment; but the judge should ensure that his or her name is not used to solicit money.

(b) It is permissible to serve on the board of a bicentennial foundation if no direct fundraising is involved.

(c) A judge who is on the board of a charitable club may assist with its annual fundraising auction in an administrative capacity (i.e., as bookkeeper or cashier) so long as there is no focus on the judge's identity, but the judge should not directly assist with or encourage participation in the bidding.

(d) A judge may accept a "distinguished citizen" award at the annual dinner of a Boy Scouts organization, if no fundraising will occur at the dinner, and the ticket prices are reasonably related to the cost of the dinner. Same for being designated as a "role model" and attending Girl Scouts luncheon.

(d-1) Judge's attendance at annual televised pageant, at which judge receives public achievement award from nonprofit company, does not impermissibly involve judge in fundraising, where judge's receipt of award is not announced in advance and televised tapes or pictures of judge will not be used for promotional or commercial purposes.

(d-2) Where a voluntary bar association solicited law firm contributions for its annual dinner but then returned the contributions, and the dinner does not otherwise involve fundraising, a judge may accept an award at the dinner.

(d-3) A judge may allow a charity award to be named for the judge so long as it is not presented at or designed to promote fundraising events. Similarly, a judge may accept an award from an organization of law enforcement officers under similar circumstances.

(e) A judge may participate in seminar during celebration of law school's history. The fact that fundraiser is announced during celebration — but not at the seminar — does not convert every aspect of the celebration into fundraising.

(f) The same is true with respect to a judge participating in a singing group at charitable fund raiser so long as the judge is not featured or prestige of office otherwise exploited.

(g) A judge may be listed on the letterhead as a member of the board of a charitable organization in the solicitation of contributions and the judge's title may be used if comparable designations are listed for other persons. See Commentary on Canon 4C.

(h) Use of law clerk's name and title in biographical profile contained in college's annual fundraising brochure does not constitute "use . . . of the prestige of the office in the solicitation of funds," where judge is not named and law clerk does not personally participate in fundraising.

(i) A judge may serve as honorary chairperson of a charity, in the capacity of spouse of an elected official, but may not engage in fundraising or serve as speaker or guest of honor at fundraising events.

(j) A judge may contribute an essay about the judge's college for a book to be sent to all alumni; distribution of the book with information about the college's capital campaign does not make the essay a fundraising effort.

(k) A judge may serve as president of a civic and charitable organization but should refrain from fundraising activities.

(l) A judge may lend his or her home as a charity fundraiser show house, where the judge's name is not used, the judge does not personally participate in fundraising, and selection of the home is unconnected to the judge's position. The judge may accept associated home improvements.

(m) A judge who serves on the board of a memorial foundation honoring a relative may attend the organization's fund raiser; mere attendance is not inconsistent with the restriction on being a speaker, guest of honor, or featured on the program.

(n) A judge may donate items for a fund-raising auction held by a charitable organization, provided that the judge is not identified to potential bidders as the source of the items and that there is little likelihood that potential bidders will know that the judge is the donor.

§ 4.3-4 Impermissible Fundraising Activities

(a) A senior judge is subject to Canon 4C and should not solicit funds or otherwise engage in fundraising activities for a charitable organization, except as permitted by Canon 4C.

(b) Where friends establish a trust in memory of a judge's deceased spouse for the benefit of the judge's children, the judge's title should not be used in solicitations, judges should not solicit contributions, and the names of those who do and do not contribute should not be disclosed to the judge.

(c) A judge who offers to match charitable donations made by others should not permit the charity to identify the judge by name or title, but the offer may be made anonymously. Similarly, a judge should not be listed as a sponsor in an organization's fundraising solicitation.

(d) A judge should not be listed as a reference on a charitable organization's grant application, as this would lend the prestige of office to fundraising.

(e) A judge may not serve on a board of citizen advisors of a nonprofit corporation, when circumstances suggest that the purpose of the board is to exploit the members' official positions in aid of the organization's fundraising.

(f) A judge should not be the guest of honor at a fundraising dinner. Nor should a judge accept an award at a fundraising event, even an inactive senior judge. Nor should a judge speak as part of a panel presentation at a fundraising event.

(g) A judge should not serve on a university's "development council" if it would engage the judge in direct fundraising activities, exploit the judge's judicial office for fundraising or require the judge to "introduce" fund-solicitors to others.

(h) A judge should not serve as master of ceremonies at a charity fundraiser except where the judge's role is neither announced in advance nor used subsequently to raise funds, the judge serves as a facilitator and not an honoree or focus of the program, and fundraising or solicitations do not occur at the event.

(i) A judge should not accept an award at a dinner sponsored by a correctional reform organization where it appears that the judge's name and position would be used to attract invitees in order to raise funds for the organization.

(j) A judge may not accept a university's award for legal service at a dinner where the judge would be a guest of honor, featured on the program and where one purpose of the event is to raise money for the university.

(k) A judge should not sign a letter soliciting funds from alumni.

(l) A judge should not serve on the board of a private foundation established to provide benefits and service to a state-supported community college.

(m) A judge should not serve as chairperson of the board of managers of a local YMCA, where it appears that the judge would be expected to lead extensive fundraising activities, nor should the judge serve as chairperson of a YMCA fund-drive.

(n) A judge should not serve on the board of a preservation commission whose sole purpose is to raise funds to acquire property, but the judge may serve if the commission will pursue other purposes permitted by Canon 4B. Similarly, a judge

should not serve as campaign chairman in what is essentially a fundraising position or head an organization whose sole purpose is fundraising.

(o) A judge should not participate in a charitable event involving fundraising on the basis of bowling scores.

(p) A judge should not be involved in fundraising for the Combined Federal Campaign. Under Canon 4B of the Code of Conduct for Judicial Employees, the Clerk may call subordinates' attention to such a general fundraising campaign.

(q) A judge may not participate in the fundraising activities of a committee establishing a legal intern fellowship and may not permit the use of the judge's position in the committee's fundraising activities. Similarly, a judge should not lend his or her name to an organization's student intern fellowship supported by fundraising solicitations.

(r) A judge's current law clerk and judicial employees should have no involvement in soliciting funds for a gift or dinner honoring the judge's years of service.

(s) A judge may not participate in television commercials on behalf of a charity.

(t) A judge should not serve on a committee that selects for-profit companies to receive ethics awards at a fundraising event.

(u) A judge may solicit volunteers for charity work, but may not do so in joint presentations with those soliciting funds.

(v) A law clerk should avoid engaging in fundraising efforts that are directed towards law firms, legal vendors, and individuals who are likely to appear before the court.

§ 4.4 Financial Activities

§ 4.4-1 Business Activities

- Advisory Opinion No. 55 (judicial writings and publications).
- Advisory Opinion No. 114 (promotional activity associated with extrajudicial writings and publications).

(a) Judge may serve as officer or director of homeowners' association for development in which judge resides, where duties consist of routine civic responsibilities not involving extensive business contacts likely to lead to litigation. See Advisory Opinion No. 29.

(b) Where judge's spouse is offered a financial opportunity with minimal investment, no risk, and large return, the judge should consider whether the offer

implicates Canons 2A (public confidence in integrity of the judiciary), 2B (lending prestige of office), or 4D(1) (exploitation of judicial position).

(c) A judge may record music for sale and perform live music, so long as it does not detract from the dignity of the court, but the judge may not use the judicial position or title to promote sales.

(d) A judge may sell real property to a public corporation, but should consider recusal (subject to remittal) for a reasonable time in future cases involving the corporation.

(e) A judge may establish a limited liability company, so long as it is a closely held family business and does not detract from the dignity of the office or interfere with the performance of official duties.

§ 4.4-2 Active Involvement in Nonfamily Business Prohibited

(a) A full-time magistrate judge may not be employed as a real estate salesman or broker on weekends.

(b) A judge may not serve as officer or director of a for-profit golf club, or act as advisor to that entity.

(c) A judge may not serve as officer or director of a holding company which has for-profit subsidiaries, or as officer or director of such subsidiaries. Similarly, a judge should not serve on the board of a non-profit organization where the nature and scope of the organization's operations are similar to a business under Canon 4D(2), particularly where the organization has significant interests in for-profit businesses.

(d) A judge may not serve as director of a nonfamily corporation; Committee on Codes of Conduct is not authorized to grant exceptions. A judge should not serve as an officer or director of a law firm professional corporation, except that service may continue after appointment for a reasonable period (not to exceed one year) to wind up a practice.

(d-1) Canon 4D(2) (prohibiting service as officer, etc., of nonfamily business) and 4A(4) (prohibiting service as arbitrator or mediator) preclude a judge from serving for compensation on a committee of a national stock exchange when the jurisdiction of the committee is to rule upon alleged ethical violations of members of the exchange.

(d-2) A judge may not serve as a director or officer of a corporation in which any nonfamily member owns any substantial interest because such a business is not a family business.

(e) A judge should not serve on advisory board of legal publisher in violation of Canon 4D(2) prohibition against a judge serving as advisor to a nonfamily business. Similarly, a judge should not serve on the advisory board of a for-profit company that provides legal writing programs for attorneys.

(f) Complimentary use of an automobile granted by a rental agency to a judge in exchange for the judge's transporting the vehicle between cities might make the judge an employee in violation of Canon 4D(2), even though no other compensation was involved. However, a bona fide rental offered at a discount might avoid the problem.

(f-1) Judge should not be designated as company representative for nonfamily business, even for limited purpose of using company's sports club membership, when such designation suggests an employee or agency relationship with the company. See Canon 2 (lending prestige of office) and Canon 4D(2).

(g) Under Canon 4D(2), a judge should not serve as a business advisor, and hence should not accept a "finder's fee" for advising a former client of a business acquisition opportunity. Nor should a judge accept a "finder's fee" for assisting friends in making business contacts leading to contracts.

(h) A judge may serve as a volunteer trail guide at a ski area, but should not accept compensation or benefits and should take steps to ensure that the ski company does not exploit the judge's position to promote its business.

(i) A judge should not accept employment as a member of a café musical group, but may volunteer; the dignity of judicial office is not damaged solely because the café is at a casino.

(j) Judge should not assist management consulting firm in its efforts to obtain a contract for a state court improvement project, or serve as a consultant on the project; such assistance or service would raise concerns under Canon 2 and 4D(2).

(k) A judge may engage in an artistic or other performance, provided that the activity does not exploit the judge's position for private gain and does not make the judge an "employee" of a nonfamily business within the meaning of Canon 4D(2). The judge should not wear the judicial robe or use the judicial title in promotional materials or while performing. Similarly, a judge may serve as a consultant for a creative work, so long as the judge is not an employee of the production company and any funders are not law firms or other persons likely to come before the court.

(k-1) Similarly, a judge's limited service as a consultant for a documentary film based on the judge's book may be viewed as an artistic endeavor, but any compensation for such service is subject to the limit on outside earned income.

(l) A judge should not participate in a "moot court" or similar legal training for a law firm or other business entity, due to concerns under Canon 2. In addition, depending on the financial arrangements involved, such activities may violate Canon 4D(2) unless the business is closely held and controlled by members of the judge's family. See Advisory Opinion No. 105. Similarly, a judge should not serve as an evaluator, "judge," or similar official in a law-related competition or contest that offers a significant monetary prize due to Canon 2 concerns. A significant prize purse distinguishes such a contest from purely academic competitions such as moot court or mock trial competitions and tends to foster an "appearance of impropriety" to judicial participation.

(m) While a judge may teach in a law school, the Code does not suggest that a judge may also be considered an "employee" of the school.

§ 4.4-3 Passive Investments in Nonfamily Businesses

(a) A judge may be a passive investor in a business venture, but may not actively participate in the operation or management of such venture. Examples include: a cable television company; a trailer park; a real estate venture; a general partnership.

(b) A judge who is a passive investor in a real estate limited-partnership venture may, in an emergency occasioned by the serious illness of the general partner, call, and preside at, an emergency meeting of the partnership held for the purpose of selecting a new general partner, but may not otherwise or publicly engage in the management or operation of the venture.

(c) A judge may have a passive investment as a general partner in a partnership engaged in real estate investment. Canon 4D(2) prohibits active business participation.

(d) Franchise ownership by a judge is a permissible remunerative activity under Canon 4D, provided that the judge complies with the Judicial Conference Regulations on Outside Earned Income, Honoraria, and Outside Employment and avoids any appearance of impropriety.

§ 4.4-4 Participation in Family-Owned Businesses

(a) Where a corporation wholly owned by the judge is a limited partner (passive investor) in a venture with the judge's sibling, the arrangement is permissible.

(b) Where a family-owned business is managed entirely by the judge's sibling, it is permissible for the sibling to negotiate with the United States Postal Service concerning real estate, and to bid at a public sale conducted by the Postal Service.

(c) A judge may be an uncompensated officer or director of a business wholly owned by members of the judge's family.

(d) A judge should not become involved in any business which has extensive dealings with lawyers likely to appear in the judge's court, or litigants likely to have interests in litigation in that court.

(e) A judge may form a corporation to produce a documentary film, provided that the resulting corporation is a wholly-owned family business. Likewise, the judge may apply for a grant offered to the public on an open and competitive basis to fund the expenses incurred to produce the film, provided that the granting organization is unlikely to be a litigant before the court and the judge's title is not disclosed on the grant application.

(f) A judge may advise the judge's spouse concerning a family-owned business, but may not accept compensation for providing legal advice.

(g) Non-investment income from a business that is not totally owned by a judge and members of the judge's family is subject to the limitation on outside earned income. The salaries of the business's employees should be commensurate with their duties and responsibilities to avoid an appearance of impropriety in ownership.

§ 4.4-5 Financial Activities That Require Frequent Recusal

(a) A judge should remove his or her retirement account from former law firm's profit-sharing trust where members of former law firm appear regularly in federal court in the judge's district requiring frequent disqualification by the judge.

(a-1) When a judge leaves a retirement account in former firm's retirement plan, thus causing recusal, judge should consider Canon 4D(3) (manage investments to minimize recusals); and if the judge's continued recusals would impose a significant burden on other judges, the judge should ordinarily withdraw the account if feasible.

(b) A judge may retain an interest in a pension fund at the judge's former law firm when the judge's spouse is presently a partner at the same firm because recusal would be required in any event from all cases involving that firm.

§ 4.4-6 Business Activities [Judicial Employees]

(a) An appellate judge should not hire secretary who would continue to manage a court reporting business because public would reasonably question whether lawyers would patronize the business because of the relationship to the judge. *Cf.* Canon 4C(1), Code of Conduct for Judicial Employees.

(a-1) Proposal by judge's secretary to seek assignments from court to type transcripts of electronically recorded court hearings requested by parties presents concerns under Canon 2 (appearance of favoritism) and Canon 4C

(financial relationships with lawyers likely to come before the court) of the Code of Conduct for Judicial Employees.

(a-2) A judge should not permit his or her secretary to perform secretarial or paralegal work for area law firms, even if the firms do not appear in that court. Same for a part-time law clerk.

(a-3) Judicial assistant may engage in jewelry-selling business, provided that all sales activity takes place outside the court premises, on non-work hours, and does not involve sales to people who appear frequently before the court.

(b) For the same reason, Canon 4C(1) of the Code of Conduct for Judicial Employees suggests that a deputy clerk who services court computers should not engage in outside employment that would involve assisting law firms in selection and installation of computers. Also, this would involve the deputy clerk in frequent transactions with lawyers likely to come before the court.

(b-1) Deputy clerks working on the judiciary's electronic filing software should not engage in directly-related outside employment, as this could be perceived as exploiting official position for private gain. Same, for staff interpreter's proposed outside business activity to provide instruction on federal court interpreter examination.

(b-2) With the judge's approval, a law clerk may serve as law clerk to a special master in an unrelated matter in another court and accept compensation.

(b-3) Probation officer should not accept outside employment with a company that provides offender monitoring services, as it would appear to be exploiting official position for private gain. Same, with respect to operating a business that provides background screening services.

(b-4) Probation officer should not seek simultaneous part-time employment as a police officer, due to the potential for conflicts of interest and the perception of partiality created by such work.

(b-5) Probation officer may purchase services from a company that is owned by an offender who is under the officer's supervision, but only if conflicts of interest can be avoided under Canon 3F(3).

(b-6) A judicial employee whose responsibilities are not case-related may be a co-owner of an office building and rent space to attorneys who may practice before the employee's court, provided that any potential future conflict of interest can be avoided under Canon 3F(3).

(b-7) A judicial employee should not accept a consulting position that involves providing advice to private contractors where it is clear that the position

has been offered because of the employee's specialized knowledge acquired through judicial employment.

(b-8) Probation officers should avoid involvement in staffing, marketing, or soliciting resources for nonprofit organization assisting at-risk youth, where participants may involve federal offenders, due to potential conflicts of interest.

(c) A law clerk is not prohibited from part-time work as anonymous typist in free time, where work will be done at home and work will be limited to transcripts of state proceedings that are not likely to ever get to federal court.

(d) Under the Judicial Conference Regulations on Outside Employment, a member of the legal staff of the United States Sentencing Commission should not earn a commission for assisting a real estate broker or salesperson, a referral fee for referring a prospective buyer or seller, or a flat or hourly fee for conducting an "open house" or for informing prospective sellers or buyers about the nuances of real estate marketing and transactions.

(e) A chief pretrial services officer is not subject to 5 U.S.C. § 13144(a) limiting outside employment and may invest in an automotive business where officer will not perform personal services or participate in the business except as a passive investor. Same for probation officer, who may teach officer safety classes.

(f) With approval of the court, a probation officer may serve without compensation in a fiduciary capacity as a board member of a credit union subject to the limitations set forth in Canon 5C(1) of the Code of Conduct for United States Probation Officers. Canon 5C(1) of the probation officers' code differs substantially from the judges' code with respect to business and financial dealings and service in a fiduciary capacity. See also Compendium § 32.2(a), 35(c) (Ethics Reform Act limitation on outside employment as fiduciary not applicable to probation officers). [Refers to probation officers' code that was withdrawn; compare to current Canon 4C(1), Code of Conduct for Judicial Employees.]

(f-1) Law clerk may serve as uncompensated member of a committee that advises board of a credit union; to the extent such service requires legal skills it is permitted as pro bono legal service.

(g) Where law clerk has significant interest in company seeking to do business with the court, clerk of court should ensure that any agreement between the court and the company satisfies applicable contracting requirements and does not present an appearance of impropriety; clerk should consider public bidding process and other procedures to minimize any appearance that an agreement resulted from clerk's relationship with law clerk.

(h) Where law clerk has significant interest in company seeking to do business with the court, law clerk should refrain from any involvement in company's dealings with the court.

(i) Clerk of court should decline appointment to state medical licensing board because of concerns under Canon 2 (appearance of impropriety) and Canon 4C(1) (frequent transactions with persons likely to come before the court).

(j) Bankruptcy court employee may serve as a consultant to local police department, where the work will not interfere with official duties and is unlikely to associate the employee with persons who transact business in bankruptcy court.

(k) Court reporter's activities for a private reporting firm should be "wholly disassociated" from official court work, and the court reporter should not use the private firm name and address on official court transcripts.

(k-1) Court reporter's proposal to purchase and operate a private court reporting agency that has court reporting contracts with federal courts would be contrary to Canons 2, 3, and 4 of the Code of Conduct for Judicial Employees.

(k-2) An official court reporter's decision to hire a substitute court reporter from the official court reporter's private court reporting firm would not raise concerns under the Code of Conduct for Judicial Employees.

(l) Canon 4C(1) of the Code of Conduct for Judicial Employees permits a clerk of court to form a corporation to purchase, refurbish, and sell homes, where chief judge approves and no activities will take place on court premises or during working hours.

(m) A law clerk may teach massage therapy courses in accordance with Canon 4A of the Code of Conduct for Judicial Employees.

(n) A law clerk may recruit athletes for a sports agent, provided such activity does not involving the practice of law.

(o) A law clerk should not serve as chapter president of a professional trade association while it actively lobbies against state regulatory legislation and should not serve on a state board committee drafting regulations for the profession.

(p) A judicial employee may serve on the board of a family timber business. Similarly, a law clerk may serve on the advisory board of a family business that provides marketing services to law firms in a non-legal capacity when the law firms are unlikely to come before the court, the law clerk's position with the court is not exploited, and the law clerk promptly informs his or her appointing authority of any conflicts.

(q) Canon 4C(1) of the Code of Conduct for Judicial Employees does not prohibit a law clerk from starting a company to educate students about the law, where

the clerk's position with the court will not be revealed, there will be no use of judicial time or resources, and the attorney-instructors do not practice in federal court.

(r) A law clerk may sell wildlife photographs through an art gallery and on a web site, assuming no exploitation of office and no transactions at the courthouse.

(s) A law clerk should not work as a part-time real estate agent where the proposed employer is a party to cases in the judge's court and proposed work would involve frequent transactions with attorneys who appear before the court.

(t) A judicial assistant may not accept private compensation for tasks treated as part of official duties (i.e., performed during work hours, with other judicial employees, using court facilities).

(u) Canon 6 of the Code of Conduct for Public Defender Employees permits an attorney to take a paid leave of absence from a law firm to serve as an unpaid assistant federal public defender.

(v) A judicial employee may accept part-time employment as a title examiner, where the work would not involve the practice of law or service as a fiduciary. Similarly, a judicial employee may assist with the non-legal work of a spouse's sole-proprietor law firm.

(w) A law clerk should not continue outside employment involving consulting contracts with public policy advocacy organizations that take positions on issues likely to be the subject of federal litigation.

(x) A part-time judicial assistant may engage in part-time outside employment for a state court that is not in the same state as the federal court, provided that potential conflicts of interest can be avoided.

(y) Judicial employees may operate a business translating documents, provided that the business does not involve the practice of law, overlap with the employees' official duties, lend the prestige of the office, or lead to public entanglement in court proceedings.

(y-1) A staff interpreter should not accept outside employment with a company to perform work for a government agency that appears as a litigant because it would associate the employee in a substantial financial manner with an entity likely to come before the court and may entangle the employee in court proceedings.

(z) Judicial employee should consider potential conflicts of interest related to membership on board of an organization that will apply for gaming and liquor licenses, and should consider whether involvement with the organization may detract from the dignity of the court or lead to appearance of impropriety.

§ 4.5 Fiduciary Activities

§ 4.5-1 Family Trusts and Estates

- Advisory Opinion No. 96 (service as fiduciary of an estate or trust).

(a) A judge may serve as co-executor of his or her uncle's estate.

(b) A judge may serve as co-executor of his or her father-in-law's estate.

(c) A judge may serve as trustee of a family trust, including a testamentary trust.

(d) A judge may serve as testamentary trustee for the estate of the aged parent of the judge's deceased ex-spouse, where the judge's children are the beneficiaries.

(e) A judge may serve as fiduciary for a family member and, in that capacity, engage in adversary proceedings in court (other than the judge's own court or one under the appellate jurisdiction of judge's court). But a judge should not serve as a family fiduciary if service will involve negotiations with an administrative agency that frequently appears before the judge.

(e-1) A judge serving as executor of a parent's estate may appear in a wrongful death action if under state law the appearance is considered pro se and not representative.

(f) A judge may serve as director of nonprofit family corporation set up to solicit contributions from family members for college scholarships for family members, but cannot solicit funds.

(g) In determining the scope of "family" for purpose of permissible service as family fiduciary, Canon 4D(4) definition of any relative of a judge by blood, adoption or marriage, includes the spouse of the judge's second cousin.

(h) In determining the scope of "family" for purpose of permissible service by a judge as family fiduciary, testator's status as judge's close family friend and spouse of former law partner does not by itself qualify testator as a "person treated by a judge as a member of the judge's family" under Canon 4D(4).

§ 4.5-2 Nonfamily Fiduciaries

- Advisory Opinion No. 33 (judge should not serve as co-trustee of pension trust).

(a) A judge may not serve as executor under the will of a nonfamily member.

(b) A judge may not serve as executor trustee for a member of the family of the fiancee of the judge, but such service would be permitted after the marriage.

(c) Although a judge may not serve as executor or trustee under the will of a nonfamily member, designation as such in a will or trust instrument "effective at such time as [the judge] is willing and able to serve" is not a violation of the Canons.

(d) A judge may not serve as trustee of a settlement fund generated by litigation in another federal court.

(e) A judge may serve on the "board of control" established to select charitable organizations to receive charitable bequests, if such selection is the sole function to be performed, and the relationship does not constitute a true trusteeship.

(f) Under Canon 4E judge may serve as trustee for friend's child, where child is treated by judge as a member of judge's family.

(f-1) A judge may serve as executor of close friend's will, and guardian of friend's children, where friend and children are treated as members of the judge's family, but the judge should consider declining to serve if it is likely to involve serious litigation.

(g) A judge may not serve as sole trustee of a scholarship fund named in the judge's honor since this would require the judge to know the identity of donors and to invest and manage the funds, but the judge may be empowered to designate the recipients of the scholarship.

§ 4.5-3 Continuation of Pre-Existing Fiduciary Relationships

(a) A judge who, before ascending the bench, served as an executor of the estate of a nonfamily member, or as trustee of a nonfamily trust may, with the approval of the judicial council of the circuit, continue in that capacity if resignation would cause undue hardship to the estate and its beneficiaries, but may not receive compensation for such service.

(b) A judge who, before ascending the bench, served as a guardian, and continued in that service after becoming a judge, may not thereafter commence serving as executor of the same estate.

(c) A judge who, before ascending the bench, was named trustee under a large number of deeds of trust (a form of real estate security transaction) should resign from each trust before taking any action to enforce the trust; but in view of the expense and inconvenience involved, the judge need not resign where the judge's function is purely passive (i.e., no action as trustee required except to acknowledge satisfaction of the underlying debt when paid). Similarly, a judge who served as trustee for a deed of trust may acknowledge satisfaction to terminate the trusteeship.

§ 4.6 Governmental Appointments

§ 4.6-1 Governmental Agencies and Entities

- Advisory Opinion No. 44 (judge should not serve as trustee of state-supported college or university).
- Advisory Opinion No. 43 (judge should not serve as statutory member of citizen's supervisory commission of county personnel board).
- Compendium §§ 1.3.

(a) A judge may attend or be a guest of honor at a ceremonial event hosted by a foreign government. See Canon 4F.

§ 4.6-2 Military and National Guard Service

(a) A part-time magistrate judge should not serve as a full-time active member of a state national guard, in the capacity of legal advisor to the state adjutant general. Advisory Opinion No. 76.

(b) A bankruptcy judge should not serve as staff judge advocate in the state's national guard, nor serve as a hearing officer in disciplinary proceedings in the national guard — this constitutes either the practice of law or involves the receipt of additional compensation for performing judicial services.

(c) A judge should not accept a JAG position to develop an international procedure for handling civilian misconduct on foreign bases, as this would inherently entail resolving legal issues and providing legal advice.

(d) A magistrate judge in the military reserve should not provide legal advice in any capacity or serve as a military judge. Nor should a magistrate judge head a military legal services group and supervise its attorneys. If called to active duty and on an extended unpaid leave of absence, Canon 4A(5) would not prohibit the judge from providing legal advice or serving as a military judge (but see 28 U.S.C. § 632(a)).

(d-1) A part-time magistrate judge may continue service as an attorney in the military reserve, provided that conflicts of interest can be avoided.

(d-2) Military service that involves the practice of law while a judge is actively employed by the federal judiciary violates the practice of law prohibitions of Canon 4A(5) of the Code of Conduct for U.S. Judges, a prohibition that is essential to maintaining the independence of the federal judiciary under Canon 1.

(e) A judge should not serve on a special military tribunal or in a similar judicial capacity for the military.

(f) A judge may serve as a temporary, unpaid volunteer advising the military as to improving communication and cooperation with state entities, subject to the restrictions in Canon 5.

(g) A judge who serves in the military reserve in a non-legal capacity may conduct research and compile information on foreign legal systems, but the judge may not offer legal advice or impart his or her own assessment of the foreign legal systems.

§ 4.6-3 Other Similar Service

(a) Although a judge could serve in Civil Aeronautics Patrol, an auxiliary of the U.S. Air Force, a judge should not serve as a wing commander whose responsibilities include drug-related law enforcement. A judge has a duty to avoid activities that would require frequent recusal.

§ 4.6-4 Governmental Appointments – Permissible Activities

(a) Canon 4F does not bar a judge's service on a committee whose function is to recommend for final selection by the Board of Trustees of the university three to five candidates for president of a public university. The judge's service on the committee would not involve the judge in the governance of the university, and the circumstances did not indicate a highly visible or controversial matter.

(b) A judge may serve on the National Conference of Commissioners on Uniform State Laws and as a member of the American Law Institute without violating Canons 4A(2), 4A(3) and 4F provided that the judge does not personally engage in activity designed to promote particular legislation or a rule of law before any official governmental agency.

(c) A judge may accept appointment by the United States Government to serve as a member of the Working Group of a United Nations Commission, the work of which relates to the unlawful detention of persons. The work involves improvement of the administration of justice and thus is not barred by Canon 4F or Canon 5C. The judge's nomination by the United States Government avoids any problem of interfering with foreign policy, see e.g., 18 U.S.C. § 953. The work would be done in the name of the United Nations, and thus minimize the problem of lending the prestige of judicial office. While the Working Group could become involved in matters so controversial as to jeopardize the judge's effectiveness as a judge, such situations should be rare and should afford sufficient warning to permit the judge's withdrawal.

(d) A judge may serve on a university "board of regents" which is not a governing body.

(e) A judge may serve on a Presidential commission "on the federal appointment process" pursuant to the Ethics in Government Act. Same for service on a committee related to judicial nominations pursuant to federal law.

(f) A judge may serve on the advisory council of the National Center for State Courts.

(g) Canon 4F prohibits a judge's service in a governmental position concerned with issues of fact or policy. There is an exception, however, for matters relating to the improvement of the legal system. A state commission to review and improve pardon procedures falls within the exception. Same for national commission studying prevention of prison rape. Same for a bar committee to analyze a state indigent criminal defense system.

(g-1) The following is also within the Canon 4F exception relating to the improvement of the legal system: A judge's service on a committee organized by a prominent law school in the United States, where the function of the committee is to review proposed legislation for the reorganization of the court system in Russia.

(g-2) Judge may serve on short-term special advisory board in Department of Defense whose purpose is to consider *procedures* to insure the accuracy, efficiency and integrity of the investigative function of the Department and report recommendations to the Secretary of Defense where the investigative functions in question ordinarily are directed to matters governed by the Uniform Code of Military Justice.

(g-3) Where the statute makes clear Congress intended judges to serve, there is no impropriety in serving on an international dispute resolution panel.

(g-4) A judge may serve on a law-related panel of the National Academy of Sciences, but should avoid involvement in matters within the jurisdiction of legislative and executive branch agencies and should refrain from litigation-related activities, including filing of amicus briefs. Recusal should be considered if the panel's work is introduced in a case before the judge.

(h) Canon 4F would prohibit serving on a Children Services Board and Children's Trust Fund, a county agency, but a judge can serve on the county's Juvenile Justice Advisory Board because it is an organization devoted to improvement of law, etc.

(i) A study group addressing foreign political and economic developments, requested and partly funded by Congress, is not a law-related activity permitted by Canon 4F, but a senior judge may participate so long as the judge refrains from judicial service during the appointment.

§ 4.6-5 Governmental Appointments – Impermissible Activities

(a) A federal judge is employed full-time in the Judicial Branch of the Federal Government. Generally speaking, a judge is not permitted to be employed by, receive

compensation from, or participate in policy-making or the execution of policy on behalf of, any state or local government or other branch of the Federal Government, with the limited exceptions mentioned in Advisory Opinion No. 50.

(b) A judge should not serve on a United States Senator's committee to screen applicants for appointment to the service academies.

(c) A judge should not serve on a state board of regents that operates state colleges and universities or on the board of a community college foundation. Also, a judge should not serve on a governmental board, appointed by the governor, overseeing hospital facilities.

(c-1) Due to concerns arising under Canon 1 (judicial independence) and Canon 4F (governmental appointments), a judge should not serve on the board of a public charter school because of the school's connection to state and local government.

(d) A judge should not serve on the board of the civil service league of a state (watchdog agency). Similarly, a judge should not serve on an advisory group for a county inspector general office.

(e) A judge should not accept appointment by a state agency to a committee to screen applicants for the position of state education commissioner.

(f) It is inappropriate for a judge, formerly a state judge, to accept designation as a "special commissioner," eligible for recall to state judicial service.

(f-1) Judge who previously served on state court should not accept appointment as senior judge of that court, even in inactive status.

(f-2) Judge who formerly served on state court should not agree to serve as special consultant to the state as a condition of receiving cost of living increases in state annuity, even though the likelihood of actually serving is small.

(g) A judge should not serve on a state "law institute" which makes annual reports to the legislature, suggesting changes in state law. Similarly, a judge should not chair state law revision commission responsible for recommending improvements in state law. Nor should a judge serve on a commission studying criminal justice and corrections systems for the state executive and legislative branches. Same, for a state court task force examining the causes of wrongful criminal convictions. Same, for an advisory committee to assist a state task force studying capital punishment. Same, for a federal board that makes recommendations on the operations of state courts and awards grants to improve state courts. Same, for a state government advisory group charged with making recommendations to address the rise in violence and discrimination against an ethnic group.

(h) It is inadvisable to serve on a government study commission of local government.

(h-1) Similarly, a judge should not chair a committee examining coroner's inquest procedures for the county executive.

(h-2) A judge should not serve on a commission charged with advising the mayor as to the internal policy and operations of the police department following a controversial incident that could lead to federal litigation.

(h-3) Similarly, a judge should not serve on a city council committee responsible for drafting city ordinances for possible enactment.

(i) A judge should not serve on state Alcohol and Drug Abuse Commission. Similarly, a judge should not accept appointment by a state governor to a state mental health commission.

(i-1) A judge may not chair a group established to reduce youth violence, where the group includes state officials, works closely with state agencies, receives state funding, and carries out social policy for the benefit of state residents; the judge should not accept this role even in the capacity of spouse of an elected official.

(i-2) A judge should not serve on a committee to conduct an evaluation of a city's public school system, due to concerns under Canons 4B and 4F.

(j) Canon 4F precludes a judge's service on a government committee established to study preventive, educational, social, and legal strategies addressing problems of violence and to report back to the legislature. Such service would inappropriately involve the judge in matters of public policy and would not be limited to matters of improving the law as to which the judge would have a unique perspective. In addition, service on such a committee could give rise to questions of judicial participation in legislative functions and could require frequent recusal in cases involving the interpretation of such laws.

(k) A judge should not accept appointment by the FBI Director to a board established to advise the FBI on DNA testing; such an appointment would risk sacrificing independence of the judiciary concerns expressed in Canon 1 and 4F. Same, for appointment to a board established to advise the FBI Director concerning policy, technical, and operational issues related to criminal justice information systems.

(k-1) Similarly, a judge should not serve as advisor to a federal agency recommending compensation for families of deceased federal employees.

(l) Although Canon 4F excepts matters related to improvement of the legal system, a judge should not serve on judicial selection board established by Governor because of political implications. Same for U.S. Senator's judicial screening committee.

(l-1) Although Canon 4F excepts matters relating to the improvement of the legal system, the concerns expressed in Canon 1 relating to an independent federal judiciary indicate that a judge should not serve as a member of a state Board of Law Examiners. In habeas matters a federal judge is required to review indirectly decisions of the state's highest court, and it would be inappropriate for the judge to be appointed or sit on a committee subject to the direction of that court. See Compendium § 1.3(a). However, law clerk may serve on state board of law examiners if judge approves and law clerk is isolated from all habeas cases.

(l-2) A judge should not serve on investigative, fact-finding ethics advisory panel of state senate.

(m) A judge should not serve as trustee of Park Commission although its activities resemble those of charitable and civic organizations because the Committee views it as a governmental commission as its activities are tied too closely to the government of the town. Similarly, a judge should not serve on a local government's Library Board.

(n) A judge cannot serve as Honorary Vice Consul of a foreign country. It is a governmental position within meaning of 4F as it requires appointment by a government and accreditation by the State Department. Similarly, a senior judge should not serve as an ambassador to a foreign country while retaining a federal judgeship.

(o) A full-time magistrate judge should not serve on a state board established to determine payments from a liability fund for attorney malpractice claims, but a part-time magistrate judge is not subject to Canons 4A(4) and 4F and may do so.

(p) A judge should not serve as an expert advisor to a foreign tribunal that is responsible for restructuring a corporation, due to concerns under Canon 2, 4A(4) and 4F.

§ 4.6-6 Governmental Appointments [Judicial Employees]

(a) Law clerk may serve on committee to review city tax expenditures where the position is unpaid and has no governmental power but is advisory only; law clerk should ensure that any publicity about committee's recommendations refrains from identifying the clerk as a law clerk or court employee.

(b) A pretrial services officer may serve on an advisory state commission honoring a historic civil rights case, but should restrict fundraising and refrain from related partisan political activity.

(c) Canon 4F would prohibit judge from accepting appointment to Oral Appraisal Board of a state's Department of Civil Service; but because there is no similar provision in the Code of Conduct for United States Probation Officers, a judge can approve the probation officer's outside employment in this capacity provided duties are performed while on leave, duties do not impair the probation officer's ability to perform assigned work, and probation duties are limited to the cases on the criminal docket of the district court. [Refers to probation officers code that was withdrawn; compare to current Code of Conduct for Judicial Employees.]

(d) Staff counsel may accept uncompensated appointment to advisory committee for city water board where the committee's work is advisory only, will not interfere with the performance of official duties, and is unlikely to give rise to federal litigation or involve the counsel with frequent litigants in federal court.

(e) A federal public defender may serve without pay on a board setting policy for a local housing agency; the duties are quite distinct from defender duties and do not involve law enforcement.

(f) A probation officer assistant may remain on inactive status (no duties) with a sheriff's department, but should refrain from working on matters stemming from sheriff's department investigations.

(g) A law clerk may serve on state board of law examiners if judge approves and law clerk is isolated from all habeas cases.

(h) Although clerks of court are not subject to Canon 4F of judges' code restricting appointment to governmental commissions, clerk should nevertheless decline appointment to state medical licensing board because of concerns under Canon 2 (appearance of impropriety) and Canon 4C(1) (frequent transactions with persons likely to come before the court).

(h-1) A deputy clerk should not serve on a local zoning board that exercises governmental powers and would entail association with lawyers who appear in federal court. Same for judicial employee's service on town planning and zoning commission likely to lead to contentious public debate and state and federal litigation. Same, for clerk of court's service on state commission that would make recommendations concerning state judicial retention elections. Same, for a judicial employee's proposed service on a state board that is responsible for certifying and licensing court reporters. Same, for service by a judicial employee on a committee that evaluates character and fitness for state bar admission. Same, for law clerk's service on a county commission where appointment is made by an elected official and the commission makes recommendations to legislature on the allocation of tax dollars. Same, for staff attorney's service on a community board where appointment is made by an elected official and board directly influences the exercise of local governmental power. Same, for judicial employee's proposed service on state judicial council

where appointment is made by state governor or state supreme court, the council exercises governmental and policymaking powers, and service may involve overseeing lawyers who also appear in federal court. Same for service by judicial employee on a tribal government commission where appointment is subject to approval by tribal government officials and commission exercises some governmental powers.

(h-2) An assistant federal public defender should not serve on a state alcohol beverage control commission in a position involving judicial and law enforcement responsibilities.

(h-3) A judge's secretary should not accept appointment to a local water board that has governmental as opposed to advisory responsibilities, that is likely to be involved in challenges in federal court, and that would involve association with lawyers or other litigants in federal court.

(h-4) A probation officer should not serve on a local board responsible for hiring, firing, and discipline of police officers and firefighters.

(h-5) A chief pretrial services officer should not serve in a corrections policy organization set up by the Department of Justice and should not attend organization conferences at DOJ expense.

(h-6) A law clerk should not accept appointment to a state government ethics commission, due to concerns under Canons 2, 4, and 5.

(h-7) A judicial intern should not accept a concurrent internship with a state or federal government agency. See Canon 4A. Similarly, a judicial employee should not accept volunteer employment with a local district attorney's office, due to concerns regarding "dual service to and/or supervision by . . . different governments" in violation of Canon 4A.

(h-8) A judicial employee should not assist with an evaluation of a state university athletic department's compliance with federal law, due to risk of litigation and potential for dual service or supervision by another government entity during judicial employment. See Canon 4A.

(h-9) A judicial employee should not serve on a nonpartisan redistricting commission because of the commission's prominent role in a hot-button political issue that will likely become the subject of contentious public debate.

(i) A judicial employee should not serve on the board of a public charter school because it would likely create the potential for dual service to and/or supervision by different governments during judicial employment.

§ 4.7 Chambers, Resources, and Staff

§ 4.7-1 Use of Staff and Chambers

- Advisory Opinion No. 79 (use of chambers, resources, and staff for activities permitted by Canon 4).

(a) A judge who writes a law-related periodical and receives compensation therefor should not use secretary to type manuscripts. See Advisory Opinion No. 79.

(b) A judge who chairs a bar association committee may use chambers' local telephone, FAX and e-mail for these activities (where legally permitted and the government does not incur extra charges) but should not use government postage and letterhead.

(c) It would be inconsistent with Canon 4G for a judge to accept compensation for supervising mock court proceedings in judicial facilities, but this would not apply to programs in nongovernmental facilities.

(d) A court may permit an outside group to use courthouse facilities for a CLE or other educational event, provided that the event does not interfere with regular court use, other groups are also permitted to use courthouse facilities for similar educational purposes on request, and permitting the activity does not otherwise raise Canon 2 concerns by showing a preference for one particular group over another.

(e) A judge's proposal to use internal court documents in a judge's extrajudicial publication raises concerns under the Code about preserving the confidentiality of judicial decision-making in the court as a whole. The integrity of the judiciary would be undermined if confidential work and communications between staff attorneys and judges are unilaterally disclosed to the public. Such use of internal court materials would also be inappropriate under Canon 4D(5).

§ 4.8 Compensation, Reimbursement, and Financial Reporting

§ 4.8-1 Gifts

- Compendium §§ 21 *et seq.* (Ethics Reform Act Concerning Gifts).

§ 4.8-2 Honorary/Reduced-Rate Memberships

- Advisory Opinion No. 47 (acceptance of complimentary or discounted club memberships).

(a) A judge may accept a free membership in the "American Board of Trial Advocates," the organization being devoted to the improvement of the law.

(b) It is permissible to accept free membership in a local bar association.

(c) Judge may accept a free one-year guest membership in a hunting club offered by a longstanding family friend, unless acceptance creates a perception that club members who are attorneys are in a special position to influence the judge; remittal should be considered if other club members appear before the judge.

(d) Judge may accept membership in a social club that offers multiple membership categories, and sets membership dues and fees based on broad occupational categories; in this situation judges are eligible for membership in a category that includes government attorneys and other professionals, and that entails reduced membership privileges. Such memberships are not prohibited gifts, and do not fall within the statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(e) Judge may accept honorary membership in a service club that exempts the judge from paying annual dues. Such membership is consistent with Canon 4B and is not prohibited by statutory restrictions concerning honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(f) Judge may accept a discounted or complimentary membership in a professional organization, including a bar association or an Inn of Court. Such memberships are not prohibited gifts, and do not fall within the statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008) *and* Memorandum from James C. Duff to U.S. Judges (October 20, 2008).

(g) Judges may accept offer of limited access to a social club for a monthly fee; the same offer is extended to a broad group that includes judges, the clergy, and the military. Such privileges, which do not constitute full membership and entail restricted rights in the club, are not prohibited gifts and do not fall within statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(h) Judge may accept membership in a dining club that offers multiple membership categories, and sets membership dues and fees based on broad occupational categories; in this situation judges are eligible for membership in a category that includes government attorneys and that entails reduced membership privileges. Such memberships are not prohibited gifts, and do not fall within the statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(i) After the October 13, 2008 effective date of the statutory restriction regarding honorary club memberships, a judge should not continue to accept the benefit of a prohibited honorary club membership with a value of more than $50 per year. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008) *and* Memorandum from James C. Duff to U.S. Judges (October 20, 2008).

(j) Judge may accept the benefits of a golf club membership received by the judge's spouse in consideration for legal services provided by the judge's spouse in connection with the development of the club. Such membership is not a prohibited gift, and does not fall within the statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008). Same, with respect to an athletic club membership received by a judge's spouse incident to the spouse's business or profession.

(k) Judge should not accept a reduced-rate membership in a dining club, where the membership offer is highly selective (only 50 persons at a time may hold such memberships) and the memberships are intended to enhance the reputation of the club. Such memberships constitute prohibited gifts under the Judicial Conference Gift Regulations.

(l) Judge may accept social club's offer to waive annual dues where judge had been a dues-paying member for over 35 years and club offered dues waiver in recognition of long-standing membership. A dues waiver under these circumstances is not a prohibited gift and does not fall within statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(m) The opportunity to eat lunch at a judge's own expense at a private social club, offered to judges solely because of their judicial status, constitutes a gift. A judge should not accept the club's offer if the value of the gift is greater than $50 per year. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(n) Judges should not accept honorary membership in a social club that offers such memberships only to select groups of individuals and it is clear that such membership is offered to judges solely because of their judicial status. In this situation honorary members do not pay the club initiation fee or monthly dues that all other members must pay. Such memberships constitute prohibited gifts under the Judicial Conference Gift Regulations and also fall within the statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(o) Judge may accept invitation to use recreation facilities at a military base, where the Department of Defense extends a similar invitation to many others (including all civilian Department employees) and where judges must pay the same fees to use the facilities as others. Such an invitation does not fall within statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

(p) A free membership to a shooting range does not fall within the statutory restrictions regarding honorary club memberships, but the judge should not accept the offer of free membership under the Gift Regulations, where the free membership is based solely on judicial status.

(q) Honorary membership in a golf club that was awarded in recognition of the judge's efforts to develop the golf course prior to becoming a judge does not fall within

statutory restrictions regarding honorary club memberships. *See* Public Law 110-402, 122 Stat. 4255 (Oct. 13, 2008).

§ 4.8-3 Investitures and Similar Ceremonies

- Advisory Opinion No. 98 (gifts to newly appointed judges).

(a) A judge may accept a gavel and a $500 gift from a former client on the occasion of the judge's investiture.

(b) A judge may accept a gavel and a contribution toward the cost of the reception from a local bar association on the occasion of the judge's investiture.

(b-1) Judge may permit bar association to host reception following investiture. Judge should not permit another organization to do so where the organization is identified with particular legal, social or political positions likely to be advanced in the courts or where the judge has no preexisting relation with the organization and sponsorship could reasonably be viewed as putting the organization's members in a special position of influence.

(c) A judge may accept leather notebook and pen from Law Institute as a memento of a judge's presentation. See Advisory Opinion No. 88.

(d) Bankruptcy judge may serve on committee planning testimonial for retiring chief judge that will be sponsored by and funded by contributions from bankruptcy bar associations and panel trustees' association so long as judge does not participate in solicitation of contributions. See Canon 4D(4); Gift Regulations, Guide, Vol. 2C, Ch. 6; Advisory Opinion No. 46.

(e) Gifts of $10 or less (toward robe to be presented at investiture) by former colleagues and friends of new judge are permitted gifts incident to public testimonial or gifts from friends on special occasion, and give rise to no impropriety or need to recuse.

(f) Gift from former law firm (reception following investiture) to new judge upon investiture is a gift incident to a testimonial or a gift from friends upon a special occasion. Although substantial in amount ($1000-$3000) and although impropriety might be indicated in other circumstances where a donor likely to appear before the judge makes a substantial gift, because the judge intends in any event to recuse for two years from cases in which the former firm appears, the circumstances here indicate no impropriety.

(g) It would create an appearance of impropriety for a judge to permit a for-profit company to host a reception following the judge's investiture, where the judge had no preexisting relationship with the company, would not otherwise have been required to recuse, and the circumstances would convey the impression that the company was in a

special position to influence the judge. Canon 2B. See Compendium §§ 2.10 and 25.1 (Ethics Reform Act Concerning Gifts).

(h) A judge should not accept an expensive investiture gift from an attorney acquaintance who is not a close, personal friend.

(i) A court's use of non-appropriated funds, collected through attorney admission fees, to pay for the costs of an investiture reception does not raise ethics concerns. *See also* Advisory Opinion No. 98.

(j) A judge may permit a close friend, whose appearance in a case would necessitate the judge's recusal, to solicit contributions for an investiture reception, but the judge should make all reasonable efforts to remain unaware of those who donate.

§ 4.8-4 Travel and Lodging

(a) A judge may accept free travel and hotel reimbursement from a former client for attending a seminar or for attending an anniversary celebration of a client, provided the donor is not likely to come before the court. Canon 4D(4)

(b) A judge may not permit travel expenses incurred in the performance of judicial duties to be paid by litigants.

(c) A judge or spouse may not accept free transportation from a former client or anyone else whose interests have come before the judge or may in the future come before the judge.

(d) Judge may accept, from an organization devoted to improvement of the law, an award in the form of a framed certificate and reimbursement of travel expenses to attend the organization's meeting at which the judge will be honored, although the organization will purchase the framed certificate and make the reimbursement with funds donated to it by a legal publishing company doing business with the courts.

§ 4.8-5 Discounts

(a) A judge may accept a "professional courtesy" reduction in brokerage fees or attorney's fees if, and only if, the same concession is routinely made to other professionals.

(b) A judge may accept a professional courtesy waiver of attorney's fees if it is extended by a particular law firm to all members of the bar. However, where members of the firm offering the discount have appeared before the judge or are likely to appear before the judge in the future, he or she may not accept the waiver of attorney's fees.

§ 4.8-5 [1] Discounts [Judicial Employees]

(a) Bankruptcy court employees should not accept discounted or pro bono legal representation in bankruptcy proceedings from an attorney who frequently practices before the court.

(b) Judicial employee may accept free or reduced-rate legal services from a friend who does not seek action from, or do business with, the employee's court or office, provided that the friend's interests would not be substantially affected by the performance of the employee's duties and Canon 2 concerns can be avoided.

§ 4.8-6 Hospitality

(a) A judge may attend, and accept hospitality at, bar association events and meetings of other organizations devoted to improvement of the law, legal system, or the administration of justice. Social events sponsored by a bar association itself and open to all attendees of a conference present a reduced risk of an appearance of impropriety compared to hospitality conferred by a particular law firm or lawyer. With respect to attendance at cocktail parties hosted by law firms in connection with bar meetings, judicial conferences, and the like, there is no impropriety in a judge accepting such invitations in the absence of reason to believe that such attendance will reasonably reflect unfavorably on the judge's impartiality or is likely to be exploited by the law firm. Advisory Opinion No. 17.

(a-1) Attendance at a law firm buffet dinner held in conjunction with a circuit judicial conference is also permissible, where other judges and a cross-section of attendees are invited and attendance facilitates collegial bench-bar relations, subject to individual determinations of impropriety due to pending cases or other factors.

(a-2) A circuit judicial council may accept an offer from a non-federal entity to host a social event in conjunction with its judicial conference when the offer was based on factors other than judicial status and the non-federal entity has no litigation pending within the circuit. See also *Guide to Judiciary Policy*, Vol. 24, § 320(b)(4) (Private Support for Circuit Judicial Conference Activity).

(b) Judges may attend bar association events such as receptions where a legal publishing firm has donated the hors d'oeuvres and beverages to the bar association. It is not appropriate, however, for a group of judges or judicial personnel to allow a legal publishing firm or any other vendor doing business with their court to donate food and beverages for a meeting of the judges or judicial employees. See Compendium § 2.9.

(b-1) Although mere attendance (along with others similarly situated) without paying registration fee would not create an appearance of impropriety, it would create an appearance of impropriety for employees of the Administrative

Office to accept from a legal publishing firm a gift of transportation, lodging and meals in connection with a professional training program sponsored by the firm.

(b-2) It would create an appearance of impropriety for a judge to permit a for-profit company to host a reception following the judge's investiture, where the judge had no preexisting relationship with the company, would not otherwise have been required to recuse, and the circumstances would convey the impression that the company was in a special position to influence the judge. Canon 2B. See Compendium §§ 2.10 and 25.1 (Ethics Reform Act Concerning Gifts).

(b-3) No appearance of special influence in violation of Canons 1 or 2 or acceptance of prohibited gift in judge's acceptance of testimonial reception honoring retirement, sponsored and paid for by bar associations, or in acceptance (and acknowledgment thereof) of donated invitations from company which has no direct business with the court and is owned by retiring judge's old friend.

(b-4) When judge is retiring, contributions by lawyers who have appeared before the judge and businesses that have done business with the court to a retirement party for the judge raises fewer ethics concerns because such lawyers or businesses will not appear before the judge in the future and because the event is sponsored by the bar association. The modest additional contributions in this case will not change the perception of who is sponsoring the event.

(c) A judge may be the guest of honor at a public dinner arranged by former law clerks, attended by lawyers and other members of the public, as well as the law clerks. The law clerks should make clear on the invitations and other papers relating to the dinner not only the fact that the dinner is sponsored solely by present and former law clerks, but that the amount paid by other attendees is solely to cover the cost of the dinner, that no fundraising activity is involved, and that no part of the amount paid by the attendees for the dinner will be employed in the purchase of a gift for the honoree.

(d) In connection with a judicial meeting, judges should not accept an invitation and tickets to an event that provides special access to benefits not available to the general public, regardless whether the judges pay for the tickets.

§ 4.8-7 Attendance at Seminars and Reimbursement of Expenses

- Advisory Opinion No. 67 (attendance at educational seminars).
- Compendium § 2.10.

(a) Subject to the conditions and limitations set forth in Advisory Opinion No. 67, a judge may accept reimbursement of expenses and tuition waivers for attendance at a seminar given by a hospital association, but not if the interest of that association has, or

is likely to, come before the court or if the association has interests that may be substantially affected by the performance or nonperformance of the judge's official duties. The judge should be satisfied that there is no appearance of attempting to influence decision of specific cases. See Advisory Opinion No. 17.

(a-1) A judge may accept reimbursement of expenses to attend a private environmental law seminar where neither the sponsor nor source of funding is involved in litigation before the judge's court (i.e., is a party; controls, is controlled by, or is under common control with a party; or is a party's attorney); but the judge should consider recusal if he or she gains extra-judicial knowledge of disputed facts in a case before the judge.

(b) A judge may participate in an international conference concerning minimum standards of judicial independence, and accept reimbursement of travel expenses from the (foreign) university-sponsor. Similarly, a judge may participate in, and accept reimbursement of travel expenses associated with, a trip abroad sponsored by a non-profit organization to promote cross-cultural understanding.

(b-1) A judge may speak at a bar association convention, or an international congress of maritime arbitrators, and accept reimbursement for travel and lodging expenses.

(c) A judge may serve as advisor for a bankruptcy law institute that conducts educational seminars, and may accept reimbursement of expenses for attending meetings of that body.

(c-1) Judges may attend a bench/bar conference focusing on law-related issues; no impropriety due to its small, informal nature and social interactions even though some attorneys are invited to attend but it is also open to others.

(d) A judge may accept reimbursement of expenses for attending law-related seminars.

(d-1) Bankruptcy judges may accept from a bankruptcy bar association (open to all bankruptcy practitioners and representative of all interests in bankruptcy court) reimbursement for expenses incurred in attending National Conferences of Bankruptcy Judges.

(d-2) Judges may accept invitation to attend free mediation training session offered by organization previously selected by court to provide training to court mediators.

(d-3) Judge may accept reimbursement of expenses to address meeting of an association of corporate attorneys, where the association is not a likely litigant in judge's court.

(d-4) Judges should not conduct private educational seminars where the "educators" are lawyers who practice before the court, the programs are directed to areas of law that are likely to arise before the court, and the only persons present are judges, law clerks, and the invited educators. But judges may attend seminars for state and federal judges sponsored by bar associations, and this should not disqualify attending judges from cases handled by the attorney-lecturers.

(e) A judge may attend a George Mason University seminar under factors set forth in Advisory Opinion No. 67: (1) the sponsor is a center at an accredited institution of higher learning; (2) the seminar is funded by general contributions to a university center and not by funds earmarked for judicial seminars; (3) the university and the center are not involved in litigation before the judge and are unlikely to be in the future; (4) the subject matter (American history) is unlikely to relate to litigation before the judge and is not controlled by contributors; (5) expenses covered are reasonable in amount and educational rather than recreational in nature; and (6) although contributors are not publicly identified, no corporate donor provides more than two percent of center funds.

(f) A judge may attend a Medina seminar under factors set forth in Advisory Opinion No. 67: (1) the sponsors include a government entity (the FJC) and an arm of an accredited institution of higher learning (Princeton University); (2) the seminar is funded by donations to a government foundation and attendee fees; (3) the sponsors are not involved in litigation before the judge and are unlikely to be in the future; (4) the subject matters (world events, humanities and the sciences) are unlikely to relate to litigation before the judge and are not controlled by contributors; (5) expenses covered are reasonable in amount and educational rather than recreational in nature; and (6) although contributors are not publicly identified, funding comes from private, unrestricted gifts to a government foundation.

§ 4.8-7[1] Attendance at Seminars and Reimbursement of Expenses [Judicial Employees]

(a) Law clerks and staff attorneys may accept waiver of tuition for attending a law-related seminar, although the sponsor of the seminar is a profit-making educational institution, when the sponsor is not likely to come before nor seeking to do business with the court and its interests would not be substantially affected by the performance or nonperformance of the judicial employees' official duties.

(b) Law clerk may accept reimbursement of costs of attending a legal education conference from prospective employer that does not practice before law clerk's court.

(c) A law clerk should not participate in CLE programs sponsored by the law clerk's former employer, where participation could create the impression of a special relationship between the law clerk's court and the sponsor.

(d) A law clerk should not accept reimbursement of expenses for attendance at an educational event if a reasonable person would believe the reimbursement is being offered in return for being influenced in the performance of an official act. Where the sources of the funding for the event are unknown, a law clerk should inquire to ensure that there is no actual or potential impropriety.

§ 4.8-8 Gifts on Special Occasions

- Advisory Opinion No. 89 (judges' acceptance of honors funded through voluntary contributions).

(a) A judge may accept a gift of a trip aboard a cruising ship (costing about $1500) on the occasion of 20th anniversary as a United States judge where the donors consist exclusively of persons who have worked directly with the judge (i.e., law clerks, secretaries, courtroom deputies, and court reporters), there are a sufficient number of donors that no individual contribution to the gift is unusually large, and the judge is not made aware of the amounts contributed by the respective donors.

(b) On occasion of taking senior status, judge may accept gift from law clerks of golfing trip.

(c) No impropriety for former law clerks to solicit from other law clerks to establish scholarship in honor of retiring judge. Judge and present law clerks should not solicit.

(d) Judges may accept clocks valued from $81.40 to $101.40 from bar association upon the occasion of their appointment to the federal bench. A judge may also accept a chair valued at $238 from judges of a state court bench on which he previously served upon the same occasion.

§ 4.8-9 Gifts from Persons Likely To Appear Before Judge

(a) Although Canon 4D(4) prohibits gift from person who has come or is likely to come before judge, this does not apply when the judge would recuse in any event.

§ 4.8-10 Miscellaneous Gift Rulings

- Advisory Opinion No. 91 (solicitation and acceptance from persons doing business with the court of funds to defray expenses of conference for improvement of the law).

(a) Under the Judicial Conference Regulations on Gifts, it may be permissible to accept books from a publishing company for official use. However, this exception to the usual prohibition on acceptance of gifts does not include the acceptance of a complimentary subscription to books from a publishing company.

(b) It is permissible for a judge's children to accept scholarships awarded on the same terms and based on the same criteria applied to other applicants. Similarly, a judge may accept a scholarship awarded on the same terms and based on the same criteria applied to other applicants and that is based on factors other than judicial status; this is not considered a gift under the Gift Regulations.

(c) Gifts from a friend not prohibited where friend not likely to ever appear in judge's court.

(d) Neither Canon 2 nor the Ethics Reform Act prohibits a judge whose part-time teaching at law school has been approved from using service provided by Westlaw free of charge to all full and part-time faculty members of the law school, if that use is incidental to the judge's teaching duties and otherwise uncompensated scholarly research.

(e) Where a judge's retirement account is left in former firm's retirement plan and partners of the firm serve without compensation as trustees, their unpaid services are appropriately considered to be part of the agreement reached with the firm at the time of withdrawal from the firm and not a gift.

(e-1) A judge who receives a prestigious distinguished service award honoring service to the public and to the administration of justice may also accept the accompanying substantial cash award, where the award is funded by a company doing business with the courts but is administered by an entity that does not do business with, or frequently appear before, the courts.

(f) Canon 3D of the Code of Conduct for Federal Public Defender Employees permits acceptance of mementoes or tokens from clients, but not valuable gifts.

(f-1) Handmade crafts valued between $50 and $150 are not mementoes or tokens permitted under Canon 3D.

(g) Gifts to the judicial branch may be accepted by the Director of the Administrative Office; personal gifts may be accepted by individual judges consistent with the gift regulations.

§ 4.8-11 Receipt of Compensation by Judges and Judicial Employees

- Compendium §§ 31-35 (Ethics Reform Act concerning outside earned income, honoraria, and outside employment).

(a) A judge may accept compensation from a nonprofit organization to assist with drafting a national constitution.

(b) Compensation received by judges for extrajudicial activities must be reasonable in amount, and not in excess of what would be paid to other nonjudge professionals for similar services.

(c) Judges may be paid at a higher rate than other adjunct professors but a lower rate than full-time and emeritus professors.

(d) Judges may be compensated for preparing bar examination questions.

(e) A judge may not accept an endowed adjunct professorship where the professorship is endowed by and named after a local law firm or lawyer who practices before the judge's court.

(f) A judge may accept compensation for teaching where the subject matter only incidentally relates to practice before the judge's court. See Advisory Opinion No. 87.

(g) Subject to consulting with the appointing judge, a law clerk may teach at a law school or college, may receive compensation and reimbursement of expenses, and may accept legal research services provided to all teachers. A law clerk should not use as teaching materials cases the judge or the law clerk worked on during the clerkship; the law clerk may use other cases from the same court but should avoid disclosing confidential information.

(h) A judge may accept compensation from a government corporation to assess proposals for case management software and to design case management training for a foreign judiciary, assuming that the software vendors submitting proposals do not do business with the judge's court.

(i) A judge may accept reasonable compensation for participating in a clinical drug trial from a company not involved with the court.

(j) A judge may accept compensation from a foreign government's judicial department to develop and conduct training for judges on alternative dispute resolution.

(k) Under Canon 4H, a judge's "compensation" should be considered broadly to include both monetary payment, such as salary or wages, and acceptance of other tangible benefits afforded to an employee. Complimentary access to an electronic book as a courtesy for a judge's contribution constitutes compensation under Canon 4H because it is a tangible benefit.

§ 4.8-12 Expense Reimbursement

- Compendium §§ 25, 34.1, and 35.4.

(a) A judge may accept reimbursement of travel expenses for self and spouse to attend a meeting of a charity of which the judge is trustee. Where reimbursement is

paid by a related corporation rather than by the charity, the judge should ensure that the corporation does not have interests before the court.

(b) A judge who serves on the board of a charity may accept reimbursement of travel expenses to inspect the charity's research program from a for-profit company that donates supplies for the research, where the judge has recused from all cases involving the company and the judge's role will not be publicized.

(c) A judge may be a panelist or participant at a seminar and receive reimbursement of expenses. It is also permissible for a judge to attend social events sponsored by businesses or law firms in conjunction with the seminar. No compensation may be accepted unless the activity qualifies as teaching under the Ethics Reform Act and outside employment regulations.

(d) A judge may lecture at a seminar organized by a nonprofit foundation with corporate sponsors and may accept reimbursement of expenses but not compensation. See Compendium § 34.1-2(k). Same, for lecturing at a continuing education program for physicians. Same, for participation in an international conference geared towards improvement of a foreign court system.

(e) A judge may appear on a panel at a legal conference sponsored by a for profit company and may accept reimbursement of expenses; but the judge should ensure promotional materials used at the conference do not overemphasize the judge's participation or imply the judge's endorsement of the company's commercial services.

CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

COMPENDIUM OF SELECTED OPINIONS CONCERNING CANON 5

§ 5. Political Activities

- Advisory Opinion No. 98 (gifts to newly appointed judges).

(a) "Political activity" for purposes of Canon 5 includes activities that associate a judge with a political officeholder, candidate, party or organization, or that promote the policies or positions thereof.

(b) A judge should not participate in a program designed to encourage the establishment of political parties in foreign countries.

§ 5.0 Voting and Registration

(a) There is no blanket prohibition against voting in primary elections and judges may vote in a primary run by a board of elections and accomplished by secret ballot; but judges should not participate in primary proceedings that require open and public expressions of support for candidates (e.g., caucuses that require a public expression of support for a candidate). Same for law clerks and other chambers staff.

(b) Judicial employees who may permissibly participate in nonpartisan activities under Canon 5B may participate in caucuses in those states where caucuses substitute for primary elections, but only to the extent necessary to cast a vote. See Advisory Opinion No. 92.

§ 5.1 Attendance at Meetings

- Advisory Opinion No. 19 (judge should not be member of partisan political club).

(a) A judge may not attend any political meeting or rally, or otherwise associate himself or herself, with a candidate for political office, even when the candidate is the judge's spouse. Similarly, a judge should not accept an invitation to meet with a political party official. See Commentary to Canon 5.

(b) A judge may not attend a national political convention, even though a close relative is a leading candidate.

(c) A judge may make a speech at the annual convention of a union formerly represented by the judge, where the meeting is remote in time from any political campaign, there are no political overtones to the meeting, and the judge's speech will not address political topics or issues.

(d) A judge may attend purely ceremonial functions involving elected officials, including inaugural festivities and installation ceremonies, where the price of the ticket (if any) is not a political contribution. A judge's attendance at an investiture ceremony and administering the oath of office is permissible, provided that doing so does not detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification.

(d-1) There is no impropriety in a judge attending a reception honoring Congressional Black Caucus, where it is not a fundraising affair nor an event intended to promote a party or candidate (Canon 5A(3) and the judge's mere attendance as a guest of a friend does not lend the prestige of office (Canon 2B). Same, where the judge plans to attend the event and administer a ceremonial oath.

(e) A judge should not give a speech at a meeting of a partisan political group.

(f) A judge should not perform with a musical group at a political fundraiser, as this could be viewed as a political endorsement and/or contribution.

§ 5.2 Relationships with Elected Officials, Including Contributions to Campaigns

- Advisory Opinion No. 73 (requests for letters of recommendation and similar endorsements).

- Advisory Opinion No. 59 (a judge may properly recommend and give an evaluation of a judicial candidate to screening or appointing authority).

(a) A judge whose spouse is an elected official may attend purely ceremonial and social functions, but not political functions. Events and gatherings that associate the judge with a political candidate or party or promote the policies or positions of a political party (such as political meetings and rallies) are not permissible.

(b) A judge should not serve on a United States Senator's committee to screen applicants for the various service academies.

(c) It is inappropriate for a judge to serve on a committee to screen applicants for appointment by the governor to the State Education Commission.

(d) A judge may contribute to a scholarship fund established by a congressman.

(e) A judge should not serve on judicial selection board established by Governor because of political implications. See Compendium § 4.6. Same for U.S. Senator's judicial screening committee. Same for bar association committee that selects candidates to be appointed by the mayor. But see Advisory Opinion No. 59 (allowing judges to respond to requests from appointing authorities/screening committees for suggested names of judicial candidates).

(f) A judge may join a Committee that is requesting a county Board of Supervisors to name a newly constructed Hall of Justice after a recently deceased member of the local bar, and judge may allow his or her name to be used so long as the judge's name and position are listed in the same manner as all other committee members.

(g) A judge should avoid giving advice to elected officials running for public office because of the risk of contravening Canons 1, 2, 3, 4, and 5 and should not participate in political campaigns; any consultation with candidates should be infrequent, private, and circumscribed to focus on matters concerning the administration of justice rather than political or social issues of the day.

(h) Judge who previously served as a legal and political advisor to an elected official should refrain from responding during a subsequent election campaign to public criticism of their previous actions; this may be viewed as an indirect political endorsement.

(i) A social or professional relationship between a judge and a candidate for political office does not affect the categorical prohibition of Canon 5A(3) against a judge making a contribution to a political candidate or organization.

(j) A part-time magistrate judge may not make political contributions, and may not permit the law firm in which he or she is a partner to make such contributions; individual contributions from partners, using their own funds, are not prohibited.

(k) A judge does not violate Canon 5A(3) by paying a mandatory bar fee for a legislatively-created state appellate judicial campaign fund, because the fund is neither a political organization nor a candidate within the meaning of Canon 5A(3) and the fee is mandatory for bar members under state law. Same result for members of a judge's personal staff under Canon 5B of Code of Conduct for Judicial Employees.

§ 5.2-1 Relationships with Elected Officials [Judicial Employees]

(a) A Circuit Executive may not accept membership on a merit selection panel functioning as part of a political apparatus of an elected official.

(b) Members of a judge's personal staff do not violate Canon 5B of Code of Conduct for Judicial Employees by paying a mandatory bar fee for a legislatively-

created state appellate judicial campaign fund, because the fund is neither a political organization nor a candidate and the fee is mandatory for bar members under state law.

§ 5.3 Spouse's and Other Relatives' Political Activities

(a) A judge's spouse may freely contribute to political campaigns and causes so long as the judge plays no role in the decision to contribute and makes reasonable efforts to ensure that the contribution is perceived as that of the spouse and not the judge, including, but not limited to, requiring that the contribution be made from a separate account over which the judge has no control. Advisory Opinion No. 53.

(b) A judge whose spouse is a candidate for elected office may not attend political meetings, should avoid active involvement in the campaign, and must recuse from cases in which contributors to the spouse's campaign are parties or appear as counsel. The judge should not attend: the spouse's announcement of candidacy; political gatherings where the spouse appears or speaks (whether or not they involve fundraising); public debates if they are political or campaign functions; or a victory celebration. The judge may attend civic gatherings sponsored by nonpolitical organizations to which all candidates (including the spouse) are invited, and may attend inaugural festivities because these are not political gatherings. Where recusal is indicated due to a contributor's involvement, the judge may use the remittal procedures of Canon 3D.

(b-1) A judge can be responsible for recusing only with respect to those contributors to a spouse's campaign of whom the judge is aware; where state law requires public disclosure of the identity of contributors, the judge may choose to examine the public records but is not required to do so. It is reasonable for a judge to limit the time frame in which contributions will be examined.

(b-2) Judge need not recuse from cases involving contributors and active supporters of child's campaign who are not identified to the judge; also, judge need not make inquiry to identify such contributors and supporters.

(b-3) Where an attorney contributed to a spouse's campaign, the judge need not recuse from matters handled by other attorneys at the law firm, unless the firm itself contributed or is closely identified with the campaign.

(b-4) A judge whose spouse is running for elected office may appear in a family photo that may be used in campaign advertising and literature, but the judge's title or office should not be identified in the photo or campaign material. The judge should not place a campaign bumper sticker on the judge's personal vehicle.

(c) When the spouse of a judge uses the marital home to host political events, such as receptions for candidates and fundraisers, the judge must not in any manner encourage, assist or concur in the holding of the events and must take all reasonable

measures to dissociate himself or herself from them, including steps to avoid being seen by those in attendance during the events, which if necessary would include leaving the premises for the duration of the event. Similarly, a judge should take steps to disassociate self from minor child's political campaign activities.

(d) A judge whose spouse proposes to post a political candidate's sign at the marital home should try to dissuade the spouse from doing so and, failing that, should make reasonable efforts to disassociate himself or herself from the sign (e.g., by posting a disclaimer, listing spouse's name only on the sign, or placing the sign on the spouse's automobile that judge would not drive). Law clerk should take similar steps to disassociate from spouse's partisan political activities.

(e) A judge may permit a minor child to take part in a public recital, one segment of which has political overtones.

(f) The Code of Conduct for United States Judges does not prohibit a judge's spouse from serving in a political campaign, but the judge should disassociate him or herself from the spouse's political activities.

(g) Canon 5 does not prevent a judge's spouse from co-chairing a political campaign, but the judge may not attend political functions including a victory celebration.

§ 5.3-1 Spouse's and Other Relatives' Political Activities [Judicial Employees]

(a) A law clerk may not attend political meetings or accompany a spouse campaigning for political office door-to-door; however, a family picture may be used in the spouse's campaign material if the clerk's judicial employment is not identified in any way; the marital home may be used for political meetings if the law clerk does not appear at such meetings; bumper stickers are also permissible if the car is used by the spouse and not the law clerk.

(b) A probation officer should not attend fundraisers or campaign functions and should not accompany a candidate spouse campaigning door-to-door. Where the home is campaign headquarters, the probation officer generally need not leave during meetings unless their size and frequency make it difficult to avoid interacting with campaign workers.

(c) Law clerk should not attend any political functions with spouse who is working for a political campaign; this includes social events that have some political purpose such as developing campaign strategy.

(d) A judge should advise his or her secretary whose spouse is running for political office that the secretary should not appear at political meetings and should use caution in determining whether to engage in nonpublic campaign support activities, such

as envelope-stuffing, with other supporters. The secretary may appear in a family portrait with his or her spouse if the secretary is not identified as having any connection with the judge and may engage in nonpublic campaign support activities alone.

(e) A deputy clerk whose spouse is running for a nonpartisan city office may assist in the campaign, so long as the clerk's activities do not reflect adversely on the dignity or impartiality of the court or interfere with official duties. The deputy clerk may also appear in family photo but should not be identified as a judicial employee.

(f) A staff attorney is not considered part of the judges' personal staff and may assist in a spouse's campaign for local nonpartisan office. [Note: This guidance was superseded by the amendment to Canon 5B of the Code of Conduct for Judicial Employees in March 2013.]

(g) A court employee whose relative is a candidate for a non-partisan office should not participate in the campaign if the candidate seeks the endorsement of a political party. By seeking the endorsement, the relative became a partisan political candidate, and the judicial employee's participation in the campaign is prohibited under Canon 5A.

§ 5.4 Public Support Causes

(a) A judge not publicly support a referendum to revise the state constitution.

(b) A judge should not state publicly a position on a proposal for a state lottery.

(c) A judge should not serve on a commission to study local government and make public recommendations concerning possible changes.

(d) A judge may serve on a commission appointed by the President pursuant to the Ethics in Government Act.

(e) Judge with special expertise may testify in public hearings before Congress in favor of a constitutional amendment if the substance and manner of the testimony is within the contours of the judge's special expertise and if the circumstances rule out the appearance of endorsing or opposing any candidate or political organization. The judge should not otherwise speak publicly in support of (or against) the proposed amendment.

(f) Judge should not sign a state initiative petition that would affect a class of litigants who regularly appear before the judge where public and media would construe signing as support for the proposed initiative.

(g) A judge should not give a speech on governmental policy matters devoted exclusively to the executive and legislative branches, including giving a speech on foreign policy, that criticizes the executive and legislative branches of government.

(h) A judge should not attend, seated in the VIP section, a politically-oriented event in which elected officials and others will address a highly controversial matter of federal policy, legislation, or law enforcement.

(i) A Special Master of the Court of Federal Claims should comply with the Code of Conduct for U.S. Judges, and should not engage in political activities or public advocacy on a controversial matter of federal policy, legislation, or law enforcement.

§ 5.4-1 Public Support Causes [Judicial Employees]

(a) Judicial employees should avoid politically-oriented events involving controversial issues in the political arena, including public protests. Chambers staff, staff attorneys, and unit executives governed by Canon 5(B) should not participate in public protests in order to protect the impartiality of the courts. Other employees have greater latitude to participate in public protests, but should examine the factors in Advisory Opinion No. 92 and exercise prudence in the choice of events to attend and their level and manner of participation.

(b) Public policy advocacy groups that advocate policy views to government officials but do not promote or oppose political parties, candidates for partisan political office, or partisan political groups are not "political organizations" for purposes of Canon 5 of the Code of Conduct for Judicial Employees.

(c) Law clerks should not distribute political leaflets.

§ 5.5 Other Partisan Political Activities [Judicial Employees]

- Advisory Opinion No. 92 (political activities guidelines for judicial employees).

(a) Judicial employees subject to the Code of Conduct for Judicial Employees should refrain from partisan political activity. Judicial employees subject to this code (excepting a member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district executive) may participate in nonpartisan political activity. See Advisory Opinion No. 92.

(a-1) "Partisan" political office includes offices for which any candidate is nominated or elected as representing a political party. See 5 U.S.C. § 7322(2). Where candidates run in a party primary and nominees receive party support, the election is considered partisan, even if party labels are not on the ballot. Likewise, a nonpartisan election may be considered a partisan election for purposes of the Code when a candidate for a nonpartisan office seeks the endorsement of a political party.

(b) A law clerk may be a member of a political party, but it is impermissible for the law clerk to attend political functions as a member of a local partisan political group.

Neither should a law clerk contribute to a political action committee whose purpose is to fund state and local political candidates in partisan elections.

(c) Canon 7A of the Code of Conduct for Federal Public Defender Employees prohibits defender employees from running for public office in partisan elections, but does not prohibit them from running as a delegate for a political party. An assistant federal public defender may also hold a meeting at home designed to provide an opportunity to meet a candidate for partisan political office, provided that the candidate does not solicit funds at the meeting and the employee's position or title are not used in connection with the meeting.

(c-1) An assistant federal public defender may engage in door knocking and phone banking on behalf of a candidate for partisan political office, provided that he or she does not solicit funds. Any permitted political activity should be consistent with Canon 7 of the Code of Conduct for Federal Public Defender Employees.

(d) A deputy clerk should not post partisan political signs at the family home, should attempt to dissuade spouse from doing so, and, failing that, should make reasonable efforts to disassociate himself or herself from signs posted by the spouse.

(e) A deputy clerk may sign a nominating petition to place a candidate on the ballot for partisan office, but may not initiate or circulate the petition or publicly endorse the candidate. Similarly, a judge may sign a nominating petition provided that the judge’s office is not identified.

(e-1) A judicial employee should not initiate or circulate a recall petition. Merely signing a recall petition does not violate Canon 5, provided that signing the petition does not involve public disclosure of the employee's support of, or opposition to, a particular candidate.

(f) A judicial employee may not serve as a “touch screen technician” or similar officer at the polls in a partisan political election. *See* Advisory Opinion No. 92.

(g) A law clerk should not post on the internet a photograph of the law clerk wearing clothing that endorses a political candidate.

(h) A judicial employee should not display any partisan political bumper sticker in court facilities regardless of the timing of the political campaign.

(i) A judicial employee should not be permitted to take a leave of absence from judicial employment to run for elected office; the employee should either resign from judicial employment or refrain from running for office. Similarly, a law clerk should not contact a political party to express interest in being appointed as a delegate after the clerkship ends.

(j) Although the Code of Conduct does not impose an affirmative duty on a law clerk to modify or attempt to delete expressions of political views on public websites that predate the clerkship, a law clerk should take action to clarify the matter, such as posting a statement explaining that the law clerk's employment precludes further political commentary or endorsement and that the website therefore will not be updated during the employment.

§ 5.6 Other Nonpartisan Political Activities [Judicial Employees]

- Advisory Opinion No. 92 (political activities guidelines for judicial employees).
- Compendium §§ 5.2-1, 5.3-1, 5.4-1, 5.5.

(a) An operations manager in a clerk's office may run as a candidate for school board in a nonpartisan election. Same for a probation officer. Similarly, a federal public defender employee may run for and hold a seat on the board of regents of a university in a nonpartisan election. However, a defender employee should not include his or her title or position in campaign materials.

(b) With judge's approval, judge's secretary who is newly subject to Code of Conduct for Judicial Employees may, for a reasonable additional period of time (not to exceed one year), carry out previous commitment to serve in nonpartisan political office, which was previously permitted but is prohibited under the new code.

(c) Deputy clerk may gather signatures for a petition relating to arena construction, so long as the activity does not reflect adversely on the dignity or impartiality of the court or interfere with the performance of official duties.

(d) Deputy clerk should not manage the campaign of a city council candidate, even though it is nonpartisan, where the election is contested and involves a highly visible public office, and where the court has a history of adjudicating local election disputes.

(e) A law clerk should not make monetary contributions to a nonpartisan campaign, even in a city distant from the clerk's judicial district.

(f) A clerk of court may not engage in nonpartisan political activities, which includes running for or holding appointive political office.

(g) Career law clerk should not run for election to a local state judicial seat while serving as a law clerk even though the election is nonpartisan.

(h) A law clerk may be considered for a potential appointment to a state judgeship or executive branch position while serving as a law clerk, provided that the law clerk is isolated from all cases involving the potential future employer.

§ 5.7 Issues Raised By Judge's Candidacy for/Election to State Office

(a) A magistrate judge who was an unsuccessful candidate for elected office before becoming a judge may not solicit contributions to pay off lingering campaign debts, and may not accept any such contributions from lawyers or from any person whose interests have or may come before the magistrate judge.

(b) A judge should not use a campaign fund accumulated during his or her tenure as an elected official to defray the cost of the judge's investiture, or to host a party for former campaign workers.

(c) A newly-appointed judge should resign elected political office upon appointment as judge.

(d) Judge should not donate excess property from state court judgeship campaign to a political organization or candidate, but may donate the items to other (e.g., civic or charitable) organizations.

(e) A judge does not violate Canon 5B merely because filing deadline for alderman election comes before retirement date as a magistrate judge, when there will be no campaigning or other activity until magistrate judge's actual date of resignation. Similarly, a magistrate judge does not violate Canon 5 by applying for a state judgeship, provided that the magistrate judge upholds the independence of the judiciary and avoids the appearance of impropriety. However, the magistrate judge should resign from the federal bench if the magistrate judge becomes a candidate in an election for the position.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. *Part-time Judge.* A part-time judge is a judge who serves part-time, whether continuously or periodically, 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 Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. *Judge Pro Tempore.* A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. *Retired Judge.* A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

COMPENDIUM OF SELECTED OPINIONS CONCERNING COMPLIANCE AND APPLICABILITY SECTIONS OF THE CODE OF CONDUCT

§ 6 Applicability and Compliance

(a) Retired magistrate and bankruptcy judges who are eligible for recall but not serving in recall status are subject to the Code of Conduct provisions governing part-time judges, even if their annuity under 28 U.S.C. § 377 equals or exceeds the compensation they received at the time of retirement. A magistrate judge who retires before reaching 65 years of age with a deferred JRS annuity is not eligible for recall and therefore is not subject to the Code as applied to part-time judges. However, it would

be prudent for the judge to remain mindful of the Code to avoid potential conflicts if the judge ultimately chooses to accept a recall appointment once eligible.

(b) Date of Compliance section in judges' code does not permit judge to continue to hold elected political office beyond the time reasonably needed to arrange resignation from office.

(c) With judge's approval, judge's secretary who is newly subject to Code of Conduct for Judicial Employees may, for a reasonable additional period of time (not to exceed one year), carry out previous commitment to serve in nonpartisan political office, which was previously permitted but is prohibited under the new code.

(d) Land commissioners appointed pursuant to Fed. R. Civ. P. 71A(h) are judges *pro tempore* within the meaning of section B of the compliance section and therefore are not required to comply with Canon 5's prohibition on political activities.

(e) A senior judge is subject to Canon 4C and should not solicit funds or otherwise engage in fundraising activities for a charitable organization.

(f) A senior judge who still performs judicial duties should comply with the provisions of Canon 4F. But a senior judge may accept an appointment not permitted by Canon 4F if the judge refrains from judicial service during the appointment.

(g) Newly appointed judge may accept an award at a fundraiser occurring shortly after appointment, where arrangements were made before appointment; but the judge should ensure that his or her name is not used to solicit money.

(h) A judge retired under 28 U.S.C. § 371(a) no longer holds judicial office and is not subject to the Code of Conduct, but a judge retired under § 372(a), whether or not accepting case assignments, should comply with all provisions of the Code except Canon 4F.

(i) A judge should not serve as an officer or director of a law firm professional corporation, except that service may continue after appointment for a reasonable period (not to exceed one year) to wind up the practice.

(j) Retired judges eligible for recall but not serving in that capacity are exempt from the Canon 4 restrictions on mediation, arbitration and practice of law. The Compliance section prohibiting such judges from practicing law in their own court (or circuit) does not extend to mediation and arbitration. Alternating periods of mediation or arbitration with judicial service may give rise to concerns under Canons 2, 3, and 4D(1); these concerns are obviated if judges who mediate or arbitrate are ineligible for recall. Similarly, a senior Tax Court judge should not accept a position that requires the practice of law while being subject to recall.

(k) The Code of Conduct for U.S. Judges does not apply to judicial nominees, and does not require a nominee to withdraw from cases that are pending before the court for which the person has been nominated.

(l) A Special Master of the Court of Federal Claims should comply with the Code of Conduct for U.S. Judges.

(m) Although a recall-eligible bankruptcy or magistrate judge may be permitted to engage in the pro bono practice of law under certain circumstances, Compliance Section A(2) restricts the judge from such pro bono practice before the judge's current or former court. However, this limitation does not restrict recall-eligible judges from mediation and arbitration in their own courts.

(n) A former law clerk who volunteers to serve as a member of a court's advisory group is not subject to the Code of Conduct for Judicial Employees, but the appointing authority may impose ethical standards on the volunteer members of the group.

(o) Although a person who acts solely as a special master is not subject to Canon 5 of the Code of Conduct for United States Judges, a special master's political activities should not impact public confidence in the integrity of the judiciary under Canons 1 and 2.

PART TWO: ETHICS REFORM ACT CONCERNING GIFTS

§ 21 General: Purpose and Scope

- Gift Regulation, Guide, Vol. 2C, § 620.15.

- § 21.1 Ethics Reform Act Gift Regulations Are in Addition to Standards of Code of Conduct

§ 21.1-1 Gifts Creating Appearance of Impropriety

- Advisory Opinion No. 91 (solicitation and acceptance from persons doing business with the court of funds to defray expenses of conference for improvement of the law).

- Compendium § 2.9.

(a) A judge does not receive a "gift" or "anything of value" within the meaning of 5 U.S.C. § 7353, when the judge's former law clerks establish a scholarship fund in the judge's name at a law school and increase the amount of the fund by soliciting contributions from others.

(b) Where judge learns that donor of gift had subsequent commercial intentions, judge may return gift to avoid appearance of impropriety.

§ 22 Definition of Judicial Officer or Employee

- Gift Regulation, Guide, Vol. 2C, § 620.20.

§ 23 Definition of Gift in Gift Regulations

- *See also* Compendium § 4.8

(a) Where a judge's retirement account is left in former firm's retirement plan and partners of the firm serve without compensation as trustees, their unpaid services are considered to be part of the agreement reached with the firm at the time of withdrawal from the firm and not a gift.

(b) Bar association members' contributions of funds for judge's portrait to be donated to the court, in honor of judge's lengthy service, is not a gift to the judge.

§ 23.1 Social Hospitality Based on Personal Relationships

- Advisory Opinion No. 17

- Gift Regulation, Guide, Vol. 2C, § 620.25.

(a) A judge may accept dinner and theater tickets from a former partner and social friend who does not appear before the judge, but not if the expenses are reimbursed by the law firm, which does appear before the judge.

§ 23.2 Modest Items Offered as Social Hospitality

- Gift Regulation, Guide, Vol. 2C, § 620.25.

(a) At bar association or similar meeting, a judge may attend social event open to all participants even though event is sponsored by a law firm or business organization so long as there are no special circumstances giving rise to an appearance of impropriety.

> (a-1) Judges may accept invitations to receptions and dinners at law-related functions sponsored by organizations that litigate regularly before the court, where judges' attendance will be educational and informative, the event provides an appropriate forum for public outreach by the court, a diverse group of litigants attends, and judges are willing to offer similar outreach to others.

(b) Employees of clerk of court's office are not prevented by gift regulations from receiving "gifts" or "gratuities" in the nature of cakes, cookies or candy to commemorate the Christmas holidays or other festive occasions. Such items are not "gifts" as

contemplated by the Act as they would have *de minimis* pecuniary value to any member of the office. See Guide, Vol. 2C, § 620.35(b)(8). Furthermore, even if these items were "gifts" under the Act, they would fall within the "ordinary social hospitality" exception to the rule against acceptance of gifts by federal employees.

§ 23.3 Items of Little Intrinsic Value

- Gift Regulation, Guide, Vol. 2C, § 620.25.

(a) Judge may accept an award in the form of a framed certificate or plaque; this is not considered a gift under the gift definition in the Gift Regulations.

§ 23.4 Loans From Banks

- Gift Regulation, Guide, Vol. 2C, § 620.25.

§ 23.5 Opportunities, Favorable Rates and Commercial Discounts

- Gift Regulation, Guide, Vol. 2C, § 620.25.

(a) Benefits offered to travelers for relinquishing a reserved seat reflect mutual consideration and are not gifts.

(b) A free membership to a shooting range does not fall within the statutory restrictions regarding honorary club memberships, but the judge should not accept the offer of free membership under the Gift Regulations, where the free membership is based solely on judicial status.

(c) A judicial employee may accept a low-interest loan and a gift card from a charitable organization formed by the state bar association when the low-interest loan and gift card are available based on factors other than judicial status.

§ 23.6 Rewards and Prizes Open to Public

- Gift Regulation, Guide, Vol. 2C, § 620.25.

(a) A judicial employee may not accept a prize from an entity doing business with the court where the raffle was not "open to the public" as required by the gift definition.

§ 23.7 Scholarships or Fellowships

- Gift Regulation, Guide, Vol. 2C, § 620.25.

(a) It is permissible for a judge's children to accept scholarships awarded on the same terms and based on the same criteria applied to other applicants. Similarly, a judge may accept a scholarship awarded on the same terms and based on the same

criteria applied to other applicants and that is based on factors other than judicial status; this is not considered a gift under the Gift Regulations.

§ 23.8 Market Value Paid for Item

- Gift Regulation, Guide, Vol. 2C, § 620.25.

§ 23.9 Payments Permitted by Regulations Concerning Outside Employment

- Gift Regulation, Guide, Vol. 2C, § 620.25.

§ 24 Solicitation of Gifts

- Gift Regulation, Guide, Vol. 2C, Ch.6.

(a) Former law clerks are not subject to prohibition on solicitation of gifts and may raise money for scholarship fund to honor judge; judge may play no role in solicitation and should remain unaware of contributors.

(b) Neither a judge nor the judge's current law clerk should solicit funds for a gift or dinner honoring the judge's years of service.

§ 24.1 Limitation in Gift Regulation on Soliciting Gifts from Persons Doing Business with Court

- Advisory Opinion No. 91 (solicitation and acceptance from persons doing business with the court of funds to defray expenses of conference for improvement of the law).

§ 24.2 Limitation in Gift Regulation on Soliciting or Making Gift to Superior or Accepting Gift From Employee Making Less Pay

(a) The statutory restriction on giving gifts to a superior or accepting gifts from subordinates does not prohibit judges from giving gifts to their staff.

(b) A judge may give and secretary may accept a cash Christmas gift.

§ 24.2-1 Exception: Special Occasion

(a) The statutory restriction on giving gifts to a superior or accepting gifts from subordinates has been modified by the Judicial Conference Gift Regulations, Guide, Vol. 2C, § 620.40, to permit gifts on special occasions; hence judges may accept holiday gifts from their staff.

§ 24.2-2 Exception: Other Circumstances Where Gifts Traditional

§ 25 Acceptance of Gifts; General Rule Against Gifts with Specific Exceptions Where Gifts Ordinarily Permissible

(a) Westlaw's offer of free service to judge whose teaching at law school has been approved is not a gift to judge if service is made available to all other faculty members, full and part-time, and its use is incidental to the judge's teaching duties.

§ 25.1 Gifts Incident to Public Testimonial

- Advisory Opinion No. 46.
- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(1).

(a) Although hosting reception following investiture may be an excepted gift incident to a public testimonial, it would create an appearance of impropriety for a judge to permit a for-profit company to host a reception following the judge's investiture, where the judge had no preexisting relationship with the company, would not otherwise have been required to recuse, and the circumstances would convey the impression that the company was in a special position to influence the judge. Canon 2B. Similarly, a judge should not accept contributions for a reception from law firms with no employment or other close relationship to the judge.

(a-1) Although the gift regulations permit a judge to accept a gift commemorating years of service on the bench (as a gift incident to a public testimonial), it would present an appearance of impropriety under Canon 2 to accept a very expensive gift from a small, specialized bar association whose members will continue to appear before the judge.

(a-2) A privately-organized, invitation-only dinner honoring the judge's years of service is not a public testimonial within the meaning of the gift regulations.

(b) Bankruptcy judge may serve on committee planning testimonial for retiring chief judge that will be sponsored by and funded by contributions from bankruptcy bar associations and panel trustees' association, so long as judge does not participate in solicitation of contributions.

(c) No appearance of special influence in violation of Canons 1 or 2 or acceptance of prohibited gift in judge's acceptance of testimonial reception honoring retirement, sponsored and paid for by bar associations, or in acceptance (and acknowledgment thereof) of donated invitations from company that has no direct business with the court and is owned by retiring judge's old friend. See also Compendium § 25.10-2(c).

(c-1) When judge is retiring, contributions by lawyers who have appeared before the judge and businesses that have done business with the court to a retirement party for the judge raises fewer ethics concerns because such lawyers or businesses will not appear before the judge in the future and because the event is sponsored by the bar association. The modest additional contributions in this case will not change the perception of who is sponsoring the event. See also Compendium § 25.10-2(c-1).

(d) Judge may accept gifts of silver tray and right to designate $1000 scholarship incident to public achievement award presented to judge by nonprofit company that is unlikely to appear before and does no business with the court.

(e) Judge may accept honor (such as scholarship, reading room, or professorship named after judge) funded through voluntary contributions so long as (1) the honor is associated with an organization or institution in which the judge may participate consistent with Canon 4 (e.g., not an organization espousing a particular point of view on controversial issues or one likely to be a litigant), (2) the judge neither initiates nor participates in any fundraising, and (3) the judge makes a reasonable effort to remain unaware of the identity of those who contribute. Advisory Opinion No. 89.

(e-1) Same, when bar association members contribute funds for portrait of judge to be donated to the court, in honor of judge's lengthy service.

(f) A judge who receives a prestigious distinguished service award honoring service to the public and to the administration of justice may also accept the accompanying substantial cash award, which is a "gift incident to a public testimonial" permitted by the Gift Regulations.

(g) Gift of dinner for judge and spouse at former law firm's 125th anniversary celebration is a permissible gift incident to a public testimonial or a gift on a special occasion, commensurate with the occasion and the relationship; but the judge should consider whether accepting the gift creates an appearance of impropriety or a need to recuse.

(h) A judge may accept a $100 dining certificate from a law-related association in recognition of the judge's past service as president.

(i) A judge may accept an engraved tray presented as a public testimonial after a speech, where the donor only occasionally appears in the judge's court and has not appeared before the judge for some years.

§ 25.2 Gifts of Books, Etc. Supplied by Publisher on Complimentary Basis for Official Use

- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(2).

(a) Neither Canon 2 nor the Ethics Reform Act prohibits a judge whose part-time teaching at law school has been approved from using service provided by Westlaw free of charge to all full and part-time faculty members of the law school, if that use is incidental to the judge's teaching duties and otherwise uncompensated scholarly research.

(b) Judge should not accept gift of computer software for use in judge's chambers from company that is doing business, or seeking to do business, with the court.

(c) Judge may accept a gift of a book written by an attorney who appears in the judge's court, but should refrain from using the book as a resource in cases involving the attorney or the attorney's firm.

(d) Judges may accept bar association's gift of a book, where the book was presented in connection with the author's remarks at a circuit judicial conference.

(e) Under the Judicial Conference Regulations on Gifts, it may be permissible to accept books from a publishing company for official use. However, this exception to the usual prohibition on acceptance of gifts does not include the acceptance of a complimentary subscription to books from a publishing company.

§ 25.3 Gifts Incident to Bar-Related Function, Educational Activity, or Activity To Improve Legal System

- Advisory Opinion No. 17.
- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(3).

(a) Bankruptcy judge may accept complimentary room and registration fee for bankruptcy seminar sponsored by nonprofit forum established to further the interests of bankruptcy practice.

(a-1) Bankruptcy judges may accept from a bankruptcy bar association (open to all bankruptcy practitioners and representative of all interests in bankruptcy court) reimbursement for expenses incurred in attending National Conferences of Bankruptcy Judges.

(a-2) Judges may accept invitation to attend free mediation training session offered by organization previously selected by court to provide training to court mediators.

(b) Employees of the Administrative Office are not prevented by gift regulations from receiving from legal publishing firm doing business with the Administrative Office reimbursement of travel, lodging, and meal expenses in connection with professional training program, because such expenses are incident to an activity devoted to the

administration of justice and thus excepted under the Gift Regulations. However, such a gift would create an appearance of impropriety under Canon 2.

(c) Law clerk may accept reimbursement of costs of attending a legal education conference from prospective employer that does not practice before law clerk's court.

(c-1) Law clerks and staff attorneys may accept waiver of tuition for attending a law-related seminar, although the sponsor of the seminar is a profit-making educational institution, when the sponsor is not likely to come before nor seeking to do business with the court and its interests would not be substantially affected by the performance or nonperformance of the judicial employees' official duties.

(d) A judge may speak at a bar association convention, or an international congress of maritime arbitrators, and accept reimbursement for travel and lodging expenses. Similarly, where the judge is to speak at a program on board a cruise ship, the judge may accept reimbursement for food, lodging, and passage aboard ship.

(d-1) A judge may accept reimbursement of expenses for appearing on a panel at a legal conference sponsored by a for-profit company.

(e) Judge may accept, from an organization devoted to improvement of the law, an award in the form of a framed certificate and reimbursement of travel expenses to attend the organization's meeting at which the judge will be honored, although the organization will purchase the framed certificate and make the reimbursement with funds donated to it by a legal publishing company doing business with the courts.

(f) A judge may accept modest hospitality at bar functions for the judge and a date, but may accept transportation, lodging, and meals to attend bar functions only for the judge and a family member, not a date.

§ 25.4 Gift for Special Occasion

- Advisory Opinion No. 98 (gifts to newly appointed judges).
- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(4).

(a) Gift to judge from law clerks of a trip aboard a cruising ship (costing about $1500) on the occasion of the 20th anniversary as a judge satisfies the special occasion exception.

(b) The same rule applies with respect to the occasion of taking senior status.

(c) Gift of dinner for judge and spouse at former law firm's 125th anniversary celebration is a permissible gift incident to a public testimonial or a gift on a special occasion, commensurate with the occasion and the relationship; but the judge should

consider whether accepting the gift creates an appearance of impropriety or a need to recuse.

(d) Judges may accept clocks valued from $81.40 to $101.40 from bar association upon the occasion of their appointment to the federal bench. A judge may also accept a chair valued at $238 from judges of a state court bench on which he previously served upon the same occasion.

(e) Gifts of $10 or less (toward robe to be presented at investiture) by former colleagues and friends of new judge are permitted gifts incident to public testimonial or gifts from friends on special occasion, and give rise to no impropriety or need to recuse.

(f) A judge may accept a small birthday gift from a former law clerk, assuming the donor has no matters before the judge and the judge is satisfied there is no appearance of impropriety.

(g) A gift and dinner honoring a judge's years of service are gifts for a special occasion that may be accepted, if commensurate with the relationship, from relatives and friends (which may include some but presumably not all court employees and attorneys appearing in the court).

(h) A judicial employee may receive wedding gifts from friends who also do business with or appear before the court, provided the gifts are fairly commensurate with the occasion and the relationships.

§ 25.5 Gift from Relative or Close Friend Whose Appearance Would in Any Event Require Recusal

- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(4).

(a) Gift from former law firm (reception following investiture) to new judge upon investiture is a gift incident to a testimonial or a gift from friends upon a special occasion. Although substantial in amount ($1000-$3000) and although impropriety might be indicated in other circumstances where a donor likely to appear before the judge makes a substantial gift, because the judge intends in any event to recuse for two years from cases in which the former firm appears, the circumstances here indicate no impropriety. See also Compendium § 25.1(a).

(b) Judge may accept a trip paid for by a personal friend who does not engage in litigation or appear before the judge, where the trip is entirely social and gives no appearance of exploitation of office for the donor's or others' private interests. Same, regarding gift (in this situation a $1000 hotel gift certificate) from former client intended to express gratitude for services performed while judge was in private law practice.

(c) A judge may accept payment of a child's private school tuition from a close personal friend who is unlikely to come before the judge and who would in any event

prompt the judge's recusal, so long as the payment does not create an appearance of impropriety or exploit the judicial position.

(d) Judge may accept gifts of discounted or free professional services from close friends where the friends gave the judge gifts of similar value before the judge's appointment, the value of the gifts do not suggest they are given for reasons other than long-standing friendship, and the judge would recuse from any cases involving the friends even in the absence of the gifts. Same, for gifts to judicial employees from close friends.

§ 25.6 Benefits from Prospective Employer

- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(5).

(a) A law clerk may occasionally go to lunch or dinner with law firms that are considering extending employment offers, and it is not inappropriate for the law firms to pay for the law clerk's meal.

§ 25.7 Bar Related Expenses

- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(6).

§ 25.8 Gift Incident to Separate Activity of Family Member

- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(7).

§ 25.9 De Minimis Gifts

- Gift Regulation, Guide, Vol. 2C, § 620.35(b)(8).

(a) Employees of clerk of court's office are not prevented by gift regulations from receiving "gifts" or "gratuities" in the nature of cakes, cookies or candy to commemorate the Christmas holidays or other festive occasions. Such items are not "gifts" as contemplated by the Act as they would have *de minimis* pecuniary value to any member of the office. See Gift Regulation, Guide, Vol. 2C, § 620.35(b)(8). Furthermore, even if these items were "gifts" under the Act, they would fall within the "ordinary social hospitality" exception to the rule against acceptance of gifts by federal employees.

§ 25.10 Other Gifts Ordinarily Permissible Unless One of the Following Situations Applies

§ 25.10-1 Donor Seeking Official Action from or Doing Business with the Court or Other Entity Served by the Judicial Officer or Employee

(a) Judges may accept reduced rate membership in a law-related organization where the reduction is funded by entities that do not seek action from or do business with the federal courts.

§ 25.10-2 Donor's Interests May Be Substantially Affected by the Performance or Nonperformance of Official Duties

(a) Where a judge as a member of the board of a nonprofit hospital receives gift of free medical examinations, the judge may accept the gift since the judge would be disqualified in any event from hearing any case involving the hospital.

(b) Where a judge receives a suitable memento which is not an honorarium for speaking at a continuing legal education program, the judge may accept the gift assuming the donor is the sponsor of the program and not identifiable lawyers who have come or are likely to come before the judge.

(b-1) Where a program organizer is an attorney unlikely to appear before the court, the judge may accept a memento but should consider recusal for a reasonable period thereafter, should the attorney appear before the judge.

(c) No appearance of special influence in violation of Canons 1 or 2 or acceptance of prohibited gift in judge's acceptance of testimonial reception honoring retirement sponsored and paid for by bar associations, or in acceptance (and acknowledgment thereof) of invitations donated by company that has no direct business with the court and is owned by the retiring judge's old friend. See also Compendium § 25.1(c).

(c-1) When judge is retiring, contributions by lawyers who have appeared before the judge and businesses that have done business with the court to a retirement party for the judge raises fewer ethics concerns because such lawyers or businesses will not appear before the judge in the future and because the event is sponsored by the bar association. The modest additional contributions in this case will not change the perception of who is sponsoring the event. See also Compendium § 25.1(c-1).

(d) A judge may accept a professional courtesy waiver of attorney's fees if it is extended by a particular law firm to all members of the bar. However, where members of the firm offering the discount have appeared before the judge or are likely to appear before the judge in the future, the judge may not accept the waiver of attorney's fees.

(e) Judge may accept a free one-year guest membership in a hunting club offered by a longstanding family friend, unless acceptance creates a perception that club members who are attorneys are in a special position to influence the judge; remittal should be considered if other club members appear before the judge.

(f) A judge may accept a monetary award from a college where neither the college nor the panelists who selected the award recipient are likely to come before the judge's court or to be affected by the judge's performance of official duties, and where no other features present an appearance of impropriety. Same for private foundation that has no business or interests before the court.

(g) A judge may accept a clock commemorating committee service from a local attorney who is unlikely to appear before the judge.

(h) A judge should not accept a gift from a litigant shortly after the conclusion of proceedings.

(i) A judge should not accept an invitation to visit a government facility, involving free transportation and lodging, where the offering agency is a party before the judge.

(j) Judges may accept a local bar association's gift robe for shared use at a remote courthouse.

(k) A judge should not accept an invitation to attend a corporate conference from a company that is a regular litigant in the judge's court.

§ 25.10-3 In Case of Employee Other Than Judge, Donor Has Had or Is Likely To Have an Interest in the Performance of Employee's Duties

(a) Where Clerk's Office employees initiate fund for the benefit of family member of co-employee who has cancer, employees should not accept gift for the fund from law firm that practices in the court. Law firm is likely to have an interest in the performance of employee's official duties.

§ 26 Overarching Prohibition; Gift Regulation, Guide, Vol. 2C, § 620.45

§ 26.1 Against Gift in Return for Being Influenced in Performance of Official Act; Gift Regulation, Guide, Vol. 2C, § 620.45

§ 26.2 Against Gifts Giving Appearance of Use of Public Office for Private Gain

§ 27 Ethics Reform Act Gift Regulations Are in Addition to Disclosure Requirements of Ethics in Government Act of 1978 and Instructions of the Committee on Financial Disclosure; Gift Regulation, Guide, Vol. 2C, § 620.50.

§ 28 Advisory Opinions; Gift Regulation, Guide, Vol. 2C, § 620.55.

§ 29 Disposition of Prohibited Gifts; Gift Regulation, Guide, Vol. 2C, § 620.60

(a) A federal public defender who cannot properly accept a gift from a former client, and who cannot locate the client to return the gift, may turn it over to the clerk of court, who should continue efforts to return it.

PART THREE: ETHICS REFORM ACT CONCERNING OUTSIDE EARNED INCOME, HONORARIA, AND OUTSIDE EMPLOYMENT

§ 31 General: Purpose and Scope

§ 31.1 Ethics Reform Act Outside Employment Regulations Are in Addition to Standards of Code of Conduct

§ 31.2 Ethics Reform Act Outside Employment Regulations Are in Addition to Disclosure Requirements of Ethics in Government Act of 1978 and Instructions of Committee on Financial Disclosure

§ 32 Definitions

§ 32.1 "Judicial Officer or Employee"

(a) A judge retired under 28 U.S.C. § 371(a) no longer holds judicial office and is not subject to the outside employment regulations, but a judge retired under § 372(a) is subject to the regulations. Similarly, a retired bankruptcy or magistrate judge who is recalled to judicial service is subject to the outside employment regulations, including the limitations on outside earned income.

§ 32.2 "Covered Senior Employee"

(a) A probation officer is not a "covered senior employee" as defined in section 2(b) of the outside employment regulations, and therefore is not subject to the outside earned income limitation in section 4 or the limitations on outside employment in section 5. Same for law clerk. Same for judge's secretary. Same for bankruptcy administrator.

(b) A part-time Sentencing Commissioner appointed to work no more than 130 days per year is not subject to the Ethics Reform Act outside earned income, honoraria, and outside employment provisions as a special Government employee exempted under 5 U.S.C. § 13141(4).

(c) A recalled bankruptcy or magistrate judge is a "covered senior employee" and is therefore subject to the Ethics Reform Act limitations on outside earned income and employment.

§ 33 Outside Earned Income Limitation

§ 33.1 Outside Earned Income Cannot Exceed 15%

(a) Where service as family fiduciary involves work performed over several years, but fee is paid in a single year, it is consistent with the statute and outside employment regulations for the judge, in applying the 15% cap, to allocate the amount

of the fee over the several years in proportion to the work actually performed during each year. See Compendium § 33.2-2(a).

(a-1) Similarly, in applying the outside earned income cap, a judge may attribute teaching income received in one calendar year to a different calendar year based on a good faith allocation reflecting the work done.

(b) When a judge is the sole residual legatee under an estate and also serves as its executor, the executor's commission paid to the judge is regarded as earned income for purposes of 5 U.S.C. § 13143 even though the judge would have received those funds as legatee under the will if they were not received as executor's commissions.

(c) Income for service as trustee of family trust is subject to outside earned income cap.

(d) A judicial employee may serve as trustee for a family member's charitable trust and receive compensation therefor.

§ 33.2 Outside Earned Income Per Outside Employment Regulation, Guide, Vol. 2C, § 1020.25(b): Any Compensation for Services (Less Ordinary and Necessary Expenses); Subject to Following Exceptions

(a) A covered senior employee may accept from a law school reimbursement for "ordinary and necessary expenses" incurred in traveling between the employee's principal place of employment in Washington, D.C., and the law school, even though the employee maintains a residence near the law school, so long as each trip is "necessary" to enable the employee to teach and not merely for the purpose of the employee's visiting the residence.

(b) Amounts received as reimbursement for expenses incurred in producing income may be deducted to determine the amount of income subject to the earnings limitation.

(c) Amounts received for sale of an option to make a documentary film based on a judge's book, or fee received from a filmmaker to produce a documentary film based on a judge's book, does not constitute outside earned income subject to the earnings limitation.

(d) Non-investment income from a business that is not totally owned by a judge and members of the judge's family is subject to the limitation on outside earned income. The salaries of the business's employees should be commensurate with their duties and responsibilities to avoid an appearance of impropriety in ownership.

§ 33.2-1 Services Rendered to or for United States

(a) A research grant from a government agency constitutes funds "for services rendered to or for the U.S. government," and is therefore excluded from the outside earnings ceiling.

(b) A judge may accept a cash award that constitutes compensation for prior government employment, but should consider recusal in cases involving government officials who were responsible for award selection.

(c) Disability benefits for prior military service are excluded from the limit on outside earned income.

§ 33.2-2 Pensions, Annuities, Deferred Compensation

(a) Where fee for serving as family fiduciary represents work done before January 1, 1991, the effective date of the Ethics Reform Act, as well as work done thereafter, a judge may make good faith allocation of the fee to reflect the amount attributable to services performed before the effective date, which amount would not be subject to the 15% cap.

§ 33.2-3 Investment Income

(a) Income from rental property owned by a judge is excluded from the outside earned income limit except to the extent that such income, or a portion of it, is attributable to the significant personal services of the judge.

§ 33.2-4 Income from Family Business to the Extent Not Resulting from Significant Personal Services

§ 33.2-5 Royalties or Functional Equivalent

(a) Flat fee of $250 received by judge from publisher (established user or purchaser of copyright and other forms of intellectual property) for writing a chapter in publisher's treatise is not excludable from the definition of outside earned income. The payment is a fixed and unconditional cash payment for a manuscript that is wholly unrelated to the sales or distribution of the ensuing publication. Thus, the fee is subject to the 15% cap. Same where the judge receives a flat fee for producing a volume of legal forms and transferring the copyright to the publisher.

(b) Where judge serves as editor-in-chief of a law journal and receives a royalty of 15% of the net cash receipts from the sale of the publication, the amount is considered a royalty and thus not subject to the 15% cap.

(c) Although fee paid to one who serves largely as an editor may in other circumstances be deemed a royalty from use or sale of a copyright, it was not so here

where a fixed fee was paid, was characterized by the payor as a publication fee, and the material in question was mainly authored by someone else.

(d) A royalty of 15% of the shares of a handbook on criminal procedure written annually by a judge is not subject to the 15% cap.

(d-1) Proceeds from sale of fiction or nonfiction book are not subject to outside earned income limitation to the extent they take the form of royalties or functional equivalent.

(d-2) Same, for compensation related to the sale of jewelry based on a judge's designs.

(e) Payment of a flat fee for the selection of law review articles to appear in an anthology of criminal law is not a royalty, and is not excludable from the definition of outside earned income.

(f) Where a judge creates a federally-registered service mark, income generated by licensure of the service mark to another party does not constitute "outside earned income" pursuant to the Ethics Reform Act outside employment regulations, Guide, Vol. 2C, § 1020.25, but is a royalty under the exception found in § 1020.25(b)(5), provided that the judge's compensation is based upon the use or sale of the service mark and is not a guaranteed flat fee.

(g) Fees from the sale of copies of art works are akin to royalties for the sale of books and do not fall within the definition of outside earned income when they are received from art collectors and other established users or purchasers of copyrighted material.

(h) Royalties received for writing and publishing music are not subject to the earnings ceiling, but pay for performances is.

§ 33.2-6 Anything Earned or Received for Services Rendered Which Is Not Includable as Gross Income Under Internal Revenue Code

- Advisory Opinion No. 86 (honoraria, teaching, and outside earned income limitation).

(a) Value of judge's use of Westlaw service provided to all law school faculty members in connection with judge's duties as part-time member of law school faculty is not counted in arriving at Ethics Reform Act's 15% cap on outside earned income because it is not a thing of value that must be included in gross income under Internal Revenue Code.

§ 33.2-7 Teaching by Some Senior Judges

(a) With respect to those senior judges designated in 5 U.S.C. § 13144(b), compensation received from approved teaching is excluded from the 15% cap. Although Ethics Reform Act is satisfied, provisions of Code of Conduct for United States Judges must also be satisfied.

(b) Compensation for teaching earned during the year in which a judge takes senior status should be allocated to the period in which it is earned or to which it is attributable. Teaching income earned after taking senior status is not counted against the annual earnings ceiling.

§ 33.3 Outside Earned Income Is Attributed Solely to the Actual Earner Regardless of Community Property Laws

§ 34 Prohibition on Receipt of Honoraria

(a) It would violate the statute and outside employment regulations for a law clerk to write an article for compensation during clerkship even though publication of the article and receipt of the honorarium would occur after the clerkship ends.

> (a-1) Before beginning the clerkship, a law clerk may accept compensation for an article that has been completed and accepted for publication but will be published during the clerkship.

(b) Where article is written and accepted prior to January 1, 1991, the effective date of the Ethics Reform Act, the fee paid after that date is not covered by the honoraria provisions of the statute. Same where article is written and accepted before judicial employment commences.

(c) Civic group honors worthy individuals by making annual cash awards to a charity of the honoree's choosing. Because a judge-honoree has no option to receive the cash award or anything of value, it is not a prohibited honorarium and is not subject to the $2000 limit of 5 U.S.C. § 13143(c).

(d) Where award is clearly made in recognition of past service and not *for* an appearance or speech, it is not a prohibited honorarium, even though judge will appear and say a few words of thanks at the recognition dinner.

(e) A judge who returns a proffered honorarium to the charitable institution that offered it does not accept or donate that honorarium within the meaning of the Ethics Reform Act where, in accordance with the institution's instructions for return of the funds, the judge cashes the institution's check and immediately returns the money by writing own check to the institution.

(f) The Ethics Reform Act and its implementing regulations prohibit judges from receiving honoraria; the Committee on Codes of Conduct is not authorized to advise as to the constitutionality of this provision.

(g) Judge may not accept a cash gift for speaking at a church program.

§ 34.1 Definition of Honorarium Per Outside Employment Regulation, Guide, Vol. 2C, § 1020.30(b): Money or Anything of Value (Excluding Travel Expenses per 5 U.S.C. §§ 13141(2) and (5)) Paid for Appearance, Speech or Article; Subject to the Following Exceptions

(a) Fee for performing wedding is not honorarium. However, canons bar a judge from accepting additional compensation for performing judicial activities.

(a-1) Reimbursement of expenses necessarily incident to judge's performance of marriage ceremony is neither honorarium nor compensation for official activity, and is not otherwise inappropriate.

(b) Reimbursement of travel expenses (as defined in 5 U.S.C. § 13141) for judge and one relative does not constitute honorarium.

(c) Compensation received by a career law clerk for service as dog show arbitrator (unlike Code of Conduct for United States Judges, Code of Conduct for Law Clerks does not prohibit service as arbitrator) does not constitute honorarium. [Refers to law clerks code that was withdrawn; compare to current Code of Conduct for Judicial Employees.]

(d) Where judge's paper for continuing legal education program was later published and later still won $3000 cash award at sponsor's annual award program, the award is not a payment for the speech or article, and thus was not an honorarium. An after-the-fact award based on merit for scholarly work, like the Nobel prize, is an award in recognition of prior meritorious service and not in exchange therefor.

(e) Freelance writing as art critic for newspaper is continuing employment relationship and thus the fee-per-article compensation received by judge's secretary is not honorarium. Outside earned income limitations not applicable because the secretary is not a "covered senior employee."

(f) Law school's payment to judge of a flat amount for reviewing scholarly papers prepared by others and for presenting critique of one paper at a conference is a prohibited honorarium. Teaching exception not addressed because no prior approval.

(g) When a judge must be present and deliver remarks to receive a monetary award, it is an honorarium (payment for an appearance); the judge may not accept it but may direct that it be donated to charity.

(h) Payment for writing a paper and presenting it at a symposium is a prohibited honorarium.

(i) Receipt of a grant to conduct extended research and make a related presentation does not constitute an honorarium.

(j) A stipend for providing an evaluation and report about a law school program is not an honorarium.

(k) A law clerk may accept compensation to attend meetings for the purpose of reviewing grant applications for a nonprofit foundation; such compensation is not a prohibited honorarium.

(l) A law clerk should not accept payment to attend and participate in a conference sponsored by a private educational foundation. Such payment would constitute a prohibited honorarium.

(m) A judge may accept compensation from a nonprofit organization for work that includes designing a curriculum, as well as selecting participants and faculty, because the work involves much more extensive activity than that contemplated by the prohibition on receipt of honoraria.

§ 34.1-1 Series of Related Appearances, Speeches or Articles if Subject Matter Is Not Directly Related to Official Duties and Payment Is Not Made Because of Status with Government

(a) Payment for a series of opera appearances falls within the exception from the definition of honorarium, because it is a payment for a series of related appearances not directly related to the judge's official duties or status.

(b) Payments for music album reviews for a newspaper fall within the exception from the definition of honorarium, because they are payments for a series of related articles not directly related to the law clerk's duties or status. Same for series of articles about architecture.

(c) Payment for a series of law school lectures on religious freedom falls within the exception as long as the subject matter does not directly relate to the judge's official duties.

(d) A judge may accept fees for a series of related appearances at academic conferences to discuss the judge's work on military history. Same for a series of related religious talks or sermons.

(e) A judge may accept compensation for serving as a moderator at a weeklong program that was unrelated to the judge's official duties where the judge's responsibilities went beyond making a single presentation or casual participation.

§ 34.1-2 Teaching

(a) See Outside Employment Regulation, Guide, Vol. 2C, § 1020.35(b) and Compendium § 35.6 for definition of teaching.

(b) See Advisory Opinion No. 86 (honoraria, teaching, and outside earned income limitation).

(c) Fee paid to judge for preparation of questions to be used in a state bar examination is not an honorarium, but rather falls under the definition of teaching that requires prior approval.

(d) Compensation for teaching a seminar for prospective law students and preparation of course materials does not constitute an honorarium.

(d-1) Judge's work to revise teaching materials and teaching methodologies for law school course is considered "meaningful participation in bona fide components of an educational curriculum or plan" and qualifies as teaching for which the judge may be compensated. Same, for judge's participation in law school's effort to redesign its curriculum. Same, for judge's service as the faculty supervisor of a law school moot court competition.

(e) Compensation for 15-20 minute speech at class day during college graduation exercise constitutes an honorarium.

(f) Compensation on a regular basis in a fixed amount for outside teaching by United States Probation Officer does not constitute an honorarium pursuant to 5 U.S.C. § 13143(b).

(g) Westlaw's free provision of its service to judge in judge's capacity as a member of a law school faculty is not a prohibited honorarium so long as the free service's use is merely incidental to the judge's teaching duties and restricted to that purpose.

(h) Qualified teaching is not limited to legal education, but includes, for example, participation in educational programs at accredited colleges and universities.

(i) Review of law students' papers and ranking of five top entrants in a national competition sponsored by a trade association constitutes teaching for which compensation may be received.

(j) University's payment of a summer research stipend to a tenured faculty member on leave of absence is payment for teaching and not an honorarium.

(k) A lecture at a seminar organized by a nonprofit foundation with corporate sponsors does not qualify as teaching; the judge may accept reimbursement of expenses but not compensation. Same, for lecturing at a continuing education program

for physicians. Same, for participation in an international conference geared towards improvement of a foreign court system.

(l) A judicial employee may accept payment derived from a USAID grant for participating in a workshop concerning foreign legal education where the workshop was administered by an accredited educational institution and the employee's participation was an extension of his or her academic responsibilities at the institution.

§ 34.1-3 Writing More Extensive Than an Article

(a) Fee received by judge as editor-in-chief of a law journal is not an honorarium, but rather is compensation for writing more extensive than an article.

(a-1) Fee paid to judge was not an honorarium because judge's role was more extensive than writing an article, more nearly resembling the role of an editor — e.g., suggesting idea for reprint of selected essays, selecting several works to be reprinted, and writing the foreword.

(b) A judge who authors a substantial piece of scholarship for inclusion as a chapter of a treatise and receives compensation therefor has not received a prohibited honorarium, but rather has written a work more extensive than an article. In general, however, a judge should not accept compensation for writing a law review article.

(c) Compensation to law clerk for authoring or editing legal treatises or manuals, or updating same, does not constitute honorarium. Same, with respect to compensation to law clerk for writing case law summaries for a legal news service.

(d) A law clerk may establish an online discussion forum on legal issues, for compensation and outside of working hours, but should not be identified as a law clerk and should not provide information about cases pending or likely to arise before the court. Same for online CLE course, but the law clerk should remain anonymous and avoid interactive communication with attorney/students who appear in the clerk's court.

§ 34.1-4 Suitable Memento Provided It Is Neither Money nor of Commercial Value

- Advisory Opinion No. 88 (receipt of mementos or other tokens under prohibition against receipt of honoraria).

(a) The test for commercial value is whether the memento would have commercial value in the hands of the judge. Where the circumstances are such that a judge could not, consistent with the intent of the donor, transfer the tendered article to another, then a memento would ordinarily not have commercial value within the meaning of the outside employment regulations. Whether a memento is "suitable" depends upon whether its value is solely as a reminder of the occasion. If, in 1991, the

value is $200 or less, it is unlikely to have utilitarian or prestige value beyond its value as a reminder of the occasion.

(b) A judge may accept a leather notebook and pen from Law Institute as a memento of a judge's presentation. See Advisory Opinion No. 88. Judge may also accept a framed picture after speaking at a law student banquet.

(c) A judge may accept cufflinks from the attorney organizer after making remarks at a tribute to the legal profession, but the judge should consider recusal for a reasonable period thereafter, should the attorney appear before the judge.

§ 34.2 Exclusion for Honorarium Paid on Behalf of Judge to Qualified Charity Provided It Does Not Exceed $2000 and Is Not Made to a Charity from Which Judge or Specified Family Members Derive Any Financial Benefit

- Advisory Opinion No. 86 (honoraria, teaching, and outside earned income limitation).

(a) Where judge's lawyer-parent is compensated by a law firm that performs more than half the legal work of a University, the parent derives a financial benefit from the University and the judge may not direct an honorarium to be paid to that University.

(b) Judge who may not accept honorarium may direct that it be paid to charity, so long as amount does not exceed $2,000 and judge's close relatives do not directly benefit financially from the charity. Judge may direct payment in lieu of an honorarium to a Donor Advised Fund, so long as the ultimate recipients of the subsequent charitable contributions also meet the requirements of 26 U.S.C. § 170(c) and the contributions do not provide any financial benefit to the judge or the judge's family. See Judicial Conference Outside Employment Regulation, Guide, Vol. 2C, § 1020.30(c).

§ 35 Limitations on Outside Employment

(a) Limitations on outside employment under 5 U.S.C. § 13144(a) apply to judges and to specified covered senior judicial employees, which does not include assistant federal public defenders, who thus do not have to receive prior approval before teaching.

(b) A chief pretrial services officer is not subject to 5 U.S.C. § 13144(a) limiting outside employment and may invest in an automotive business where officer will not perform personal services or participate in the business except as a passive investor.

(c) A probation officer is not subject to 5 U.S.C. § 13144(a), limiting outside employment as a fiduciary, and may (with court approval) serve without compensation in a fiduciary capacity as a board member of a credit union. See Compendium § 32.2(a); Outside Employment Regulation, Guide, Vol. 2C, §§ 1020.20(b) and 1020.35(a).

§ 35.1 Affiliating With Any Entity To Provide Professional Services Involving a Fiduciary Relationship for Compensation

(a) A member of the legal staff of the United States Sentencing Commission should not earn a commission for assisting a real estate broker or salesperson, a referral fee for referring a prospective buyer or seller, or a flat or hourly fee for conducting an "open house" or for informing prospective sellers or buyers about the nuances of real estate marketing and transactions.

§ 35.2 Permitting Use of Name by Any Such Entity

(a) A judge should not permit a former law firm to continue using the judge's name; where the firm plans to remove the judge's name that year, the judge need not take steps to compel an immediate change.

§ 35.3 Practicing a Profession Involving a Fiduciary Relationship for Compensation

(a) Serving as a fiduciary of a family estate or trust as permitted by Canon 5D of the Code of Conduct for United States Judges does not constitute practicing a profession involving a fiduciary relationship under this section. See Commentary to Outside Employment Regulations; Advisory Opinion No. 96.

§ 35.4 Serving for Compensation as an Officer or Member of the Board of an Association, Corporation or Other Entity

(a) Service for compensation as editor-in-chief of a bankruptcy law journal is not the equivalent of being an officer or member of the board of an entity, and thus is not barred by this section.

(b) Although judge cannot receive compensation for service as a family fiduciary where the trust directs the operating policy of a charity because that would be the functional equivalent of serving as an officer or member of the board of directors in violation of 5 U.S.C. § 13144(a)(4), where the judge serves as family fiduciary charged only with duties normally exercised by a family fiduciary 5 U.S.C. § 13144(a)(4) is inapplicable. Rather, § 13144(a)(3) applies, as does the family fiduciary exception. Thus, the judge may receive compensation subject to the 15% cap.

(c) A judge's status as partner of a family partnership or shareholder of a family corporation is not the equivalent of serving as officer or member of the board of an entity, and thus the financial return to the judge as partner or shareholder is not prohibited by 5 U.S.C. § 13144(a)(4).

(d) A judge cannot receive compensation for serving as an officer or member of the board of a charitable or civic association, corporation, or other entity, but may accept reimbursement of reasonable expenses including transportation and meals and lodging away from home.

(d-1) A judge may not receive compensation for serving as director or officer of corporation, even if it is family business.

(e) A judge may not accept compensation for service as a trustee of a charitable trust that is functionally equivalent to a "charitable organization" under Canon 5B.

§ 35.5 Receiving Compensation for Teaching Without Prior Approval

- Advisory Opinion No. 87 (participation in CLE programs).

§ 35.6 Definition of Teaching

(a) A judge's participation in continuing legal education program sponsored by recognized provider of continuing legal education qualifies the compensation as being received from teaching as distinguished from honoraria.

(b) Qualified teaching is not limited to legal education, but includes, for example, participation in educational programs at accredited colleges and universities.

(c) University's payment of a summer research stipend to a tenured faculty member on leave of absence is payment for teaching for which the judge should obtain prior approval.

(d) A seminar for foreign justices offered by an accredited law school falls within the definition of teaching.

(e) Judge's work to revise teaching materials and teaching methodologies for law school course is considered "meaningful participation in bona fide components of an educational curriculum or plan" and qualifies as teaching for which the judge may be compensated.

§ 35.7 Outside Employment Regulation, Guide, Vol. 2C, § 1020.35(c) and (d), Detail Procedures for Obtaining Prior Approval for Teaching

(a) Where a judge failed to obtain *prior* approval of teaching, Chief Judge has authority to approve teaching for compensation *nunc pro tunc* if satisfied that the failure was occasioned by excusable neglect, the application would have been approved if timely filed, and other criteria for approval are satisfied. If circumstances do not justify *nunc pro tunc* approval, the judge's only recourse is to refund the compensation.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 1: Overview

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 110 Background

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§ 110 Background

Part C of Volume 2 contains Judicial Conference regulations and resolutions related to ethics, and related statutes. The regulations and statutes include ethics requirements that are in addition to the codes of conduct. For example, judges' outside income and employment are subject to the relevant Ethics Reform Act provisions, and other Ethics Reform Act provisions regulate the acceptance of gifts and honoraria by judges and judicial employees. For these reasons, it is important to review applicable statutes and regulations as well as the applicable codes of conduct.

Last revised (Transmittal GR-4) September 2, 2009

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§ 260 Confidentiality

§ 270 Role of the Internal Revenue Service

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§ 210 Overview

§ 210.10 History

These regulations became effective on September 18, 2007 (JCUS-SEP 2007, p. 11).

§ 210.20 Authority

Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, Div. A, § 418, *amending* 26 U.S.C. (I.R.C.) § 1043 (2000).

§ 210.30 Purpose and Scope

(a) These regulations implement 26 U.S.C. (I.R.C.) § 1043, which allows an eligible person to defer paying capital gains tax on property sold to comply with conflict of interest requirements. To defer the gains, an eligible person must obtain a Certificate of Divestiture before selling the property. Pursuant to a delegation from the Judicial Conference, the Committee on

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Codes of Conduct (Committee) is authorized to take dispositive action on requests for Certificates of Divestiture relating to judges and judicial officers other than the Chief Justice of the United States and the associate justices of the Supreme Court. These regulations describe the circumstances when an eligible person may obtain a Certificate of Divestiture and establish the procedures that the Committee uses to issue Certificates of Divestiture.

(b) The purpose of 26 U.S.C. (I.R.C.) § 1043 and these regulations is to minimize the burden that would result from paying capital gains tax on the sale of assets to comply with conflict of interest requirements. Minimizing this burden aids in attracting and retaining highly qualified personnel in the judicial branch and strengthens the confidence of the public in the integrity of the federal judiciary (JCUS-SEP 2007, p. 11; and JCUS-MAR 2007, p. 6).

§ 210.40 Definitions

For purposes of this chapter:

(a) Eligible Person

(1) A judge of a United States court of appeals, a district court (including a bankruptcy, magistrate, or territorial judge), the Court of International Trade, the Tax Court (including a special trial judge), the Court of Federal Claims, the Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Armed Forces;

(2) The spouse or any minor or dependent child of the individual referred to in subparagraph (1) of this definition; and

(3) Any trustee holding property in a trust in which an individual referred to in subparagraph (1) or (2) of this definition has a beneficial interest in principal or income.

(b) Permitted Property

Any obligation of the United States or any diversified investment fund approved by regulations issued by the Office of Government Ethics (OGE). **See:** OGE Regulations, 5 CFR 2634.1003.

Note: Not all forms of permitted property under the OGE regulations will necessarily avoid subsequent conflicts under Canon 3C(3)(c). Judges may seek guidance from the Committee as to recusal considerations arising from subsequently acquired permitted property.

§ 220 Availability of Certificates of Divestiture

(a) The Committee may issue a Certificate of Divestiture for specific property as provided by these regulations if the Committee determines that divestiture of the property by an eligible person is reasonably necessary to comply with 28 U.S.C. § 455, Canon 3C of the Code of Conduct for United States Judges, or any other federal conflict of interest statute, regulation, rule, or judicial canon.

(b) The Committee may issue a Certificate of Divestiture in the following circumstances:

(1) Current Conflict

To divest property presenting a conflict of interest in a proceeding that is currently before the judge;

(2) Preemptive Divestiture

To divest property likely to result in a conflict of interest in proceedings that may come before the judge. **See:** § 240.10.

Example #1: A circuit judge owns shares in a number of companies that often have appeals in the judge's court. A Certificate of Divestiture may be issued to permit the judge to divest all shares in those companies, provided that the judge agrees to divest shares in all companies that present the same likely conflict. The judge may retain stock in companies that do not present the same likely conflict.

Example #2: A district judge owns a pooled stock investment through a broker in which the judge has no prior knowledge of or control over the trades, which occur frequently and result in unavoidable financial conflicts. A Certificate of Divestiture may be issued to permit the judge to divest all similar pooled stock investments.

Example #3: A bankruptcy judge and the judge's spouse both own stock in local banks that appear regularly as parties in bankruptcy cases. A Certificate of Divestiture may be issued to permit the judge and spouse to divest all stock in local banks and similar financial institutions.

§ 230 Unavailability of Certificates of Divestiture

(a) Federal law does not provide for issuance of a Certificate of Divestiture in the following circumstances:

(1) Sale of the property will not give rise to capital gains (e.g., because any gain is ordinary income or because no gain results);

(2) The property owner is not an eligible person;

(3) The property was sold before issuance of a Certificate of Divestiture.

(b) The Committee, in its sole discretion, may deny a request for a Certificate of Divestiture, including in the following circumstances:

(1) The Committee concludes that divestiture is not reasonably necessary to comply with conflict of interest requirements within the meaning of 26 U.S.C. (I.R.C.) § 1043;

(2) The entire conflict of interest (either current or preemptive) will not be resolved because an eligible person has not agreed to divest all similar or related property that presents the same conflict;

(3) The property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan or retirement plan and the eligible person can otherwise roll over the property into an eligible tax-deferred retirement plan within the 60-day reinvestment period;

(4) The property was acquired voluntarily (e.g., by purchase or gift, but not by inheritance) at a time when ownership of the property created a conflict in the proceeding that gives rise to the request for a Certificate of Divestiture;

(5) The eligible person received a preemptive Certificate of Divestiture under § 220(b)(2) and subsequently acquired the property voluntarily (e.g., by purchase or gift, but not by inheritance) at a time when acquisition of the property presented the same likely conflict addressed in the earlier Certificate of Divestiture.

§ 240 How to Obtain a Certificate of Divestiture

A judge seeking a Certificate of Divestiture must submit a written request to the Committee. (Application for Certificate of Divestiture (Form AO 308) is available for this purpose). The request must contain the following:

(a) A full and specific description of the property to be divested (e.g., if the property is corporate stock, the number of shares for which the Certificate of Divestiture is sought).

(b) A brief description of how and when the eligible person acquired the property.

(c) A certification that divestiture of the property will resolve the entire conflict.

(d) A statement from the eligible person(s) (or legal representative) holding the property agreeing to divest the property within a reasonable time.

(e) A copy of the judge's latest financial disclosure report and a statement indicating the section and line number of the report where the property to be divested is reported. If the property is not reported in the latest financial disclosure report, a statement explaining why it is not.

(f) In the case of property held in a trust, a copy of the trust instrument, as well as a list of the trust's current holdings, unless the holdings are listed on the most recent financial disclosure report.

(**Note:** In certain cases involving divestiture of property held in a trust, the Committee may decline to issue a Certificate of Divestiture unless the parties take actions which, in the opinion of the Committee, are appropriate to exclude, to the extent practicable, parties other than eligible persons from benefitting from the deferral of capital gains. Such actions may include, as permitted by applicable state law, division of the trust into separate portfolios, special distributions, dissolution of the trust, or anything else deemed feasible by the Committee, in its sole discretion.)

(g) A statement that describes why divestiture of the property is reasonably necessary to comply with a federal conflict of interest statute, regulation, rule, or judicial canon, including a certification that divestiture is sought for conflict reasons and not for purposes of financial management.

(h) In the case of divestiture under 28 U.S.C. § 455(f) and/or Canon 3C(4), a statement indicating that the judge does not believe the property to be divested could be substantially affected by the outcome of the matter giving rise to the conflict of interest.

(**Note:** If the property to be divested could be substantially affected by the outcome of the matter at issue, divestiture would not be available under Canon 3C(4) to enable the judge to continue participating in the matter. Recusal would still be necessary even after a divestiture of such property. In this situation, a certificate would not issue.)

(i) Any additional information requested by the Committee.

After reviewing the materials submitted and making a determination that all requirements have been met, the Committee may issue a Certificate of Divestiture.

§ 240.10 Factors Considered Related to Preemptive Divestiture

(a) In making a decision on an application for preemptive divestiture the Committee will consider all of the relevant circumstances, including, where the property consists of shares in a company:

(1) the number of times a conflict of interest may arise if the property is not divested, including:

(A) the legal or physical presence of the company in the judicial circuit or district;

(B) the actual litigation history of the company in the judicial circuit or district; and

(C) any recent merger, acquisition, or other activity indicating the company may become engaged in litigation in the judicial circuit or district;

(2) the availability of other judges on the court to hear cases when the requesting judge has a conflict of interest due to the property for which divestiture is sought;

(3) whether the disqualification of the requesting judge would unduly burden judicial resources in the judicial circuit or district;

(4) the length of time the requesting judge (or eligible person) has owned the property;

(5) whether granting the preemptive divestiture would give rise to an appearance of impropriety.

(b) As a general matter, preemptive divestiture of the property should be sought no later than 18 months following:

(1) the date of the appointment;

(2) the date the judge (or eligible person) acquires the property; or

(3) the date on which it becomes apparent that facts about the property (e.g., in the case of shares in a company, the company's legal or

physical presence in the judicial circuit or district) have changed so as to substantially increase the likelihood of a conflict of interest.

§ 250 Divestiture and Reinvestment in Permitted Property

An eligible person who receives a Certificate of Divestiture must divest the property within a reasonable time (not to exceed 90 days, absent special circumstances). In order to qualify for deferral of capital gains, an eligible person must reinvest the proceeds from the sale of the property divested pursuant to a Certificate of Divestiture into permitted property during the 60-day period beginning on the date of the sale. The proceeds may be reinvested into one or more types of permitted property.

§ 260 Confidentiality

Requests for Certificates of Divestiture and the Committee's responses thereto are confidential and will be disclosed only when the eligible person consents by waiving confidentiality, either expressly or impliedly, or when required by law. For the purposes of this section, disclosure to the Internal Revenue Service (IRS) does not constitute a waiver of confidentiality.

§ 270 Role of the Internal Revenue Service

The IRS has jurisdiction over the tax aspects of a divestiture made pursuant to a Certificate of Divestiture. An eligible person who elects to defer capital gains from the sale of property pursuant to a Certificate of Divestiture must follow IRS requirements for reporting the sale of the property, the reinvestment transaction (including whether the proposed acquisition meets the requirement for permitted property), and the election under 26 U.S.C. (I.R.C.) § 1043 not to recognize capital gains. An eligible person should consult a personal tax advisor or the IRS for guidance on these matters.

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Ch. 3: Conflicts of Interest

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 310 Statutory Texts on Conflicts of Interest

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§ 310 Statutory Texts on Conflicts of Interest

The following statutes relate to conflicts of interest:

- Fee Agreements in Cases under Title 11 and Receiverships (18 U.S.C. § 155);
- Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government (18 U.S.C. § 203);
- Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government (18 U.S.C. § 205);
- Purchase of Claims for Fees by Court Officials (18 U.S.C. § 291); and
- Appointment and Tenure (28 U.S.C. § 631(c)).

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Ch. 4: Conflicts Screening Requirements

§ 410 Mandatory Conflict Screening
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- § 410.20 Definitions
- § 410.30 Policy Requirements
- § 410.40 Model Conflict Review Certification Statement
- § 410.50 Model Conflict Screening Implementation Plan

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§ 410 Mandatory Conflict Screening

§ 410.10 Overview

The Judicial Conference of the United States adopted a mandatory conflict screening policy in 2006 (JCUS-SEP 2006, p. 11), and amended the policy in 2022 (JCUS-MAR 2022, pp. 10-11). This chapter includes three main elements:

(a) policy requirements (§ 410.30);

(b) a model certification statement for judges (§ 410.40); and

(c) a model implementation plan (§ 410.50).

§ 410.20 Definitions

(a) "Conflict of interest" or "conflict" refers to an interest that disqualifies a judge as provided in Canon 3C(1) of the Code of Conduct for United States Judges. **See also:** 28 U.S.C. § 455(a) and (b).

(b) "Financial conflict" or "financial conflict of interest" refers to a financial interest that disqualifies a judge as provided in Canon 3C(1)(c) of the Code of Conduct for United States Judges. **See also:** 28 U.S.C. § 455(b)(4).

(c) "Financial interest" has the meaning established in Canon 3C(3)(c) of the Code of Conduct for United States Judges. **See also:** 28 U.S.C. § 455(d)(4).

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Last revised (minor form-name change) January 28, 2026

(d) "Judge" refers to circuit, district, bankruptcy, and magistrate judges and any other judicial officers, such as a special master, subject to the Code of Conduct for United States Judges under the "Compliance with the Code of Conduct" section.

§ 410.30 Policy Requirements

(a) Based on the proven effectiveness of automated conflict screening and the importance of extending its use to all courts, the Judicial Conference in 2006 adopted a mandatory conflict screening policy requiring the use of automated conflict screening. That policy was amended in 2022.

(b) This mandatory conflict screening policy applies to financial conflicts of interest, but courts and judges should use automated conflict screening for other types of conflicts that would require a judge to disqualify himself or herself from a proceeding.

(c) Automated conflict screening is required in addition to each judge's personal review of cases for conflicts. Each judge is ultimately responsible for identifying and avoiding conflicts of interest and must ensure that assigned matters are reviewed for conflicts before action is taken in a case.

(d) This policy is administered and directed by the circuit councils, under 28 U.S.C. § 332(d)(1), or by the individual courts not subject to the authority of a circuit council. (**Note:** This Judicial Conference policy extends to courts of appeals, district courts, the Court of International Trade, the Court of Federal Claims, and bankruptcy courts, and to the judicial officers of those courts, but does not extend to the Supreme Court.)

§ 410.30.10 Administrative Office of the U.S. Courts

The Administrative Office, in cooperation with the courts, must do the following:

(a) Continue developing, refining, and deploying the necessary technological tools for automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system or any future system approved by the Judicial Conference.

(b) Examine ways to improve the screening, including more sophisticated matching mechanisms and features available in other software.

(c) Provide information, training, and assistance to facilitate implementation of and participation in the screening.

§ 410.30.20 Judges' Responsibilities

Each judge must do the following:

(a) Keep informed about personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of a spouse and minor children residing in the household.

(b) Develop a "financial recusal list," identifying financial conflicts for use in conflict screening. Form AO 300 (Checklist for Financial Conflicts) may assist judges in developing a financial recusal list.

(c) Review the financial recusal list regularly, at least semiannually, and update it whenever there is a change in the judge's financial interests (or the financial interests of a spouse or minor child) that would require recusal.

(d) Enter the financial recusal list into the court's automated screening process database, either personally or with the assistance of chambers staff or clerk's office staff.

(e) Personally review each case for financial conflicts at or before case assignment, if practicable, or no later than before taking any action in a case.

(f) When notice is provided to the judge (or designee) that a possible conflict has been identified, determine whether a conflict exists and then arrange for appropriate action to resolve the conflict (i.e., recusal or divestiture of the interest).

(g) Complete and submit a conflict review "certification statement" semiannually, or more frequently if required by the circuit council. **See:** § 410.40 (Model Conflict Review Certification Statement).

§ 410.30.30 Court Responsibilities

Each court must do the following:

(a) Implement automated conflict screening to identify financial conflicts of interest for judges.

(b) Take reasonable steps to ensure that parties provide timely information relevant to conflict screening (including corporate parent information) and either:

(1) enter the information promptly into the automated conflict screening system; or

(2) require that the parties enter and update the information, if feasible.

(c) Screen for financial conflicts:

(1) either before or at the time a case is assigned to a judge;

(2) on a regular schedule — at least weekly;

(3) each time a judge updates his or her financial recusal list; and

(4) each time a new party is added to a case.

(d) Notify the judge (or designee) when a financial conflict is identified so that the judge can decide how to address it. For the court of appeals and the bankruptcy appellate panel, allow the judges to authorize the clerk of court to assign a matter to another judge when a financial conflict is identified before an initial assignment is made.

(e) Make reports as requested by the chief judge of the court and the circuit council.

(f) Provide information about automated conflict screening, including regular reminders to judges, training, and assistance, to facilitate participation in the screening.

(g) Implement the conflict screening software to identify financial conflicts based on the existing capabilities of the screening software for each court type (appellate, district, bankruptcy) and consistent with this policy.

(h) Each court not subject to the authority of a circuit council must assume the responsibilities in § 410.30.40, below.

§ 410.30.40 Circuit Council Responsibilities

Each circuit council must do the following:

(a) By June 30, 2022, adopt a Conflict Review Certification Statement that is consistent with this chapter and the model statement in § 410.40.

(b) By June 30, 2022, adopt a conflict screening implementation plan that is consistent with this chapter and the model plan in § 410.50. Afterwards, make further reports as required by the Judicial Conference. The implementation plan adopted by the circuit council may include requirements beyond those included in this chapter, and each circuit council is strongly encouraged to consider extending the mandatory use of automated conflict screening to include other types of conflicts under Canon 3C(1) of the Code of Conduct for United States Judges.

(c) Require chief judges within the circuit to report annually to the circuit council on the status of automated financial conflict screening in their court.

(d) Make all necessary and appropriate orders to implement this mandatory conflict screening policy within the circuit, considering the specific circumstances of that circuit, and each judicial officer and court within it, and providing for appropriate exceptions.

§ 410.40 Model Conflict Review Certification Statement

Circuit councils must adopt a conflict review certification statement that is consistent with this chapter and the model below.

Judge's Semiannual Conflict Review Certification Statement

As required by the Judicial Conference Mandatory Conflict Screening Policy and the [_____ Circuit] Conflict Screening Implementation Plan, I certify that:

(1) I have read and understand the Judicial Conference Mandatory Conflict Screening Policy (*Guide to Judiciary Policy,* Vol. 2, Pt. C, Ch. 4), and the Code of Conduct for U.S. Judges.

(2) Consistent with my obligations under Canon 3C(1)(c) and 3C(2) of the Code of Conduct, I have reviewed my financial holdings and those of my spouse and any minor child residing in my household. (In addition, the Commentary to Canon 3C provides: "Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.")

(3) I have prepared or updated my financial recusal list to include all financial conflicts known to me or I do not have any financial interests (including those of my spouse and any minor child) that would create a financial conflict under Canon 3C(1)(c). See *Ethics Deskbook for United States Judges*, § 4.03. See also Form AO 300 (Checklist for Financial Conflicts).

(4) I have implemented appropriate procedures to screen for all other types of conflicts under Canon 3C(1) of the Code of Conduct for United States Judges. See *Ethics Deskbook for United States Judges*, § 4.01. See also Form AO 301 (Checklist for Other Mandatory Conflicts).

Dated this ___ day of ___ 20___ _____
Judge

§ 410.50 Model Conflict Screening Implementation Plan

Circuit councils must adopt a conflict screening implementation plan that is consistent with this chapter and the model below.

JUDICIAL COUNCIL OF THE _____ CIRCUIT

MANDATORY CONFLICT SCREENING IMPLEMENTATION PLAN

Authority: The Judicial Council of the _____ Circuit ("circuit council") adopts this plan under the authority provided in 28 U.S.C. § 332(d)(1) and consistent with the mandatory financial conflict screening policy adopted by the Judicial Conference on Sept. 19, 2006 (Report of the Proceedings, p. 11), and amended on March 15, 2022 (Report of the Proceedings, p. __).

§ 1 Scope. This plan applies to the court of appeals, bankruptcy appellate panel, district courts, and bankruptcy courts within the _____ Circuit, and to each active, senior and recalled judge of those courts, and to visiting judges to those courts to the extent practical. This plan does not apply to judges retired under 28 U.S.C. §§ 371(b) or 372(a) and not performing duties. While the Judicial Conference policy requires automated screening only for financial conflicts, circuit councils are strongly encouraged to consider extending the mandatory use of automated conflict screening to include other types of conflicts under Canon 3C(1) of the Code of Conduct for United States Judges.

§ 2 Definitions. For purposes of this plan:

(a) "Conflict of interest" or "conflict" refers to an interest that disqualifies a judge as provided in Canon 3C(1) of the Code of Conduct for United States Judges. See also 28 U.S.C. § 455(a), (b).

(b) "Financial conflict" or "financial conflict of interest" refers to a financial interest that disqualifies a judge as provided in Canon 3C(1)(c) of the Code of Conduct for United States Judges. See also 28 U.S.C. § 455(b)(4).

(c) "Financial interest" has the meaning set forth in Canon 3C(3)(c) of the Code of Conduct for United States Judges. See also 28 U.S.C. § 455(d)(4).

(d) "Judge" refers to circuit, district, bankruptcy, and magistrate judges and any other judicial officers, such as a special master, subject to the Code of Conduct for United States Judges under the "Compliance with the Code of Conduct" section.

§ 3 Obligations of Courts. Each court is required to implement automated screening to identify possible conflicts of interest for each judge appointed, designated and assigned, transferred, temporarily assigned, or recalled to serve on the court. Each court must use the screening component of the Case Management/Electronic Case Files (CM/ECF) system or other automated screening approved by the circuit council under § 6 of this plan or the Judicial Conference. In implementing the screening, each court must:

(a) ensure that relevant information is added to the conflict screening system on a timely basis for each matter (including the parties, attorneys, law firms, and corporate parents disclosed by the parties);

(b) either enter the judge's recusal list into the database used for automated screening or assist the judge or chambers staff to do so;

(c) take reasonable steps to ensure that parties and/or attorneys provide information needed for conflict screening, including corporate parent statements as required by Fed. R. App. P. 26.1, Fed. R. Bankr. P. 1007(a)(1), and 7007.1, Fed R. Civ. P. 7.1, and Fed. R. Crim. P. 12.4;

(d) conduct automated screening of all new matters as they are assigned or about to be assigned to a judge or panel, and screen existing matters each time a judge updates his or her recusal list, or whenever a new party is added to a case, and no less frequently than on a weekly basis;

(e) notify the judge (or designee) when a possible conflict is identified, or for the court of appeals and the bankruptcy appellate panel, allow the judges to authorize the clerk of court to assign a matter to another judge when a conflict is identified before an initial assignment is made;

(f) provide periodic notices to judges reminding them to review and update their recusal lists and to review and update the designee (if any) who will receive notice when a possible conflict is identified; and

(g) provide information, training, and assistance to judges and staff to facilitate their participation in automated screening.

§ 4 Obligations of Judges. Each judge has the ultimate responsibility for identifying and avoiding conflicts of interest and must ensure that assigned matters are reviewed for conflicts before action is taken in the matter. To assist in discharging this obligation, each judge is required to use automated screening to identify financial conflicts of interest by using the screening system implemented by each court to which the judge is appointed, designated and assigned, transferred, temporarily assigned, or recalled to serve. Each judge must also use the court's automated screening to identify conflicts of interest other than financial conflicts. Form AO 300 (Checklist for Financial Conflicts) and Form AO 301 (Checklist for Other Mandatory Conflicts) may be helpful to judges in developing a recusal list. (Financial disclosure reports prepared under 5 U.S.C. §§ 13101-13111 may also be used for this purpose, although the disclosures on these reports are not co-extensive with disqualification requirements).

Each judge must:

(a) Keep informed about personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the spouse and minor children residing in the household, as required by Canon

3C(2) of the Code of Conduct for United States Judges. See also 28 U.S.C. § 455(c).

(b) Develop a "recusal list," identifying financial and other conflicts, for use in automated screening.

(c) Review the recusal list regularly and update the recusal list whenever there is a change in the judicial officer's financial interests (or the financial interests of a spouse or minor child) that would require recusal.

(d) Complete a "Conflict Review Certification Statement" and submit it to the chief judge of the court or circuit council semiannually.

(e) Use the recusal list in the court's automated screening process by entering the financial interests and other conflicts listed into the database used for automated screening, either personally or with the assistance of chambers staff or court staff.

(f) Personally review each case for conflicts at or before the time of case assignment, if practicable, or no later than before taking any action in a case.

(g) When notice is provided to the judge (or designee) that a possible conflict has been identified, determine whether a conflict exists and then arrange for appropriate action to resolve the conflict (i.e., recusal or divestiture of the interest).

§ 5. Exceptions. Upon application, the circuit council may except a judge from § 4 of this plan if the circumstances indicate that the judge's participation in automated screening is unnecessary to identify conflicts of interest or is otherwise infeasible, such as when the judge has no case currently assigned and is not receiving new case assignments (e.g., due to serious illness).

§ 6. Approval of Alternative Screening. A court may request that the circuit council approve an alternative automated screening system other than CM/ECF or any future system approved by the Judicial Conference. The circuit council must approve an alternative system only if its functionality is comparable to the automated screening in CM/ECF in all major respects, including the ability to:

(a) create and store electronically a judge's recusal list;

(b) compare entries on a judge's list to parties, attorneys, law firms, and corporate parents in the court's docket;

(c) allow for screening on a regularly scheduled basis and on an ad hoc basis; and

(d) provide notice to a judge when a possible conflict is identified.

§ 7. Reporting Obligations.

(a) Each chief judge must make such reports as are requested by the circuit council. The first report must be filed by January 1, 2023, and further reports should be filed annually.

(b) Each chief judge's annual report must contain the following information:

(1) the availability of automated screening at the court;

(2) a description of how the system is used including:

- who enters information from recusal lists (chambers or clerk's office),
- how frequently lists are updated,
- how frequently the screening program is run,
- whether the program is run automatically or only on request, and
- the means used to notify judges of possible conflicts;

(3) the identity of judges not using automated screening;

(4) the reasons given for not using automated screening;

(5) how conflict screening works for visiting judges;

(6) difficulties with or complaints about automated screening, including any observed failure to identify a conflict;

(7) confidentiality concerns;

(8) difficulty entering information into the database or running the screening;

(9) suggestions for improving the conflict screening process; and

(10) such other information as requested.

§ 8. Confidentiality of Recusal Lists. Nothing in this plan requires a court or judge to disclose the contents of a recusal list to anyone except to the limited extent necessary in the court's implementation of its automated screening. The Judicial Conference previously rejected a suggestion that it encourage courts to maintain a recusal list for each judge that would be available to litigants upon written request (JCUS-MAR 1999, pp. 11-12, 17-18).

§ 9. Enforcement. Under the authority of 28 U.S.C. § 332(d)(1), courts and judges subject to this plan must comply with its requirements. A judge who violates this plan may be subject to discipline under 28 U.S.C. §§ 332(d)(2) and 351-364. A judge appointed by a court who violates this plan may be subject to discipline by the appointing court in accordance with existing customary practices.

§ 10. Effective Date. This plan takes effect on _____ *[insert date]*.

Adopted by the Judicial Council of the _____ Circuit on _____ *[insert date]*.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 5: Disqualification and Recusal

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 510 Statutory and Rules Texts on Disqualification and Recusal

§ 515 Model Forms for Waiver of Disqualification

§ 520 Interest in Litigation

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§ 510 Statutory and Rules Texts on Disqualification and Recusal

The following statutes and rules relate to disqualification and recusal:

- Disqualification of trial judge to hear appeal (28 U.S.C. § 47);
- Bias or prejudice of judge (28 U.S.C. § 144);
- Disqualification of justice, judge, or magistrate judge (28 U.S.C. § 455);
- Disqualification of bankruptcy judge (Bankruptcy Rule 5004); and
- Prohibition of ex parte contacts in bankruptcy proceedings (Bankruptcy Rule 9003).

§ 515 Model Forms for Waiver of Disqualification

(a) Canon 3D of the Code of Conduct for United States Judges (Guide, Vol 2A, Ch 2) provides that, when a judge is disqualified in a proceeding because "the judge's impartiality might reasonably be questioned" under Canon 3C(1), instead of withdrawing from the proceeding the judge may disclose on the record the basis of disqualification and may continue to preside if all parties consent. Canon 3D further provides, in particular, that "[t]he judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding."

Last substantive revision (Transmittal 02-011) March 27, 2013
Last revised (minor technical changes) March 17, 2015

(b) The Judicial Conference has approved three versions of a Model Form for Waiver of Judicial Disqualification: one for civil *pro se* cases, one for all other civil cases, and one for criminal cases. JCUS-SEP 2011, p.12. For each case type, the Model Form consists of two parts:

(1) The first part of each model form is a notice that may be issued by the clerk of court to inform the parties of a judge's intent to disqualify under Canon 3C(1).

(2) The second part of each model form is a sample "waiver of disqualification letter" that attorneys or pro se litigants may use if they agree to waive a judge's disqualification in response to the clerk's notice.

(c) The Model Forms are available on JNet's Ethics Forms page.

§ 520 Interest in Litigation

In October 1971, the Judicial Conference adopted the following resolution (JCUS-OCT 71, pp.68-69):

> In all cases involving actual, potential, probable or possible conflicts of interest, a federal judge should reach his own determination as to whether he should recuse himself from a particular case, without calling upon counsel to express their views as to the desirability of his remaining in the case. The too frequent practice of advising counsel of a possible conflict and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 6: Gifts to Judicial Officers and Employees

§ 610 Statutory Texts on Gifts

§ 620 Judicial Conference Regulations on Gifts
- § 620.10 Authority
- § 620.15 Purpose and Scope
- § 620.20 Definition of Judicial Officer or Employee
- § 620.25 Definition of Gift
- § 620.30 Solicitation of Gifts by a Judicial Officer or Employee
- § 620.35 Acceptance of Gifts by a Judicial Officer or Employee; Exceptions
- § 620.40 Solicitation and Acceptance of Gifts Among Judicial Officers and Employees
- § 620.45 Additional Limitations
- § 620.50 Disclosure Requirements
- § 620.55 Advisory Opinions
- § 620.60 Disposition of Prohibited Gifts
- § 620.65 Commentary on Regulations
- § 620.70 Notes on Regulations

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§ 610 Statutory Texts on Gifts

The following statutes relate to gifts:

- Gifts to Superiors (5 U.S.C. § 7351); and
- Gifts to Federal Employees (5 U.S.C. § 7353).

§ 620 Judicial Conference Regulations on Gifts

§ 620.10 Authority

Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 301 and 303, 103 Stat. 1716, 1745-1747 (1989), as amended. These regulations are promulgated by the Judicial Conference of the United States under the authorities of 5 U.S.C. §§ 7351(c), 7353(b)(1), and 7353(d)(1)(C).

Last revised (Transmittal 02-062) July 27, 2021

§ 620.15 Purpose and Scope

(a) These regulations implement 5 U.S.C. §§ 7351 and 7353, which prohibit the giving, solicitation, or acceptance of certain gifts by officers and employees of the judicial branch and provide for the establishment of such reasonable exceptions to those prohibitions as the Judicial Conference of the United States finds appropriate. The regulations do not proscribe all gifts but only those from certain persons and in certain circumstances, specifically defined below.

(b) Nothing in these regulations alters any other requirements imposed by statutes, other regulations, or the Codes of Conduct adopted by the Judicial Conference of the United States, which may in certain circumstances prohibit or advise against acceptance of gifts not prohibited by these regulations.

(c) Any violation of any provision of these regulations will make the officer or employee involved subject to appropriate disciplinary action.

(d) These regulations do not apply to a gift that is accepted under specific statutory authority, including 5 U.S.C. § 7342 for foreign gifts and decorations, and 28 U.S.C. § 604(a)(17) for gifts to the judicial branch. **See:** Guide, Vol. 2C, Ch. 7 and Ch. 15.

§ 620.20 Definition of Judicial Officer or Employee

In these regulations, a "judicial officer or employee" means a United States circuit judge, district judge, judge of the Court of International Trade, judge of the Court of Federal Claims, judge and special trial judge of the Tax Court, judge of the Court of Appeals for Veterans Claims, bankruptcy judge, magistrate judge, commissioner of the Sentencing Commission, and any employee of the judicial branch other than an employee of the Supreme Court of the United States or the Federal Judicial Center.

§ 620.25 Definition of Gift

"Gift" means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value but does not include:

(a) social hospitality based on personal relationships;

(b) modest items, such as food and refreshments, offered as a matter of social hospitality;

(c) greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

(d) loans from banks and other financial institutions on terms that are available based on factors other than judicial status;

(e) opportunities and benefits, including favorable rates and commercial discounts, that are available to the public, a class consisting of all federal employees, or are available based on factors other than judicial status;

(f) rewards and prizes given to competitors in contests or events, including random drawings, that are open to the public and that are available based on factors other than judicial status;

(g) scholarships or fellowships awarded on the same terms and based on the same criteria applied to other applicants and that are based on factors other than judicial status;

(h) anything for which market value is paid by the judicial officer or employee;

(i) any payment, compensation, or reimbursement the acceptance of which is permitted by the Regulations of the Judicial Conference Concerning Outside Earned Income, Honoraria, and Outside Employment; and

(j) anything that is paid for by the judiciary or secured by the judiciary under contract.

§ 620.30 Solicitation of Gifts by a Judicial Officer or Employee

A judicial officer or employee is not permitted to solicit a gift from any person who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties.

§ 620.35 Acceptance of Gifts by a Judicial Officer or Employee; Exceptions

(a) A judicial officer or employee is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties.

(b) Notwithstanding this general rule, a judicial officer or employee may accept a gift from a donor identified above in the following circumstances:

(1) the gift is made incident to a public testimonial and is fairly commensurate with the occasion;

(2) the gift consists of books, calendars, or other resource materials related to the official duties of the judicial officer or employee that are supplied on a complimentary basis, so long as acceptance of the gift does not create an appearance of impropriety;

(3) the gift consists of an invitation and travel expenses, including the cost of transportation, lodging, and meals for the officer or employee and a family member (or other person with whom the officer or employee maintains both a household and an intimate relationship) to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice;

(4) the gift is from a relative or friend, if the relative's or friend's appearance or interest in a matter would in any event require that the officer or employee take no official action with respect to the matter, or if the gift is made in connection with a special occasion, such as a wedding, anniversary, or birthday, and the gift is fairly commensurate with the occasion and the relationship;

(5) the gift consists of meals, lodgings, transportation, and other benefits customarily provided by a prospective employer in connection with bona fide employment discussions, so long as conflicts of interest are avoided;

(6) in the case of a judicial officer or employee who has obtained employment to commence after judicial employment ends, the gift consists of reimbursement of relocation and bar-related expenses customarily paid by the employer, so long as conflicts of interest are avoided;

(7) the gift is incident to the business, profession or other separate activity of the officer or employee or the spouse or other family member of an officer or employee residing in the officer's or employee's household, including gifts for the use of both the spouse or other family member and the officer or employee (as spouse or family member), so long as the gift is of the type customarily provided to others in similar circumstances and is not offered or enhanced because of the judicial officer's or employee's official position; or

(8) the gift (other than cash or investment interests) is to a judicial officer or employee other than a judge or a member of a judge's personal staff and has an aggregate market value of $50 or less per occasion, provided that the aggregate market value of

individual gifts accepted from any one person under the authority of this subsection does not exceed $100 in a calendar year.

§ 620.40 Solicitation and Acceptance of Gifts Among Judicial Officers and Employees

(a) A judicial officer or employee is not permitted to solicit a contribution from another officer or employee for a gift to an official superior, make a donation as a gift or give a gift to an official superior, or accept a gift from an officer or employee receiving less pay than himself or herself.

(b) Notwithstanding this general rule, a judicial officer or employee may on an occasional basis:

(1) collect voluntary contributions for a gift, or make a voluntary gift, to an official superior, or accept a gift from a judicial officer or employee receiving less pay, on a special occasion such as marriage, anniversary, birthday, retirement, illness, or under other circumstances in which gifts are traditionally given or exchanged;

(2) share food and refreshments with other judicial officers or employees in the court or office;

(3) offer hospitality at the residence of the judicial officer or employee, or accept items given in connection with the receipt of hospitality, provided that the hospitality offered and the items given are of the same type and value customarily extended to personal friends; or

(4) accept a gift from a judicial officer or employee receiving less pay than himself or herself when there is a personal relationship that would justify the gift and the recipient does not exercise any authority over the officer or employee offering the gift.

§ 620.45 Additional Limitations

Notwithstanding the provisions of § 620.35, no gift may be accepted by a judicial officer or employee if a reasonable person would believe it was offered in return for being influenced in the performance of an official act or in violation of any statute or regulation, nor may a judicial officer or employee accept gifts from the same or different sources on a basis so frequent that a reasonable person would believe that the public office is being used for private gain. A judicial officer or employee should decline a gift permitted by these regulations if acceptance would cause the officer or employee to violate any applicable provision of the Codes of Conduct.

§ 620.50 Disclosure Requirements

Judicial officers and employees subject to the Ethics in Government Act of 1978 and the instructions of the Financial Disclosure Committee of the Judicial Conference of the United States must comply with the Act and the instructions in disclosing gifts.

§ 620.55 Advisory Opinions

The Committee on Codes of Conduct of the Judicial Conference of the United States is authorized to render advisory opinions interpreting Title III of the Ethics Reform Act of 1989 (5 U.S.C. §§ 7351 and 7353) and these regulations (JCUS-MAR 1990, pp. 14-15). Any person covered by the Act and these regulations may request an advisory opinion by sending an email to the chair of the Committee on Codes on Conduct or by writing to:

Chair of the Committee on Codes of Conduct
c/o Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

§ 620.60 Disposition of Prohibited Gifts

(a) A judicial officer or employee who has received a gift that cannot be accepted under these regulations should return any tangible item to the donor, except that a perishable item may be given to an appropriate charity, shared within the recipient's office, or destroyed.

(b) A judicial agency may authorize disposition or return of gifts at Government expense.

§ 620.65 Commentary on Regulations

(a) All officers and employees of the judicial branch hold appointive positions. Title III of the Ethics Reform Act of 1989 (5 U.S.C. §§ 7351 and 7353) thus applies to all officers and employees of the judicial branch. However, the Judicial Conference has delegated its administrative and enforcement authority under the Act for officers and employees of the Supreme Court of the United States to the Chief Justice of the United States and for employees of the Federal Judicial Center to its Board. For this reason, the definition of "judicial officer or employee" does not include every judicial officer or employee whose conduct is governed by Title III. For purposes of Title III and these regulations, employees of the Tax Court and the Court of Appeals for Veterans Claims are employees of the judicial branch.

(b) Several provisions in the regulations refer to persons seeking official action from or doing business with a judge's court. A judge's court encompasses, in the case of an appellate judge, any case coming before the court in which the judge personally participates in the decision of the court; in the case of a trial court, the judge's court encompasses only cases on the particular judge's docket and not cases before another judge of the same court.

(c) These regulations do not repeal the gift provisions of the Codes of Conduct promulgated by the Judicial Conference. The scope of the gift provisions of the Codes exceeds that of these regulations and the statute, however, in that they impose certain responsibilities on an officer or employee with respect to the acceptance of gifts by members of the officer's or employee's family residing in his or her household. Guide, Vol. 2C, § 620.35 is based upon former Canon 5C(4) of the Code of Conduct for United States Judges.

(d) Guide, Vol. 2C, § 620.35(b)(3) permits acceptance of travel expenses for a judicial officer or employee and one family member (or other person with whom the officer or employee maintains both a household and an intimate relationship) to attend bar-related, educational, and law-related functions. Where due to infirmity or disability the judicial officer or employee requires an accompanying personal or medical assistant in order to attend, payment or reimbursement of the assistant's travel expenses is considered a component of the gift to the judicial officer or employee, which may properly be accepted under this section.

(e) A judge covered by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351 to 364) who violates these regulations is subject to discipline as provided in that Act. Any other judicial officer or employee who violates these regulations is subject to discipline consistent with existing customary practices.

§ 620.70 Notes on Regulations

(a) The "Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts" were adopted on May 18, 1990, by the Judicial Conference, through its Executive Committee (JCUS-SEP 1990, p. 60).

(b) On August 15, 1990, the Judicial Conference, through its Executive Committee, amended these regulations to implement the prohibition against gifts to superiors as required by the Ethics Reform Act of 1989, 5 U.S.C. § 7351.

(c) At its March 1991 session, the Judicial Conference amended these regulations to include procedures for requesting advisory opinions from the Committee on Codes of Conduct interpreting Title III and these regulations (JCUS-MAR 1991, p. 14).

(d) These regulations were amended by the Judicial Conference at its September 1991 session to cover the Tax Court and the Sentencing Commission and make certain minor technical corrections (JCUS-SEP 1991, p. 54).

(e) The Judicial Conference amended these regulations at its March 1992 session to cover judges and employees of the Court of Appeals for Veterans Claims (JCUS-MAR 1992, pp. 16-17).

(f) At its September 1994 session, the Judicial Conference renumbered these regulations and revised them to include a new definition of the term "gift;" a new section 4(a) prohibiting the solicitation of gifts; revised sections 4(b), 5(b), and 6 incorporating general limitations on the acceptance of gifts; a new section 5(h) permitting most employees to accept gifts of minimal value; and a new section 9 regarding the return or disposal of gifts that may not properly be accepted (JCUS-SEP 1994, p. 46).

(g) The Judicial Conference amended these regulations at its March 1997 session to add a new subsection (i) (the existing subsection (i) was renumbered (j)) (JCUS-MAR 1997, pp. 14-15).

(h) The Judicial Conference adopted revised and renumbered regulations in September 2003. The revisions did not, except in a few modest respects, alter the substantive standards embodied in the former regulations as they had previously been interpreted and applied (JCUS-SEP 2003, pp. 11-12).

(i) At its March 2021 session, the Judicial Conference approved adding anything that is paid for by the judiciary or secured by the judiciary under contract to the exclusions from the definition of gift; modifying the gift exception permitting the acceptance of books or other resource materials to clarify that acceptance is permitted when the resource materials relate to the official duties of the judicial officer or employee and acceptance does not create an appearance of impropriety; updating the reference to a "family member" in the gift exception for travel expenses to attend law-related events to include any person with whom a judicial officer or employee maintains both a household and an intimate relationship; and reorganizing and updating the provision governing gifts among judicial officers and employees to permit explicitly the occasional sharing or exchanging of hospitality, food, refreshments, and other gifts under certain specified circumstances. The Judicial Conference also approved various technical changes (JCUS-MAR 2021, p. 13).

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 7: Receipt of Foreign Gifts and Decorations

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 710 Overview

§ 720 Acceptance of Gifts

§ 730 Acceptance and Disposition of Tangible Gifts

§ 740 Acceptance and Disposition of Decorations

§ 750 Acceptance of Travel Expenses

§ 760 Prohibition on Requests

§ 770 Reporting Procedures

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§ 710 Overview

(a) The Foreign Gifts and Decorations Act of 1966, as amended, 5 U.S.C. § 7342, governs the acceptance, disposition, and reporting of gifts and decorations received from foreign governments.

(b) Gifts and decorations received by officers and employees of the judiciary (including judges and judicial officials) and their spouses or dependents are covered by this Act.

(c) Gifts may consist of tangible or intangible presents, including the expenses of travel.

(d) The term "foreign government" includes:

(1) any unit of a foreign government,

(2) any international or multinational organization whose membership is composed of foreign governments, and

(3) any agent or representative of those entities.

Last substantive revision (Transmittal GR-4) September 2, 2009
Last revised (minor technical changes) March 17, 2015

(e) Gifts of more than minimal value must be reported to the employing agency, which is defined in the Act as the Administrative Office of the United States Courts (AO).

§ 720 Acceptance of Gifts

Gifts from foreign governments may be accepted in two circumstances:

(a) Minimal Value

A gift of minimal value (as that term is currently defined — see § 770) in the nature of a souvenir or mark of courtesy may be accepted and retained by the employee.

(b) More Than Minimal Value

(1) A gift of more than minimal value may be accepted:

(A) when the gift consists of:

(i) an educational scholarship or

(ii) medical treatment, or

(B) where refusal of the gift:

(i) would cause offense or embarrassment or

(ii) would otherwise adversely affect the foreign relations of the United States.

(2) Tangible gifts of more than minimal value that fall within this second category are:

(A) deemed to be accepted on behalf of the United States and

(B) become the property of the United States.

(3) Gifts of expenses for travel taking place entirely outside the United States may be accepted by the employee if acceptance is:

(A) appropriate,

(B) consistent with the interests of the United States, and

(C) permitted by the AO.

§ 730 Acceptance and Disposition of Tangible Gifts

(a) As noted above, gifts of minimal value may be retained by the employee.

(b) The employee must deposit tangible gifts of more than minimal value (other than travel expenses and decorations discussed below) with the AO within 60 days after acceptance.

(1) The AO may dispose of a gift:

(A) by forwarding it to the General Services Administration or

(B) by designating it for the official use of the judiciary.

(2) In the latter case, the gift may be returned to the court for official use (such as display).

(c) Employees should contact the Office of the General Counsel for specific guidance before physically forwarding gifts to the agency.

§ 740 Acceptance and Disposition of Decorations

(a) Decorations recognizing military service or other meritorious performance that are received from foreign governments may be accepted, retained, and worn by the employee, subject to the approval of the AO.

(b) Without this approval, decorations are deemed to be accepted on behalf of the United States and become the property of the United States. In those instances, as in the case of tangible gifts, the employee must, within 60 days after acceptance, deposit the decoration with the AO to be disposed of or designated for official use.

(c) An employee who receives a decoration from a foreign government should provide a brief letter to the Office of the General Counsel:

(1) describing the circumstances surrounding receipt of the decoration and

(2) requesting approval to retain it.

§ 750 Acceptance of Travel Expenses

(a) The Foreign Gifts and Decorations Act permits an employee to accept gifts of more than minimal value of travel or expenses for travel taking

place entirely outside the United States (such as transportation, food, and lodging). However, such a gift must be:

(1) appropriate,

(2) consistent with the interests of the United States, and

(3) reported to and permitted by the AO.

(b) An employee receiving a gift of travel expenses of more than minimal value should submit a letter to the Office of the General Counsel describing:

(1) the nature and purpose of the travel expenses received,

(2) the date received,

(3) the identity of the donor, and

(4) the estimated value.

(c) Gifts of travel expenses received by a spouse or dependent must be included in the letter.

(d) These reports should be submitted within 30 days after the travel is completed or, in any event, no later than the annual reporting date discussed below in § 770.

§ 760 Prohibition on Requests

The Foreign Gifts and Decorations Act expressly prohibits employees from requesting or encouraging any foreign government to tender a gift or decoration.

§ 770 Reporting Procedures

(a) The Foreign Gifts and Decorations Act requires the Director of the AO to report to the Secretary of State by January 31 of each year as to:

(1) any tangible gifts of more than minimal value, and

(2) any gifts of travel expenses of more than minimal value:

(A) that are not accepted in accordance with § 750, above, and

(B) that have been received from foreign governments during the preceding calendar year by officers and employees of the judiciary.

(b) Each year the AO issues a memorandum to judges and other officers and employees of the judiciary reminding them of the need to report any gifts of more than minimal value received from a foreign government that have not previously been reported to the AO.

(1) The memorandum:

(A) requests that reports be transmitted to the Office of the General Counsel by a specified date, usually in mid-January; and

(B) advises recipients of the current definition of “minimal value.”

(2) Reports should describe:

(A) the item received,

(B) its estimated value,

(C) the date and circumstances of its acceptance, and

(D) the identity of the donor.

(3) Specific questions about what should be reported may be directed to the Office of the General Counsel.

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Ch. 8: Judges Personally Implicated in Criminal Proceedings

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 810 Overview

§ 820 Policy

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§ 810 Overview

The Judicial Conference of the United States adopted the following policy in September 1995 (JCUS-SEP 95, p. 87).

§ 820 Policy

Federal judges who are indicted or formally charged for any offense which is subject to punishment by imprisonment of one year or more shall have all of their criminal cases reassigned, and may be permitted to continue with their civil dockets and administrative duties until it is determined that they must devote their time primarily to their own defense; and federal judges who have been implicated in a criminal process by way of arrest, or informed that they are the target of a federal or state criminal investigation for a crime which is subject to punishment by imprisonment of one year or more, may be permitted to continue with their criminal and civil dockets and administrative duties until the judicial council determines, after considering all the circumstances, to adopt the limitations which the nature of the investigation and charges justify.

Last substantive revision (Transmittal GR-4) September 2, 2009
Last revised (minor technical changes) December 14, 2010

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Ch. 9: Nepotism

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 910 Statutory Texts and Rules on Nepotism

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§ 910 Statutory Texts and Rules on Nepotism

The following statutes and rules relate to nepotism:

- Employment of Relatives; Restrictions (5 U.S.C. § 3110);
- Definition of "relative" (11 U.S.C. § 101(45));
- Nepotism in Appointment of Receiver or Trustee (18 U.S.C. § 1910);
- Relative of Justice or Judge Ineligible to Appointment (28 U.S.C. § 458);
- Appointment and Tenure of Magistrate Judges (28 U.S.C. § 631(b)); and
- Restrictions on Appointments (Bankruptcy Rule 5002).

See also: Guide, Vol 12, § 540 (Employment of Relatives).

Last substantive revision (Transmittal GR-4) September 2, 2009
Last revised (minor technical changes) December 14, 2010

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Ch. 10: Outside Earned Income, Honoraria, and Employment

§ 1010 Statutory Texts on Outside Earned Income, Honoraria, and Employment

§ 1020 Judicial Conference Regulations on Outside Earned Income, Honoraria, and Outside Employment
§ 1020.10 Authority
§ 1020.15 Purpose and Scope
§ 1020.20 Definitions
§ 1020.25 Outside Earned Income Limitation
§ 1020.30 Prohibition on Receipt of Honoraria
§ 1020.35 Limitations on Outside Employment
§ 1020.40 Advisory Opinions
§ 1020.45 Effective Date
§ 1020.50 Commentary on Regulations
§ 1020.55 Notes on Regulations

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§ 1010 Statutory Texts on Outside Earned Income, Honoraria, and Employment

The following statutes relate to Outside Earned Income, Honoraria, and Employment

- Government-Wide Limitations on Outside Earned Income and Employment (5 U.S.C. §§ 13141-13146);
- Outside Earned Income Limitation (5 U.S.C. § 13143);
- Limitations on Outside Employment (5 U.S.C. § 13144);
- Administration (5 U.S.C. § 13142);
- Civil Penalties (5 U.S.C. § 13145);
- Definitions (5 U.S.C. § 13141);
- Teaching Compensation of Retired Tax Court Judges (26 U.S.C. § 7447(k)); and
- Tax Treatment of Honoraria Donated to Charity (26 U.S.C. § 7701(k)).

Last revised (Transmittal 02-080) March 15, 2024

§ 1020 Judicial Conference Regulations on Outside Earned Income, Honoraria, and Outside Employment

§ 1020.10 Authority

Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 601-603, 103 Stat. 1716, 1760-1763 (1989), as amended. The Judicial Conference of the United States issued these regulations under the authority of 5 U.S.C. § 13142(3). **See:** JCUS-SEP 1990, p. 64.

§ 1020.15 Purpose and Scope

(a) These Regulations of the Judicial Conference of the United States Under Title VI of the Ethics Reform Act of 1989 Concerning Outside Earned Income, Honoraria, and Outside Employment implement Title VI of the Ethics Reform Act of 1989, 5 U.S.C. §§ 13141-13146, by prescribing:

(1) limitations on:

(A) the amount of outside earned income that certain officers and employees of the judiciary may receive, and

(B) the types of outside employment activities in which such officers and employees may engage; and

(2) a prohibition against the acceptance of honoraria for any appearance, speech, or article by certain officers or employees of the judiciary.

(b) Nothing in these regulations alters any other standards or Codes of Conduct adopted by the Judicial Conference of the United States.

(c) Any violation of any provision of these regulations will make the officer or employee involved subject to appropriate disciplinary action, which may be in addition to any penalty prescribed by statute or regulation.

§ 1020.20 Definitions

(a) A "judicial officer or employee" means any:

(1) circuit judge,

(2) district judge,

(3) judge of the Court of International Trade,

(4) judge of the Court of Federal Claims,

(5) judge and special trial judge of the Tax Court,

(6) judge of the Court of Appeals for Veterans Claims,

(7) bankruptcy judge,

(8) magistrate judge,

(9) commissioner of the Sentencing Commission, and

(10) any employee or officer of the judicial branch other than a part-time magistrate judge, or an officer or employee of the Supreme Court of the United States or the Federal Judicial Center.

(b) A "covered senior employee" means an individual:

(1) who is a noncareer officer or employee (defined for these purposes as the following officers and employees):

(A) circuit judges,

(B) district judges,

(C) judges of the Court of International Trade,

(D) judges of the Court of Federal Claims,

(E) judges and special trial judges of the Tax Court,

(F) judges of the Court of Appeals for Veterans Claims,

(G) bankruptcy judges,

(H) full-time magistrate judges,

(I) the commissioners and staff of the Sentencing Commission,

(J) the Director of the Administrative Office of the U.S. Courts (Administrative Office),

(K) the Deputy Director of the Administrative Office, or

(L) Administrative Office employees appointed by its Director to a position exempted under the Administrative Office of the United States Courts Personnel Act of 1990, § 3(a)(5)(B), or to a position paid under 28 U.S.C. § 603; and

(2) whose rate of basic pay is equal to or greater than 120% of the minimum rate of basic pay payable for GS-15 of the General Schedule.

(c) The terms "judicial officer or employee" and "covered senior employee" referenced in § 1020.20(a) and § 1020.20(b) do not include any special government employee as defined in 18 U.S.C. § 202.

§ 1020.25 Outside Earned Income Limitation

(a) No covered senior employee may have outside earned income attributable to a calendar year that exceeds 15% of the annual rate of basic pay for Level II of the Executive Schedule under 5 U.S.C. § 5313 as of Jan. 1 of that calendar year.

(b) "Outside earned income" means all wages, salaries, commissions, professional fees, and payments and compensation of any kind for services rendered or to be rendered by the covered senior employee, less the ordinary and necessary expenses paid or incurred in producing the income, provided, however, that the following do not constitute outside earned income:

(1) Funds received for services rendered to or for the United States government and income attributable to service with the National Guard;

(2) Pensions, annuities, deferred compensation (whether qualified or nonqualified) and other funds received for services rendered by the reporting individual before becoming a covered senior employee, or before Jan. 1, 1991;

(3) Funds received from investments to the extent not attributable to significant personal services of the covered senior employee;

(4) Funds received from a business totally owned by the covered senior employee, or his or her family, as defined in Canon 4D(2) of the Code of Conduct for United States Judges, to the extent that such funds do not result from significant personal services of the covered senior employee;

(5) Royalties, fees, and their functional equivalent, from the use or sale of copyright, patent, and similar forms of legally recognized intellectual property rights, when received from established users or purchasers of those rights;

(6) Anything of value earned or received for services rendered that is not included as gross income in the relevant calendar year under controlling provisions of the Internal Revenue Code; and

(7) Compensation received by a senior judge for approved teaching under § 1020.35(a)(5) if the senior judge:

(A) retired from regular active service under § 371(b) and is certified as having met the requirements of 28 U.S.C. § 371(e);

(B) retired from regular active service on permanent disability under 28 U.S.C. § 372(a);

(C) retired under 26 U.S.C. § 7447(b) (for judges of the Tax Court) and is certified as having met the requirements of § 7447(c); or

(D) retired on permanent disability under 26 U.S.C. § 7447(b)(4) (for judges of the Tax Court).

(c) "Outside earned income" is attributed solely to the actual earner, even though under applicable community property law one-half of any personal service income earned by a covered senior employee may be deemed to belong to a spouse.

§ 1020.30 Prohibition on Receipt of Honoraria

(a) No judicial officer or employee may receive any honorarium while that individual is a judicial officer or employee.

(b) "Honorarium" means a payment of money or anything of value (excluding or reduced by travel expenses as provided in 5 U.S.C. §§ 13141(2) and (5)) for an appearance, speech or article by a judicial officer or employee, provided that the following do not constitute an honorarium:

(1) Payment for a series of related appearances, speeches, or articles, provided that:

(A) the subject matter is not directly related to the officer's or employee's official duties, and

(B) the payment is not made because of the officer's or employee's status with the government.

(2) Compensation received for teaching activity, provided that in the case of covered senior employees such teaching activity is approved under § 1020.35.

(3) Awards for artistic, literary, or oratorical achievement made on a competitive basis under established criteria.

(4) Compensation for any performance using an artistic, athletic, musical, or other skill or talent or any incidental oral presentation, provided that:

(A) the subject matter is not directly related to the officer's or employee's official duties, and

(B) the opportunity is not extended because of the officer's or employee's official position.

(5) Compensation for any writing more extensive than an article.

(6) Compensation for works of fiction, poetry, lyrics, script or other literary or artistic works.

(7) A suitable memento or other token in connection with an occasion or article, provided that it is neither money nor of commercial value.

(c) Any honorarium prohibited by these regulations from being paid to a judicial officer or employee, but which is paid instead on behalf of such officer or employee to a charitable organization described in section 170(c) of the Internal Revenue Code of 1986, is deemed not to be received by such officer or employee, provided that:

(1) such payment does not exceed $2,000;

(2) is not made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any direct financial benefit separate from and beyond any general benefit conferred by the organization's activities; and

(3) no payment may be made to a charitable organization under this paragraph if the judicial officer or employee would be prohibited from receiving and retaining the honorarium by any applicable standards of conduct other than § 1020.25(a) or § 1020.30(a) (for example, where an appearance, speech or article is prepared as part of official duties).

§ 1020.35 Limitations on Outside Employment

(a) No covered senior employee may:

(1) affiliate with or be employed by a firm, partnership, association, corporation, or other entity to provide professional services that involve a fiduciary relationship for compensation;

(2) permit the use of his or her name by any such firm, partnership, association, corporation, or other entity;

(3) practice a profession that involves a fiduciary relationship for compensation;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

(5) receive compensation for teaching without the prior notification and approval required by these regulations.

(b) "Teaching" in these regulations includes:

(1) teaching a course of study at an accredited educational institution;

(2) participating in an educational program of any duration that is sponsored by such an institution and is part of its educational offering (e.g., a lecture, lecture series or symposia sponsored by a law school or college); or

(3) participation in:

(A) continuing legal education programs for which credit is given by licensing authorities, or

(B) programs that are sponsored by recognized providers of continuing legal education.

(c) A covered senior employee who obtains prior approval from the chief judge of the circuit — or, in the case of the chief judge, from the judicial council — may engage in part-time teaching for compensation.

(1) Covered senior employees of the Court of International Trade or the Court of Federal Claims are required to obtain approval from the chief judge of their respective court.

(2) Covered senior employees of the Tax Court are required to obtain approval from its chief judge.

(3) Covered senior employees of the Court of Appeals for Veterans Claims are required to obtain approval from its chief judge.

(4) Covered senior employees of the Sentencing Commission are required to obtain approval from its Chair.

(5) Covered senior employees of the Administrative Office are required to obtain approval from its Director.

(d) The procedures for obtaining prior approval of teaching activities are as follows:

(1) A request for approval for compensated teaching must be made:

(A) before the start of any compensated teaching;

(B) during the performance of a previously approved teaching commitment, before any material increase in the compensation or the time required; and

(C) during the performance of a previously approved long-term teaching commitment, before the start of teaching in any new academic year (i.e., the fall semester).

(2) A request for approval for compensated teaching must state:

- the institution for which the teaching will be done;
- the source and amount of compensation;
- the time required, including travel; and
- that the proposed activity will be consistent with the relevant Code of Conduct.

(3) The chief judges of the circuits, the Court of International Trade, the Court of Federal Claims, the Tax Court, and the Court of Appeals for Veterans Claims must approve or disapprove a request based on whether:

(A) the proposed activity will be consistent with the Codes of Conduct,

(B) the requester is current in his or her judicial work, and

(C) the proposed activity is unlikely to affect adversely the ability of the court in which the requester serves to conduct its operations efficiently.

(4) A request by a circuit's chief judge must be approved or disapproved by the circuit's judicial council.

(5) A request by the chief judge of the Court of Appeals for the Federal Circuit, Court of International Trade, Court of Federal Claims, Tax Court, or Court of Appeals for Veterans Claims must be approved or disapproved by a majority vote of the respective court.

(6) In the case of a covered senior employee of a district court, the circuit's chief judge must consult with the district court's chief judge and, where appropriate, the bankruptcy court's chief judge before making the decision.

(7) In the case of a senior judge, the chief judge must adjust the approval criteria to take account of the senior judge's status and decreased work assignments.

(8) The chief judge's decision may be appealed to the judicial council, or the Court of Appeals for the Federal Circuit, Court of International Trade, Court of Federal Claims, Tax Court, or Court of Appeals for Veterans Claims as appropriate. A majority vote to approve or disapprove the request is final.

(9) Reports of teaching requests and rulings covering the 12-month period ending June 30 must be sent by chief judges or others authorized to approve such requests to the Judicial Conference Committee on Codes of Conduct by July 31 of each year. That committee will monitor the submissions and report to the Conference.

§ 1020.40 Advisory Opinions

The Judicial Conference Committee on Codes of Conduct is authorized to render advisory opinions interpreting Title VI of the Ethics Reform Act of 1989 (5 U.S.C. §§ 13142(3), 13145(b)) and these regulations (JCUS-MAR 1990, pp.14-15). Any person covered by the Act and these regulations may request an advisory opinion by writing to the Chair of the Committee on Codes of Conduct, in care of the Administrative Office of the U.S. Courts, One Columbus Circle NE, Washington, DC 20544.

§ 1020.45 Effective Date

These regulations became effective on Jan. 1, 1991.

§ 1020.50 Commentary on Regulations

(a) Judges and judicial employees who are covered by Codes of Conduct

promulgated by the Judicial Conference of the United States may receive outside earned income, make speeches and appearances, write articles, and engage in extrajudicial activities only in conformity with the provisions of both the Codes of Conduct and these regulations.

(b) Title VI of the Ethics Reform Act of 1989 (the Act) applies to officers and employees of the judicial branch. However, the Judicial Conference has delegated its administrative and enforcement authority under the Act for officers and employees of the Supreme Court of the United States to the Chief Justice of the United States and for employees of the Federal Judicial Center to its Board (JCUS-MAR 1990, pp. 14-15). For this reason, the definitions of "judicial officer or employee" and "covered senior employee" exclude the judicial officers and employees of the Supreme Court and the Center. For purposes of Title VI and these regulations, employees of the Tax Court and the Court of Appeals for Veterans Claims are employees of the judicial branch.

(c) "Outside earned income" includes anything of value received in consideration for the provision of services by a covered senior employee except as specified in § 1020.25(b).

(1) Under § 1020.25(b)(5), advance payment of permissible royalties, fees, or their functional equivalent is not outside earned income if it must be deducted from amounts that later become payable.

(2) Under § 1020.25(b)(6), a covered senior employee may determine outside earned income in a manner consistent with his or her income tax return, or may allocate any amount received in a calendar year over two or more years according to a good faith allocation reflecting the work done.

(3) The outside earned income limitation that applies to an individual who becomes a covered senior employee during a calendar year is determined on a pro rata basis by dividing the annual income limitation by 365 and multiplying it by the number of days in that calendar year that the individual serves as a covered senior employee.

(4) Income earned before an individual becomes a covered senior employee is not subject to this limitation.

(d) A covered senior employee, in planning for compliance with the limitation on outside earned income, may be required to estimate in advance income producing expenses for a calendar year. Should the actual expenses turn out to be less than anticipated, causing the outside earned income to exceed the statutory limitation, the requirements of § 1020.25

are satisfied if the resulting excess is refunded to the payor promptly after the close of the year.

(e) The Act prohibits a judicial officer or employee from accepting any "honorarium" and defines "honorarium" as "a payment of money or any thing of value for an appearance, speech, or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government)."

(1) The ban on the receipt of honoraria does not preclude a judicial officer or employee from accepting compensation for a series of thematically connected presentations, works, or articles not directly related to his or her official duties so long as the compensation is not being paid because of the individual's status with the judicial branch.

(2) Payments for artistic and literary works or performances generally are not considered honoraria and are excluded from the ban.

(3) The ban also does not prohibit reimbursement of actual expenses such as typing, editing, and reproduction costs incurred in connection with an appearance, speech, or article.

(f) The general prohibition standing alone could be read to foreclose the receipt of compensation for appearances, lectures, and speeches in the context of a *bona fide* educational program. This was clearly not the intent of Congress, however, since Title VI specifically approves teaching for compensation by judicial officers and senior employees so long as an appropriate entity designated by the Judicial Conference gives prior approval to such teaching and so long as the compensation received, together with other outside earned income, does not exceed the 15% limit on outside earned income. (Compensation received by senior judges for teaching is excluded from the 15% limit on outside earned income if the judge retired from regular active service under 28 U.S.C. § 371(b) and is certified as having met the requirements of § 371(e) or retired on permanent disability under § 372(a).) Thus, the prohibition on receipt of honoraria does not foreclose teaching for compensation.

(g) Compensation received from a law school for writing a law review article is an example of an honorarium.

(1) On the other hand, compensation received as the author or co-author of a *bona fide* legal treatise or book is an example of compensation for scholarly writing more extensive than an article and therefore is not an honorarium.

(2) Of course, compensation for writing more extensive than an article is excluded from the definition of an honorarium only if it is *bona fide* compensation for the writing (e.g., compensation received from an established publisher according to usual and customary contractual terms).

(h) The same rules apply whether the writing is legal or nonlegal, scholarly or otherwise. For example, compensation received for writing a nonlegal article for a newspaper or magazine is an honorarium. On the other hand, compensation received as the author or co-author of a nonlegal book is not an honorarium.

(i) The definition of a prohibited "honorarium" excludes a suitable memento or other token in connection with an occasion or article, provided it is neither money nor of commercial value.

(1) The test for "commercial value" is whether the memento would have commercial value in the recipient's hands.

(2) Examples of "suitable mementos" include a plaque or letter opener.

(3) Examples of "other tokens" that are not honoraria include benefits incidental to attending the occasion or to an article's publication, such as:

- food and beverages consumed,
- waiver of a registration fee,
- copies of publications containing articles,
- reprints of a law review article,
- a free subscription provided to the article's author, or
- tapes of appearances or speeches and similar items that provide a record of the event.

(j) The prohibition against practicing a profession that involves a fiduciary relationship includes the provision of the following services when they involve such a relationship:

- legal,
- real estate,
- consulting and advising,
- insurance,
- medicine,
- architectural, or
- financial.

(1) The prohibition does not apply to service by a covered senior employee as an executor or trustee of a family estate or trust as permitted by the Codes of Conduct where the covered senior employee does no more than provide the service that would be provided by a lay person in the same capacity.

(2) Compensation received for such services is subject to the 15% limitation on outside earned income.

(k) Covered senior employees must notify the authority designated to grant approvals and obtain approval *before* engaging in compensated teaching activities. Further, during the performance of a previously approved teaching commitment, approval is required before any material increase in the compensation or the time required. Those who have previously secured approval for compensated teaching under a long-term contract must reapply for approval before the start of any new academic year.

(l) The Act does not define "teaching." These regulations define it to include meaningful participation in *bona fide* components of an educational curriculum or plan, regardless of the duration or format of the particular program in which the covered senior employee participates. The statutory authority to "teach" for compensation thus includes permission to participate in the educational program of an accredited institution in the manner in which that institution plans and carries out its teaching function.

(1) When speeches and lectures are sponsored by and presented within the overall educational program of an accredited institution, the Conference believes that they do not provide the occasion for any of the evils Congress was seeking to avert and should qualify as "teaching." Lectures, symposia, moot courts, and jurist-in-residence programs may therefore be compensated as "teaching" so long as the strictures of the Codes of Conduct are met.

(2) Teaching may also include:

(A) participation in programs sponsored by bar associations or professional associations or other established providers of continuing legal education programs for practicing lawyers;

(B) participation in bar review courses; or

(C) preparation and grading of bar examinations.

(m) The Codes of Conduct permit a covered senior employee to receive compensation for part-time teaching so long as:

(1) the compensation received is reasonable in amount and does not exceed that normally received by others for the same activity,

(2) the source of the compensation does not give the appearance of impropriety, and

(3) the teaching activity does not interfere with the performance of judicial duties.

These requirements are continued as criteria for approval of teaching requests.

(n) Covered senior employees who wish to participate in a symposium, lecture series, or other teaching activity of limited duration and receive compensation for it must secure the same prior approval as those who teach conventional courses for compensation.

(1) No such approval is required for teaching when no payment is received or when payment is received only to reimburse the ordinary and necessary expenses incurred in providing the teaching services, such as travel, lodging, and meals for the covered senior employee and a relative accompanying him or her. Such reimbursement of expenses is not "compensation."

(2) No prior approval is required for compensated teaching activity of an employee of the judicial branch whose basic pay is less than 120% of the minimum rate of basic pay payable for GS-15 of the General Schedule.

(o) In addition to the civil penalty provided in 5 U.S.C. § 13145(a), a judge covered by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351–364) who violates these regulations is subject to discipline as provided in that Act, and any other judicial officer or employee who violates these regulations is subject to discipline according to with existing customary practices.

§ 1020.55 Notes on Regulations

(a) On Aug. 15, 1990, the Judicial Conference adopted these regulations through its Executive Committee (JCUS-SEP 1990, p. 64).

(b) In 1991, the Conference amended them to exclude part-time magistrate judges from the ban against the receipt of honoraria (JCUS-MAR 1991, p.14).

(c) The Conference amended the regulations later that year to cover the Tax Court and the Sentencing Commission and to make certain technical corrections (JCUS-SEP 1991, p. 54).

(d) The Conference amended these regulations in 1992 and 1993 to:

(1) cover judges and employees of the Court of Appeals for Veterans Claims,

(2) reflect Ethics Reform Act amendments relating to the definition of "honorarium" and the exclusion from the limitation on outside earned income or compensation from approved teaching activities by certain senior judges (**see:** JCUS-SEP 1993, p. 43), and

(3) clarify under what circumstances prior approval for compensated teaching activities must be obtained (JCUS-MAR 1992, pp. 16-17).

(e) In 1994, the Conference amended the definition of Administrative Office employees who are included in the term "judicial officer or senior employee." JCUS-MAR 1994, p. 15.

(f) The Conference later that year (JCUS-SEP 1994, p.46):

- amended the definition of outside earned income in § 1020.25(b)(1) to exclude income from National Guard service;
- revised § 1020.30(b)(2) to clarify that the requirement for approval of teaching activities extends only to covered senior employees;
- revised the definition of an honorarium in § 1020.30(b)(3), § 1020.30(b)(4), and § 1020.30(b)(6) to exclude compensation for various artistic and athletic endeavors;
- amended § 1020.30(c) to clarify when honoraria may properly be donated to charitable organizations;
- made additional editorial revisions; and
- revised the Commentary.

(g) The Conference added a new § 1020.20(c) in 1996 that excluded special government employees from these regulations (JCUS-MAR 1996, p. 12).

(h) Due to statutory changes, the Conference amended these regulations in 2024 to update the citations to the Ethics Reform Act and add that compensation received by senior judges of the Tax Court for approved

teaching is excluded from the outside earned income limitation. The Conference also replaced the word “shall” in the regulations and made other stylistic changes. JCUS-MAR 2024, p. 7.

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Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 11: Part-Time Judicial Officers

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 1110 Conflict-of-Interest Rules for Part-Time Magistrate Judges
§ 1110.10 Overview
§ 1110.20 Text of Rules

§ 1120 Part-Time Magistrate Judge Accepting Fees for Service as a Special Master
§ 1120.10 Overview
§ 1120.20 Policy

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§ 1110 Conflict-of-Interest Rules for Part-Time Magistrate Judges

§ 1110.10 Overview

(a) Under 28 U.S.C. § 632(b), the Judicial Conference has adopted the following Conflict-of-Interest Rules applicable to part-time magistrate judges.

(b) The Conference adopted Conflict-of-Interest Rules 1 through 6 in March 1969 (JCUS-MAR 69, pp. 32-33). Rule 7 was adopted by the Conference in October 1969 and amended in March 1977 and March 1991 (JCUS-OCT/NOV 69, p. 79; JCUS-MAR 77, pp. 27-28; JCUS-MAR 91, p. 14). Rule 8 was adopted in October 1972 (JCUS-OCT 72, pp. 67-68).

§ 1110.20 Text of Rules

(1) A part-time magistrate judge, his or her partners, and his or her associates, may appear as counsel in any civil action in any court or governmental agency, including matters in which the United States is a party or has a direct and substantial interest, but they may not appear in cases in which the part-time magistrate judge has been involved in connection with his or her official duties. (JCUS-MAR 69, pp. 32-33.)

(2) A part-time magistrate judge, his or her partners, and his or her associates, may appear as counsel in any matter before the Internal Revenue Service, other than in those matters in which the part-time

magistrate judge has been involved in connection with his or her official duties. (JCUS-MAR 69, pp. 32-33.)

(3) A part-time magistrate judge may appear as counsel in a criminal action in any state court, but is precluded from appearing as counsel in any criminal action in any court of the United States. (JCUS-MAR 69, pp. 32-33.)

(4) A part-time magistrate judge's partners and associates may appear as counsel in any criminal action in any state court and in any federal court other than in the district in which the part-time magistrate judge serves, provided that the part-time magistrate judge has not been involved in such criminal proceeding in connection with his or her official duties. (JCUS-MAR 69, pp. 32-33.)

(5) A part-time magistrate judge is precluded from using his or her official office to refer cases to his or her partners, associates, or to others. (JCUS-MAR 69, pp. 32-33.)

(6) Generally, a part-time magistrate judge represents conflicting interests when, on behalf of the government, it is his or her official duty to take certain action or contend for that which duty to another would require him or her to oppose. (JCUS-MAR 69, pp. 32-33.)

(7) A part-time magistrate judge who is assigned additional duties under Section 636(b) or who conducts civil proceedings with the consent of the parties under Section 636(c) of Title 28, United States Code, may not appear as counsel in any case, civil or criminal, in the district court for which he or she is appointed. This prohibition shall not extend to a part-time magistrate judge whose additional assignments are limited to the review of prisoner petitions, service as a special master in a specified case, the receipt of indictments returned by grand juries, or the conduct of arraignments. (JCUS-OCT/NOV 69, p. 79; JCUS-MAR 77, pp. 27-28; JCUS-MAR 91, p. 14.)

(8) A part-time magistrate judge may not use his or her official position in any way to promote his or her private law practice. In this regard, he or she may not use his or her official stationery in the conduct of his or her law practice nor include his or her official title on general office letterhead. (JCUS-OCT 72, p. 68.)

§ 1120 Part-Time Magistrate Judge Accepting Fees for Service as a Special Master

§ 1120.10 Overview

In April 1976 (JCUS-APR 76, pp. 19-20), the Judicial Conference adopted the following statement of policy concerning special master references to part-time magistrate judges.

§ 1120.20 Policy

A part-time magistrate judge is precluded from accepting fees, in addition to the salary set for his or her position by the Conference, for services performed as a special master, whether or not such service is rendered in the magistrate judge's official capacity, and further, that no fees should be taxed against the litigants for such service.

Note: The prohibition against the taxing of fees against the litigants applies only to payment for the services performed by the part-time magistrate judge, and not to other necessary costs incident to the reference.

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Ch. 12: Practice of Law

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 1210 Statutory Texts on Practice of Law

§ 1220 Judicial Conference Resolutions on Practice of Law
§ 1220.10 Text of Resolutions
§ 1220.20 Notes on Resolutions

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§ 1210 Statutory Texts on Practice of Law

The following statutes relate to practice of law:

- Salaries of Bankruptcy Judges; Character of Service (28 U.S.C. § 153(b));
- Recall of Certain Judges and Magistrate Judges (28 U.S.C. § 375(b));
- Practice of Law by Justices and Judges (28 U.S.C. § 454);
- Practice of Law by Magistrate Judges; Character of Service (28 U.S.C. § 632);
- Clerks of Court; Practice of Law Restricted (28 U.S.C. § 955); and
- Federal Public Defender Practice of Law Restricted (18 U.S.C. § 3006A(g)(2)(A)).

§ 1220 Judicial Conference Resolutions on Practice of Law

§ 1220.10 Text of Resolutions

(a) The Judicial Conference adopted the following resolution in September 1958 (JCUS-SEP 58, pp. 17-18):

Resolved, That no person employed on a full-time basis in the federal judicial establishment shall engage in the private practice of the law.

Last substantive revision (Transmittal GR-4) September 2, 2009
Last revised (minor technical changes) March 17, 2015

(b) The Conference in March 1978 (JCUS-MAR 78, p. 5) modified a 1940 resolution by adopting the following resolution:

(1) A law clerk or a secretary to any judge of the United States, as defined by 28 U.S.C. § 451, shall not engage in any employment outside of his or her official position which would be incompatible with the full and proper discharge of the duties of that position.

(2) No such law clerk, during his or her tenure in that capacity, shall practice law in any federal, state, or local court or undertake to perform legal services for any private client in return for remuneration. This prohibition, however, shall not be construed to preclude the performance of routine legal work necessary to the management of the personal affairs of the law clerk or a member of his or her family so long as:

(A) such work is done without compensation or for nominal compensation;

(B) it does not require the entry of an appearance in a court of the United States or any other act which would suggest that the position of law clerk is being misused, that preferential treatment is being sought by virtue of the holding of that position, or which would otherwise be inconsistent with the law clerk's primary responsibility to the employing judge and court; and

(C) so long as such activity does not have actual conflict or appear in conflict with court duties or will not reflect discreditably on the court or create the appearance of impropriety.

(3) Such law clerk or secretary shall not be prohibited from performing and receiving compensation for such activities as teaching, lecturing, authoring or editing articles, publications, and books. Nor shall such law clerk be prohibited from performing any activity related to the judicial process which tends toward the improvement of the law, the legal system, or the administration of justice, or which is unrelated to the judicial process. Regardless of any other provisions set out above, any such otherwise permitted activity may be undertaken only after notice to the employing judge and upon his or her finding that it poses no inconsistency with the function of law clerk or secretary including the responsibility to maintain the confidentiality of the judicial process and that it will not inhibit the devotion of the full business day to that position during the tenure of the incumbent in such capacity.

§ 1220.20 Notes on Resolutions

(a) The appointment of certain persons listed in the resolution to dual offices has been authorized by statute and by the Judicial Conference.

(b) In September 1995, the Judicial Conference adopted a new Code of Conduct for Judicial Employees [Guide, Vol 2A, Ch 3], Canon 4D of which contains restrictions on the practice of law by judicial employees (JCUS-SEP 95, p. 74).

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Ch. 13: Privately Funded Educational Seminars

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 1310 Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Seminars

§ 1320 Definition of Source of Financial or Other Support

§ 1330 Judicial Branch Committee Statement of Purpose

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§ 1310 Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Seminars

The Judicial Conference of the United States in September 2006 (JCUS-SEP 06, p. 24) adopted the following policy, effective Jan. 1, 2007, with technical amendments implemented in December 2023.

(a) A nongovernmental source,[1] other than a state or local bar association, a subject-matter bar association, a judicial association, the Judicial Division of the American Bar Association, or the National Judicial College, that wishes to pay for or reimburse federal judges'[2] expenses (i.e., travel, food, lodging, or anything that would be considered a gift under the Judicial Conference Ethics Reform Act Gift Regulations)[3] above the threshold at which judges must report reimbursements on their annual financial disclosure reports[4] in connection with attending, as a speaker or participant, a program, a significant purpose of which is the education of

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1 Private and public educational institutions are included in the reporting requirement.

2 This term includes Article III judges as well as fixed-term judges and judicial officers.

3 The term "expenses" is not intended to include seminar books and materials.

4 Currently, a judge must report any reimbursement exceeding the threshold figure in Guide, Vol. 2D, § 330.20 (Reimbursements). This figure is subject to change every three years according to the cost of living as determined by the Administrator of General Services. **See:** 5 U.S.C. § 7342(a)(5); 41 CFR 102-42; **see also** 5 U.S.C. § 13104(a)(2)(B).

Last substantive revision (Transmittal 02-080) March 15, 2024
Last revised (minor technical changes) July 9, 2025

United States federal or state judges, shall disclose to the Administrative Office of the U.S. Courts in writing the following information:

(1) the name of the program provider(s);

(2) the name or title of the program;

(3) the dates and location of the program;

(4) the various presentation topics and the speakers expected respectively to address each topic; and

(5) all the program provider's source(s) of support, financial or otherwise, as defined below.

The disclosures will be made on the judiciary's website (www.uscourts.gov) and be available to the public on uscourts.gov and to judges in InfoWeb. The disclosures will remain available to the public and to judges for three years from the date of filing.

(b) A federal judge may not accept travel, food, lodging, reimbursement, or anything that would be considered a gift under the Judicial Conference Ethics Reform Act Gift Regulations from a nongovernmental source other than a state or local bar association, a subject-matter bar association, a judicial association, the Judicial Division of the American Bar Association, or the National Judicial College, in connection with attending, as a speaker or participant, a program, a significant purpose of which is the education of United States federal or state judges, unless the judge:

(1) determines from the judiciary's website that the program provider has made the disclosures required in paragraph (a); and

(2) within 30 days following the conclusion of the educational program, files a disclosure report via InfoWeb. This filing will be available to the public on the local court's website for three years from the date of filing.

(c) This is a policy of the Judicial Conference. It is not intended to change the Code of Conduct for United States Judges (see in particular Advisory Opinion No. 67 and Advisory Opinion No. 116 of the Judicial Conference Committee on Codes of Conduct) or the annual financial disclosure reporting requirements for judges under the Ethics in Government Act, 5 U.S.C. §§ 13101-13111.

§ 1320 Definition of Source of Financial or Other Support

(a) If the support, financial or otherwise, comes from the general revenues of the program provider(s), and/or from endowments or gifts not raised for

the particular educational program or for the purpose of educating judges, then it is sufficient to identify the program provider(s) as the source of support.

(b) If the support, financial or otherwise, comes in whole or in part from money, goods or services from others (e.g., corporations, nonprofit organizations, foundations, individual donors) specifically for the particular educational program, or for the education of judges generally, list every such donor. This policy is not intended to require the disclosure and reporting of monies derived from tuition, educational program registration fees, and other similar enrollment fees.

§ 1330 Judicial Branch Committee Statement of Purpose

(a) The continuing education of judges is in the public interest. Judges need to enhance their understanding of law, science, history, economics, sociology, philosophy, and other disciplines to the same extent as lawyers and other professionals. In an age where rapid technological changes are revolutionizing virtually every aspect of American life, the law must keep pace with changes that society undergoes. Without such knowledge of the world around them, judges would be ill-prepared to make informed and fair decisions.

(b) In view of the compelling need for and many benefits of continuing education, the Judicial Conference believes that neither it nor any other entity should seek to limit judges' access to knowledge or censor their right to increase that knowledge.

(c) The Federal Judicial Center provides high quality educational programs to the judiciary, but it does not and likely never will have sufficient resources to meet the needs of every judge. Private funding of expenses for attendance at educational programs facilitates judges' participation in these activities.

(d) Judicial attendance at privately funded educational programs poses certain concerns, however. Some observers believe that judges may be influenced inappropriately by those who sponsor or contribute (financially or otherwise) to these seminar programs and who might be litigants before those judges. That influence, it is argued, may be exerted through program content, contact between judges and those who litigate before them, and perquisites provided to program attendees.

(e) To address these concerns, the Judicial Conference has adopted the above policy that provides for timely disclosure by educational program providers and judges who attend those programs. The required disclosure

includes judges' attendance at the program, dates and location of the program, topics to be presented, speakers who will address each topic, funding source for the program, and sponsors of the programs.

(f) The Conference's overarching objective in preparing this policy is greater transparency. The required disclosure by program providers will better enable judges to determine whether they should attend a program. The disclosure will also enable a party or an attorney or the public to check on a local court's website to determine whether a judge has recently attended an educational seminar covered by this policy. A party, an attorney, or the public may consult the judiciary's website (www.uscourts.gov) to access further details concerning the educational program. This transparency and accountability should strengthen public and congressional confidence in federal judicial ethics.

(g) This new policy appropriately balances judges' educational needs and the desire of the public to be informed promptly when judges meet those needs by attending privately funded programs.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 14: STOCK Act Compliance

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 1410 Overview

§ 1420 STOCK Act Requirements and Compliance

§ 1430 Ethics Guidance

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§ 1410 Overview

Certain provisions of the Stop Trading on Congressional Knowledge Act of 2012 ("STOCK Act"), Pub. L. No. 112-105, 126 Stat. 291, enacted on April 4, 2012, apply to judges and judicial branch employees who are required to file annual financial disclosure reports.

§ 1420 STOCK Act Requirements and Compliance

(a) Most provisions of the STOCK Act apply only to certain employees of the legislative and executive branches, but several requirements apply to those judges and judicial employees who are required to file financial disclosure reports (referred to here as "covered judiciary personnel").

(b) The STOCK Act provisions that apply to the judiciary do not amend the Ethics in Government Act or modify the existing financial disclosure reporting process. The STOCK Act does not limit the construction of the existing anti-fraud provisions of the securities laws with respect to judges and judicial employees.

(c) The requirements of the STOCK Act that specifically apply to the judiciary are as follows:

(1) The Judicial Conference is required to issue "interpretive guidance," as necessary, to clarify that the covered judiciary personnel are prohibited from using nonpublic information derived from their position or gained from the performance of their official responsibilities "as a means for making a private profit." STOCK Act, § 9(a).

Last revised (Transmittal 02-011) March 27, 2013

(2) Covered judiciary personnel are not exempt from insider trading provisions arising under federal securities laws. The STOCK Act affirms that covered judiciary personnel have "a duty arising from a relationship of trust and confidence to the United States government and the citizens of the United States with respect to material, nonpublic information derived from such person's position . . . or gained from the performance of such person's official responsibilities." STOCK Act, §§ 5 and 9(b).

(3) With respect to securities that are the subject of an initial public offering, the covered judiciary personnel may not purchase such securities "in any manner other than is available to members of the public generally." STOCK Act, § 12.

(4) Covered judiciary personnel who are negotiating agreements with private entities for post-judicial employment or compensation, or who have made such agreements, must file statements that include "the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced." STOCK Act, § 17(a).

(5) These statements should be filed with the supervising ethics office (defined for this purpose as the Judicial Conference) within 3 business days after the "commencement of such negotiation or agreement." STOCK Act, § 17(a).

(6) Covered judiciary personnel who have filed statements concerning post-judicial employment, as outlined above, must recuse themselves "whenever there is a conflict of interest, or appearance of a conflict of interest, for such individual with respect to the subject matter of the statement," and must "notify" the supervising ethics office of such recusals. STOCK Act, § 17(b).

(d) These provisions were effective immediately upon enactment of the STOCK Act, on April 4, 2012. Covered judiciary personnel who on or after that date were negotiating agreements for post-judicial employment or have made such agreements, must file the statements and any recusal notices required under Section 17 of the Act. Any such statement or notice should be submitted to the Judicial Conference by means of an email to the Judicial Conference Secretary at Aodb_OGCEthics@ao.uscourts.gov and will not be subject to disclosure except as may be directed by the Judicial Conference.

§ 1430 Ethics Guidance

(a) With the exception of the new reporting requirement described above, the judiciary's existing ethics rules already cover, in general terms, the specific items addressed in the STOCK Act. For example, Canon 4D(5) of the Code of Conduct for United States Judges (Guide, Vol 2A, Ch 2), provides, regarding financial activities, that "a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties." Similarly, Canon 2 of the Code of Conduct for Judicial Employees (Guide, Vol 2A, Ch 3) states that "a judicial employee should not use public office for private gain."

(b) Existing ethics rules also provide guidance concerning potential conflicts of interest related to post-judicial employment. Canon 3C of the Code of Conduct for United States Judges (Guide, Vol 2A, Ch 2) addresses recusal and disqualification, while Canon 3F of the Code of Conduct for Judicial Employees (Guide, Vol 2A, Ch 3) covers employee conflicts of interest. For judges, an advisory opinion of the Judicial Conference Committee on Codes of Conduct provides guidance on recusal issues related to negotiations for post-judicial employment. **See:** Guide, Vol 2B, Ch 2, Advisory Opinion No. 84 (Pursuit of Post-Judicial Employment). That advisory opinion concludes that "after the initiation of any discussions with [a future employer], no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the [future employer] appears."

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Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

Ch. 15: Gifts to the Judicial Branch

§ 1510 Overview and Scope

§ 1520 Acceptance of Gifts

§ 1530 Acceptance of Voluntary and Uncompensated Services

§ 1540 Prohibition Against Solicitation

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§ 1510 Overview and Scope

(a) Under 28 U.S.C. § 604(a)(17), the Director of the Administrative Office of the U.S. Courts (AO) has authority to accept voluntary and uncompensated (gratuitous) services as well as gifts of personal property for the purpose of aiding or facilitating the work of the judicial branch.

(b) The Director has delegated to the AO's General Counsel, who may redelegate to the Deputy General Counsel, the authority to:

(1) accept voluntary and uncompensated (gratuitous) services; and

(2) accept, hold, administer, and utilize gifts and bequests of personal property for the purpose of aiding or facilitating the work of the judicial branch.

(c) This chapter does not apply to:

(1) gifts of personal property to judges or judiciary employees that are not for the purpose of aiding or facilitating the work of the judicial branch (**see:** Guide, Vol. 2C, Ch. 6);

(2) gifts that may be accepted under the Foreign Gifts and Decorations Act (**see:** Guide, Vol. 2C, Ch. 7);

(3) volunteer arrangements in a court or federal public defender organization focusing either exclusively or primarily on providing an educational experience for the volunteer, or part of a work-training program (**see:** Guide, Vol. 12, § 550);

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(4) the AO's student intern program (**see:** AO Manual, Vol. 4, § 450); and

(5) accommodations to hold court that are furnished without cost to the judicial branch (**see:** 28 U.S.C. § 462(a)).

(d) For purposes of this chapter, "gift" means any favor, discount, entertainment, forbearance, or other item having monetary value, including an in-kind item, offered or provided without consideration. It does not include:

(1) opportunities and benefits, including favorable rates and commercial discounts, that are available to the public or all federal government agencies;

(2) anything that is paid for by the judiciary or secured by the judiciary under contract; and

(3) any item or service offered or provided by a federal entity (**see:** Guide, Vol. 14, § 550).

(e) The statutory authority to accept gifts under 28 U.S.C. § 604(a)(17) does not include gifts of money. **See:** Guide, Vol. 13, § 310.40(f).

(f) Questions concerning this chapter should be addressed to the AO's Office of the General Counsel.

§ 1520 Acceptance of Gifts

(a) For delegations of authority to accept gifts of privately owned legal research resources, **see:** Guide, Vol. 21, § 230.

(b) For acceptance of offers from state, local, or private entities for probation or pretrial services officers to use a firing range at no cost for official purposes, **see:** Guide, Vol. 8H, § 320.20.10(d)(3).

(c) A judge or judiciary employee who has not been delegated authority to accept gifts on behalf of the judiciary must forward any gift offers of personal property that are for the purpose of aiding or facilitating the work of the judicial branch to the General Counsel via email or by mail to:

Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

(d) Any gift of personal property accepted under the AO Director's statutory authority becomes official government property and is subject to the policies that apply to government property. **See:** Guide, Vol. 16, Ch. 4 and Ch. 5.

§ 1530 Acceptance of Voluntary and Uncompensated Services

A judge or judiciary employee who has not been delegated authority to accept and utilize voluntary and uncompensated (gratuitous) services must forward any offer of services covered under this chapter to the General Counsel via email or by mail to the address listed in § 1520(c). The General Counsel may require the execution of a gratuitous services agreement as a condition of accepting the services.

§ 1540 Prohibition Against Solicitation

No judge or judiciary employee may solicit voluntary and uncompensated (gratuitous) services, or any gift of personal property, covered under this chapter on behalf of the judicial branch without the prior written approval of the AO Director.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. D: Financial Disclosure

Ch. 1: Overview

§ 110 Introduction

§ 120 Authority

§ 130 Purpose

§ 140 Applicability

§ 150 In General

§ 160 Relationship to Codes of Conduct

§ 170 Definitions

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§ 110 Introduction

(a) Judicial officers and certain judicial employees are required to file financial disclosure reports by Title I of the Ethics in Government Act of 1978, Pub. L. No. 95-521, amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, and by the Courthouse Ethics and Transparency Act (CETA), Pub. L. No. 117-125, 136 Stat. 1205 (2022).

(b) Congress later repealed and reenacted the Ethics in Government Act, which had previously been in the appendix of title 5 of the U.S. Code. Pub. L. No. 117-286, 136 Stat. 4196, 4361, 4266-4295 (2022).

(c) References to the "Ethics in Government Act, as amended" or the "Act" in *Guide*, Vol. 2D refer to both the provisions already codified at 5 U.S.C. §§ 13101–13111 and the CETA provisions not yet codified.

(d) The Act provides the information required in financial disclosure reports and prescribes their general format and procedures.

§ 120 Authority

(a) The regulations in this volume are issued under the Act's authority.

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(b) The Judicial Conference of the United States is responsible for judiciary compliance with, and implementation of, the Act (**see:** 5 U.S.C. § 13102).

(c) In 1990, 2017, and 2022, the Conference delegated this authority to its Committee on Financial Disclosure, as authorized by the Act (**see:** JCUS-SEP 1990, p. 85; JCUS-SEP 2017, p. 13; JCUS-SEP 2022, p. 5).

(d) The Committee approved a revised set of financial disclosure regulations in 2017 and several amendments since then.

(e) The Committee has prescribed Forms AO 10 and AO 10T for filing financial disclosure reports.

§ 130 Purpose

This part of Volume 2 provides the uniform procedures and requirements for the judiciary's financial disclosure system.

§ 140 Applicability

This part of Volume 2 applies to all judicial officers and judicial employees required by the Act to file financial disclosure reports.

§ 150 In General

(a) Title I of the Act requires that designated federal officials disclose publicly their personal financial interests, to ensure confidence in the integrity of the federal government by demonstrating that they are able to carry out their duties without compromising the public trust.

(b) Financial disclosure reports are not net-worth statements. Financial disclosure systems seek only the information that the judiciary has deemed relevant to the administration and application of conflict-of-interest laws, statutes on ethical conduct or financial interests, and regulations on standards of ethical conduct.

(c) Nothing in the Act or these regulations requiring the reporting of information or the filing of any report may be deemed to authorize:

- receipt of income, honoraria, gifts, or reimbursements;
- holding of assets, liabilities, or positions; or
- involvement in transactions that are prohibited by law or regulation.

See: § 160, below.

(d) The Administrative Office of the U.S. Courts (AO) is responsible for processing, maintaining, and releasing financial disclosure reports according to the Act and this part of Volume 2.

(1) As required by the Act, the reports are maintained for six years, after which they are destroyed unless needed in an ongoing investigation.

(2) For individuals who file a report as a nominee under Guide, Vol. 2D, § 210.20 and are not later confirmed by the Senate, such reports will be destroyed one year after the individual is no longer under consideration by the Senate, unless needed in an ongoing investigation.

§ 160 Relationship to Codes of Conduct

(a) This part of Volume 2 governs only the filing of financial disclosure reports.

(b) The disclosure requirements and exemptions in the Ethics in Government Act neither define nor limit the standards imposed by the Code of Conduct for United States Judges and other rules of the Judicial Conference or the statutory provisions for disqualification or recusal. **See:** Mandatory Conflict Screening Policy (Guide, Vol. 2C, Ch. 4).

(c) Article III judges, bankruptcy judges, and magistrate judges are governed by the Code of Conduct for United States Judges (Guide, Vol. 2A, Ch. 2).

(d) Judicial employees are governed by the Code of Conduct for Judicial Employees (Guide, Vol. 2A, Ch. 3).

(e) Federal public defender employees are governed by the Code of Conduct for Federal Public Defender Employees (Guide, Vol. 2A, Ch. 4).

(f) AO employees are governed by the Code of Conduct for Administrative Office Employees (*AO Manual*, Vol. 4, Ch. 2).

§ 170 Definitions	
Act	The Ethics in Government Act of 1978 (Pub. L. 95-521, as amended), as modified by the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended), as further modified in May 2022 by the Courthouse Ethics and Transparency Act (CETA) (Pub. L. 117-125 (2022)), and as repealed and reenacted by Pub. L. 117-286 (Dec. 27, 2022). References to "the Act" refer to both the provisions codified at 5 U.S.C. §§ 13101–13111 and the CETA provisions not yet codified.

§ 170 Definitions	
Beneficial interest	In a trust, this means that the beneficiary has a right to receive an asset or the income from an asset but does not hold title to the asset itself.
Dependent child	When used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who is: (1) unmarried, under age 21, and living in the household of the reporting individual; or (2) a dependent of the reporting individual within the meaning of 26 U.S.C. § 152.
Designated agency ethics official	The Judicial Conference's Committee on Financial Disclosure, a subcommittee, or member of either, or counsel of either designated to administer the provisions of the Act and these regulations within the judiciary.
Excepted Investment Fund	An investment fund is an excepted investment fund if: (1) it is widely held; (2) it is publicly traded or the assets of the fund are widely diversified; and (3) the reporting individual neither owns nor exercises control over nor has the ability to exercise control over the financial interests held by the fund. **Note:** (1) Publicly traded mutual funds and exchange-traded funds (ETFs) registered with the Securities and Exchange Commission qualify as excepted investment funds. (2) Mutual funds and ETFs that qualify as an "excepted investment fund" for financial disclosure reporting also likely qualify as a "safe harbor" from a financial conflict of interest under the Code of Conduct for United States Judges with respect to assets held by the fund, but judges should evaluate all of their financial holdings for potential conflicts that may require disqualification. **See:** Canon 3C(1)(c), (3); Guide, Vol. 2B, Ch. 2 (Published Advisory Opinions), Advisory Opinion No. 106 ("investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds"). (3) In a managed asset account (i.e., separately managed account), the individual investor owns (or has an ownership interest in) the assets within the account, but all or most investment and transaction decisions related to the account are within the discretion and control of an account manager. Such an account is not an excepted investment fund. A defined contribution plan (e.g., 401(k), IRA, 457(b), 403(b)) is also not an excepted investment fund since the contributor has an equity interest in the amounts deposited.

§ 170 Definitions	
Filer	Used interchangeably with "reporting individual," and includes both judicial officers and judicial employees.
Gift	A payment, advance, forbearance, rendering, or deposit of money, or anything of value, unless consideration of equal or greater value is received by the donor, including food and beverages consumed in connection with a gift of overnight lodging. **Note:** A gift does not include: (1) bequests and other forms of inheritance; (2) suitable mementos of a function honoring the reporting individual; (3) food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States government, the District of Columbia, or a state or local government or its political subdivision; (4) food and beverages that are consumed without a gift of overnight lodging; (5) communications to the offices of a reporting individual, including subscriptions to newspapers and periodicals; and (6) exclusions and exceptions as described in Guide, Vol. 2D, § 330.30 and § 330.40.
Honorarium	A payment of money or anything of value (excluding or reduced by travel expenses as provided in 5 U.S.C. § 13141(2) and (5)) for an appearance, speech, or article by a judicial officer or employee, provided that the following do not constitute an honorarium: (1) payment for a series of related appearances, speeches, or articles, provided that: • the subject matter is not directly related to the officer's or employee's official duties, and • the payment is not made because of the officer's or employee's status with the government;

§ 170 Definitions	
	(2) compensation received for teaching activity, provided that in the case of covered senior employees such teaching activity is approved under § 1020.35; (3) awards for artistic, literary, or oratorical achievement made on a competitive basis under established criteria; (4) compensation for any performance using an artistic, athletic, musical, or other skill or talent or any incidental oral presentation, provided that: • the subject matter is not directly related to the officer's or employee's official duties, and • the opportunity is not extended because of the officer's or employee's official position; (5) compensation for any writing more extensive than an article; (6) compensation for works of fiction, poetry, lyrics, script, or other literary or artistic works; and (7) a suitable memento or other token in connection with an occasion or article, provided that it is neither money nor of commercial value.
Income	All monies, compensation, and wages derived from whatever source, whether or not taxable for federal income tax purposes (e.g., municipal bond interest). Generally, income means "gross income" as determined under the Internal Revenue Service principles at 26 CFR 1.61-1 through 1.61-15 and 1.61-21. **Note:** It includes but is not limited to the following items: • earnings such as compensation for services, fees, commissions, salaries, wages, and similar items; • gross income derived from business (and net income if the individual elects to include it); • gains derived from dealings in property including capital gains (whether actually received or reinvested); • income from rental property, even if a profit is not realized; • interest; • rents; • royalties; • dividends; • annuities; • income from the investment portion of life insurance and endowment contracts; • pensions; • income from discharge of indebtedness;

§ 170 Definitions	
	• distributive share of partnership income; and • income from an interest in an estate or trust.
Judicial employee	Any employee of the federal judiciary (including the United States Sentencing Commission and Court of Federal Claims), Tax Court, Court of Appeals for Veterans Claims, or Court of Appeals for the Armed Forces who: (1) is not a judicial officer and who is authorized to perform adjudicatory functions with respect to proceedings in the judicial branch, or (2) occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule. **See:** Ethics in Government Act of 1978, as amended, 5 U.S.C. § 13101(9).
Judicial officer	Justices of the Supreme Court, judges of the United States courts of appeals, United States district courts (including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands), Court of Appeals for the Federal Circuit, Court of International Trade, Tax Court, Court of Federal Claims, Court of Appeals for Veterans Claims, United States Court of Appeals for the Armed Forces, and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior. **See:** Ethics in Government Act of 1978, as amended, 5 U.S.C. § 13101(10).
Marriage	Includes a same-sex marriage regardless of the filer's state of residency.
Personal hospitality of any individual	Hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his or her family or on property or facilities owned by that individual or his or her family. **Notes:** (1) The personal hospitality gift reporting exemption applies only to food, lodging, or entertainment and is intended to cover such gifts of a personal, non-business nature. Therefore, the reporting exemption does not include: • gifts other than food, lodging or entertainment, such as transportation that substitutes for commercial transportation; • gifts extended for a business purpose; • gifts extended at property or facilities owned by an entity, rather than by an individual or an individual's family, even if the entity is owned wholly or in part by an individual or an individual's family; (**Note:** The reporting exemption applies to stays extended for a nonbusiness purpose at a personal residence of the host, even if the

§ 170 Definitions	
	personal residence is owned by an entity, provided that the residence is not regularly rented out to others for a business purpose and there are no indicia that the residence is commercial.) • gifts paid for by any individual or entity other than the individual providing the hospitality, or for which the individual providing the hospitality receives reimbursement or a tax deduction related to furnishing the hospitality; or • gifts extended at a commercial property (e.g., a resort or restaurant, or at a property that is regularly rented out to others for a business purpose). (2) A judicial officer or employee may not solicit or accept anything of value from a person seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties, but a judicial officer or employee may accept a gift authorized by the Judicial Conference regulations. **See:** 5 U.S.C. § 7353; Guide, Vol. 2C, Ch. 6.
Personal residence	Any real property used exclusively as a private dwelling by the filer or filer's spouse that is not rented during any portion of the reporting period. **Note:** The term is not limited to one's domicile. Consequently, there may be more than one personal residence, including a vacation home.
Property	(1) Any real estate (e.g., a personal residence, vacation home, rental holding, land, mineral or royalty interests); (2) Any possessions, objects, and goods (e.g., automobiles, furniture, paintings, coins, stamps); or (3) Any financial holdings (e.g., stocks, bonds, mutual funds, IRAs, 401K and other retirement accounts, education funds, bank accounts, certain life insurance policies).
Reimbursement	Any payment or other thing of value received by the reporting individual (other than gifts, as defined above) to cover travel-related expenses of such individual, other than those that are: (1) provided by the United States Government, the District of Columbia, or a state or local government or its political subdivision; or (2) required to be reported by the filer under 5 U.S.C. § 7342 (codifying the Foreign Gifts and Decorations Act).
Relative	An individual who is related to the filer, as father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-

§ 170 Definitions	
	in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the filer, and is deemed to include the future spouse of the filer. **Note:** The term "relative" includes a same-sex spouse and those related to the spouse as described here.
Reporting individual	Used interchangeably with "filer," and includes both judicial officers and judicial employees.
Reviewing official	The Committee on Financial Disclosure, a subcommittee, or a member of either, or designated counsel and staff to the Committee.
Spouse	Includes a same-sex spouse. The term does not include someone in a domestic partnership or civil union.
Value	A good faith estimate of the fair market value if the exact value is neither known nor easily obtainable to the filer without undue hardship or expense. **Note:** For any interest in property, **see:** alternative valuation options in Guide, Vol. 2D, § 315.60. For gifts and reimbursements, **see:** Guide, Vol. 2D, § 330.50.

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Ch. 2: Filing Requirements

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- § 220.20 Reporting Form
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§ 230 Reimbursement of Professional Fees

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§ 210 Who Must File and When

§ 210.10 Initial Filers

(a) Within 30 days of assuming a position as a judicial officer or judicial employee (as defined in Guide, Vol. 2D, § 170), or within 30 days of receiving notification from the Administrative Office of the U.S. Courts (AO), whichever is later, an individual must file a financial disclosure report. However, no report is required if the individual:

(1) has, within 30 days before assuming such position, left another position or office for which a public financial disclosure report under the Act was required to be filed; or

(2) has already filed such a report as a nominee or candidate for the position.

(b) A filer who has left another position or office within 30 days and who is not required to file a new financial disclosure report according to this section must, upon the request of the Judicial Conference's Committee on

Financial Disclosure (Committee) or its staff, provide to the Committee a copy of the filer's most recent financial disclosure report filed with the former office or agency. For special rules for initial reports, **see:** § 210.30.

Example: Y, a Treasury Department employee who has previously filed public financial disclosure reports under the Act, terminates employment with that department on Jan. 12, 2015, and begins employment with the judiciary on Feb. 10, 2015, in a covered position that requires the filing of a financial disclosure report. Y is not a new entrant since Y has assumed a position described in § 210.10 within 30 days of leaving a similarly described position. Y, therefore, need not file a new report.

(c) A filer's first annual report is due by May 15 of the year following the first calendar year in which the filer works more than 60 days in a covered position. **See:** § 210.40. As a result, the first annual report ordinarily will overlap the period covered by the nomination or initial report.

Example 1: If a filer performs official duties for more than 60 days during a calendar year (i.e., enters on duty or reaches the filing threshold on or before November 1), an annual report for that year must be filed, and the period of the report will be January 1 through December 31 of that year. Thus, a filer who entered on duty on Oct. 12, 2012 must file an annual report by May 15, 2013, and the reporting period would be Jan. 1, 2012 to Dec. 31, 2012.

Example 2: If a filer performs official duties for 60 days or fewer during a calendar year (i.e., enters on duty or reaches the filing threshold on or after November 2), an annual report is not required for that calendar year, but an annual report must be filed for the following calendar year. Thus, a filer who entered on duty on Dec. 1, 2012, would file an annual report by May 15, 2014, and the reporting period would be Jan. 1, 2013 to Dec. 31, 2013.

§ 210.20 Nominees

(a) Within five days of the transmittal by the President of the United States to the Senate of the nomination of an individual to a position, appointment to which requires the advice and consent of the Senate, such individual must file a financial disclosure report containing the information described in § 210.30 and Guide, Vol. 2D, §§ 310-330.

(b) An individual whom the President of the United States or President-elect has publicly announced that he or she intends to nominate to a position may file the financial disclosure report required by this section at any time

after that public announcement, but not later than five days after the transmittal of the nomination to the Senate.

§ 210.20.10 Updated Disclosure

(a) Each individual described in § 210.20 who is nominated by the President of the United States for appointment to a position that requires advice and consent of the Senate, must, at or before the beginning of the first Senate committee hearing to consider the nomination, submit to the Judicial Conference's Committee on Financial Disclosure an amendment to the report previously filed under § 210.20 and transmit copies of the amendment to the designated agency ethics official referred to in Guide, Vol. 2D, § 430 and to the AO.

(b) The amendment to the report must update, through the period ending no more than five days before the beginning of the hearing, the disclosure of information required with respect to receipt of:

(1) outside earned income; and

(2) honoraria, as defined in Guide, Vol. 2D, § 170.

§ 210.30 Special Rules for Initial and Nomination Reports

Each financial disclosure report filed under § 210.10(a) and (b) and § 210.20 must include a full and complete statement of the information required to be reported according to the provisions of Guide, Vol. 2D, Ch. 3, except for § 315.40 (relating to transactions) and § 330 (relating to gifts and reimbursements). The following special rules also apply:

(a) Interests in Property

For purposes of Guide, Vol. 2D, § 310, the report must include all interests in property (as defined in Guide, Vol. 2D, § 170) specified by that section that are held on or after a date that is fewer than 31 days before the date on which the report is filed.

(b) Income

(1) For purposes of Guide, Vol. 2D, § 320, the report must include all income items specified by that section that are generated by or attributable to an asset during the period beginning on January 1 of the preceding calendar year and ending on the date on which the report is filed, except as otherwise provided by § 210.20.10 relating to updated disclosure for nominees.

(2) The report must identify the filer's sources of compensation (other than from United States government employment) exceeding $5,000 during either of the preceding two calendar years or during the current calendar year up to the date of filing, and must briefly describe the nature of the duties performed or services rendered by the reporting individual for each such source of compensation. Information need not be reported, however, that is considered confidential as a result of a privileged relationship, established by law, between the reporting individual and any person. The report also need not contain any information with respect to any person for whom services were provided by any firm or association of which the reporting individual was a member, partner, or employee, unless such individual was directly involved in the provision of such services.

Example: A new entrant hired on June 30, 2015 must file a first financial disclosure report by July 30, 2015. The filer must provide the source of income received exceeding $5,000 and a description of the duties performed or services rendered by the filer, from any position during the calendar year 2013, other than from the United States government, from Jan. 1, 2013 through the date of filing. The filer must also provide the source, type, and amount of income received by the filer, aggregating $200 or more from any source other than the United States government, from Jan. 1, 2014 through the date of filing. **See:** Guide, Vol. 2D, § 320.10.

(c) Liabilities

For purposes of Guide, Vol. 2D, § 335, the report must include all liabilities specified by that section that are owed during the period beginning on January 1 of the preceding calendar year and ending fewer than 31 days before the date on which the report is filed.

(d) Agreements and Arrangements

For purposes of Guide, Vol. 2D, § 340, the report must include only those agreements and arrangements that still exist at the time of filing.

(e) Outside Positions

For purposes of Guide, Vol. 2D, § 355, the report must include all such positions held during the preceding two calendar years and the current calendar year up to the date of filing.

§ 210.40 Annual Filers

(a) Any individual who is a judicial officer or judicial employee (as defined in Guide, Vol. 2D, § 170) during any calendar year and performs the duties of his or her position or office for a period in excess of 60 days in that calendar year must file a financial disclosure report.

(b) Each report must include a full and complete statement of the information for the preceding calendar year for which reporting is required by Guide, Vol. 2D, Ch. 3. Reports are due on or before May 15 of the following year.

§ 210.40.10 Part-Time Magistrate Judges

A part-time magistrate judge whose salary level is equal to or less than 10 percent of the salary of a full-time magistrate judge (i.e., Salary Level 5) normally will not perform the duties of the office for more than 60 days each year and is therefore not required to notify the Committee of exempt status. **See:** § 210.60.10.

§ 210.40.20 Recalled Judges and Re-Employed Annuitants

(a) Recalled judges and re-employed annuitants who are employed immediately after retirement, and who performed the duties of their positions for more than 60 days in the calendar year, should not file a final report but should continue to file annual reports.

(1) Recalled judges and re-employed annuitants who are not employed within 60 days of retirement must file a final report. **See:** § 210.50.

(2) If a judge's Order of Recall states that the recall is on an ad hoc, when-actually-employed basis, not to exceed 60 days, he or she may be authorized to file a final report. **See:** § 210.50.

(3) A judge whose Order of Recall does not authorize the employment of staff by the relevant circuit judicial council or court may consider that a judge is generally not reasonably expected to perform the duties of the office for more than 60 days in a calendar year during the recall. **See:** § 210.50.

(b) After filing a final report, if the recalled judge or re-employed annuitant performs the duties of his or her filing position for more than 60 days in a calendar year, he or she must file an initial report, followed by annual reports for each year that the reporting requirements are met.

§ 210.40.30 Article III Judicial Officers

(a) A judicial officer who retires from regular active service (i.e., a senior judge) must either continue to file annual reports under § 210.40 or certify

that he or she did not perform the duties of the office for more than 60 days in the calendar year under § 210.60.

(b) To assist a senior judge in determining whether to file a final report or certify under § 210.50(d), the judge may consider that a judge who is no longer authorized the employment of staff by the relevant circuit judicial council or court is generally not reasonably expected to perform the duties of the office for more than 60 days in a calendar year. **See:** § 210.50.

§ 210.40.40 Judges of the U.S. Tax Court, U.S. Court of Appeals for the Armed Forces, U.S. Court of Appeals for Veterans Claims, and U.S. Court of Federal Claims

(a) A senior judge must either continue to file annual reports under § 210.40 or certify that he or she did not perform the duties of the office for more than 60 days in the calendar year under § 210.60.

(b) To assist a senior judge in determining whether to file a final report or certify under § 210.50(d), the judge may consider that a judge who is no longer authorized the employment of staff by the relevant judicial council or court, is generally not reasonably expected to perform the duties of the office for more than 60 days in a calendar year.

(c) A senior judge who retires on disability or who freezes his or her pay after electing retired pay must file a final report under § 210.50.

§ 210.45 Periodic Transaction Report Filers

(a) All judges, including judicial officers, bankruptcy judges, magistrate judges, and special trial judges who are required to file annual or final financial disclosure reports and whose filing requirement has not been terminated by the Judicial Conference's Committee on Financial Disclosure must file a periodic transaction report to report any purchase, sale, or exchange that exceeds $1,000 in stocks, bonds, commodities futures, or other securities that is made on or after Aug. 11, 2022. Pub. L. No. 117-125, 136 Stat. 1205 (2022); 5 U.S.C. § 13105 Notes. For exclusions and information on filing, **see:** Judiciary Financial Disclosure Filing Instructions.

(b) The periodic transaction report must be received by the Committee not later than 30 days after the filer receives notification of the transaction, but in any case, no later than 45 days after the transaction.

§ 210.50 Final Filers

(a) An initial or annual filer who separates from employment, including retirement from office or filing position or retirement on disability, or has a

reduction in base salary to below the reporting threshold must file a final financial disclosure report including a full and complete statement of the information required to be reported under Guide, Vol. 2D, Ch. 3 through the date of separation or reduction in base salary. If the filer's annual report for the preceding year has not been filed, the preceding year must be included in the final report as well.

Example: If a filer retires on April 5, 2015, and has not yet filed an annual report for 2014, the final report must be filed by May 5, 2015, and the reporting period would be Jan. 1, 2014 to April 5, 2015.

(b) A final report is due on or before the 30th day after separation from employment or reduction in base salary to below the reporting threshold and may be filed no more than 15 days before separation. If the report is filed before the separation date and there are any changes between the filing date and the separation date, the filer must update the report. The filer should acknowledge this obligation to update the report in an explanation on the financial disclosure form.

(c) If a filer, within 30 days of separating from judiciary employment, assumes a position or office for which a public financial disclosure report under the Act is required to be filed, no final report is required.

(d) If a judge certified that he or she did not perform the duties of the office for more than 60 days in the preceding calendar year in lieu of filing an annual report under § 210.60, and he or she did not perform the duties of the office for more than 60 days in the year of separation, he or she may so certify in lieu of filing the final report.

(e) After filing a final report under paragraph (a) or certification under paragraph (d), if the filer performs the duties of the office or holds a filing position for more than 60 days in a calendar year, the filer must file an initial report, unless the reporting individual filed a nomination report for the filing position, in which case the filer must file an annual report, followed by annual reports for each year the reporting requirements are met.

§ 210.60 Persons Excluded by Rule

§ 210.60.10 Employment of 60 Days or Less

(a) Any judicial officer or judicial employee (as defined in Guide, Vol. 2D, § 170) who performs the duties of his or her position or office for a period of 60 days or less in a calendar year, is not required to file an annual financial disclosure report for that calendar year.

(b) However, the filer must certify in writing to the Committee by May 15th that the filer did not work more than 60 days during the preceding calendar year.

(c) Employment of more than 60 days in a calendar year is not reasonably expected if the judge is no longer authorized the employment of staff by the relevant circuit judicial council or court.

§ 210.60.20 Special Waiver of Reporting Requirements (130-Day Rule)

(a) General Rule

In unusual circumstances, the Committee may grant a request for a waiver of the reporting requirements for an individual who is reasonably expected to perform, or has performed, the duties of an office or position for fewer than 130 days in a calendar year, but only if the Committee determines that:

(1) the individual is not a full-time employee of the United States government;

(2) the individual is able to provide services specially needed by the United States government;

(3) it is unlikely that the individual's outside employment or financial interests will create a conflict of interest; and

(4) public financial disclosure by the individual is not necessary under the circumstances.

(b) Procedure

Requests for waivers must be submitted in writing to the Committee in sufficient time before the filing deadline for the Committee to consider the request. The request must include:

(1) the name of the individual and his or her position, the approximate number of days in a calendar year that he or she expects to serve or the actual number of days that he or she did serve in that position, and a request to waive the reporting requirements under this chapter; and

(2) the reasons for the individual's belief that the conditions of § 210.60.20(a)(1)-(4) are met in the particular case.

§ 210.70 Timeliness

(a) The date of filing is determined by the date a report is received by the Committee through its electronic filing system.

(b) To remind and assist filers of their annual reporting obligation, each spring the Committee electronically sends filing information to all filers. The information contains links to resource material and software required to complete the report.

(c) Each filer is personally responsible for filing an annual financial disclosure report, whether or not filing information or a reminder is received.

(d) Reports that are not filed in a timely manner are subject to a late filing fee (**see:** Guide, Vol. 2D, § 610).

§ 210.80 Extensions

(a) A filer may request from the Committee an extension of the due date up to a maximum of 90 days (**see:** 5 U.S.C. § 13103(g)(1)).

(b) Extension requests should be submitted to the Committee through the electronic filing system and must state the number of additional days requested and why the extension is necessary.

(c) If, after an extension, the new due date falls on a weekend or holiday, the report will be due on the next business day that is not a weekend or holiday.

§ 220 How and Where to File

§ 220.10 [Reserved]

§ 220.20 Reporting Form

The Committee provides an approved form for reporting the information described in Guide, Vol. 2D, Ch. 3. All reports, amended reports, and responses to letters of inquiry from the Committee must be filed utilizing this form.

§ 220.30 Electronic Filing

(a) The Committee has implemented a system for the electronic filing of financial disclosure reports.

(b) All financial disclosure reports filed according to this chapter and amendments (including amendments filed in response to letters of inquiry)

must be submitted electronically through the filing system approved by the Committee and maintained by the AO.

(c) The Committee does not accept filings by paper, email, or facsimile unless permitted under § 220.50.

(d) Filers must certify the accuracy of their reports and electronically sign them upon submission.

§ 220.40 [Reserved]

§ 220.50 Use of Alternative Formats

(a) In exceptional circumstances, it is permissible to provide the required information in any part of the financial disclosure report in an alternative format, but only upon a specific written determination by the Committee that such alternative reporting is acceptable.

(b) Requests to use an alternative format must be submitted to the Committee through the electronic system stating in detail the format sought to be used, why the request is being made, and whether it is for the current report only or for future reports as well.

(c) Absent permission to use an alternative format, no extrinsic reports or documents (such as a brokerage report) may be used or attached as a substitute for disclosure.

§ 230 Reimbursement of Professional Fees

(a) Judges and employees of the United States courts of appeals, district courts, Court of Federal Claims, territorial courts, federal public defender organizations, and the AO who incur professional fees rendered by an accountant, a stock broker, an attorney, or similar licensed professional in the preparation of financial disclosure reports filed under the Act may request reimbursement of the amount of those fees up to a maximum of $1,685 for all work performed through the closure of a report required by the Act, with the exception of a nomination report. JCUS-SEP/OCT 2001, p. 59; JCUS-MAR 2019, p. 21-22; JCUS-SEP 2023, p. 13–14. The maximum reimbursement authorized for an annual or final report includes professional fees incurred to prepare periodic transaction reports for the transactions included in the annual or final report. JCUS-SEP 2023, p. 13–14.

Note: The reimbursement policy is limited to those courts and agencies of the judicial branch governed by the Judicial Conference and therefore

does not include the United States Supreme Court, the Federal Judicial Center, or the United States Sentencing Commission. The Court of Appeals for the Federal Circuit and the Court of International Trade have discretion to reimburse such fees out of their separate appropriations.

Example 1: Filer incurs $2,000 in professional fees rendered by an accountant who assists filer in preparing his or her annual report. Filer later receives a letter of inquiry (LOI) from the Committee requiring filer to provide additional information and re-file an amended annual report. Filer's accountant helps prepare the response to the LOI in the form of an amended annual report, charging filer an additional $1,000. Filer is only entitled to seek reimbursement for up to $1,685 for all the work performed by the accountant through the closure of the annual report, which includes the preparation of the original annual report, the response to the LOI, and the preparation and filing of the amended annual report. Filer is **not** entitled to seek reimbursement of $1,685 per activity the accountant performs.

Example 2: In May 2017, a filer incurs $2,500 in professional fees rendered by an accountant who assists the filer in preparing and filing an annual report. In September 2017, the filer retires from the judiciary and incurs $1,500 in professional fees rendered by an accountant who assists the filer in preparing and filing a final report. As these are separate reports required by the Act, the filer may seek up to $1,685 reimbursement for each report (i.e., $1,685 for the annual report and $1,685 for the final report).

Example 3: In May 2025, a filer incurs $3,000 in professional fees rendered by an accountant who assists the filer in preparing and filing an annual report. The filer incurred an additional $2,000 in professional fees rendered by the accountant to prepare periodic transaction reports for transactions that occurred throughout calendar year 2024, which are also reportable on the filer's annual report due in May 2025. The filer may seek up to $1,685 reimbursement for all professional fees incurred to prepare the annual and associated periodic transaction reports.

(b) For more detailed guidance on the reimbursement request process, **see:** Guide, Vol. 13, § 430.10.30 (Reimbursement for Financial Disclosure Professional Preparation Fees).

Guide to Judiciary Policy

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§ 310 Reporting Thresholds for Assets

(a) As a general rule, when reporting assets, a filer must list each asset that:

(1) exceeds $1,000 in value during the reporting period (**see:** § 315), or

(2) generated more than $200 in income during the reporting period (**see:** § 320).

(b) The income and value of each asset held in brokerage or managed accounts **must be reported individually** (**see:** § 315.30).

§ 312 Types of Reportable Property

Subject to the exceptions in § 315.20, examples of the types of property required to be reported include, but are not limited to:

(a) real estate;

(b) beneficial real estate interests (e.g., royalty and mineral rights);

(c) stocks (including stock options), bonds, securities, and futures contracts;

(d) livestock owned for commercial purposes;

(e) commercial crops, either standing or held in storage;

(f) antiques or art held for resale or investment;

(g) beneficial interests in trusts and estates (but not contingent interests);

(h) cash and cash-equivalent accounts in banks or other financial institutions;

(i) pensions, retirement accounts, and annuities (assets must be listed individually), except as provided in § 315.20(c);

(j) mutual funds;

(k) 529 college education funds;

(l) accounts or other funds receivable; and

(m) capital accounts or other asset ownership in a business or partnership, as well as the business or partnership itself.

§ 315 Interests in Property

(a) Each financial disclosure report filed must include the identity and a brief description of any interest in property having a fair market value in excess of $1,000:

(1) held by the filer during the reporting period in a trade or business; or

(2) for investment or the production of income.

(b) The report must designate the category of value of the property as of the end of the reporting period consistent with § 315.50.

(1) Each item of property must be disclosed separately.

(2) The underlying asset(s) of each of the following items must be **separately** disclosed (**see:** § 315.30), unless the entity qualifies for special treatment under § 365:

(A) individual retirement accounts (IRAs),

(B) brokerage accounts,

(C) managed accounts,

(D) trusts,

(E) pension funds,

(F) 401(k) and 403(b) retirement accounts,

(G) 529 college education funds, and

(H) other entities with portfolio holdings.

§ 315.10 Economic Entities (Businesses and Partnerships)

For property held in a trade, business, partnership, or other business enterprise (e.g., an LLC or sole proprietorship), the filer must list the name and ownership interest in the trade or business, and provide a description of the nature of the trade or business. The source, type, and the actual amount or value of gross income from such a partnership or business must be reported under § 320.10 and § 320.20(b).

(a) Active Assets

Assets actively used in the operation of a trade or business are active assets, which do not need to be individually listed.

(b) Passive Assets

Assets that are passively held in the trade or business and are not related to the nature of the trade or business are passive assets. A filer must list each individual passive asset that is:

(1) valued at more than $1,000, or

(2) earning more than $200 in income.

§ 315.20 Exceptions

The following property interests are exempt from the reporting requirements described above in § 315 and § 315.10:

(a) personal cash-equivalent accounts (defined as any checking, savings, money market account, and certificate of deposit in a bank, savings and loan association, credit union, or similar financial institution) in a single financial institution aggregating $5,000 in value or less in that institution at the end of the reporting period, and earning $200 or less in income during the reporting period;

(b) a personal residence of the filer or his or her spouse (as defined in Guide, Vol. 2D, § 170); and

(c) financial interests in any retirement system of the United States (e.g., Thrift Savings Plan, Social Security).

§ 315.30 Identification of Assets

(a) Each asset required to be reported must be individually listed and identified with sufficient detail so the reader can readily identify the asset type and/or asset nature.

(1) For stocks and other securities, indicate the name and the type of the holding (e.g., “common” or “preferred”). Including stock ticker symbols is encouraged.

(2) For bonds, you must report the name of the issuer (corporation, municipality, state, U.S. Treasury, or government agency) and specify that the asset is a bond (or specify what type of debt obligation it is if not a bond (e.g., debenture or convertible)). For state or local government bonds, you must identify both the city or county and the state. For federal government bonds, indicate the specific type (e.g., savings bonds, Treasury notes, TVA (Tennessee Valley Authority), GNMA (Ginnie Mae), or FHLMC (Federal Home Loan Mortgage Corporation)).

(3) For a cash-equivalent account (savings, checking, money market, certificates of deposit) within a bank, credit union, savings and loan, or similar financial institution, valued at or aggregating more than $5,000 or producing aggregate annual income over $200, list the name of the institution followed by “cash-equivalent account(s)” (e.g., Bank of America cash-equivalent accounts). Information for all cash-equivalent accounts held at each named institution may be aggregated. There is no need to indicate the precise type of account (e.g., savings or checking). Do not list account numbers or addresses for a financial institution or its branches.

(4) For mutual funds, when not listing the ticker symbol, filers must identify both the fund family and the name of the fund (e.g., “Vanguard S&P Index 500 Fund”).

(5) For each real estate interest, indicate the city or county, and state. If more than one parcel of real estate is owned in the same geographic area, identify each parcel by number (e.g., Parcel 1, 2, 3). Do not identify real estate by street address, lot, or block number.

(6) For an interest in a trust, indicate the nature of the interest (e.g., “income beneficiary”) and the trust’s name (e.g., “family trust #1”).

(b) Investment Funds

If the filer owns or has the ability to select individual stocks, bonds, or other assets within an account or plan, even if the filer defers to the decisions of an investment manager, it is not an excepted investment fund. The filer is therefore required to disclose the individual assets that are part of the plan.

(c) Excepted Investment Funds

(1) A filer is not required to list the individual holdings of an excepted investment fund. (**see:** Guide, Vol. 2D, § 170)

(2) The filer must provide:

(A) the specific name of the plan (including the fund family and the name of the fund) and include words in the plan's description to delineate it as a general investment strategy rather than a self-directed plan (e.g., "Vanguard S&P 500 Index Fund");

(B) income from the fund;

(C) the fund's value at the end of the reporting period; and

(D) fund transactions exceeding $1,000 in value (e.g., increasing or decreasing one's interest in the fund).

Note: This does not refer to individual transactions made by the managers of the excepted investment fund.

§ 315.40 Transactions

(a) Transactions during the reporting period that involve any purchase, sale, or exchange of any property or asset (**see:** Guide, Vol. 2D, § 170) exceeding $1,000 must be reported.

(b) A filer must report the:

(1) type of transaction (e.g., buy, sell, redeem, etc.);

(2) date of the transaction;

(3) value of the consideration paid or received;

(4) opening of a bank account and closing of a bank account that has been reported on a prior report, and

(5) mandatory distributions from retirement accounts;

(c) If a reportable asset has been bought and sold during the same reporting period, you must provide the required information about both transactions.

§ 315.40.10 Exceptions

A filer is not required to report the following transactions:

(a) transactions solely between filer, filer's spouse, and filer's dependent children;

(b) transactions in which the then-fair market value paid or received did not exceed $1,000;

(c) transactions involving property used solely as the personal residence of the filer and the filer's spouse;

(d) transactions involving a mere change in the form of the asset (e.g., a stock split);

(e) transactions involving deposits or withdrawals from bank accounts, money market accounts, and certificates of deposit within any given financial institution, other than the opening or closing of all accounts at such institution;

(f) transactions involving U.S. Treasury securities (i.e., Treasury bills, notes, and bonds, including U.S. savings bonds);

(g) transactions involving the reinvestment of dividends, interest, and capital gain distributions (**see:** § 320.20.10);

(h) cash inheritances or inherited property not held for the production of income that was received by the filer or the filer's spouse or dependent children;

(i) donations made to a charity or to a non-dependent relative by the filer or the filer's spouse or dependent children; or

(j) the maturation of any debt, including the call or redemption of any bond.

§ 315.50 Value Categories

(a) The value categories specified for property items are as follows:

(1) $0 – $15,000;

(2) $15,001 – $50,000;

(3) $50,001 – $100,000;

(4) $100,001 – $250,000;

(5) $250,001 – $500,000;

(6) $500,001 – $1,000,000; and

(7) greater than $1,000,000.

(b) With respect to items held by the filer alone or held jointly by the filer with the filer's spouse and/or dependent children, the following additional categories over $1,000,000 apply:

(1) $1,000,001 – $5,000,000;

(2) $5,000,001 – $25,000,000;

(3) $25,000,001 – $50,000,000; and

(4) greater than $50,000,000.

§ 315.60 Valuation of Interests in Property

(a) A good faith estimate of the fair market value of interests in property and assets may be made in any case in which the exact value cannot be obtained without undue hardship or expense to the filer.

(b) Fair market value may also be determined by:

(1) the purchase price (in which case, the filer should indicate date of purchase);

(2) recent appraisal;

(3) the assessed value for tax purposes (adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of that market value);

(4) the year-end book value of nonpublic traded stock, the year-end exchange value of corporate stock, or the face value of corporate bonds or comparable securities;

(5) the net worth of a business partnership;

(6) the equity value of an individually owned business; or

(7) any other recognized indication of value (such as the last sale on a stock exchange).

§ 320 Income

§ 320.10 Non-Investment Income

(a) Each financial disclosure report filed must disclose the source, type, and the actual amount or value of earned or other non-investment income aggregating $200 or more from any one source that is received by the filer or has accrued to the filer's benefit during the reporting period, including the following:

(1) Salaries, fees, commissions, wages, and any other compensation for personal services (other than from United States government employment).

(2) Retirement benefits other than from the United States government (e.g., Thrift Savings Plan, Social Security).

(3) Any honoraria (the source, date, and amount of payments), including payments made or to be made to charitable organizations on behalf of the filer in lieu of honoraria.

Note: Filers should not list the name of the recipient of an honoraria made on behalf of the filer on the financial disclosure report. Rather, the filer must simultaneously file with the Judicial Conference's Committee on Financial Disclosure (Committee), on a confidential basis, a corresponding list of all recipients of such payments, together with the dates and amounts.

(4) Any other non-investment income, such as:

- earnings from teaching,
- prizes,
- awards,
- discharge of indebtedness, and
- fees earned as trustee of a family trust or executor of a family estate.

(b) The following do not have to be reported as non-investment income:

(1) death benefits under insurance policies;

(2) inheritances;

(3) tort recoveries and other compensation for injuries and sickness;

(4) disability compensation;

(5) income tax refunds; and

(6) veteran's benefits.

§ 320.20 Investment income

Each financial disclosure report filed under this subpart must disclose the following:

(a) The source and type of investment income, including dividends, rents, interest, capital gains, or income from qualified or excepted trusts (**see:** § 365), that is generated by or attributable to an asset during the reporting period, and that exceeds $200 in amount or value from any one source.

(1) For entities with portfolio holdings, such as individual retirement accounts (IRAs), brokerage accounts, managed asset accounts, and trusts, each underlying source of income must be separately disclosed, unless the entity qualifies for special treatment under § 365.

(2) The amount or value of income from each reported source must be disclosed and categorized consistent with the following table:

(A) $0 – $1,000;

(B) $1,001 – $2,500;

(C) $2,501 – $5,000;

(D) $5,001 – $15,000;

(E) $15,001 – $50,000;

(F) $50,001 – $100,000;

(G) $100,001 – $1,000,000;

(H) greater than $1,000,000; but with respect to investment income of the filer alone or joint investment income of the filer with the filer's spouse and/or dependent children, the following additional categories over $1,000,000 apply:

(i) $1,000,001 – $5,000,000; and

(ii) greater than $5,000,000.

(b) The source, type, and the actual amount or value of gross income from a business, distributive share of a partnership, joint business venture income, payments from an estate or an annuity or endowment contract, or any other items of income not otherwise covered by § 320.10 and § 320.20(a) that are generated by or attributable to an asset during the reporting period and that exceed $200 from any one source.

§ 320.20.10 Reportable Income

(a) Reportable income can differ from taxable income.

(b) For purposes of the financial disclosure report, all reportable interest, dividends, and other income generated by or attributable to an asset during the reporting period must be listed, regardless of whether that income is taxable, tax deferred, or tax exempt.

(c) Income from mutual fund holdings includes short-term and long-term capital gains along with dividends that are reinvested.

§ 320.30 Life Insurance Policies

(a) Term Insurance

A term insurance policy pays a benefit if the insured person dies during the term of the policy, and when the policy expires, no value remains. Since the insured person does not have an ownership interest in the value of the policy, term insurance is not reportable.

(b) Cash Value Insurance

Cash value insurance is part insurance and part investment (e.g., Prudential Whole-Life Insurance Policy). Such policies require premiums during the life of the insured person in exchange for a fixed sum of money to be paid to a beneficiary when the insured person dies. A part of the premium pays for the expense of the insurance portion of the policy, and the remainder goes into a tax-deferred cash reserve that is invested and builds the policy's cash value. An insured person would have an ownership interest in the investment portion of such a policy that would require reporting.

(c) Variable Policy

Generally, the purchaser of an insurance policy does not select specific investment funds other than a general category of risk (e.g., high, medium, or low risk). Under a "variable" or "universal variable" policy that allows the insured person to choose specific investments from options offered by the insurer, the filer must report the name of the insurance company and the fund selected (e.g., "Prudential Variable Life: Prudential Money Market Fund"). If assets were allocated to more than one fund, all funds to which investments were allocated must be reported.

§ 325 Purchases, Sales, and Exchanges

§ 325.10 Generally

Except as indicated in Guide, Vol. 2D, § 210.30, each financial disclosure report filed must include a brief description, the date, and value (using the categories of value in § 315.50) of any purchase, sale, or exchange of a reportable asset during the reporting period, in which the transaction amount exceeds $1,000. **See:** Guide, Vol. 2D, § 170.

§ 325.20 Exceptions

(a) The following transactions do not need to be reported:

(1) Any transaction solely by and between the filer, filer's spouse, and dependent children.

(2) Transactions involving government-issued Treasury securities (i.e., Treasury bills, notes, and bonds, including U.S. savings bonds); and personal cash-equivalent accounts (as defined in § 315.20(a)) that occur at rates, terms, and conditions available generally to members of the public.

Note: Likewise, transactions involving portfolio holdings of qualified and investment trusts and excepted trusts described in § 365.20 do not need to be reported.

(3) Any transaction that occurred at a time when the reporting individual was not a judicial officer or judicial employee.

§ 330 Gifts and Reimbursements

§ 330.10 Gifts

Except as indicated in Guide, Vol. 2D, § 210.30, each financial disclosure report must contain the identity of the source, a brief description, and the value of all gifts aggregating more than $480 in value that are received by the filer during the reporting period from any one source.

§ 330.20 Reimbursements

Except as indicated in Guide, Vol. 2D, § 210.30, each financial disclosure report must contain the identity of the source and a brief description (including travel locations, dates, and nature of expenses provided) of any travel-related reimbursements aggregating more than $480 in value that are received by the filer from one source during the reporting period.

§ 330.30 Exclusions

(a) Reports need not contain any information about gifts and reimbursements to which the provisions of this section would otherwise apply that are received from relatives (as defined in Guide, Vol. 2D, § 170) or during a period in which the filer was not a judicial officer or judicial employee.

(b) For gift reporting only, any food, lodging, or entertainment received as "personal hospitality of any individual" (as defined in § 170) need not be reported. Certain exclusions are also specified in the definitions of gift and reimbursement in § 170.

§ 330.40 Aggregation Exception

Any gift with a fair market value of $192 or less need not be aggregated for purposes of the reporting rules of this section.

§ 330.50 Value of Gifts and Reimbursements

(a) The value to be assigned to a gift (for determining whether the reporting threshold is met and for reporting) or reimbursement (for determining whether the reporting threshold is met) is its fair market value.

(b) For most reimbursements, this will be the amount actually received.

(c) For gifts, the value should be determined using one of the following means:

(1) If the gift has been newly purchased or is readily available in the market, the value should be its retail price (the filer need not contact the donor, but may contact a retail establishment selling similar items to determine the present cost in the market); **or**

(2) If the item is not readily available in the market, such as a piece of art, a handmade item, or an antique, the filer may make a good faith estimate of the value of the item.

Note: In the case of gifts related to travel, the filer's estimate of value should be made in reference to the most analogous commercially available substitute (e.g., transportation aboard a private aircraft should be valued at the cost of a first-class ticket for a similar route on a commercial air carrier; travel aboard a private yacht should be valued according to the cost of a ticket on a commercial cruise with similar destinations, duration, and accommodations).

(d) "Readily available in the market" means that an item generally is available for retail purchase in the metropolitan area nearest to the filer's residence or from an internet retailer.

(e) The market value of a ticket entitling the holder to attend an event that includes food, refreshments, entertainment, or other benefits is the face value of the ticket, which may exceed the actual cost of the food and other benefits. The value of food and beverages (which may be excludable under the definition of "gift" in Guide, Vol. 2D, § 170) may be determined by:

- making a good faith estimate, or
- determining their actual cost from the caterer, restaurant, or similar source.

§ 330.60 Waiver Rule in the Case of Certain Gifts

(a) In unusual cases, the value of a gift as defined in Guide, Vol. 2D, § 170 need not be aggregated for reporting threshold purposes under this section and, therefore, the gift need not be reported if the Committee receives a written request for and issues a waiver. A waiver request must include the following:

(1) A cover letter with the filer's name and position and a request for a waiver under 5 U.S.C. § 13104(a)(2)(C); and

(2) An enclosure with:

(A) the identity and occupation of the donor;

(B) a description and estimated fair market value of the gift;

(C) a description of the relationship between the filer and the donor including whether the relationship and motivation for the gift are personal in nature;

(D) an explanation if the relationship or gift from the donor would require recusal;

(E) whether the gift was given to the filer because of an official position; and

(F) an explanation as to why there is no countervailing public purpose requiring public disclosure of the nature, source, and value of the gift.

(b) The Committee may issue a waiver, after determining that:

(1) both the basis of the relationship between the grantor and the grantee and the motivation behind the gift are personal; and

(2) no countervailing public purpose requires public disclosure of the nature, source, and value of the gift.

(c) The date of any waiver request and grant issued under this section must be made publicly available as a note in Part VIII. Additional Information or Explanations on the filer's financial disclosure report.

(d) Any determination by the Committee that a filer does or does not have to report a gift under this section is not a determination that the filer may properly accept the gift under the appropriate Code of Conduct for the filer or any other applicable ethics statute or regulation (**see:** Guide, Vol. 2D, § 160).

§ 335 Liabilities

§ 335.10 Generally

(a) Each financial disclosure report filed must identify and include a brief description of the filer's liabilities over $10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed.

(b) The report also must designate the category of value of the liabilities consistent with § 315.50, reporting the amount owed to the creditor at the end of the reporting period.

§ 335.20 Exceptions

(a) The following are not required to be reported:

(1) personal liabilities owed to a spouse or to the parent, brother, sister, or child of the filer or the filer's spouse;

(2) any mortgage secured by a personal residence of the filer or the filer's spouse;

(3) any loan secured by a personal motor vehicle, household furniture, or appliances, provided that the loan does not exceed the purchase price of the item that secures it;

(4) any revolving charge account with an outstanding liability that does not exceed $10,000 at the close of the reporting period; and

(5) any liability:

(A) that is the sole financial liability or responsibility of the spouse or child;

(B) that is not in any way, past or present, derived from the assets, income, or activities of the reporting person;

(C) from which the reporting person does not derive or expect to derive a benefit; and

(D) regarding which the reporting person has no knowledge.

(b) Omission of such data indicates a certification of these statutory conditions.

§ 340 Agreements and Arrangements

Each financial disclosure report filed under this section must identify the parties to, the date of, and a brief description of the terms of, any agreement or arrangement of the filer in existence at any time during the reporting period with respect to:

(a) future employment;

(b) a leave of absence from employment during the period of the reporting individual's government service;

(c) continuation of payments by a former employer other than the United States government; and

(d) continuing participation in an employee welfare or benefit plan maintained by a former employer.

§ 345 Trustees, Executors, Administrators, and Custodians

(a) If the filer is a trustee, executor, administrator, custodian, or in any other similar position, the filer has the legal authority and responsibility to exercise control over and manage the assets in a trust or estate.

(b) The reporting of a position as trustee, executor, administrator, custodian, or any similar position requires a listing of the assets involved if the filer, filer's spouse, or any dependent child receives income from, or has a beneficial interest in, the estate or fund with which filer is associated.

§ 350 Power of Attorney

A filer is not required to list the assets (**see:** § 312, § 315, and § 320); purchases, sales, and exchanges of assets (**see:** § 325); and liabilities (**see:** § 335) subject to a power of attorney, whether or not the power has been exercised.

§ 355 Outside Positions

§ 355.10 Generally

(a) Each financial disclosure report filed must identify all positions held by the filer at any time during the reporting period and any time up to the date of the filing of the report, as an officer, director, trustee, general partner, proprietor, representative, executor, employee, or consultant of any corporation, company, firm, partnership, trust, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States.

(b) When a filer lists trustee, executor, or a similar position, the filer must also list the assets in the trust or estate for which the position is held if the filer, the filer's spouse, or any dependent child receives income from, or has a beneficial interest in, the estate or fund with which the filer is associated. **See:** § 365.

§ 355.10.10 Compensation and Financial Interest

Outside positions must be disclosed even if the filer is not compensated and even if neither the filer nor the filer's family has any financial interest in the entities listed.

§ 355.20 Exceptions

The following need not be reported:

(a) positions held in any religious, social, fraternal, or political entity; and

(b) positions solely of an honorary nature, such as those with an emeritus designation.

§ 360 Spouses and Dependent Children

§ 360.10 Special Disclosure Rules

Each report required under Guide, Vol. 2D, Ch. 2 must also include the following information with respect to the spouse or dependent children of the reporting individual:

(a) Income

For purposes of § 320, the filer must report the following income:

(1) Spouse Non-investment Income

(A) Non-investment income includes such items as salary, royalties, and lottery winnings.

(B) The filer must report the source but not the amount of the spouse's non-investment income (other than honoraria and investment income) exceeding $1,000 from any one source (other than from the spouse's current employment by the United States government).

(C) If items of earned income are derived from a spouse's self-employment in a business or profession, the filer must report the nature of the business or profession but not the amount of the earned income.

(2) Spouse Honoraria

The source and actual amount or value of any honoraria received by or accrued to the spouse (or payments made or to be made to

charity on the spouse's behalf in lieu of honoraria), and the date on which the honoraria were received must be reported.

(3) Spouse and Dependent Child Investment Income

With respect to a spouse or dependent child, the type and source, and the amount or value (category or actual amount, consistent with § 320) of all other income exceeding $200 from any one source, such as investment income from interests in property (if the property itself is reportable under § 315).

(b) Gifts and Reimbursements

For purposes of § 330, the filer must report the identity and a brief description of reportable gifts, and the identity of the source and a brief description of reportable reimbursements received by a spouse or dependent child. Gifts and reimbursements do not have to be reported if they are received either from a relative or totally independent of their relationship to the filer.

(c) Interests in Property, Transactions, and Liabilities

For purposes of § 315, § 325, and § 335, the filer must report all information concerning property interests, transactions, or liabilities referred to by those sections of a spouse or dependent child, unless the following three conditions are satisfied:

(1) the filer certifies that the item represents the spouse's or dependent child's sole financial interest or responsibility, and that the filer has no specific knowledge regarding that property;

(2) the item is not in any way, past or present, derived from the income, assets or activities of the filer; and

(3) the filer neither derives, nor expects to derive, any financial or economic benefit from the item.

Note: One who prepares a joint tax return with his or her spouse will normally derive a financial or economic benefit from assets held by the spouse, and will also be charged with knowledge of such items. Consequently, the filer could not invoke this exception.

§ 360.20 Exception (New Entrant and Nominee)

For a report filed by a new entrant or nominee under Guide, Vol. 2D, § 210.10 or § 210.20, no information regarding gifts and reimbursements or transactions is required for a spouse or dependent child.

§ 360.30 Divorce and Separation

A reporting individual need not report any information about:

(a) a spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation;

(b) a former spouse or a spouse from whom the reporting individual is permanently separated; or

(c) any income or obligations of the reporting individual arising from dissolution of the reporting individual's marriage or permanent separation from a spouse.

§ 365 Trusts, Estates, and Investment Funds

§ 365.10 Generally

(a) Except as otherwise provided, each financial disclosure report must include the information required by this part of Volume 2 about the holdings — and income from the holdings — of any trust, estate, investment fund, or other financial arrangement from which income is received, or with respect to which a beneficial interest (as defined in Guide, Vol. 2D, § 170) in principal or income is held by the filer or the filer's spouse or dependent child. Disclosure of the holdings of a trust in which the filer or the filer's spouse or dependent child has a contingent beneficial interest is not required.

(b) Revocable Living Trust

(1) Nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust (also known as a "living trust") with respect to which the filer, the filer's spouse, or dependent child has only a remainder interest, vested or not, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child.

(2) Furthermore, nothing in this section requires the reporting of the holdings or income from the holdings of a revocable inter vivos trust

from which the filer, the filer's spouse, or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither the filer, nor the filer's spouse, nor the filer's dependent child. Distributions from the trust received by the filer, the filer's spouse, or the filer's dependent child are reportable as income from the trust.

(c) Trust Income Exclusion

Filers are not required to report the source of income from any trust:

(1) that was not created directly by the filer, the filer's spouse, or any dependent child; and

(2) the holdings or sources of income of which the filer, the filer's spouse, and any dependent child have no knowledge.

(d) Life Insurance Policies Within Trusts

A trust whose sole asset is a term life insurance policy need not be listed, as term insurance is not regarded as an investment asset.

§ 365.20 Qualified Trusts and Excepted Trusts

The Code of Conduct for United States Judges (**see:** Guide, Vol. 2A, Ch. 2, Canon 3C(2)) precludes judges, their spouses, and dependent children from owning a blind trust. Other judiciary filers may own beneficial interests in a qualified blind trust with the approval of the Committee. For those filers:

(a) Qualified Trust Reporting Exceptions

(1) A filer should not report information about the holdings or income from holdings of any qualified blind trust or any qualified diversified trust.

(2) For a qualified blind trust, a financial disclosure report must disclose the category of the aggregate amount of the trust's income attributable to the beneficial interest of the filer, the filer's spouse, or dependent child in the trust.

(3) For a qualified diversified trust, a financial disclosure report must disclose the category of the aggregate amount of income with respect to such a trust that is actually received by the filer, the filer's spouse, or dependent child, or applied for the benefit of any of them.

(b) In the case of an excepted trust, a filer should indicate the general nature of its holdings, to the extent known, but will not otherwise need to report information about the trust's holdings or income from holdings.

(1) The category of the aggregate amount of income from an excepted trust that is received by the filer, the filer's spouse, or dependent child must be reported on financial disclosure reports.

(2) For purposes of this part, the term "excepted trust" means a trust:

(A) that was not created directly by the filer, spouse, or dependent child; and

(B) the holdings or sources of income of which the filer, spouse, or dependent child have no specific knowledge through a report, disclosure, or constructive receipt, whether intended or inadvertent.

§ 370 Security Issues

The Act makes financial disclosure reports available to the public. Revealing certain identifying information can pose a security risk to the filer or the filer's family. Reporting of the following information is not required, and the Committee recommends that it not be included in financial disclosure reports.

(a) Real Estate

(1) Home Address

Filers should not disclose their home address for any purpose connected with the report. Filers should use their chambers or office address.

(2) Rental Properties

Filers only need to provide the city (or county) and state in which the property is located. Do not use street addresses, lot numbers, or survey descriptions.

(b) Unnecessary Financial Detail

(1) Account Numbers

Filers should not include any bank or brokerage account numbers.

(2) Social Security Number

Filers should not include nor use the social security number for themselves, their spouse, nor their dependent children.

(3) Bank Details

Filers only need to provide the name of a bank, not its address or the branch frequented. Bank account numbers should never be included in a report.

(c) Names of Relatives

Filers should not identify relatives by name nor designation (e.g., “daughter,” “brother,” or “mother-in-law”). Trusts or estates should be identified by number (e.g., “Trust #1” or “Estate #2”).

(d) Financial Documents

Filers should not attach financial documents, brokerage statements, tax returns, deeds, or trust agreements to their report.

§ 375 No Incorporation by Reference

Each financial disclosure report submitted by a filer must be complete in itself. No information may be adopted or incorporated by reference to prior financial disclosure reports or financial documents, statements, or reports.

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Ch. 4: Report Review

§ 410 In General

§ 420 Responsibilities of Reviewing Officials
- § 420.10 Initial Review
- § 420.20 Signature by Reviewing Official
- § 420.30 Requests for Additional Information
- § 420.40 Compliance with Applicable Laws and Regulations
- § 420.50 Administrative Closure

§ 430 Expedited Procedure for Presidential Appointees Subject to Senate Confirmation

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§ 410 In General

(a) The Judicial Conference of the United States is the designated agency ethics official (**see:** Guide, Vol. 2D, § 170) for judges and judiciary employees and serves as the reviewing official for judiciary financial disclosure reports.

(b) That responsibility has been delegated to the Conference's Committee on Financial Disclosure (Committee), which has in turn delegated certain responsibilities to Committee counsel and staff.

(c) The date that a report or supplemental report is received will be noted.

(d) Except as indicated in § 420.30, all reports should be reviewed within 60 days after the date of filing.

(e) Final certification under § 420.20 may, of necessity, occur later, where additional information is being sought, or remedial action is being taken.

Last substantive revision (Transmittal 02-036) February 5, 2018
Last revised (minor technical changes) January 15, 2021

§ 420 Responsibilities of Reviewing Officials

§ 420.10 Initial Review

The reviewing official must examine the report to determine, to his or her satisfaction that:

(a) each required item is completed; and

(b) no interest or position disclosed on the form violates or appears to violate:

(1) the Act, as amended, and the implementing regulations; and

(2) items specifically set out in the filer's certification stated at the filer's signature block of the report, including:

- outside employment,
- honoraria, or
- gifts.

§ 420.20 Signature by Reviewing Official

(a) If the reviewing official determines that the report meets the requirements of § 420.10, he or she must certify it by signature and date.

(b) The reviewing official need not audit the report to ascertain whether the disclosures are correct.

(c) Disclosures should be presumed correct unless:

(1) there is a patent omission or ambiguity, or

(2) the office has independent knowledge of matters outside the report.

(d) A report signed by a reviewing official certifies that:

(1) the judiciary has reviewed the report;

(2) the reviewing official has concluded that each required item has been sufficiently reported; and

(3) on the basis of information in the report, the filer is in compliance with applicable laws and regulations noted in § 420.10(b).

§ 420.30 Requests for Additional Information

(a) If the reviewing official believes that additional information is required, he or she will request that it be submitted by a specified date.

(b) If the additional information needed is required to be in the filer's report, the filer must submit an amended report with the additional information specified by the reviewing official.

(c) If the reviewing official concludes, based on the information in the report and any additional information submitted, that the report fulfills the requirements of § 420.10, he or she must sign and date the report.

§ 420.40 Compliance with Applicable Laws and Regulations

(a) If the reviewing official concludes that report information may reveal a violation of the laws and regulations specified in § 420.10, the official will:

(1) notify the filer of that conclusion;

(2) afford the filer a reasonable opportunity to respond; and

(3) determine, after considering any response, whether or not the filer has complied with applicable laws and regulations specified in § 420.10(b).

(b) If the reviewing official concludes that the report fulfills the requirements, he or she will sign and date the report.

(c) If the reviewing official determines that the report does **not** fulfill the requirements, he or she will:

(1) notify the filer of the conclusion;

(2) afford the filer an opportunity for personal consultation if practicable;

(3) determine what action should be taken to bring the report into compliance with § 420.10; and

(4) notify the filer in writing of the action that is needed, and the date by which such action should be taken.

§ 420.50 Administrative Closure

(a) In extraordinary circumstances, the Committee on Financial Disclosure's Subcommittee on Compliance may administratively close a financial disclosure report that:

(1) otherwise does not meet the requirements provided in Guide, Vol. 2D, Ch. 2 and Ch. 3, and

(2) cannot be certified by a reviewing official as required under § 420.

(b) Factors that the Subcommittee will consider when determining whether to administratively close a report include:

(1) the absence of evidence indicating that the filer is knowingly and willfully failing to act;

(2) in the case of a non-responsive filer, the number of, type of, and time period over which efforts were made to contact the filer, and the unsuccessful results;

(3) in the case of a filer incapable of filing or responding to a letter of inquiry because of sickness, infirmity, or other such reason, a sufficient indication of the filer's incapacity and the likelihood of its continuation (e.g., a letter from a doctor, family member, representative, or chief judge who is aware of or knowledgeable about the situation); and

(4) in the case of a filer who is no longer in a governmental decision-making position, the absence of any likelihood that official actions would be compromised by a conflict of interest.

(c) Administrative closures will not be used in situations where a filer does not want to report required information.

(d) A report that is administratively closed will be neither certified nor signed by a reviewing official.

§ 430 Expedited Procedure for Presidential Appointees Subject to Senate Confirmation

The following procedures apply in cases of a report filed by an individual described in Guide, Vol. 2D, § 210.20 who is nominated by the President for appointment to a position that requires the advice and consent of the Senate.

(a) The Executive Office of the President will furnish the applicable financial disclosure report form to the nominee. The completed report will be forwarded to the Judicial Conference's Committee on Financial Disclosure.

(b) The Committee will complete an accelerated review of the report according to the standards and procedures in § 420.

(c) If the Committee is satisfied that the report meets the requirements of the Act and its implementing regulations, the reviewing official will sign and date the report form, and then either return the report to the nominee, or submit the report to the appropriate Senate committee expressing the opinion whether, based on the report information, the nominee has complied with all applicable conflict laws and regulations.

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Ch. 5: Report Redaction and Release

§ 510 Overview

§ 520 Applicability

§ 530 Responsibility

§ 540 Requesting a Report
- § 540.10 Request to View a Report
- § 540.20 Cost for Copies of Reports
- § 540.30 Notification of a Request

§ 550 Limitations on Release
- § 550.10 Custody of Financial Disclosure Reports
- § 550.20 Incomplete or Improper Request
- § 550.30 Security

§ 560 Use of Reports

§ 570 Reporting Requirements

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§ 510 Overview

(a) The Judicial Conference issued the "Regulations of the Judicial Conference of the United States on Access to Financial Disclosure Reports Filed by Judges and Judiciary Employees Under the Ethics in Government Act of 1978, as Amended" on Dec. 2, 1999 (JCUS-SEP 1999, pp. 48, 63), and amended them on Oct. 1, 2000 (JCUS-SEP 2000, pp. 39, 53), Oct. 1, 2007 (JCUS-SEP 2007, p. 17), and March 14, 2017 (JCUS-MAR 2017, pp. 12-13).

(b) In 2017 and 2022, the Conference delegated to its Committee on Financial Disclosure (Committee) the authority to adopt and amend regulations under the Act (JCUS-SEP 2017, p. 13; JCUS-SEP 2022, p. 5).

(c) The regulations in this chapter govern access to the financial disclosure reports filed by judicial officers and judicial employees under the Act.

Last revised (Transmittal 02-094) March 10, 2026

§ 520 Applicability

These regulations apply to the processing of requests for copies of the financial disclosure reports of judicial officers and judicial employees maintained by the Administrative Office of the U.S. Courts (AO).

§ 530 Responsibility

(a) The Committee on Financial Disclosure:

(1) monitors the release of financial disclosure reports and the publishing of reports to a publicly accessible online database to ensure compliance with the Act and the Committee's guidance;

(2) reviews and, within the Committee's discretion, approves or disapproves any requests for the redaction of statutorily mandated information where the release of the information could endanger a filer or a filer's family member, as provided in § 550.30;

(3) reviews and approves or disapproves any requests for waiver of costs associated with a request for the release of a financial disclosure report; and

(4) provides guidance when questions not covered in these regulations arise.

(b) The Committee's Subcommittee on Public Access and Security is delegated the authority to act for the Committee where necessary to implement the provisions of these regulations.

§ 540 Requesting a Report

(a) To request a report, requesters must submit a Form AO 10A or its electronic equivalent to the AO's Financial Disclosure Office or must register for access to the online database.

(1) The Form AO 10A or its electronic equivalent must:

(A) include a list of the filers whose reports are requested;

(B) be signed and dated by the requester; and

(C) contain the information identified below in § 540(a)(2).

(2) All requests must contain:

(A) the requester's name, occupation, and address;

(B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(C) the requester's affirmation that he or she is aware of the prohibitions and restrictions with regard to obtaining or viewing the report.

(b) Each request received that results in the release or viewing of a report will be retained throughout the period that the report is available to the public (**see:** § 550.10), except as provided in § 540.30(b).

§ 540.10 Request to View a Report

(a) Financial disclosure reports may be viewed in the AO's Financial Disclosure Office by appointment.

(b) Appointments must be made at least five working days in advance.

(c) Staff will provide the requester with an approved copy of the requested report(s) to view.

§ 540.20 Cost for Copies of Reports

(a) Unless otherwise requested, financial disclosure reports will be provided via reliable electronic means at no charge.

(b) If a paper copy of a report is requested, the requester will be charged $0.20 per page to cover reproduction and mailing costs.

(c) A paper copy of a requested report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest, particularly the requester's inability to pay the fee.

(d) Requests for waiver must be presented in writing to the Committee.

§ 540.30 Notification of a Request

(a) For financial disclosure reports that are required to be published on the online database (i.e., judges' reports covering calendar year 2021 to present), AO's Financial Disclosure staff will notify the judge once a report is certified and afford the judge a final opportunity to request redaction before publication on the database. Publication of a report on the database constitutes its public release since anyone registered on the

database can immediately access and download published reports. Judges may choose to receive notifications about who previously accessed their reports on the database.

(b) For financial disclosure reports that are not required to be published on the online database (i.e., all employee reports, and judges' reports covering calendar years 2020 and earlier), AO's Financial Disclosure staff will notify filers when a request for copies of their reports is received, provide them a copy of the request, and afford them an opportunity to request redaction before releasing the requested reports.

(c) When a request involves a filer who is the subject of an ongoing criminal or ethics investigation by the U.S. Department of Justice, a Judicial Conference committee, or a circuit judicial council, the Committee will not notify a filer of the request and later release of a financial disclosure report where the request's originator affirmatively asks that the filer not be notified. The Committee staff will coordinate with the Committee Chair on the release of reports related to such investigations.

§ 550 Limitations on Release

§ 550.10 Custody of Financial Disclosure Reports

(a) Any report filed under Guide, Vol. 2D, Ch. 2 will be retained by the AO for six years after receipt.

(b) After the six-year period, the report will be destroyed unless needed in an ongoing investigation.

(c) For individuals who file a report as a nominee under Guide, Vol. 2D, § 210.20 and are not later confirmed by the Senate, such reports will be destroyed one year after the individual is no longer under consideration by the Senate, unless needed in an ongoing investigation.

§ 550.20 Incomplete or Improper Request

Under 5 U.S.C. § 13107, financial disclosure reports will not be released to any individual who fails to complete the request properly or pay assessed costs.

§ 550.30 Security

(a) Financial Disclosure Committee staff will take reasonable steps to ensure the privacy and security of individuals required to file a financial disclosure report according to the Act and the guidance provided by the Committee.

(b) The staff will not release or allow the viewing of any report until notice has been given to the filer, except as provided in § 540.30.

(c) According to Committee direction, Committee staff will continue to monitor compliance with the Act, while minimizing security risks by removing information that is not required by the Act, including without limitation:

(1) spouse's and dependents' names, initials, and designations (e.g., "spouse," "son," "dependent child," "dc");

(2) home addresses;

(3) home or personal mobile telephone numbers, or the direct telephone number of a government-issued cell phone or private extension in chambers;

(4) personal email addresses;

(5) social security and driver's license numbers;

(6) financial account, credit or debit card, and bank account numbers;

(7) street addresses of rental properties, business properties, and financial institutions (including branch names or location identifiers);

(8) ownership codes (e.g., "joint," "JTWROS," "UGMA," "UTMA"); and

(9) filer's signature.

(d) A report that may be disseminated to the public may be redacted under 5 U.S.C. § 13107 to prevent public disclosure of personal or sensitive information that could directly or indirectly endanger the filer or a filer's family member if obtained by a member of the public hostile to the filer or a filer's family member. The following procedure will be used to determine whether redaction is appropriate.

(1) When an annual report is filed, the filer may request redactions believed to be appropriate before release of a report that may be disseminated to the public. Redaction requests may also be made at any other time based on the filer's security situation.

(2) Reports that will not be considered as ones that may be disseminated to the public include, but are not limited to:

(A) reports released upon request to appropriate committees of the Senate or House of Representatives; and

(B) reports released upon request to appropriate executive-branch officials.

Note: In the case of (A) and (B), redaction of the filer's signature under § 550.30(c)(9) may not occur if so indicated by the requester.

(3) The filer must state with specificity what material is sought to be redacted. The filer must also state in detail the reasons justifying redaction. These reasons may include, but are not limited to:

(A) the purposes and need for an ongoing protective detail;

(B) particular threats or inappropriate communications;

(C) involvement in a high threat trial or appeal;

(D) a current and active protective investigation;

(E) false liens have been filed against the filer or the filer's family member;

(F) persons have engaged in identity theft activities against the filer or the filer's family member;

(G) persons have engaged in other forms of financial harassment of the filer or the filer's family member; or

(H) certain information on the form that could endanger the filer or the filer's family member directly or indirectly if possessed by a member of the public hostile to the filer or the filer's family member. The types of information that could endanger the filer or the filer's family member may include, but are not limited to:

(i) street addresses and city or county and state of primary or secondary residences, including rental properties at which the filer or the filer's family member resides for part of a year;

(ii) names of schools or care facilities attended by a filer or the filer's family member or at which a filer or the filer's family member works; and

(iii) names of spouses' employers.

(4) The Committee will determine, in consultation with the U.S. Marshals Service, whether information sought to be redacted could,

if disseminated to the public, directly or indirectly endanger the filer or the filer's family member, then grant or deny the request as appropriate.

(A) Information that could facilitate the financial harassment of a filer or a family member (e.g., identity theft) may be deemed information that could endanger a filer or a family member.

(B) However, no redaction will be granted that eliminates disclosure of the existence, rather than extent, of an interest in an entity that would disqualify the filer from serving as a judge in litigation involving that entity, unless disclosure of that interest would:

(i) reveal the location of a residence of the filer or the filer's family member;

(ii) reveal the place of employment of the filer or the filer's family member;

(iii) reveal the school or care facility attended by the filer or the filer's family member or at which the filer or the filer's family member works; or

(iv) increase an existing danger to a filer or the filer's family member based on circumstances described in § 550.30(d)(3). (**Note:** Generally, an existing danger is one that is recent or current (i.e., within the last seven years).)

(C) It would be unusual for a request for the redaction of the identity of a stock or other security to be granted.

(D) The Committee may redact material without a request from a filer if it has received credible evidence that the release of information contained in a financial report could endanger the filer or the filer's family member.

(e) Information may be redacted from a report according to such finding to the extent necessary to protect the filers who filed the report and their family, and the redactions will be made for as long as the filers certify that reasons for redacting the report exist.

(f) The Committee staff will notify a filer when a report is actually released or reviewed and provide the filer with a copy of the redacted report. The staff

will maintain a copy of the redacted material for as long as the original report is maintained.

(g) A request for redaction and its supporting documents, except for copies of the financial disclosure report and any amendments to it, are considered confidential and will only be used to determine whether to grant a request for redaction. Such documents are not considered part of any report available for release under 5 U.S.C. § 13107(b)(1).

§ 560 Use of Reports

(a) Under 5 U.S.C. § 13107(c), it is unlawful for any person to obtain or use a report for:

(1) any unlawful purpose;

(2) any commercial purpose other than by news and communications media for dissemination to the general public;

(3) determining or establishing the credit rating of any individual; or

(4) use directly or indirectly in the solicitation of money for any political, charitable, or other purpose.

(b) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited by this section. The court in which such action is brought may assess against such person a penalty in any amount not to exceed $10,000. Such remedy may be in addition to any other remedy available under statutory or common law. **See also:** Guide, Vol. 2D, § 630.

§ 570 Reporting Requirements

The AO will report the following to the appropriate Congressional Committees by March 30 of each year:

(a) the total number of reports in which required information is redacted under exercise of the authority delineated in § 550.30(d);

(b) the total number of individuals whose reports have been redacted under exercise of the authority in § 550.30(d);

(c) the types of threats against filers whose reports are redacted, if appropriate;

(d) the nature or type of information redacted;

(e) what steps or procedures are in place to ensure that sufficient information is available to litigants to determine whether there is a conflict of interest;

(f) principles used to guide implementation of redaction authority; and

(g) any public complaints received relating to redaction.

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Ch. 6: Related Penalties

§ 610 Filing a Late Report
§ 610.10 Late Filing Fee
§ 610.20 Waiver of Late Fee
§ 610.30 Procedure

§ 620 Failure to File or Falsifying a Report
§ 620.10 Civil Action
§ 620.20 Criminal Action

§ 630 Misuse of Public Reports

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§ 610 Filing a Late Report

§ 610.10 Late Filing Fee

(a) Under 5 U.S.C. § 13106(d), any individual required to file a financial disclosure report must transmit a $200 late filing fee payable to the United States Treasury if such report is filed more than 30 days after the later of:

(1) the date such report must be filed under Guide, Vol. 2D, Ch. 2; or

(2) the last day of any filing extension period granted under Guide, Vol. 2D, § 210.80.

Note: If the 30th day from the last day of the filing extension falls on a weekend or holiday, such report must be filed by the next day that is not a weekend or holiday.

(b) The date of filing for purposes of determining whether a public financial disclosure report is filed more than 30 days late will be the date of receipt by the Administrative Office of the U.S. Courts (AO).

(c) The 30-day period prior to imposing a late filing fee is adequate allowance for administrative delays in the receipt of reports.

Last revised (Transmittal 02-088) March 12, 2025

§ 610.20 Waiver of Late Fee

(a) The Judicial Conference's Committee on Financial Disclosure may waive the late filing fee if it determines that the delay in filing was caused by extraordinary circumstances, including a failure by the AO to notify a new entrant, first-time annual filer, or separated filer of the requirement to file the public financial disclosure report, which made the delay reasonably necessary.

(b) Filers requesting a waiver of the late filing fee from the Committee must request the waiver in writing with supporting documentation. The Committee's determination will be made in writing to the filer, and a copy will be maintained in his or her financial disclosure report file.

§ 610.30 Procedure

(a) The Committee's staff will maintain a record of the due dates for all financial disclosure reports that must be filed, along with the new filing dates under any granted extensions.

(b) The date of receipt of each report will be noted.

(c) For any report not received by the end of the period specified in § 610.10, the Committee will advise the delinquent filer, in writing, that:

(1) because his financial disclosure report is more than 30 days overdue, a $200 late filing fee is due at the time of filing, under 5 U.S.C. § 13106(d) and Guide, Vol. 2D, § 610.10;

(2) the filer is directed to transmit to the AO the $200 fee, payable to the United States Treasury, with the completed report;

(3) the filer will be subject to debt collection procedures if he or she fails to transmit the $200 fee when filing his or her late report; and

(4) if extraordinary circumstances exist that would justify a request for a fee waiver under § 610.20, such request and supporting documentation must be submitted immediately.

(d) The late filing fee is in addition to other sanctions which may be imposed, including agency disciplinary action, civil action, or criminal action.

§ 620 Failure to File or Falsifying a Report

Under 5 U.S.C. § 13106(b), the Judicial Conference through its Committee on Financial Disclosure can refer to the United States Attorney General the name of any individual that the Committee has reasonable cause to believe has:

(a) willfully failed to file a report,

(b) willfully falsified a report, or

(c) willfully failed to file information required to be reported.

§ 620.10 Civil Action

Under 5 U.S.C. § 13106(a)(1):

(a) the Attorney General may bring a civil action in any appropriate U.S. district court against any filer who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report; and

(b) the court in which such action is brought may assess against such non-compliant filer a civil penalty as prescribed by § 13106(a)(1) and adjusted by the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

§ 620.20 Criminal Action

Under 5 U.S.C. § 13106(a)(2), an individual may be criminally prosecuted for knowingly and willfully falsifying or failing to file or report any financial disclosure information that such person is required to report under 5 U.S.C. § 13104.

§ 630 Misuse of Public Reports

(a) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited by 5 U.S.C. § 13107(c)(1), as incorporated in Guide, Vol. 2D, § 560.

(b) The court in which the action is brought may assess against the person a civil monetary penalty for any such violation as provided by 5 U.S.C. § 13107(c)(2), with an inflation adjustment as prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

(c) This remedy will be in addition to any other remedy available under statutory or common law.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. E: Judicial Conduct and Disability Act and Related Materials

Ch. 1: Overview

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 110 Overview

§ 120 Uniform Docket Numbering for Judicial Conduct and Disability Complaints

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§ 110 Overview

(a) The authorities and policies in this chapter apply to a complaint alleging that a judge has committed misconduct or is disabled. They establish a process that requires a circuit chief judge or judicial council to take appropriate action on each complaint. Such action cannot include impeachment, which is solely the province of Congress.

(b) The complaint process is prescribed — and terms such as "judge," "misconduct," and "disability" are defined — by the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, and by the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Chapter 3 of this Part), which the Judicial Conference promulgated under 28 U.S.C. § 358.

(c) The Conference's Rules for the Processing of Certificates from Judicial Councils that a Judicial Officer Has Engaged in Conduct that Might Constitute Grounds for Impeachment (Chapter 4 of this Part) specify when and how the Conference would bring potentially impeachable conduct to the attention of Congress. These Rules are triggered only in rare circumstances.

(d) The Conference's Committee on Judicial Conduct and Disability supports and monitors the complaint process. Courts must make submissions to the Committee as required by the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Chapter 3 of this Part) and in the form specified by the Committee's procedures for Submitting Documents to the Committee on Judicial Conduct and Disability (Chapter 5 of this Part).

Last substantive revision (Transmittal 02-027) May 4, 2016
Last revised (minor technical changes) June 2, 2016

§ 120 Uniform Docket Numbering for Judicial Conduct and Disability Complaints

(a) Under Rule 8(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the circuit clerk must, upon receiving a complaint, "assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability." The scheme promulgated by the Committee specifies the format and content of docket numbers for judicial conduct and disability complaints.

(b) Under the scheme promulgated by the Committee on Judicial Conduct and Disability, circuits must reserve docket numbers beginning with 90000 for complaints under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364. Each number must consist of the following components:

CC-YY-9NNNN

CC	circuit in which matter is ongoing
YY	year in which matter was initiated
9	non-variable signifier for judicial conduct and disability complaints
NNNN	matter number (one per subject judge, sequentially assigned)

(c) A multi-judge complaint must be docketed separately for each judge who is the subject of the complaint. For example, a complaint naming five subject judges must be docketed five times, using a different matter number for each named judge.

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Last revised (Transmittal 02-047) March 12, 2019

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Appendix to the Rules: Form AO 310 (Complaint of Judicial Misconduct or Disability)

§ 310 Overview

Section 320 of this chapter reproduces the Rules for Judicial-Conduct and Judicial-Disability Proceedings. They were adopted on March 11, 2008, and took effect on April 10, 2008. They were amended on September 17, 2015, and again on March 12, 2019.

§ 320 Rules for Judicial-Conduct and Judicial-Disability Proceedings

Preface

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364.

ARTICLE I. GENERAL PROVISIONS

1. Scope and Covered Judges

(a) Scope. These Rules govern proceedings under the Judicial Conduct and Disability Act (Act), 28 U.S.C. §§ 351–364, to determine whether a

covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

(b) Covered Judge. A covered judge is defined under the Act and is limited to judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

COMMENTARY ON RULE 1

In September 2006, the Judicial Conduct and Disability Act Study Committee ("Breyer Committee"), appointed in 2004 by Chief Justice Rehnquist, presented a report ("Breyer Committee Report"), 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364. The Breyer Committee had been formed in response to criticism from the public and Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed its Committee on Judicial Conduct and Disability to consider the Breyer Committee's recommendations and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. *Id.* at 212–15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

Based on the Breyer Committee's findings, the Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies that must exercise responsibility under the Act. To that end, the Committee on Judicial Conduct and Disability proposed rules based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the Judicial Conference promulgated the present Rules on March 11, 2008. They were amended on September 17, 2015, and again on March 12, 2019.

The definition of a covered judge tracks the Judicial Conduct and Disability Act. *See* 28 U.S.C. § 351(d)(1) (defining the term "judge" as "a circuit judge, district judge, bankruptcy judge, or magistrate judge"). As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

Rules 8(c) and (d) address the procedures for processing a complaint involving allegations against a person *not* covered by the Act, such as other court personnel, or against both a covered judge and a noncovered person. Court employees seeking to report, or file a claim related to, misconduct or the denial of rights granted under their Employment Dispute Resolution (EDR) plan by other court personnel may wish to consult the Model EDR Plan and the EDR plan for the relevant court, among other resources. *See* Guide to Judiciary Policy, vol. 12, appx. 2B.

2. Construction and Effect

(a) Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) Exception. A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, or the Judicial Conference expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

COMMENTARY ON RULE 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

3. General Definitions

The following general definitions apply to these Rules. Cognizable misconduct and disability are defined in Rule 4.

(a) Chief Judge. "Chief judge" means the chief judge of a United States court of appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) Circuit Clerk. "Circuit clerk" means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) Complaint. A "complaint" is:

(1) a document that, in accordance with Rule 6, is filed by, or on behalf of, any person, including a document filed by an organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 1(b), has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) Court of Appeals, District Court, and District Judge. "Court of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) Judicial Council and Circuit. "Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(f) Judicial Employee. "Judicial Employee" includes judicial assistants, law clerks, and other court employees, including unpaid staff, such as interns, externs, and other volunteer employees.

(g) Magistrate Judge. "Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

(h) Subject Judge. "Subject judge" means a covered judge, as described in Rule 1(b), who is the subject of a complaint.

COMMENTARY ON RULE 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by a complainant under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. *See* 28 U.S.C. § 351(a), (b). Under Rule 3(c)(1), a complaint may be submitted by, or on behalf of, any person, including a document filed by an organization. Traditional standing requirements do not apply. Individuals or organizations may file a complaint even if they have not been directly injured or aggrieved.

Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint filed by a complainant under Rule 6, chief judges are expected in some circumstances to trigger the process — "identify a complaint," *see* 28 U.S.C. § 351(b) and Rule 5 — and conduct an investigation without becoming a party. *See* 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Where the complainant reveals information of misconduct or disability but does not claim it as such, the chief judge is not limited to the "four corners of the complaint" and should proceed under Rule 5 to determine whether identification of a complaint is appropriate. *See* Breyer Committee Report, 239 F.R.D. at 183–84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be, an accusation. This definition is codified in subsection (c)(2).

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules.

ARTICLE II. MISCONDUCT AND DISABILITY

4. Misconduct and Disability Definitions

(a) Misconduct Generally. Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable misconduct includes, but is not limited to, the following:

(1) Violation of Specific Standards of Judicial Conduct. Cognizable misconduct includes:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) engaging in improper ex parte communications with parties or counsel for one side in a case;

(D) engaging in partisan political activity or making inappropriately partisan statements;

(E) soliciting funds for organizations; or

(F) violating rules or standards pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.

(2) Abusive or Harassing Behavior. Cognizable misconduct includes:

(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault;

(B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or

(C) creating a hostile work environment for judicial employees.

(3) Discrimination. Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender

identity, pregnancy, sexual orientation, religion, national origin, age, or disability;

(4) Retaliation. Cognizable misconduct includes retaliating against complainants, witnesses, judicial employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability;

(5) Interference or Failure to Comply with the Complaint Process. Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules; or

(6) Failure to Report or Disclose. Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability.

A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the relevant chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary.

A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge.

Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.

(7) Conduct Outside the Performance of Official Duties. Cognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the

business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(b) Conduct Not Constituting Cognizable Misconduct.

(1) Allegations Related to the Merits of a Decision or Procedural Ruling. Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse.

If the decision or ruling is alleged to be the result of an improper motive, *e.g.*, a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision.

(2) Allegations About Delay. Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(c) Disability. Disability is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

COMMENTARY ON RULE 4

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (a) therefore provides some specific examples. 28 U.S.C. § 351(a). The Code of Conduct for United States Judges sets forth behavioral guidelines for judges. While the Code's Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules. *See also* Rule 24 (Public Availability of Decisions).

Even where specific, mandatory rules exist — for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations — the distinction between the misconduct statute and these specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules,

promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

Rule 4(a)(2)(A) provides expressly that unwanted, offensive, or abusive sexual conduct by a judge, including sexual harassment or assault, constitutes cognizable misconduct. The Rule recognizes that anyone can be a victim of unwanted, offensive, or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging in the misconduct.

Under Rule 4(a)(4), a judge's efforts to retaliate against any person for reporting or disclosing misconduct, or otherwise participating in the complaint process constitute cognizable misconduct. The Rule makes the prohibition against retaliation explicit in the interest of promoting public confidence in the complaint process.

Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation. *See* Code of Conduct for United States Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.").

Rule 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules constitutes cognizable misconduct. While the exercise of rights under the Fifth Amendment to the Constitution would constitute good cause under Rule 4(a)(5), given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause. The Commentary on Rule 13 provides additional discussion regarding Rule 4(a)(5). The Rules contemplate that judicial councils will not consider commencing proceedings under Rule 4(a)(5) except as necessary after other means to acquire the information or enforce a decision have been tried or have proven futile.

All judges have a duty to bring to the attention of the relevant chief district judge or chief circuit judge reliable information reasonably likely to constitute judicial misconduct or disability. *See* Rule 4(a)(6). This duty is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate action as necessary. Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. *See* Code of Conduct for United States Judges, Canon 3B(6) & cmt. These Rules incorporate those principles while allowing for appropriate, expeditious, fair, and effective resolutions of all such complaints.

The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability. By statute and rule, the chief circuit judge administers the misconduct and disability complaint process, including the authority to investigate an allegation and, if warranted, to identify a formal complaint. *See* Rule 5. Disclosures made to or otherwise brought to the attention of the appropriate chief district judge of reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary warrant communication to and consultation with the chief circuit judge in light of the chief circuit judge's statutory responsibility for overseeing any required final action.

In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.

A person who seeks to report information of misconduct or disability on a confidential or anonymous basis may proceed through various alternative avenues within the judiciary, including the Office of Judicial Integrity and/or comparable offices within the circuits.

Rule 4(a)(7) reflects that an allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. Furthermore, some conduct specified in Rule 4(a)(1) through 4(a)(6), or not specified within these Rules, might constitute misconduct occurring outside the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct under the Act and these Rules. For example, allegations that a judge solicited funds for a charity or other organization or participated in a partisan political event are cognizable under the Act even though they did not occur in the course of the performance of the judge's official duties.

Rule 4(b)(1) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's

administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — "the merits" — of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by the chief judge until the appellate proceedings are concluded to avoid inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand — for example, a statement that a claim is legally or factually "frivolous" — then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11(b) is necessary.

With regard to Rule 4(b)(2), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, *i.e.*, assigning a low priority to deciding the particular case. But, an allegation of a habitual pattern of delay in a significant number of unrelated

cases, or an allegation of deliberate delay in a single case arising out of an improper motive, is not merits-related.

Rule 4(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available. A mental disability could involve cognitive impairment or any psychiatric or psychological condition that renders the judge unable to discharge the duties of office. Such duties may include those that are administrative. If, for example, the judge is a chief judge, the judicial council, fulfilling its obligation under 28 U.S.C. § 332(d)(1) to make "necessary and appropriate orders for the effective and expeditious administration of justice," may find, under 28 U.S.C. § 45(d) or § 136(e), that the judge is "temporarily unable to perform" his or her chief-judge duties. In that event, an appropriate remedy could involve, under Rule 20(b)(1)(D)(vii), temporary reassignment of chief-judge duties to the next judge statutorily eligible to perform them.

Confidentiality as referenced elsewhere in these Rules is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability. *See* Rule 23(c).

ARTICLE III. INITIATION OF COMPLAINT

5. Identification of Complaint

(a) Identification. When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) Submission Not Fully Complying with Rule 6. A legible submission in substantial but not full compliance with Rule 6 must be considered as possible grounds for the identification of a complaint under Rule 5(a).

COMMENTARY ON RULE 5

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245–46.

The Act authorizes a chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. *See* 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, *see* Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a chief judge identifies a complaint, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once a chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for a chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances

warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 4(b)(1), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that submissions that do not comply with the requirements of Rule 6(d) must be considered under Rule 5(a). For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information and as a possible basis for the identification of a complaint under the process described in Rule 5(a).

6. Filing of Complaint

(a) Form. A complainant may use the form reproduced in the Appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) Brief Statement of Facts. A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

(1) what happened;

(2) when and where the relevant events happened;

(3) any information that would help an investigator check the facts; and

(4) for an allegation of disability, any additional facts that form the basis of that allegation.

(c) Legibility. A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) Complainant's Address and Signature; Verification. The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the submission will be accepted, but it will be reviewed under only Rule 5(b).

(e) Number of Copies; Envelope Marking. The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

COMMENTARY ON RULE 6

The Rule is adapted from the Illustrative Rules and is largely self-explanatory. As discussed in the Commentary on Rule 4 and in Rule 23(c), confidentiality as referenced elsewhere in these Rules does not prevent judicial employees from reporting or disclosing misconduct or disability.

7. Where to Initiate Complaint

(a) Where to File. Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) Misconduct in Another Circuit; Transfer. If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

COMMENTARY ON RULE 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the filing or identification of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar — ex parte contact between an attorney and a judge, for example — it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

8. Action by Circuit Clerk

(a) Receipt of Complaint. Upon receiving a complaint against a judge filed under Rule 6 or identified under Rule 5, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

(b) Distribution of Copies. The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or, where the chief judge is disqualified from considering a complaint, to the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 6 or identified under Rule 5 to each subject judge. The circuit clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) Complaint Against Noncovered Person. If the circuit clerk receives a complaint about a person not holding an office described in Rule 1(b), the clerk must not accept the complaint under these Rules.

(d) Complaint Against Judge and Another Noncovered Person. If the circuit clerk receives a complaint about a judge described in Rule 1(b) and a person not holding an office described in Rule 1(b), the clerk must accept the complaint under these Rules only with regard to the judge and must so inform the complainant.

COMMENTARY ON RULE 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

9. Time for Filing or Identifying Complaint

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impracticable, the complaint must be dismissed under Rule 11(c)(1)(E).

COMMENTARY ON RULE 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

10. Abuse of Complaint Procedure

(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, the judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) Orchestrated Complaints. When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept additional complaints. The circuit clerk must send a copy of any such order to anyone whose complaint was not accepted.

COMMENTARY ON RULE 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these

complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

ARTICLE IV. REVIEW OF COMPLAINT BY CHIEF JUDGE

11. Chief Judge's Review

(a) Purpose of Chief Judge's Review. When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25, in which case the most-senior active circuit judge not disqualified will review the complaint. If a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing a complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) Chief Judge's Inquiry. In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report.

(c) Dismissal.

(1) Permissible grounds. A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivolous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations that are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) Impermissible grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.

(d) Corrective Action. The chief judge may conclude a complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6; or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) Intervening Events. The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.

(f) Appointment of Special Committee. If some or all of a complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Judge's Action; Petition for Review.

(1) When chief judge appoints special committee. If the chief judge appoints a special committee, the chief judge must notify the complainant and the subject judge that the matter has been referred to a committee, notify the complainant of a complainant's rights under Rule 16, and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Committee on Judicial Conduct and Disability.

(2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

(3) Right to petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and the subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19. In the event of such a transmission, the subject judge may make a written submission to the

judicial council but will have no further right of review except as allowed under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial council, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the council.

(h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

COMMENTARY ON RULE 11

This Rule describes complaint-review actions available either to the chief judge or, where that judge is the subject judge or is otherwise disqualified under Rule 25, such as where the complaint is filed against the chief judge, to the judge designated under Rule 25(f) to perform the chief judge's duties under these Rules. Subsection (a) of this Rule provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. The chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. A formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243–45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to the judicial council and its special committee. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's—in other words, there is simply no other significant evidence of what happened or of the

complainant's unreliability — then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur when a complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. *Id*. The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. *Id*. In this example, the matter remains reasonably in dispute. If all five witnesses say the subject judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. *Id.*

Similarly, under subsection (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under subsection (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239–45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 4 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 4 and its accompanying Commentary.

Subsections (c)(1)(C)–(E) implement the statute by allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as "frivolous" under Rule 11(c)(1)(C) will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The subject judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the subject judge did X. *Id*. The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the subject judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. *Id*. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. *Id*. at 243–44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. *Id.*

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability as to warrant dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should not be undertaken, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. at 244–45. The Act authorizes the chief judge to conclude the complaint proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after a complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. *Id.* Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability may be preferable to sanctions. *Id.* The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. *Id.* Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on identical conduct.

"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. *Id.* Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). *Id.* Compliance with a previous judicial-council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. *Id.*

Where a subject judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. *Id.* While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. *Id.* In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise. *Id.*

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in a complaint. The form of corrective action should also be proportionate to any sanctions that the judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244–45. In other words, minor corrective action will not suffice to dispose of a serious matter. *Id.*

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

Concluding a complaint proceeding, by either the judicial council of the subject judge or the judicial council to which a complaint proceeding has been transferred, precludes remedial action under the Act and these Rules as to the subject judge. But the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote "the expeditious conduct of court business," 28 U.S.C. § 331, and to "make all necessary and appropriate orders for the effective administration of justice within [each] circuit." *Id.* at § 332(d)(1). Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence. The judicial council may request that the Committee on Judicial Conduct and Disability transmit its order to relevant Congressional entities.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding a proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the

names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When a complaint is disposed of by the chief judge, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. *See also* Commentary on Rule 24 (dealing with public availability).

Rule 11(g) provides that the complainant and the subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. Because an identified complaint has no "complainant" to petition for review, the chief judge's dispositive order on such a complaint will be transmitted to the judicial council for review. The same will apply where a complaint was filed by its subject judge. A copy of the chief judge's order, and memoranda incorporated by reference in the order, disposing of a complaint must be sent by the circuit clerk to the Committee on Judicial Conduct and Disability.

ARTICLE V. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Special Committee's Composition

(a) Membership. Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the special committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer. When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate

judge. The adviser cannot vote but has the other privileges of a special-committee member.

(d) Provision of Documents. The chief judge must certify to each other member of the special committee and to any adviser copies of the complaint and statement of facts, in whole or relevant part, and any other relevant documents on file.

(e) Continuing Qualification of Special-Committee Member. A member of a special committee may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) Inability of Special-Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) Voting. All actions by a special committee must be by vote of a majority of all members of the committee.

COMMENTARY ON RULE 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question the size of a special committee is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so. Rule 12(a) acknowledges the common practice of including senior judges in the membership of a special committee.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another member of the special committee as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge. Subsection (c) also provides that the adviser will have all the

privileges of a member of the special committee except a vote. The adviser, therefore, may participate in all deliberations of the special committee, question witnesses at hearings, and write a separate statement to accompany the committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a special committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the special committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a special committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the special-committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a special committee should participate in committee decisions. In that circumstance, it seems reasonable to require that special-committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

13. Conduct of Special-Committee Investigation

(a) Extent and Methods of Special-Committee Investigation. A special committee should determine the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee's preliminary inquiry. In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or a broader disability exists. The investigation may include use of appropriate experts or other professionals. If, in the course of the investigation, the special committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the specific pending complaint, the committee must refer the new matter to the

chief judge for a determination of whether action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter.

(b) Criminal Conduct. If the special committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The special committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) Staff. The special committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judiciary or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

COMMENTARY ON RULE 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which the special committee carries out its mission. They reflect the view that the special committee has two roles that are separated in ordinary litigation. First, the special committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. *Id*. Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter into an agreement with the subject judge as to the scope and use that may be made of

the examination results. In addition or in the alternative, the special committee may ask to review existing records, including medical records.

The extent of the subject judge's cooperation in the investigation may be taken into account in the consideration of the underlying complaint. If, for example, the subject judge impedes reasonable efforts to confirm or disconfirm the presence of a disability, the special committee may still consider whether the conduct alleged in the complaint and confirmed in the investigation constitutes disability. The same would be true of a complaint alleging misconduct.

The special committee may also consider whether such a judge might be in violation of his or her duty to cooperate in an investigation under these Rules, a duty rooted not only in the Act's definition of misconduct but also in the Code of Conduct for United States Judges, which emphasizes the need to maintain public confidence in the judiciary, *see* Canon 2(A) and Canon 1 cmt., and requires judges to "facilitate the performance of the administrative responsibilities of other judges and court personnel," Canon 3(B)(1). If the special committee finds a breach of the duty to cooperate and believes that the breach may amount to misconduct under Rule 4(a)(5), it should determine, under the final sentence of Rule 13(a), whether that possibility should be referred to the chief judge for consideration of action under Rule 5 or Rule 11. *See also* Commentary on Rule 4.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of a judicial council by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of the special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. *See* Rule 12(g).

14. Conduct of Special-Committee Hearings

(a) Purpose of Hearings. The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the special committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) Special-Committee Evidence. Subject to Rule 15, the special committee must obtain material, nonredundant evidence in the form it considers appropriate. In the special committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) Counsel for Witnesses. The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) Witness Fees. Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) Oath. All testimony taken at a hearing must be given under oath or affirmation.

(f) Rules of Evidence. The Federal Rules of Evidence do not apply to special-committee hearings.

(g) Record and Transcript. A record and transcript must be made of all hearings.

COMMENTARY ON RULE 14

This Rule is adapted from the Act, 28 U.S.C. § 353, and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, special-committee members should not regard themselves as prosecutors one day and judges the next. Their duty — and that of their staff — is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the special committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a special-committee witness. Cases may arise in which the subject judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes

the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

15. Subject Judge's Rights

(a) Notice.

(1) Generally. The subject judge must receive written notice of:

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the special committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) Suggestion of additional witnesses. The subject judge may suggest additional witnesses to the special committee.

(b) Special-Committee Report. The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) Presentation of Evidence. At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine special-committee witnesses, in person or by counsel.

(d) Presentation of Argument. The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) Attendance at Hearings. The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the special committee.

(f) Representation by Counsel. The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

COMMENTARY ON RULE 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the subject judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings — for example, meetings at which the special committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

16. Complainant's Rights in Investigation

(a) Notice. The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence. If the complainant knows of relevant evidence not already before the special committee, the complainant may briefly explain in writing the basis of that knowledge and the nature of that evidence. If the special committee determines that the complainant has information not already known to the committee that would assist in the committee's investigation, a representative of the committee must interview the complainant.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

COMMENTARY ON RULE 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) gives the complainant the prerogative to make a brief written submission showing that he or she is aware of relevant evidence not already known to the special committee. (Such a submission may precede any written or oral argument the complainant provides under Rule 16(c), or it may accompany that argument.) If the special committee determines, independently or from the complainant's submission, that the complainant has information that would assist the committee in its investigation, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the special committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

17. Special-Committee Report

The special committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of special-committee members, and the record of any hearings held under Rule 14. In addition to being sent to the subject judge under Rule 15(b), a copy of the report and any accompanying statements and documents must be sent to the Committee on Judicial Conduct and Disability.

COMMENTARY ON RULE 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statements and documents to the Committee on Judicial Conduct and Disability was new at the time the Judicial Conference promulgated the Rules for Judicial-Conduct and Judicial-Disability Proceedings in 2008.

ARTICLE VI. REVIEW BY JUDICIAL COUNCIL

18. Petition for Review of Chief-Judge Disposition Under Rule 11(c), (d), or (e)

(a) Petition for Review. After the chief judge issues an order under Rule 11(c), (d), or (e), the complainant or the subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) When to File; Form; Where to File. A petition for review must be filed in the office of the circuit clerk within 42 days after the date of the chief judge's order. The petition for review should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The petition for review should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . . " and state the reasons why the petition should be granted. It must be signed.

(c) Receipt and Distribution of Petition. A circuit clerk who receives a petition for review filed in accordance with this Rule must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;

(B) all materials obtained by the chief judge in connection with the inquiry;

(C) the chief judge's order disposing of the complaint;

(D) any memorandum in support of the chief judge's order;

(E) the petition for review; and

(F) an appropriate ballot; and

(3) send the petition for review to the Committee on Judicial Conduct and Disability. Unless the Committee on Judicial Conduct and Disability requests them, the circuit clerk will not send copies of the materials obtained by the chief judge.

(d) Untimely Petition. The circuit clerk must refuse to accept a petition that is received after the time allowed in (b).

(e) Timely Petition Not in Proper Form. When the circuit clerk receives a petition for review filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the circuit clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within the original time allowed for filing the petition or within 21 days after the date on which a notice of the deficiencies was sent to the complainant, whichever is later. If the deficiencies are corrected within the time allowed, the circuit clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the circuit clerk must reject the petition.

COMMENTARY ON RULE 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits the subject judge, as well as the complainant, to petition for review of the chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, the chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of 42 days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in

order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. *See* Fed. R. App. P. 25(a)(2)(A), (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

19. Judicial-Council Disposition of Petition for Review

(a) Rights of Subject Judge. At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The circuit clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual judicial-council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) Judicial-Council Action. After considering a petition for review and the materials before it, the judicial council may:

(1) affirm the chief judge's disposition by denying the petition;

(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) Notice of Judicial-Council Decision. Copies of the judicial council's order, together with memoranda incorporated by reference in the order and separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

(d) Memorandum of Judicial-Council Decision. If the judicial council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a judicial-council order must not include the name of the complainant or the subject judge.

(e) Review of Judicial-Council Decision. If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented, the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b).

(f) Public Availability of Judicial-Council Decision. Materials related to the judicial council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

COMMENTARY ON RULE 19

This Rule is adapted largely from the Act and is self-explanatory.

The judicial council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition for review by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

Under Rule 19(b), after considering a petition for review and the materials before it, a judicial council may return a matter to the chief judge to take various actions, including conducting further inquiry under Rule 11(b), identifying a complaint under Rule 5, or appointing a special committee under Rule 11(f).

A petition for review of a judicial council's decision under this Rule may be filed in any matter in which one or more members of the council dissented from the order. *See* Rule 21(b).

20. Judicial-Council Action Following Appointment of Special Committee

(a) Subject Judge's Rights. Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The subject judge must also be given an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council. The subject judge must not otherwise communicate with judicial-council members about the matter.

(b) Judicial-Council Action.

(1) Discretionary actions. Subject to the subject judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351–364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference with the judicial council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed; and

(vii) in the case of a circuit chief judge or district chief judge, finding that the judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with 28 U.S.C. § 45(d) or § 136(e).

(E) take any combination of actions described in (b)(1)(A)—(D) of this Rule that is within its power.

(2) Mandatory actions. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) Inadequate Basis for Decision. If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Judicial-Council Vote. Judicial-council action must be taken by a majority of those members of the council who are not disqualified. A

decision to remove a bankruptcy judge from office requires a majority vote of all the members of the judicial council.

(e) Recommendation for Fee Reimbursement. If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) Judicial-Council Order. Judicial-council action must be by written order. Unless the judicial council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. Such a memorandum may incorporate all or part of any underlying special-committee report. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. The order and memoranda incorporated by reference in the order must be provided to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b). If the complaint was identified under Rule 5 or filed by its subject judge, the judicial council must transmit the order and memoranda incorporated by reference in the order to the Committee on Judicial Conduct and Disability for review in accordance with Rule 21. In the event of such a transmission, the subject judge may make a written submission to the Committee on Judicial Conduct and Disability but will have no further right of review.

COMMENTARY ON RULE 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within 21 days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present argument to the judicial council, personally or through counsel, or both, at the direction of the council. Whether that argument is written or oral would be for the judicial council

to determine. The subject judge may not otherwise communicate with judicial-council members about the matter.

Rule 20(b)(1)(B) allows a judicial council to conclude a proceeding where appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. This provision tracks Rules 11(d) and (e), which provide for similar action by the chief judge. As with Rule 11(d), appropriate corrective action must acknowledge and remedy the problem raised by the complaint. *See* Breyer Committee Report, 239 F.R.D. at 244. And similar to Rule 11(e), although "action on the complaint is no longer necessary because of intervening events," the Judicial Conference and the judicial council of the subject judge may nonetheless be able to take action on potential institutional issues related to the complaint (such as an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence). 28 U.S.C. § 352(b)(2).

Rule 20(b)(1)(D) recites the remedial actions enumerated in 28 U.S.C. § 354(a)(2) while making clear that this list is not exhaustive. A judicial council may consider lesser remedies. Some remedies may be unique to senior judges, whose caseloads can be modified by agreement or through statutory designation and certification processes.

Under 28 U.S.C. §§ 45(d) and 136(e), which provide for succession where "a chief judge is temporarily unable to perform his duties as such," the determination whether such an inability exists is not expressly reserved to the chief judge. Nor, indeed, is it assigned to any particular judge or court-governance body. Clearly, however, a chief judge's inability to function as chief could implicate "the effective and expeditious administration of justice," which the judicial council of the circuit must, under 28 U.S.C. § 332(d)(1), "make all necessary and appropriate orders" to secure. For this reason, such reassignment is among a judicial council's remedial options, as subsection (b)(1)(D)(vii) makes clear. Consistent with 28 U.S.C. §§ 45(d) and 136(e), however, any reassignment of chief-judge duties must not outlast the subject judge's inability to perform them. Nor can such reassignment result in any extension of the subject judge's term as chief judge.

Rule 20(c) provides that a judicial council may return a matter to a special committee to augment its findings and report of its investigation to include additional areas of inquiry and investigation to allow the judicial council to reach a complete and fully informed judgment. Rule 20(c) also provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the judicial council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that judicial-council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the judicial council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office that the subject judge be reimbursed for reasonable expenses incurred, including attorneys' fees. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1)(A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that judicial-council action be by order and, normally, that it be supported with a memorandum of factual determinations and reasons. Notice of the action must be given to the complainant and the subject judge, and must include notice of any right to petition for review of the judicial council's decision under Rule 21(b). Because an identified complaint has no "complainant" to petition for review, a judicial council's dispositive order on an identified complaint on which a special committee has been appointed must be transmitted to the Committee on Judicial Conduct and Disability for review. The same will apply where a complaint was filed by its subject judge.

ARTICLE VII. REVIEW BY COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability

(a) Committee Review. The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion. Its disposition of petitions for review is ordinarily final. The Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) Reviewable Matters.

(1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order.

(2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote. Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. Those members hearing the petition for review should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only six members are qualified to consider a petition for review, the Chief Justice shall select an additional judge to join the qualified members to consider the petition. If four or fewer members are qualified to consider a petition for review, the Chief Justice shall select a panel of five judges, including the qualified Committee members, to consider it.

(d) Additional Investigation. Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance. There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions.

(f) Committee Decision. A Committee decision under this Rule must be transmitted promptly to the Judicial Conference. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) Finality. All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

COMMENTARY ON RULE 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Committee on Judicial Conduct and Disability to dispose of petitions for review does not preclude review of such dispositions by the Judicial Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of a dismissal or a conclusion of a complaint under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented, the complainant or the subject judge has the right to petition for review by the Committee. Under Rule 21(b)(2), the Committee may review such a dismissal or conclusion in its sole discretion, whether or not a dissent occurred, and only as to the appointment of a special committee. Any review under Rule 21(b)(2) will be conducted as soon as practicable after the dismissal or conclusion at issue. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. The Rule provides that every petition for review must be considered and voted on by at least five, and if possible by seven, qualified Committee members to avoid the possibility of tie votes. If six, or four or fewer, members are qualified, the Chief Justice shall appoint other judges to join the qualified members to consider the petition for review. To the extent possible, the judges whom the Chief Justice selects to join the qualified members should be drawn from among former members of the Committee.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

22. Procedures for Review

(a) Filing Petition for Review. A petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability at JCD_PetitionforReview@ao.uscourts.gov or to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition for review to the complainant or the subject judge, as the case may be.

(b) Form and Contents of Petition. No particular form is required. The petition for review must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition for review should not normally exceed 20 pages plus necessary attachments. A petition for review must be signed by the petitioner or his or her attorney.

(c) Time. A petition for review must be submitted within 42 days after the date of the order for which review is sought.

(d) Action on Receipt of Petition. When a petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), is submitted in accordance with this Rule, the Administrative Office shall acknowledge its receipt, notify the chair of the Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

COMMENTARY ON RULE 22

Rule 22 is self-explanatory.

ARTICLE VIII. MISCELLANEOUS RULES

23. Confidentiality

(a) Confidentiality Generally. Confidentiality under these Rules is intended to protect the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules.

(b) Confidentiality in the Complaint Process.

(1) General Rule. The consideration of a complaint by a chief judge, a special committee, a judicial council, or the Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be publicly disclosed by any judge or judicial employee, or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability.

(2) Files. All files related to a complaint must be separately maintained with appropriate security precautions to ensure confidentiality.

(3) Disclosure in Decisions. Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(4) Availability to Judicial Conference. On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee on Judicial Conduct and Disability to records of proceedings under the Act at the site where the records are kept.

(5) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(6) Impeachment Proceedings. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(7) Subject Judge's Consent. If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted under these Rules, not be revealed.

(8) Disclosure in Special Circumstances. The Judicial Conference, its Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. For example, disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(9) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(10) Assistance and Consultation. Nothing in this Rule prohibits a chief judge, a special committee, a judicial council, or the Judicial Conference or its Committee on Judicial Conduct and Disability, in the performance of any function authorized under the Act or these Rules, from seeking the help of qualified staff or experts or from consulting other judges who may be helpful regarding the performance of that function.

(c) Disclosure of Misconduct and Disability. Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct or disability.

COMMENTARY ON RULE 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(b)(1) provides that judges, employees of the judiciary, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(b)(9).

With regard to the second question, Rule 23(b)(1) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, a judicial council, the Judicial Conference, and the Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(b)(5) so provides.

In extraordinary circumstances, a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the judiciary is capable of redressing judicial misconduct or

disability. Moreover, the confidentiality requirement does not prevent a chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(b)(3) makes it explicit that written decisions, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (b)(3) is subject to Rule 24(a), which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative branch. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of a proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(b)(6) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(b)(7) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(b)(8) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit prosecution for perjury based on testimony given before a special committee, where a special committee discovers evidence of a judge's criminal conduct, to permit disciplinary action by a bar association or other licensing body, or in other appropriate circumstances.

Under subsection (b)(8), where a complainant or other person has publicly released information regarding the existence of a complaint proceeding, the Judicial Conference, the Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize the disclosure of information about the consideration of the complaint, including orders and other materials related to the complaint proceeding, in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.

Subsection (b)(8) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of a complaint proceeding to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results. In authorizing disclosure, a judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or when those materials constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(b)(10), any of the specified judges or entities performing a function authorized under these Rules may seek expert or staff assistance or may consult with other judges who may be helpful regarding performance of that function; the confidentiality requirement does not preclude this. A chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, a chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

Rule 23(c) provides that confidentiality as referenced in these Rules and Commentary is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability.

Judges should bring such matters to the attention of the relevant chief district judge or chief circuit judge in accordance with Rule 4(a)(6). Judges should be mindful of Canon 3(B)(6) of the Code of Conduct for United States Judges, which provides in part that a judge “should take appropriate action upon receipt of reliable information indicating the likelihood that a judge’s conduct contravened this Code.”

24. Public Availability of Decisions

(a) General Rule; Specific Cases. When final action has been taken on a complaint and it is no longer subject to review as of right, all orders entered by the chief judge and judicial council, including memoranda incorporated by reference in those orders and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials generally should not disclose the name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any remedial action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge or the judicial council orders disclosure.

(b) Manner of Making Public. The orders described in (a) must be made public by placing the orders on the court's public website and by placing them in a publicly accessible file in the office of the circuit clerk. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Committee on Judicial Conduct and Disability will make available on the judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Committee on Judicial Conduct and Disability. Orders of the Committee on Judicial Conduct and Disability constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the circuit clerk of the relevant court of appeals. The Committee on Judicial Conduct and Disability will also make such orders available on the judiciary's website, www.uscourts.gov. When authorized by the Committee on Judicial Conduct and Disability, other orders related to complaint proceedings will similarly be made available.

(d) Complaints Referred to Judicial Conference. If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

COMMENTARY ON RULE 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of a chief judge, a judicial council, and the Committee on Judicial Conduct and Disability, as well as the texts of memoranda incorporated by reference in those orders, together with any dissenting opinions or separate statements by members of the judicial council. No memoranda other than those incorporated by reference in those orders shall be disclosed.

However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the subject judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge generally should not be disclosed, except where the complainant or another person has disclosed the existence of a complaint proceeding to the public. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest — particularly if a judicial officer resigns in the course of an investigation — to make the identity of the subject judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full judicial council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Rule 24(b) makes clear that circuits must post on their external websites all orders required to be made public under Rule 24(a). The judiciary will seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

Matters involving orders issued following a special-committee investigation often involve highly sensitive situations, and it is important that judicial councils have every opportunity to reach a correct and just outcome. This would include the ability to reach informal resolution before a subject judge's identity must be released. But there must also come a point of procedural finality. The date of finality — and thus the time at which other safeguards and rules such as the publication requirement are triggered —

is the date on which the judicial council issues a Final Order. *See In re Complaint of Judicial Misconduct*, 751 F.3d 611, 617 (2014) (requiring publication of a judicial council order "[e]ven though the period for review had not yet elapsed" and concluding that "the order was a final decision because the Council had adjudicated the matter on the merits after having received a report from a special investigating committee"). As determined in the cited case, modifications of this kind to a final order are subject to review by the Committee on Judicial Conduct and Disability.

25. Disqualification

(a) General Rule. Any judge is disqualified from participating in any proceeding under these Rules if the judge concludes that circumstances warrant disqualification. If a complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) Subject Judge. A subject judge, including a chief judge, is disqualified from considering a complaint except to the extent that these Rules provide for participation by a subject judge.

(c) Chief Judge Disqualified from Considering Petition for Review of Chief Judge's Order. If a petition for review of the chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council's consideration of the petition.

(d) Member of Special Committee Not Disqualified. A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) Subject Judge's Disqualification After Appointment of Special Committee. Upon appointment of a special committee, the subject judge is disqualified from participating in the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) Substitute for Disqualified Chief Judge. If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge (including where a complaint is filed against a

chief judge), those duties must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council.

(g) Judicial-Council Action When Multiple Judges Disqualified. Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 4(b); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) Disqualification of Members of Committee on Judicial Conduct and Disability. No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

COMMENTARY ON RULE 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules. For example, the subject judge cannot initiate complaints by identification, conduct limited inquiries, or choose between dismissal and special-committee investigation as the threshold disposition of a complaint. Likewise, the subject judge cannot participate in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference, or the Committee on Judicial Conduct and Disability. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings. Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "duties that the Act and these Rules assign to a chief judge" does not apply to determine the acting presiding member of the council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. *See, e.g.*, *In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of the chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the judicial council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition for review is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Committee on Judicial Conduct and Disability contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

26. Transfer to Another Judicial Council

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

COMMENTARY ON RULE 26

Rule 26 implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214–15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original judicial council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a judicial council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint — for example, reference to the transferee chief judge, appointment of a special committee, etc.

27. Withdrawal of Complaint or Petition for Review

(a) Complaint Pending Before Chief Judge. With the chief judge's consent, the complainant may withdraw a complaint that is before

the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent the chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending Before Special Committee or Judicial Council. After a complaint has been referred to the special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) Petition for Review. A petition for review addressed to the judicial council under Rule 18, or the Committee on Judicial Conduct and Disability under Rule 22, may be withdrawn if no action on the petition has been taken.

COMMENTARY ON RULE 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection (a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

28. Availability of Rules and Forms

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the circuit clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules, the complaint form, and complaint-filing instructions available on the court's website, or provide an Internet link to these items on the appropriate court of appeals website or on www.uscourts.gov.

29. Effective Date

These Rules will become effective after promulgation by the Judicial Conference of the United States.

Appendix to the Rules: Form AO 310 (Complaint of Judicial Misconduct or Disability)

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. E: Judicial Conduct and Disability Act and Related Materials

Ch. 4: Rules for Processing Judicial Council Certificates of Potential Impeachable Conduct

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 410 Overview

§ 420 The Rules

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§ 410 Overview

The Judicial Conference approved the following amended Rules for the Processing of Certificates from Judicial Councils that a Judicial Officer Has Engaged in Conduct that Might Constitute Grounds for Impeachment. These rules were revised by the Conference on September 23-24, 1991 (JCUS-SEP 1991, p. 71).

§ 420 The Rules

(1) When a certificate from a judicial council that a judicial officer has engaged in conduct that might constitute grounds for impeachment is premised entirely upon a judgment of conviction in a criminal case, or when the Judicial Conference is otherwise informed that a judge or judicial officer has been convicted of a felony, and the judgment has become final by the exhaustion or termination of all rights of direct judicial review, the Judicial Conference, in its discretion, may accept the final judgment as conclusive and, without notice to the accused judicial officer, may make its own determination by a majority vote as to whether or not it will forward a final certificate to the House of Representatives of the United States Congress.

(2) Except when the Judicial Conference of the United States determines that the full Conference should act upon the matter pursuant to Rule 1, all such certification matters shall be referred in the first instance, by the Conference or its Executive Committee, to an *ad hoc* committee of Conference members or to the Committee to Review Circuit Council Conduct and Disability Orders [now the Committee on Judicial Conduct

Last substantive revision (Transmittal GR-11) December 1, 2009
Last revised (minor technical changes) January 15, 2016

and Disability] for processing and the preparation of a report with recommendations back to the Conference.

(3) When a certification proceeding is referred to a committee for a report and recommendation as provided in Rule 2, the relevant committee shall (1) provide the accused judicial officer with a copy of the certificate and a copy of all papers filed with the Judicial Conference in support of the certificate unless a copy of all such documents has previously been furnished to the accused judicial officer, or (2) in its discretion, make all such papers available for inspection by the judicial officer and his or her counsel in the Administrative Office in Washington, D.C., or some other convenient, designated place.

(4) The accused judicial officer shall have sixty days within which to file a written response to the certificate. The sixty-day period will begin to run when (1) a copy of all relevant papers is furnished or made available for inspection, or (2) when he or she is given written notice of the right to file such a written response, whichever later occurs. For good cause, the committee may extend the time within which a written response may be filed.

(5) The committee may receive written argument from a complainant if the committee determines that it may be assisted by such receipt.

(6) Oral argument ordinarily will not be allowed, but may be allowed if the committee determines that it would be assisted by it.

(7) In the preparation and filing of the written response and in oral argument, if allowed, the judicial officer is entitled to representation by counsel of choice at his or her expense.

(8)

(a) If the Judicial Conference or its committee determines that additional investigation is necessary or appropriate, notice that such investigation will be conducted will be given in advance to the accused judicial officer. The notice will be given at least ten days in advance of the commencement of the investigation, unless an emergency situation requires an earlier commencement of investigatory measures.

(b) During the course of any such investigation, the accused judicial officer will be afforded those opportunities as provided in 28 U.S.C. § 372(c)(11)(B) [now 28 U.S.C. § 358(b)(2)], and the complainant will be afforded those opportunities as provided in 28 U.S.C. § 372(c)(11)(C) [now 28 U.S.C. § 358(b)(3)].

(c) At the conclusion of any such investigation, the investigation panel will file a written report, a copy of which will be furnished the accused judicial officer or made available for his or her inspection and, if the committee decides that it is appropriate, to the complainant. The report of the investigation will be made a part of the record, and the time within which the accused judicial officer may file a written response will not begin to run before a copy of the report is furnished to or made available for inspection by the judicial officer.

(9) The committee will file with the Conference a report, including a recommendation or recommendations. The report will be received by the Conference as the reports of other of its committees. The Conference may adopt the report, including its recommendations, in its entirety, or adopt it in part and reject it in part.

(10) Since the committee's report is an internal document and an accused judicial officer will already have been given an opportunity to file a full written response to the certificate, a copy of the committee's report need not be furnished to him.

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct
Pt. E: Judicial Conduct and Disability Act and Related Materials

Ch. 5: Submitting Documents to the Committee on Judicial Conduct and Disability

*(**Note:** No unauthorized disclosure of this policy guidance outside the judiciary is permitted.)*

§ 510 Documents That Must Be Sent to the Committee

§ 520 Method of Sending Documents to the Committee

§ 530 Further Guidance

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§ 510 Documents That Must Be Sent to the Committee

The Rules for Judicial-Conduct and Judicial-Disability Proceedings (Guide, Vol. 2E, Ch. 3) require the following documents be sent to the Committee on Judicial Conduct and Disability:

§ 510 Documents That Must Be Sent to the Committee	
Rule	**Required Documents**
Rule 11(g)(1)	copy of circuit chief judge's order appointing special committee under Rule 11(f)
Rule 11(g)(2)	copy of circuit chief judge's order (and memoranda incorporated by reference in the order) dismissing or concluding matter under Rule 11(c), 11(d), or 11(e)
Rule 17	copy of special committee's Rule 17 report (accompanied by statement of vote by which it was adopted, separate or dissenting statements of committee members, and record of any hearings held under Rule 14)
Rule 18(c)(3)	copy of petition for judicial council review of circuit chief judge's order under Rule 11(c), 11(d), or 11(e)
Rule 19(a)	copy of subject judge's written response to petition for judicial council review of circuit chief judge's order under Rule 11(c), 11(d), or 11(e)
Rule 19(c)	copy of judicial council order (and memoranda incorporated by reference in the order, and separate or dissenting statements) deciding petition for review of circuit chief judge's order under Rule 11(c), 11(d), or 11(e)
Rule 20(f)	copy of judicial council order (and memoranda incorporated by reference in the order) acting on report of special committee appointed under Rule 11(f)

Last revised (Transmittal 02-095) March 10, 2026

§ 510 Documents That Must Be Sent to the Committee	
Rule	**Required Documents**
	(**Note:** If a complaint was identified under Rule 5 or filed by its subject judge, the judicial council must transmit the order and memoranda incorporated by reference in the order to the Committee for review according to Rule 21.)
Rule 23(b)(4)	copy of any records related to complaint that are requested by the Committee (**Note:** The Committee has issued a standing request for a copy of any complaint identified by the chief circuit judge or filed by a lawyer, a non-litigant, a public official, or a judicial employee.)

Note: The Committee need not be sent any documents obtained during a circuit chief judge's limited inquiry or that a special committee used but did not include in its report.

§ 520 Method of Sending Documents to the Committee

(a) Each document noted above must be emailed to the Committee as a PDF attachment.

(b) Each email message must contain only one attachment consisting of only one document.

(c) The subject line of each email message and the filename of each attached PDF document must consist of the following components:

CC-YY-9NNNN.T

CC-YY-9NNNN	complaint docket number (**see:** Guide, Vol. 2E, Ch. 1)	
T	document type indicator:	
	O	chief judge order
	S	special committee report
	P	petition for review
	R	subject judge response to petition for review
	J	judicial council order
	L	complaint — lawyer
	NL	complaint — non-litigant
	PO	complaint — public official
	JE	complaint — judicial employee
	CJ	complaint – identified by chief circuit judge

(d) Unless the Administrative Office of the U.S. Courts (AO) specifies otherwise, documents that relate to more than one complaint should be sent separately for each complaint to which they apply, and the subject line of each transmittal should reflect that complaint's docket number.

§ 530 Further Guidance

Questions about this procedure may be directed to the AO's Office of the General Counsel at 202-502-1100.

Bankruptcy
Deep Dive

Multi-Color Bankruptcy Brought Judge's Mediation to Key Issues

April 23, 2026, 5:00 AM EDT

Multi-Color Corp.'s brief but contentious bankruptcy encapsulated some of the thorniest issues in modern corporate reorganizations, including venue shopping, and concluded in a surprising fashion: with a judge mediating his own case.

The label maker won court approval April 16 to exit bankruptcy, less than three months after it entered with a prearranged restructuring plan. The road was bumpy, but the case incorporated strategies that practitioners should expect more of as key players become increasingly sophisticated, Justin M. Ellis of MoloLamken LLP said.

"This case is also a good example of parties pushing new and creative litigation tactics in bankruptcy," he said.

The bankruptcy started out with junior creditors objecting to Multi-Color's private equity owner, Clayton, Dubilier & Rice, taking a controlling stake in the reorganized company. It quickly shifted to a venue fight that led to a ruling from Judge Michael B. Kaplan allowing the Atlanta-based company to file in New Jersey based on deposits made into newly-opened bank accounts 16 days before the bankruptcy.

Then, in late March, the case shifted again as Kaplan took on an unusual dual role as a presiding judge and mediator. Within a couple weeks, the disputes were settled.

Multi-Color's plan cuts $3.9 billion in debt, secures $889 million in new money—including a large chunk from CD&R—and clears the way for a Chapter 11 exit with a 100% recovery for unsecured creditors and saved nearly 5,000 jobs.

To appease dissenting creditors, Multi-Color offered up to $19.5 million for their lawyers while CD&R contributed $17 million in cash.

Restructuring attorney Kenneth Rosen, who runs his own firm, said the case moved fast and Kaplan helped the settlement process despite the contested issues and criticism of his dual role.

"It got buzz because of Kaplan's venue decision and his decision to mediate himself," Rosen said. "But, despite all the buzz, it only took 75 days."

Judicial Mediation

After a court-appointed mediator failed to broker a settlement, Kaplan stepped in himself.

"No one can dispute the outcome—Judge Kaplan assisted the parties in reaching a global resolution in a very difficult case," said Joseph J. DiPasquale, a Fox Rothschild LLP restructuring partner.

But Steven M. Berman, a Shumaker, Loop & Kendrick LLP restructuring partner, noted that mediation parties typically want to speak candidly about weaknesses in their own positions, which is harder to do with the presiding judge in the room.

"If I'm going to be sharing something and really exposing problems on my side or my strategy moving forward, I would be hesitant to share that with the presiding judge," Berman said.

In addition the financial resolution, the mediated deal ended the company's effort to disband the government-appointed official committee of unsecured creditors—allowing Kaplan to avoid ruling on the motion, which was aggressive even for a contentious case.

Official creditor committees are generally key players in large Chapter 11s, serving as the representative for junior creditors.

A presiding judge's self-appointment as mediator raises issues because judges aren't supposed to rely on case information that isn't obtained through the formal proceeding, said former Nevada bankruptcy judge Bruce A. Markell, now a Northwestern Pritzker School of Law professor.

The practice could affect lawyers' preparation for cases if they know a judge could flip roles, he said.

"If the mediation fails, what does the judge do with what they've learned that would not be admissible in court?" Markell said. "It's not like Men in Black where someone can flash a device and erase the memories."

Not everyone in a bankruptcy is part of private mediation, so judges serving dual roles can create an appearance of impropriety for claimants, especially in controversial cases, said Melissa Jacoby, a University of North Carolina law professor.

“It is a structural concern, not a matter of intentional misbehavior,” Jacoby said.

Kaplan declined to comment, citing ongoing appeals.

Unusual Circumstances

Kaplan took over mediation after weighing in on the venue dispute, where the Multi-Color subsidiary that provided the jurisdictional connection was accused of having no legitimate ties to New Jersey.

Kaplan disagreed, satisfied by the $1 million bank deposit in the weeks leading up to the bankruptcy and saying Congress left the statute “deliberately broad.”

The ruling adds to a growing body of decisions affirming bankrupt corporations’ authority to pick their courts.

“Judge Kaplan’s decision could, in theory, allow debtors to have their bankruptcy cases heard in any forum they choose simply by moving money into a local bank account,” Ellis said.

Judges mediating and presiding in their own cases is rare, but not unheard of. Kaplan last year did so in cosmetics materials supplier Presperse Corp.'s bankruptcy. Former Delaware Judge Christopher Sontchi self-mediated in the 2016 Paragon Offshore case.

Retired Southern District of New York Judge Robert Drain mediated collective bargaining issues in Hostess Brands’ 2012 case that he presided over.

“I felt there might be information that the union might want to share with me in a confidential setting, for example political issues/pressures within the union,” Drain said in an email. “The parties agreed on the record that this would not be a basis for recusal.”

Drain said the practice will likely continue only under unusual circumstances that don’t lend themselves to third party mediation.

Multi-Color’s case was also marked by a fight over the company’s valuation to determine whether CD&R’s new equity stake represented a fair investment or an improper windfall.

The mediated deal ultimately incorporated on the company’s $2.9 billion to $3.4 billion valuation over dissenting creditors’ higher estimate.

Valuation fights have grown rarer in corporate bankruptcies, said Joseph E. Sarachek of Sarachek Law via email, citing controversial pre-bankruptcy liability management exercises.

"Most of us bankruptcy 'old-timers' miss those days when valuation fights were commonplace BECAUSE there weren't all these LME's that fleeced companies of the remaining value," Sarachek said.

Kirkland & Ellis LLP and Cole Schotz PC represent Multi-Color.

The case is Multi-Color Corp., Bankr. D.N.J., No. 26-10910, hearing 4/21/26.

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*45 CAN THE JUDGE DO THAT?--THE NEED FOR A CLEARER JUDICIAL ROLE IN SETTLEMENT

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*46 I. INTRODUCTION

Judge Samuel B. Kent [1] was quoted in a recent newspaper article as saying that his "most memorable moment so far as a judge" [2] was "personally arranging a settlement by telephone of a suit that allowed a woman to receive a heart-lung transplant." [3] According to Judge Kent, "[t] here's no other place in America where you could do that except in this chair." [4]

Similarly, Judge Robert R. Merhige, Jr., [5] speaking at a conference sponsored by the Federal Judicial Center, [6] described for other federal district judges his efforts to facilitate settlement of a complex multidistrict case in his court. [7] The case was a consolidation of number of cases against Westinghouse. [8] At Judge Merhige's suggestion, the plaintiffs had formed a committee to participate in settlement discussions with Westinghouse and a liaison counsel from Richmond. [9] After some effort at settlement, the liaison counsel and counsel for the defendant indicated to the judge that there was very little progress in negotiating with the committee. [10] In Judge Merhige's words:

> They told me that they thought that one of the difficulties was that the people really didn't know each other, and, although all plaintiffs had similar issues, everybody was watching the guy next to him. They thought if we could get them all together, including some of the officials we might get somewhere.
>
> The thought occurred to me that maybe we ought to get all the people together, but I knew it was going to take some time . . . . There were too many lawyers to have a single effective conference. And I sent out invitations, not an order, I simply sent a letter. I said, "I think it's time now to get down to your individual cases, ***47** because each of you has primary responsibility to your own power company, although your clients are presenting a united front."
>
> I asked them what their view was of coming in to see whether the court could be of any help. I didn't think we were going to dispose of it in one sitting, but let's see how far apart they were and what the issues were, and do it in an informal manner. I also suggested that it might be a good idea if we could sort of get together socially before each of these conferences.
>
> [Judge Merhige decided to host three social gatherings at his home. Each group would be invited to a party the night before they gathered in chambers for conferences.]
>
> Well, I was really surprised at the response I got . . . . We started on Sunday and we had about 35 people. The weather was delightful. And these guys were calling each other by their first name. We met on Monday, and the plaintiffs made their presentations, and then we had another party on Monday night. And the crowd came in yesterday, and they made their presentations and we're going to give it another stab tonight. [11]

Judge Kent's comment and Judge Merhige's story illustrate the way in which many trial judges today see their roles as including active participation in settlement discussions. This role is part of a larger trend toward "managerial judging," which includes judges' increasingly accepted roles as case managers at the pre-trial stage of litigation. [12]

The trend toward managerial judging has intensified in recent years because of both an increasing public concern about a perceived inefficient judicial system [13] and the growth of alternative dispute resolution procedures. [14] That intensification is manifested in a number of ways, ***48** including changes to the Federal Rules of Civil Procedure allowing judges more active involvement in each stage of litigation. [15] A recent public debate over ways to increase the efficiency of the American legal system has spurred a number of suggestions for increased judicial management of cases. [16]

Although widely practiced in the federal courts today, the role of judge as manager has its critics as well as its proponents. Proponents focus on the increased efficiency of case disposition without full-fledged adjudication. They argue that the greater and earlier the involvement of the judge in the lawsuit, the more likely the parties are to benefit from a quicker and less expensive disposition of the case. Proponents of judges as managers contend that active case management greatly decreases both delay and cost. [17]

Critics, on the other hand, point to certain dangers inherent in the managerial role for judges. They argue that the trial judge's new role, that of case manager instead of neutral arbiter, may result in a loss of the impartiality that has always been the hallmark of the trial judge. [18] Because acting as a case manager forces the judge to become involved in the lawsuit at a much earlier stage than the traditional role of judging would require, critics argue that the judge may make decisions about the case without full knowledge of the case and therefore may prejudge the case. [19]

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***49** One critic notes that managerial judging creates "two sources of arbitrariness." [20] The first is that judges may be making managerial decisions about a case at such an early stage that they have only a "cursory understanding" of the merits of the case. [21] The second concern about arbitrariness arises from the ad hoc nature of case management. [22]

Further, because of the context in which judges make these decisions, critics fear that the parties affected by managerial judging techniques may lose traditional procedural safeguards; their substantive rights are likely to be affected by a decision that is not subject to appeal. [23] Because of this lack of review of many managerial judging decisions, critics fear that judges have increased opportunity for abuse. [24] One author has said that "[i]t seems beyond serious debate . . . that discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without the procedural safeguards that accompany decisions on the merits." [25] Additionally, because of a "judicial zeal for settlement," the increased opportunity for abuse may lead to judges punishing parties and lawyers who fail to cooperate in settlement. [26]

Judges themselves appear to be uncertain about exactly what the appropriate role in settlement is for them. [27] While some judges advocate judicial involvement in settlement, others believe that it is unnecessary, or even unethical. [28] Even those judges who believe that facilitating settlement is an appropriate role may not perceive this role accurately. Although many judges view themselves as "mediators" of settlement, ***50** their role frequently evolves into one more accurately described as arbitrator or adjudicator during the settlement process. [29]

This article addresses several questions raised by the debate over managerial judging, focusing specifically on federal judges' use of managerial judging techniques to facilitate settlement: First, what evidence exists that judges are actively involved in settlement in ways that might be characterized either as abuse or as evidence of bias? Second, what relief have existing judicial processes provided to parties claiming that they have been subject to inappropriate judicial involvement in settlement? Third, are the existing processes adequate both to protect parties from misuse of managerial judging regarding settlement and to give trial judges clearer guidance about their role with regard to settlement? Finally, if the existing processes are not adequate, are there steps that should be taken to decrease misuse of judicial involvement in settlement and to clarify the appropriate role of judges in settlement?

The article concludes that some judges engage in inappropriate techniques during settlement discussions and that the existing remedies are inadequate to prevent misuse of managerial judging to effect settlement. The lesson to be learned, however, is not that judges should be discouraged from involvement in settlement. Rather, the appropriate role of the judge in settlement requires better definition. Therefore, there should be changes in both Federal Rule of Civil Procedure 16 and the Code of Conduct for United States Judges to prevent misuse of case management techniques with regard to settlement and to give judges clearer guidance regarding their role in settlement. Additionally, judicial education should focus on the unintended coercive effect of a judge's conduct during settlement to help prevent misuse of managerial judging techniques.

II. WHAT ARE JUDGES DOING?

A. History: The Development of Judicial Involvement in Settlement

Although judicial involvement in settlement has received increased attention in the past ten to fifteen years, it is not a new phenomenon. Stories of judges acting to facilitate settlement have existed for many ***51** years. [30] However, it is clear that the number of judges taking an active role in settlement has increased in recent years, in part because of the growing concern over litigation delay and expense. [31]

The role of judges in effecting case management through settlement was both encouraged and given official sanction when Federal Rule of Civil Procedure 16 was amended in 1983. Rule 16 provided that judges could require that lawyers and unrepresented parties appear at a pretrial conference. [32] The 1983 amendment added language specifically to include settlement as a matter for discussion during those pre-trial conferences. [33] The amended rule validated what many judges were already doing and provided specific authority for judges who had up until then been reluctant to discuss settlement with parties because of uncertainty about their authority to do so. [34]

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The Advisory Committee's notes to Rule 16 indicate that part of the purpose of the amendment was to encourage greater judicial involvement in settlement. According to the advisory notes:

> Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. [35]

Referring to the addition of settlement as an appropriate topic for discussion at the pre-trial conference, the Advisory Committee noted:

> [The amendment] recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose ***52** of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. [36]

The Civil Justice Reform Act of 1990, which requires district courts to implement plans for reducing delays in civil litigation, provided increased pressure on the federal district courts to actively manage cases. The stated purpose of the district courts' plans is "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." [37] All districts were required to implement plans in compliance with the Act by the end of 1993. [38]

The Act sets out "litigation management and cost and delay reduction techniques" [39] that the districts may include in their own plans. Among these techniques is "a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference . . . ." [40]

An additional encouragement of district courts' active involvement in settlement is included in a recent amendment to Rule 16. That amendment adds language specifically authorizing a trial judge to require the availability of a person with settlement authority during a pre-trial conference. [41] The new language reads: "[i]f appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." [42]

The amendment again provides explicit authorization in the rules for what many judges are already doing. Its addition was the result of some disagreement among the courts about whether a trial court had authority to order someone with settlement authority to appear at the settlement conference. [43] The amendment indicates that the advisory committee believes the explicit statement of this authority will be helpful to judges in facilitating settlement. Yet the advisory committee notes also indicate that while a judge has authority to order the presence of a particular party, that authority should not always be exercised: "the ***53** unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required." [44]

B. Techniques Used by Courts to Effect Case Management Through Settlement

There is no doubt that federal trial judges currently use a variety of techniques to effect case management through settlement. Sources about techniques used by judges include anecdotal information found in articles or lectures by trial judges in which they advise other trial judges about their roles as case managers, empirical studies, reported cases, and even fictional accounts.

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While anecdotal and fictional stories may offer the most colorful accounts of judicial actions regarding settlement, empirical studies provide the most comprehensive account. [45] In addition, the reported cases confirm the variety of settlement techniques used by judges.

One empirical study indicates that in 1980, seventy-five percent of federal district judges initiated settlement discussions in jury trials. [46] The percentage probably would be higher today, given the encouragement of the 1983 and most recent amendments to Rule 16, increasing concern over docket management, and the increased advocacy of judicial involvement in settlement. [47] In fact, one author has indicated that "[i]n civil negotiations, the prime issue is not whether but *how* a judge will intervene in pre-trial conference and discussions." [48]

The evidence shows that when judges are involved in settlement discussions, they use a number of diverse techniques to facilitate settlement. [49] In response to a survey, 963 lawyers and judges [50] identified approximately seventy settlement techniques that they had either observed ***54** or used. [51] According to the study's authors, the identified techniques target four "leverage points" during settlement negotiations: "(a) the interlawyer relationship; (b) the lawyers themselves; (c) the lawyer-client relationship; and (d) clients." [52] The majority of the techniques observed or used involved the interlawyer relationship. [53]

The seventy techniques ranged from talking with both lawyers together about the settlement to more coercive techniques such as penalizing or threatening a lawyer for a refusal to settle. Among the most frequently used or observed techniques were less coercive ones, such as asking both lawyers to compromise, setting a settlement conference upon request, calling a certain figure reasonable, noting to the lawyer the high risk of going to trial, and arguing logically for concessions. [54] All of those techniques had either been used or observed by 75 percent of the lawyers and judges responding to the survey. [55]

In several studies, judges have reported taking a mathematical approach to helping parties reach a settlement figure. [56] Popular methods include telling the parties to "split the difference" [57] or using the "Lloyd's of London" approach, [58] which involves the judge asking the lawyers to estimate both the value of the case and their probability of winning to arrive at a settlement figure. [59]

Another study revealed that 10.3% (261) of responding federal and state judges "intervene aggressively--through the use of direct pressure" in settlement. [60] The more coercive techniques used by judges include reminding litigants of the possible adverse consequences of not reaching an agreement. One judge

> reported that he sometimes encourages litigants to talk settlement at the final pretrial conference by belittling the case with an observation such as 'You don't want to go to trial with this!' Others suggest the possibility that defendant might invoke Rule 68 and submit an offer of judgment, which could expose plaintiff to paying the costs of continuing the litigation. [61]

***55** Studies also indicate that judges are more frequently using the technique of caucusing, which involves discussions with each party and that party's attorney outside of the presence of the other party. [62] Caucuses by judges are similar to those used by a mediator during formal mediation and take place with the permission of both parties; therefore, caucusing does not involve improper ex parte communications within the meaning of the Code of Conduct for United States Judges.

Not only do judges meet separately with the parties and their attorneys, but some judges meet individually with the parties directly, outside of the presence of that party's attorney. [63] One judge reports that he "negotiates directly with clients upon occasion, bypassing counsel in negotiating a settlement." [64] The judge reported that he may use that technique even in a case tried without a jury "when a case is complicated and litigation costs are high." [65]

Studies also indicate some doubt about the propriety of certain techniques that judges use to facilitate settlement. [66] Participants in one empirical study, in addition to being asked to identify settlement techniques, were asked whether they thought each particular technique observed was ethical. [67] Of the seventy techniques, seventeen were judged to be unethical by 40 percent or

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more of the respondents. [68] This response indicates that there is some disagreement among lawyers [69] about the appropriateness of certain techniques judges use to facilitate settlement. The response also shows that at least some lawyers who have experienced judicial involvement in settlement feel that the judge's conduct has crossed the line separating appropriate from inappropriate behavior.

The techniques observed that lawyers thought were unethical include:

(1) giving advice to the lawyer with the weaker case;

(2) speaking personally with the client to persuade the client to accept a settlement offer;

(3) coercing lawyers to settle;

(4) siding with the stronger party to force agreement;

(5) penalizing the client for the attorney's actions;

(6) delaying ruling to the disadvantage of the stronger side;

***56** (7) giving favorable rulings to the lawyer with the weaker case;

(8) forcing the client to explain to the judge why he or she will not accept the settlement;

(9) penalizing a lawyer for not settling (e.g., with dismissal or mistrial);

(10) relaying information to and from the client;

(11) giving information to the lawyer with the weaker case;

(12) threatening the lawyer for not settling (e.g., with dismissal or mistrial);

(13) threatening to declare a mistrial if a decision is not returned by a certain time during the time the jury is deliberating;

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(14) discussing an attorney's recalcitrance with a senior member of the attorney's firm;

(15) transferring the case to another district on the day of the trial, to force settlement rather than to have the trial far away;

(16) threatening to discuss an attorney's recalcitrance with a senior member of the attorney's firm; and

(17) ordering the defendant to pay the settlement figure to charity instead of to the plaintiff.

Not all of these techniques were used with the same frequency. Of the seventeen techniques that lawyer participants judged unethical, the percentage of lawyers and judges observing and using the technique ranged from a low of three percent (ordering the defendant to pay the settlement figure to charity instead of to the plaintiff) to a high of forty-four percent (giving advice to the lawyer with the weaker case). [70] All but five of the seventeen techniques in this category had been observed or used by at least 10 percent of the respondents. [71]

These reports of the techniques judges use to facilitate settlement lead to several conclusions. Judges use a wide variety of techniques, many of which do not evidence abuse of the judge's authority or that the judge is acting out of bias. Some of the techniques, however, do evidence abuse or bias. The use of such techniques has two potential consequences: (1) judges are perceived as acting unethically in attempting to facilitate settlement, a perception that undermines confidence in the legal system, and (2) the parties subjected to abuse or bias are deprived of fair proceedings. Both of these consequences are problems that require solutions; the question then becomes whether existing legal theories effectively provide solutions.

*57 III. LEGAL THEORIES REGARDING JUDICIAL INVOLVEMENT IN SETTLEMENT

As trial courts have experimented with different techniques for case management, appellate courts have begun to define the limits on a court's involvement in settlement. The appellate cases have focused on two different types of legal theories in addressing this issue: (1) the proper scope of a court's authority to act regarding judicial involvement in settlement; [72] and (2) whether judicial involvement in settlement constitutes bias sufficient to warrant disqualification or reversal. [73]

A. Scope of a District Court's Authority to be Involved in Settlement

The cases point to two different, but sometimes overlapping, sources of a court's authority to manage cases: some decisions rely on trial courts' inherent authority to control litigation before them, [74] while others look specifically to Federal Rule of Civil Procedure 16 to define the scope of the court's appropriate involvement in settlement. [75] These two sources overlap because at times courts indicate that even when a court's actions are authorized by its inherent authority, the court must exercise that authority consistently with the Federal Rules of Civil Procedure, specifically Rule 16, as it applies to settlement. [76]

1. Inherent Authority

Inherent authority describes “the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” [77] A court's inherent power is grounded in necessity; it arises from the court's need to issue orders necessary for it to function. [78]

***58** A recognition of the courts' inherent authority to manage litigation is often traced to *Link v. Wabash Railroad,* decided by the United States Supreme Court in 1962. [79] In that case, the district court, relying on its inherent authority, dismissed a case because the plaintiff's counsel failed to prosecute the action by not appearing at a pre-trial conference. [80] In upholding the district court's inherent authority to dismiss the action, the Supreme Court described the district court's power to dismiss as one of "ancient origin." [81] The Court found that the power to dismiss was "necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." [82] Further, in language similar to that of Federal Rule of Civil Procedure 1, the Court found the inherent power to dismiss "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." [83]

Building upon the Court's grounding of inherent authority in the district courts' need to control their dockets and to dispose of cases efficiently, a number of lower courts have looked to the scope of that inherent authority when considering the propriety of a trial court's involvement in settlement. [84]

For example, in 1985, the United States Court of Appeals for the Third Circuit, sitting en banc in *Eash v. Riggins Trucking, Inc.,* stated that a district court had authority to impose the costs of calling a jury upon an attorney whom the court found had unreasonably delayed settlement. [85] In a lengthy opinion, [86] the court reviewed the development ***59** of the law regarding a court's inherent authority. [87] Discussing the necessity justification for a court's exercise of inherent authority, the court noted that "[t]he dramatic rise in litigation in the last decade has led trial judges to conclude that indulgent toleration of lawyers' misconduct is simply a luxury the federal court system no longer can afford." [88] The court approved the use of inherent authority as one means of allowing the district courts to deal with the recent call for increased case management, finding that neither traditionally recognized powers of the courts nor those specifically granted by the Federal Rules of Civil Procedure allowed the courts to deal adequately with a "wide range of attorney misconduct." [89] Therefore, the Third Circuit found that the courts must be able to use inherent authority to "fashion tools that aid the courts in getting on with the business of deciding cases." [90]

In a decision relying upon the Third Circuit's *Eash* decision, the Fourth Circuit also found that a district court's inherent authority to control its docket supported an order imposing the costs of impaneling a jury upon an attorney who had failed to notify the court of settlement in time to prevent the calling of the venire. [91] Although in this instance the district court was acting pursuant to a local rule that authorized such an order, the Fourth Circuit explicitly noted that such an order would have been authorized even in the absence of the local rule. [92]

Similarly, the Eleventh Circuit recognized inherent authority as a basis for a court's order requiring certain persons to appear at a settlement conference in *In re Novak.* [93] In that case, the district court ordered that an employee of the defendant's insurer who had authority to settle be present at a settlement conference. [94] When that person did not appear at the settlement conference, the court held him in criminal contempt. [95] The appeal to the Eleventh Circuit was from the contempt order. [96]

Although the appellate court affirmed, it held that an order requiring a non-party to appear at a settlement conference was unnecessary and therefore fell outside the scope of the district court's inherent authority. [97] ***60** The court recognized that the district court's inherent authority authorized it to issue orders necessary for it to manage its caseload efficiently. [98] According to the court, the scope of that authority included any orders necessary to conduct meaningful pre-trial settlement conferences as authorized by Rule 16. [99] Therefore, the court recognized that, acting under its inherent authority, a district court could order a party to present someone authorized to agree to settlement at the pre-trial conference. [100] The problem with the district court's order in this case was that because it could have ordered the party to bring the proper insurance company employee to the conference, it was not necessary for the court to achieve the purpose of the Rule 16 settlement conference by issuing an order to a non-party to appear. [101]

The Seventh Circuit initially defined the scope of inherent authority to support judicial involvement in settlement as limited by Federal Rule of Civil Procedure 16. [102] In *Strandell v. Jackson County,* [103] decided in 1987, the Seventh Circuit found that a district court did not have the right to order parties to participate in a mandatory non-binding summary jury trial. [104] While

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noting that "a district court no doubt has substantial inherent power to control and to manage its docket," [105] the court held that "[t]hat power must, of course, be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure." [106] The court in *Strandell* took an approach different from that taken by the Third Circuit in *Eash* -- that the district courts must be allowed to rely on their inherent authority to develop innovative techniques for managing their dockets. The court in *Strandell* found that "in those ***61** areas of trial practice where the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judicial officer must conform to that balance." [107] Because Rule 16 does not authorize a mandatory summary jury trial, the district court could not rely on its inherent authority to order participation in a summary jury trial. [108]

The court's decision in *Strandell* was consistent with several decisions of the Seventh Circuit decided before the 1983 amendment to Rule 16. [109] In *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.,* [110] the court held that "courts [could not] use Rule 16 to force parties to stipulate facts to which they could not voluntarily agree." [111] In *Identiseal Corp. v. Positive Identification System,* [112] the court held that a district court could not require parties to undertake discovery because Rule 16 was not meant to be coercive. [113]

One year after *Strandell,* however, the Seventh Circuit, sitting en banc in *G. Heileman Brewing Co. v. Joseph Oat Corp.,* [114] took a slightly different approach. The court upheld the district court's power to compel a party to appear at a pre-trial settlement conference. [115] The court reconciled its decision with *Strandell* by characterizing *Strandell* as establishing only that a court may not exercise its inherent authority in a manner inconsistent with rule or statute. [116] However, the court ***62** rejected the notion that Rule 16 was "designed as a device to restrict or limit the authority of the district judge in the conduct of pre-trial conferences." [117] Citing *Link,* the Seventh Circuit held that the Federal Rules of Civil Procedure are not the exclusive source of authority for orders from the district court necessary for the efficient management of their dockets. [118] Finding that "the entire thrust" of the 1983 amendment to Rule 16 was to encourage the district courts to more actively manage their dockets, the court upheld the district court's order because it was neither inconsistent with, nor in derogation of, Rule 16. [119] Further, the use of inherent authority to justify the district court's order was consistent with the stated purpose of the Federal Rules: to promote the just, speedy, and inexpensive determination of every action. [120]

2. Rule 16 as Exclusive Authority for Judicial Involvement in Settlement

Some courts have looked at the purpose of Rule 16 to find authority for judicial participation in settlement beyond orders specifically authorized by Rule 16. [121] The courts are in general agreement that a trial court may issue orders not specifically authorized by Rule 16 if the orders encourage or facilitate settlement; the courts act outside the scope of their authority under Rule 16, however, if their orders amount to coercion. [122]

For example, in *Kothe v. Smith,* [123] the Second Circuit reversed a district court's order imposing sanctions upon one of the defendants in a medical malpractice trial for failure to settle the case before trial. [124] Three weeks before the trial, the judge held a pre-trial conference at which he ordered the attorneys for the parties to conduct settlement negotiations. [125] According to the appellate opinion, "it appears that [[[the judge] recommended that the case be settled for between $20,000 and $30,000. He also warned the parties that, if they settled for a comparable figure after trial had begun, he would impose sanctions ***63** against the dilatory party." [126] When the case was settled for $20,000 one day after the trial began, the trial court ordered the defendant to pay $1,000 to the plaintiff's attorney, $1,000 to plaintiff's medical witness, and $480 to the Clerk of the Court. [127]

Finding the district court's order an abuse of discretion, the Second Circuit held that the trial court exceeded its authority under Rule 16 by trying to achieve settlement through coercion. [128] Recognizing that "the law favors the voluntary settlement of civil suits," [129] the court noted that the policy in favor of settlement does not authorize a court to coerce settlements. [130] The appellate court found that the trial court's "excessive zeal" [131] in imposing sanctions required reversal, especially because the sanctions were imposed on the defendant alone, who had never received an offer within the settlement range. [132]

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In *Newton v. A.C. & S., Inc.,* [133] the Third Circuit found that it was within a district court's authority under Rule 16 to impose sanctions for a failure to comply with a settlement schedule. However, the court reversed the trial court's orders because it found that they amounted to a form of civil contempt and therefore should not have been issued without notice and a hearing. [134] The district court in *Newton* had before it a number of asbestos cases. In what the Third Circuit described as "an innovative effort to manage its trial docket," [135] the trial court set a deadline for settlement negotiations two weeks before the scheduled trial date for the case. [136] The district court warned parties that it would impose a fine upon parties who settled after that deadline without a hearing and without regard to fault. [137]

The district court was true to its warning in two different groups of asbestos cases. In one group, the plaintiffs settled with two of the defendants the day the trial was scheduled to begin. [138] As a result, the district court imposed a fine of $1,000 on the settling defendants. In ***64** the second group of cases, all parties settled before trial but after the settlement deadline. [139] The court imposed a $250 fine upon counsel for the plaintiffs and counsel for each of the defendants.

The district court relied on Rule 16(f) as authority for its orders. [140] Rule 16(f) authorizes courts to compel parties to attend pre-trial conferences to discuss settlement and to impose sanctions if the parties do not participate in settlement discussions in good faith. [141] The rule does not, however, specifically authorize the court to impose sanctions for settling after a certain date. [142] Nonetheless, the Third Circuit held that such an order was authorized as "entirely consistent" with the intent and purpose of Rule 16. [143] According to the court:

> [t]he purpose of Rule 16 is to maximize the efficiency of the court system by insisting that attorneys and clients cooperate with the court and abandon practices which unreasonably interfere with the expeditious management of cases . . . . The intent and spirit of Rule 16 is to allow courts to actively manage the timetable of case preparation so as to expedite the speedy disposition of cases. [144]

Although the court found that the trial court's orders were within the scope of Rule 16, it sounded a cautionary note:

> We also express our concern over the district court's imposition of sanctions on those parties settling after the first few days of trial. Settling a case after a trial is only partially completed does not, by itself, demonstrate that an attorney or his client has been irresponsible in the use of judicial resources. In fact, it is likely that the courts have served their purpose of providing a forum for resolving disputes in that instance. When parties come to a settlement after they have begun trial, it is likely that the process aided them in coming to a resolution. [145]

The court further emphasized that while encouragement of settlement is appropriate, coercion is not: "In this age of burgeoning complex litigation and limited judicial resources, settlements are to be encouraged . . . . However, the court's efforts to expedite the settlement of cases . . . should not unduly pressure or coerce litigants into settlement." [146]

***65** In *In re Air Crash Disaster,* [147] a district court denied a motion to amend an order directing the parties to meet to discuss settlement. In that order, the court directed that the parties hold settlement conferences in the offices of each plaintiff's attorney and that each of the parties be represented by counsel and an individual other than counsel with authority to make settlement decisions. [148] The court held that the order was proper because "based on the totality of the circumstances . . . ," [149] it neither prejudiced the ultimate litigation nor coerced a particular resolution of the case. [150]

In *Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb, Inc.,* a district court upheld a magistrate's order accelerating the date of an expert's deposition when one purpose for the order was to facilitate settlement. [151] Although the court acknowledged that a court's order designed to pressure or coerce a party into settling would be impermissible, it found that the order expediting the deposition did not amount to coercion. [152] Rather, the district court agreed with the magistrate, who had stated in the order that the order would facilitate settlement. [153]

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Courts have found that other types of orders amount to coercion and, therefore, are not authorized under Rule 16. [154] In *Del Rio v. Northern Blower Co.,* the First Circuit reversed a district court order charging costs to an insurer because the insurer refused to facilitate settlement by waiving a lien due it by the plaintiff under a workers' compensation statute. [155] Although the court in *Del Rio* did not discuss specifically either Rule 16 or the district court's inherent authority, it focused its decision on the absence of a party's duty to settle. [156] The court held that because a party does not have a duty to settle, it was not appropriate to penalize the party for refusing to settle. [157]

***66** Similarly, the Second Circuit in *Hess v. New Jersey Transit Rail Operations, Inc.* [158] found that a district court should not have held a party in contempt for failing to make a "bona fide" settlement offer before trial. [159] Although the basis for the appellate court's decision was that the requirements of a contempt proceeding had not been met, the court also expressed disapproval of the trial court's efforts to force a party to make a particular settlement offer. [160] Finding the order to make a "bona fide" settlement offer too vague to be enforceable in contempt, the appellate court noted that "[i]f the district judge had a figure in mind, he wisely refrained from telling [the party] what it was." [161]

B. Bias

Critics of judicial involvement in settlement argue that one danger of early judicial involvement in a case is that it becomes difficult for the judge to maintain his or her traditional neutrality about the case. [162] Parties aggrieved by judicial attempts to facilitate settlement have alleged judicial misconduct either to seek recusal of a trial judge or to seek reversal of a trial court decision. [163] Both remedies are based on an underlying argument that the trial court was biased.

Although most of the cases setting out rules regarding when judicial bias requires that a judge be disqualified or that a trial court decision be reversed due to judicial misconduct deal with actions by the judge during the trial, a few deal with pre-trial judicial actions. Certain of those cases specifically discuss whether comments or actions by the court during settlement discussions amount to judicial bias requiring disqualification or reversal. [164]

***67 1. Disqualification Because of Judicial Bias**

Title 28 of the United States Code, section 455, provides for disqualification of a judge for judicial bias. [165] Subsection (a) of that section provides that a judge shall disqualify himself or herself "in any proceeding in which [the judge's] impartiality might reasonably be questioned." [166] Disqualification under this subsection does not require that a party file a motion; it can be accomplished sua sponte by the judge. [167]

The purpose of the disqualification statute is to maintain the appearance of judicial impartiality. [168] In determining whether to recuse himself or herself, the court must apply an objective standard: whether a reasonable person with knowledge of all of the facts would think that a judge's impartiality might reasonably be questioned. [169] In many jurisdictions, appellate courts review a judge's failure to disqualify himself or herself on an abuse of discretion standard. [170]

Subsection (b) of § 455, on the other hand, provides that a judge must recuse "[w]here [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." [171] Recusal under this subsection requires a motion by a party. [172] The party seeking disqualification must file an affidavit setting out the facts and reasons for the party's belief that bias exists pursuant to 28 U.S.C. § 144. [173] Although § 144 seems to ***68** indicate that disqualification is automatic upon the filing of the affidavit provided for in that statute, courts have held that the judge may pass on the sufficiency of the facts and statements set out in the affidavit. [174]

Subsection (a) requires a judge to determine whether a reasonable person would think that the judge was biased; the judge must recuse himself or herself to avoid the appearance of bias, even in the absence of actual bias. [175] Subsection (b), on the other

hand, requires a determination that the party seeking disqualification has demonstrated bias in the affidavit filed pursuant to § 144. [176] Despite this difference, courts have consistently held that the bias required under both sections is the same. Unless a judge's remarks demonstrate such pervasive bias or prejudice that one party is actually prejudiced, [177] the bias must stem from an extrajudicial source to be disqualifying. [178] A source of bias is extrajudicial if the bias "is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." [179]

The requirement of an extrajudicial source for the bias has been the basis for many courts rejecting an argument that the trial court should be disqualified for bias based on conduct during pre-trial proceedings. [180] For example, in *Pau v. Yosemite Park and Curry Co.,* [181] the Ninth Circuit rejected an argument that a trial judge should have recused ***69** himself under 455(a). One of the trial judge's actions complained of was a comment during pre-trial proceedings that "he had seen better cases before and that the case did not impress him." [182] The court found that although the judge's conduct was "heavy-handed" [183] and "regrettable," [184] it was not prejudicial misconduct warranting reversal because any bias did not result from an extrajudicial source. [185] Rather, the judge's comments were based on information he had learned about the case during the pre-trial stage of the litigation. [186]

Similarly, the United States District Court for the District of Hawaii held that an opinion formed about counsel during judicial proceedings, including pre-trial conferences, was not sufficient to require recusal because the source of the bias was not extrajudicial. [187] According to the court, part of a trial judge's job is to make credibility determinations, which could include forming opinions about the credibility of counsel during judicial proceedings. [188]

In *NLRB. v. Honaker Mills Division of Top Form Mills,* [189] the Fourth Circuit similarly rejected an argument that an administrative law judge's decision was invalid because of judicial bias. One of the facts to which the appellant pointed to show bias was a remark made by the judge during a pre-trial conference with the appellant's attorneys. [190] During that conference, the judge allegedly expressed skepticism about the validity of appellant's defense to the charge of unfair labor practices. [191] The appellant argued that the remark indicated an inherent prejudice on the part of the judge toward the appellant's legal theory. The court held that "[a] judge's remarks that constitute mere expressions on a point of law are not sufficient to show personal bias or ***70** prejudice." [192] Because a judge bases those kinds of remarks on experience and knowledge gained through judicial proceedings, they do not stem from extrajudicial sources and, hence, do not constitute bias warranting recusal. [193]

In several decisions, courts have applied these general rules regarding bias to arguments that a trial judge's conduct occurring during settlement discussions requires the judge's disqualification. [194] In *Johnson v. Trueblood,* the Third Circuit supported the trial court's right to develop an opinion about the case before trial. [195] In doing so, it both defended the trial court's eagerness to encourage settlement and issued a cautionary note to trial courts concerning their role in facilitating settlement. [196]

The appellate court in *Johnson* rejected an argument that statements made at pre-trial settlement conferences were extrajudicial because of the timing of the statements. [197] The appellant argued that because the statements were not based on evidence admitted at trial, they were extrajudicial. The Third Circuit held that the timing of the judge's comments was not the important factor in determining whether the source of bias was extrajudicial. Rather, "[t]he relevant inquiry is whether the trial judge's pre-trial comments were linked to his evaluation of the case based on the pleadings and other materials outlining the nature of the case, or whether the comments were based on purely personal feelings towards the parties and the case." [198]

The appellate court characterized the trial judge's statement that the lawsuit was a "personal tragedy for the defendants" [199] who were "honest men" of "high character" [200] as "a form of judicial coloration in an overzealous effort to settle what obviously would be a lengthy and complicated case to try . . . [O]n balance, [the allegations] add up more to settlement fever than personal bias warranting recusal . . . . " [201] While holding that recusal was not warranted, the court warned district judges to avoid allowing their roles as "negotiators" in settlement to ***71** "obscure their paramount duty to administer the law in a manner that is both fair in fact and has the appearance of fairness." [202]

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The Tenth Circuit reached a similar conclusion in *Franks v. Nimmo.* [203] The appellant based allegations of bias on the trial judge's efforts to work out a compromise between the parties during settlement discussions. [204] Following the settlement discussions, the trial judge attempted to persuade the plaintiff to accept the compromise reached by the lawyers. The trial judge's effort at persuasion occurred in a private meeting between the plaintiff and the judge. During that meeting, the trial judge told the plaintiff that "these matters never work out for a plaintiff unless they are settled, and that he [the plaintiff] ought to settle because the judge could not rule in his favor . . . . " [205] The judge's comments formed the basis for the plaintiff's argument that the trial judge had prejudged the case and therefore should recuse to avoid the appearance of impropriety. [206]

The appellate court evaluated the judge's comments in light of 28 U.S.C. sections 144 [207], 455(a), and 455(b)(1), and found that the remarks did not show the requisite bias. [208] According to the court, the judge's attempt at settlement was "clearly beneficial" [209] to the plaintiff and, therefore, did not require recusal.

Finally, in *Fong v. American Airlines (In re Fong),* [210] a decision noteworthy for its emphatic defense of trial courts' "intervention" [211] in facilitating settlement, the United States District Court for the Northern District of California rejected an argument that statements made during settlement discussions constituted bias based on an extrajudicial source. [212] *In re Fong* involved a claim of employment discrimination. The plaintiff had been discharged by his employer, an airline, for stealing a sandwich and drink worth about $2.00. Among other ***72** statements, the trial court indicated that "he was outraged by the fact that in this day and age a man's life could be ruined because he stole a few sandwiches." [213]

As the court did in *Johnson,* [214] the district court in *Fong* rejected the argument that the statements were extrajudicial because of their timing. [215] However, the court's reasoning was more policy-based than was the Third Circuit's. Accepting the argument that the statements were extrajudicial would, according to the trial court, "hold potentially disastrous consequences for the management of the business of the courts." [216] The disastrous consequences would include handicapping trial courts' ability to intervene in the settlement process. According to the judge:

> Judicial intervention in the settlement process, even if not universally favored or practiced, is an absolute necessity in the federal judicial system, burdened as it is by a staggering and ever-growing case load . . . . Intervention may, of course, take many forms depending on the personality, style and experience of the individual judge. It may, among others, take the form of an expression by the judge of his reaction to the allegations, admissions and denials contained in the pleadings and his evaluation of each party's prospects of success in the litigation. To subject judges to the risk of disqualification on the basis of statements of this kind would jeopardize their effectiveness as catalysts in the settlement process. [217]

2. Reversal Because of Judicial Bias

Appellate courts also must consider allegations of judicial bias when a party contends that an appellate court should reverse a trial court decision because of judicial misconduct stemming from bias. The general standard for reversal because of judicial misconduct during trial is whether the trial was fair. [218] Although, under this theory, courts do not rely on section 455, courts frequently have applied the same test for judicial bias as that applied when a party relies on 455: that the ***73** alleged judicial misconduct is not grounds for reversal unless the bias derives from an extrajudicial source. [219]

The cases dealing with this issue typically deal with the court's conduct at trial rather than in a pre-trial proceeding. Some of these decisions may nonetheless provide valuable insight into whether an attack on pretrial efforts to facilitate settlement would be successful based on a theory of judicial bias. Those decisions rest on a discussion of the trial court's proper role in making decisions about the facts, evidence, legal theories, parties, and lawyers in the case before the court. [220]

For example, the Ninth Circuit, in *Hansen v. Commissioner,* [221] rejected an argument that a tax court decision should be reversed because of judicial bias. [222] The appellant's claim of bias rested on several actions of the trial court. The appellant alleged that

the judge rushed the appellant in presenting his evidence, abruptly terminated the appellant's testimony at trial, unfairly refused to accept certain documents offered by the appellant at trial, set an "unrealistic" time limit on the appellant's closing statement, frequently interrupted the appellant's testimony, and generally attempted to speed the trial along. [223]

The Ninth Circuit held that these allegations failed to demonstrate the judicial bias necessary to reverse a decision for judicial misconduct. [224] The appellants had failed to show that the conduct of the judge evidenced a disposition to treat them unfairly that came from an extrajudicial source. [225] Emphasizing the trial court's broad discretion in conducting a trial, the appellate court held that "[a] trial judge's comments geared toward facilitating an orderly trial are not, in and of themselves, prejudicial." [226]

Similarly, in *In re Corey,* [227] the Ninth Circuit held that "a judge's comments aimed at facilitating orderly proceedings" did not constitute judicial bias. [228] Further, if the trial judge's inclination to rule against the appellants was based on knowledge learned during judicial proceedings, ***74** the trial judge did not base the rulings on any extrajudicial source; consequently, the rulings could not support a bias argument. [229]

C. Ethical Considerations as Restraints on Trial Courts' Involvement in Settlement

1. The Code of Conduct for United States Judges

One study of judicial involvement in settlement indicates that judges are constrained in their settlement activities by ethical concerns. [230] The authors of that study concluded that "judges are more apt to use techniques which are considered ethical by the judicial community." [231] Therefore, it is important to examine relevant standards of judicial ethics to determine if these standards provide adequate safeguards against judicial bias or abuse of judicial authority during settlement.

The Code of Conduct for United States Judges sets out ethical standards for federal judges. [232] The Code is based on the American Bar Association's Model Code of Judicial Conduct and was first adopted by the Judicial Conference of the United States in 1973. Although the Code does not itself establish disciplinary procedures for violations of the Code's provisions, it provides that "[a]lthough judges should be independent, they should comply with the law, as well as the provisions of this Code." [233]

The Code also establishes standards of conduct that may apply in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. [234] According to the Commentary to Canon 1 of the Code:

> [I]t is not intended that disciplinary action [under the 1980 Act] be appropriate for every violation of [the Code's] provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that ***75** disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. [235]

Three canons in the Code arguably are relevant to a judge's conduct during settlement discussions. Canon 1 provides that "a judge should uphold the integrity and independence of the judiciary." [236] Canon 2 provides that "a judge should avoid impropriety and the appearance of impropriety in all activities." [237] Canon 3 provides that "a judge should perform the duties of the office impartially and diligently." [238]

Canons 1 and 2 are relevant to concerns about judicial bias arising from involvement in settlement because they require a judge to maintain neutrality and impartiality. Neither the language of those canons nor the commentaries to them mention the role of the judge in facilitating settlement. They do, however, stress the importance of both the fact of impartiality and the appearance of impartiality. For example, the commentary to Canon 2 notes that "[p]ublic confidence in the judiciary is eroded by irresponsible

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or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety." [239] The Commentary also defines the test for appearance of impropriety as "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." [240]

Canon 3 more directly addresses the judicial role in settlement by addressing a judge's responsibilities for case management. In fact, one subsection of Canon 3 and the accompanying commentary specifically refer to a judge's involvement in settlement discussions. Canon 3 includes a subsection that authorizes a judge's caucusing with parties as an effort to facilitate settlement, as long as all parties consent. [241] ***76** Subsection (A)(4) provides that "[a] judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." [242]

Similarly, subsection (A)(5) of Canon 3 requires that "a judge should dispose promptly of the business of the court." [243] In the commentary to that section, the drafters address the purposes of case management with regard to reducing expense and delay. The drafters also note the proper role of the judge with regard to settlement:

> In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts. [244]

The Judicial Conference of the United States has appointed an advisory committee that responds to inquiries from judges about ethical issues, publishes opinions, and periodically evaluates the Code of Conduct for United States Judges. To date, that committee has not issued an advisory opinion dealing with the proper role of the trial judge with regard to settlement.

However, the American Bar Association recently published a formal advisory opinion that discusses judicial involvement in settlement. [245] The opinion deals with both the propriety of a judge's requiring an attorney to reveal the extent of the attorney's settlement authority during settlement discussions and the propriety of the attorney disclosing the extent of settlement authority in response to a judge's request to do so. [246]

The advisory committee considered the following facts: a trial judge held separate meetings in chambers with each counsel to discuss settlement with all parties receiving notice of the meeting. [247] During one of those meetings, the judge asked the lawyer to disclose both the extent of the lawyer's settlement authority from the client and what the lawyer intended to recommend to the client regarding settlement. [248]

***77** The advisory opinion concluded that a lawyer should not reveal this information to the judge without prior consent of the client and that, although a judge may ask the lawyer about these matters, the judge may not order the attorney to reveal this information. [249] The members of the advisory committee relied upon both the Model Rules of Professional Conduct and the Model Code of Judicial Conduct in issuing the opinion. [250]

The opinion states that revealing information about either the lawyer's settlement authority or the lawyer's recommendation concerning settlement, in response to a judge's inquiry, would violate confidentiality requirements of Rule 1.6 of the Model Rules of Professional Conduct. [251] Rule 1.6 requires that lawyers maintain the confidentiality of "information relating to the representation" [252] of the client. According to the opinion, Rule 1.6 clearly encompasses disclosure of both settlement authority and any advice to the client regarding settlement. [253] Therefore, the lawyer could reveal this information only after the client has given informed consent or if one of the implied consent provisions of Rule 1.6 is satisfied. [254]

The opinion rejected the argument that the lawyer has implied consent to reveal this information because disclosure might "facilitate a satisfactory conclusion." [255]

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> While a lawyer normally has implied authority to enter into routine stipulations and to admit matters not in dispute, the settlement parameters sought by the judge are neither routine nor uncontested. ***78** The potential for adversely affecting the client's position, or leading to a disposition of the case that is not satisfactory to the client, will ordinarily be significantly increased by disclosure of the client's ultimate settlement position. Such information is confidential and its disclosure cannot be said to be impliedly authorized simply by reason of the lawyer's representation of the client. Although there will be occasions when a lawyer's authority to reveal a client's settlement position may be implied from the circumstances, no such implication arises simply because the inquiry is made by a judge. Such information should not be disclosed even to a judicial mediator without informed consent. [256]

With respect to the propriety of the judge's asking the lawyer to reveal the extent of settlement authority or the lawyer's recommendation on settlement, the opinion relied on sections 3(B)(7)(D) and 3(B)(8) of the Model Code of Judicial Conduct, [257] the commentaries to those sections, and the advisory committee's notes to the 1983 amendment to Rule 16. [258] The opinion provides that "a judge may not require a lawyer to disclose settlement limits authorized by the lawyer's client, nor the lawyer's advice to the client regarding settlement terms." [259]

Although this conclusion at first glance seems to prohibit a judge from asking about settlement authority and recommendations, the opinion goes on to give more mixed signals:

> This is not to suggest, however, that a judge may not, in seeking to facilitate a settlement, and in an appropriate manner, make inquiry of a lawyer as to those matters. For example, while attempting to settle a case a judge may well feel it appropriate and helpful to inquire of counsel the limits of his settlement authority or whether counsel will recommend to the client the terms of settlement the judge recommends. Such an inquiry, if exercised within limits, is proper. Those limitations are formed by the ethical constraints imposed upon lawyers by Rule 1.6 not to disclose ***79** information relating to the representation without prior client consent or other expressly-permitted excuse. [260]

In fact, the opinion even instructs the judge as to how to make the inquiry:

> [A] judge making such an inquiry should acknowledge the lawyer's ethical duties and assure the lawyer that the inquiry is not intended to pressure the lawyer to violate them. Properly phrased and sincerely expressed, such prefatory remarks will help strike the balance between the perceived need of the judge to inquire and the ethical duty of the lawyer to comply with relevant confidentiality rules. If the lawyer, in response to the inquiry, expresses a reticence to disclose such information on ethical grounds, the judge should not pursue the inquiry further. [261]

This advice to lawyers and judges comes in the context of a strong statement in the opinion supporting the judge's role in facilitating settlement: the opinion refers to "increasing and salutary initiatives in the areas of alternative dispute resolution and pretrial settlement, a process sponsored and supported by the courts and the bar." [262] Further, the opinion states that "[r]easonable settlement is often better for the client than the fortuities of a trial. A lawyer should therefore cooperate to the fullest extent possible in a pretrial settlement conference." [263]

Therefore, the opinion indicates that it is appropriate, within the judge's responsibility to facilitate settlement, to inquire about the lawyer's settlement authority and settlement recommendations, as long as the judge does not insist on an answer to the inquiry. In reaching this conclusion, the opinion ignores the reality of the subtle coercive power of even a "properly phrased and sincerely expressed" [264] inquiry from the court during settlement discussions. It also indicates that a lawyer should be as cooperative as possible in responding to judicial initiatives during settlement, implying that a lawyer should anticipate such an inquiry and seek consent for disclosure ahead of time.

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2. The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980

The Judicial Council's Reform and Judicial Conduct and Disability Act was enacted in 1980[265] as a response to calls for reform of the ***80** means by which judicial conduct is monitored. Its primary purpose is to respond to charges that a particular judge is unfit.[266] The Act provides that one may file a complaint against a federal judge or magistrate if the judge or magistrate "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . ."[267] The statute allows "any person" who alleges that a circuit judge, district judge, bankruptcy judge, or a magistrate has engaged in such conduct to file with the clerk of the court of appeals for the circuit "a written complaint containing a brief statement of the facts constituting such conduct."[268]

The Act details the way in which the complaint is handled after it is filed. The complaint is first transmitted to the chief judge of the circuit, who has several options: he or she may dismiss the complaint if it is "(i) not in conformity with [the requirements of the Act], (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous."[269] The chief judge may also "conclude the proceeding if [the judge] finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events."[270]

If the chief judge does not dismiss the complaint or conclude the proceedings, he or she is required to appoint a committee of circuit and district judges "to investigate the facts and allegations contained in the complaint."[271] After conducting an investigation, the committee is to file a written report with the judicial council of the circuit.[272] The report "shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit."[273]

The judicial council is authorized to further investigate the complaint and/or take "such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."[274] If the judicial council decides it is appropriate, the judicial council may refer the complaint, along with its recommendations for ***81** action, to the Judicial Conference of the United States.[275] The Judicial Conference has authority under the Act to take the same steps in disposing of a complaint as the judicial council is authorized to take.[276]

Experience under the Act has made it clear that the goal of the Act is deterrence of conduct affecting the expeditious and efficient administration of justice, and not remediation of past errors. The Ninth Circuit, in dismissing a complaint against a former bankruptcy judge, made this clear:

> The several remedial methods prescribed by 28 U.S.C. 372 (c)(6)(B) are clearly directed at preventing the recurrence of actions by that judicial officer that might impair the administration of justice. When the subject of the complaint is no longer a judicial officer, he is beyond the reach of these procedures and the remedies they prescribe.[277]

Similarly, it has been held that the Act is not to be invoked by one who eventually received full relief but who contends that the trial judge engaged in untruths and deliberately delayed the complainant's obtaining of relief.[278] Nor is the Act intended to be a substitute for appeal. The courts have been quick to dismiss complaints when there is a judicial remedy of appeal available to the complainant, noting that under § 372(c)(3), the chief judge may dismiss the complaint if it is ***82** "directly related to the merits of a decision or procedural ruling."[279] In fact, a large number of complaints filed under the Act have been dismissed on this basis.[280]

Because the Act is not intended either to be remedial or to deal with any complaints affecting the merits of a decision, it is not likely to have much impact on the decisions a judge makes about the extent of his or her involvement in settlement discussions.

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IV. ARE THESE THEORIES ADEQUATE TO PROTECT PARTIES FROM MISUSE OF JUDICIAL INVOLVEMENT IN SETTLEMENT AND TO GIVE TRIAL JUDGES CLEARER GUIDANCE?

This article has discussed three restraints on judicial conduct with regard to settlement: limits on the scope of the court's authority to act with regard to settlement, the need for disqualification or reversal because of judicial bias, and ethical constraints. As they presently exist, each of these approaches inadequately deals with the problems of abuse and bias arising from increased judicial intervention in settlement.

A. Limits on the Scope of a Court's Authority

The deficiency of challenging the trial court's authority to take certain actions with regard to settlement is procedural. Most parties will not be able to avail themselves of these remedies because they are available only when there is an appealable order in the trial court. For example, the trial court must have issued a sanctions order, a dismissal, or a similar order. These kinds of orders occur only when a party resists a judge's initial efforts to coerce settlement, causing the court to enter an order in the face of that resistance. Therefore, the stronger party or attorney, that is, the one in the best position to resist judicial pressure, will be the party with the remedy.

A party against whom coercive techniques are effective is unlikely to be in a position to appeal. Instead, the case will be disposed of with a ***83** settlement agreement, albeit a coerced one, from which there is no appeal. Because the one who most needs the remedy is the least likely to have it, this method of remedying abuse of settlement techniques does not address the criticism that one problem with active case management is the lack of adequate procedural safeguards. [281]

Substantively, it is difficult to challenge the correctness of the standard articulated by the courts for assessing a trial court's conduct--that a court acts within its authority when it facilitates settlement but outside of that authority when it coerces settlement. [282] However, the standard is a vague one; the distinction between facilitation and coercion is not clear. The same comment can be made about this standard as was once made about *International Shoe's* "minimum contacts" standard for assessing the constitutionality of personal jurisdiction: it will require a process of "arbitrary particularization" [283] to arrive at workable rules.

B. Disqualification or Reversal Because of Judicial Bias

The same procedural obstacles exist when a party seeks appellate reversal of a trial court decision because of bias as exist when a party seeks appellate reversal because a trial court acted outside of its authority. Although there are not the procedural obstacles to a party's filing a motion to disqualify as there are in seeking appellate review, there is a practical obstacle to doing so. A party whose complaint is that he or she is being coerced into settlement by a trial judge may be reluctant to risk the judge's ire by alleging bias. For a party already perceiving that a judge is biased against it, the risk of an unsuccessful motion to disqualify is great. Once again, those parties most able to resist coercion will be more likely to seek relief while those most susceptible to it will not.

There is also a substantive problem with disqualification as a remedy. Because of the limited types of conduct that meet the requirements of judicial bias, seeking disqualification of a judge or reversal because of bias is not a viable remedy for inappropriate judicial involvement in settlement. When judges engage in biased conduct during judicial facilitation of settlement, the judge's bias usually arises from knowledge about the parties, case, or lawyers acquired by the judge during the ***84** pre-trial proceedings. The biased conduct of the trial judge would not stem from extrajudicial sources and, therefore, would not rise to the definition of judicial bias necessary to require recusal or reversal of a trial court decision. This fact was recognized by the court in *Johnson v. Trueblood* [284] when it stated that a judge's comments motivated by "settlement fever" [285] were not sufficient to warrant the judge's disqualification. The result of the existing rule, when applied to the settlement context, is the realization of the specter raised by some critics: judges may in fact make up their minds prematurely about a case during pretrial proceedings and these decisions may affect the judges' conduct in the settlement context.

That does not mean, however, that the law concerning disqualification should be changed. As a practical matter, a rule that a judge cannot act on the basis of what the judge has learned during litigation would be unworkable and would, as the court in

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Fong noted,[286] unduly handicap case management by trial judges. There should be some vehicle other than disqualification for attacking the problem of judicial bias regarding the court's involvement in settlement.

C. Ethical Considerations

Ethical considerations, to the extent that they influence judicial behavior, are not remedial but preventive. Although they are self-enforcing, evidence shows that courts are influenced by ethical considerations, and therefore, ethical rules may act as restraints on behavior. To the extent that they act as effective restraints, however, the problem is that the ethical rules are unclear. The Code of Conduct takes the same approach to a trial judge's authority to be involved in settlement as do the cases regarding the proper scope of a judge's involvement in settlement: facilitation is appropriate; coercion is not. Therefore, the problem with the existing ethical rules is that they are too vague to effectively prevent judicial abuse or bias during settlement. The rules need to give clearer guidance about the distinction between facilitation and coercion of settlement.

V. PROPOSED REFORMS

While it is relatively easy to point to problems with the current rules for controlling misuse of case management techniques to facilitate ***85** settlement, it is not so easy to point to solutions. The problem is a complex one, as evidenced by the amount of time, energy, and paper that has been consumed in debating it. Even in the face of concern about potential and actual abuse of case management techniques, most people agree that there are compelling reasons for judicial facilitation of settlement. In fact, it is important to distinguish between criticisms of settlement, as opposed to adjudication, and criticisms of certain techniques used by judges to effect case management through settlement.[287]

No one can dispute the myriad of difficulties faced by trial judges. They deal daily with congested dockets[288] and pressure for effective case management from other members of the judiciary and the public. The pressure from other judges may be particularly keen. In a fictional account of one trial judge's efforts to facilitate settlement of a personal injury case, the judge, in a moment of frustration over the defendant's refusal to settle, "thought for a moment of how the assignment judge would needle him at the weekly productivity meeting to be held in a day or two."[289] Litigants face similar difficulties--the expense and time required to adjudicate a dispute have experienced steady growth.

These difficulties, however, lead to a need to distinguish between appropriate and inappropriate managerial judging techniques regarding settlement. To the extent judges misuse their active role in settlement and to the extent that the current legal system does not adequately ***86** either prevent or remedy such misuse, the result may be a backlash against all judicial involvement in settlement. The lesson to be learned is not that judges should be discouraged from involvement in settlement, but rather that a more specific definition of their appropriate role needs to be provided.

This article has addressed two concerns with regard to judicial involvement in settlement: the opportunity for abuse of managerial judging techniques because of lack of procedural safeguards and the loss of a judge's traditional impartiality because of early involvement in the case. These problems can be addressed through Federal Rule of Civil Procedure 16, the Code Of Conduct for United States Judges, and judicial education.[290]

The solutions suggested here are preventive rather than remedial; therefore, they do not resolve concerns that one danger of managerial judging is a lack of procedural safeguards. However, the reason that a lack of procedural safeguards is perceived as a danger is because it creates opportunities for abuse. By taking an effective preventive approach, the lack of appellate review for judges' conduct is not as great a problem.

Further, the lack of procedural safeguards is inherent in the nature of judicial involvement in settlement; appellate review is limited to a final order. The nature of many judicial actions is that they cannot be appealed from.[291]

A. Rule 16

Several commentators have suggested that the potential for abuse can be lessened by amendments to Rule 16. The most frequently suggested amendment is to add to Rule 16 a prohibition against the same judge who tries the case participating in

settlement discussions.[292] That solution is at best a partial one to address the problem of judicial abuse of case management during settlement talks.[293] Having a different judge handle ***87** settlement discussions and trial might prevent the appearance of impropriety when a judge conducts a trial after learning about the case during settlement negotiations. However, the real problem with bias in this context does not seem to be that bias as a result of settlement involvement has deprived a party of a fair trial; rather, the concern is that a judge might make up his or her mind about a case prematurely and then use that premature opinion to urge the parties toward a settlement that is not what the parties or the judge would think proper after lengthier involvement with the case. To the extent that bias stems from a judge's taking a position with regard to settlement that is based on a "cursory understanding"[294] of the case, separating the functions of trial and settlement would not resolve that problem.

Separating the trial and settlement functions may eliminate some coercive techniques that have been observed, such as threatening a party or lawyer with mistrial. However, it would not prevent a number of other techniques used, such as meeting directly with a client to put pressure on him or her or giving advice to the party with the weaker case. Further, while this separation may work well in some districts, the logistical problems of requiring every district to go to such a practice are difficult to anticipate and should not be underestimated.

Others have suggested adding to Rule 16 some guidelines concerning the appropriateness of certain kinds of judicial involvement in settlement.[295] This is a workable idea, and one whose time has come. While specifying certain kinds of conduct in Rule 16 may not have been appropriate in earlier versions of the rule, there has now been sufficient experience with judicial involvement in settlement, its promise, and its perils, to include the lessons of that experience in Rule 16. Further, experience shows that reliance on traditional remedies has not prevented misuse of managerial judging techniques.

There now exist both empirical studies and case law to look to for assistance in drafting guidelines for appropriate judicial conduct during settlement. We have seen through empirical studies the kind of conduct judges and lawyers find inappropriate -- for example, threatening parties with reprisal for refusing to accept a settlement offer, speaking personally with the client to persuade the client to accept a settlement offer, and giving advice to the side with the weaker case. We have also seen the kinds of techniques that judges and lawyers think is appropriate -- for example, requiring parties to be prepared at settlement conferences, ***88** arguing for concessions, and making certain scheduling decisions.

In addition to empirical studies, there now exists a body of case law to inform us about the kind of conduct appellate courts find inappropriate -- for example, imposing sanctions for reaching a settlement after trial has begun at an amount that had been suggested by the judge before trial,[296] penalizing a party for failing to make what the court considered a "bona fide settlement offer" before trial,[297] and demanding that parties stipulate to certain facts or give up legal rights to reach settlement.[298] Cases also demonstrate the kind of conduct appellate courts find appropriate to facilitate settlement, which are similar to the conduct approved by those surveyed in empirical studies -- for example, ordering parties to appear at pretrial conferences, entering sanctions when parties are unprepared at those conferences, and entering certain scheduling orders.

The Federal Rules of Civil Procedure are, of course, written with a view to allowing judges some discretion in the way in which they apply the rules. Discretion is both laudatory and necessary. Unfettered discretion, in the face of evidence of abuse, is not.[299] Therefore, it is time for the Advisory Committee to take some of the lessons learned from empirical work and case law and establish guidelines for distinguishing between the aspirational goal of facilitation of settlement and the prohibition of coercion of settlement.

An example of the Advisory Committee doing just that appears in the most recent amendments to Rule 16. The addition of authority to order someone with settlement authority to be present at trial is based on case law development concerning the scope of a district court's authority to act during settlement.

The most appropriate place for these guidelines is in the Advisory Committee notes to Rule 16 where they can appear as illustrations of the difference between facilitation and coercion. By appearing in the notes rather than in the text of Rule 16, these examples will truly be guidelines rather than a hard and fast list of permitted and prohibited conduct.

B. The Code of Conduct for United States Judges

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Similar changes to the Code of Conduct for United States Judges are also in order. Because studies indicate that judges are restrained in ***89** their settlement involvement by ethical considerations, any changes to the Code will be effective to prevent misuse of case management techniques with regard to settlement.

The Code of Conduct is a particularly appropriate place to address the problem of judicial bias arising from judicial involvement in settlement. The Code sets out the traditional role of judges as impartial and puts equal emphasis on both actual impartiality and the appearance of impartiality. [300] However, the Code also admonishes judges to be "prompt" in disposing of the cases before them and, therefore, is an appropriate place for dealing with the problem of abuse as well as that of bias. [301] While the commentary to Canon 3 indicates that facilitation of settlement is appropriate while coercion is not, that standard, as has already been noted, is a difficult one to apply. [302] It needs elucidation in the Code of Conduct as well as in Rule 16. In fact, Rule 16 and the Code of Conduct should reinforce each other. As with any changes to Rule 16, changes to the Code of Conduct should be based on the lessons of empirical data and case law and are most appropriately included in the Commentary rather than in the text of the Code.

C. Judicial Education

In addition to clearer guidance from the Federal Rules of Civil Procedure and the Code of Conduct, judicial education may help curb inappropriate judicial involvement and provide clearer guidance to judges. While case management techniques and judicial involvement in settlement are frequent subjects at judicial education seminars, one topic warrants greater attention: the subtle coercive power of a judge's authority. The authority of a judge, in the eyes of many lawyers and parties, gives greater effect to a judge's actions than many judges may believe. A Federal Judicial Center study of judicial involvement in settlement found that:

> Accountability is not a salient issue for the judges who have been most active in introducing settlement-oriented procedures to the federal courts. These judges tend to trust the lawyer's instinct for adversary proceedings and the lawyer's sense of responsibility to counter the possibility that some judges might abuse the broad discretion they enjoy in discussing settlement and mandating settlement procedures . . . . The dominant view, in short, is that while ***90** many lawyers cannot be trusted to see when settlement is in their client's best interest, they can be depended upon to resist an unfair settlement . . . . Settlement-oriented judges also tend to resist the idea that judicial involvement in the settlement process might be coercive. [303]

Studies show that while most judges agree that coercion of settlement is inappropriate, some use techniques, such as suggesting a settlement figure or meeting directly with a client, that are likely to be regarded as coercive by those to whom the techniques are directed. Similarly, the language judges use to describe their appropriate role in settlement implies that the judge may be more than a mere facilitator. Judges have described their roles as those of activists, mediators, and intervenors. [304]

Judges must be willing to struggle with the fact that the judge's position, as opposed to the particular action of the judge, may have coercive effect. If judges are truly interested in avoiding coercion, more attention needs to be given to this aspect of the judge-litigant relationship and to the unintentionally coercive effect of certain techniques of judicial involvement in settlement.

Footnotes

a1 Assistant Professor of Law, Texas Tech University School of Law; B.A., M.A., Emory University; J.D., University of Georgia School of Law. I am grateful to Professor Timothy W. Floyd for his support during the writing of this article.

1 Judge Kent is United States District Judge for the Eastern District of Texas.

2 Charles B. Camp, *Laying Down the Law,* DALLAS MORNING NEWS, July 6, 1993, at 1A, 4A.

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3 *Id.*

4 *Id.*

5 Judge Merhige is United States District Judge for the Eastern District of Virginia.

6 Hubert L. Will et al., *The Role of the Judge in the Settlement Process,* 75 F.R.D. 89, 203 (1976).

7 *Id.* at 212-26.

8 *Id.* at 212.

9 *Id.*

10 *Id.*

11 *Id.* at 212-13.

12 *See* Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982). One definition of case management states that it involves two basic phases of pretrial planning: first, the pre-trial activity is planned and second, the trial itself is planned. It is during this second phase that "the trial judge becomes an active facilitator of the lawsuit, shaping its structure and shepherding its expeditious completion." Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution,* 37 RUTGERS L. REV. 253, 253-54 n.3 (1985). Another definition is provided by Donald Elliott: "One can in fact define managerial judging as the selective imposition by judges of costs on lawyers for the purpose of rationing the use of procedures available under the Federal Rules of Civil Procedure." E. Donald Elliott, *Managerial Judging and the Evolution of Procedure,* 53 U. CHI. L. REV. 306, 312 (1986) (emphasis omitted).

13 Much of the call for more efficient resolution of disputes is based on the increased cost of litigation. Judge Robert F. Peckham notes that "in the federal courts, the prevailing response to the cost of litigation is judicial case management of the pre-trial process." Peckham, *supra* note 12, at 253.

14 *Id.* at 254.

15 *See, e.g.,* FED. R. CIV. P. 16, 68.

16 In August of 1991, the President's Council on Competitiveness, chaired by then-Vice President Dan Quayle, released a report entitled "Agenda for Civil Justice Reform in America." PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991). That report included 50 recommendations for change, intended to "greatly reduce the burden of excessive, needless litigation, while at the same time protecting and enhancing every American's ability to vindicate legal rights through our judicial system." *Id.* (cover letter). The recommendations included several proposals to increase judicial management of cases. For example, Recommendation 18 included a proposal that "[j]udges should take a hands-on approach to case management. Their active involvement in the discovery process and other pre-trial matters should be encouraged." *Id.* at 20. Similarly, Recommendation 31 says, [t]o ensure cost-effectiveness, federal judges should utilize procedures to speed management of cases after a lawsuit has been filed." *Id.* at 23. Under that recommendation, the Commission commented: "Many courts have adopted procedures for speeding the processing of cases and for resolving disputes earlier. Continued innovation should be encouraged

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within the judiciary to process cases efficiently and fairly. The Federal Rules of Civil Procedure should continue to retain the flexibility to permit tests of promising case management approaches." *Id.*

17 Peckham, *supra* note 12, at 253-255. As support for his contention that case management has been successful, Peckham compares the effectiveness of efforts to reduce delay in federal district courts through case management techniques with the delays in state courts, which at that time had not engaged in widespread case management. *Id.* at 258. Other proponents include many federal district judges, *see, e.g.,* Will, *supra* note 6, as well as the Federal Judicial Center, which regularly holds programs for new judges on the techniques of case management.

18 Resnik, *supra* note 12, at 376; Elliott, *supra* note 12, at 310.

19 Resnik, *supra* note 12, at 378; Elliott, *supra* note 12, at 328.

20 Elliott, *supra* note 12, at 327-28.

21 *Id.* at 328.

22 *Id.*

23 According to Resnik, "[M]anagerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review." Resnik, *supra* note 12, at 378. Resnik notes two "byproducts" of managerial judging: first, it gives judges vast new powers to use or abuse their power, and second, it threatens impartiality because privacy and informality breed dangers. *Id.* at 424-26. According to Resnik, "management becomes a fertile field for the growth of personal bias." *Id.* at 427.

24 *Id.* Some proponents regard lack of available review as an advantage of facilitated settlement, because it yields certainty. *See* Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It,* 72 JUDICATURE 175 (1988).

25 Elliott, *supra* note 12, at 317.

26 Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry,* 25 WILLAMETTE L. REV. 743, 771 (1989).

27 Rude & Wall, *supra* note 24, at 175.

28 *Id.*

29 *See* Carrie Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?,* TRIAL, Oct. 1985, at 24. Menkel-Meadow argues that judges often act as arbitrators or adjudicators during settlement. She bases this conclusion on studies showing that judges often use techniques such as caucusing with the parties individually and requiring the presence of parties with authority to settle the case during settlement discussions.

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30 *See, e.g.,* Marc Galanter, ". . . *A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States,* 12 J.L. & SOC'Y 1 (1985); D. Marie Provine, *Settlement Strategies for Federal District Judges,* 1986 FEDERAL JUDICIAL CENTER 1, 23 (1986); Peckham, *supra* note 12, at 255-56.

31 Provine, *supra* note 30, at 2.

32 FED. R. CIV. P. 16.

33 *Id.*

34 According to Galanter, before the 1960s the pre-trial conference was viewed as having a primary function of preparing cases for trial; "settlement was seen as a desirable 'by-product' of the pre-trial conference." Galanter, *supra* note 30, at 3.

35 FED. R. CIV. P. 16 Advisory Committee Notes to 1983 amendments.

36 *Id.*

37 Civil Justice Reform Act of 1990, 28 U.S.C.S. 471 (1991).

38 *Id.*

39 *Id.*

40 *Id.*

41 Proposed Amendments to the FED. R. CIV. P. 16.

42 *Id.*

43 *Id.*

44 FED. R. CIV. P. 16 Advisory Committee Notes to 1993 amendments.

45 Some of the studies discussed in this article are based on responses from both federal and state judges. *See, e.g.,* James A. Wall, Jr., et al., *Judicial Participation in Settlement,* 1984 J. DISP. RESOL. 25.

46 Galanter, *supra* note 30, at 7. Judges do not initiate settlement discussions in bench trials as frequently as they do in jury trials. *Id.*

47 *See* Provine, *supra* note 30, at 2.

48 JOHN P. RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 77 (1980).

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49 *See, e.g.,* Wall, *supra* note 45.

50 Surveys were sent to 500 attorneys, 500 state court judges, and 500 federal trial judges. *Id.* at 33. Of the 1500 surveyed, 963, or 64%, responded. *Id.*

51 *Id.*

52 *Id.* at 27.

53 *Id.*

54 *Id.* at 535-38.

55 *Id.*

56 *Id.;* Will, *supra* note 6.

57 Wall, *supra* note 45, at 28.

58 Will, *supra* note 6, at 206.

59 *Id.;* Galanter, *supra* note 30.

60 RYAN, *supra* note 48, at 77.

61 Provine, *supra* note 30.

62 For a description of how judges use caucuses in facilitating settlement, see Steven Weller, *The Perils and Promise of One-party Discussions,* JUDGES' J. 2 (Summer 1991).

63 Wall, *supra* note 45, at 30; Provine, *supra* note 30, at 23.

64 Provine, *supra* note 30.

65 *Id.*

66 Wall, *supra* note 45, at 38-39.

67 *Id.*

68 *Id.*

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69 *Id.* This disagreement may reflect similar disagreement among judges.

70 *Id.* at 34-38.

71 *Id.*

72 *See, e.g.,* Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987); Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985).

73 *See, e.g.,* Franks v. Nimmo, 796 F.2d 1230 (10th Cir. 1986); Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980).

74 *See, e.g.,* White v. Raymark Indus., Inc., 783 F.2d 1175 (4th Cir. 1986); *Eash,* 757 F.2d at 557.

75 *See, e.g.,* Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985); Del Rio v. Northern Blower Co., 574 F.2d 23 (1st Cir. 1978).

76 *See, e.g.,* Newton v. A.C. & S., Inc., 918 F.2d 1121 (3d Cir. 1990).

77 Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962).

78 For discussion of a court's inherent authority, see David Rammelt, "*Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?,* 65 IND. L.J. 965 (1990); and Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry,* 25 WILLAMETTE L. REV. 743 (1989).

79 370 U.S. at 626.

80 *Id.* at 628. Although Federal Rule of Civil Procedure 41(b) specifically authorized the district court to dismiss an action for failure to prosecute, the rule provided that the dismissal would come upon the defendant's motion. FED. R. CIV. P. 41(b). In *Link,* the district court dismissed the case sua sponte. 370 U.S. at 627. The plaintiff argued that the court acted outside of the authority granted it in Rule 41; therefore, the Court was required to consider the district court's reliance on inherent authority. *Id.*

81 *Link,* 370 U.S. at 630.

82 *Id.* at 629-30.

83 *Id.* at 630-31.

84 *See, e.g.,* Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987); Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985).

85 *Eash,* 757 F.2d at 568. Although the Third Circuit found that the court had authority to impose costs, it reversed the court's order because it held that the attorney should have been provided notice and a hearing before the costs were imposed. *Id.* at 570.

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86 The length of the opinion is due in part to the fact that the court was overruling its previous decision in Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), *cert. denied,* 371 U.S. 888 (1962), in which the court had held that a district court lacked inherent authority to impose a fine on an attorney who had failed to file a timely pre-trial memorandum.

87 757 F.2d at 557.

88 *Id.* at 565.

89 *Id.* at 566.

90 *Id.* at 567.

91 White v. Raymark Indus., Inc., 783 F.2d 1175 (4th Cir. 1986).

92 *Id.* at 1177.

93 932 F.2d 1397 (11th Cir. 1991).

94 *Id.* at 1399.

95 *Id.* at 1400.

96 *Id.*

97 *Id.* at 1408. Although it found the district court's order to be outside of its authority, the court affirmed because it also found that the district court had properly adjudged the insurance company employee to be in contempt of court for wilfully disobeying the court's order. *Id.* at 1400. The court held:

> the district court was unauthorized, by statute, rule, or its inherent power, to order Novak, an employee of the defendants' insurer, to appear before it to facilitate settlement discussions. Therefore, that order was invalid. Nevertheless, Novak was required to obey the order until it was vacated; instead, he wilfully disregarded it. For that, the district court properly convicted him of criminal contempt.

Id. at 1409.

98 *Id.* at 1406.

99 *Id.* at 1407.

100 *Id.*

101 *Id.* at 1408.

102 *Strandell,* 838 F.2d at 886.

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103 838 F.2d 884 (7th Cir. 1985).

104 *Id.* at 887.

105 *Id.* at 886.

106 *Id.*

107 *Id.* at 886-87.

108 *Id.* at 888. There have been a number of decisions dealing with a district court's authority to order participation in a summary jury trial. *See, e.g.,* Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988); *see also* Menkel-Meadow, *supra* note 29. For a criticism of the Seventh Circuit's decision in *Strandell* as overly formalistic, see James Benzoni, Note, *Defining the Power of Federal Judges in Pretrial Litigation: Where to Draw the Line,* 38 DRAKE L. REV. 927 (1988-89).

109 *See* Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298 (7th Cir. 1977); J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976).

110 542 F.2d 1318 (7th Cir. 1976).

111 *Id.* at 1322.

112 560 F.2d at 298.

113 *Id.* at 302.

114 871 F.2d 648 (7th Cir. 1989).

115 *Id.* at 652; *see* Scott A. Miller, Note, *Expanding the Federal Court's Power to Encourage Settlement under Rule 16: G. Heileman Brewing v. Joseph Oat,* 1990 WIS. L. REV. 1399 (1990). The most recent amendments to the Federal Rules of Civil Procedure include an amendment to Rule 16 that specifically authorizes a court to order a party to be present during a settlement conference. FED. R. CIV. P. 16(c)(14). The amended portion of the rule reads: "If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." *Id.* at 16(c). The amendment became effective on December 1, 1993.

116 *G. Heileman Brewing Co.,* 871 F.2d at 652.

117 *Id.*

118 *Id.*

119 *Id.*

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120 *Id.* at 653; FED. R. CIV. P. 1.

121 *See, e.g.,* Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

122 *Id.*

123 771 F.2d 667 (2d Cir. 1985).

124 *Id.* at 668.

125 *Id.* at 668-69.

126 *Id.* at 669.

127 *Id.* at 668.

128 *Id.* at 669.

129 *Id.* (citing ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 997 (2d Cir. 1983)).

130 *Id.*

131 *Id.* at 670.

132 *Id.* at 669.

133 918 F.2d 1121 (3d Cir. 1990).

134 *Id.* at 1126-27.

135 *Id.* at 1125.

136 *Id.*

137 *Id.*

138 The court refers to this group of cases as the "*Dougherty/Wells* Group." *Id.*

139 The court refers to this group of cases as the "*Newton* group." *Id.*

140 *Id.*

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141 *Id.* at 1126.

142 *See id.*

143 *Id.*

144 *Id.*

145 *Id.* at 1128.

146 *Id.* at 1129.

147 720 F. Supp. 1433 (D. Colo. 1988).

148 *Id.* at 1435.

149 *Id.* at 1437.

150 *Id.*

151 124 F.R.D. 75 (S.D.N.Y. 1989).

152 *Id.* at 78.

153 The magistrate specifically found that expediting the depositions of two experts would "fulfill the purposes of Rule 16 . . . by (1) expediting the disposition of the litigation; (2) establishing case control so as to avoid protracting the litigation through lack of management; (3) discouraging wasteful pre-trial activities; and (4) facilitating settlement of the case." *Id.*

154 *See, e.g., Northern Blower Co.,* 574 F.2d at 23.

155 *Id.* at 26.

156 *Id.*

157 *Id.* at 27.

158 846 F.2d 114 (2d Cir. 1988).

159 *Id.* at 116.

160 *Id.*

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161 *Id.*

162 See Resnik, *supra* note 12, at 426-31; Elliott, *supra* note 12, at 327; Tornquist, *supra* note 26, at 771.

163 There is also an argument that judicial bias amounts to a deprivation of due process of law and, therefore, rises to the level of a constitutional issue. *See, e.g.,* Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 820 (1986). For judicial bias to rise to the level of a constitutional deprivation, however, the court must have some personal stake in the outcome of the case, typically, a financial interest. *Id.* at 824. A bias argument based on Due Process would apply in so few attacks on judicial involvement in settlement that this article excludes any discussion of the issue.

164 *See, e.g.,* Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 885 (9th Cir. 1991); Franks v. Nimmo, 796 F.2d 1230, 1235 (10th Cir. 1986).

165 28 U.S.C. § 455 (1988).

166 *Id.* § 455(a).

167 *Id.*

168 *See, e.g.,* United States v. Murphy, 768 F.2d 1518, 1539-40 (7th Cir. 1985), *cert. denied,* 475 U.S. 1012 (1986); United States v. Brown, 539 F.2d 467, 469-70 (5th Cir. 1976).

169 *See, e.g.,* Preston v. United States, 923 F.2d 731, 734 (9th Cir. 1991); *In re* Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988), *cert. denied sub nom.* Milken v. SEC, 490 U.S. 1102 (1989); Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989); *In re* Beard, 811 F.2d 818, 827 (4th Cir. 1987).

170 *See, e.g.,* United States v. Haldeman, 559 F.2d 31, 139 (D.C. Cir. 1976), *cert. denied sub nom.* Ehrlichman v. United States, 431 U.S. 933 (1977); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

171 28 U.S.C. § 455(b) (1988). Courts have held that the prejudice must be against a party. Prejudice against the party's attorney will not satisfy the statutory requirements for disqualification, unless the prejudice rises to such a level that it will result in prejudice to a party. *See, e.g.,* Henderson v. Dep't of Pub. Safety and Corrections, 901 F.2d 1288, 1296 (5th Cir. 1990); Moore v. McGraw Edison Co., 804 F.2d 1026, 1032 (8th Cir. 1986).

172 28 U.S.C. § 455 (1993).

173 28 U.S.C. § 144 (1993). This section provides that the party alleging bias must file an affidavit in which he or she states the facts and reasons for the belief that bias exists. *Id.* The section states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id.

174 *See, e.g.,* United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976), *cert. denied,* 429 U.S. 951 (1977); Fong v. American Airlines (*In re* Fong), 431 F. Supp. 1334, 1336 (N.D. Cal. 1977).

175 28 U.S.C. § 455(a).

176 *Id.* § 455(b).

177 *See, e.g.,* United States v. Ramos, 933 F.2d 968, 973 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 1269 (1992); Wiley v. Wainwright, 793 F.2d 1190, 1193 (11th Cir. 1986).

178 United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

179 Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), *cert. denied,* 450 U.S. 999 (1981).

180 The First Circuit has indicated that it is possible that the statute could require disqualification because of the judge's conduct during prior judicial involvement in a case. The judge's prior involvement can form the factual basis for doubting impartiality in a second proceeding. *See* Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979).

181 928 F.2d 880 (9th Cir. 1991).

182 *Id.* at 885.

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *In re* Ellis, 108 B.R. 262, 266 (D. Haw. 1989).

188 *Id.*

189 789 F.2d 262, 265 (4th Cir. 1986).

190 The appellant made five other allegations of bias based on the following: that the judge actively participated in questioning witnesses; that the judge would not credit uncontradicted testimony by witnesses favorable to the appellant; that the judge would not allow testimony favorable to the appellant; that the judge made disparaging remarks to counsel for one of the parties; and that the judge disregarded certain evidence in ruling on the appellant's defense. *Id.* at 264-65.

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191 The remarks were made during an off-the-record conference, so that the appellate court's knowledge of the judge's remarks came from an affidavit filed by one of the lawyers present at the conference. The appellate court nevertheless dealt with the allegation of bias as if the trial judge had made the remarks as alleged. *Id.*

192 *Id.* at 265 (citing Sakellar v. Lockheed Missiles and Space Co., 765 F.2d 1453, 1457 (9th Cir. 1985) and referring to United States v. Carmichael, 726 F.2d 158, 161 (4th Cir. 1981)).

193 *Id.*

194 Franks v. Nimmo, 796 F.2d 1230, 1235 (10th Cir. 1986); Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980).

195 629 F.2d at 291.

196 *Id.* at 291-92.

197 *Id.* at 291.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* at 292.

203 796 F.2d 1230 (10th Cir. 1986).

204 *Id.* at 1233.

205 *Id.*

206 *Id.*

207 The court considered the timeliness of the motion to recuse when evaluating it under section 144 and found that the motion was not timely. The plaintiff filed the motion more than a year and a half after the plaintiff's conversation with the judge. Additionally, the plaintiff had filed a motion for partial summary judgment between the conversation and the motion for recusal. *Id.* at 1234.

208 *Id.*

209 *Id.* at 1235.

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210 431 F. Supp. 1334 (N.D. Cal. 1977).

211 *Id.* at 1339.

212 *Id.* at 1338-39.

213 *Id.* at 1338 n.5.

214 629 F.2d at 291.

215 431 F. Supp. at 1338.

216 *Id.* at 1338-39.

217 *Id.* at 1339.

218 *E.g.,* Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1289 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985) (citing Godman v. Fenn, 252 F.2d 47, 48 (1st Cir. 1958).

219 Hansen v. Commissioner, 820 F.2d 1464, 1467 (9th Cir. 1987).

220 *See In re* Corey, 892 F.2d 829, 838-39 (9th Cir. 1989); *Hansen,* 820 F.2d at 1467.

221 820 F.2d 1464 (9th Cir. 1987).

222 *Id.* at 1467.

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 892 F.2d 829 (9th Cir. 1989).

228 *Id.* at 838-39.

229 *See id.*

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230 Wall, *supra* note 45.

231 *Id.* at 38.

232 CODE OF CONDUCT FOR UNITED STATES JUDGES (1992).

233 *Id.* Canon 1 cmt.

234 *Id.* Canon 1 cmt.

235 *Id.*

236 *Id.* Canon 1.

237 *Id.* Canon 2.

238 *Id.* Canon 3.

239 *Id.* Canon 2(A) cmt.

240 *Id.*

241 The Code of Conduct prohibits ex parte contact with parties, without notice to the other party unless the subject matter does not involve substantive matters or issues on the merits. Canon 3(A)(4) provides in part:

A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.

Id. Canon 3(A)(5).

242 *Id.* Canon 3(A)(4).

243 *Id.* Canon 3(A)(5).

244 *Id.*

245 ABA Committee on Ethics and Professional Responsibility, Formal Op. 93-370 (1993).

246 *Id.*

247 *Id.*

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248 *Id.*

249 *Id.*

250 *See id.*

251 *Id.*

252 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1980).

253 ABA Formal Opinion 93-370, *supra* note 245.

254 Rule 1.6 of the Model Rules of Professional Conduct provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

255 ABA Formal Opinion 93-370, *supra* note 245.

256 *Id.*

257 Sections 3(B)(7)(d) and 3(B)(8) of the Model Code of Judicial Conduct are comparable to sections 3(A)(4) and 3(A)(5) of the Code of Conduct for United States Judges.

258 ABA Formal Opinion 93-370, *supra* note 245. The authors of the opinion point to the advisory committee's notes to the 1983 amendment to Rule 16:

The reference to 'authority' is not intended to insist upon the ability to settle the litigation. Nor should the rules be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally require prior consultation with and approval from the client.

Id.

259 *Id.*

260 *Id.*

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261 *Id.*

262 *Id.*

263 *Id.*

264 *Id.*

265 The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 331 (1982).

266 *See* Thomas E. Baker, *Twentieth Century Fund Task Force on Federal Judicial Responsibility,* THE GOOD JUDGE 70-78 (1989). An evaluation of the Act appears in the Report of the National Commission on Judicial Discipline and Removal (Aug. 2, 1993).

267 28 U.S.C. § 372(c)(1) (1991).

268 *Id.*

269 28 U.S.C. § 372(c)(3)(A) (1988).

270 *Id.* § 372 (c)(3)(B).

271 *Id.* § 372 (c)(4)(A).

272 *Id.* § 372 (c)(5).

273 *Id.*

274 *Id.* § 372 (c)(6). The Act lists the actions that the council can take, including, but not limited to, the following: (i) directing the chief judge of the district of the judge or magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate; (ii) certifying disability of a judge appointed to hold office during good behavior . . . ; (iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire . . . ; (iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint; (v) censuring or reprimanding such judge or magistrate by means of private communication; (vi) censuring or reprimanding such judge or magistrate by means of public announcement; or (vii) ordering such other action as it considers appropriate under the circumstances . . . . " *Id.* The judicial council also has the option of dismissing the complaint. *Id.*

275 *Id.* § 372 (c)(7)(A).

276 The statute provides full subpoena power to any group authorized to conduct an investigation under the act. *Id.* § 372 (c)(9). It also provides for judicial council review of an order by the chief judge. *Id.* § 372 (c)(10). Similarly, the Judicial Conference of the United States may review an action of the judicial council. *Id.* The Chief Justice has appointed a Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, made up of three judges, to

carry out the Conference's review responsibility under the Act. *Id.* § 331. Otherwise, all orders and determinations under the act are final and conclusive and not reviewable on appeal. *Id.* § 372 (c)(10).

The Act authorizes each judicial council and the Judicial Conference to prescribe rules for the conduct of proceedings under the Act, as long as those rules comply with certain procedural standards. *Id.* § 372 (c)(11).

277 *In re* Charge of Judicial Misconduct, 782 F.2d 181, 181 (9th Cir. 1986).

278 *See In re* Judicial Complaint Under 28 U.S.C. 372, 795 F.2d 379, 381 (4th Cir. 1986).

279 The courts have dismissed complaints based on such things as a magistrate's failure to appoint counsel for the complainant, *see In re* Complaint of Judicial Misconduct, 858 F.2d 331, 332 (6th Cir. 1988); failure of judges to disqualify themselves, *see In re* Complaint of Thomas L. and Carol Latimer Against the United States Chief District Judge Barefoot Sanders Under the Judicial Conduct and Disability Act of 1980, 955 F.2d 1036, 1036-37 (5th Cir. 1992); and comments made by a trial judge during a sentencing proceeding, *see In re* Petition of David F. Lauer, 788 F.2d 135, 137 (Judicial Council of 8th Cir. 1985).

280 See Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?,* 37 EMORY L.J. 45 (1988), in which the author notes that, in 1986, 184 of the 229 complaints dismissed by chief judges were dismissed because they directly related to the merits of a claim. *Id.* at 59.

281 *See* Resnik, *supra* note 12, at 424-35; Elliott, *supra* note 12, at 329-333.

282 *See, e.g.,* Newton v. A.C. & S., Inc., 918 F.2d 1121, 1129 (3d Cir. 1990); Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

283 Geoffrey Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241, 283.

284 629 F.2d 287 (3d Cir. 1980).

285 *Id.* at 291.

286 Fong v. American Airlines (*In re* Fong), 431 F. Supp. 1334, 1339 (N.D. Cal. 1977).

287 Some who advocate settlement as the preferable means for resolving disputes may warn against greater judicial involvement in settlement. Similarly, those who advocate adjudication over settlement may find some of their objections to settlement satisfied by greater judicial involvement in the process. See Menkel-Meadow, *supra* note 29, in which the author explains that, where judges' approach to settlement is to "narrow the gap" in an effort to clear the docket, the judicial involvement in settlement may be counter-productive.

The difficulty with this technique is that the parties tend to compromise all the issues in the case. Although some cases may reduce to simple monetary issues, such an approach may in fact reduce the likelihood of settlement by making fewer issues available for trade-offs . . . . Thus, the irony is that settlement managers who think they are making settlement easier by reducing the issues may, in fact, be increasing the likelihood of deadlock by reducing the issues to one [money] . . . . In addition to failing to facilitate a greater number of possible settlements, the efficiency-minded settlement officer seems to be more likely to use coercive techniques, such as suggesting a particular result, threatening to take the case off the docket, or meeting directly with clients or parties. Thus, the quest for efficiency may be counterproductive.

Id. at 27.

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288 For an argument that the "conventional wisdom" of increased caseload as an explanation for more active judicial participation in settlement is unsound, see Galanter, *supra* note 30, at 13-14.

289 David B. Saxe, *Jockeying for Position,* A.B.A.J., July 1993, at 52, 54.

290 See Elliott, *supra* note 12, at 335, for an argument that while providing guidelines for case management by trial judges may help reduce arbitrary behavior by reducing the ad hoc character of judicial actions, "more fundamental" reform must come through "addressing directly the system of incentives that creates the need for managerial judging in the first place."

291 Judith Resnik has suggested that the lack of procedural safeguards can be remedied through amendments to title 28 "to permit some form of appellate review of judges' management decisions." Resnik, *supra* note 12, at 433. According to Resnik, "[s]uch review not only would enforce the new behavioral norms, but also would permit refinement of management standards in light of practical experience." *Id.*

292 *See, e.g.,* Resnik, *supra* note 12; Tornquist, *supra* note 26; Peckham, *supra* note 12.

293 Even some proponents of such an amendment admit its incompleteness. *See, e.g.,* Resnik, *supra* note 12; Tornquist, *supra* note 26.

294 Elliott, *supra* note 12, at 328.

295 Tornquist has suggested such changes to prevent abuse arising from the ad hoc nature of judicial involvement in settlement. *See* Tornquist, *supra* note 26, at 773.

296 Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

297 Hess v. New Jersey Transit Rail Operations, 846 F.2d 114, 116 (2d Cir. 1988).

298 Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir. 1978).

299 *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking,* 137 U. PA. L. REV. 1969, 1995-96 (1989).

300 *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3 (1992).

301 *See id.* Canon 3(A)(5) cmt.

302 *See id.*

303 Provine, *supra* note 30, at 91-92.

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304 *See* Will, *supra* note 6, at 205 (“mediators”); Peckham, *supra* note 12, at 254 (“activists”); *In re* Fong, 431 F. Supp. 1334, 1339 (N.D. Cal. 1977) (judges' “intervention” in settlement).

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Symposium: Perspectives on Dispute Resolution in the Twenty-First Century
Edward Brunet [a1]

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JUDICIAL MEDIATION AND SIGNALING

Two seemingly inconsistent developments in settling pending litigation merit special attention. Pretrial conferences conducted under Rule 16 of the Federal Rules of Civil Procedure afford the trial judge an opportunity to engage in a range of settlement activities. The court may "signal" the likely result with a not too subtle query, may ask the parties to attend a settlement conference, or may set an impossible trial date that leaves little alternative but to settle. Under this "traditional" view, the judge will strive to settle cases assigned to the trial court. Put succinctly, the all-purpose judges who use this traditional view unabashedly try to settle their own cases, and later preside over the trial if settlement is not reached. [1] A judge's settlement effort may take alternative forms, ranging from a formal judicial mediation to an evaluative pretrial comment that a party's case "looks weak."

However, the modern view proceeds in a markedly different direction. Increasingly, judges are using the pretrial process to set settlement conferences before a different judge of the same court. Judge A will use a pretrial conference to ask or cajole the parties into agreeing to participate in a settlement conference held before Judge B. Judge B will often be a self-appointed specialist at settling cases and may be trained in mediation techniques. Many courthouses have one or more judges who are very skilled mediators and would prefer to mediate rather than try cases. When the parties appear before Judge B for their settlement conference, the court will essentially be mediating the case. This is modern judicial mediation, characterized by a clear division of labor between the judge assigned to a case and the judge who mediates.

This article will analyze the tension that exists between the traditional view, under which courts seek to settle and evaluate their own cases, and the modern view, under which the case is assigned to a different, more "neutral" judge who may be an expert in settling cases using mediation techniques.

The term "judicial mediation" as used in this essay includes, but goes beyond, mere settlement conferences or judicial mediation sessions. It broadly embraces the concept of settlement efforts by a trial judge and includes any oral or written case evaluation whatsoever by a judge. Here, the term includes signaling by the assigned trial judge at a Rule 16 pre-trial conference (e.g., comments by the court that a particular claim or defense may "appear unsubstantiated"), similar evaluative comments made by the trial court when ***233** denying a motion for summary judgment (e.g., "while I cannot say that I think highly of the plaintiff's case, I must deny the defendant's summary judgment motion because there may be an issue of fact"), court-annexed mediation before a judge, and settlement conferences. [2] Judicial mediation comes in a variety of forms and occurs at a variety of times, from very early in the case, soon after filing, to the plenary trial itself. [3] The essence of judicial mediation is evaluation by a judge and communication of that evaluation to the parties.

One introductory confession about my prior thinking on this issue is in order. At a 1995 Ninth Circuit Judicial Conference meeting, I confidently took the academic position that the modern view was the only possibly correct procedure. I lamented that judges who tried to settle their own cases by holding more formal mediation sessions risked losing valuable neutrality and failed to use the advantages that a division of labor between judge and mediator might provide. While I was not the only person who took this position, [4] it is not unfair to say that I was certain that I was one hundred percent correct.

Upon reflection and the passage of seven years, I am confident that the certainty of my earlier conclusion was at least premature. While there is much to be said in favor of the modern view, it is not at all clear to me that systematic and routine assignment

of settlement conferences to another judge should be the norm in every case. I also gave too little thought to the efficiencies of judicial signaling and the relationship of signaling (clearly a type of case evaluation) to mediation. Put differently, there are so many advantages to letting courts use the panoply of methods available to settle their own cases that an inflexible rule, mandating routine reassignment and banning signaling, is probably inadvisable. In particular, this essay argues that judicial signaling plays a valuable role in achieving fair and accurate litigation outcomes, whether or not the signaling leads to settlement.

I. Pondering the Nature of Judicial Mediation

Judicial mediation is still mediation. When a judge holds a mediation session, normal mediation procedures are generally used. Nonetheless, judicial mediation is unlike other forms of mediation in one very important respect: the ***234** mediator is a judge. This section will compare the similarities and differences between judicial mediation and conventional mediation supplied by private mediators. In particular, the section is designed to provide a descriptive overview of the style of mediation provided by trial judges.

A. Judicial Mediation as Muscle, "Walk and Talk" Mediation: An Overview of the Characteristics of Judicial Mediation

The typical model of mediation delivered by today's judge is that of evaluative or "muscle mediation." [5] In this type of mediation, the judge, as mediator, appraises the relative strengths and weaknesses of the parties' cases, presents a rough case evaluation to the parties, and seeks to extract settlement offers that mirror the judge's analytical perception of the dispute.

My conclusion that judges use their muscle when they mediate is somewhat anecdotal. Former students, some of whom hire me as a private mediator in complex environmental cases, consistently provide me with entertaining war stories of muscle mediation sessions conducted by judges. These anecdotes are confirmed by several writings by federal and state judges who have openly explained their evaluative techniques. [6] Additional confirmation of the judicial use of evaluative mediation derives from training videotapes used to teach judges how to mediate. [7] The significance of these educational videos should not be understated. Another judge who stars in a videotape mediation session using the evaluative model to successfully settle a case will be likely to influence a judge untrained in mediation.

I do not suggest that modern judges never use a mediation style closer to that known as facilitative mediation, where the mediator does not evaluate but, ***235** instead, asks probing questions to allow the parties to reach their own interests and positions. [8] Undoubtedly, some mediator judges use a more facilitative style and eschew evaluative mediation. [9] Moreover, it is undoubtedly the case that individual judge mediators, like private mediators, combine facilitative and evaluative styles. [10] Nonetheless, I remain steadfast in my belief that the typical style of a judge who mediates is primarily that of evaluative mediation.

The process in which a judge forms a case evaluation merits focus. The court possesses instant access to the entire case file. In addition, if the judicial mediator is the judge originally assigned to the case, all case events that occurred prior to the mediation session cannot help but inform the court. The process of hearing arguments and digesting briefs regarding earlier motions to dismiss and motions for summary judgment will color the way a court evaluates a case. In addition, some judges will request mediation briefs which may set forth the main points of contention, case strengths, and prior settlement history. [11]

Some judicial mediators will form and articulate evaluations during the mediation session itself. While judicial mediators, like conventional private mediators, can begin with opening sessions involving all parties and their counsel, it is at caucus sessions that most "evaluation" occurs. The judicial mediator is likely to meet with each side privately. One purpose of these confidential caucus sessions is for the judge to learn more about each side's case. In addition, caucuses afford the court a chance to present a confidential case evaluation and to try to convince a party that the evaluation is correct. Caucuses also constitute the foundation of offer generation. They will often conclude with the judicial mediator obtaining an offer and authority to convey the offer to the opposing party. The mediator becomes a conduit between the disputants, conveying and explaining offers and counter offers.

***236** In mediation theory, the process of obtaining and transmitting information is critical. [12] The mediator is an information filter. [13] Acting as the dual agent for both disputing parties, the private mediator asks questions, whether at a private caucus or

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at a public session attended by all parties, in order to gain valuable information. Information gained during a mediation session can educate the mediator and permit a more informed and accurate [14] evaluation of the case.

Anecdotal evidence suggests that judicial mediators concentrate less on obtaining information and more on conveying information when mediating a case. This approach may be a reflection of the limited time available for judicial mediation. Judicial mediation generally tends to consist of one short, two or three-hour effort to settle a case. In a mediation of such limited duration, a judge will not be able to hold multiple, lengthy caucus sessions capable of supplying additional information. Instead, the typical judicial mediator focuses on evaluation and muscle during caucuses. In some private mediations, the parties do most of the talking during caucus sessions and the mediator gains information by listening. In judicial mediation caucuses, the parties largely listen and the judge talks.

In judicial mediation, the court's role will often be that of transmitting offers and counteroffers between the parties. The judge acts as a go-between, seeking to achieve a working compromise by shifting from one party caucus to the next. After a fully evaluative caucus in which the judge "talks," the court then "walks" between the parties.

Evaluative mediation can also contain "noisy" caucus exchanges between the mediator and a party. [15] Consider the following example. In A v. B, A tells the mediator in caucus he "cannot settle for less than $100,000," then hints that he would indeed accept a $75,000 offer from B. The mediator then meets with B and tells B that "A would probably take $75,000." This noisy communication from the mediator might lead to a $75,000 offer from B and a subsequent settlement. Yet, the mediator's declaration that "A would probably take $75,000," while true, was unauthorized as A never gave the mediator specific authority to reveal his willingness to accept a $75,000 offer. Indeed, A might have expected that the mediator would tender to B an offer of $100,000.

Noisy mediation helps to settle cases, yet it can destroy the parties' trust in a mediator whom they perceive has breached a confidence. Noisy mediation occurs naturally in the ebb and flow of evaluative mediation, whether judicial mediation or muscle mediation. There is a danger that noisy mediation can inhibit the effectiveness of judicial mediation, as well as private mediation, by destroying party trust. A mediator who leaks information gained in confidence ***237** is not someone who can be trusted. This problem is complicated by another dynamic of both judicial and private mediation - the mediator's questions and comments to the opposing side can add information going beyond what one side may have wanted to convey to the other. Judge Posner suggests that the mediator can "fuzz up" information and act as an "impediment to transparent communication" between the parties. [16]

Therefore, confidentiality is another critical feature of mediation. [17] The parties, when in caucus, speak to the mediator "in confidence." The mediator may not disclose confidential information to the other side without express permission of a party. This confidentiality concept supports trust, another cornerstone concept of mediation theory. [18] The parties will not disclose valuable information to a mediator they do not trust. [19] Mediators who breach the duty to keep information confidential soon lose the trust of disputants and cannot function effectively.

The subject of trust and judicial mediation is sticky. Some parties will trust a judge simply out of respect for the judiciary. The legitimacy of an independent judiciary, [20] central to our American justice system, spills over to foster respect for judges who mediate. Institutional respect for judges helps to make judicial mediation effective. Other parties may respect an individual judge for reasons unrelated to an independent judiciary, namely, positive prior interactions or a general positive personal reputation.

However, public trust toward sitting judges who mediate cannot be assumed. Individual or institutional reasons can cause a lack of trust toward judicial mediation. A judge with a checkered general reputation is unlikely to be trusted by a litigator or a client forced to mediate before that judge. This might make the judge's evaluation less influential and tend to deter disclosure of confidential information. Moreover, a judicial mediation process that does not instill public confidence can cause institutional distrust toward the general process of mediation by judges. If this occurs, even respected judges possessing great reputations may have a hard time mediating effectively.

Professor Frank Sander rightly argues that a judge who seeks to mediate cases assigned to her faces a lack of trust from the disputants. [21] He theorizes that the disputants will be unlikely to speak candidly to a judicial mediator who will later be in a position to decide a case based upon allegedly confidential information obtained during a mediation session. Sander's position

appears logical. Some parties will not open up to the judge assigned to hear a case. ***238** This point, however, does not necessarily condemn all judicial mediation. Parties may transfer critical information to an independent judicial mediator not assigned to the case.

One last definitional point concerns the term "settlement conference." Because case evaluation from a judge is the essence of both judicial mediation and a settlement conference, there is not a great deal of difference between these terms. As aptly put by Professor Hensler, "court mediation is a lot like a settlement conference." [22]

B. Differences Between Judicial and Private Mediation

While the previous discussion demonstrates similarities between judicial and private mediation, there remain fundamental differences between evaluative mediation provided by judges and private mediators.

1. Time Constraints of Judicial Mediation

Judges who mediate operate under different time constraints than private mediators. Paid by salary and mediating from a set of institutional pressures rather than a profit motive, judges naturally can devote less time to mediation than private mediators. Private mediators, typically paid by the hour, have little or no incentive not to be deliberate when mediating. Leisurely and multiple mediation sessions are expected in private mediation. There is little pressure to cut caucus sessions short. In great contrast, the typical judge who mediates only can devote roughly two or three hours to mediating any one case. [23] Little opportunity for repeat mediation sessions exists in the contemporary culture of judicial mediation. Early Neutral Evaluation [24] has thrived because of the need to provide meaningful and accurate case evaluations to the litigants, and the ***239** inability of trial and magistrate judges to devote the time needed to meaningfully evaluate claims. [25]

These same time constraints inhibit productive post-mediation contact between the judge and the parties to a dispute. When mediation ends without a settlement, it is very common for the private mediator to telephone and sometimes even visit each party to seek ways to continue the settlement process. While some judges who mediate might use the very same post-mediation procedure, most lack the time to engage in similar post-session conduct. Some judges may also feel it is improper or unseemly for the court to initiate out-of-court, ex parte contact with individual litigants.

2. Mediators Wearing Black: The Contrasting Perceived Abilities of Judges and Private Market Mediators to Evaluate

Judges and private mediators have contrasting abilities to evaluate disputes. Judges may have a built-in, natural advantage in case evaluation, since evaluation, in the form of constant decisions is the everyday task of a judge. At the same time, judges have institutional pressures that may prevent them from supplying a complete set of sessions that would allow a case to settle, or to settle most effectively.

While the private mediator with substantial specialty experience may possess similar expertise in case evaluation, a judge is viewed as having an innate perception of evaluative legitimacy unavailable to all but a few private market mediators. Judges who wear black have almost automatic authority when assessing a case. [26] Parties naturally respect judges, whether they are judging, sentencing, or mediating. Such institutional respect is simply absent in the market for most private mediators.

Hiring patterns for respected judges who leave the bench to enter the mediation market confirm this point. A bidding war among mediation providers erupted when former Chief Justice Armand Arabian of the California Supreme Court left the bench to mediate. [27] Joint ventures of retired judges appear to be successful and busy providers of mediation, [28] more so than mere litigation experts who may know a substantive area of law well but lack the credibility and respect that comes with prior judicial experience.

***240** Nonetheless, judicial mediators can lose their evaluative edge. Judges who evaluate or mediate in a way that decreases trust will not be able to mediate successfully. [29] The natural judicial advantage to evaluate issues is not automatic and can be

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lost through incompetence or indiscretion. Not every retired judge will be sought after to mediate. Respected retired judges with an ability to naturally evaluate a case appear to get the most mediation work. In addition, the perception of being unbiased helps former judges get mediation clients. Being typecast as pro-plaintiff or pro-defendant will not help a judge who wants to act as a neutral. [30]

3. Contrasting Types of Evaluative Mediation

Not all evaluative mediation is the same. The evaluative mediator, whether privately hired or a judge, who arm twists and cajoles in an effort to reach settlement, will often suffer unpopularity. In the model of evaluative mediation, most disputants will anticipate and respect the evaluation process. In contrast, they may not appreciate an overly assertive mediator's attempts to coerce a settlement. A true "muscle mediator" may not be admired when he overly flexes the evaluative muscle. It is one thing for a mediator to evaluate, but quite another for the mediator to cajole or pressure a settlement.

There is no reason to assume that either private mediators or judicial mediators are more likely to cross the line to over-evaluative mediation. Yet, one can easily imagine some judges who are more than willing to arm-twist a settlement. The problem of pressuring a settlement was so great in Dodds v. Commission on Judicial Performance that a commission recommended a public censure of the court's self-described "assertive" judicial "style." [31] In refusing to sanction the trial judge, the California Supreme Court nonetheless observed that the judge exceeded "his proper role and casts disrepute on the judicial office" when he "repeatedly interrupt[ed] a litigant and yell[ed] angrily and without adequate provocation." [32] Private mediators who misbehave can easily be discharged and lose business. In contrast, sitting judges possess a degree of job security unavailable in the free market, regardless of their behavior.

4. Contrasting Risks

Judges who mediate cases assigned to them take greater risks than private mediators. Those who hire a respected litigator to mediate understand that there will be no subsequent contact between the attorney or her client and the mediator as it relates to the trial phase of the dispute. Those litigants assigned ***241** to a judge who mediates have no such guarantee. Professor Sander terms this a problem of "role confusion," and considers such confusion a major concern regarding "judges doing mediation." [33]

A judge who mediates another judge's case also faces some reputational risk. If she erroneously evaluates a case, she could lose face and suffer considerable damage to her reputation. Since, by definition, a mediator's evaluation of a case is based on incomplete information, errors are bound to occur from time to time. These errors will effect the mediation judge in a different way than the private mediator who does not routinely decide cases following a mediation.

II. The Origin and Development of the Traditional View

The traditional view permitting unregulated judicial mediation was an outgrowth of the Rule 16 pretrial conference, combined with the increasing, and now routine, use in the federal courts of the individual calendar system. [34] The growth of the individual calendar system in which "judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion," [35] created a sense of judicial accountability for each assigned case. [36] As dockets became more crowded, this sense of individual responsibility may have increased. With the advent of efficiency-minded court clerks, judges received written report cards, in the form of memoranda, listing their mean disposition rates. [37] A typical judge felt peer pressure to dispose of assigned cases while working in a context involving "a spirit of competition." [38]

In an important article, Professor Judith Resnik set forth a type of cultural explanation for promotion of settlement and avoidance of trial by federal ***242** judges. [39] Professor Resnik first described the federal judge sitting in 1915 as a "solo player," noting that there were only 120 district judges at that time who sat "with few shared practices." [40] The early twentieth century federal judge toiled in isolation. Resnik points out that the twentieth century growth of the American Bar Association led to procedural reforms such as passage of the Federal Rules of Civil Procedure. [41] In the pre-Federal Rules period, the lack of uniform procedures undoubtedly contributed to a culture of judging that excluded pressures to settle rather than to try cases.

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Resnik sees the passage of the Federal Rules as part of a more significant trend toward unifying the federal judiciary. [42] According to this view, the trend towards a more bureaucratic federal court system includes the authorization of the Administrative Office of the United States Courts, [43] the development by the Judicial Conference of the 1960 Handbook for Protracted Cases, [44] the shift from a master calendar system to an individual calendar that focused the responsibility of case management upon the assigned judge, [45] and formal judicial education. [46]

Professor Resnik describes these factors as transforming the federal court system into an agency in the broad sense of the word. [47] The court system has a set of collective interests to advance, bureaucratic machinery at its disposal, and, obviously, considerable power. [48] The net result today is a federal judicial system that functions with substantial discretion and raw power in the hands of its judges. [49]

The succinct, two paragraph, original 1938 version of Rule 16, which provided that the court could hold a discretionary pretrial conference, said nothing ***243** about settlement in its list of subjects for consideration. [50] In its original form, the pretrial conference was held "to prepare for, not to avert, trial." [51] Professor Marc Galanter has written that "the relationship between pre-trial and settlement was ambivalent." [52] The purpose of the 1938 pre-trial conference was to "sharpen cases for trial, making litigation more effective." [53] Under the original Rule 16, settlement was, at most, a useful "'by-product"' [54] of the pretrial conference.

The typical use of the original Rule 16 was as a discretionary conference with the judge on the very eve of trial. As set out by Professor Tidmarsh, "[m]y own early experience showed me that judges rarely invoked Rule 16 until they held a final pretrial conference a few days in advance of trial." [55] While discussion of settlement certainly was within the broad discretion granted the court in the original Rule 16(b)(6), [56] it was not until the important 1983 revision to Rule 16 that settlement became a textual component of federal pretrial conferences. [57]

Despite the prevailing tendency to downplay settlement, under the original pretrial conference rule, leading federal judges began to openly stress the settlement and evaluative function of the pretrial conference in the decades before the 1983 revision of Rule 16. In 1962, Judge Skelly Wright recommended that ***244** judges put a value on a case at a pretrial conference. [58] In 1975, Judge Renfrew asserted that "judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family." [59] In 1977, a widely respected district judge, Hubert Will, wrote that the court should act as a mediator. [60] Because these positions were stated in speeches before other judges, an activist, pro-settlement intervention philosophy began to pervade the federal courts.

The stage was set for the 1983 revision to Rule 16, which made it clear that settlement could take center stage in the pretrial process. Revised Rule 16(a)(5) transparently listed as an objective "facilitating settlement of the case." [61] Revised Rule 16(c)(7) set forth as a subject of discussion at pretrial "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." [62] Rule 16(c)(10) permitted the judge to employ special pretrial procedures to aid in managing complex cases. It is important to acknowledge that the 1983 revision of Rule 16 was made at a time when the individual calendar assignment system was fully entrenched in the federal courts. The listing of settlement as a major part of the new pretrial conference rule must have increased the sense of individual responsibility felt by the trial judge to be actively involved in prompting consideration of settlement. [63]

The Advisory Committee's Note to the 1983 revision set forth a number of factors relevant to the transition from the traditional view to the modern view. The Committee asserted that, because settlement "obviously eases crowded dockets and results in savings to the litigants and the judicial system, . . . [it] should be facilitated at as early a stage of the litigation as possible." [64] The Committee Note reasoned that providing a neutral forum might foster settlement, and observed that it was not the purpose of the revised rule "to impose settlement negotiations on unwilling litigants." [65]

It is interesting that the Advisory Committee Note foresaw the transition to the modern view of judicial mediation. It observed that "a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, ***245** to have settlement

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conferences handled by another member of the court or by a magistrate." [66] This important sentence showed a permissive and entirely voluntary acceptance and transition to the modern view. The assigned trial judge could refer the matter to another settlement judge, in its discretion, and would not be forced to make this move. [67] In the context of 1983, at the time of the Rule 16 revision, this grant of discretion seems entirely understandable. It is not surprising that this sentence was drafted in a way to maximize judicial discretion. However, it is surprising that by 1983, the Advisory Committee already perceived the need to provide the option that this essay calls the modern view.

The modern version of Rule 16 has transformed the role of the federal judge, as compared to the role sought in the original draft of the rule. The rule now mandates an early case management role for the judge by requiring the court to enter scheduling orders. [68] The rule also encourages judges to hold multiple pretrial conferences at various stages of litigation. [69] More important, the current Rule 16 has transformed the federal judge into "an active player in the litigation." [70] In this context, it is understandable that courts routinely address the status of settlement with counsel and are willing to suggest settlement conferences.

The traditional view that a judge may mediate her own cases appears consistent with the existing rules that govern present judicial conduct. While the Code of Conduct for federal judges has the standard requirement of disqualification where the court's "impartiality might reasonably be questioned," [71] it also provides that a sitting trial judge "may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle" pending matters. [72]

The most recent Federal Judicial Center publication relevant to court-annexed ADR takes the position that the assigned judge may serve as an ADR neutral. [73] It relies heavily on an advisory opinion published by the Judicial Conference's Committee on Codes of Conduct, which interprets the federal Code of Conduct to permit a judge to first act to settle a case, and then later preside over the trial of the same litigation. [74] This opinion appears to provide a clear validation of the traditional view. The opinion reasons that the Code of Conduct's authorization for judges to meet ex parte to discuss settlement with ***246** one party demonstrates support for judges to meet with both parties to facilitate settlement. [75]

The same opinion, however, raises concerns about several issues associated with the traditional view. It stresses that such cases need to be analyzed on a case-by-case basis, and that specific attention should be awarded to whether the parties accompanied their attorney at the settlement conference, whether the case is a bench or jury trial, and whether the parties have specifically consented to a later trial by the settlement judge. [76] The opinion raises a special concern about the court's ability to impartially preside over a bench trial following a settlement conference. [77]

III. The Ascendancy of the Modern View

With the growing popularity of private mediation, critics began to find fault with the traditional version of judicial mediation. The criticisms articulated were, for the most part, ones concluding that the traditional view caused several process failures. This section will catalog these criticisms.

A. The Perception of Lack of Trial Court Neutrality Following Judicial Mediation

Perhaps the simplest criticism of traditional mediation focuses on the potential loss of neutrality of the trial court that has earlier tried and failed to resolve the case through judicial mediation. According to this critique, the mediation effort will cause the court to inherently pre-judge issues during the adjudicatory phase of a case after learning critical facts during the earlier mediation phase. The important judicial characteristic of neutrality is deemed to be undermined by an earlier mediation effort. There is a chance that the court will be perceived as deciding a case based upon evidence and arguments presented at the mediation rather than at trial. [78] The parties may also believe the judge who unsuccessfully mediated a case may have had an emotional stake in the resolution of the case through the earlier mediation. These problems have led Professor Judith Resnik to conclude that, in order to preserve impartiality, we should "prohibit a judge who manages pretrial preparation or attempts unsuccessfully ***247** to mediate disputes from later adjudicating contested issues." [79] Professor Charles Craver concludes that parties who mediate before an assigned judge "may understandably fear the possibility of prejudicial trial rulings if they are unable to resolve their controversies amicably." [80]

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In Lon Fuller's terms, several of the chief conditions of adjudication are missing when a judge mediates a case over which she later presides at trial. Fuller theorized that a judge should: (1) "not act on his own initiative," (2) have "no direct or indirect interest (even emotional) in the outcome of the case," (3) decide the case "solely on the basis of evidence and arguments presented to him by the parties," and (4) afford "[e]ach disputant . . . ample opportunity to present his case." [81] Fuller's points, when combined, set forth a coherent theory of judicial neutrality that is challenged by a judge who mediates her own cases.

A judge's decision to mediate rather than to try a case is an act of activism. Moreover, once the mediation process begins, the court has an appreciable interest in settling the case rather than trying it later. It is not uncommon for judicial mediations to commence with a boilerplate statement by the court that the parties have a right to try their case rather than settle through the mediation process. The judge who cares about the efficacy of her mediation efforts is prone to breach Fuller's third and fourth points. If the case does not settle through mediation, the judge is very likely, consciously or unconsciously, to lean against any party to the mediation who, in the court's opinion, caused the trial. The risk of judicial bias against a recalcitrant non-settler is palpably present. Even in cases where the mediation failed to settle without fault of either party, the loser of a later trial might feel that the court was biased against it and failed to consider the evidence in an even-handed fashion. This could create the appearance of partiality that undermines the judicial branch and, according to Fuller, prevents achieving a trial with maximum moral force.

The style of mediation provided by judges contributes to this problem. Judicial mediation is evaluative mediation. Courts, whether seeking to settle their own cases or those of a fellow judge, often use their "muscle" when mediating. [82] This is far from the more lengthy "facilitative" mediations, [83] in which a mediator strives to remain neutral and avoids evaluation at all cost. In judicial ***248** mediation, the court, lacking the time of a private mediator who is usually paid by the hour, must quickly seek to settle the case. In a two or three hour period, the most the judicial mediator can hope to do is weigh the respective cases of the parties and try to find some level of overlap between the adversaries that can lead to a common evaluation of the litigation and settlement.

Following an evaluative judicial mediation, each party knows how the court has initially appraised the case, so the court no longer appears wholly neutral. The party who may have rejected a settlement offer characterized by the court as fair will remember this evaluation if the court later finds against the party at trial. The important appearance of neutrality can be lost by the judicial mediation process.

Parties who fear that the assigned judge who mediates may lose her neutrality may be less than candid with that judge during caucus sessions. When compared with Early Neutral Evaluation (ENE), "parties may be more forthcoming in an ENE session than they would be in the presence of the judge, because the ENE session is confidential and the evaluator has no power." [84] Effectively, the parties may share less information with a trial judge who mediates under the traditional view than they would with either private market mediators or a different "settlement judge" who will not later try the case. [85]

B. Criticism of Pressure Tactics and Time-Restricted Muscle Mediation

Some members of the litigation bar now complain about the nature of formal mediation supplied by judges. This subsection contains several criticisms of the present process. It is largely anecdotal and is not based upon any empirical evidence. Nonetheless, these criticisms resonate with real world flavor.

The most common criticism is that the style of evaluative mediation used can be overly coercive. The judge who evaluates a case, whether or not assigned to her, is often an arm-twister by nature. Judges are accustomed to being on top of a hierarchical chain of command. Judges who mediate may project an attitude that attorneys should accept their view of what is a fair settlement. The tendency for judges to be evaluative when suggesting a substantive solution led Professor Menkel-Meadow to conclude that this judicial role may have shifted to that of "med-arb" [86] rather than pure mediation. [87] While this argument cannot be taken literally - the judge will not really arbitrate the case - it focuses correctly on a dynamic of judicial mediation that must be acknowledged. The fear of a subsequent trial can, and does, cause the ***249** parties mediating before a judge to consider her settlement options more carefully. In this way, judicial mediation does bear resemblance to med-arb.

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Professor Nancy Welsh has recently expressed concern that settlements may lack self-determination where they follow a case evaluation by the assigned judge. [88] She posits that a party may be coerced into a settlement by fear that the court's subsequent rulings "will be influenced by the party's refusal to cooperate," [89] and questions whether such settlements are "an expression of free will." [90]

Another criticism of judicial mediation focuses on its duration. The evaluative mediations set by busy judges are generally one-shot events with little or no chance for follow-up meetings. When compared to the leisurely style of evaluative mediation offered by private mediators, judicial mediation is a time-restricted product. [91] Private mediators, who are typically paid by the hour for their services, can afford to take whatever time is necessary to arrive at a fair and reasonable settlement. The parties often do not settle at the first mediation session, but may reach agreement after a second session or follow-up telephone conferences. There is evidence that longer mediations settle at a higher rate than shorter sessions. [92] In private mediation, the mediator has the incentive to create a lengthy process in order to increase her fee. [93] While parties who closely monitor the mediator's time can mitigate this problem, the tendency of the parties to split the mediator's fee tends to decrease an optimal amount of fee monitoring. Nonetheless, there is every reason to believe that private mediations will last significantly longer than sessions held before sitting judges acting as mediators.

The economics of judicial mediation makes it a different process than private evaluative mediation. A busy and salaried federal judge may have only two or three hours set for a settlement conference. Numerous other trial and pretrial tasks prevent a federal judge from spending an unlimited amount of time mediating. Within the typical two-hour period, the judicial mediation process needs to start and finish. Judicial time for a subsequent session is often ***250** impossible to arrange. The judge's ability to informally caucus on the telephone with a disputant's attorney following the session is limited. Such calls take time that may be unavailable.

These constraints limit the utility of judicial mediation. Some disputes just cannot be resolved in the small amount of time made available by judges. Some attorneys find this process frustrating, and they may agree to mediate more to placate the court than to settle. Under these conditions, judicial mediation may add a layer of procedure to a litigation process already cluttered with procedures of less than optimal value. Other attorneys may agree to mediate more from a need to obtain some discovery than from optimism that the case may settle in the brief time provided. [94]

This is not to say that judicial mediation is unpopular. Professor Menkel-Meadow has concluded that "lawyers overwhelmingly seem to favor judicial intervention." [95] She cites Magistrate Judge Wayne Brazil's study of lawyers practicing in four different federal courts. [96] Brazil found a "staggering 85 percent of our respondents agree that 'involvement by federal judges in settlement discussion [is] likely to improve significantly the prospects for achieving settlement.'" [97] He also concluded that attorneys supported judicial efforts to activate a settlement process for other reasons, such as better quality settlements and settlements reached earlier in the litigation. [98] While these attorney conclusions seem subjective and based on intuition rather than data, they are nonetheless derived from informed sources having direct contact with the settlement process.

C. Information Inefficiencies Inherent in the Traditional Method

Information plays a critical role in mediation, with the mediator standing in the center of the information clearinghouse. [99] The mediator serves as a broker of information, seeking facts with probing questions and doling out facts to the disputants that may encourage settlement.

***251** By retaining some facts and distributing others, the mediator acts as a filter of factual data. [100] In order for the mediator to sift through information, the parties must, of course, be in a position to transfer facts to the mediator.

It is in this crucial act of information retrieval that the traditional view judge who mediates is at a comparative disadvantage. As Sander has argued, a party will be less likely to make candid disclosures to a judge who will later be in a position to decide the controversy. [101] Trust is a scarce commodity, and is less likely to exist when a judge mediates her own case. Conversely, there will be little reason to distrust a judicial or private mediator who will not later decide the case. Such matters are truly "neutral" in a robust sense of the word.

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A mediator who lacks a relationship of trust with the parties will retrieve less information than a neutral who has established trust, rendering him inefficient. [102] Trust, in this mediation context, means that a disputant can rely upon the integrity of the mediator. [103]

This inefficiency will not exist in every situation. The assigned trial judge may be in an ideal position to "rekindle previously unproductive settlement discussions" [104] by suggesting to the parties that they give settlement negotiations another try. If the disputants consent to another round of negotiation, the judge may simply leave the room, creating a settlement event. [105] Here, the assigned judge may play a useful role in restarting settlement. It may be the case that neither party is in a position to suggest another try at settlement without losing face. In contrast, a third party, the trial judge, may be in a structured position to reopen settlement in a way that leaves neither party at a tactical disadvantage.

D. Mixed Reactions to Judicial Signaling

The complicated and sometimes subtle practice of judicial signaling has received some criticism as well. The adage that judges not prejudge may be inconsistent with signals from the bench. [106] Critics also view judicial signaling as a potential denial of due process because it can evidence a judge's conclusion made without specific notice or a hearing, as well as lack of neutrality.

Some initial attention to the difficulty of defining judicial signaling merits emphasis. A national survey of trial judges revealed that over two-thirds thought their intervention in the settlement process was subtle "'through the ***252** use of cues/suggestions.'" [107] This percentage seems considerable, especially in light of the fact that the same study showed only ten percent of the judges surveyed rated their style as "aggressive" or using "direct pressure." [108] Assuming the truth of this data yields the conclusion that far more judges signal their evaluations than offer more formal thoughts in mediation. Judicial mediation is much more time-consuming than signaling and creates risks that signaling may avoid. What this survey may tell us is that signaling, not mediation, is where most judicial evaluation of a case takes place.

It must be stressed that the voices criticizing judicial signaling are fewer than those criticizing other aspects of the traditional view. There are several possible explanations why attorneys may not be overtly critical of judges who signal. First, signaling may not be possible to detect. Signaling can come in many forms: it can be oral, through body language, or facial expressions; it can be so subtle (such as a scowl) that an advocate may fail to perceive it; or a judge's blank look or raised eyebrow when confronted with a hard to understand argument can be ambiguous and misunderstood. The difficulty in detecting accurate signals has caused some potential critics to back off - an equivocal signal is simply more difficult to criticize.

Second, while much judicial signaling is transparent, signaling that is on the record is more difficult to condemn. Judges' questions during oral argument of pretrial motions often show their leanings on issues beyond those presented by the motion being argued. Because these questions are on the record, the court's leanings are transparent for all parties to see and analyze. Transparent, on the record signals can be considered a process in which the court solicits the parties to submit additional information that might change the judge's tentative thinking. Signals constitute a form of helpful notice to the disputants of the court's potential ruling. As such, on the record signals advance efficiency by providing new evidence that can aid the judge in reaching a more fully informed decision. An ex parte comment that is off-the-record is likely to cause more criticism than a comment made before all parties with a court reporter present. [109]

Written signals present a few problems as well. Trial judges frequently send not too subtle signals when writing short opinions granting or denying pretrial motions. It is common for a judge to deny a motion for summary judgment because of the presence of an issue of fact, and to write in the opinion that "the movant's evidence is substantial and that the non-movant's proof looks slim." This looks like a signal to the winning side that the court thinks that the trier of fact may decide the matter differently if the case is subsequently tried. This signal is perfectly transparent, on-the-record, and offers little or no implication ***253** of a lack of neutrality. Placing a judicial signal in a written order occurs regularly, and is normally good judicial practice. [110]

Third, some attorneys are all too happy to receive an unfavorable signal from the court for reasons relating to client management. The attorney may have reached similar negative conclusions about the case but might have difficulty communicating this fear to a client. The unfavorable signal, in this situation, may be viewed positively by counsel. No lawyer likes to pass on unpopular

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news of her own making to a client. The ability to pass on bad news from a third party, the trial court, is helpful to the fragile attorney-client relationship.

Fourth, some attorneys will disagree with a judge's signal but nonetheless appreciate receiving the bad news for a different reason. This sort of reaction can be labeled "at least we know where we stand." The negative signal is information that may prove helpful in several ways. It may be used to reevaluate a settlement offer that, in light of the signal, now seems fair. Alternatively, the negative signal may cause a claim or defense to be eliminated from the case earlier and enable counsel and the client to concentrate on more positive aspects of their case. The "bad news" evaluation should be seen as free information obtained from a knowledgeable and authoritative source. [111]

Consider the oral signals sent by U.S. District Judge Colleen Kollar-Kotelly in the remedy trial United States v. Microsoft. [112] This remedy trial, which aired complaints by nine states that an earlier settlement between the United States and Microsoft was improper, included several major signals from the bench. The judge, presiding over a bench trial, characterized the states' remedy proposal - to remove the Microsoft code from Windows software - as a "'Draconian"' measure that would "destroy" Microsoft's operating system. [113] Such a signal seems clear - the judge was leaning against the states' proposal and pragmatically decided to publicly air her inclinations. Her comment was, of course, on the record. The comment also indicated the judge's tentative position to the states, and afforded them an opportunity to adjust their trial strategy.

Viewed in this light, a signal from the bench may advance decisional efficiency and enhance the opportunity for settlement. Without a signal, the judge may feel, for example, that the defendant's affirmative defense looks unlikely to succeed, but the defense counsel may feel confident about her defense. A significant informational asymmetry exists. Once the court signals on the issue, the informational asymmetry is lessened substantially. The defendant ***254** and her lawyer know which way the judge is leaning and can adjust their settlement strategy accordingly.

For all these reasons, judicial signaling stands apart from other forms of judicial mediation. It is premised on pragmatic human behavior. Signaling, while sometimes problematic, is difficult to view in a wholly negative light, and is particularly difficult to regulate as some signaling is wholly inadvertent and unintentional. Most signaling occurs off the record and often takes place in private chambers. While uninformed and inaccurate signaling can be justifiably criticized, the force of these criticisms appears relatively weak when compared to other negative attributes regarding judicial mediation.

IV. Re-Examining Signaling, a Normal and Sometimes Effective Form of Decision-Making

Judicial signaling represents natural behavior. Decision makers do not wait until all the evidence relevant to a choice has been collected to begin their evaluations. It is normal for any person who must make a decision to think about the choices and evaluate information as it is received. The decision maker may "lean" one way or the other while continuing to assimilate information relevant to the decision. Such behavior is not at all aberrant and mirrors that of a typical individual, be that person a judge or juror.

A review of psychological theory and evidence confirms that signaling is a natural mode of behavior. First impressions are important and will undoubtedly occur. [114] Nisbett and Ross stress the "primacy effect," in which early information has "an undue influence on final judgment." [115] This research demonstrates that, rather than waiting until the very last unit of evidence is presented, a decision maker tends to make at least a tentative decision much earlier. [116]

The natural tendency to engage in judicial signaling is confirmed by legal doctrine. Judges have long used a precautionary instruction to jurors at the start of the case to caution the jury not to decide the case until it begins to deliberate at the close of all the evidence. [117] The typical judicial charge, warning jurors against making up their minds before all of the evidence has been admitted, demonstrates that the law has long understood the tendency of decision makers ***255** to lean one way or the other before formalizing a choice. There would be no need to caution the jury if decision makers waited calmly until all information had been received before making a decision. This stock jury instruction should not be considered a general condemnation of bit by bit, sequential processing of evidence. Rather, it represents a caution for jurors to sift through all the evidence, whenever submitted, when deciding the verdict.

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Trial advocacy strategies, acknowledging the importance of the opening statement, confirm a pattern of decision-making that evaluates information early in the decisional process. Trial attorneys rate opening statements as a crucial phase of the case. [118] Their significance represents the tendency of a juror or judge to react quickly and early in a case. There appears to be some evidence that jurors make tentative decisions at the time of the opening statement. [119] Waiting until closing argument risks underemphasizing critical arguments that some fact finders will have evaluated earlier in the case.

The realism writing of Karl Llewellyn supports this reasoning. Llewellyn's thought on judging requires the litigator and judge to engage in "realistic observation." [120] The realist school understood that judges had the power and human tendencies to decide cases based upon their instincts. [121] The attorney who "observed" the judge to learn the court's leanings would be attuned to realism jurisprudence.

Focus on the "realistic observation" metaphor can be read to present a picture of the trial process that resembles a nine inning baseball game. The game is not over until the last inning, or the end of the trial. However, teams may score in early innings (e.g., the trial court denies a motion to dismiss but makes a disparaging comment about the plaintiff's case). Such early inning scores will be fully reflected in the final outcome. Moreover, early posted scores cause changes of trial strategy that also affect the final outcome.

The baseball analogy can be more fully developed in the context of judicial signaling. A judge who clearly signals throughout the litigation process places an identifiable score on a transparent scoreboard. To be sure, the early inning scores posted by a judge can be obscure or opaque. Yet, the observant litigator (and client) should be able to see the score. Identifying the score permits important adjustments in strategy and becomes critical to the opposing parties in developing late inning tactics.

***256** A disputant's ability to "know the score" advances economic efficiency. Decisional information becomes less asymmetrical as it is shared by the judge. Serious asymmetry exists where the judge knows how she may rule but refuses to share this information with the likely losing party. Where each disputant has the same information, the risk-reward calculus that drives settlement choices should lead to more efficient decisions to either settle or continue to trial.

All of the above tends to make judicial signaling normal and sometimes valuable. Nonetheless, I do not necessarily advocate systematically increased signals from the bench. Some signals are made with very little information or research and are inaccurate. Occasionally, signals manifest intemperate behavior. It can be argued that such signals are improper. On the other hand, a party potentially victimized by such a signal knows that the judge must be persuaded on the issue at hand.

Some might contend that signals can violate the judicial canon of neutrality and avoid pre-judging the issues. [122] However, it is not at all clear that a judge's evaluative signal always shows partiality. The judge is merely expressing current leanings when signaling and may be more than willing to lean in a different direction if conditions change. There is also a neutral signal based upon the information received up to a particular point in the litigation. Nonetheless, signals may present an implication of prejudging and, hence, risk an appearance of impropriety in some contexts. [123]

Signaling is an entirely discretionary practice and should remain so. While signaling may be efficient under the "scoreboard" theory of transparent leanings, no law should require it. A judge will know when there is a need and utility to signal. Signals cannot practically be banned. Some judges seldom or never signal; others signal frequently. Good mediation practice leaves the decision to signal up to the mediator. [124] We should treat sitting judges no differently.

I do advocate a pragmatic view of the reality of signaling. Signaling happens. It happens despite the canons regulating the behavior of judges. It will happen in the future despite developments in positive law that might ban or regulate it. Our task is to evaluate inevitable signaling fairly and to consider it as part of the settlement process.

V. Conclusion

The question of whether a sitting judge should openly evaluate her own cases and share this evaluation with the parties is complicated and may not be solved through clear, categorical rules.

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Judicial settlement conferences and judicial mediation involve, at least, an evaluation by the judge. The evaluation is likely to be more fleshed out in a ***257** formal mediation context than in the off-the-cuff comment at a scheduling conference or a motion argument. Nonetheless, a theme of this article is that an evaluation is an evaluation, whether made at a motion hearing or at a more formal judicial mediation session.

The question of whether to allow the judge who presides at a trial to mediate the dispute earlier is not easily resolved. I remain troubled by the appearance of impropriety of a judge first evaluating a case at mediation and then later trying the case. The court's neutrality appears to be corrupted by this sequence of events. Professor Sander's fear that judges, during trial, may misuse information provided to them in confidence at an earlier mediation should be taken seriously.

I am unsure, however, if a categorical rule banning the assigned judge from mediating her case is the best answer. The assigned judge has a huge informational edge regarding a case compared to a different judge appointed merely to mediate. The judge may also have a legitimate advantage over an alternative neutral. These factors may urge the parties to allow the assigned judge to mediate and thereby risk a dual role for the judge.

Under such circumstances, my concluding comments regarding this problem may lie in very practical and incremental steps. One federal judge offers to hold settlement conferences in his own cases, but tells counsel that he will not preside over the trial if he holds a judicial mediation earlier.[125] In essence, the disputants have a choice of allowing the assigned judge to either mediate or try the case. Interestingly, this judge seldom has to pass a case on to a colleague following a judicial mediation, as she is usually able to successfully settle the mediated cases. This may simply measure the judge's prudence in selecting cases for possible mediation. By selecting disputes that are likely to settle, the court will avoid holding settlement conferences that reach impasse.

The obvious advantage of assigning the parties the option to select the judge's role is that it firmly separates the role of a judge as mediator from that of later judging. Moreover, if the parties know and respect the judge who takes this position, they will try to work harder to settle the litigation before a judge who is likely to be a capable mediator.

The dangers of a trial judge implementing an institutional memory to punish the recalcitrant, non-settling attorney may itself be a reason to rigidly separate the roles of judicial mediator and judge. Judging and mediating are, after all, very different tasks, and ones that cannot be easily separated by any rigid firewall. The role of judge requires binding evaluation, while the role of muscle mediator involves evaluation of a non-binding nature. As Professor Subrin has recently said, "the best way that judges can relate to mediation is to make themselves available to try cases. . . ."[126]

***258** Finally, there is reason to worry about a judicial system where courts are encouraged to openly signal their leanings throughout the litigation. Signals carry a message that a court has pre-judged an issue and imply a diminished impartiality. Nonetheless, most decision makers do not wait to decide until all the evidence is presented. Rather, decision makers, be they judges, juries or lay members of the public, begin to decide at early phases of a dispute. Early tentative decisions, or "leanings," are a fact of life for anyone facing a decisional choice and cannot be ignored. Accordingly, judicial signaling is a natural occurrence. Signaling is also difficult to regulate. A ban on signals, many of which are uttered in chambers, or may be non-verbal in nature, is plainly impractical and unrealistic.

Footnotes

a1 Henry J. Casey Professor of Law, Lewis & Clark Law School. I thank Jean Sternlight, Deborah Hensler, and Nancy Welsh for comments.

1 See, e.g., Marc Galanter, The Emergence of the Judge as a Mediator in Civil Cases 1 (Disputes Processing Research Program Working Paper No. 1984-5, 1985) (asserting that "[m]ost American judges participate to some extent in the settlement of some of the cases before them" and explaining that judicial participation in settlement of their own cases "has become a respectable, even esteemed, feature of judicial work").

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2 See, e.g., In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 305-06, 316-17 (N.D. Ga. 1993) (in approving class action settlement, the judge sent the signal that he would have granted a summary judgment for the defendants in an antitrust suit, and asserts "[P]laintiffs possess a slim chance of recovery should this action proceed to trial" and that the state of antitrust doctrine and plaintiffs' lack of evidence "create a considerable risk to the class should plaintiffs proceed to summary judgment or trial").

3 In theory, judicial mediation can even occur on appeal. Every Federal Circuit Court of Appeals now has a mediation program. Appellate mediation is provided, however, not by judges, but by neutral third parties, schooled in mediation techniques, and is therefore different than the mediation that is the focus of this essay, mediative efforts by the trial court. See generally Robert J. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers (1997); Edward Brunet & Charles B. Craver, Alternative Dispute Resolution: The Advocate's Perspective 547-49 (2d ed. 2001) ("[I]n appellate mediation, the neutral is not 'judicial': - a third party mediator, not a judge, serves as the mediator.").

4 I was part of a panel on settlement procedures and techniques. I was the lone academic on the panel; the other members were federal judges.

5 See generally Stacy Lee Burns, Making Settlement Work: An Examination of the Work of Judicial Mediators 7 (2000) (sitting judges mediate by offering opinions "as to what a 'fair' settlement in the case" would be); Hiram E. Chodosh, Judicial Mediation and Legal Culture, at http:// usinfo.state.gov/journals/itdhr/1299/ijde/chodosh.htm (last accessed January 22, 2003) ("[J]udicial mediators tend to be more evaluative than facilitative, that is, they are generally more willing to share their evaluation of the merits or value of a claim.").

6 See, e.g., Noel P. Fox, Settlement: Helping the Lawyers to Fulfill Their Responsibility, 53 F.R.D. 129, 154 (1971) (urging judges who mediate to "develop a keen sense of evaluation" that will "reflect the subjective positions of the parties"); Stanley Ryan & John Wickham, Pre-trial Practice in Wisconsin Courts, 1954 Wisc. L. Rev. 5, 16 ("I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement, and then also attempt to persuade the parties and their attorneys to accept a settlement within that range."); Ruggero J. Aldisert, A Metropolitan Court Conquers Its Backlog, 51 Judicature 247, 248 (1968) (at a compulsory pre-trial settlement conference, the judge makes "a realistic appraisal of both sides" of a case). Accord Deborah Hensler, A Research Agenda: What We Need to Know About Court-Connected ADR, Disp. Resol. Mag., Fall 1999, at 15 (suggesting that judicial mediation is evaluative rather than facilitative); Galanter, supra note 1, at 9-12 (collecting authority that judges present their evaluations at settlement conferences, and concluding that judges use evaluative techniques); Lawrence F. Schiller & James A. Wall, Jr., Judicial Settlement Techniques, 5 Am. J. Trial Advoc. 39, 52 (1981) (describing judicial mediation as a judge convincing the attorney of the fairness of a judicial evaluation of the case, then persuading the client to accept a figure agreed to by the attorney).

7 See, e.g., The Settlement of Sechrist v. Burlington Northern: A Videotape for Mediators (Federal Judicial Center 1994) (videotape of a settlement conference before a federal judge who clearly uses evaluative mediation).

8 See, e.g., Robert A. Baruch Bush & Joseph P Folger, The Promise of Mediation: Responding To Conflict Through Empowerment and Recognition 96-107 (1994) (facilitative mediation permits the parties to form their own empowered negotiation positions and eventually reach a settlement that will be respected).

9 See, e.g., Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers 65-66 (1996) (suggesting that judges who mediate use both evaluative and facilitative styles).

10 See Murray S. Levin, The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion, 16 Ohio St. J. on Disp. Resol. 267, 269 (2001) ("In practice, however, many mediators combine aspects of facilitative and evaluative mediation."); Jeffrey W. Stempel, The Inevitability of the Eclectic: Liberating ADR From Ideology, 2000 J. Disp. Resol. 247, 249 (cautioning that the utility of the evaluative and facilitative labels "should not

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drive ... policymakers to categorize mediation as either evaluative or facilitative" because "[m]uch mediation ... has substantial elements of both schools of thought"); Jeffrey W. Stempel, Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role, 24 Fla. St. U. L. Rev. 949 (1997) [hereinafter Stempel, Beyond Formalism] (criticizing either characterization of evaluative or facilitative mediation styles as creating a false dichotomy).

11 See Brunet & Craver, supra note 3, at 209-10 (describing materials given to mediator by the parties to a dispute); Patrick F. Kelly, Mediation: A Settlement Conference Format that Works, in ADR and the Courts: A Manual For Judges and Lawyers 133, 136 (1987) ("[c]ounsel are also encouraged to submit to the mediator or settlement judge a statement detailing factual or legal issues and the requested relief").

12 See generally Jennifer Geralda Brown & Ian Ayers, Economic Rationales for Mediation, 80 Va. L. Rev. 323, 330-31 (1994) (setting forth critical nature of information exchange between mediator and the disputants).

13 See Richard A. Posner, Mediation, Text of the Eleventh Annual Frank E.A. Sander Lecture, American Bar Association's Section of Dispute Resolution (July 8, 2000) (characterizing the mediator as a conduit of information between the opposing sides).

14 See, e.g., Norman Brand, Learning to Use the Mediation Process - A Guide for Lawyers, 47 Arb. J. 6, 8-12 (Dec. 1992) (describing "information centered mediation" as a process in which the mediator obtains and uses "superior information gained through formal study").

15 See Brown & Ayers, supra note 12, at 331.

16 Posner, supra note 13.

17 See Brunet & Craver, supra note 3, at 182 ("Confidentiality is a hallmark of mediation.").

18 See, e.g., Frank E.A. Sander, A Friendly Amendment, Disp. Resol. Mag., Fall 1999, at 11 ("To be effective, the mediation process must inspire candor by both parties, something that is unlikely to happen if the mediator can later don his judicial robe and render a decision, perhaps based in part on confidential information that was imparted to him in the mediation session.").

19 See Piotr Sztompka, Trust: A Sociological Theory 25 (1999) (defining trust as a function of risk and a "bet about the future contingent actions of others") (emphasis in original).

20 See, e.g., Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982).

21 See Sander, supra note 18.

22 Hensler, supra note 6, at 18.

23 See Burns, supra note 5, at 21 (quoting a judge's lament that he had only two hours to mediate a case set for forty days of trial); D. Marie Provine, Settlement Strategies for Federal District Judges 84-85, 103 (Federal Judicial Center 1986) (reporting nature of settlement conferences held by Magistrate Judge Pat Irwin of the Western District of Oklahoma, who spends "between two to three hours on a case," and republishing judicial workload grid of Judge Robert Keeton (D. Mass.), estimating that a judge would spend one hour at a settlement conference); Plapinger & Stienstra, supra note 9, at 303-07 (reporting that settlement conferences held by magistrate judges of the Western District of Wisconsin "last

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anywhere from fifteen minutes to five hours"). Cf. Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St. J. on Disp. Resol. 641, 651-52 (2002) (in Ohio state court mediations study, seventy-seven percent of mediation sessions held by court-appointed attorney mediators employed half or full-time by the courts lasted between thirty-one minutes and three hours); Douglas A. Henderson, Mediation Success: An Empirical Analysis, 11 Ohio St. J. on Disp. Resol. 105, 143 (1996) (concluding that data indicates that the length of mediation sessions "was positively related to settlement .... The longer the process lasted, the more likely the mediation would settle in full."); Thomas B. Metzloff, et al., Empirical Perspectives on Mediation and Malpractice, 60 Law & Contemp. Probs. 107, 118-19 (Winter 1997) (collecting data on court-ordered mediations before private mediators in North Carolina state courts, suggested 16% last 1.1 to 2.0 hours, 27% last 2-3 hours, 19.1% last 3-4 hours, 13% last 4-5 hours, 8% last 5-6 hours, 5.6% last 6-7 hours, and 5.6% last more than 7 hours).

24 See, e.g., David I. Levine, Early Neutral Evaluation: The Second Phase, 1989 J. Disp. Resol. 1.

25 See 3 James Wm. Moore et al., Moore's Federal Practice, § 16.53(5)(c) (3d ed. 2001) (Magistrate Judge Wayne Brazil asserts that Early Neutral Evaluators "can devote more time to the individual cases assigned to them than can busy district judges"); see also Stephen M. Bainbridge & G. Mitu Gulati, How Do Judges Maximize? (The Same Way Everybody Else Does - Boundedly): Rules of Thumb in Securities Fraud Opinions, 51 Emory L.J. 83 (2002) (stressing time constraints that inhibit judges and lack of incentive to expend extra time on particular matters).

26 My authority for this proposition is the seeming ease with which retired judges get ADR work. Taking off a black robe helps a neutral obtain business. Former judges wear a cloak of black even without a robe.

27 See Margaret A. Jacobs, Retired Judges Seize Rising Role in Settling Disputes in California, Wall St. J., July 26, 1996, at A1, 5.

28 Id.; Burns, supra note 5, at 20 (describing merger of JAMS and ENDISPUTE and explaining that "popularity of early retirement by judges to work at JAMS or other ADR providers has given some commentators concern that these opportunities are enticing many knowledgeable and talented sitting judges away from the public courts").

29 See Fox, supra note 6, at 152 (urging judicial mediators to "never breach a confidence" and cautioning that misuse of confidential information "will result in a serious loss of confidence in the judge's good faith and impair his future effectiveness").

30 See William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 239-40 (1979) (noting that private market "[j]udges will tend to promulgate vague standards which give each party to a dispute a fighting chance" and reasoning that clear rules that indicate how a private market judge is "likely to decide a case will assure that no disputes subject to the rule are submitted to that judge since one party will know that it will lose").

31 906 P.2d 1260, 1270 (Cal. 1995).

32 Id.

33 Sander, supra note 18, at 11. Accord Judith Resnik, Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 1002 (2000) (describing "role-blurring" of judges as their job has shifted from "adjudicator to manager to settler to dealmaker").

34 In the individual calendar system, a case is assigned to an individual judge at the time it is filed and remains the responsibility of that judge for the remainder of the case. See, e.g., Steven Flanders, Case Management and Court Management in the United States District Courts (1977); Note, The Assignment of Cases to Federal District Judges, 27

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Stan. L. Rev. 475, 476-81 (1975) (describing individual calendar system as one in which "each judge is responsible for his own calendar," and urging adoption of a system that pre-assigns complex and criminal cases to appropriate judges).

35 Resnik, supra note 20, at 378.

36 Cf. Owen M. Fiss, The Bureaucratization of the Judiciary, 92 Yale L.J. 1442, 1456-58 (1983) (theorizing that responsibility of judges is a good thing, and that increasing bureaucratization of the judiciary tends to reduce this important sense of responsibility).

37 See, e.g., Resnik, supra note 20, at 404 (noting that "[w]ith the individual calendar system, the publication of each judge's case load, and comparative data on judges' performance, judges can learn which of their colleagues dispose of the most cases") (footnote omitted); Eve Lieber, Maximum Case Management with Minimum Judge Time, Judges' J., Fall 1986, at 4, 16 ("Effective case management begins by defining general time standards for the disposition of cases.").

38 See Flanders, supra note 34, at 13. See also Resnik, supra note 20, at 404 (concluding that "peer pressure tends to generate more vigorous [judicial] management").

39 See Resnik, supra note 33, at 925 (explaining a federal judge's statement that trial cases evidence a "lawyers' failure"). See also Wolf Heydebrand & Carroll Seron, Rationalizing Justice: The Political Economy of the Federal District Courts 185 (1990) (describing a shift in the federal trial courts from a culture of adjudication to one of administration).

40 Resnik, supra note 33, at 933-34.

41 Id. at 934.

42 Id. at 937-38.

43 See Peter Graham Fish, Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939, 32 J. Pol. 599 (1970) (detailing historical origin of Administrative Office of the U.S. Courts).

44 See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960).

45 See Resnik, supra note 33, at 940-43 (stressing that the switch from a master calendar to an individual assignment system was a business-like effort designed to embrace every case, not just so-called complex cases).

46 Id. at 943-49.

47 Id. at 949.

48 See, e.g., Heydebrand & Seron, supra note 39, at 30-31 (describing a bureaucratic "court rationalization" that has occurred in the federal judiciary by "systematization, codification of procedures, simplification, and routinization of work" in the face of new judgeships and court reorganization).

49 See, e.g., Stephen B. Burbank, Procedure and Power, 46 J. Legal Educ. 513 (1996) (setting forth a historical vision of a "power grab by the judiciary"); Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil

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Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909 (1987) (setting forth a history of federal procedure in which a tradition of judicial equity and discretion becomes the modern norm).

50 See Moore, supra note 25, at §16 App.01(1) (listing, as subjects to consider at a pretrial conference, simplification of the issues, amendment, using admissions of fact or documents to avoid unnecessary trial proof, limiting expert witnesses, use of masters, and the catchall "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action"). Id. at 16.01(c)(16). For discussion of the historical analog to Rule 16, the settlement conference that began in the state courts, see Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 490-92 (1985).

51 Padovani v. Bruchhausen, 293 F.2d 546, 548 (2d Cir. 1961) (emphasis added). Accord Nancy A. Welsh, Court-Ordered ADR: What are the Limits?, 12 Hamline J. Pub. L & Pol'y 35, 43-44 (1991) (pretrial conference not designed to explore settlement but, instead, to insure an efficient trial).

52 Galanter, supra note 1, at 5.

53 Id., citing Edson R. Sunderland, Theory and Practice of Pre-Trial Procedure, 21 J. Am. Jud. Soc'y 125, 131 (1937) (describing pre-trial as designed to prevent concealment of issues and to improve public confidence in litigation).

54 See, e.g., Provine, supra note 23, at 21; Galanter, supra note 1, at 6 (terming perception of settlement as a by-product of the pretrial conference, a view that lasted "well into the 1950s"); Edson Sunderland, Procedure for Pretrial Conferences in the Federal District Courts, 28 Am. J. Judicature Soc'y 46, 49 (1944) (purpose of pretrial conference to designate and eliminate issues, with settlement playing a secondary role).

55 Jay Tidmarsh, Civil Procedure: The Last Ten Years, 46 J. Legal Educ. 503, 506 (1996).

56 See Fed. R. Civ. P. 16(b)(6) (authorizing pretrial conference to consider "any other matters appropriate in the circumstances of the case"); 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1522 (1971) (noting that, under original 1938 Rule 16, the pretrial conference had improved and facilitated the settlement process); Lawrence F. Schiller & James A. Wall, Jr., Judicial Settlement Techniques, 5 Am. J. Trial Advoc. 39, 42 (1981) (concluding that courts "have been willing to become involved in settlement discussions at the [Rule 16] conference under the umbrella of subsection (6) of the Rule").

57 See Moore, supra note 25, at § 16 App.03(1) (setting out 1983 revision of rule and Advisory Committee Note).

58 Skelly Wright, The Pretrial Conference, 28 F.R.D. 141, 145 (1962).

59 Hon. Charles B. Renfrew, Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases, Chi. Bar Rec., Nov.-Dec. 1975, at 130, 131.

60 Hubert L. Will et al., The Role of the Judge in the Settlement Process, 75 F.R.D. 203, 205 (1977).

61 Fed. R. Civ. P. 16(a)(5).

62 Fed. R. Civ. P. 16(c)(7).

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63 See, e.g., Guillory v. John Deere Indus. Equip. Co., 95 F.3d 1320, 1334 (5th Cir. 1996) (affirming sanctions against defendant Deere for negotiating at settlement conference in bad faith); Newton v. A.C. & S., Inc., 918 F.2d 1121,1126 (3rd Cir. 1990) (affirming trial court authority, under Rule 16(f), to impose sanctions for failure to comply with a settlement deadline); Hess v. N.J. Transit Rail Operations, Inc., 846 F.2d 114, 115 (2nd Cir. 1988) (overturning district court contempt sanction for failing to submit a "bonafide" pretrial settlement offer where trial court ordered party at a Rule 16 pretrial conference to submit offer or be subject to sanction, and where party in previous case before same judge had been unwilling to make a settlement offer until trial); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) ("The wording of the rule and the accompanying commentary make plain that the entire thrust of the amendment to Rule 16 was to urge judges to make wider use of their powers and to manage actively their dockets.").

64 Fed. R. Civ. P. 16 App.03(5) advisory committee note.

65 Id.

66 Id.

67 Id. (the judge "may arrange ....") (emphasis added).

68 See Fed. R. Civ. P. 16(b).

69 See Tidmarsh, supra note 55, at 506.

70 Id.

71 Code of Conduct for United States Judges (1990) [hereinafter Code of Conduct], Canon 3.

72 Id. at 3(B)(7)(d).

73 See Robert Niemic et al., Guide to Judicial Management of Cases in ADR 78-79 (Federal Judicial Center 2001).

74 2 Guide to Judiciary Policies and Procedures, (Administrative Office of the U.S. Courts 1999), Advisory Opinion No. 95.

75 Id. ("Since the drafters of the Code believed it was necessary to expressly permit ex parte settlement discussions between judges and parties with their consent, it is reasonable to infer that joint settlement discussions do not contravene the Code.").

76 Id. See also Local Rule 16.3(c), S.D. Cal. (mandating the parties to consent to a trial by a judge who previously presided over a settlement conference).

77 See Local Rule 16.3(b), N.D. Tex. (prohibiting the assigned judge from discussing settlement figures with the parties in bench trials without the express consent of the parties).

78 See, e.g., Resnik, supra note 20, at 385, citing Krattenstein v. G. Fox & Co., 236 A.2d 466, 469 (Conn. 1967) (observing that when a court "persist[s] at settlement efforts and then to hear the case and render judgment ... inevitably raises ... suspicion as to the fairness of the court's administration of justice"); Wayne D. Brazil, Settling Civil Suits: Litigator's Views About Appropriate Roles and Effective Techniques for Federal Judges 85 (A.B.A. 1985) (finding that fifty-eight

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percent of lawyer respondents thought "it is 'improper' for the trial judge to get involved in settlement negotiations" in a bench trial, and thirty-three percent found it improper for the assigned trial judge to become involved in settlement in a jury trial).

79 Resnik, supra note 20, at 433-34. Accord James J. Alfini, Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial, Disp. Resol. Mag., Fall 1999, at 11 (concluding that judges should not mediate a case assigned to them for trial); Brazil, supra note 78. Cf. Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 369-70 (1978) (referring to one judging and later mediating as "'mixed forms' of ordering").

80 Charles B. Craver, Effective Legal Negotiation and Settlement §16.13 [2](a) (4th ed. 2001). Craver does note that the judge who mediates her own case should point out that "no settlement discussion disclosures would be considered during subsequent trial proceedings," and should advise the parties that failure to settle would not disadvantage any party. Id.

81 See Lon L. Fuller, The Problems of Jurisprudence 706-07 (1949) (setting forth conditions for a decision having maximum moral force). Accord Resnik, supra note 20, at 376 (expressing "classical view" that "judges are not supposed to have an involvement or interest in the controversies they adjudicate").

82 See, e.g., Dodds v. Comm'n of Judicial Performance, 906 P.2d 1260 (Cal. 1996) (concluding that assertive judicial style in seeking settlement in a case involving alleged sexual misconduct by a physician was prejudicial, but not grounds for public censure of the judge).

83 See, e.g., Plapinger & Stienstra, supra note 9, at 65 (setting forth a model of mediation that calls for the parties to form their own positions and for the mediator to aid in this goal by being more of a "process expert" than a case evaluator or an expert).

84 Moore, supra note 25, at §16.53(5)(c) (commentary of Magistrate Judge Wayne Brazil).

85 Id. (stressing the parties' unwillingness to be candid with a judicial mediator as compared with an early neutral evaluator).

86 In med-arb, the parties mediate and, if unable to reach agreement, arbitrate. The mediator shifts roles and becomes the arbitrator. The theory of med-arb is that the parties will successfully mediate out of fear of the all or nothing result of a looming arbitration. See Brunet & Craver, supra note 3, at 524-25.

87 Menkel-Meadow, supra note 50, at 510-11.

88 Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 Harv. Negot. L. Rev. 1, 67 (Spr. 2001) (concluding that "the potential for coercion remains" where a trial judge conveys an evaluation of any party's case).

89 Id., citing Krattenstein v. G. Foy & Co., 236 A.2d 466, 469 (Conn. 1967) (questioning fairness of a trial court first expressing an opinion on monetary settlement values, then later trying and deciding a case).

90 Welsh, supra note 88.

91 See generally Plapinger & Stienstra, supra note 9, at 66 (court annexed "mediation can involve a single session of several hours or multiple sessions over time").

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92 See generally Henderson, supra note 23 (collecting and analyzing data in construction mediation and concluding that the "longer the process lasted, the more likely the mediation would settle in full").

93 See Edward Brunet, Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts, 23 Berkeley J. Emp. & Lab. L. 107, 134 n.98 (2002) (asserting that "the fact that most mediators are paid by the hour creates an incentive for the mediator to prolong the negotiations process"); Andrew K. Niebler, Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators, 4 Harv. Negot. L. Rev. 167, 183-84 (1999) (concluding that use of a fixed fee for a mediator is more efficient than an hourly fee).

94 See, e.g., Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987) (reversing trial court finding of criminal contempt of plaintiff's attorney who refused to participate in a non-binding summary jury trial, where counsel feared that participation would disclose critical witness statements that earlier had been found to be non-discoverable work product).

95 Menkel-Meadow, supra note 50, at 497.

96 Wayne Brazil, Settling Civil Cases: What Lawyers Want From Judges, Judges' J., Summer 1984, at 14.

97 Id. at 16. Of course, objective data would appear to the contrary - settlement conferences are not necessarily efficient docket-clearing devices. See, e.g., Hensler, supra note 6, at 15-16 (questioning claims of cost and time savings of ADR); James S. Kakalik, et al., Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (1996) (concluding that ADR techniques consume considerable resources and stressing costs of ADR in relation to benefits); Menkel-Meadow, supra note 50, at 504 (concluding that "[w]e have examined the efficiency argument and found it wanting").

98 Id. Accord Menkel-Meadow, supra note 50, at 504 (articulating a "substantive justice" by-product of settlement that avoids a winner and loser, and often creates remedies and legitimacy unavailable in litigation).

99 See Brunet, supra note 93, at 123.

100 See Posner, supra note 13 (describing the mediator as one who serves as a conduit of information between disputing parties).

101 See Sander, supra note 18.

102 See Thomas R. Colosi, On and Off the Record: Colosi On Negotiation 8 (1993) (trust defined in negotiation as "being able to rely on the other party's behavior and to be counted on by it in turn," and described as deriving from reliability and leading to credibility).

103 Id. at 108 ("When trust is low or nonexistent in a relationship, the parties find it difficult to reveal their expectation.").

104 Craver, supra note 80, at 16.13[5].

105 Id.

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106 See, e.g., The Judge's Book: National Conference of State Trial Judges 49 (American Bar Association and the National Judicial College 2d ed. 1994) [hereinafter The Judge's Book] (urging judges to remain open-minded and asserting that the "judge should make an effort not to prejudge a case").

107 John Paul Ryan et al., American Trial Judges: Their Work Styles and Performance 177 (1980).

108 Id.

109 Of course, candid comments by a judge at a mediation session are a necessary mode of providing case evaluation. See, e.g., The Judge's Book, supra note 106, at 189-90 (recommending in-chamber caucus sessions at settlement conferences and informal evaluative comments "such as 'This case sure has its problems;' or 'This is really a dog;' 'You have good liability, but no damages;' 'You have all the damages in the world, but lousy liability'").

110 Telephone Interview with Judge Ellen Rosenblum, Circuit Court of Multnomah County, Oregon State Courts (Jan. 18, 2002).

111 See Welsh, supra note 88 ("[T]here is substantial evidence that attorneys prefer judges who share their reasoned evaluations of each party's case."). Cf. Provine, supra note 23, at 35-36 (concluding that litigators prefer judges who candidly refer to legal doctrine that may have been overlooked).

112 2002 WL 31439450 (D.D.C. Nov. 1, 2002).

113 Kevin Galvin, States Accused of 'Bait and Switch' Tactics, Seattle Times, May 16, 2002, available at http://archives.seattletimes.nwsource.com/... (last accessed on January 22, 2003) (judge referred to "'a lack of clarity'" in the position taken by the objecting states).

114 See generally Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment 172 (1980) (concluding that evidence supports that we heavily weigh first impressions).

115 Id. Soloman Asch, Forming Impressions of Personality, 41 J. Abnormal & Soc. Psych. 258 (1946) (suggesting that early information is processed differently than later-acquired information because it is processed holistically).

116 Nisbett & Ross, supra note 114 (describing "recency effects, in which later-presented evidence has undue influence on final judgment," but concluding that "these are rare").

117 See, e.g., Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 1.9 (2001) ("[D]o not make up your mind about what the verdict should be until after you have gone to the jury room to decide that case and you and your fellow jurors have discussed the evidence."); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 1.05 (1995) (setting forth a precautionary instruction that jurors should not make up their minds when evidence is admitted); Oregon Uniform Civil Jury Instructions § 5.01 (2000) (setting forth a caution that jurors should not decide the issue until they commence deliberations).

118 See, e.g., William Lewis Burke, Ronald L. Poulson & Michael J. Brondino, Fact or Fiction: The Effect of the Opening Statement, 18 J. Contemp. L. 195, 201 (1992) (collecting materials stressing the significance of the opening statement but presenting data from a study of civil cases that thirty-eight percent did not change their minds after an opening statement); Thomas A. Mauet, Fundamentals of Trial Techniques 45 (2d ed. 1988) (asserting that jury verdicts are usually consistent with the tentative opinions reached by jurors).

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119 See, e.g., Burke, supra note 118, at 204-05 (analyzing data showing the rate of changes in juror opinions during a case); Irving Younger, The Advocate's Deskbook: The Essentials of Trying a Case 61-62 (1988) (in discussing the "enormous consequence" of opening statements: "At the end of the opening statements, the jurors cannot help but make up their minds, albeit tentatively.").

120 See Karl N. Llewellyn, Jurisprudence: Realism in Theory and Practice 144 (1962).

121 Id. at 145 (stressing that a judge is a man, not a "mechanical lawyer on a bench").

122 See Code of Conduct, supra note 71, at Canon 3 (1990) (requiring a judge to "perform the duties of the office in partiality and diligently").

123 Id. at Canon 2, entitled "[A] judge should avoid impropriety and the appearance of impropriety in all activities."

124 See, e.g., Stempel, Beyond Formalism, supra note 10, at 973-74 (effective and sought-after mediators use evaluation as one technique); Lawrence Susskind, Mediating Public Disputes: A Response to the Skeptics, 1 Negot. J. 117 (1985) (use of evaluation techniques by a mediator can be necessary).

125 Telephone Interview with Judge Garr M. King, U.S. District Court, District of Oregon (Nov. 1, 2001).

126 Stephen N. Subrin, A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought, 3 Nev. L.J. 196, 227 (2003) (arguing that judges should try cases because of the need to provide trials and the presence of "increasing numbers of capable [private] mediators"). See also Evans v. Florida, 603 So. 2d 15, 17 (Fla. Dist. Ct. App. 1992) ("The function of a mediator and a judge are conceptually different.... [M]ediation should be left to mediators and judging to the judges.")

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BEYOND "MANAGERIAL JUDGES": APPROPRIATE ROLES IN SETTLEMENT

Settlement is prevalent, and crucial to the functioning of the U.S. judicial system. But the pretrial regulatory framework in the courts is largely discretionary, and its emphasis on management does not fully take into account all the consequences of combining settlement with adjudication. The label "managerial judge" does not differentiate between the functions involved in managing a settlement process and the very different role of serving as a settlement neutral. By introducing this distinction, this Article provides a framework for analyzing settlement that focuses on the conflicts between a judge's role as a neutral in settlement and as a neutral in adjudication.

This Article argues for reform that would prevent judges assigned to a case for pretrial management and trial from serving as the neutral at a settlement conference or judicial mediation. The proposal to separate these roles structurally would address the problems of coercion and partiality that can result from a dual-neutral role, while retaining the contributions of settlement judges. The proposal is informed by the history of judges' involvement in settlement, and by their increasing reliance on mediation techniques. It draws on principles that are already recognized in some local and state ADR rules and rests on modern understandings of cognitive functioning and decisionmaking that should be incorporated into our thinking about frameworks for settlement.

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***74 I. INTRODUCTION**

In U.S. courts, judicial efforts to aid settlement are usually thought of as an element of pretrial management. This conception dates back to the identification of a "managerial" role for judges, [1] although its roots reach even ***75** earlier, to the inclusion of settlement in pretrial conferences. In her influential 1982 article, *Managerial Judges*, Professor Judith Resnik contrasted the judge's traditional role in adjudication--making decisions based on information presented by the parties in motions and at trials, with justifications in the form of reasoned explanations [2] --with that of the "judge-overseer." [3] Pretrial, a managerial judge is engaged in supervising discovery, managing case development, and encouraging settlement. [4] Professor Resnik famously questioned the wisdom of the increase in judicial authority associated with these "judge initiated, invisible, and unreviewable" roles [5] due to the absence of procedural safeguards to protect parties from abuse of that authority. [6] Her critique of the emergence of managerial judging, and of the shift in judicial focus from trial to pretrial proceedings, ushered in an era of debate about the role of judges among both academic observers and judges themselves.

This Article builds on insights from that debate, but proposes a different analytical structure for examining judicial settlement activities and the rules that govern them. This framework is based on the insight that judges perform two very different functions in settlement. Their first role is truly managerial: helping the parties plan for alternative dispute resolution (ADR) and select an appropriate process. Their second role is that of a neutral: helping to resolve the dispute by direct involvement as a third party who leads a settlement process. Rule 16 of the Federal Rules of Civil Procedure currently contemplates both roles and blends them in its authorization, and many local and state rules follow the same pattern. [7] The debate spawned by Professor Resnik's article similarly treats all of settlement as an aspect of management. Yet, although both settlement and management take place pretrial, acting as a settlement neutral is conceptually and functionally distinct from managing the settlement of a case and the other pretrial managerial duties authorized by Rule 16.

Recognizing this distinction enables a fresh consideration of the issue of judges who act as settlement neutrals in cases in which they are the assigned judicial officer. A dual judicial role that encompasses both attempting to settle cases and adjudication has been condemned (and defended) before, in the context of criticisms of pretrial managerial judging. [8] Unlike these earlier ***76** criticisms, however, I do not object either to judicial pretrial management or to judicial involvement with settlement in general. Pretrial judicial management by the judge assigned for trial is a deeply ingrained (and, in many ways, effective) aspect of procedure. [9] And judges often serve effectively as settlement neutrals--traditionally in judicial settlement conferences and more recently as mediators--and can make significant contributions in this role.

Judges' truly managerial functions related to settlement--encouraging parties to settle and helping them plan a process--are consistent with the primary thrust of Rule 16 to improve the efficiency and quality of litigation as a case moves toward a disposition. However, a problem arises when a judge who is assigned to preside as adjudication neutral also serves as a neutral to facilitate settlement. These two roles are not only distinct, but incompatible. The problems become clearer when the roles are conceptualized as two neutral roles--settlement and decisionmaking--rather than as merely adding a managerial function to the judge's traditional role of adjudication.

Some judges refuse this dual role based on their personal convictions. Yet in most jurisdictions this is a matter of discretion, not prohibited by rule, and there is ample evidence that it is not uncommon for judges to assume both roles in the same case. This Article demonstrates how new understandings of decisionmaking processes reinforce longstanding doubts about combining these roles. It argues that the practice raises such troubling implications for party self-determination in settlement, and for the integrity of the adjudicatory process, that the rules should be amended to prohibit the practice.

In Part II, this Article draws on contemporary judicial writing and empirical studies to trace judicial involvement in settlement conferences through four developmental stages. These stages were accompanied by amendments to Rule 16 that endorsed expanded judicial roles and discretion. Although today the federal rules impose few limits on judicial roles related to settlement, this history reveals that the concerns underlying the separation proposed in this Article have deep, historical roots.

Part III explores the benefits of judicial settlement, and the conflicts that result from mixing the role of settlement neutral with the judicial role of adjudication (both pretrial and as the presiding judge at trial) as currently permitted by Rule 16, the majority of local federal rules, and many state rules. The conflicts in neutral roles stem from two primary sources. One is the potential for

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coercion that undermines the important value of party self-determination in settlement. The other is the dilemma that requires attorneys to make a choice between guarding information that would improve the prospects for settlement or sharing it with the judge and potentially undermining the integrity of the adjudication process. These concerns are strengthened by modern understandings of cognitive processes, which suggest multiple flaws ***77** in a structure that allows settlement neutrals to be decisionmaking neutrals. In a day when the limitations of human decisionmaking processes are common knowledge, these concepts should be reflected in the way we organize our settlement processes.

Part IV examines possibilities for limiting the effects of these conflicting neutral roles. It draws examples from local federal court rules and state law and identifies ways in which some jurisdictions apply principles that draw a distinction between managing settlement in the context of court-connected ADR programs and serving as a neutral in settlement. This Article argues that procedural rules should use these same principles to structure the permissible roles of judges in all settlement processes, including settlement conferences. Limiting judicial discretion is necessary to avoid the problems that occur when a judicial officer who is assigned the adjudicative role also takes an active role as settlement neutral.

Granted, coercion is to some degree inherent in judicial encouragement of settlement, and concerns about bias run through the litigation process. There are two reasons, however, why it is important to attack these problems in the settlement context. First, these problems are especially acute when an adjudicatory/managerial judge serves as settlement judge. In terms of coercion, the potential is heightened when parties who do not settle will return to the settlement judge for trial. In terms of impartiality, judges gain far more information that can affect their judgments in settlement than they do in the ordinary course of management and adjudication. Significantly, this information is different in kind from that which judges learn in the context of motions and evidentiary rulings.

Second, there is a manageable solution. This Article proposes that Rule 16, local federal rules, and state rules should prohibit assigned judges from serving as settlement judges and limit the information that the settlement neutral may provide to the adjudicatory/managing neutral about the settlement process. If the rules recognize that serving as a settlement neutral is distinct from management and needs to be structurally isolated from adjudication, then settlement, management, and adjudication all will benefit from parties' increased confidence in the judicial system.

II. THE CO-EVOLUTION OF JUDICIAL SETTLEMENT AND RULE 16

The evolution of judicial pretrial settlement practices in the federal district courts is a story of expansion: both in the roles of individual judges and in the operational roles of courts as institutions. The authorization for this activity in Rule 16 of the Federal Rules of Civil Procedure has generally followed, rather than led, the developments in settlement practices. [10] Overall, amendments to ***78** Rule 16 have recognized the expanding reality of judicial pretrial practices, endorsing and making more explicit the district courts' pretrial management powers. This has been especially true of the amendments concerning settlement, which have pragmatically codified judicial trends and court innovations. These amendments have reflected the increasing attention paid to judicial settlement since the inception of the Federal Rules in 1938 and the changes in legal culture that have, in many districts, institutionalized court-sponsored settlement processes as a normal element of litigation.

Pretrial proceedings are largely committed to judges' discretion; Rule 16's current regulatory structure for settlement is primarily permissive, not limiting. The Rule not only grants judges great discretion in how they approach settlement in a particular case, but also accepts significant diversity in the local structures within which that discretion is exercised. [11] This diversity is consistent with the Alternative Dispute Resolution Act of 1998: [12] while that Act requires district courts to provide some form of ADR process, it also gives them extensive leeway to select and structure the processes they offer to suit local conditions. As a result, court-sponsored settlement varies greatly among the districts and, inevitably, some courts have surpassed others in terms of the scope and quality of their dispute resolution program.

This Part draws on judicial writings and contemporary studies to identify four stages in the evolution of judicial settlement practices. Part II.A describes the period immediately following the 1938 adoption of the Federal Rules, when Rule 16 did not recognize settlement as a pretrial judicial activity. Judges who held pretrial conferences tended to restrain themselves in discussing settlement with attorneys and, under the prevailing case assignment systems, those judges who were active in settlement rarely tried the case. This general restraint gave way during the 1960s and especially the 1970s to a second stage of development, outlined in Part II.B. It was marked by the growth of managerial judging and increasing judicial enthusiasm for promoting settlement. Pretrial settlement conferences became widespread, and they were eventually endorsed in the 1983

amendments to Rule 16. Stage three, which is detailed in Part II.C, was characterized by the establishment of court-sponsored ADR programs. Judges continued to hold settlement conferences, but options for settlement processes broadened and judges assumed additional managerial roles in settlement, which varied greatly due to the local nature of ADR programs. These changes were recognized in 1993 with further amendments to Rule 16. Part II.D presents evidence of a fourth, ongoing stage in which mediation has become an increasingly important part of judicial settlement. Judges have begun to mediate, and mediation techniques have influenced how many judges conduct their settlement conferences.

***79** For the most part, the discretion allowed to each judge to determine his or her preferred role in settlement has expanded through these evolutionary stages. Today, litigants may experience a wide range of court-connected settlement activity, which includes both judges performing managerial functions and judges presiding as neutrals. Rule 16 currently authorizes both these roles with little limitation. It is noteworthy, however, that even as discretion with regard to settlement has expanded over the decades, concerns with one potential consequence--conflicting judicial roles--have echoed repeatedly through each stage of the evolution of judicially-led settlement.

A. *Stage 1: General Judicial Restraint in Settlement and Rule 16 Silence*

The inaugural version of the Federal Rules of Civil Procedure that merged law and equity in 1938 did not mention settlement. The Rules contributed major innovations in the form of liberal rules of pleading and joinder [13] and provisions for information exchange through discovery to develop cases prior to trial [14] that, along with a decline in the rate of trials, made the pretrial phase the "main event" in litigation. [15] The rulemakers, inspired by the practice of some state court judges, also added Rule 16 to authorize pretrial conferences. [16] ***80** Consistent with the overall emphasis on the flexibility of equity traditions in the Federal Rules, [17] Rule 16 gave district judges discretion to decide on a case-by-case basis whether to hold a conference and how to shape it. [18] It thus encouraged, but did not require, judges to participate in discussion and exchange with the parties as a more informal way of narrowing issues for trial than reliance on formal pleadings. [19]

There was concern among the drafters, however, with the potential for coercion of the parties. [20] This was reflected in their reluctance to include settlement as an appropriate topic for discussion at pretrial conferences. Years later, Charles Clark, the influential reporter for the Supreme Court's Advisory Committee on Rules of Civil Procedure, explained that the omission was purposeful and stemmed directly from concerns about coercion: "[I]t is dangerous to the whole purpose of pre-trial to force settlement upon unwilling ***81** parties and to make the conference the recognized instrument of compelled negotiations." [21]

Despite the absence of settlement authorization from the language of the Rule, judges certainly did settle cases in pretrial conferences in the decades immediately following the adoption of the Federal Rules. But tradition imposed informal constraints on pretrial activity in general, [22] and two factors appear to have restrained judicial behavior specifically in terms of settlement during the 1940s, 1950s, and 1960s. First, the dominant view in the federal courts (at least as reflected in the rhetoric of the day) was that settlement was a "by-product" of pretrial conferences, not their primary purpose. [23] Second, under the prevalent system for assigning cases, the judge conducting the conference was typically not the judge assigned for trial. [24]

The by-product theory was articulated in recommendations submitted by the Pre-Trial Committee of the Judicial Conference of the United States and approved by the Conference in 1944. They stated that the "committee consider[ed] that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge." [25] Settlement at pretrial conferences was accepted, however, as "often the logical result of pretrial." ***82** [26] Judge Alfred P. Murrah, then-chair of the Pre-Trial Committee, expressed the relationship between pretrial and settlement as follows: "By narrowing the area of disagreement and pointing out the pitfalls of going to trial, the pre-trial judge can thus attempt to clear the way for a settlement advantageous to the interests of both parties." [27]

In terms of judicial behavior, contemporary judicial commentary suggests widespread consensus that it was appropriate to ask the attorneys whether they had considered settlement, [28] thereby initiating discussions that attorneys might hesitate to start for fear of signaling weakness. [29] Some judges thought suggesting that attorneys discuss settlement should be the limit of their involvement, [30] while other judges thought they could go somewhat further without overstepping. [31] But the by-product theory

was inconsistent with judges aggressively promoting settlement at the pretrial conference [32] and empirical evidence from the time suggests that this attitude seems to have encouraged restraint. [33]

The by-product view was not universally accepted, however, and there were disagreements during this period about the appropriate degree of ***83** emphasis on settlement [34] with some judges taking an activist stance, particularly in state courts. [35] This group of judges saw settlement as the "primary objective" of pretrial conferences, [36] and expressed great enthusiasm for the effect of settlement in pretrial conferences in reducing dockets and waiting times to trial. [37] Among such judges, settlement techniques included assessing the value of the case, pointing out strong and weak aspects of the claim or defense, and attempting to persuade the parties to settle. [38]

***84** The system for assigning cases, however, served as a second source of restraint on behavior, especially in state courts where judges tended to be more active in settlement. Many courts used a master calendar system that placed cases in central pools and assigned judges particular functions such as motions, pretrial conferences, or trial, often in rotation. [39] This meant that a single case would be handled by multiple judges and, if a case did not settle at a pretrial conference, a different judge would be assigned to preside at trial. [40]

At least some judicial advocates of using pretrial conferences to encourage settlement considered this separate trial assignment to be a crucial design feature. In the words of Harry M. Fisher, a pretrial conference judge of the Circuit Court of Cook County, Illinois, "We regard it as of the utmost importance that the conference be held by a judge other than the one who will be assigned to hear the case in the event a formal trial becomes necessary." [41] The reasons were partly functional: lawyers would be willing to make disclosures, and judges would feel free to participate in a discussion of the merits of the case as part of the settlement process. [42] They also reflected concerns for neutrality and the integrity of trials: "[l]awyers would feel, rightfully so, that no judge could successfully detach himself from the information absorbed during the conference or escape forming views on the merits of the case which might unconsciously color his rulings at the trial." [43]

85** **B.** ***Stage 2: Active Judicial Participation in Settlement Leading to Rule 16 Authorization

In the 1970s, a "forthright and ardent embrace of active participation" displaced the by-product framework as the dominant approach to settlement in federal pretrial conferences. [44] At the same time, a movement toward individual calendar systems in the federal courts meant that more judges had responsibility for cases from their inception. [45] These changes were part of the well-documented shift in judicial self-conception from neutral adjudicator to active case manager. [46] Effectiveness in settlement was regarded as a crucial aspect of the pretrial management role. As expressed by Chief Judge Noel P. Fox of the Western District of Michigan, "judge-mediator participation in pretrial settlement negotiations is an essential part of imaginative, active administration of the court calendar." [47]

The high level of enthusiasm for settlement is indicated by the statement, described in a mid-1980s judicial opinion as a "familiar axiom," that "a bad settlement is almost always better than a good trial." [48] As in the earlier era, settlement as a mode of docket control continued to be an important motivating factor for judicial involvement, [49] and now the compilation of ***86** docket statistics gave a ready measure of accountability that increased the pressure for quicker settlements and dispositions. [50] However, unlike the judicial writing on Rule 16 in the earlier decades (which emphasized almost exclusively the docket benefits of settlement), [51] for some the enthusiasm for settlement during this era had an additional grounding: a conviction that settlement produced superior outcomes. [52] Thus, Judge Hubert L. Will of the Northern District of Illinois proclaimed "in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement." [53]

This enthusiasm translated into widespread judicial involvement with settlement at pretrial conferences, although more conservative attitudes also persisted. Contemporary observations suggest that the extent and intensity of judicial intervention varied greatly, [54] an impression supported by the research ***87** work from the era. [55] According to a nationwide survey of state trial judges published in 1980, many judges were involved in settlement; over three-quarters described themselves as intervening at least occasionally to promote settlement discussions. [56] Of these, approximately 10% reported taking an aggressive role

"through the use of direct pressure."[57] A second survey published in 1980 also conveys a sense of activism in settlement, finding that it was common for judges to initiate settlement discussions, especially in jury cases, and that substantial numbers of judges reported suggesting settlement terms.[58] In contrast, a separate survey of lawyers in the early 1980s portrayed judges as far less likely to participate in settlement,[59] but reported that this ***88** participation included practices, such as perceived coercion to settle, that were considered unethical by many of the lawyers.[60]

How did litigants react to the more prevalent involvement of judges in settlement? While I can find no studies of clients at the time, attorneys in four different federal districts were very enthusiastic. In response to a survey of lawyers by Wayne Brazil in the early 1980s, an amazing 85% of the respondents agreed that "involvement by federal judges in settlement discussions [is] likely to improve significantly the prospects for achieving settlement."[61] The survey indicated that a majority of lawyers preferred a judge to participate "actively" in settlement by offering suggestions and observations.[62] There was, however, one major exception to the enthusiasm: lawyers were far less comfortable with judicial involvement in settlement when the settlement judge was also the judge assigned for trial.[63]

In 1983, Rule 16 (which, it should be recalled, originally did not even mention settlement)[64] was amended to be consistent with the existing practice of widespread judicial involvement in settlement. The amendment's expansion of authority for settlement activity during pretrial proceedings was consistent with the other 1983 changes to Rule 16, which overall "shift[ed] the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase."[65] But the Advisory Committee acknowledged that the changes regarding settlement merely conformed the rule to existing practice, stating that the new rule "explicitly recognize[d] that it ha[d] become commonplace to discuss settlement at pretrial conferences."[66]

The language of the new Rule established a judicial role for settlement with a broad scope. The Rule's new list of purposes for pretrial conferences officially recognized judicial authority for "facilitating the settlement of the case."[67] The scope of "facilitating" is undefined but, given prevailing practices at the time, it can be understood as authorizing judges to intervene directly as ***89** settlement neutrals in order to lead negotiations between the parties. The new Rule 16 also contemplated a planning function distinct from direct participation in negotiations. It granted judges authority to "consider and take action with respect to ... the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[68]

Thus the concept of judicial settlement activity embedded in Rule 16 included both serving as a settlement neutral and planning for a resolution procedure that would be conducted extrajudicially by someone else. Moreover, the provisions in the 1983 rule endorsed these settlement roles for judges within a framework of abundant pretrial judicial discretion carried over from the original Rule 16.[69] The Advisory Committee notes did express a caution that echoed the reasoning behind the drafters' original decision to omit settlement from the 1938 rule.[70] While noting that "providing a neutral forum" to discuss settlement "might foster it," the Advisory Committee emphasized that it was not the purpose of the rule "to impose settlement negotiations on unwilling litigants."[71] Further, the drafters seem to have contemplated that, ideally, someone other than the assigned judge should lead the settlement process.[72] Yet, by failing to distinguish a judge's planning and neutral functions, the rule conflated them in a way that misleadingly identified them both with "management," eliding an important distinction and obscuring thinking about the boundaries of the appropriate role of judges in settlement.

C. *Stage 3: Expansion of Court-Sponsored "Alternative" Dispute Resolution, with New Managerial Roles for Judges*

The third phase of development in settlement practices--court-sponsored settlement programs--broadened the focus from conferences convened at the discretion of individual judges to processes offered on an institutional basis. The programs were often motivated by the same concerns about cost and delay in civil litigation that had been associated with the rise of managerial judging, but those concerns now grew to a conviction that a litigation explosion was causing a full-blown crisis of congestion in the courts that was severe enough to impair access to justice.[73] While it is important to note that both the ***90** explosion and ensuing crisis were contested,[74] the perception of a crisis generated proposals to deal with it: chiefly reforms to discovery procedures and increased attention to settlement as a means to remove cases from court dockets.[75]

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Chronologically, the development of court programs overlapped with the growing enthusiasm for judicial settlement conferences that took place in Stage 2. Professor Frank Sander's speech describing a vision of a multi-door courthouse at the 1976 Roscoe Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice is often cited as a key event in the association between ADR programs and U.S. courts. [76] Innovative federal districts began offering mediation programs and court-annexed nonbinding arbitration in the late 1970s. [77] This was also a time when experimentation with new forms of ADR flourished, and districts began to offer processes that judges invented especially for use in the courts, including early neutral evaluation [78] and the summary jury trial. [79] While only a few courts developed full-fledged multi-door programs in which litigants could choose the process best suited to their case from a large menu, [80] many courts--both federal and state--eventually established programs that provided (or required) dispute resolution processes other than judicial settlement conferences. [81]

***91** A significant spur to the growth of federal court ADR came with the enactment of the Civil Justice Reform Act of 1990 (CJRA). [82] It required district courts to consider six case management principles, one of which was referral to ADR programs, and to adopt expense and delay reduction plans. [83] The local nature of the plans, which were developed with input from advisory committees in each district, led to great variation, [84] but many districts included some form of ADR as an element of their plan. [85] By 1996, mediation had become the most common ADR process offered by the federal courts; it was available in over half the districts. [86] During the same time period, many state courts also instituted mediation programs. [87]

The authority of the CJRA expired in 1997, but the Judicial Conference urged local districts to continue to develop ADR programs. [88] And the following year, Congress turned the CJRA's encouragement of court ADR into a mandate. The Alternative Dispute Resolution Act of 1998 (ADR Act) ***92** required each federal district court to offer at least one ADR process--including, but not limited to, mediation, early neutral evaluation, minitrial, and (when specially authorized) arbitration--and to adopt local rules requiring civil litigants to consider its use. [89] These ADR programs have become a common feature of the settlement landscape in many federal district courts. A 2011 Federal Judicial Center review of district court ADR reveals that mediation remains the most common court-connected process; two-thirds of the ninety-four district courts have authorized it as a distinct ADR process. [90] Almost one-quarter of the districts authorize early neutral evaluation, with smaller numbers including rules for summary jury or bench trials, mini-trials, or settlement weeks. [91] Slightly more than one-third authorize multiple forms of ADR. [92]

Along with these new programs, judges have continued to conduct settlement conferences. [93] A few districts placed settlement conferences in their ADR programs. [94] However, most courts did not integrate their provisions governing Rule 16 settlement conferences with the new rules they adopted for their ADR programs pursuant to the CJRA and the ADR Act. This is perhaps understandable as a historical accident: courts incorporated settlement conferences and ADR programs into their procedures at different times and under distinct authorizations. Moreover, conceptually, ADR meant alternatives to traditional processes, while settlement conferences were, by this time, solidly traditional. [95]

***93** Even today, local federal rules typically do not cover settlement in a single coherent set of rules. The rules governing district court ADR programs often define "ADR" in a way that does not include either settlement conferences or judicial mediation, and only one-third of the local ADR rules even mention the settlement conferences authorized by Rule 16. [96] Procedures for settlement conferences tend to be covered, if at all, in a section of the local rules that is separate from the ADR provisions. [97] This continuing lack of integration seems strange given the common focus on settlement. And it has had practical consequences in that a judge's role as a settlement neutral is often treated differently in the two contexts.

Regardless of the structure of the local rules, the expansion of court-sponsored dispute resolution processes has led to changes in the roles judges play in managing settlement (as distinct from the roles associated with presiding as settlement neutral). When the only court-connected settlement option was a judicial settlement conference, a judge's management functions consisted primarily of initiating the conference process by encouraging (or ***94** requiring) parties to participate and considering what timing would be productive for settlement discussions. With multiple ADR options available, management functions expanded. [98] In many courts, judges became involved in pretrial settlement planning by assessing cases for the ADR program and, in courts with multiple processes, matching them with a specific ADR process. [99]

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An analysis of the current local federal rules reveals that judges are assigned multiple management functions for the settlement processes that courts offer through their ADR programs. In some districts, they play a role in selecting a neutral, [100] in the timing of the process, [101] or in setting the fees for a neutral. [102] The most common judicial management function, however, is selecting an appropriate dispute resolution process. Many districts emphasize consultation with the judge at a case management conference as a means to encourage settlement efforts or to help the parties decide on the most appropriate dispute resolution process for their case. [103] While a few districts ***95** make their ADR programs strictly voluntary by rule, [104] many more districts grant judges authority to select a process and refer the parties, with or without their consent. [105] Hence, judges are often expected to participate in the decision to use dispute resolution, and they are frequently assigned responsibility for referring the parties to a particular process. [106]

Again, rather than leading change, Rule 16 was revised in a way that merely responded to these developments. The 1993 amendments to the Federal Rules of Civil Procedure reacted boldly to concerns about expense and delay with controversial new discovery provisions: initial disclosures of information [107] and presumptive limits on the number of depositions and interrogatories. [108] The settlement amendments to Rule 16, however, did no more than refine the authorization for judges' involvement in planning in a way that recognized the widespread adoption of court dispute resolution programs in the wake of the CJRA. A change in language emphasized the availability of court settlement procedures beyond the traditional judicial ***96** settlement conferences, [109] and the advisory committee notes stressed the new judicial planning roles that accompanied these expanded settlement opportunities. [110]

Further, this amendment to Rule 16 reflected the institutionalization of ADR programs at the district court level through the local expense and delay plans. The Rule contained a new reference to procedures "authorized by statute or local rule," which signified a shift from experimentation by individual judges to more predictable procedures adopted by each district. [111] In this way the amendment could be seen as a mild limitation on judicial discretion. [112] The overall message, however, emphasized the great degree of discretion associated with settlement. The Seventh Circuit had recently upheld the exercise of judicial discretion to order a party to attend a Rule 16 settlement conference as grounded in the court's inherent power. [113] Although procedural rules can limit courts' authority to use their inherent power, [114] the drafters of the 1993 amendments did not seek to restrict this exercise of discretion. Instead, the advisory committee notes contain multiple references recognizing the inherent powers of courts in the context of settlement and disavowing any intent to limit reasonable judicial exercise of those powers. [115] Thus the amendments were consistent with the views of judges who rejected the proposition that Rule 16 was "designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences." [116] And significantly, the Rule's endorsement of a broad scope of judicial discretion ***97** continued to blend the (now expanded) pretrial roles of promoting, organizing, and planning for settlement with authorization for judges to act as the settlement neutrals.

D. *Stage 4: Influence of Mediation on Judicial Settlement Practices*

In a fourth phase of development that overlaps chronologically with the growth of ADR programs in courts, the nature of judicial involvement in settlement has continued to evolve. Although there is a dearth of information on how judges actually behave in settlement, [117] there is some evidence that in recent decades mediation has exerted an increasing influence on judicial settlement activity. Mediation practices and norms appear to have had a discernable effect on how many judges conceive their role--and on what they actually do--when they act as settlement neutrals. These developments in the way judges exercise this role make separating it from their adjudicatory and management functions all the more important.

By the mid-1990s, commentators were reporting that "most federal judges favor and actively promote settlement," [118] creating what James Alfini described at the turn of the century as a "settlement culture" in the courts. [119] In this culture, judges not only encourage settlement by referring parties to ADR processes, but they also frequently intervene directly in a role that Alfini tellingly labeled as "a mediator or case evaluator." [120] Alfini's phrase reflects many judges' expanded conception of their settlement roles to include facilitative mediation, but at the same time signals the ongoing vitality of more traditional settlement styles focused on evaluation. [121]

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In recent decades, judges have seen the growth in popularity of private mediation and the establishment of court-annexed mediation programs. They have had opportunities to learn to mediate: there are mediation training programs for judges [122] and articles for judges explaining how to mediate. [123] ***98** Judicial writing is replete with enthusiastic stories about the benefits of mediation [124] and what Professor Jennifer Reynolds has called "conversion narratives" that focus on the "substantive justice benefits" of mediation's alternative perspective. [125] Some courts have established mediation programs in which judges officially serve as mediators. [126] More generally, many individual judges now incorporate aspects of mediation when they serve as a settlement neutral. [127] In this context there are judges who conduct what they ***99** explicitly label as "mediation," [128] and other judges who advocate techniques for what they call "settlement conferences" that closely resemble methods associated with facilitative mediation. [129] When set alongside more traditional judicial roles in settlement, the result is a melange of many different approaches.

The labels "mediation" and "settlement conference" are not very helpful for informing parties what to expect in a settlement process. As a starting point, although local court rules frequently authorize the two processes separately, [130] creating an implication that they are distinct processes with separate identities, there is no precise understanding of the differences between them. [131] The labels encompass widely varying and overlapping practices, making their use problematic. [132] As might be expected from a process that is considered part of managing cases, a judge hosting a conference might issue orders and limit issues, or alternatively conduct a process that appears identical to a mediation session. [133] To confuse matters even more, although the type of process can have important legal consequences for confidentiality protections, [134] participants and observers often make no distinction at all ***100** between settlement conferences and mediation, treating them as equivalent. [135] Others simply label them based on the position of the neutral, calling any settlement procedure conducted by a judge a "conference." [136] This lack of clarity in terminology illustrates the difficulty of distinguishing the processes based on their characteristics.

Along with confusion about designations, the distinction, in actual practice, between judicial behaviors in settlement conferences and mediations is not particularly clear. Even when comparing settlement conferences conducted by judges with mediations conducted by private neutrals, the contrasts are based, at best, on loose generalizations about the processes. In characterizing mediation and settlement conferences, Roselle Wissler notes a greater tendency in mediation to emphasize party involvement and to give prominence to the importance of parties' views and interests. [137] As a corollary to this, mediators are likely to spend more time "eliciting information from the ***101** parties than providing information to them." [138] Their orientation toward facilitating party self-determination [139] makes mediators less likely to use "strong-arm tactics" than judges in settlement conferences. [140] And mediators are thought to be more likely to adopt a problem-solving approach than the predictive or evaluative methods typically associated with judges. [141]

Wissler stresses, however, that these differences between judicial settlement conferences and private mediations are "more a matter of degree than kind." [142] Difficulties in separating the processes stem in part from the wide range of approaches that mediators employ, which can encompass both facilitation and evaluation. [143] Moreover, the plethora of retired judges who ***102** have developed second careers as private mediators has further muddied the distinction, as some of them have transferred stereotypical settlement conference techniques to mediation. [144]

If it is difficult to separate judges' behaviors in court settlement conferences from those of private mediators, it is even more difficult to distinguish between behaviors in "settlement conferences" and "mediation" when both are court processes conducted by judicial officers. [145] Professor Peter Robinson, who surveyed judges for a study of settlement practices in California, found that the judges did draw a distinction between the two processes, at least in terms of labels. [146] Questions designed to elucidate the differences, however, revealed that judges who engaged in both settlement conferences and mediation described a substantial overlap in the techniques they used in the two settings. [147]

The picture that emerges from recent accounts of judges' approaches to settlement in these two contexts is one of some convergence between the ***103** processes, [148] but with significant variation [149] that seems to depend largely on individual style and training. [150] Notwithstanding the judges who identify themselves as facilitators, many judges believe that lawyers and

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parties want an evaluation. [151] And certainly judges' adjudicatory experience can predispose them to an evaluative role. [152] A judge's approach may also reflect the stage of the settlement talks. Several judges, for example, describe beginning a conference with a facilitative approach and moving toward a more evaluative mode. [153]

It appears that facilitative mediation has become a more important part of the mix of approaches that parties encounter in judicial settlement processes, but it coexists with a more traditional conception of an evaluative, and even directive, settlement judge. This coexistence has two consequences for the regulation of these processes. First, it does not make sense to regulate judicial ***104** involvement in mediation and settlement conferences separately, as is now typically done in local federal rules. [154] Second, any form of regulation must take into account the great variation in styles and approaches that judges deploy as neutrals in these processes. While evaluative techniques emphasize predictions and suggestions that flow from the neutral to the attorneys and parties, use of facilitative techniques mean that information flows in the opposite direction. [155] This information is different in kind from the knowledge about a case that a judge ordinarily gains as part of pretrial management, in deciding pretrial motions, and at trial. And it can come from an additional source--the parties--as well as the attorneys. [156] As a consequence, the increased popularity of mediation makes settlement by adjudicative judges more problematic.

The current version of Rule 16 [157] accommodates this variety of judicial approaches and settlement styles by its silence on this matter, which translates into granting judges nearly complete discretion for conducting settlement proceedings. The Rule 16 framework continues to blend authorizations for disparate judicial functions related to settlement. This extends the discretion associated with pretrial management to the role of settlement neutral, allowing judicial officers to host a settlement conference or mediate even when assigned to the case.

***105** III. NEUTRAL ROLES: WHEN A DECIDER BECOMES A SETTLER

The following section starts in Part III.A by examining the benefits of judicially-led settlement, but then distinguishes settlements led by an assigned judge from those led by other judicial officers. In Part III.B, it explains why the blending of adjudicatory and settlement functions is problematic for two reasons: the potential for coercion in settlement and the dangers of undermining the impartiality at the heart of our adjudicatory values. These risks are exacerbated by the trend toward the use of facilitative mediation techniques by judges. The concerns are expressed by attorneys with experience in judicial settlement and by some judges, as well as by academics. Crucially, they are supported by modern scientific understandings of cognition and decisionmaking processes, which are outlined in Part III.C.

A. *The Advantages of Judicially-Led Settlement*

There can be distinct advantages to settlement conducted by a judicial officer. An individual judge may have a reputation for wisdom and fairness, [158] and these traits also tend to be imputed in general terms from the "gravitas" of the judge's position and respect for the moral authority and integrity associated with the impartiality and independence of their office. [159] Other advantages stem from the legal acumen and experience that a judge brings to a settlement process. [160] These factors do not compensate for lack of skill, [161] but ***106** judges who combine skill with the attributes of their position can be particularly effective settlement neutrals. [162]

Judges carry special credibility for functions that draw on legal analysis and expertise: evaluating the value of a case, analyzing parties' positions, and predicting outcomes. [163] Significantly, many lawyers see these activities as an important contribution toward settlement. Based on his survey of lawyers, Wayne Brazil characterized the strength of judges' contribution as "skill in judging." [164] He concluded that "[l]awyers value penetrating, analytical exposition and thoughtful, objective, knowledgeable assessment. They want the judges' opinions. They want the judges' suggestions. They want the perspective of the experienced neutral." [165] Lawyers cite the benefits of a judge who provides a "reality check" for a client who has an inflated view of the strength of her case. [166] Judges may also provide insights about the litigation process that a client may not have fully accepted even if he previously heard the same information from counsel. [167] While any mediator may (and some routinely do) provide such information, explanations about the hurdles involved in proving a case or sobering assessments of its strength can be

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particularly effective coming from a sitting judge. [168] A judge's current, direct ***107** experience with local juries and motions outcomes heightens confidence in her predictions. [169]

In addition to the advantages of their informed legal analysis, the participation of a judge also offers the possibility of some psychological benefits. Many judges believe that, for some clients, an ADR session with a sitting judge can provide a satisfactory substitute for having a day in court. [170] Observers also credit the participation of a sitting judge with beneficial effects on litigants' behavior. [171] Attorneys may act more constructively when there is a chance that they will appear before the judge in the future. [172]

Finally, a judge's participation as a settlement neutral can promote the interests of justice. Support for court settlement programs is consistent with a vision of courts as public institutions that provide services to help parties resolve their disputes in a holistic manner. [173] ADR programs that rely on referrals to outside mediators or other neutrals impose costs that litigants do not incur when a court provides the settlement process. Furthermore, when settlement neutrals are judicial officers, at least some observers credit them with using their skills and powers to achieve substantive outcomes in settlement that promote the interest of justice, [174] that the parties think are fairer than an imposed decision, [175] and that may serve the parties' needs and interests better than adjudication. [176]

Many of these real advantages of judicial settlement or mediation can be achieved with a separate settlement judge--one who is not assigned for pretrial development or to preside at trial. Some do argue that a judge's contribution is stronger if the settlement effort is led by the assigned judge. [177] For example, there are judges who believe that parties are more likely to feel they have had a true "day in court" when they can tell their story to "their" ***108** judge. [178] However the parties' perception that they have been heard is likely enhanced only incrementally when the assigned judge serves as the settlement judge, especially if the alternative is a judicial officer from the same court. [179]

The more significant advantage of settlement by an assigned judge, and the strongest argument against referral to another judicial officer, is probably informational. [180] A judge who has ruled on pretrial motions and discovery issues has personal knowledge of the facts, the parties, and counsel that a colleague on the court cannot possess at the start of a settlement process. [181] This familiarity increases the efficiency of settlement [182] and may make the assigned judge more accurate in evaluating the strengths and weaknesses of the case. [183] The informational argument loses force, however, if settlement occurs early in the case before extensive pretrial activity. [184] Moreover, the possible gains in efficiency when an assigned judge serves as settlement judge must be weighed against the very substantial risks.

B. *Risks of Judicially-Led Settlement*

There are risks to judicially-led settlement. And those risks are exacerbated when the settlement judge is also the managerial/adjudicatory judge. This Part presents arguments that these roles are in conflict and should be separated. First, the potential for coercion due to the behavior of the settlement neutral is greatly heightened when the parties will return to that neutral for pretrial and trial decisions. Second, there are dangers for both the settlement and decisionmaking processes. Either a party must forgo ***109** participating fully in settlement by revealing information that could be instrumental, or it must accept the risk of impaired neutrality in adjudication if the case does not settle.

1. *The Potential for Coercion*

The potential for coercion was the original source of hesitation about a judicial role in settlement, [185] and it continues to be a frequent objection today. [186] A sense of being coerced into settling is in the eye of the parties and their attorneys, and there are two potential sources: judicial behaviors during settlement and pretrial decisions and management designed to encourage settlement.

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When considering judicial behavior, it is helpful to remember that the role of a judge in the adjudication process is by its nature directive.[187] This personal experience, combined with the predilections of some judges, can lead them to be forceful arm twisters.[188] Such behavior on the part of any settlement neutral can threaten the parties' self-determination, but there is a heightened danger when the behavior comes from a judge: the authority of the office accompanies a judge even in an informal process such as a settlement conference or mediation.[189] The gravitas that can be a positive source of credibility for a judge leading a settlement process can, when misused, turn the judge into a coercive authority figure in the parties' eyes.[190]

The potential for coercion is elevated many fold when the arm twisting, or even less forceful encouragement, comes from a judge who will have decisional power over the case if it does not settle.[191] This stems from parties' ***110** natural fears that the judge's subsequent rulings might be influenced by their failure to cooperate with the judge.[192] Judges are under great docket pressure, and parties worry that repercussions could follow when the judge knows a party rejected a settlement backed by the judge.[193] Defenders of a dual role for judges as a neutral, both in settlement and at trial, reject this specter of retribution as an unrealistic fear that underestimates judges' understanding of their role.[194] But even if judges are able to see the parties' failure to settle in completely benign terms, a party's perception may be very different.[195] When a judge has urged settlement forcefully, a party may understandably interpret settlement as being important to that judge.

More generally, judges' perceptions of their behaviors are not always aligned with the reactions of attorneys and parties.[196] Actions that a judge may regard as merely supportive of settlement may nonetheless be perceived as pressure on a party due to the judge's position of power over the case.[197] For example, a judge's pride in his "assertive" style, which he believes promotes settlement in difficult cases, can blind him to the risk that he is imposing settlement coercively.[198]

It is impossible to assess accurately the degree to which parties perceive judges as unduly forceful in settlement, but there are too many troubling accounts of behavior that, even if only isolated instances, could be coercive.[199] ***111** Consider the judge who reportedly instructed plaintiff's counsel to "tell his client he'd better settle or there would be 'reverse interest' if the damage award was lower."[200] Or the judge who threatened contempt and warned that he would take defendant's refusal to settle into account in considering any fee application.[201] Then there was the judge who allegedly threatened to report a party to the ethics committee if the mediation did not succeed.[202] Even less explicit threats, such as an admonition to settle "because I can guarantee you much pain,"[203] or a judge's antagonistic reaction to counsel's statement that mediation would not "work out right now,"[204] can be interpreted as coercive. The potential coercion in all these instances, and the interference with the parties' autonomy and self-determination in settlement, arises because the judge will become the decisionmaker if the case does not settle.[205]

There can also be an important link between actions a judge takes in her pretrial management role--whether for the purpose of encouraging settlement or not--and a perception of coercion to settle.[206] Tight scheduling timetables or the timing of decisions on pretrial motions are often interpreted as ways to increase pressure to settle.[207] Preliminary rulings can increase or decrease ***112** uncertainty in ways designed to encourage settlement.[208] Prospective decisions that rest with the court's discretion and are of great importance to the lawyers--ranging from class certification to discovery decisions to admissibility of expert testimony--give the judge subtle and implicit leverage over the lawyers, who want the judge to view them as reasonable and cooperative.[209] Using judicial decisions to create motivation to settle can be abused, or perceived to be abused, by a judge who is enthusiastically promoting settlement.[210]

Unfortunately, mechanisms to remedy coercive judicial settlement behavior are not effective in practical terms. One problem is definitional. Courts consistently agree that a judge may not coerce or force a settlement,[211] and some condemn even the appearance of coercion.[212] Yet judges have abundant discretion in settlement, and the boundaries of appropriate judicial involvement are hazy. While the stricture against coercion in settlement may be clear at the extreme,[213] the line at which a judicial practice crosses from (acceptably) encouraging a settlement to (unacceptably) coercing one is certainly not bright.[214]

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A second set of problems is procedural.[215] Critical or even hostile remarks made during judicial proceedings ordinarily do not require recusal unless they stem from an extrajudicial source or are especially extreme.[216] Standards for recusal are difficult to meet; unless a judge learns information outside of court proceedings, he must display such a "deep-seated favoritism or antagonism" that fair judgment would be impossible.[217] Even when a judge's comments are ***113** motivated by "settlement fever," they do not justify disqualification.[218] Moreover, the decision to press a disqualification motion is a daunting prospect for a party who will later be appearing before that same judge if the motion fails.[219] Finally, there is little opportunity for review of a judge's settlement activity.[220] It is an informal process that usually takes place off the record, often in the privacy of the judge's chambers. As with much pretrial judicial activity, there are few procedural paths to an appellate court.[221]

2. ***The Dilemma of Risk to Impartiality or Risk of Reticence***

Many of the participants in the debate on judicial settlement have also expressed concern about a second danger that arises when the judicial officer leading the settlement will resume or assume a decisionmaking role if settlement is unsuccessful: the effect of the judge's experience as settlement neutral on the capacity of the judge as adjudicator. The argument has been traditionally framed as one of bias or partiality: that involvement in settlement makes it difficult for a judge to maintain her neutrality about the case.[222] As stated by James Alfini, "The judge *qua* settlement agent may very well have formed opinions or impressions about the case that are inappropriate for the judge *qua* adjudicator."[223]

For a traditional settlement conference that involves an evaluative approach, one of the primary criticisms of a judge presiding in a case she has tried to settle is that, by conveying her assessment of the case or suggestions for settlement options to the parties, she formed a preliminary judgment about the outcome that may trigger a tendency toward making subsequent judgments consistent with her initial views.[224] This criticism has support from modern understandings of the effect of tentative opinions on cognitive functioning.[225] Conversely, a decision that is inconsistent with the prior views a judge expressed as a devil's advocate in caucus may equally cause a party to ***114** question that judge's impartiality.[226] Yet, courts disagree as to whether taking a position on the merits of a case during an unsuccessful settlement conference creates an appearance of bias, leaving recusal uncertain.[227]

When the criticism is framed, in this way, as a concern with the judge's formulation of a premature evaluation of the case, one possible solution is that assigned judges should avoid making predictions or suggestions in settlement.[228] Under this view, using facilitative mediation, rather than the evaluative approach associated with traditional settlement conferences, can alleviate the problem of bias because the judge avoids making predictions and providing suggestions for outcomes.[229] From this perspective, the trend toward judges' increased use of facilitative mediation is good news that reduces the danger to their subsequent neutrality as decisionmakers.

I believe that the opposite is true, and that the growth of judicial mediation poses new dangers for impartiality in subsequent decisionmaking. Although judges who adopt the role of a facilitative mediator are not as likely to evaluate the case for the parties, a facilitative approach to mediation tends to rely heavily on parties sharing information with each other and with the mediator.[230] Moreover, many mediators have conversations with the parties separately in caucuses and take on the role of an intermediary between them.[231] This intermediary role depends entirely on information gained in those private conversations.[232] The danger to impartiality is the extensive ***115** amount of information--unfiltered by the rules of evidence--that judges obtain during informal mediation proceedings.[233] While an evaluative approach poses problems when a judge communicates conclusions to the parties, the information that flows in the opposite direction in a facilitative process--from the parties to the judge--poses its own risks to adjudicative decisions.[234]

The argument against connecting impaired impartiality with making suggestions and predictions or hearing sensitive information in settlement is that judges can compartmentalize their knowledge and ignore what they should not consider. In the words of one judge, judges are expected to separate their thoughts for separate rulings all the time.[235] They hear both admissible and inadmissible information when they decide pretrial motions, make evidentiary rulings, and dispose of posttrial motions.[236] The general presumption is that judges can be trusted to maintain impartiality by separating what they

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may appropriately consider from what they may not,[237] and this presumption extends to what judges learn in settlement conferences.[238] Evidence that judges, like other humans, have difficulty disregarding irrelevant information suggests that this confidence may be misplaced.[239] But even if we must accept, as a general matter, the risk that inadmissible information may affect decisions, the type of information conveyed in settlement discussions raises much more acute concerns. Stated simply, it is different in kind.[240]

For judges functioning as mediators, information gathering from the parties is central to the process of reaching an agreement.[241] Mediators do not just hear inadmissible information; they hear personal information, and they ***116** hear it from parties as well as from their attorneys.[242] To help the parties settle their dispute, it is important for a mediator to learn "about the parties' feelings, motivations, relationships, values, standards and priorities--topics generally irrelevant to a judge."[243] It is commonplace, for example, for parties in meditation to describe their personal interests. For example, a mediator may learn why a party needs to settle quickly, or why a party needs a particular sum of money. And this is not dry information; parties often express their personal situation in emotional terms, which makes it especially salient and more accessible in the judge's memory.[244] A mediator is also likely to become privy to parties' strategies, priorities, and trade-offs as she discusses their bargaining concessions.[245] Moreover, in the course of these discussions she is bound to gain an impression of each party's degree of cooperation and willingness to settle. Perhaps most significantly, the discussion is likely to cover extensively the attorneys' assessments of their cases: their view of the most likely outcome, the litigation cost, and the bottom line for reaching an agreement. Indeed, it "would be difficult ... to conduct a settlement conference without at some point dealing with the issue of value."[246] The key point is that exposure during settlement to the parties, to their strategies, and to the settlement value of a case go far beyond what judges usually learn in their adjudicatory and managerial roles.

The potential effect of this knowledge on a judge's subsequent decisionmaking needs to be taken seriously. As recognized in an American Bar Association (ABA) ethics opinion on settlement, such disclosure to the judge of a client's settlement position significantly increases the potential for an unsatisfactory disposition of the case.[247] The Judicial Conference's Committee on Codes of Conduct concurs, concluding that information from settlement that is not likely to be presented at trial "may undermine the judge's objectivity as a fact finder and give rise to questions about impartiality."[248] Standards for recusal and disqualification are not, however, tailored for ***117** settlement and do not provide an effective vehicle for considering the effect of information from settlement on subsequent decisionmaking. While there are court decisions that condemn mediator reports to assigned judges or testimony that reveals information learned in mediation,[249] such knowledge does not usually lead to disqualification of the judge.[250] Even when a judge gains knowledge about what transpired in mediation directly from his role as the settlement neutral, the effect of that knowledge tends to be treated as benign.[251] Courts have interpreted the federal statute on disqualification and recusal for bias or prejudice[252] in light of the "extrajudicial source" doctrine.[253] The judge's favorable or unfavorable opinion must be wrongful either because it is "excessive in degree" or based on extrajudicial knowledge.[254] This means the bias cannot be "derived from the evidence or conduct of the parties that the judge observes in the course of the ***118** proceedings."[255] A judge's knowledge acquired from participating in a settlement proceeding is not "extrajudicial," and thus does not necessitate recusal.[256]

A party may choose to avoid the risk of sharing information that might affect future decisions of the neutral,[257] but the cost of reticence can be high. The reason this information is shared is that it is helpful to the settlement process. Withholding it handicaps a mediator and very likely reduces the chances of settlement, or at least the responsiveness of the settlement to the party's needs.[258] Thus a party whose mediator is also the decisionmaker in a case faces a difficult choice: accept the risks to impartiality of sharing sensitive information with a looming trial, or risk a less effective settlement process.[259]

3. *From the Trenches: Attitudes of Attorneys*

The risks are also expressed by lawyers with reservations about a dual role for judges. Despite expressing a high degree of approval for a settlement judge's participation in settlement negotiations, almost 60% of the lawyers who responded to Wayne Brazil's study in the early 1980s felt it was improper for the judge assigned to conduct a bench trial to preside over a settlement process.[260] The assignment for trial also had a strong effect on lawyers' ***119** acceptance of judicial settlement techniques.

For example, while the vast majority (86%) believed that, in general, it was proper for a settlement judge to suggest a dollar range for a reasonable settlement, the approval rate for this technique plummeted (to 30%) if the judge was assigned to the case for trial. [261]

Brazil's findings on lawyer preferences are consistent with a more recent study conducted by Roselle Wissler in the Southern District of Ohio that allowed a comparison of attorneys' attitudes about settlement conferences conducted by judges assigned to try the case, and those who are not. [262] While the lawyers' first choice of process was mediation with court staff mediators, they voiced a statistically significant preference for settlement conferences with judges not assigned to the case as compared to conferences with assigned judges. [263] The data suggest three reasons for this strong preference. First, the lawyers rated judges who were not assigned to the case equivalently or more highly than assigned judges on multiple dimensions, which suggests that they did not see any particular advantage to settlement with an assigned judge. [264] Second, and even more importantly, the lawyers thought judges assigned to the case for trial were much more biased than non-assigned judges. [265] Third, they confirmed the problem of reticence; they thought that when settlement conferences were led by judges assigned to the case, parties were less able to discuss the case candidly and fully explore settlement options without possible negative consequences or prejudice to the ongoing litigation. [266] Thus, lawyers ***120** experienced in settlement conferences expressed significant concerns about the participation of judges assigned to adjudicate the case.

Similarly, in Brazil's earlier study in other districts, overall the lawyers preferred facilitation by a separate settlement judge. This preference was based on concerns for propriety, but it was also coupled with a "positive overall assessment" of how much a separate settlement judge could contribute to the process. [267] Brazil concluded that lawyers are "confident that courts can delegate responsibility to conduct settlement negotiations to settlement judges (not the assigned judges) without sacrificing the effectiveness of judicial intervention in this important process." [268] Both studies show that, in the lawyers' eyes, the disadvantages and risks of judges' participation in settling cases assigned to them for trial outweighed any extra effectiveness conferred by prior exposure to the case.

C. *Insights from Modern Science: The Decisionmaking Literature*

When Professor Resnik wrote her article, she speculated that pretrial management could lead to bias, but could only note that we still had much to learn about how prior knowledge affects the formation of opinions. [269] In contrast, in today's world a book on cognitive function has popular appeal, and there is widespread familiarity with the distinction between thought processes framed as "thinking fast" (automatic thinking) and "thinking slow" (careful deliberation). [270] The concepts are so mainstream that an executive order encourages federal agencies to use behavioral science insights to improve policies and programs. [271] These current understandings of the way humans think and make decisions are also relevant to the dynamics that occur when a single judicial officer serves as a neutral for both settlement and adjudicative decisions. They can provide new perspectives on the mental processes at work and shed important light on concerns about maintaining impartiality.

Psychologists theorize that thinking and decisionmaking operate on two levels, which are often labeled System 1 and System 2. [272] System 1 processes ***121** are "spontaneous, intuitive, effortless, and fast." [273] They operate with "no sense of voluntary control." [274] System 2 processes, in contrast, are "deliberate, rule-governed, effortful, and slow." [275] They are associated with the exercise of "agency, choice, and concentration." [276] The two systems act in concert. System 1 (the automatic system) is the main source of impressions and feelings. These impressions and feelings fuel the "beliefs and deliberate choices of System 2" (the effortful system). [277] System 2 can produce careful, systematic thought, but it also endorses many intuitive reactions derived from System 1 impressions, meaning that System 1 influences even careful decisions. [278]

A model of judicial decisonmaking drawn from these insights by Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich "posits that judges make initial intuitive judgments (System 1), which they might (or might not) override with deliberation (System 2)." [279] This cognitive conception of legal decisionmaking contemplates a fluid interaction between reasoning and more intuitive thinking: a judge may maintain her initial, quickly proposed solution, or may modify it after careful, systematic consideration. [280]

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When Guthrie and his co-authors tested their model on judges, they found that, like the rest of us, many of them make incorrect intuitive judgments about problems when the right conclusion requires deliberative reevaluation. [281] They also asked judges to make decisions based on hypotheticals designed to match situations that judges commonly face. These experiments showed that, in many settings, judges rely on heuristics--mental shortcuts associated with System 1 thinking--that can produce systematic errors in judgment. [282]

***122** Some of these heuristics, or "cognitive illusions," [283] are especially problematic when a judge has conducted a settlement conference. The most obvious source of potential bias is anchoring, a commonplace cognitive phenomenon that affects people when they make quantitative judgments. Individuals are influenced by the first number available to them, which creates an "anchor" that pulls their estimate up or down. [284] Even if this anchor is something completely ridiculous, it can alter one's judgment. [285]

Experiments indicate that judges are susceptible to anchors based on settlement demands when making damage awards. Judges were asked to determine damages for pain and suffering in a personal injury suit following an unsuccessful settlement conference with the judge. [286] Those in one experiment were told that the plaintiff had demanded $175,000 in the settlement talks (low anchor), while judges in a second experiment were told the plaintiff asked for $10 million (high anchor). [287] In both experiments, a control group of judges was not given any demand figure. [288] The applicable evidentiary rules required the judges to ignore the amount of the settlement demands, and they were reminded of this in the scenario. [289] Yet the awards by judges who had numerical information about the settlement demand were significantly higher, or lower, than those in the control group, depending on the anchor. [290] The pull of the anchors was so strong that the judges were ***123** influenced despite the fact that they knew the settlement demands were irrelevant. [291]

An actual settlement situation will often provide judges with even more anchoring information than the experiments: judges are likely to learn not only demands, but also the parties' bottom lines. Settlement judges are also routinely exposed to other information that can influence their views. [292] And, while judges tend to be confident about their ability to compartmentalize and ignore inadmissible information, [293] intentionally disregarding or forgetting is a difficult mental task. Judges are likely to find it hard to ignore knowledge such as a party's statements of personal interests, goals, and priorities, or the judge's impression of a party's degree of cooperation in the settlement process. These factors would not normally be relevant to the judge's legal determinations, but such information is likely to have a persistent effect on her judgment. Experiments with judges given a variety of inadmissible ***124** information indicate that, in many cases, they were unable to ignore it in making legal decisions. [294]

One explanation for why the task of disregarding information is so challenging is that information produces what psychologists call "mental contamination," which persists even if a person recognizes that the information is misleading or inaccurate. [295] The brain stores information in a holistic manner using cognitive organizing principles called schemas that then influence how additional stimuli are processed. [296] Thus, the influence of the initial information (for example, something a judge learns during settlement that he knows should be ignored) persists through the schema and affects the ways that later information is interpreted. Disregarding information is also difficult because of the phenomenon of "belief perseverance." New information is incorporated into a person's existing knowledge quickly and ideas formed unconsciously can persist, making it hard to eradicate beliefs based on that information. [297] Due to these characteristics of memory, "[m]erely ignoring the information itself is not enough." [298] Even if a judge can ignore a specific fact she learned during a settlement conference and prevent it from directly affecting her judgment, the attitudes and inferences that she associates with that information can still influence her decision indirectly. [299]

In addition to the mental challenges that a judge faces in trying to truly ignore irrelevant information, a prior role as a settlement neutral may also influence later decisionmaking because of a process known as "confirmation bias." [300] When seeking new information, people tend to look for information that confirms existing views and disregard information that challenges those views. [301] Moreover, that new information tends to be assessed in ways that are ***125** consistent with preexisting attitudes or expectations, which is known as "biased assimilation." [302] These effects are particularly strong in decisionmaking settings. In order to reduce cognitive dissonance, a person who previously made a choice tends to prefer information that supports that choice and to deprecate information that opposes it. [303]

One of the most effective methods for avoiding bias in a decisionmaking process is to deliberately consider opposing viewpoints and arguments.[304] This is consistent with the theory of the adversary process in which the decisionmaker hears arguments presented by both sides of a case. There are, however, two ways in which the adversary process might not work ideally as a debiasing mechanism following a settlement conference.

First, it is not uncommon for a settlement neutral to assess a case or suggest that parties settle for a particular amount, particularly in a traditionally evaluative settlement conference.[305] Even though a judge may not actually commit to any particular decision based on a preliminary assessment, cognitively this can be enough to trigger bias in subsequent interpretations of evidence. Research suggests that the tendency to seek confirming information operates not only to reinforce firm decisions, but is also triggered by preliminary decisions[306] and even by what cognitive scientists call "predecision" thinking.[307] Thus, an opinion a judge voices in settlement can influence the judge's interpretation of additional, more complete information added later at trial through an unconscious tendency to support the preliminary assessment.

Second, judges are privy to private information in settlement when they meet with parties in caucus. This ex parte information is not subject to rebuttal by the other side because it is unknown.[308] Thus, while evidence presented at trial may be sufficient to counter earlier impressions gained through traditional pretrial management, it cannot fully address impressions that stem from information conveyed to the judge in confidence during settlement.

There are factors associated with judging that may reduce the effects of System 1 thinking on judges' decisions. There have been suggestions that decisionmakers who are highly motivated to make accurate decisions may use ***126** more accurate reasoning.[309] As professional decisionmakers, judges would ideally display this motivation. The transparency of the judicial process may also help. Experimental evidence suggests that anchoring has less influence if people are told that they must explain their estimates,[310] so when a decision involves writing a judicial opinion, that may constrain anchoring bias.

More generally, accountability can be seen as an incentive that increases willingness to put more effort into the decisionmaking process by using System 2 thinking.[311] Since judges are accustomed to public scrutiny of their decisions, at the very least by parties and their attorneys, this may reduce the bias introduced by participating in settlement. There is, however, growing evidence that all forms of accountability are not equal. People who know they will have to justify the process behind their judgment display more accurate and unbiased decisionmaking than those who are merely held accountable for the outcome of the process.[312] Judges' opinions typically justify the outcome of their decisions, not the decisionmaking process. And unfortunately, other key factors that encourage deliberative thinking, such as prompt and accurate feedback, are missing from the judicial decisionmaking environment.[313]

In evaluating the cognitive effects of participating in settlement, it is particularly important to be skeptical of judges' own assessments of their abilities. This is because positive cognitive illusions make it difficult for judges to evaluate their own decisionmaking objectively. "Overconfidence" means we don't allow sufficiently for uncertainty in the judgments we make.[314] This tendency is increased with access to evidence for only one side of a story.[315] "Egocentric bias" means we overestimate our abilities and make judgments consistent with our own point of view.[316] Judges are no different.[317] Yet despite the cognitive evidence to the contrary, some judges are very confident that they can ignore what happened during settlement in subsequent proceedings.[318] This is likely to be overconfidence, which can exacerbate the ***127** problem by preventing a judge from recognizing the effects of settlement conferences on her decisionmaking. This lack of recognition is, in turn, likely to reduce the vigilance that might help judges deploy System 2 deliberative thinking to avoid the distortions settlement conferences can introduce. Even under the best of conditions, fighting these tendencies is difficult, for judges just as for the rest of us, because they operate at an unconscious level.

These cognitive insights are in tension with current standards for judicial conduct and settlement practices, which are examined in the following Part. The after-the-fact remedies for bias also provide an illustration of how legal standards fail to reflect modern conceptualizations of bias and its sources. The recusal and disqualification statute,[319] for instance, applies when a judge has an opinion, either favorable or unfavorable, "that is somehow wrongful or inappropriate, either because it rests upon knowledge that the subject ought not possess, or because it is excessive in degree."[320] Knowledge that a subject "ought not

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possess" is limited to extrajudicial sources of information; this limitation reflects a traditional conception of judicial activity that does not contemplate judges' modern roles in conducting settlement. The alternative prerequisite, that a judge's opinion must be "excessive" in order to be inappropriate, means that the judge must express a strong identifiable animus or favoritism. This focus on only expressed, pronounced bias reflects an outdated, confident view of rational decisionmaking that does not recognize psychological insights into actual behavior. Information shared in settlement may skew or distort a judge's subsequent attitudes, and perhaps decisions about a case, even without producing any visible animus or strong favoritism. This modern understanding of the subtle operation of bias supports the view that knowledge gained in settlement raises questions about impartiality. Because judges can avoid this knowledge, it should be regarded as "inappropriate" even if it is not "extrajudicial."

IV. LIMITING (APPROPRIATELY) THE JUDICIAL ROLE IN SETTLEMENT

The final Part of this Article evaluates possible mechanisms for avoiding the problems of dual neutral functions in the settlement context. Part IV.A reviews efforts to restrict judges assigned for trial from serving as a settlement ***128** neutral as an ethical matter. I conclude, given the failure to incorporate any restrictions on settlement activity into recent revisions of ethical standards, that this is not a promising avenue. Part IV.B considers proposals to better define acceptable judicial behaviors in settlement. I argue that this approach is an incomplete solution that could have deleterious side effects and is likely unworkable. Part IV.C explores the most promising path for reform: separating the roles of settlement and adjudicative neutrals by limiting the authorization for settlement activity in Rule 16 and other procedural rules. This structural solution would be a preventative measure, and hence more effective than after-the-fact evaluations for disqualification based on the circumstances of particular settlements (which are problematic for the reasons described above). There is precedent for this approach in some local district court ADR rules and state confidentiality provisions that apply principles of separation to reduce the risks of both coercion and partiality. This Article closes by urging rulemakers to draw on these local and state rules and to extend their principles to the regulation of settlement conferences.

A. *Limiting the Judicial Role in Settlement as an Ethical Principle*

In the most recent attempts at reform, the focus on limiting the settlement role of judicial neutrals in assigned cases centered on ethical obligations. For federal judges, judicial ethics are governed by the Code of Conduct for United States Judges. [321] State court judges are subject to the code adopted in their state, [322] some of which make no mention of settlement. [323] Historically, both federal and state codes have been influenced by the ABA Model Code of Judicial Conduct and its predecessors. [324]

An opportunity to strengthen the provisions on settlement in the ABA Model Code arose when the ABA undertook a revision beginning in 2003. [325] In 2005, the ABA Section of Dispute Resolution presented a proposal to revise ***129** the provisions on judicial ethics on settlement. [326] It provided that a judge should not act as a mediator if he or she would also be judging the merits of the case. [327] In addition, the merits judge would receive very limited information about the mediation: only whether a mediation was held, who attended, and whether a settlement was reached. [328] This proposal was rejected.

The revision process culminated in the adoption of the 2007 ABA Model Code of Judicial Conduct, which does not even address whether a judge who participates in settlement efforts should be permitted to hear the case if those efforts are unsuccessful. [329] Instead, Rule 2.6, Ensuring the Right to be Heard, merely states:

> A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement. [330]

Elsewhere, the Model Code prohibits, as a general matter, ex parte communications concerning pending matters. [331] But there is an explicit exception for judges, "with the consent of the parties," to "confer separately with the parties and their lawyers in an effort to settle matters pending before the judge." [332]

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The current official Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States, has an almost identical provision. Canon 3 prohibits ex parte communications on the merits in pending matters but has a similar exception, which provides that a judge may "with the consent of the parties, confer separately with the parties and their counsel in an effort ***130** to mediate or settle pending matters." [333] The commentary states that "[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts." [334]

It is interesting that both of these provisions stress preventing coercion in settlement, rather than the usual worry stemming from ex parte communication: unrebuttable information that can skew decisionmaking. To the extent these settlement exceptions ignore the informational consequences of ex parte communication in settlement, they stand in tension with the general principles of due process in adjudication.

In 2009, the Judicial Conference's Committee on Codes of Conduct interpreted the official Code of Conduct's settlement provision in an advisory opinion: *Judges Acting in a Settlement Capacity*. [335] The Committee determined that a trial judge's participation in settlement efforts in a case assigned to her for trial is not "inherently improper under the Code." [336] It relied heavily on the Rules of Civil Procedure and local rules in reaching this conclusion. The opinion stressed the fact that "Rule 16 does not prevent a judge who engaged in settlement discussions from presiding over a trial," [337] and concluded that, while a judge's actions could raise concerns in a particular case, there is no per se impropriety in an assigned judge leading settlement discussions or conducting a trial afterwards. [338] Local procedural rules that explicitly permit the practice "lend[] support to the propriety of a judge's actions in this respect." [339]

One way to read the canon and its interpretation is that it extends the discretion granted in Rule 16 from procedural rules to ethical rules. The Committee concluded that, in the absence of a local rule prohibiting a dual neutral role, ethical concerns should be evaluated by considering settlement practices on a case-by-case basis. [340] The Committee felt that such concerns are less serious when a judge who has led settlement negotiations presides over a jury trial, or when the parties have consented to the dual role. [341] They also identified the type of information learned in settlement as an important variable, observing that, "The extent to which a judge's impartiality may be compromised, ... will depend in part on the nature and degree of the judge's participation in settlement ...." [342]

***131** There are those who express discomfort with the discretion that implicitly accompanies this flexibility. They believe the canon is so elastic that it does not provide adequate guidance, instead allowing judges to conclude that a vast number of very different approaches to settlement are ethical. [343] Certainly the check on discretion prescribed in the judicial ethics opinion--a case-by-case, after-the-fact evaluation of the circumstances to determine their effect on a judge's impartiality--is not as prophylactic as a bright-line rule. Moreover, such evaluations require uncovering communications in mediation in ways that could either be blocked by confidentiality principles, or violate them. But perhaps the strongest argument against relying on ethical rules to limit dual judicial roles is a practical one: the proposal based on defining the problem as a matter of ethics was not approved. This was, at least in part, due to opposition from judges. They believe settlement is an important function of their job and oppose limiting their discretion to achieve it. [344]

B. *Limiting the Judicial Role in Settlement by Defining Acceptable Judicial Involvement*

For some, the concern with judicial activity in settlement is seen as a need to constrain problematic judicial behavior in settlement. This is primarily a concern about coercion. Under the discretionary framework that governs settlement conferences, statutes and court rules provide little guidance on acceptable judicial behavior in settlement. [345] One suggestion, raised by a number of commentators, is to adopt new ethical or procedural rules to clarify the appropriate limits of judicial settlement behavior. [346] Judge Cratsley, for example, notes the significant variability in judicial approaches to settlement and maintains that clearer rules will "promote litigants' confidence in the trustworthiness and fairness" of the judiciary. [347] These rules would presumably apply to all settlement judges, whether assigned an adjudicatory role or not. While some guidance is appropriate through education, and more work could be done to establish appropriate norms, in my view it would be unduly restrictive (and likely unworkable) to incorporate behavioral limits on judicial settlement into procedural or ethical rules.

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First, there is a wide range of acceptable behaviors and roles for neutrals in settlement and little agreement on particular limits. With regard to mediation, ***132** for example, there has been vigorous debate over the appropriateness of using evaluative techniques.[348] There are regional variations in practices such as using joint sessions, and variations based on the type of case, such as whether it is a commercial or family dispute. Thus it would be very difficult to agree on generally applicable, comprehensive guidelines with any meaningful specificity.

Second, there is a real danger that an effort to codify particular behaviors as acceptable for settlement neutrals would impair one of the great strengths of mediation: its flexibility. Good mediators (and good settlement judges) need to be able to tailor their approach to a particular case and to respond to the unique circumstances of the parties.[349] This means that discretion regarding approach and technique is useful, and excessive regulatory intrusion that introduces rigidity should be avoided.

Third, the proposals aimed at defining acceptable judicial behaviors in settlement address only half of the problem. They primarily react to worries about coercion in the settlement process by forceful judges. The solution (a more detailed settlement code of conduct) would not be particularly effective in reducing the risk of partiality stemming from dual roles in settlement and adjudication. To limit the potential for bias by regulating judicial conduct, a behavioral measure would need to restrict the information available to an assigned judge during settlement. But this would also impair his effectiveness as a settlement neutral.[350] One federal district court does have a local settlement rule of this nature. It addresses concerns about partiality by precluding judges presiding over settlement from obtaining the type of information that poses the most obvious risk: the parties' settlement offers and demands.[351] However, this restriction is remarkable for its rarity, probably because most districts recognize that it would reduce judges' effectiveness in the settlement context. In contrast, in districts that have adopted a structural solution--substituting a settlement judge for the assigned judge--the rules can ***133** endorse full access to information and encourage active participation by the settlement neutral.[352]

Finally, it is unlikely that regulating specific judicial behaviors would be effective without reforms to enforcement standards and procedures. As Professor Floyd demonstrated, limitations in the standards for recusal based on actions during settlement and procedural barriers to appeals make enforcement of behavioral guidelines illusory.[353] Happily, there is a more effective alternative to trying to manage and monitor individual judicial behavior: procedural rules that prevent conflicting neutral roles through structural and informational separation between adjudication and case management on the one hand, and settlement on the other.

C. *Principles from State and Local Federal Rules: Separating Managing from Settling*

Perhaps the most appropriate (and promising) way to address the problem is to avoid characterizing it as an issue of a particular judge's ethics or behavior. The incompatible dual neutral roles assigned to judges are at their core a structural issue; it is a side effect of lumping all judicial functions related to settlement into the category of pretrial management. How should the role of adjudicating (with its associated managing) be separated from settling? We can look to the local district court rules and some state provisions for examples to follow.

This Part examines three types of rules for principles that could be applied more generally in Rule 16. Alternatively, if uniformity in the federal courts proves impossible, individual federal courts and states could adopt these principles to harmonize their rules for settlement conferences and ADR programs. First, this Part considers rules that govern court ADR programs.[354] The provisions in local rules that govern who can serve as neutrals in ADR ***134** programs often establish a clear separation between management and neutral functions. Second, this Part explores ADR confidentiality rules. They often go to the heart of the problem of access to information that is inherent in dual roles. Many impose restrictions on the flow of information from the settlement process to the assigned judge, which emphasizes a separation between the role of settlement neutral and the role of decisionmaking neutral. Third, this Part analyzes the problematic rules governing judicial settlement conferences. Here, some federal districts do separate management and neutral roles to avoid role conflicts, but this approach is by no means ubiquitous. This is where courts could improve their procedures by harmonizing their rules for settlement conferences with their ADR and confidentiality rules to limit judges' discretion in settlement conferences.

1. *Rules on Neutral Roles in "ADR" Processes: Programmatic Separation*

In federal courts, the local rules that govern court-sponsored ADR programs tend to be both more detailed and more sensitive to conflicting neutral roles than the corresponding rules that govern settlement conferences convened by judges. ADR rules tend to allot settlement management tasks to the assigned judge,[355] but structure programs in ways that limit judges' discretion to serve as both the assigned judge and the ADR neutral. There are two typical patterns in local ADR rules. Under one common approach, judicial officers do not participate as mediators for the program.[356] Instead, the parties usually agree on a private mediator. This person is often chosen from a court-approved list, although some districts provide a staff mediator.[357] Under a second approach, judicial officers do serve as mediators in the court-sponsored mediation program, which preserves the benefits of having a judicial officer as a mediator. Often magistrate judges shoulder a major responsibility for mediating cases in these programs.[358] Neutral roles are typically kept separate ***135** by a rule specifying that the judicial officer who is assigned to try the case may not serve as the mediator.[359] Both of these design structures for ADR programs effectively divide an assigned judge's extensive pretrial management functions from any role as a settlement neutral, and thus prevent conflicts between adjudicatory and settlement roles.

2. ***Rules on ADR Confidentiality: Isolating the Assigned Judge from Settlement Information***

In addition to imposing a structural separation between the neutral responsible for adjudication and management and the settlement neutral in court ADR programs, many federal courts have confidentiality rules for these programs. These provisions are aimed at the potential for settlement to serve as a source of bias even with separate neutrals. They prevent settlement information from flowing to the adjudicator by explicitly prohibiting mediators from disclosing details about a mediation to the assigned judge.[360] They demonstrate a sensitivity to the distortions that can be introduced into decisions if a judge learns what happened or what was said in a settlement process, and reflect an understanding that such reports from mediators will undermine confidence in the integrity of the settlement process. Courts also limit information flow to assigned judges by preventing them from seeing the pre-mediation or evaluation statements that parties prepare for the settlement neutral,[361] or by strictly limiting the information that may be reported to them at the close of the process.[362]

Some states impose similar restrictions on communications to the court about the settlement process either by court rule or by state statute. For example, in Minnesota, communications to the court are strictly limited during ***136** and following an ADR process.[363] If the parties do not come to an agreement, the neutral may report only that fact, without comment or recommendation.[364] The Uniform Mediation Act, now enacted in twelve jurisdictions, prohibits mediators from making reports to judges who may rule on the dispute in order to maintain "confidence in the neutrality of the mediator and in the mediation process."[365]

3. ***Rules on Judicial Settlement Conferences: Mostly Silence and Ambiguity***

In contrast to the detailed rules and extensive protections in the context of ADR programs and confidentiality rules, federal local rules tend to be relatively silent concerning judicially-sponsored settlement conferences. Many rules refer only to pretrial conferences in general; they do not differentiate settlement conferences from other types of pretrial conferences. When the local rules do mention settlement conferences explicitly, their approach to assigning neutral roles spans the full spectrum. Some protect against threats to impartiality by limiting the judicial discretion of the assigned judge to serve as the neutral and by providing confidentiality protections. Many, however, are silent or ambiguous about the identity of neutrals. Yet others explicitly endorse a dual-neutral role for judges in settlement and adjudication.

A substantial number of districts have adopted the principle of structural separation urged in this Article through rules that explicitly exclude the assigned judge from serving as the presiding neutral at a settlement conference.[366] A number of these districts also extend robust confidentiality principles to their settlement conferences.[367] Others less comprehensively specify particular mechanisms to insulate assigned judges from learning about ***137** the content of settlement conferences.[368] There are also rules that channel disputes or reports about problems in dispute resolution processes away from the assigned judge,[369] which helps prevent judicial bias by limiting information that might create a bad impression about participants.

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Other rules that mention settlement conferences are silent or ambiguous as to who will conduct the conference and whether the assigned judge is eligible.[370] It may be that the practice in these districts is to assign the facilitation role to separate settlement judges, but the local rules do not impose any firm limitation on judicial discretion.[371] Finally, there are districts that explicitly reject a principle of separation. They specify that the assigned judge will personally conduct settlement conferences or reserve this power for the assigned judge.[372] The districts with rules that are silent on settlement conferences, along with those that are ambiguous or explicitly authorize blending neutral roles, all demonstrate the need for a uniform national rule that does not leave decisions about settlement neutrals to the discretion of local judges.

D. *A Proposal for Revised Procedural Rules*

Many judges have expressed the personal view that settlement negotiations should not take place before the judge who will later adjudicate the case, or they have proposed separating these functions.[373] Numerous ***138** commentators agree.[374] As discussed above, lawyers strongly prefer settlement with a judge who is not assigned to try their case.[375] Encouragingly, some state and local federal court rules do impose this separation.[376] And, even when they do not, some judges recuse themselves voluntarily after presiding over a settlement conference or mediation out of a concern for public perception and the importance of trust in the court system.[377]

Yet many judges do not see a problem.[378] A vocal group is on the record defending the practice of settling their assigned cases.[379] Empirical evidence about judges' attitudes is slight, but in a recent study of California state court judges a strong majority felt that they should be allowed to conduct settlement conferences (82%) or mediate (71%) with the consent of the parties in cases assigned to them for trial.[380] Because the discretion granted to judges for ***139** pretrial management includes everything related to settlement (unless restricted by local rule), many judges are free to take on dual-neutral roles. And, as shown above, judges' confidence in their ability to do this is understandable, even if misplaced.[381]

In the federal court system, the ideal way to reduce the potential for coercion and partiality that can damage perceptions of civil justice--in the context of both settlement and adjudication--would be through amendments to Rule 16 that prevent judges from serving as settlement neutrals in cases assigned to them for management and adjudication. Separating these functions structurally would establish a uniform national approach and establish a norm that state court systems could adopt as well. This is, however, an ambitious proposal. It failed as an ethical reform, and any attempt to amend Rule 16 of the Federal Rules of Civil Procedure will surely face similar challenges.

One headwind the proposal will face is that it would impose limitations on judicial discretion, which was embraced by the Rules' original drafters and is now particularly strong in the pretrial setting.[382] While a general lack of constraint on judicial power has been one of the central criticisms of the discretion associated with judicial management,[383] it should be clear by now that I am not urging reform from that perspective or seeking to curtail discretion as a general matter through procedural rules.[384] The argument here is limited to settlement conferences. Professor Cooper, the long-serving Reporter for the Advisory Rules Committee, offered a pragmatic justification for discretion as "a useful rulemaking technique when it is difficult--as it ***140** almost always is--to foresee even the most important problems and to determine their wise resolution."[385] The problems with judges settling cases they manage and adjudicate are not, however, difficult to foresee. A decision to serve as a settlement neutral is unlike the many pretrial managerial decisions that require case-by-case tailoring or that benefit from judicial discretion to make adjustments from default provisions.[386] Instead, policies governing the extent to which judges should mix conflicting neutral roles can be determined with reference to overarching principles coupled with practical considerations.[387]

Perhaps the best hope is that federal rulemakers would regard an amendment as an opportunity to achieve national uniformity on an important issue by imposing a structural separation of neutral functions. As with prior changes to Rule 16's provisions concerning settlement conferences, an amendment of this nature would not be breaking new ground. Although it would do much more than merely confirm the status quo, it would follow the lead of the districts with similar rules. Failing a uniform national approach, however, district courts could improve their local rules by coordinating their provisions for settlement conferences with those that govern their ADR programs. The framework suggested in this Article defines the issue as one of eliminating

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conflicting neutral roles rather than one of restricting judicial management. This conceptualization could provide a basis for revisions of local rules to bring provisions for judicial settlement conferences within accepted principles for ADR processes.

1. ***Essentials for Separating Neutral Functions***

Two key elements need to be incorporated in an amendment. First, the rule should establish a structural separation by prohibiting judges assigned to adjudicate and manage a case from presiding at settlement. "Settlement" needs to encompass both judicial settlement conferences and mediations. This does not mean relieving judges from presiding over settlement conferences or serving as mediators, where they have much to offer.[388] Separate settlement ***141** judges are not impractical if courts assign this function to magistrate judges or use a "buddy system" in which judges trade cases for settlement. Courts could also use senior or retired judges as settlement judges.[389]

Objectors sometimes envision a sharing system in which the assigned judge conducts the settlement proceeding and then, if it is not successful, transfers the case to another judge for trial. This could create administrative problems and would make it difficult to set a firm trial date as a method to encourage settlement.[390] Reassigning the settlement process rather than the trial would mitigate these administrative barriers. And, given the decisionmaking that is involved in pretrial management, reassigning settlement better serves the goal of separating adjudicatory and settlement roles. Another objection to referring mediations to another judge is that the colleague will not welcome the case, which will consume time but not bolster his disposition statistics or lighten his docket.[391] This administrative barrier could be remedied by adjusting the way statistics are gathered to account for settlements, and exchanging cases for settlement should even out the effect on the docket in the long run.

Second, the rule should include a confidentiality provision to ensure that settlement judges and mediators may not report settlement communications to assigned judges.[392] Because sometimes judges would like to know what happened during a settlement attempt in their case, it is important to limit disclosures from settlement conferences just as many districts limit such communication from their ADR programs. A provision could be modeled on the Uniform Mediation Act, the local federal court rules, or state rules discussed above.[393]

2. ***Potential Exceptions***

If the rulemaking bodies do take up the issue of dual-neutral roles, there are two potential exceptions that will likely be urged to modify a bright-line rule. One is to limit the prohibition on dual-neutral roles to bench trials. The second is to allow exceptions when parties consent to the assigned judge serving as the settlement neutral. The first exception should be rejected. The second should be limited to very narrow circumstances.

The Judicial Conference's Committee on Codes of Conduct thought that ethical concerns about a dual judicial role are lessened when a judge presides ***142** over a jury trial.[394] Consistent with this view, there are judges who consider their settlement efforts in cases assigned to them for adjudication as far less problematic in jury trials than in cases they will try from the bench.[395] The reasoning behind this distinction is that, in a bench trial, the judge is the trier of fact and key witnesses may have participated in the mediation. In contrast, in a jury trial the judge's role is only to manage the process while the jury decides the merits of the case.[396] Thus the potential effect of settlement on decisionmaking is lessened with a jury trial.

The arguments against making an exception for jury trials are twofold. First, while judges in a jury trial do not make the ultimate decision on the merits, they do make other crucial rulings during and after trial, and it is important to avoid any perception that these decisions have been influenced by settlement conversations.[397] Decisions on motions to set aside a verdict or reduce the amount of damages awarded by a jury, for example, could be affected by a party's concessions or the judge's access to inadmissible evidence during settlement.[398] Moreover, assigned judges make managerial decisions on discovery issues that might affect the value of a case in both jury and non-jury trials.[399]

Second, a judge conducting a jury trial can influence a jury through her demeanor and nonverbal communication. Nonverbal signals are important in human communication and persuasion, and experimental work suggests that judges indicate their attitudes and respect for trial participants to the jury through facial expressions and body language.[400] Jurors naturally look

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to judges for guidance during a trial, and studies of mock juries support a conclusion that not only are judges signaling their underlying views to jurors, but jurors are aware of these nonverbal cues from judges, particularly their negative behaviors. [401] At the extreme, nonverbal judicial conduct has been ***143** found to be reversible error. [402] Even with more subtle effects, nonverbal signals are a reason to take seriously concerns about a judge who has led a settlement process presiding at a jury trial.

The second potential exception is one that would allow an assigned judge to function as a settlement neutral with the consent of the parties. As with jury trials, party consent is a factor that the Judicial Conference's Committee on Codes of Conduct thought should mitigate ethical concerns when an assigned judge leads settlement discussions. [403] The ABA Section on Dispute Resolution ethical proposal would have permitted a trial judge to serve as a mediator with consent of the parties, [404] and some judges have also voiced support for this approach. [405] In addition, among the federal districts that generally do not permit an assigned judge to preside at a settlement conference, some permit an exception if the parties all stipulate their consent. [406]

An exception for consent would be consistent with the emphasis in mediation on party self-determination [407] and with the judicial codes' permission for ex parte communications in settlement with the consent of the parties. [408] Parties and their attorneys may prefer settlement with the judge assigned for management and trial based on that judge's settlement skill and style, especially if there are few alternatives in a particular jurisdiction. Consent may also, however, implicate the tendency toward overconfidence. An attorney may be so confident that the judge will see her side of the case as stronger that she may undervalue the risks of settlement participation. In any event, consent should not be a matter of agreeing to a judge's suggestion that she serve as the settlement judge; it should come entirely at the initiative of the parties. This is necessary in order to avoid the dilemma inherent in resisting a judicial request. In addition, if the case does not settle, the parties should have ***144** the option to reevaluate their consent after the settlement attempt, when they will know what information they shared with the judge. At that point, they will be better able to evaluate the risk of partiality on the part of the judge. [409]

V. CONCLUSION

Concerns about bias and coercion have accompanied judicial settlement from its inception. Both these concerns are greatly heightened when a judge serves as a neutral in a case she is also managing and will adjudicate if settlement is unsuccessful. Forceful encouragement to settle becomes coercion when it comes from a person with decisionmaking power over the case. Impartiality at trial is threatened by the information shared with the judge in settlement or, alternatively, the settlement process is made less effective by withholding that information. The rise of facilitative mediation as a judicial settlement method may help reduce worries about coercion, but it heightens concerns about impartiality because of the types of information that pass from parties to the decisionmaker. And due to advances in cognitive and social psychology, a greater understanding of mental processes and decisionmaking supports and sharpens these concerns.

The perception of these problems by parties and attorneys is as important as the reality. Settlement has become an important judicial function, identified with the courts, and the way it is conducted will influence how the public views the integrity of the judicial system. It is time to move beyond the conception of a managerial judge as someone who handles all the pretrial matters in a case, including settlement. Presiding at settlement is, at its core, a neutral role, not a managerial function. Judges make significant contributions as settlement neutrals, and the risks inherent in dual neutral roles can be avoided by imposing a structural separation between settlement and adjudication. Rules that leave true settlement management in the hands of the assigned judge, while reassigning the settlement neutral function to a judge who is not responsible for adjudication, would enhance the effectiveness of settlement and protect the integrity of courts' decisionmaking processes.

Footnotes

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1 *See* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981) (approving the role); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing the role).

2 Resnik, *supra* note 1, at 378 n.13.

3 *Id.* at 379.

4 Resnik also examined the managerial judge's posttrial role in monitoring remedies, especially in public law litigation, but concluded that pretrial supervision represents the sharper break from the norms of American adjudication. *Id.* at 414.

5 *Id.*

6 *Id.* at 380.

7 *See infra* text accompanying notes 67-68.

8 *See, e.g.*, Resnik, *supra* note 1, at 435 (suggesting that the judge who will preside at trial should not try to settle the case).

9 *See generally* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010) (discussing amendments to the Federal Rules of Civil Procedure that validate and encourage active judicial pretrial case management).

10 *See, e.g.*, FED. R. CIV. P. 16(c) advisory committee's note on 1983 amend. (stating that the amendment "recognizes that it has become commonplace to discuss settlement at pretrial conferences"); Daisy Hurst Floyd, *Can the Judge Do That?--The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 52 (1994) (stating the 1993 amendment "again provides explicit authorization in the rules for what many judges are already doing").

11 *See infra* notes 84-92 and accompanying text; *see also infra* note 157.

12 28 U.S.C. § 652(a) (2012).

13 The pleading and joinder rules eased access to the courts and permitted lawsuits with a broader scope. *See, e.g.*, Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 267-68, 270-74 (1939); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-40 (1986); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 521 (1986).

14 *See generally* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998) (discussing the influence of the 1938 Rules on increased potential for discovery).

15 Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1589 (2003).

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16 Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 258 (1986); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490-91 (1986); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935 (2000); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1973-74 (1989).

The Circuit Court of Wayne County, Michigan (where Detroit is located) is credited as the first to institutionalize the pretrial format in the United States. Alexander Holtzoff, *Pretrial Procedure: Report of the Committee to the Judicial Conference for the District of Columbia*, 1 F.R.D. 759, 759 (1941). The court was initially motivated to relieve congestion in its docket of lien cases that resulted from a building boom in the 1920s but, based on its success, it expanded the practice to the law side of the docket and made it compulsory in all cases. Ira W. Jayne, *Foreword*, 17 OHIO ST. L.J. 160, 161-62 (1956). This pretrial "preview" of cases resulted in "the reduction of issues, settlements, limitations of proofs, and early decisions on such issues as required proofs." *Id.* at 162 (quoting George E. Brand, *"Mighty Oaks"-- Pretrial*, 26 JUDICATURE 36, 37 (1942)). Similar procedures were instituted in Cleveland, Milwaukee, and Boston, and also served as models for the federal rulemakers. Galanter, *supra*, at 258; Holtzoff, *supra*, at 760; Will Shafroth, *Pre-Trial Techniques of Federal Judges*, 21 DICTA 244, 244 (1944).

17 *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

18 In creating Rule 16, there had been drafting disagreements over whether conferences would be limited to jury trials and whether judges would be obliged to hold a conference at the request of the parties. These limitations on judicial discretion were rejected. Resnik, *supra* note 16, at 935-36; Shapiro, *supra* note 16, at 1979.

19 Shapiro, *supra* note 16, at 1978-79, 1981. As adopted in 1938, Rule 16 provided: Rule 16. Pre-Trial Procedure; Formulating Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 37-38 (William W. Dawson ed., 1938).

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20 Shapiro, *supra* note 16, at 1979-80 (citing concerns about judges coercing parties by eliminating issues from the case and compelling settlement).

21 Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 167 (1956); *see also* William J. Brennan, Jr., *The Continuing Education of the Judiciary in Improved Procedures* ("[W]e must stand steadfastly against the perversion of the pretrial procedure into a device for forcing settlements."), *in Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 37, 42, 50 (1960) [hereinafter *Seminar on Practice and Procedure*]; Charles E. Clark, *To an Understanding Use of Pre-Trial* ("Compelled settlement negotiations are dangerous as bringing in question the impartiality of the tribunal ...."), *in Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 454, 456 (1961) [hereinafter *Seminar on Effective Judicial Administration*].

22 *See* Marcus, *supra* note 15, at 1563 (noting that before the 1970s, "district judges' discretion was constrained by the traditional reticence of the judge during the pretrial period").

23 The term "by-product" frequently appears in judicial writing from the time about Rule 16. *See, e.g.*, Harry M. Fisher, *Pre-Trial Conference and Its By-Products*, 1950 U. ILL. L.F. 206, 214; Alexander Holtzoff, *Federal Pretrial Procedure*, 11 AM. U. L. REV. 21, 29 (1962); Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation, in Seminar on Effective Judicial Administration, supra* note 21, at 207, 215; Shafroth, *supra* note 16, at 252; J. Skelly Wright, *Pre-Trial on Trial*, 14 LA. L. REV. 391, 399 (1954); *see also Handbook for Effective Pretrial Procedure*, 37 F.R.D. 255, 271 (1964) (statement on pretrial procedure adopted by the Judicial Conference of the United States); Harry D. Nims, *Some By-Products of Pre-Trial*, 17 OHIO ST. L.J. 185, 185 (1956).

24 *See infra* notes 39-43 and accompanying text.

25 Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (1954). Justice Brennan, addressing the Judicial Conference of the Tenth Circuit in 1960, endorsed this view, asserting that "settlement can never be the reason for the [pretrial] conference, but merely an incidental, although, of course, valuable, result of it." Brennan, *supra* note 21, at 50.

26 Murrah, *supra* note 25, at 420. The settlement rate could be substantial. In the first nine months of conducting pretrial conferences in the District Court for the District of Columbia, almost 60% of the cases settled at or after the conferences, which were conducted shortly before trial. Holtzoff, *supra* note 16, at 761.

27 Murrah, *supra* note 25, at 420; *see also* Holtzoff, *supra* note 23, at 29 (stating that at pretrial, counsel "begins to discern the weaknesses of his own side, and to perceive the strong points of his adversary's case," likely becoming "more amenable and more desirous of settlement").

28 *See* Shafroth, *supra* note 16, at 250; Wright, *supra* note 23, at 398. State appellate courts also accepted the practice. *E.g.*, Madrigale v. Corrone, 258 A.2d 102, 106 (Conn. App. Ct. 1968) (urging both counsel to settle was not inappropriate in case in which judge did not participate in negotiations); Washington v. Sterling, 91 A.2d 844, 845 (D.C. 1952) (stating trial court may suggest the advisability of settlement).

29 *See, e.g.*, Murrah, *supra* note 25, at 420; Edson R. Sunderland, *Procedure for Pretrial Conferences in the Federal Courts*, 3 WYO. L.J. 197, 202 (1949).

30 *See* Grover M. Moscowitz, *Glimpses of Federal Trials and Procedure*, 4 F.R.D. 216, 218 (1946) ("If the judge merely suggests to the attorneys that they discuss the possibilities of settlement, that should be sufficient impetus from the Court.").

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31 *See, e.g.*, Murrah, *supra* note 25, at 420 (advocating that a judge could "make discreet suggestions as to the possible outcome of a trial").

32 *See, e.g.*, William F. Smith, *Pretrial Conference--A Study of Methods* (noting that "judicially supervised 'haggling' and efforts to exert pressure are to be cautiously avoided" in settlement discussions, which "should not be regarded as a primary objective of the pretrial conference"), *in Seminar on Effective Judicial Administration, supra* note 21, at 348, 352-53; Wright, *supra* note 23, at 393 ("It is suggested that pre-trial is a means by which a judge coerces lawyers into settlement and thereby avoids the necessity for trial. I say to you such is not pre-trial, but a prostitution of the process.").

33 John W. Delehant, *The Pre-Trial Conference in Practical Employment: Its Scope and Technique*, 28 NEB. L. REV. 1, 23-24 (1948) (reporting that 80% of federal trial judges responding to an ABA survey limited their settlement involvement to inquiring if the attorneys had initiated settlement and if they thought it would be appropriate).

34 *See* Fisher, *supra* note 23, at 212 (noting two schools of thought, one of which "attaches much higher importance to [the pretrial conference] as a means of bringing about settlements"); Stanley M. Ryan & John C. Wickhem, *Pre-Trial Practice in Wisconsin Courts*, 1954 WIS. L. REV. 5, 15-23 (finding several schools of thought on settlement in a survey of Wisconsin judges on pretrial conferences); Sunderland, *supra* note 29, at 203 (advocating a secondary role for settlement at pretrial conferences but acknowledging a "considerable difference of opinion" in its importance); Melvin Belli, Book Review, 76 YALE L.J. 857, 858 (1967) (reviewing MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964)) (noting the divergent views of New Jersey judges).

35 Galanter, *supra* note 16, at 259-60.

36 Ryan & Wickhem, *supra* note 34, at 15 (emphasis omitted); *see also* Ross W. Shumaker, *Appraisal of Pre-Trial in Ohio*, 17 OHIO ST. L.J. 192, 205 (1956) (stating that settlement at pretrial is a controversial subject, but "in Ohio the majority of judges and lawyers feel that settlement is not merely a by-product, but one of the most desirable objectives, of pre-trial").

37 *E.g.*, Harry M. Fisher, *Judicial Mediation: How It Works Through Pre-Trial Conference*, 10 U. CHI. L. REV. 453, 454 (1943) ("The number of cases disposed of under the guidance of the pre-trial judge without trial has exceeded the fondest hopes of the advocates of the system."); John W. McIlvaine, *The Value of an Effective Pretrial* ("[W]ith the congested condition of the docket ... I feel it is incumbent on every judge to use the pretrial as an aid in effectuating settlement."), *in Seminar on Practice and Procedure*, *supra* note 21, at 158, 162; Ryan & Wickhem, *supra* note 34, at 15 (reporting that many judges "emphasize that unless a large percentage of cases is disposed of by settlement at pre-trials, their calendars would become hopelessly backlogged"); Shafroth, *supra* note 16, at 244 (noting that in Detroit and Boston pretrial conferences "succeeded in clearing up very bad congestion of the trial calendars"). In contrast, a book from this era on the problem of congestion in the courts, AM. ASSEMBLY, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (Harry W. Jones ed., 1965), did not even mention the potential efficacy of a pretrial conference convened for the purpose of settlement. *See* James B. Little, Book Review, 18 HASTINGS L.J. 237, 238 (1966).

38 *See, e.g.*, HARRY D. NIMS, PRE-TRIAL 28 (1950) ("After a frank discussion by counsel as to the value of the case, I give expression as to what, in my judgement, the case should be settled for." (quoting Judge Cornelius J. Harrington)); *id.* at 34 ("[T]he Court frequently points out the strong points and the weak points of either the plaintiff's claim, or of the defense, as the case may be, in endeavoring to bring the parties to an agreement." (quoting Judge Alexander Holtzoff)); Ruggero J. Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 247, 248 (1968) (noting that he makes "a realistic appraisal of both sides" of a case); Ryan & Wickham, *supra* note 34, at 16 ("I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement, and then also attempt to persuade the parties and their attorneys to accept a settlement within that range." (quoting Judge Herman W. Sachtjen)); J. Skelly Wright, *The Pretrial Conference* ("I tell them, 'This case is

worth $20,000 for the settlement,' and I tell them why; and I tell them further to go tell their clients that I said so."), *in Seminar on Practice and Procedure, supra* note 21, at 141, 145.

39 *See generally* MAUREEN SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 10-13 (1973) (suggesting standards and guidelines for planning, developing, and operating an effective case management system).

40 This separation was especially prevalent under state court master calendar systems. *See* NIMS, *supra* note 38, at 22 (describing pretrial conferences as used in New York County, New York (Manhattan) and noting "[t]he chance that the pre-trial judge will try the case, if it is not ended in the conference, is very, very small"); *id.* at 28 ("[I]f counsel cannot agree [on a settlement] then the case is reassigned to the head of the assignment division for an immediate jury trial." (quoting Judge Cornelius J. Harrington)); *see also* Ryan & Wickham, *supra* note 34, at 23-24 (describing a program in Milwaukee with separate, voluntary assignment to a judge for conciliation).

The early practice regarding settlement judges in federal courts was more variable. Some federal courts assigned separate judges for pretrial and trial functions. *See* George L. Hart, Jr., *The Operation of the Master Calendar System in the United States District Court for the District of Columbia* (describing separate processes for assigning cases to judges in the Pre-Trial and Ready for Trial Calendars), *in Seminar on Effective Judicial Administration, supra* note 21, at 265, 266-67; Holtzoff, *supra* note 23, at 23 (describing a system in which a pretrial examiner was devoted to conducting pretrial hearings, freeing judges for trial work). In other federal courts, pretrial conferences were held shortly before trial and were often conducted by the trial judge regardless of the type of calendaring system. *See* Shafroth, *supra* note 16, at 250 ("[F]ederal districts where the pre-trial judge does not try the case are very few ... [.]").

41 Fisher, *supra* note 23, at 220.

42 *Id.*; Holtzoff, *supra* note 16, at 762.

43 Fisher, *supra* note 37, at 455; *see also* Maurice Rosenberg, *Mastering the Calendar* ("[T]he central calendar avoids the unseemly situation of having the same judge--who at pretrial hears the lawyers frankly admit specific weaknesses in their case--later preside at trial of the case."), *in Seminar on Effective Judicial Administration, supra* note 21, at 271, 279; E.J. Dimock, Book Review, 36 A.B.A. J. 837, 837 (1950) (reviewing NIMS, *supra* note 38) (noting the general custom of keeping the settlement conference judge away from the trial and opining that "[a] party who has stuck to his settlement figure in the face of pressure from a judge has a right to have his case tried before another whom he has not antagonized").

44 Galanter, *supra* note 16, at 261; *see also* FREDERICK B. LACEY, THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS 3 (1977) ("The nonactivists had their day. The activists are now in the ascendancy, as times change and case loads become increasingly burdensome both in number and complexity of suits."); Peckham, *supra* note 1, at 774 ("[M]ost judges routinely consider prospects for settlement at the pretrial conference and consider settlement promotion to be one of the chief purposes of pretrial ....").

45 Robert F. Peckham, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 257 (1985) (describing the switch in the late 1960s to a single-assignment model in metropolitan federal districts). With the individual calendar system, a case is typically assigned to an individual judge when it is filed and that judge has responsibility for the case throughout its life. STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 13-15 (1977).

46 *See generally* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Peckham, *supra* note 1; Resnik, *supra* note 1.

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47 Noel P. Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 132 (1972); *see also* LACEY, *supra* note 44, at 5 ("The more efficient the judge and the more talented he is as an administrator the more cases he will settle ....").

48 *In re* Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

49 *See, e.g.*, Elwood M. Rich, *An Experiment with Judicial Mediation*, 66 A.B.A. J. 530, 530 (1980) (expressing enthusiasm about institutionalizing settlement conferences, which eliminated a chronic backlog in a California Superior Court in ten months). *See generally* Peckham, *supra* note 45, at 253 (identifying pretrial judicial case management as the "prevailing response" to high costs of litigation).

50 *See, e.g.*, Resnik, *supra* note 1, at 404. In addition, settlement activity received encouragement from favorable publicity among the judiciary. Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 750 (1989) (noting attention given to judges active in settlement: "They are invited to give seminars to new judges. Their views are published in *Federal Rules Decisions* and disseminated in booklets by the Federal Judicial Center.").

51 *See supra* note 37 and accompanying text.

52 Galanter, *supra* note 16, at 261; *see also* Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 503 A.2d 331, 333 (N.J. Super. Ct. App. Div. 1985) (stating that the policy encouraging settlement is not to relieve dockets, but because "parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone").

53 Hubert L. Will et al., *The Role of the Judge in the Settlement Process, in Proceedings of Seminar for Newly Appointed United States District Court Judges*, 75 F.R.D. 89, 203, 203 (1976). Judge Will was not alone. Chief Judge Fox of the Western District Court of Michigan described settlement as at least coequal to adjudicated decisions: "We accept settlement as a preferred means of disposition. We believe that encouragement of settlement is an important use of pretrial and is consistent with the overriding goal 'to further the disposition of cases according to right and justice on the merits.'" Fox, *supra* note 47, at 134-35 (footnote omitted) (quoting William J. Brennan, Jr., *Pretrial Proceedings in New Jersey--A Demonstration*, 28 N.Y. ST. B. BULL. 442, 449 (1956)); *see also id.* at 142 (stating that settlement can be expected to "reflect the parties' evaluation of the actual merits of the case" thus producing "results which are probably as close to the ideal of justice as we are capable of producing").

54 *See, e.g.*, ROBERT MCC. FIGG ET AL., CIVIL TRIAL MANUAL 315 (1974) (stating that the role of the pretrial conference "may vary from one in which the conference is used to force settlement to one in which the mere mention of the word *settlement* is taboo"); Menkel-Meadow, *supra* note 16, at 506-07 (observing a variety of conceptions of judicial settlement roles and associated techniques); *Perspectives from the Federal Trial and Appellate Bench: Judge Cornelia G. Kennedy*, THIRD BRANCH, Apr. 1984, at 1, 9 [hereinafter *Kennedy*] ("[S]ome judges participate a great deal, ... and others don't participate at all.").

55 *See* FRANKLIN N. FLASCHNER JUDICIAL INSTITUTE, INC., THE JUDICIAL ROLE IN CASE SETTLEMENT 2 (1980) (reporting differences of opinion among Massachusetts state and federal judges on the appropriateness of an active role in settlement proceedings); David Neubauer, *Judicial Role and Case Management*, 4 JUST. SYS. J. 223, 227-28 (1978) (reporting both activist and abstentionist federal judges based on interviews in three federal districts).

56 JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCES 177 tbl.8-2 (1980). Only 21.8% of the judges surveyed stated that they typically did not participate in settlement discussions.

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Id. Thus these authors concluded that the primary issue was "not whether but *how* a judge will intervene in pre-trial conference." *Id.* at 177.

57 *Id.* at 177 tbl.8-2. The study found that the type of calendar system was significantly related to the style of intervention. *Id.* at 182. Where the court used a master calendar, 20% of the judges reported intervening aggressively in pretrial negotiations, whereas this was reported by only 9% of judges in courts with individual calendaring systems. *Id.*

58 *See* Marc Galanter, *"... A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 7, 17 n.42 (1985) (describing a survey conducted by the Civil Litigation Research Project). The survey polled state and federal judges in five judicial districts about their typical settlement practices. *Id.* Seventy-five percent of federal judges and 56% of state court judges reported initiating settlement discussions in jury cases. *Id.* Forty-one percent of the federal judges and 56% of the state judges reported suggesting terms for settlement. *Id.* For bench trials, fewer judges reported these activities. *Id.*

When the self-reports from judges in this survey were combined with the views of lawyers who appeared before them, there was further support for a conclusion that judges assigned to a case for trial were frequently involved in settlement discussions. Herbert M. Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28, 30-34, 34 n.12 (1982). Judicial settlement activities ranged from initiating settlement discussions to more intensive, less frequent, activities such as meeting separately with each side and suggesting settlement figures. *Id.* at 31; *see also* Eugene F. Lynch, *Settlement of Civil Cases: A View from the Bench*, LITIGATION, Fall 1978, at 8, 57-58 (describing his typical evaluation of the case with the plaintiff).

59 James A. Wall, Jr. & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge Is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 35 (1982) (concluding that judges participated "significantly" in only 34% of settlement proceedings). *But see* WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 12 (1985) (criticizing the question that led to this conclusion as "ambiguous").

60 The lawyers' reports of judicial behaviors included "[c]oerces lawyers to settle" (reported by 54% of lawyers surveyed; considered unethical by 51%); "[p]oints out to the client the strengths and weaknesses of his case" (reported by 52%; considered unethical by 29%); "[d]elays rulings to the disadvantage of the stronger side" (reported by 48%; considered unethical by 65%); and "[d]owngrades the merit of the stronger case and/or the demerits of the weaker" (reported by 45%; considered unethical by 20%). Wall & Schiller, *supra* note 59, at 35-36, app. at 43 tbl.2, 44 tbl.3.

61 BRAZIL, *supra* note 59, at 1, 39 (alteration in original). Professor Kritzer's survey also indicates that lawyers believed judicial participation had an important influence on the settlement process. *See* Kritzer, *supra* note 58, at 35-36.

62 BRAZIL, *supra* note 59, at 46; *see also* Menkel-Meadow, *supra* note 16, at 497 ("[L]awyers overwhelmingly seem to favor judicial intervention.").

63 BRAZIL, *supra* note 59, at 84; *see infra* notes 260-66 and accompanying text.

64 *See supra* note 19.

65 FED. R. CIV. P. 16(a) advisory committee's note on 1983 amend.

66 *Id.* R. 16(c) advisory committee's note on 1983 amend.

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67 FED. R. CIV. P. 16(a)(5) (1983).

68 *Id.* R. 16(c)(7).

69 If there were any doubt about judicial discretion, the rule included an open-ended authorization for conferences to include "such other matters as may aid in the disposition of the action." Id. R. 16(c)(11).

70 See *supra* notes 20-21 and accompanying text.

71 FED. R. CIV. P. 16(c) advisory committee's note on 1983 amend.

72 *Id.* (suggesting that "a judge to whom a case has been assigned may arrange ... to have settlement conferences handled by another member of the court or by a magistrate").

73 This viewpoint was influentially expressed by Chief Justice Burger. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); *see also* Robert H. Bork, *Dealing with the Overload in Article III Courts* (describing "an overload so serious that the integrity of the federal system is threatened"), *in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 231, 232 (1976) [hereinafter *Pound Conference*]; Morris E. Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245, 245-46 (1978); Maria L. Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 BUFF. L. REV. 111, 111 (1979); Harry Phillips, *The Expansion of Federal Jurisdiction and the Crisis in the Courts*, 31 VAND. L. REV. 17, 17 (1978).

74 *See, e.g.*, Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1907-09 (1989) (citing studies).

75 Burger, *supra* note 73, at 276; *see also* Griffin B. Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 12-13 (1978).

76 Frank E.A. Sander, *Varieties of Dispute Processing, in Pound Conference, supra* note 73, at 111, 130-32.

77 DONNA STIENSTRA, ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 1 (Nov. 2011).

78 *See generally* Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

79 *See generally* James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213 (1989); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).

80 *See, e.g.*, Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 580-85 (1988); Kenneth K. Stuart & Cynthia A. Savage, *The Multi-Door Courthouse: How It's Working*, COLO. LAW., Oct. 1997, at 13.

81 This development was not limited to the United States. *See, e.g.*, Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 353 (2006) (describing Quebec's

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"unified and integrated hybrid system of justice" that combines adjudicative and mediative processes at every level of the court system).

82 Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (2012)); *see* Peter W. Agnes, Jr., *Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges*, 31 SUFFOLK U. L. REV. 263, 279 (1997) ("Under the [CJRA], numerous federal district courts have gone much further than Federal Rule 16 in developing the concept of early court intervention and early utilization of the most appropriate dispute resolution method in each case." (footnote omitted)); Thomas P. Griesa, *Comment: One Court's Experience with the CJRA*, 49 ALA. L. REV. 261, 262-63 (1997) (noting that while the CJRA plan in the S.D.N.Y. was mostly a "codification" of case management policies the district had been using for many years, its innovation was the addition of a mediation program).

83 104 Stat. at 5089-93 (codified as amended at 28 U.S.C. §§ 471-473).

84 Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 884 (1993); *see also* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 728 (1993) (arguing that the collision of the local and national rulemaking processes created confusion and inconsistencies); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1447 (1994) (arguing that the broad exercise of local rulemaking powers that spawned the variation was based on a misreading of the legislation).

85 STIENSTRA, *supra* note 77, at 1.

86 ELIZABETH PLAPINGER & DONNA STEINSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 4 (1996). In addition, the federal courts of appeals developed active mediation programs under the authority of Federal Rule of Appellate Procedure 33, which authorizes settlement conferences. *See generally* ROBERT J. NIEMIC, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1997).

87 For a sampling, see generally COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998).

88 STIENSTRA, *supra* note 77, at 2.

89 28 U.S.C. § 652(a) (2012). In the case of mediation and early neutral evaluation, the Act also authorized the courts to require parties to use these ADR processes. *Id.*

90 STIENSTRA, *supra* note 77, at 6, 7 tbl.2. According to the local rules and other written sources, in more than one-quarter of these district courts, mediation is the only specifically-authorized process. *Id.* at 5 & tbl.1. The indication that mediation is authorized in two-thirds of the districts, *id.* at 7 tbl.2, is likely a conservative estimate. It reflects only specifically authorized mediation programs in districts that provide guidance for their use, while additional districts have a general authorization for ADR or establish an "open" or "general" management track allowing cases to use ADR. *Id.* at 5 tbl.1, 6. Although these more general authorizations may mention mediation or another form of ADR, Stienstra does not count them because the lack of detail casts doubt on the existence of an active court-administered ADR program. *Id.*

91 *Id.* at 6, 7 tbl.2. Court-annexed arbitration, while still authorized by a significant number of courts, plays a smaller role today than it did during earlier decades. *Id.* No district relies solely on court-annexed arbitration as its ADR process. *Id.* at 6.

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92 *Id.* at 4-5, 5 tbl.1. Fourteen districts authorize three or more processes. *Id.* at 5.

93 *See, e.g.*, DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 253 tbl.11 (1995) (compiling provisions on settlement conferences from local CJRA plans and rules).

94 As of 2011, ten districts satisfied the ADR Act's mandate by designating settlement conferences as the sole type of ADR process they authorize by local rule. STIENSTRA, *supra* note 77, at 5 tbl.1, 6.

95 *See* Donna Stienstra, *ADR in the Federal Trial Courts*, FJC DIRECTIONS, Dec. 1994, at 4, 7 n.1 ("Because ADR is defined in contrast to 'traditional' litigation, the judge-hosted settlement conference--a long-standing component of the traditional process--is often not considered a form of ADR.").

96 STIENSTRA, *supra* note 77, at 6 (commenting, however, that "[w]e can be certain that a greater number of districts use settlement conferences, but many very likely do not mention this procedure in their ADR provisions").

97 Many federal district courts provide comprehensive ADR provisions without including procedures for settlement conferences. *See, e.g.*, D.D.C. CIV. R. 84-84.10; M.D. FLA. R. 9.01-.07; S.D. IND. LOCAL ADR RULES; W.D. MO. MEDIATION & ASSESSMENT PROGRAM; D. NEB. MEDIATION PLAN; D.N.H. CIV. R. 53.1; D.N.H. GUIDELINES FOR MEDIATION PROGRAM; E.D.N.Y. R. 83.7 (arbitration); *id.* R. 83.8 (mediation); N.D.N.Y. MANDATORY MEDIATION PROGRAM (General Order 47); W.D.N.Y. ADR PLAN; M.D.N.C. CIV. R. 83.9a-.9g; N.D. OHIO CIV. R. 16.4-.7; S.D. OHIO CIV. R. 16.3; S.D. OHIO CIV. R. SUPP. PROCEDURES FOR ADR; E.D. TEX. COURT-ANNEXED MEDIATION PLAN (General Order 14-6). Similarly, local rules on pretrial procedures often include specific provisions on mediation, or ADR more generally, without mentioning settlement conferences. *See, e.g.*, C.D. CAL. R. 16-15; D. COLO. CIV. R. 16.6; N.D. FLA. R. 16.3; S.D. FLA. R. 16.2; N.D. GA. CIV. R. 16.7; S.D. GA. CIV. R. 16.7.5; D. KAN. R. 16.3; D. MASS. R. 16.4; E.D. MO. R. 16.01-.05; D.S.C. CIV. R. 16.03-.12; D. UTAH CIV. R. 16.2; D. VT. R. 16.1; N.D. W. VA. CIV. R. 16.06. Rules on pretrial do sometimes mention settlement likelihood or prospects as a topic for discussion at pretrial conferences, but without providing procedures for settlement conferences. *See, e.g.*, D. DEL. R. 16.1; M.D. FLA. R. 3.06(b); S.D. FLA. R. 16.1; D. MASS. R. 16.3(a); D.N.H. CIV. R. 16.3(c); N.D.N.Y. R. 16.1(D); M.D.N.C. CIV. R. 16.1(b). Or, they may contain detailed provisions that are limited to procedures for managing the settlement process. *See, e.g.*, D.D.C. CIV. R. 16.3. When there is a rule that specifically authorizes or governs settlement conferences, it is typically separate from the rule on ADR processes. *See, e.g.*, E.D. CAL. R. 270, 271; D. Haw. R. 16.5, 88.1; C.D. ILL. R. 16.1, 16.4; N.D. IND. R 16.1, 16.6; N.D. MISS. R. 16(g), 83.7; D.N.J. CIV. R. 16.2(a), 201.1, 301.1. There are exceptions. Some courts specify procedures for settlement conferences and ADR under the umbrella of the same rule. *See, e.g.*, D. ALASKA CIV. R. 16.2(c); N.D. CAL. ADR R. 3.4(c), 7.1-.5; D. CONN. CIV. R. 16(c), (h); D. IDAHO CIV. R. 16.4; W.D. MICH. Civ. R. 16; E.D.N.C. ADR R. 101.2; W.D.N.C. CIV. R. 16.3(D); W.D. OKLA. CIV. R. 16.2-.3; M.D. PA. CIV. R. 16.7-.9.5; D.R.I. ADR PLAN.

98 Professor Carrie Menkel-Meadow identified three new management functions associated with the new ADR programs: "selecting cases for ADR, providing ADR neutrals, and managing cases that have been referred to ADR." Carrie J. Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, FJC DIRECTIONS, Dec. 1994, at 8, 8. Each district had to decide whether to address these issues with a court-wide policy, assign them to staff, or include them as part of individual judges' pretrial functions. *Id.*; *see also* SECTION OF DISPUTE RESOLUTION, AM. BAR ASS'N & INT'L CTR. FOR DISPUTE RESOLUTION, PRESENTING DISPUTE RESOLUTION TO JUDGES: A GUIDE FOR DEVELOPING JUDICIAL TRAINING ON ALTERNATIVE DISPUTE RESOLUTION 31 (1996) (listing the roles of judges in ADR as "[p]rogram planning & implementation, [n]eutral selection, [c]ase assessment, ADR referral, [c]oordination between ADR and litigation ([c]ase monitoring, [j]udicial action, [and] [e]nsuring compliance), [and] [f]eedback on neutral and program effectiveness").

99 *See* J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1007, 1012-13 (1996) (reporting that in the Western District of Tennessee, the local rule required discussions about settlement processes at the initial Rule

16(b) conference, with a determination of what ADR process would be most effective); Menkel-Meadow, *supra* note 98, at 8-9 (discussing factors relevant to the selection of cases for ADR processes by judges); *id.* at 11 (discussing the educational function of judges in assisting attorneys and parties to choose an appropriate process); *see also* NAT'L ADR INST. FOR FED. JUDGES, JUDGE'S DESKBOOK ON COURT ADR pt. C, at 53-60 (Elizabeth Plapinger et al. eds., 1993) (materials prepared for an educational institute on ADR for federal judges).

100 *See, e.g.*, D. ALASKA CIV. R. 16.2(e); N.D. GA. CIV. R. 16.7(F)(1); S.D. GA. CIV. R. 16.7.4; D. HAW. R. 88.1(d); D. IDAHO CIV. R. 16.4(b)(3)(D); D. KAN. R. 16.3(c)(1); W.D. LA. CIV. R. 16.3.1; E.D. TEX. COURT-ANNEXED MEDIATION PLAN pt. VI (General Order 14-6); E.D. WASH. R. 16.2(g); S.D. W. VA. CIV. R. 16.6.2; E.D. WIS. CIV. R. 16(d)(4)(D).

101 *See, e.g.*, N.D. CAL. ADR R. 5-5, 6-5; E.D. TEX. COURT-ANNEXED MEDIATION PLAN pt. VI (General Order 14-6).

102 *See, e.g.*, S.D. TEX. CIV. R. 16.4.G.

103 *See, e.g.*, D. DEL. R. 16.1; D. HAW. R. 16.2(a)(11); C.D. ILL. R. 16.4(D); D. KAN. R. 16.3(c); D. ME. R. 16.3(b)-(c), 83.11; D. MASS. R. 16.4(b); D.N.H. CIV. R. 53.1(a); N.D.N.Y. R. 16.1(d)(10), (14), (15); S.D.N.Y. R. 83.9; W.D.N.Y. CIV. R. 16.2(b)-(c); N.D. OHIO CIV. R. 16.3(b); S.D. OHIO CIV. R. 16.3(a); W.D. TENN. CIV. R. 16.3; D. UTAH CIV. R. 16-2(e); E.D. WIS. CIV. R. 16(d) (ADR evaluation conference).

104 *See, e.g.*, E.D. CAL. R. 271 (voluntary program); S.D. GA. CIV. R. 16.7.5 (court-annexed mediation by election of the parties); C.D. ILL. R. 16.4(E) (referral to mediation only by parties' agreement); E.D. LA. CIV. R. 16.3.1 (referral to private mediation, minitrial, or summary jury trial with parties' consent); W.D. LA. CIV. R. 16.3.1 (same). Some courts require party consent for only selected forms of dispute resolution. *See, e.g.*, E.D. TENN. R. 16.3(a), 16.5(a). These are typically court-annexed arbitration, summary jury trial, or summary bench trial. Occasionally districts offer parties the opportunity to make a dispute resolution process binding, which requires party consent. *See, e.g.*, N.D. GA. CIV. R. 16.7(B)(1) (binding arbitration, summary jury trial, or bench trial).

105 *See, e.g.*, N.D. FLA. R. 16.3; E.D.N.Y. R. 83.8; M.D. TENN. R. 16.04(b); W.D. VA. R. 83(b); S.D. W. VA. CIV. R. 16.6(a). It is common for rules to couple a provision that the judge will discuss ADR options with the parties with an authorization for the judge to select a process if the parties are unable to agree on one. *See* C.D. CAL. R. 16-15.3; N.D. CAL. ADR R. 3-2; W.D. PA. CIV. R. 16.2(d). Typical language allows a judge to order a dispute resolution process on the request of a party, by the agreement of the parties, or in the judge's discretion (or on the court's own motion). *See, e.g.*, D. ALASKA CIV. R. 16.2(c); D. COLO. CIV. R. 16.6(a); D. HAW. R. 88.1(d); D. IDAHO CIV. R. 16.4(b)(2); N.D. & S.D. MISS. R. 83.7(c), (e)(1); N.D. OHIO CIV. R. 16.5(b), 16.6(b); D. OR. R. 16-4(e); S.D. TEX. CIV. R. 16.4.C. Other districts simply grant the judge authority to order parties to use a dispute resolution process without elaborating on the role of party consent. *See, e.g.*, N.D. ALA. CIV. R. 16.1; M.D. FLA. R. 9.03; N.D. GA. CIV. R. 16.7(B)(1); S.D. ILL. R. 16.3; D. MASS. R. 16.4; D. MINN. R. 16.5(b); D. MONT. R. 16.5; D. WYO. CIV. R. 16.3(b).

106 Alternatively, when judges are not involved in an initial process choice, they may play a role in exempting parties from dispute resolution as a check on an administrative determination. In districts that refer all cases with certain characteristics to a particular dispute resolution procedure, or in which an administrator selects and diverts cases, judges are often given the role of considering objections to the assigned process and deciding whether a specific case should be exempted from the referral. *See, e.g.*, N.D. CAL. ADR R. 3-3(c); E.D.N.C. CIV. R. 101.1(a); W.D.N.C. CIV. R. 16.2(B); N.D. OHIO CIV. R. 16.7; E.D. PA. CIV. R. 53.2(3)(C)(3); W.D. TEX. CIV. R. 88(g).

107 FED. R. CIV. P. 26(a)(1) (1993).

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108 *Id.* R. 30, 33(a).

109 The new rule replaced the reference to "extrajudicial" settlement procedures, FED. R. CIV. P. 16(c)(7) (1983), with language authorizing judges to consider and "take appropriate action, with respect to ... settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." FED. R. CIV. P. 16(c)(9) (1993).

110 FED. R. CIV. P. 16(c) advisory committee's note on 1993 amend. ("[T]he judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration ....").

111 FED. R. CIV. P. 16(c)(9) (1993).

112 *See In re* Atl. Pipe Corp., 304 F.3d 135, 142 (1st Cir. 2002) ("[T]he words 'when authorized by statute or local rule' are a frank limitation on the district courts' authority to order mediation [under Rule 16] ...." (quoting FED. R. CIV. P. 16(c)(9) (1993))).

113 G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 650 (7th Cir. 1989) (en banc).

114 *See, e.g.*, Bank of N.S. v. United States, 487 U.S. 250, 254 (1988) (holding that a court cannot rely on its supervisory power in contradiction of a procedural rule); United States v. ONE 1987 BMW 325, 985 F.2d 655, 661 (1st Cir. 1993); *G. Heileman Brewing Co.*, 871 F.2d at 652; Landau & Cleary, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996, 1002 (7th Cir. 1989); *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (allowing use of inherent powers when the Civil Rules did not limit the nature of the sanction); *Atl. Pipe*, 304 F.3d at 143.

115 FED. R. CIV. P. 16(c) advisory committee's note on 1993 amend. (acknowledging inherent judicial authority to require disputants to engage in settlement procedures without their agreement and to require party participation).

116 *G. Heileman Brewing Co.*, 871 F.2d at 652.

117 *See, e.g.*, John C. Cratsley, *Judges and Settlement: So Little Regulation with So Much at Stake*, DISP. RESOL. MAG., Spring 2011, at 4, 4. *See generally* Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15.

118 Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 649 (1994).

119 James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11, 11; *see also* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1723 (2012) ("[S]ettlement ... has become the dominant mode of civil dispute resolution."); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("A trial is a failure.").

120 Alfini, *supra* note 119, at 11.

121 *See infra* notes 137-53 and accompanying text.

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122 Organizations focused on judicial administration and the education of state and federal judges, such as the National Center for State Courts, Institute for Court Management, Federal Judicial Center, and the National Judicial College, have included ADR in their training programs. Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 825 (1988); *see also* Alfini, *supra* note 119, at 14; Steve Gizzi, *Judging Meditation*, 10 JOHN F. KENNEDY U. L. REV. 135, 136 (2004); Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 350.

The influence of these programs is indicated by the number of judicial authors writing about settlement who describe receiving mediation training tailored for judges. *See, e.g.*, Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 147 (2001); Stephen G. Crane, *Judge Settlements Versus Mediated Settlements*, DISP. RESOL. MAG., Spring 2011, at 20, 21; Dan Aaron Polster, *The Trial Judge as Mediator: A Rejoinder to Judge Cratsley*, MAYHEW-HITE REP. ON DISP. RESOL. & CTS. n.3 (2006), http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/lead.html [https://perma.cc/5A6B-2JK2]. The educational trend is not limited to the United States. *See* Otis & Reiter, *supra* note 81, at 367 n.68 (stating that in Canada, the National Judicial Institute offers training programs in judicial mediation). *But see* John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 576 (2006) (claiming that many judges have no formal mediation training and tend to rely on "procedures borrowed from ADR" combined with "personal settlement techniques").

123 Charles B. Craver, *When Parties Can't Settle: Mediation Techniques Every Judge Needs to Master*, JUDGES' J., Winter 1987, at 4, 6-7 (emphasizing techniques for facilitative mediation as well as a role for evaluative skills).

124 *See, e.g.*, Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 JUST. SYS. J. 343, 343 (2005) (noting that mediation "offers parties the opportunity to take control of their destiny"); Rich, *supra* note 49, at 530 ("More, more, and more mediation is the answer."); Lisa Sullivan, *ADR Offers What the Bench Cannot*, MICH. B.J., Feb. 2006, at 16, 16 (describing the "obvious benefits" of mediation).

125 Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ON ARB. & MEDIATION 111, 130 (2013).

126 *See infra* text accompanying notes 358-59. In the federal courts, magistrate judges are often the judicial officers who serve as mediators in court mediation programs. *See, e.g.*, Breen, *supra* note 99, at 1008; Beth Deere, *Federal Court Mediation*, ARK. LAW., Fall 2008, at 22, 22; Judith Gail Dein, *Wearing Two Hats: Being a Mediator and a Trial Judge*, BOS. B.J., Winter 2013; Morton Denlow, *Magistrate Judges' Important Role in Settling Cases*, FED. LAW., May/June 2014, at 101, 103; Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 739-45 (1994); Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 1003-05 (2016). Judges are also active mediators in state court mediation programs. *See, e.g.*, Robinson, *supra* note 122, at 347-52 (describing state judicial mediation programs in California and Delaware).

127 *See, e.g.*, Cratsley, *supra* note 122, at 573-74 (listing mediation techniques borrowed by settlement judges).

128 Karen K. Klein, *A Judicial Mediator's Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice*, 81 N.D. L. REV. 771, 785 (2005); Kristena A. LaMar, *I Think I Blew It*, DISP. RESOL. MAG., Spring 2011, at 12, 13; Steven J. Miller, *Judicial Mediation: Two Judges' Philosophies*, LITIGATION, Spring 2012, at 31, 38 (interview of Judge Polster).

129 Morton Denlow, *Settlement Conference Techniques: Caucus Dos and Don'ts*, JUDGES' J., Spring 2010, at 21, 23 (advocating principles identified with mediation such as "client control of the outcome," "confidentiality," "creative resolution possibility," and "preserving a continuing relationship"); Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429, 441 (1991) (describing the judge's role as a "communication link[] between the parties"); *id.* at 443-44 (characterizing the settlement process as "reorient[ing] the parties away from competitive posturing" toward problem solving); *id.* at 445 (placing emphasis on

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exploring "underlying interests"); *id.* at 445-46 (emphasizing the need to listen and attend to feelings); *see also* Welsh, *supra* note 126, at 1019-21 (discussing the blurring of lines between settlement conferences and mediation).

130 *See supra* notes 94-97 and accompanying text. *But see* D.N.D. R. 16.2 (authorizing "mediation in the form of court-sponsored settlement conferences held by judicial officers").

131 Stienstra, *supra* note 95, at 7 n.1 (arguing that categorizing settlement conferences as distinct from ADR is problematic due to a lack of firm definitions of the processes).

132 *See, e.g.*, Susan Nauss Exon, *Foreword*, 33 U. LA VERNE L. REV. 1, 2 (2011) ("[M]any now proclaim to mediate when, in fact, they are convening a settlement conference ...."); Carol M. Rice, *The Civil Justice Reform Act Conference: A Reporter's View*, 49 ALA. L. REV. 265, 277 (1997) (noting difficulties in communication due to "inaccurate terminology" with the same label applied to varying court processes).

133 UNIF. MEDIATION ACT § 3(b)(3) cmt. (UNIF. LAW COMM'N 2003).

134 For example, in California the protection for confidentiality of communications in mediation does not apply to judicial settlement conferences. CAL. EVID. CODE § 1117(b)(2) (West 2009); *see also* Foxgate Homeowners' Ass'n. v. Bramalea Cal., Inc., 25 P.3d 1117, 1124 n.8 (Cal. 2001) (finding that confidentiality was required when a judge's role was defined by party agreement as "act[ing] as [a] mediator for settlement conferences"). In contrast, the coverage of the Uniform Mediation Act, which establishes a privilege for mediation communications, does not rest on a distinction between mediation and settlement conferences. Instead, mediations "conducted by a judge who might make a ruling on the case" are excluded from coverage by the Act. UNIF. MEDIATION ACT § 3(b)(3).

135 *See, e.g.*, Cratsley, *supra* note 122, at 571 (combining judicial mediation and settlement conferences under the label "settlement activity"); Hogan, *supra* note 129, at 445, 453 (referring to a judge conducting a settlement conference as a "judge mediator"); Robert A. Holtzman & Jeff Kichaven, *Recent Developments in Alternative Dispute Resolution*, 39 TORT TRIAL & INS. PRAC. L.J. 195, 213 (2004) (describing a court settlement process that was variously referred to as "mediation" and "settlement conference" despite the difference in applicable confidentiality rules and statutes); David A. Katz, *Mediation--A Judge's Views on Judicially Monitored Settlement Conferences*, LITIGATION, Summer 2009, at 3, 3 (using terms interchangeably); Menkel-Meadow, *supra* note 16, at 510 (noting that some judges conducting settlement conferences call themselves mediators and are referred to as mediators); Rich, *supra* note 49, at 530 (identifying a settlement conference procedure as "mediation"); *see also* STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS (2000) (referring to active judges conducting settlement conferences in court and retired judges conducting private mediations using the single term "judicial mediator").

136 Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727, 733 (2001) ("If the mediator is a judge, ... the process is called a settlement conference.").

137 Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 291 (2011); *see also* Baer, *supra* note 122, at 146 (characterizing mediation as more likely to involve "the presence and participation of the parties"); Gregory D. Brown, *The Judicially Hosted Settlement Conference--My Case in the Balance: Musings of a Trial Attorney*, DISP. RESOL. MAG., Spring 2011, at 8, 9-10 (criticizing settlement conferences as suffering from relatively little client involvement); Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, ARIZ. ATT'Y, Nov. 1996, at 20, 54 (describing settlement conferences as involving less client involvement and deference to clients than mediation). *But see* Robert C. Zampano, *From the Bench: Settlement Strategies for Trial Judges*, LITIGATION, Fall 1995, at 3, 69-70 (advocating personal participation of clients in settlement conferences).

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138 Wissler, *supra* note 137, at 291; *see also* Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 233 n.9 (2007) (observing that, as a magistrate judge conducting settlement conferences, he talked more than court-trained mediators).

139 Brown, *supra* note 137, at 8 (describing judges as "widely perceived" to be "less interested than many mediators in ... enhancing your client's sense of personal empowerment over the resolution of the case"); Wissler, *supra* note 137, at 291-92.

140 Wissler, *supra* note 137, at 291-92.

141 *Id.* at 292; *see also* Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 78-79 (1991); Carrie Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?*, TRIAL, Oct. 1985, at 24, 27-28 (arguing that judges often act as arbitrators or adjudicators during settlement conferences); Pyle, *supra* note 137, at 21 ("[J]udges are 'evaluators' while ... mediators are 'facilitators.'" (quoting Charles B. Wiggins, professor and mediator)). Settlement conferences are also characterized as taking less time than mediation and as cheaper because there is no need to compensate a private neutral. Baer, *supra* note 122, at 146; Brown, *supra* note 137, at 8-9; Pyle, *supra* note 137, at 22.

142 Wissler, *supra* note 137, at 291 n.82; *see also* Hensler, *supra* note 117, at 17 (suggesting that settlement conferences are much like mediation, which is often evaluative and distributive); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 25-26 (2001) (noting "uncanny resemblance" between settlement conferences and court-connected mediations, which often emphasize legal issues).

143 *See* Leonard L. Riskin, Commentary, *Mediator Orientations, Strategies, and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994) (contrasting facilitative and evaluative approaches, and broad and narrow problem definitions); *see also* Brazil, *supra* note 138, at 230-31 (characterizing court-connected mediations as "stylistically nonlinear events" that include both facilitative and evaluative elements); Dwight Golann, *Variations in Mediation: How--And Why--Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 42 (reporting that mediators flexibly move among styles during the course of a mediation). Mediation has also been described in terms of other contrasting characteristics. *See* DEBORAH M. KOLB, THE MEDIATORS 23-45 (1983) (contrasting dealmakers and orchestrators); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30-33 (2003) (contrasting elicitive and directive approaches); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 19-25 (1986) (contrasting bargaining and therapeutic styles).

The lack of agreement on what constitutes "mediation" is reflected in a debate on what should be appropriately included in a mediator's role. *Compare, e.g.*, Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996), *and* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997), *with* John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996), *and* Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

144 *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 69 (1991).

In an observational study comparing settlement proceedings conducted by sitting and retired judges, Stacy Lee Burns concluded that their practices were "much more similar than different," BURNS, *supra* note 135, at 210, and she labeled both processes as "judicial mediation." Burns found that these processes, whether conducted by sitting or retired judges, are characterized by "active and directive intervention" with judges drawing on their "substantive legal expertise and persuasiveness." *Id.*

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The differences Burns did observe between settlement conferences conducted by sitting judges and mediation conducted privately by retired judges stemmed primarily from differences between the public court and private institutional settings. For example, private judicial mediators were able to devote more time to the process and were overall more cordial and patient, while judicial time and resources were limited in the public system and judges could not spend time with cases that were not likely to settle. *Id.* at 211.

145 Edward J. Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 238 (2002/2003) (observing that there is little difference between judicial mediation and a settlement conference); *see also* Baer, *supra* note 122, at 146 (stating that both mediation and settlement conferences "involve the judge's recommendation as to an appropriate resolution").

146 They overwhelmingly reported that they call their settlement activity a "settlement conference" rather than "mediation." Robinson, *supra* note 122, at 358.

147 *Id.* at 373-78. These findings were limited by the sample size, *see id.*, and when judges did report differences in their approaches to the two processes, they were consistent with Wissler's characterizations of mediation verses settlement conferences. *See supra* notes 137-41 and accompanying text.

148 Professor Robinson concluded that California general civil trial court judges were less directive and had a broader focus during settlement conferences than generally expected. Peter Robinson, *Settlement Conference Judge--Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 124-39 (2009).

149 Judge Cratsley's interviews with superior court judges in Massachusetts revealed dramatically different approaches to settlement. Cratsley, *supra* note 117, at 5-6; *see also* Agnes, *supra* note 82, at 265, 282 (describing variations in number of settlements, timing of settlements, and quality of settlement processes); Jonathan M. Hyman & Milton Heumann, *Minitrials and Matchmakers: Styles of Conducting Settlement Conferences*, 80 JUDICATURE 123 (1996) (contrasting approaches to settlement used by New Jersey judges).

150 Moreover, judicial styles are not necessarily static; some judges report that they have changed their approach over time. *See, e.g.*, LaMar, *supra* note 128, at 14 (describing the evolution of her settlement process to involve clients, joint sessions, and expression of emotions).

151 Compare, for example, Judge Polster's description of himself as "a facilitator" in mediation, Miller, *supra* note 128, at 38 (quoting Judge Polster), with Professor Brunet's observation that most judges who mediate use primarily an evaluative style, Brunet, *supra* note 145, at 235.

152 Klein, *supra* note 128, at 784-85; *see also* Aldisert, *supra* note 38, at 248 (observing that many cases involve a disagreement on value, not facts, and "I am usually asked my suggestion of value and I have no hesitation in offering my ideas"); Baer, *supra* note 122, at 136 (describing how caucuses can provide a judge with a view of the appropriate resolution of the case, the "hallmark" of evaluative mediation); Brown, *supra* note 137, at 9 (asserting that many judges and lawyers believe evaluative techniques contribute to settling as many cases as possible); Crane, *supra* note 122, at 21 (retired judge observing that parties who hired him as a mediator expected an opinion on the merits). *But see* Dein, *supra* note 126 (expressing hesitancy to predict outcomes based on the limited information available to her in mediation); Otis & Reiter, *supra* note 81, at 369 (urging that in Canada a judge-mediator should refrain from expressing any opinion on the legal merits).

153 Morton Denlow, *Breaking Impasses in Settlement Conferences: Five Techniques for Resolution*, JUDGES' J., Fall 2000, at 4, 6; *Judicial Mediation of Cases Assigned to the Judge for Trial: Magistrate Judges Celeste F. Bremer and Karen*

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K. Klein Interviewed by Wayne D. Brazil, DISP. RESOL. MAG., Spring 2011, at 24, 25 [hereinafter *Brazil Interview*] (interview of Judge Bremer); Klein, *supra* note 128, at 785.

154 *See supra* note 97 and accompanying text.

155 *See supra* text accompanying note 138; *infra* text accompanying notes 230-32.

156 *See supra* text accompanying note 137.

157 After stylistic revisions in 2007, the pertinent part of Rule 16 now reads:

Rule 16. Pretrial Conferences; Scheduling; Management

(a) PURPOSES OF A PRETRIAL CONFERENCE. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

....

(5) facilitating settlement.

....

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

(1) *Attendance*. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration*. At any pretrial conference, the court may consider and take appropriate action on the following matters:

....

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule ....

FED. R. CIV. P. 16.

158 Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 356-57 (1986) (describing the importance of respect for and confidence in the judge in the negotiation of settlement in the Agent Orange case).

159 *See, e.g.*, Brunet, *supra* note 145, at 237; Candy Wagahoff Dale, *Judicially Supervised Alternative Dispute Resolution: Perspectives from a Magistrate Judge*, FED. LAW., May 2009, at 47, 59; Katz, *supra* note 135, at 3; Jarrod B. Martin, *A User's Guide to Bankruptcy Meditation and Settlement Conferences*, 11 TRANSACTIONS: TENN. J. BUS. L. 185, 192 (2009); Miller, *supra* note 128, at 33 (quoting Judge Polster); Otis & Reiter, *supra* note 81, at 365; Zampano, *supra* note 137, at 4.

160 *See, e.g.*, BURNS, *supra* note 135, at 208-10 (describing legal content in mediations conducted by judges: legal reasoning; argumentation; precedent; knowledge of local juries, judges, court procedures, and outcomes in similar cases); Dein, *supra* note 126 (describing advantages of experience in the courtroom for her role as a mediator); Marcus, *supra*

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note 15, at 1592 (noting that settlement conferences provide the parties with the "insights of an experienced outsider about the strengths and weaknesses of a case").

161 Claudia L. Bernard, *Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal*, DISP. RESOL. MAG., Spring 2011, at 16, 17 (arguing that a judge's status and authority do not trump skill and experience as a mediator); Stephen B. Goldberg et al., *What Difference Does a Robe Make? Comparing Mediators With and Without Prior Judicial Experience*, NEGOT. J., July 2009, at 277, 277 (finding that the capacity of a mediator to gain the confidence of the disputants was the most important factor in attorneys' judgments about why a mediator is successful).

162 Alexander, *supra* note 118, at 652 (noting that the "primary reason why settlement conferences are so effective is the authority and expertise of the judge who conducts them"); Cratsley, *supra* note 122, at 574 ("[N]o one can dispute that a judge has the greatest standing and resources to promote settlement.").

163 In Professor Wissler's study of attorneys' views of settlement neutrals, judges were seen as having more "credibility regarding settlement considerations" than court staff mediators, private mediators, or volunteer mediators. Wissler, *supra* note 137, at 292, 293 tbl.7; *see also* Brunet, *supra* note 145, at 239 (noting the "evaluative legitimacy" of judges); Pyle, *supra* note 137, at 21 (stressing the advantage of a "credible evaluator" in a settlement conference). *But see* Dein, *supra* note 126 (judge noting that when she serves as a mediator she has limited information and no sense of the witnesses, and is therefore loath to make predictions).

164 BRAZIL, *supra* note 59, at 45.

165 *Id.* Judges also consider these activities as important for encouraging settlement. *See* Hogan, *supra* note 129, at 450; Zampano, *supra* note 137, at 69. There is some empirical evidence to support these views. *See* Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG., Winter 2003, at 8, 9 (reporting that cases are more likely to settle and litigants are more likely to assess mediation as fair when mediators disclose their view on the merits or value of a case).

166 *See, e.g.*, Martin, *supra* note 159, at 192; *see also* Hogan, *supra* note 129, at 449 (opining that judges can ensure a realistic view of liability and damage issues).

167 Dale, *supra* note 159, at 59 (citing example of providing information about burden of proof); Polster, *supra* note 122 (judge noting that clients will accept information from him when they were unwilling to listen to their attorney).

168 Crane, *supra* note 122, at 20-21; Dale, *supra* note 159, at 47; Martin, *supra* note 159, at 192; *see also* Goldberg et al., *supra* note 161, at 288 (finding that lawyers rate evaluation skills as more important to the success of former-judge mediators than nonjudge mediators).

169 For example, with a jury trial, a sitting judge has credibility in predicting how a local jury will react to a case, or in highlighting the unpredictability of jury deliberations. Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, LITIGATION, Spring 2009, at 17, 19. Some commentators believe that current local knowledge gives sitting judges credibility that even retired judges lack. *See, e.g.*, Brown, *supra* note 137, at 8; Dale, *supra* note 159, at 47. *But see* BURNS, *supra* note 135, at 209 (citing use of "experience-based local knowledge" by both sitting and retired judge-mediators).

170 Crane, *supra* note 122, at 22; Dale, *supra* note 159, at 47; Lynch, *supra* note 58, at 58; Miller, *supra* note 128, at 33 (quoting Judge Polster).

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171 *See, e.g.*, Martin, *supra* note 159, at 192-93.

172 *Id.* at 193.

173 *See* Brazil, *supra* note 138, at 240-41.

174 Elliott, *supra* note 46, at 325. *But see* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 92 (2003) (questioning whether judicial intervention promotes fair settlement or merely promotes settlement).

175 Hogan, *supra* note 129, at 436.

176 Menkel-Meadow, *supra* note 16, at 504.

177 *See, e.g.*, Craver, *supra* note 123, at 42 (noting the argument that settlement participants are more conciliatory and less likely to exaggerate the strength of their case with the judge assigned for trial because they don't want to appear obstinate before the future decisionmaker).

178 *Brazil Interview, supra* note 153, at 27 (quoting Judge Klein); Polster, *supra* note 122.

179 Moreover, while "being heard" is an important element of a sense of procedural justice, it is probably related more to the behavior of a neutral than to her judicial status. *See, e.g.*, Goldberg et al., *supra* note 161, at 298 ("The authority of the robe was sometimes a substitute for keen listening and creativeness and former judges therefore may not have developed these skills as well because they haven't had to when they had the authority of the robe ...." (omission in original) (quoting survey respondent)).

180 *See* Brunet, *supra* note 145, at 257.

181 *See, e.g.*, Menkel-Meadow, *supra* note 16, at 512 (attributing some of a judge's settlement authority to the judge's "power, control, or knowledge of the specific case").

182 Polster, *supra* note 122 (emphasizing the judge's understanding of a case obtained from the case management conference and the limited time available to prepare for settlement of a case on another judge's docket); *see also* Miller, *supra* note 128, at 35 ("There's a lot of work that goes into a successful mediation ...." (quoting Judge McCarthy)); Polster, *supra* note 122 (emphasizing the importance of preparation for credibility); Zampano, *supra* note 137, at 4 (stressing need for the judge to be familiar with the case).

183 Evaluation and prediction by an assigned judge has been endorsed as providing a signaling function that can inform parties' assessment of their prospects at trial. Brunet, *supra* note 145, at 234.

184 *See generally* JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION (2d ed. 2015).

185 *See supra* notes 20-21 and accompanying text.

186 *See* Brunet, *supra* note 145, at 248 (stating that the most common criticism of judicial settlement is that judges can be "overly coercive").

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187 *See, e.g.*, Goldberg et al., *supra* note 161, at 298 ("Because they've been judges, they're used to being able to tell you what to do and what not to do." (quoting a survey respondent, describing a retired-judge mediator)).

188 Alfini, *supra* note 144, at 68-71 (describing "bashing" mediators, who are often retired judges); Brown, *supra* note 137, at 9 (acknowledging that judges' approach can be "rough" and observing that this can have a negative effect on clients' views of the civil justice system); Brunet, *supra* note 145, at 248; Marcus, *supra* note 15, at 1592 (noting instances when judges use "rather firm techniques of persuasion to obtain agreements").

189 *See* Otis & Reiter, *supra* note 81, at 367 (observing that maintaining party self-determination is a special challenge for judges, "since they will always remain judges in the eyes of the parties," even in the "informal setting" of mediation).

190 *See* Floyd, *supra* note 10, at 90 ("[T]he judge's position, as opposed to the particular action of the judge, may have coercive effect.").

191 Crane, *supra* note 122, at 22 (noting that the "environment is inherently coercive" when a settlement conference is conducted by the judge who will have power over the case at trial); *see also* UNIF. MEDIATION ACT § 3(b)(3) cmt. (UNIF. LAW COMM'N 2003) (recognizing "concern that party autonomy in mediation may be constrained either by the direct coercion of a judicial officer who may make a subsequent ruling on the matter, or by the indirect coercive effect that inherently inures from the parties' knowledge of the ultimate presence of that judge").

192 Crane, *supra* note 122, at 22; Welsh, *supra* note 142, at 67.

193 Brunet, *supra* note 145, at 247; Frey, *supra* note 136, at 760; Longan, *supra* note 126, at 736-37.

194 Hogan, *supra* note 129, at 439 ("[J]udges who understand and use successful intervention tactics in the negotiation process would [not] blame one particular party for a case not settling." (emphasis omitted)); *see also* Baer, *supra* note 122, at 148 (commenting that it is "demeaning ... to suggest ... that the judge cannot be fair regardless of the result of the mediation").

195 *See* Molot, *supra* note 174, at 93 (arguing that a party urged by a judge to settle has an incentive to avoid proceeding before a potentially hostile judge); Schuck, *supra* note 158, at 359-61 (warning of judicial overreaching and the danger that lawyers will interpret judicial involvement in settlement as coercion).

196 D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 92 (1986) ("Settlement-oriented judges ... tend to resist the idea that judicial involvement in the settlement process might be coercive.").

197 Alfini, *supra* note 119, at 13; Brian J. Shoot & Christopher T. McGrath, *"Don't Come Back Without a Reasonable Offer:" Surprisingly Little Direct Authority Guides How Judges Can Move Parties*, N.Y. ST. B. ASS'N J., May 2004, at 28, 34.

198 *See* Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1270 (Cal. 1995) (concluding that judge's interruptions and unprovoked displays of anger "exceed[ed] his proper role and cast[] disrepute on the judicial office"); *see also* Peskin v. Peskin, 638 A.2d 849, 858 (N.J. Super. Ct. App. Div. 1994) (finding comments that were likely intended to force a decision on whether or not to settle instead "unquestionably had the effect of coercing defendant into agreeing to settle").

199 *See, e.g.*, Newton v. A.C. & S., Inc., 918 F.2d 1121, 1126 (3d Cir. 1990) (finding fine levied for reaching settlement after court's deadline was coercive); Crane, *supra* note 122, at 22 (reporting a judicial settlement technique "that amounts to little more than outright bludgeoning"); Cratsley, *supra* note 122, at 575 (stating that several state disciplinary counsel reported complaints of judicial coercion and intimidation in settlement conferences); Miller, *supra* note 128, at 37

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(acknowledging that there are judicial officers who "are not thoughtful and principled about the pressure that they exert, both in fact and in perception, when they push for settlement"); Shoot & McGrath, *supra* note 197, at 33-34 (describing "arm twisting" judges in settlement); *see also supra* note 60 and accompanying text.

200 Hyman & Heumann, *supra* note 149, at 125.

201 *Peskin*, 638 A.2d at 858.

202 *In re* Estate of Romero, No. CA2006-06-015, 2007 WL 1310192, *8 (Ohio Ct. App. May 7, 2007).

203 Cont'l Ins. Co. v. First Wyo. Bank, 771 P.2d 374, 376 (Wyo. 1989) (order vacating judgment and redirecting reassignment of case) (quoting the district court).

204 Trahan v. Lone Star Title Co. of El Paso, 247 S.W.3d 269, 275 (Tex. App. 2007).

205 When a judge has forcefully or repeatedly urged settlement, comments that seem to attribute the failure to one party can lead to impressions of biased decisions. *See, e.g.*, Davidson v. Lindsey, 104 S.W.3d 483, 488-92 (Tenn. 2003) (rejecting claims of bias when judge denied defendant's motion for new trial after repeatedly remonstrating attorneys about the failure to settle).

206 *See* Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 855 (describing the "misconception" that "case management is a process by which judges push reluctant parties to settle").

207 *See, e.g.*, Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 124 F.R.D. 75, 79 (S.D.N.Y. 1989) (upholding order that accelerated the date of an expert's deposition when one purpose was to facilitate settlement); Amanda Bronstad, *Pelvic Mesh Maker Bets on Trials; Unlike Other Defendants, Ethicon Isn't Blinking*, NAT'L L.J., Jan. 11, 2016, at 1, 1 (describing pressure to settle from judge scheduling a consolidated trial of thirty-seven cases).

208 Schuck, *supra* note 158, at 351-53 (discussing how preliminary rulings in the complex Agent Orange case assisted settlement: a decision precluding punitive damages *reduced* uncertainty about the stakes of the case, while key choice-of-law decisions *increased* uncertainty about its outcome).

209 *Id.* at 358-59 (attributing lawyers' cooperation in settlement to "professional norms and strategic concerns").

210 *Id.* at 360-61 (describing attorneys' allegations of improper pressure by Judge Weinstein to achieve settlement in the Agent Orange case).

211 *See, e.g.*, Newton v. A.C. & S., Inc., 918 F.2d 1121, 1129 (3d Cir. 1990); Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985); *In re* LaMarre, 494 F.2d 753, 756 (6th Cir. 1974); Wolff v. Laverne, Inc., 233 N.Y.S.2d 555, 557 (App. Div. 1962) (per curiam).

212 *See, e.g., In re* Ashcroft, 888 F.2d 546, 547 (8th Cir. 1989) (per curiam).

213 *See, e.g.*, Goss Graphics Sys., Inc. v. DEV Indus., Inc., 267 F.3d 624, 627-28 (7th Cir. 2001) (reversing dismissal of suit imposed as a sanction due to parties' failure to settle); *Kothe*, 771 F.2d at 669-70 (condemning coercion and reversing

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a sanction imposed when a case settled at trial after the insurance carrier agreed to pay the same amount the judge had recommended weeks earlier).

214 Floyd, *supra* note 10, at 83; Shoot & McGrath, *supra* note 197, at 34; Tornquist, *supra* note 50, at 752.

215 *See generally* Elliott, *supra* note 46, at 329-33 (criticizing active case management for lack of procedural safeguards); Resnik, *supra* note 1, at 424-35 (same).

216 Liteky v. United States, 510 U.S. 540, 553-55 (1994).

217 *Id.* at 555.

218 Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980).

219 Floyd, *supra* note 10, at 83.

220 *Id.* at 82-83.

221 Either the situation must qualify for mandamus, or there must be an appealable order in the trial court (such as a sanctions order or dismissal) to provide a vehicle to challenge inappropriate settlement behavior. *Id.* at 82. Ironically, when coercion to settle is effective, the case is closed, leaving no avenue to raise an objection. *Id.* at 82-83.

222 Resnik, *supra* note 1, at 426-31; Tornquist, *supra* note 50, at 771-72; *see also* Elliott, *supra* note 46, at 327.

223 Alfini, *supra* note 119, at 13.

224 *See, e.g.*, Cratsley, *supra* note 122, at 581; *cf.* Lon L. Fuller, *The Adversary System* ("An adversary presentation seems the only effective means for combating th[e] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."), *in* TALKS ON AMERICAN LAW 34, 44 (Harold J. Berman ed., rev. ed. 1971).

225 *See infra* text accompanying notes 305-07.

226 *See* Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *2 (E.D. Wis. Oct. 26, 2007) (order of recusal) (magistrate judge recusing himself from presiding in a case he previously mediated).

227 *Compare* United States v. Pfizer Inc., 560 F.2d 319, 322-23 (8th Cir. 1977) (per curiam) (proposing that a settlement figure creates appearance of bias requiring judge's recusal for a bench trial), *and* First Wis. Nat'l Bank of Rice Lake v. Klapmeier, 526 F.2d 77, 80 n.6 (8th Cir. 1975) (same), *with* Franks v. Nimmo, 796 F.2d 1230, 1233-34 (10th Cir. 1986) (finding no appearance of bias when judge urged plaintiff in ex parte meeting to settle because judge could not rule in his favor), *and* Smith v. Sentry Ins., 752 F. Supp. 1058, 1061-62 (N.D. Ga. 1990) (denying recusal request based on judge's comments on the merits of plaintiff's case during a settlement conference). Moreover, again, there are also procedural barriers to success with a motion to recuse or disqualify. *See* Floyd, *supra* note 10, at 83-84.

228 *See, e.g.*, *Kearny*, 2007 WL 3171395, at *2 (opining that the ethical obligations of a presiding judge "limit[] the judge's ability to speak candidly").

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229 Robinson, *supra* note 122, at 372-73; *see also Brazil Interview, supra* note 153, at 26 (Judge Klein expressing the view that parties are less likely to fear that settlement will color subsequent rulings if a judge uses a facilitative approach, whereas a highly evaluative style raises questions about a judge's ability to remain neutral).

230 *See generally* DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION 165-206 (2d ed. 2012) (exploring the importance of expanding information during mediation and discussing techniques for doing so).

231 *See, e.g.*, Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325-28 (1994).

232 Often a mediator does not convey the information explicitly to the other side, but instead engages in a process of "noisy translations." *Id.* at 328.

233 Professor Resnik argued that this was a more general problem associated with all pretrial proceedings. Resnik, *supra* note 1, at 426-27.

234 *See infra* notes 241-46 and accompanying text.

235 Hogan, *supra* note 129, at 439-40.

236 *Id.*; *see also* Cratsley, *supra* note 122, at 588 n.69.

237 *See, e.g.*, Enter. Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001); Pizzuto v. State, 10 P.3d 742, 748 (Idaho 2000); Hite v. Haase, 729 N.E.2d 170, 176 (Ind. Ct. App. 2000); *see also* JUDICIAL CONFERENCE OF THE U.S., Advisory Opinion No. 95 (2009) [hereinafter Advisory Opinion No. 95] ("Judges ... periodically receive information that is not admissible and exclude it from their deliberations before rendering judgment. It is not unreasonable to credit their ability to be impartial in these circumstances."), *in* 2B GUIDE TO JUDICIARY POLICY ch. 2, § 220, at 161, 162, http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf [https://perma.cc/2BTP-LKKL] (last revised Apr. 25, 2016).

238 Cratsley, *supra* note 122, at 583 n.49 (citing cases). For judicial expressions of confidence in this ability, see *infra* note 318.

239 *See infra* notes 293-99 and accompanying text.

240 *Brazil Interview, supra* note 153, at 25 (quoting Judge Bremer stating that a judge is likely to learn about the parties' interests, strategies, and the value their counsel places on the case).

241 FRENKEL & STARK, *supra* note 230, at 169 ("If a resolution is to be achieved in mediation, both the parties and the mediator need far more and different information than a judge would need to decide a case.").

242 *See supra* note 137 and accompanying text.

243 FRENKEL & STARK, *supra* note 230, at 169 (emphasis omitted).

244 JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING 73 (2012).

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245 *See* Schauf v. Schauf, 107 P.3d 1237, 1245 (Kan. Ct. App. 2005) (per curiam) (recognizing need for disclosures of strategic strengths and weaknesses in mediation and the potential to "taint impartiality" of decisionmaker).

246 *Brazil Interview, supra* note 153, at 25 (quoting Judge Bremer expressing special concern about settlement disclosures of case valuation).

247 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-370 (1993), http://www.americanbar.org/content/dam/aba/publications/YourABA/93_370.authcheckdam.pdf [https://perma.cc/B2TM-75U8] (discussing judicial participation in pretrial settlement negotiations and concluding that a judge may ask a lawyer to disclose settlement limits authorized by the client and inquire about the lawyer's advice on settlement terms, but that a lawyer may not reveal that information without informed client consent).

248 Advisory Opinion No. 95, *supra* note 237, at 162.

249 *E.g.*, Duininck Bros., Inc. v. Howe Precast, Inc., No. 4:06-cv-441, 2008 WL 4411608, at *2 (E.D. Tex. Sept. 23, 2008) (order granting defendant's motion to strike) (striking mediator as expert witness and noting that sensitive, highly relevant information was disclosed to the mediator on the understanding that it would facilitate settlement); VJL v. RED, 39 P.3d 1110, 1113 n.3 (Wyo. 2002) (reprimanding mediator for reporting on party's behavior during mediation). *But see* Harkrader v. Farrar Oil Co., No. 2004-CA-000114-MR, 2005 WL 1252379, at *2 (Ky. Ct. App. May 27, 2005) (refusing to reverse a court order enforcing a settlement when trial court had considered an affidavit from a mediator).

250 *E.g.*, Enter. Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001) (holding that a judge who learned of mediation settlement offers in violation of confidentiality statute was not disqualified); Metz v. Metz, 61 P.3d 383, 389 (Wyo. 2003) (holding that a judge who heard evidence about divorce mediation was not required to recuse).

251 *See* Blackmon v. Eaton Corp., 587 F. App'x 925, 933-34 (6th Cir. 2014) (holding that a magistrate judge was not disqualified from issuing a report and recommendation in a case he had previously mediated); Zhu v. Countrywide Realty Co., 66 F. App'x 840, 842 (10th Cir. 2003) (rejecting a claim that it was improper for a magistrate judge who served as mediator to recommend that the contested settlement agreement be enforced); Rehkoph v. REMS, Inc., 40 F. App'x 126, 130 (6th Cir. 2002) (finding no error when the trial judge acted as mediator and then decided motion for summary judgment); Garrett v. Delta Queen Steamboat Co., No. 05-1492-CJB-SS, 2007 WL 837177, at *2 (E.D. La. Mar. 14, 2007) (denying motion to recuse the magistrate judge based on argument that her involvement as mediator would cause her to be prejudiced and vested in enforcement of the contested settlement); DeMers v. Lee, 99 Wash. App. 1056 (Ct. App. 2000) (per curiam) (finding no violation of the appearance of fairness doctrine when the judge who presided at a settlement conference enforced the contested agreement). *But see In re* Disqualification of Unruh, 937 N.E.2d 1030, 1031 (Ohio 2010) (ordering disqualification of trial judge who participated in mediation from evidentiary hearing on disputed settlement agreement because of the likelihood she would be called to testify about the agreement).

252 28 U.S.C. § 455(b)(1) (2012).

253 Liteky v. United States, 510 U.S. 540, 553-55 (1994). The same requirement for an extrajudicial source of bias has been applied in cases refusing to reverse decisions for alleged judicial bias in a decision. Floyd, *supra* note 10, at 72-74.

254 Williams v. Anderson, 460 F.3d 789, 814 (6th Cir. 2006) (quoting *Liteky*, 510 U.S. at 550).

255 Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980).

256 *See, e.g.*, Sec. & Exch. Comm'n v. Sunwest Mgmt., Inc., No. 09-6056-HO, 2009 WL 1065053, at *2 (D. Or. Apr. 20, 2009) (refusing to require recusal of presiding judge who had mediated a similar case with many of the same parties and

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citing cases), *aff'd*, 360 F. App'x 826 (9th Cir. 2009); *see also* Floyd, *supra* note 10, at 68-72 (discussing cases in which courts rejected arguments that a judge should be disqualified for biased statements made during settlement conferences).

257 Some policies have drawn on the assumption that lawyers and parties are likely to choose reticence. For example, the Uniform Mediation Act excluded from its coverage judicial conferences conducted by a judge who might make a ruling in the case in part because the drafters believed that parties were not likely to be candid with a judge during such a mediation, and thus the confidentiality protections of the Act were unnecessary. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE § 10.16, at 628 (20162017 ed.).

258 *See supra* note 241 and accompanying text.

259 *Cf.* Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ON ARB. & MEDIATION 219, 224-25 (2013). Lawyers may also be tempted to engage in other unproductive strategic behaviors, such as demanding excessive amounts to anchor a judge's perception, *see infra* text accompanying notes 284-90, which can reduce the likelihood of reaching a settlement. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT § 16.14(2)(a) (8th ed. 2016) (opining that advocates would be "wise" to engage in anchoring when a settlement conference is conducted by a presiding judge, but noting that this will decrease the likelihood that the conference will lead to a settlement).

260 BRAZIL, *supra* note 59, at 84. Smaller, but substantial, percentages also disapproved in cases scheduled for a jury trial. *Id.* at 85-86 (reporting that more than 40% of lawyers had reservations about settlement involvement by an assigned judge in cases to be tried by jury: 33% deemed this practice to be improper, while 9% were not sure about its propriety).

261 *Id.* at 85. Brazil found that the greatest antipathy for an assigned judge acting as a settlement neutral was in the district where lawyers had the most pronounced preference for active and assertive judicial involvement in settlement. *Id.* at 90-94. This led him to suggest that these attitudes were linked. *Id.* at 94. He speculated that because these lawyers wanted their settlement neutral to dig deeply into the case and express opinions, perhaps they therefore did not think this judge could then try the case with complete impartiality. *Id.*

262 Wissler, *supra* note 137, at 274-75. The study also compared lawyers' views on these two forms of settlement conferences with their opinions on three types of mediation: court-connected mediation by court staff mediators, court-connected mediation by volunteer mediators, and mediation with private, paid mediators. *Id.*

263 *Id.* at 298-99, 298 tbl.12, 299 n.110.

264 Judges not assigned were seen as more likely to incorporate clients into the settlement process, to devote a sufficient amount of time to settlement, and to leave clients feeling well served regardless of the outcome. *Id.* at 310. The two types of judges were rated similarly on providing useful input, helping to manage difficult parties, responding in a timely manner, and making good use of parties' resources. *Id.* The only advantage lawyers attributed to judges assigned to the case was more credibility regarding settlement considerations. *Id.*

265 *Id.* at 287 & tbl.3 & n.68.

266 *Id.* at 284-86, 284 n.57, 285 tbl.1 & n.60, 286 tbl.2. Similarly, in Brazil's study, nearly two-thirds of the lawyers thought they would be less open in discussing settlement with the trial judge in a non-jury trial than with another judge. BRAZIL, *supra* note 59, at 92. This was especially true in northern California, where 80% of the respondents held this view. *Id.*

267 BRAZIL, *supra* note 59, at 85.

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268 *Id.* at 84.

269 Resnik, *supra* note 1, at 427 & n.197.

270 DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

271 Exec. Order No. 13707, 80 Fed. Reg. 56365 (Sept. 18, 2015).

272 Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?, in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436-38 (Thomas Gilovich et al. eds., 2002) [hereinafter HEURISTICS AND BIASES]. Others have proposed two-process models that use different terminology and vary somewhat, but there is agreement on the general characteristics of the two systems. *Id.*

273 Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in* HEURISTICS AND BIASES, *supra* note 272, at 49, 49.

274 KAHNEMAN, *supra* note 270, at 20.

275 Kahneman & Frederick, *supra* note 273, at 49.

276 KAHNEMAN, *supra* note 270, at 21.

277 *Id.*

278 *Id.* at 86.

279 Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 8-9 (2007) [hereinafter Guthrie et al., *Blinking*]; *see also* Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1480-82 (2009) [hereinafter Guthrie et al., *Hidden*].

280 Guthrie et al., *Blinking, supra* note 279, at 9.

281 *Id.* at 10-19 (describing results of the Cognitive Reflection Test with judges); *see also* KAHNEMAN, *supra* note 270, at 48 (explaining test).

282 Guthrie et al., *Blinking, supra* note 279, at 19-27 (discussing examples of anchoring, representativeness, and hindsight bias); *see also* Guthrie et al., *Hidden, supra* note 279, at 1495-520 (discussing research with administrative law judges on anchoring, framing, conjunction, hindsight bias, disregarding, and egocentric bias); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787-815 (2001) [hereinafter Guthrie et al., *Inside*] (discussing research with federal magistrate judges on anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (describing assessments of judges' ability to disregard inadmissible evidence).

283 Guthrie et al., *Blinking, supra* note 279, at 40.

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284 *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128-30 (1974) (describing anchoring and showing how providing different starting points influences estimates); *see also* KAHNEMAN, *supra* note 270, at 119-28 (discussing mechanisms of anchoring and its effects); ROBBENNOLT & STERNLIGHT, *supra* note 244, at 71-72 (discussing anchoring in the legal context).

285 For example, when people were asked to estimate the average daytime temperature in San Francisco, they gave higher values if they had first been asked if the average temperature was greater than 558 degrees Fahrenheit. SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 146 (1993).

286 Wistrich et al., *supra* note 282, at 1288-89.

287 *Id.*

288 *Id.*

289 *Id.* at 1289.

290 The judges in the low anchor group awarded an average of $612,000 in damages, less than half the average of the control group. *Id.* at 1289. In the high anchor group, the average damage award was $2.2 million, approaching three times that of the control group. *Id.* at 1290.

In another experiment demonstrating anchoring, a personal injury scenario with substantial damages, judges awarded significantly less if they were told that the defendants had filed a motion to dismiss the case from federal court on the ground that it did not meet the $75,000 jurisdictional minimum for a diversity case. Guthrie et al., *Blinking, supra* note 279, at 21; Guthrie et al., *Inside, supra* note 282, at 790-91. While the motion clearly lacked merit under the facts of the scenario, judges exposed to this anchoring figure awarded nearly 30% less on average than judges who were not told about the motion. Guthrie et al., *Blinking, supra* note 279, at 21; Guthrie et al., *Inside, supra* note 282, at 791-92; *see also* Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 196-97 (2006) (reporting effects on length of sentences from sentencing demands that judges knew to be randomly generated); Guthrie et al., *Hidden*, *supra* note 279, at 1501-06 (reporting anchoring by administrative law judges based on an irrelevant damage award from a court TV show).

291 Similar studies have demonstrated analogous anchoring bias with mock jurors; their damage awards are influenced by the amount they are told the plaintiff has requested in the lawsuit. *See, e.g.*, Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 525-27 (1996). In the case of juries, the legal system has reacted to this effect of anchoring. Some states have enacted provisions to eliminate this source of bias, either by prohibiting tort plaintiffs from specifying the amount of damages they seek in the complaint, *see, e.g.*, HAW. REV. STAT. ANN. § 663-1.3 (West 2008) (prohibiting "ad damnum" clause); ME. REV. STAT. ANN. tit. 14, § 52 (2003) (prohibiting dollar amount in demand in any civil case), or by prohibiting disclosure to the jury, *see, e.g.*, IDAHO CODE § 10-111 (2010) (grounds for mistrial to reveal amount of general damages sued for); TENN. CODE ANN. § 29-26-117 (2012) (demands for a specific sum may not be disclosed to the jury in a health care liability action). *But see* CONN. GEN. STAT. ANN. § 52-216b (West 2013) (authorizing counsel in personal injury or wrongful death cases to articulate the amount of damages claimed to the jury). Moreover, the practice of using closing argument to suggest a specific award that would compensate for noneconomic damages, such as pain and suffering, has fallen into disfavor in some courts on the ground that it risks "anchor[ing] the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence." Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1016 (2d Cir. 1995), *vacated on other grounds*, 518 U.S. 1031 (1996). *See generally* Don Rushing et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings*, 70 DEF. COUNSEL J. 378 (2003) (citing cases).

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292 *See supra* text accompanying notes 241-46.

293 *See supra* text accompanying notes 235-38. This confidence may result from a tendency toward positive illusions and egocentric bias. *See infra* text accompanying notes 314-16.

294 Wistrich et al., *supra* note 282, at 1286-322 (reporting that judges' rulings showed they were unable to disregard what they knew about settlement demands, information protected by the attorney-client privilege, sexual history in a sexual assault case, a criminal record in a civil case, and information excluded by a sentencing agreement, but were able to ignore the outcome of a search without probable cause and a criminal confession obtained after a request for counsel); *see also* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125 (1994) (finding that judges were unable to disregard evidence that a tort defendant had taken subsequent remedial measures).

295 Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem, in* HEURISTICS AND BIASES, *supra* note 272, at 185, 185-87.

296 *See* Wistrich et al., *supra* note 282, at 1265-67 (providing examples); *see also* ROBBENNOLT & STERNLIGHT, *supra* note 244, at 12-13.

297 Wistrich et al., *supra* note 282, at 1267-69.

298 *Id.* at 1269.

299 *Id.* at 1270.

300 ROBBENNOLT & STERNLIGHT, *supra* note 244, at 15.

301 *Id.* at 14-16; Eva Jonas et al., *Giving Advice or Making Decisions in Someone Else's Place: The Influence of Impression, Defense, and Accuracy Motivation on the Search for New Information*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 977, 978 (2005) (noting bias "in favor of previously held beliefs, expectations, or desired conclusions").

302 ROBBENNOLT & STERNLIGHT, *supra* note 244, at 15.

303 J. Edward Russo et al., *The Distortion of Information During Decisions*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 102, 102 (1996).

304 ROBBENNOLT & STERNLIGHT, *supra* note 244, at 16, 77-83 (discussing "debiasing").

305 *See supra* notes 151, 163-69 and accompanying text.

306 Eva Jonas et al., *Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 557-58 (2001).

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307 Aaron L. Brownstein, *Biased Predecision Processing*, 129 PSYCHOL. BULL. 545, 545 (2003). In developing a preference, decisionmakers seem to distort new information so as to favor their leading alternative, Russo et al., *supra* note 303, at 107, and thus inhibit careful and objective consideration of all alternatives.

308 It may also be irrelevant as an evidentiary matter.

309 Brownstein, *supra* note 307, at 565.

310 Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 262-63 (1999).

311 *See* Jonas et al., *supra* note 301, at 988.

312 *Id.*

313 *See* Guthrie et al., *Blinking, supra* note 279, at 32 (discussing the lack of feedback in litigation and explaining why appellate review is an inadequate mechanism).

314 ROBBENNOLT & STERNLIGHT, *supra* note 244, at 68.

315 KAHNEMAN, *supra* note 270, at 86-88 (reporting that confidence in judgments is increased by coherence of the story).

316 ROBBENNOLT & STERNLIGHT, *supra* note 244, at 70.

317 Guthrie et al., *Inside, supra* note 282, at 813-16; *see also* Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 983-87 (1994) (reporting a study of bankruptcy judges who overestimated the degree to which lawyers who appeared before them felt they were fair, efficient, and diligent).

318 LACEY, *supra* note 44, at 23 ("As you become known as one who can conduct [settlement] discussions without coloring your judgment at trial, lawyers will not hesitate to engage in full, frank discussion with you."); Martin, *supra* note 159, at 194-95 (describing a judge who conducts his own settlement conferences when he is the trier of fact because, as the judge, "he is able to 'turn off' the information he learned as a mediator"); Miller, *supra* note 128, at 33 ("When I was in private practice, one of my sensitivities about a judge getting actively involved in the settlement process was a concern for whether he or she could put aside what was said in mediation when it came time to decide the case .... In my own mind, I'm confident that I can do that ...." (quoting Judge McCarthy)).

319 28 U.S.C. § 455(a), (b)(1) (2012); *see also supra* text accompanying notes 216-18, 252-56.

320 Blackmon v. Eaton Corp., 587 F. App'x 925, 933 (6th Cir. 2014) (emphasis omitted) (quoting Williams v. Anderson, 460 F.3d 789, 814 (6th Cir. 2006)).

321 *See* JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES, *in* 2A GUIDE TO JUDICIARY POLICY, ch. 2, intro. [hereinafter CODE OF CONDUCT], http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf [https://perma.cc/VN6QVECJ] (last revised Mar. 30, 2014).

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322 *See, e.g.*, CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) (SUPREME COURT OF CAL. 2015); OHIO CODE OF JUDICIAL CONDUCT r. 2.6 (SUPREME COURT OF OHIO 2017); TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(8)(b) (SUPREME COURT OF TEX. 2002).

323 *See, e.g.*, N.Y. RULES OF THE CHIEF ADMIN. JUDGE r. 100.3 (N.Y. STATE UNIFIED COURT SYS. 2015) (dealing with adjudicatory responsibilities only); PA. CODE OF JUDICIAL CONDUCT Canon 3.1 (JUDICIAL CONDUCT BD. OF PA. 2014).

324 Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 280 (2007).

325 *See* JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS'N, OVERVIEW OF MODEL CODE OF JUDICIAL CONDUCT AS ADOPTED FEBRUARY 12, 2007, at 1 [hereinafter OVERVIEW OF MODEL CODE], http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/overview_gak_030707.authcheckdam.pdf [https://perma.cc/VF9R-9P5S].

326 SECTION OF DISPUTE RESOLUTION, AM. BAR ASS'N, PROPOSED ADDITION TO THE ABA MODEL CODE OF JUDICIAL CONDUCT (Feb. 2005), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/comm_rules_aba_dispute_resolution_020405_ddt.authcheckdam.pdf [https://perma.cc/9LHL-8G9X].

327 *Id.*

328 *Id.*; *see also* Molly McDonough, *Meddling in Settling: Pressure to Clear Caseloads Spurs Judges to Coerce Settlements, Critics Say*, ABA J., June 2005, at 14, 14 (describing proposal and citing perception that "plenty of judges coerce settlements or otherwise improperly meddle with the mediation process"). This and similar proposals were supported by numerous commentators. *See, e.g.*, Alfini, *supra* note 119, at 14; Cratsley, *supra* note 122, at 585-94; Floyd, *supra* note 10, at 88-89; Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 69-70 (2007).

329 OVERVIEW OF MODEL CODE, *supra* note 325, at 4.

330 MODEL CODE OF JUDICIAL CONDUCT r. 2.6(B) (AM BAR ASS'N 2007), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf [https://perma.cc/68T7-XLYP]. This provision did, however, elevate the caution against coercion from a comment in the prior Model Code into the canon itself, thus emphasizing this important principle.

331 *Id.* r. 2.9(A).

332 *Id.* r. 2.9(A)(4).

333 CODE OF CONDUCT, *supra* note 321, Canon 3(A)(4)(d).

334 *Id.* Canon 3(A)(4) cmt.

335 *See generally* Advisory Opinion No. 95, *supra* note 237.

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336 *Id.* at 162.

337 *Id.* at 161.

338 *Id.* at 162.

339 *Id.*

340 *Id.* at 163.

341 Advisory Opinion No. 95, *supra* note 237, at 162.

342 *Id.* at 163.

343 *See* Cratsley, *supra* note 117, at 4.

344 *See Judicial Code Panel Gets Close to Releasing Full Draft, Hears More Feedback on Its Work*, 21 ABA/BNA LAW. MANUAL PROF. CONDUCT 317 (2005) (describing negative reactions of judges on the ABA Commission at a public hearing).

345 *See* Agnes, *supra* note 82, at 265; Alfini, *supra* note 119, at 12.

346 *See, e.g*, Cratsley, *supra* note 117, at 4; Floyd, *supra* note 10, at 87-88; Shoot & McGrath, *supra* note 197, at 34; Tornquist, *supra* note 50, at 773; William L. Adams, Comment, *Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 OR. L. REV. 427, 455-56 (1993).

347 Cratsley, *supra* note 117, at 4.

348 *See supra* note 143.

349 *See, e.g.*, Golann, *supra* note 143, at 42; Stempel, *supra* note 143, at 970-83.

350 Despite the potential to diminish their effectiveness, there are nonetheless judges who self-censor their participation in settlement when assigned to trial due to worry about introducing bias. *See, e.g.*, Miller, *supra* note 128, at 34 (quoting Judge Polster commenting that he limited communications when settling a case scheduled for a bench trial by discussing only business solutions, not the merits); Will et al., *supra* note 53, at 215 (describing a judge who avoids discussion of settlement numbers even with a jury trial due to concern for bias in deciding potential post-verdict motions); *see also* CRAVER, *supra* note 259, § 16.14(2)(a) (suggesting a prohibition on parties stating specific demands as a way to prevent the anchoring effect in settlement conferences conducted by a judge assigned to trial); Deason, *supra* note 259, at 246-47 (describing a proposal for a no-caucus approach to mediation in order to limit information flow when mediation is combined with international arbitration before the same neutral).

351 *See, e.g.*, N.D. TEX. CIV. R. 16.3(b) (judge may not discuss settlement figures in nonjury cases "unless requested to do so by all concerned parties").

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352 *See, e.g.*, D. IDAHO CIV. R. 16.4(b)(1)(A) (judge's function in settlement conference is to "facilitate communication between the parties and assist them in their negotiations, e.g., by clarifying underlying interests"); E.D. OKLA. CIV. R. 16.2(a) (discussion to include "every aspect of the case bearing on its settlement value"); *id.* R. 16.2(g) (participants are "required to be completely candid with the settlement judge so that the judge may properly guide settlement discussions"); N.D. OKLA. CIV. R. 16.2(a), (g) (containing the same language as the Eastern District of Oklahoma); M.D. TENN. R. 16.04(d)(1)(a) (parties provide settlement judge with ex parte settlement conference statement including settlement positions); D. UTAH CIV. R. 16-3(c) (settlement judge may discuss any aspect of the case and make suggestions or recommendations for settlement); *see also* Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *2-3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (describing benefits to settlement of a judge's "unencumbered" participation, in contrast to the ethical obligations that constrain a presiding judge).

353 Floyd, *supra* note 10, at 82-84; *see also supra* text accompanying notes 216-21.

354 As described above, *see supra* text accompanying notes 94-97, most courts currently segregate "ADR" from settlement conferences and provide separate authorizations in their rules.

355 *See supra* text accompanying notes 100-06.

356 Under this approach, judges similarly do not serve as neutrals for neutral evaluation or court-annexed arbitration if the court sponsors those processes. Summary jury trials or summary bench trials are an exception, often presided over by the same judge who will hear the case if there is no settlement. They are not considered in this Article because they are relatively rare and because the neutral's role in those processes has so much overlap with the judge's role at trial.

357 Unfortunately, staff mediators in some districts, such as the Southern District of Ohio, have been eliminated due to budget cuts. E-mail from Terence P. Kemp, Mag., U.S. Dist. Court for the S. Dist. of Ohio, to author (Mar. 11, 2017, 10:44 EST) (on file with author).

358 *See, e.g.*, Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (stating that the court refers cases to magistrate judges for mediation under its ADR policy (citing E.D. WIS. CIV. R. 72.2(b)(20))); Garrett v. Delta Queen Steamboat Co., Inc., No. 05-1492-CJB-SS, 2007 WL 837177, at *2 (E.D. La. Mar. 14, 2007) (stating that magistrate judge schedules about eight settlement conferences a week); *see also* Welsh, *supra* note 126, at 999-1004; *supra* note 126 (citing articles by magistrate judge mediators).

359 *See, e.g.*, D. ALASKA CIV. R. 16.2(e)(2)(A) (court may order parties to mediate before a district, bankruptcy, or magistrate judge who is not assigned to the case); S.D. W. VA. CIV. R. 16.6.2 ("The parties may request that a judicial officer (who is not the presiding judicial officer) conduct the mediation.").

360 *See, e.g.*, N.D. CAL. ADR R. 5-12(a)(2), 6-12(a)(2); N.D. GA. CIV. R. 16.7(F)(3); S.D. GA. CIV. R. 16.7.8; C.D. ILL. R. 16.4(E)(7); D. KAN. R. 16.3(i)(2); E.D.N.Y. R. 83.8(d)(3); N.D. OHIO CIV. R. 16.5(h), 16.6(e)(3); D. OR. R. 16-4(g)(1); M.D. TENN. R. 16.08(a); S.D. TEX. CIV. R. 16.4.I; E.D. WASH. R. 16.2(g). In some districts, there is an exception that allows communication to the assigned judge with the consent of all the parties. *See, e.g.*, C.D. ILL. R. 16.4(E)(7); M.D. TENN. R. 16.05(e).

361 *See, e.g.*, N.D. CAL. ADR R. 5-8(b).

362 Reporting restrictions often limit the content of a mediator's report. *See, e.g.*, D. ALASKA CIV. R. 16.2(e)(3)(A); W.D. MICH. CIV. R. 16.3(f); N.D. OHIO CIV. R. 16.6(h); E.D. TENN. R. 16.4(m); M.D. TENN. R. 16.05(e). A parallel

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principle is often used with nonbinding arbitration so that the assigned judge may not learn the award until after a final judgment is entered or the case is terminated. *See, e.g.*, N.D. OHIO CIV. R. 16.7.

363 MINN. GEN. R. PRAC. 114.10(c), (d).

364 *Id.* R. 114.10(d). The neutral's report may also, with the parties consent, identify pending motions, outstanding legal issues, or discovery processes that, if resolved or completed would further the possibility of a settlement. *Id.*; *see also* IND. ADR R. 2.7(E)(1).

365 UNIF. MEDIATION ACT § 7(a) & cmt. (UNIF. LAW COMM'N 2003). There are limited exceptions allowing mediators to disclose whether mediation occurred, whether settlement was reached, and attendance. *Id.* § 7(b)(1).

366 *See, e.g.*, N.D. CAL. ADR R. 7-2; D. IDAHO CIV. R. 16.4(b)(2)(B); C.D. ILL. R. 16.4(B); N.D. ILL. CIV. R. 16.1(5); N.D. & S.D. IOWA CIV. R. 16.2(e); D. MASS. R. 16.4(b) (allowing case referral from a pretrial conference "to another judicial officer for settlement purposes"); E.D.N.C. CIV. R. 101.2(c); W.D.N.C. CIV. R. 16.3(D); D.N.D. R. 16.2(C)(1); E.D. OKLA. CIV. R. 16.2(j); N.D. OKLA. CIV. R. 16.2(c); W.D. OKLA. CIV. R. 16.2(a); D. OR. R. 16-4; M.D. TENN. R. 16.04(a); D. UTAH CIV. R. 16-3(b); *see also* Dale, *supra* note 159, at 47 (describing the settlement role of magistrate judges in the District of Idaho). Some limit this exclusion to assigned judges who are scheduled to conduct a bench trial. *See, e.g.*, D. CONN. CIV. R. 16(c)(2); C.D. ILL. R. 16.1(B).

367 *See, e.g.*, N.D. CAL. ADR R. 7-4(a); D.N.D. R. 16.2(C); M.D. TENN. R. 16.04(d)(3).

368 These measures include prohibiting communications about information discussed at a settlement conference, *see, e.g.*, D. IDAHO CIV. R. 16.4(b)(2)(F), preventing parties from filing their settlement conference memos with the court, *see, e.g.*, D. WYO. CIV. R. 16.3(c)(2)(A), or limiting reports following the conference to whether or not the parties reached a settlement, *see, e.g.*, D. IDAHO CIV. R. 16.4(b)(2)(E); E.D. OKLA. CIV. R. 16.2(j); N.D. OKLA. CIV. R. 16.2(j); D. UTAH CIV. R. 16-3(d).

369 Some districts appoint a single judge as a compliance judge who handles all allegations that the ADR rules were violated or a process abused. *See, e.g.*, E.D. CAL. R. 271(m)(2)(C)(ii), (p); D.D.C. CIV. R. 84.9(a)(2), 84.10; D. UTAH CIV. R. 16-2(j)(1).

370 For an example of this ambiguity, see S.D. W. VA. CIV. R. 16.3, under which the judicial officer to whom the case is assigned convenes pretrial conferences, and *id.* R. 16.7(c), which states that the final settlement conference is to be conducted by "the judicial officer."

371 *See, e.g.*, D. ME. R. 83.11(c); D. MD. CIV. R. 607(1); W.D. MICH. CIV. R. 16.8; D. MINN. R. 16.5(a)(4); N.D. & S.D. MISS. R. 16(g); W.D. VA. R. 83; W.D. WASH. CIV. R. 39.1(a), (c); N.D. W. VA. CIV. R. 16.04(e); E.D. WIS. CIV. R. 16(d).

372 *See, e.g.*, C.D. CAL. R. 16-15.4; S.D. CAL. CIV. R. 16.1(c), 16.3; D. CONN. CIV. R. 16(c); D. HAW. R. 16.5; D. N. MAR. I. CIV. R. 16.2CJ(e)(5)(c); W.D. TENN. CIV. R. 16.1(b); *see also* C.D. ILL. R. 16.3(I)(4)(a) (special provision for prisoner cases); D.N.H. CIV. R. 16.2(a)(8) (requiring parties to include information in their final pretrial statement describing their ADR participation and their final demand or offer, except in bench trials).

373 *See, e.g.*, Jaclyn Barnao, *In Pursuit of Settlement: Deciphering Judicial Activism*, 18 GEO. J. LEGAL ETHICS 583, 594-95 (2005) (quoting Judge Levy); *Brazil Interview*, *supra* note 153, at 24 (quoting Judge Bremer); Crane, *supra* note 122, at 21; Cratsley, *supra* note 122, at 571; R. Allan Edgar, *A Judge's View--ADR and the Federal Courts--The Eastern District of Tennessee*, 26 U. MEM. L. REV. 995, 1000 (1996); *Kennedy, supra* note 54, at 10; McKay, *supra*

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note 122, at 827; Peckham, *supra* note 1, at 789; Zampano, *supra* note 137, at 4. For some, this concern is limited to nonjury cases. *See* Baer, *supra* note 122, at 150-51; *Brazil Interview, supra* note 153, at 25 (quoting Judge Klein); Will et al., *supra* note 53, at 211-12.

374 *See, e.g.*, CRAVER, *supra* note 259, § 16.14(1); Alfini, *supra* note 119, at 11; Randall E. Butler, *Ethics in Mediation: Protecting the Integrity of the Mediation Process*, HOUS. LAW., Mar./Apr. 2001, at 40, 43-44; Frey, *supra* note 136, at 760; Killefer, *supra* note 169, at 21; Longan, *supra* note 126, at 738; Marcus, *supra* note 15, at 1593; Menkel-Meadow, *supra* note 16, at 511; Resnik, *supra* note 1, at 435; Frank E.A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG., Fall 1999, at 11, 24; Schuck, *supra* note 158, at 364; Tornquist, *supra* note 50, at 760; Susan M. Gabriel, Note, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 OHIO ST. J. ON DISP. RESOL. 81, 91-92 (1988). *But see* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1997 (2007).

375 *See supra* notes 260-68 and accompanying text.

376 *See supra* text accompanying notes 356-59.

377 Novak v. Farneman, No. 2:10-CV-768, 2011 WL 4688630, at *4 (S.D. Ohio Sept. 30, 2011) (deciding that continuing to preside over disputes the judge had mediated did not pose a threat to impartiality and that recusal was not required, but nonetheless recusing himself to avoid any taint of suggested bias); Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (magistrate judge recusing himself on his own initiative when assigned to try a case he had mediated); *see also* Day v. NLO, 864 F. Supp. 40, 41, 43-44 (S.D. Ohio 1994) (order transferring case) (disagreeing with the argument that a judge who participated in settlement is incapable of reviewing that settlement, but recusing himself "out of an abundance of caution").

378 *Brazil Interview, supra* note 153, at 24 (noting "considerable disagreement" among federal judges).

379 *See, e.g.*, LACEY, *supra* note 44, at 23; Baer, *supra* note 122, at 148; *Brazil Interview, supra* note 153, at 27 (quoting Judge Klein); Hogan, *supra* note 129, at 439; Miller, *supra* note 128, at 33 (quoting Judge McCarthy); Polster, *supra* note 122; *see also* Martin, *supra* note 159, at 194-95 (describing a judge who conducts his own settlement conferences when he is the trier of fact).

380 Robinson, *supra* note 122, at 344 & tbl.2, 356 & tbl.6. Actual use of the practice was somewhat less prevalent. Practices were almost evenly split at the extremes on the general civil trial bench. About 38% of the judges reported that they were the trial judge in 90% or more of their settlement conference cases, while almost 40% reported that they were rarely assigned as the trial judge in their settlement conference cases (10% or less). *Id.* at 346 & tbl.5. Judges assigned to the family law bench, however, were more likely to conduct settlement conferences in cases to which they were assigned for trial. *Id.* at 347; *see also* Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv., Nos. 00-1401 (PLF/JMF), 00-2089 (PLF/JMF), 2010 WL 4116858, at *4 (D.D.C. Oct. 19, 2010) (remarking that federal magistrate judges "are often called upon to try a case after they have presided over settlement discussions" in the District of Columbia).

381 *See supra* notes 314-18 and accompanying text.

382 *See* Gensler, *supra* note 9, at 720. *See generally* Marcus, *supra* note 15; Subrin, *supra* note 17.

383 *See, e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 44 (1995); Resnik, *supra* note 1, at 380; Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 553 (2006).

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384 The appropriate amount of discretion the rules should grant to judges is an important question that requires a delicate balance among many competing policies, among them simplicity, flexibility, uniformity, predictability, and the transsubstantive application of the rules. *See, e.g.*, Bone, *supra* note 374, at 1963-64; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1936-37 (1989) (criticizing aversion to substance-specific procedures that necessitates heavy reliance on judicial discretion); Gensler, *supra* note 9, at 720-26 (summarizing scholarly criticism and defense of discretion); Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 116-19 (2007) (discussing tradeoffs among simplicity, predictability, tailoring, and divergent treatment).

385 Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002).

386 As an example, the Federal Rules of Civil Procedure permit judges to vary the appropriate number and length of depositions depending on the circumstances of the case. *See* FED. R. CIV. P. 26(b)(2), 30(a)(2), 30(d)(1).

387 There are also other reasons to avoid undue optimism about the prospects of addressing the problem of dual-neutral roles via an amendment to Rule 16. In the words of Professor Marcus, Associate Reporter of the Advisory Committee on Civil Rules, "Amendments do not and should not happen often. Amending the rules is not easy and should not be." Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 637 (2013). Moreover, sometimes a crisis mentality is necessary before procedural reform is undertaken. Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 186 (2008).

388 *See supra* notes 158-76 and accompanying text.

389 One judge has even suggested reciprocal arrangements between federal- and state-court judges. Cratsley, *supra* note 122, at 589.

390 Polster, *supra* note 122.

391 Baer, *supra* note 122, at 149.

392 *See* Welsh, *supra* note 126, at 990, 1028-32 (proposing strict confidentiality provisions to separate mediation from adjudication).

393 UNIF. MEDIATION ACT § 7(a) (UNIF. LAW COMM'N 2003); *see also supra* Part IV.C.2.

394 Advisory Opinion No. 95, *supra* note 237, at 162.

395 *See, e.g.*, Baer, *supra* note 122, at 150; Barnao, *supra* note 373, at 594-95; *Brazil Interview, supra* note 153, at 25 (quoting Judge Klein); Katz, *supra* note 135, at 3; Will et al., *supra* note 53, at 211-12; *see also* D. CONN. CIV. R. 16(c) (distinguishing assignment of neutral for bench and jury trials); D. HAW. R. 16.5 (same).

396 Polster, *supra* note 122, at n.2.

397 Cratsley, *supra* note 122, at 589 (discussing decisions about the jury empanelment process, evidentiary rulings, motions for directed verdict, and jury instructions); Killefer, *supra* note 169, at 19 (noting important effect of judges' rulings on "the shape" of jury trial).

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398 Barnao, *supra* note 373, at 595 n.87 (quoting Judge Levy).

399 *Brazil Interview, supra* note 153, at 24 (quoting Judge Bremer discussing procedures in the District of Iowa to separate settlement from management functions).

400 *See, e.g.*, Peter David Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 92 (1985).

401 Ann Burnett & Diane M. Badzinski, *Judge Nonverbal Communication on Trial: Do Mock Trial Jurors Notice?*, 55 J. COMM. 209, 209 (2005).

402 *See e.g.*, Andrew Horwitz, *Mixed Signals and Subtle Cues: Jury Independence and Judicial Appointment of the Jury Foreperson*, 54 CATH. U. L. REV. 829, 850-54 (2005) (discussing cases).

403 Advisory Opinion No. 95, *supra* note 237, at 161.

404 *See* SECTION OF DISPUTE RESOLUTION, *supra* note 326. It would also have permitted the practice if there is no reasonable alternative, such as when a jurisdiction has only a single judge. *Brazil Interview, supra* note 153, at 26.

405 *Brazil Interview, supra* note 153, at 25 (quoting Judge Klein emphasizing the importance of the parties' wishes); Katz, *supra* note 135, at 3 (describing a judge willing to participate in mediation in cases scheduled for bench trial when parties so request and waive the conflict). The survey of California judges that asked about dual-neutral roles premised the question on party consent. Robinson, *supra* note 122, at 343; *see also supra* text accompanying note 380.

406 *See, e.g.*, E.D. CAL. R. 240(a)(16), 270(b); N.D. CAL. ADR R. 7-2; D. GUAM R. 16-2(b)(1)(B); D. HAW. R. 16.5(a); D.N.D. R. 16.2(C)(1) ("appropriate jury case[s]" only); *see also* D. OR. R. 16-4(e)(2) (parties must "jointly initiate a request"); M.D. TENN. R. 16.04(a) (exception when "requested and agreed by the parties" or if the assigned judge deems it appropriate "because of the exigencies of the case").

407 *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard 1 (AM. ARBITRATION ASS'N ET AL. 2005) (self-determination).

408 *See supra* text accompanying notes 331-34.

409 *Cf.* Welsh, *supra* note 126, at 990, 1032-33 (proposing that when a single magistrate judge presides over both settlement and adjudication, caucuses should be barred in the settlement session and the parties should be able to elect, after the settlement session, whether or not the magistrate judge will conduct the trial).

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THE TOP TEN REASONS WHY MEDIATORS SHOULD NOT EVALUATE

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II. EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTITHETICAL TO THE GOALS OF MEDIATION 940
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The debate over whether mediators should "evaluate" revolves around the confusion over what constitutes evaluation and an "evaluative" mediator. The following examples describe two situations in which the mediators operate in an evaluative capacity.

During the course of an employment termination dispute, Eric Green [1] "tells both sides privately that, in his opinion, $600,000 … is the settlement value of the case." [2] Green pushes the employer towards settlement by saying, "It was your corporation's responsibility ***938** to live up to its moral obligations." [3] When the former employee resists the $600,000 figure, Green's responds, "How greedy can you get?" [4] In the second example, during a divorce mediation, the husband appears friendly and gregarious while the wife is calm and poised, but somewhat cool. [5] The mediator repeatedly favors the husband in a manner indicating that she enforces the groundrules. [6] When the wife mentions her debilitating health problems, the mediator laughs and says, "You don't have to act sick to get what you want." [7]

In the first example, Green evaluates by assessing a fair settlement value of the case and pressing the parties to accept that settlement value. In the second example, the mediator evaluates by making and articulating a judgment that the party is acting sick as a ploy to advance her position.

An "evaluative" mediator gives advice, makes assessments, states opinions-- including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution. [8] The ten reasons that follow demonstrate that those activities are inconsistent with the role of a mediator.

I. THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS

Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions. To do so, they use predetermined criteria to evaluate evidence and arguments presented by adverse parties. The tasks of evaluators include: finding "the facts" by properly weighing evidence; judging credibility and allocating the burden of proof; determining and applying the relevant law, rule, or custom to the particular situation; and making an award or rendering an opinion. The adverse parties have expressly asked the evaluator--judge, arbitrator, or expert--to decide the issue or resolve the conflict.

***939** In contrast, the role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations. A mediator "facilitate[s] communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement." [9] Mediators push disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives, stories, and arguments. They urge the parties to consider relevant law, weigh their own values, principles, and priorities, and develop an optimal outcome. In so doing, mediators facilitate evaluation by the parties.

These differences between evaluators and facilitators mean that each uses different skills and techniques, and each requires different competencies, training norms, and ethical guidelines to perform their respective functions. Further, the evaluative tasks of determining facts, applying law or custom, and delivering an opinion not only divert the mediator away from facilitation, but also can compromise the mediator's neutrality--both in actuality and in the eyes of the parties--because the mediator will be favoring one side in his or her judgment. [10]

Endeavors are more likely to succeed when the goal is clear and simple and not at war with other objectives. [11] Any task, whether it is the performance of an Olympic athlete, the advocacy of an attorney, or the negotiation assistance provided by a mediator, requires a clear and bright focus and the development of appropriate strategies, skills, and power. In most cases, should the athlete or the attorney or the mediator divert their focus to another task, it will diminish their capacity to achieve their primary goal. "No one can serve two masters." [12] Mediators cannot effectively facilitate when they are evaluating. [13]

***940** II. EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTITHETICAL TO THE GOALS OF MEDIATION [14]

When disputing parties are in the presence of an evaluator--a judge, an arbitrator, or a neutral expert--they act (or should act) differently than they would in the presence of a mediator. With an evaluator, disputants make themselves look as good as possible and their opponent as bad as possible. They do not make offers of compromise or reveal their hand for fear that it weakens the evaluator's perception of the strength of their case. [15] They are in a competitive mind-set seeking to capture the evaluator's favor and *win* the case.

While adversarial confrontations between parties are helpful to a neutral who must judge credibility and clarify the choices he or she must make, such confrontations are not helpful to collaboration. Adversarial behaviors run counter to the mediator's efforts to move parties towards a different perception of their own situation and of each other. [16] While parties typically enter the mediation process in a hostile and adversarial stance, the mediator seeks to shift them towards a collaborative posture in which they jointly construct a win-win solution. An atmosphere of respectful collaboration is a necessary foundation for creative problem-solving. [17]

III. ETHICAL CODES CAUTION MEDIATORS--AND OTHER NEUTRALS--AGAINST ASSUMING ADDITIONAL ROLES

The ethical codes explicitly include a preference to keep processes "pure." The Model Standards of Conduct for Mediators highlight party self-determination as being the fundamental principle of mediation. [18] The committee that created the Model Standards rejected ***941** mediation as an evaluative process. [19] The comments to the Model Standards state that "[a] mediator

should … refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes."[20]

Similarly, ethical codes for arbitrators encourage those neutrals not to participate in settlement discussions unless requested to do so by all parties.[21] Important rationales for this rule are: the arbitrator may be improperly influenced by the settlement discussions; the arbitrator may impede the discussions by his or her presence; and the arbitrator's questions and suggestions while acting as a mediator can create improper pressure to settle.

Consequently, a mediator undertaking to give an opinion on the likely court outcome of a particular claim or a fair resolution of a particular matter should give an accurate label of the new role he or she is assuming[22] and obtain the disputants' informed consent for undertaking the new role. Also, the mediator should be sure that the disputants understand that taking on an additional role might adversely impact the ability to facilitate discussions. When processes become "mixed," such as when an arbitrator mediates or a mediator evaluates, it should be at the request and with the informed consent of the parties.

IV. IF MEDIATORS EVALUATE LEGAL CLAIMS AND DEFENSES, THEY MUST BE LAWYERS; ELIMINATING NONLAWYERS WILL WEAKEN THE FIELD

If it is acceptable or customary for mediators to give opinions on likely court outcomes or the merits of particular legal claims or defenses, then only lawyers and substantive experts will be competent to mediate.[23] The comments to the Model Standards state that a ***942** "mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes."[24]

While this result may be good news for lawyers, the mediator pool would be substantially weakened by the loss of the talents and perspectives of nonlawyers.[25] Furthermore, if the field is theirs, lawyer-mediators will likely pull mediation into an adversarial paradigm.[26] One noted authority in the mediation field, reacting to a Florida rule requiring mediators of certain cases to be either experienced lawyers or retired judges, proclaimed this requirement to be "the end of good mediation."[27]

V. THERE ARE INSUFFICIENT PROTECTIONS AGAINST INCORRECT MEDIATOR EVALUATIONS

Even assuming that mediators could be governed by and held to appropriate standards when they evaluate, growing concerns about the quality of justice that disputants receive when they are diverted from courts into private alternative dispute resolution (ADR) processes[28] argue for leaving evaluation to adversarial processes where due process protections are in place. In the courts, disputants can appeal decisions they feel are wrong. In arbitration, disputants pick arbitrators based on the arbitrator's substantive expertise or wisdom and consciously waive the right to appeal.

In mediation, little protection exists from a mediator's inadequately informed opinion. Confidentiality statutes, rules, and agreements keep sessions private.[29] Quasi-judicial immunity in some ***943** cases can shield mediators from liability for careless opinions.[30] The mediator's opinion that one of the parties should buy a carpet to lessen the impact of sounds heard by a neighbor or that one of the parties does not have standing to bring a particular claim in court carries enormous weight.[31] Mediators are not in the best position to make those sorts of evaluations because, if they are doing their facilitative job, they have not completed the necessary preliminary tasks of an evaluator. Additionally, unless a mediator has separate training as a judge, arbitrator, or neutral evaluator, he or she may not be competent to serve as an evaluator. Service as a mediator does not qualify a mediator to be a judge any more than service as a judge qualifies a judge to mediate.

VI. EVALUATION ABOUNDS: THE DISPUTING WORLD NEEDS ALTERNATIVE PARADIGMS

The processes of litigation, "rent-a-judge,"[32] arbitration,[33] early neutral evaluation,[34] and summary jury trial[35] are all available for parties who want opinions or decisions. Evaluative models and service providers abound. We need a genuine alternative to the adversarial paradigm of disputants who fight and a neutral who assesses.

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The collaborative paradigm of mediation, in which mediator evaluation does not play a part, offers a dispute resolution process ***944** through which parties are taught how to resolve their own disputes, listen to each other differently, broaden their own capacities for understanding and collaboration, and create resolutions that build relationships, generate more harmony, and are "win-win."[36] The lesson, "Give a man a fish and you feed him for a day, teach him to fish and you feed him for a lifetime," highlights the importance of teaching people how to solve their own dilemmas.

In the corporate world, phalanges of consultants assist in promoting creative problem-solving and building teams capable of successful collaboration. Similarly, the legal community needs a model from among the array of dispute resolution processes that will assist parties to evolve in their understandings, relationships, and arrangements, using the opportunity represented by conflict situations.

Mediation has the potential of being shifted towards an adversarial framework in which mediators "trash and bash"[37] to get parties to settle. They "trash" the parties' cases, predicting loss and risk if litigation is pursued.[38] They "bash" settlement proposals that the other side will not accept.[39] We lose a great deal if mediation becomes a mere adjunct of the adversarial norm. Having mediators use evaluation as a technique to get movement takes us in that direction.

VII. MEDIATOR EVALUATION DETRACTS FROM THE FOCUS ON PARTY RESPONSIBILITY FOR CRITICAL EVALUATION, RE-EVALUATION AND CREATIVE PROBLEM-SOLVING

If Einstein's insight is true that "[t]he significant problems we face today cannot be solved at the same level of thinking we were at when we created them,"[40] then we, as a society, are called on to nurture ways to achieve higher levels of thinking and creativity. Mediation is the one dispute resolution process in which the neutral's role ***945** is to assist the parties to collaborate creatively and resolve the issues they face.[41]

Frequently, for the individuals, communities, or institutions involved, conflicts represent true crises, holding the potential for doing extreme harm and, at the same time, holding the potential for creative change and restructuring. The mediator's task of elevating the dialogue from recriminations and blame to the generation of possibilities and breakthrough ideas is a task we are just beginning to understand. If we allow mediation and mediators to slip into the comfortable (because it is the norm) adversarial mind-set of evaluation, we kill the turbo-thrust of the jet engine of idea generation.[42] So-called "evaluative mediation" pulls mediation away from creativity and into the adversarial frame.[43] If we are to continue to survive and evolve as a species, we need to nurture the processes that tap our affinity to create and imagine.[44]

VIII. EVALUATION CAN STOP NEGOTIATION

When mediators provide opinions, the opinions have consequences. An unfavorable opinion can seriously disadvantage one of the parties. When a party disagrees with the unfavorable opinion, the party is likely to withdraw from the mediation, believing that the mediator has "sided" with the other party. On the other hand, a party advantaged by a favorable opinion may get locked into an unacceptable claim or position and negotiations may stop altogether.[45] Because mediators are charged with furthering negotiation, this result is undesirable.

The following incident illustrates this problem. The general counsel of a large shipping company was called to a mediation session in Florida.[46] The mediation involved a multi-million dollar dispute with ***946** a union, and the general counsel went to Florida wanting to settle the matter.[47] During the mediation, in a joint session, the mediator urged the company to be more flexible *because the business did not have a chance of winning on appeal.*[48] That evaluation shut down the negotiations by freezing the union representatives into their position.[49] Several years and hundreds of thousands of dollars later, the company won a complete victory in court that was affirmed on appeal.[50] Mediator behavior should not cause such pyrrhic (lose-lose) victories.

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Of course, when one side has an unrealistic assessment of its case, a different impediment to negotiation is present. In such cases, mediators should encourage re-evaluation by enabling each side to present its best case and strongest arguments to the other side, encouraging the parties to get professional advice, questioning conclusions of the parties, and urging a neutral evaluation to break a stalemate. [51]

IX. A UNIFORM UNDERSTANDING OF MEDIATION IS CRITICAL TO THE DEVELOPMENT OF THE FIELD [52]

A recently completed two-year-long study and report on court-referred ADR in New York State, commissioned by New York Court of Appeals Chief Judge Judith S. Kaye, concluded that a critical need exists for uniformity of standards and definitions for alternative dispute resolution processes. [53] The report specifically noted that "mediation" is a term used in an "extraordinary variety of ways." [54] To address this problem, the report recommends the promulgation of ***947** statewide standards [55] and the subscription of neutrals to a specific code of ethics. [56] In discussing the confusion of terms and labels, the report notes that "[b]lurring the lines between mediation, neutral evaluation and even arbitration can have deleterious consequences." [57] The consequences include parties who do not know what to expect and neutrals who do not understand what constitutes good practice. [58] Interestingly, the body of the report includes a discussion of training standards that states: "*mediators do not advise litigants on the law or likely court outcomes* …." [59]

When attorneys advise clients about the advantages and disadvantages of mediation, when courts and institutions create mediation programs and panels of mediators, when consumers go to the Yellow Pages to find a mediator, they should know what they are getting. They should have a clear understanding of the goals of the process and the tasks the neutral will perform. [60]

In an article criticizing ADR, Noreen Connell, former president of the New York State chapter of the National Organization for Women, describes a case in which a married couple elects to mediate their divorce to avoid dissipating marital assets in litigation:

> At the sessions, the mediator, who is a woman, echoes the husband's complaints that the wife is "too angry and too suspicious" when he claims that he no longer has a pension and that he has lost the credit card records. The wife is told her complaintss [sic] about not getting enough money to pay the mortgage since her husband moved out of the house are emotionally damaging to their son and that responsible parents choose joint custody. [61]

Ms. Connell's conclusion about mediation is contained in the article's title, "Beware of Alternative Dispute Resolution." Another conclusion based on the same story is that the mediator was so busy evaluating who was right and wrong and what the outcome should be that *the mediator did not mediate at all.* The mediation community must make the meaning of mediation so clear that, in her next article, Ms. Connell will criticize the mediator involved in this case, not the mediation process itself.

***948** X. MIXED PROCESSES CAN BE USEFUL, BUT CALL THEM WHAT THEY ARE!

Parties sometimes request that neutrals assume a variety of roles. "Mixed processes" abound: med-arb, arb-med, [62] mini-trials, [63] summary jury trials, and mediation and neutral evaluation. [64] These mixed processes can address particular needs of a situation and can be very helpful.

Mediators are not foreclosed from engaging in some other process or helping parties design a mixed process. Whatever the service being provided, however, it should be requested by the parties and accurately labeled. When a process is "mixed" and the neutral has multiple roles, he or she is bound by more than one code of ethics and is charged with separate goals and tasks. A properly labeled process--or, conversely, a label that has a clear meaning--promotes integrity, disputant satisfaction, and uniform practice.

Mediators who regularly give case assessments and expert opinions should continue those practices only if they are requested by the parties, properly advertised, and accurately labeled.

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Driving out of Manhattan on the Henry Hudson Parkway, a major route to New Jersey, a large billboard pictures David Letterman proclaiming: "Attention motorists: NJ is closed." I can imagine David Letterman with his huge smile announcing "Attention disputants: YOUR MEDIATOR MAY EVALUATE." It should seem equally absurd.

Footnotes

a1 Professor of Clinical Law, Director of the Mediation Clinic and the Kukin Program for Conflict Resolution, Benjamin N. Cardozo School of Law. B.A., Harvard University, 1973; M.Ed., Virginia Commonwealth University, 1975; J.D., Georgetown University, 1979. The author thanks: Kimberlee Kovach, for her partnership in writing about these ideas in an earlier article; Joseph Stulberg, for his partnership in exploring the evaluative-facilitative debate in the context of advanced mediator training programs; Baruch Bush, for his insightful dialogue on the subject; and Len Riskin, for raising the issue in the first place. The author acknowledges and deeply appreciates Rebecca Martin, Abigail Sloane, Roger Brach, and Dan Weitz for their helpful comments on drafts of this Article.

1 Eric Green founded Endispute, a dispute resolution consulting firm. He is a professor at Boston University Law School and the co-author of STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985), the first dispute resolution textbook for law students. The use of this example is not to criticize Professor Green's performance; he is a highly successful and respected neutral intervener. Rather, this Article argues that in this example, Professor Green is combining mediation with neutral evaluation to create a "mixed process."

2 Lavinia Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 279, 295 (Deborah M. Kolb et al. eds., 1994).

3 *Id.* at 298-99.

4 *Id.* at 299.

5 *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1586 (1991).

6 *See id.*

7 *Id.*

8 *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 27-28 (1996) (describing the mediator techniques associated with evaluative mediation as proposing a settlement, pushing parties to accept a settlement, predicting court or other outcomes, and assessing the strengths and weaknesses of each side's case).

9 John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95 app. at 123.

10 *See* Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31 (1996); *see also* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 265 (1989) (describing the importance of complete mediator impartiality). *But see* Marjorie Corman Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62, 62 (1996) (noting that while the primary risk of evaluation is the mediator's potential loss of perceived neutrality because the "loser" in the evaluation may view the mediator as an

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adversary, nonetheless, situations do exist in which the careful and thoughtful use of mediator evaluation can serve the parties).

11 *See* Kovach & Love, *supra* note 10, at 32.

12 *Matthew* 6:24.

13 As seen in Professor Green's performance, there are examples in the mediation literature of "mediators" who evaluate. *See supra* text accompanying notes 1-4. When mediators evaluate, they assume additional roles and potentially jeopardize their effectiveness as a mediator. However, "mixed processes," in which the mediator assumes different roles, can be useful. *See* discussion *infra* Part X.

14 *See* Kovach & Love, *supra* note 10, at 31 (noting that evaluation tends to perpetuate or create an adversarial climate and discourage understanding and problem-solving).

15 *See* Riskin, *supra* note 8, at 45 (noting that mediator evaluation can be a disincentive for the parties' candor). Federal Rule of Evidence 408 renders evidence of conduct or statements made in compromise negotiations inadmissible at trial to prove liability for or validity of a claim. *See* FED. R. EVID. 408. This rule encourages free participation in settlement discussions and highlights the assumption that negotiators will not speak openly and candidly if their remarks are or will be heard by someone who will subsequently evaluate their case. *See* FED. R. EVID. 408 advisory committee's note.

16 *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) (articulating and expounding the mediator goal of supporting parties' efforts to move towards empowerment and recognition).

17 The technique of "brainstorming," designed to maximize the development of creative options, precludes evaluation of ideas during the idea-generating process as detrimental to creativity. Parties should separate the processes of inventing solutions and deciding outcomes. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 62-67 (1981).

18 *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (Am. Arb. Ass'n et al. 1995) ("A Mediator shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.") The Model Standards were approved by the American Arbitration Association (AAA), the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution.

19 John Feerick, chairman of the committee that drafted the Model Standards, noted that "[w]e as a group did not buy into mediation as an evaluative process …." Feerick et al., *supra* note 9, at 103.

20 MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI cmt. (1995).

21 *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon IV.H (1977) (approved by the AAA and ABA). "[A]n arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle." *Id.*

22 *See* Kovach & Love, *supra* note 10, at 31 (stating that the Model Standards require a mediator who engages in other processes to inform the parties).

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23 *See* Riskin, *supra* note 8, at 46 (noting that the need for subject-matter expertise typically increases in direct proportion to the parties' need for mediator evaluation); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57, 61 (1996) (asserting that giving legal predictions and evaluations is the practice of law and cautioning nonlawyer-mediators to be wary of evaluative mediation).

24 MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI cmt. (1995).

25 *See* Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified--Lessons from the San Diego Experience*, 30 U.S.F. L. REV. 677, 693-97 (1996) (describing the critical role that nonlawyers and nonadversarial thinking have played in the development of mediation).

26 *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 50 (1991) (raising concerns regarding the transformation of mediation from a consensual to a coercive process); Kovach & Love, *supra* note 10, at 31-32 (discussing a variety of ways in which courts and lawyers tend to pull mediation towards an adversarial framework).

27 Alfini, *supra* note 26, at 47 (quoting Albie Davis's comment that increasing the use of evaluative mediation approaches portends the end of "good mediation").

28 *See* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 82-83 (1996) (raising concerns about the quality of justice unrepresented litigants receive when they come to court but are diverted into mediation).

29 *See Confidentiality in Court-ADR Programs*, 10 ALTERNATIVES TO HIGH COST LITIG. 173, 175 (1992) (discussing the various protections afforded the mediation process). *But see* Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. (forthcoming 1997) (arguing that even a strict confidentiality statute should not preclude parties' ability to obtain information relevant to mediator malpractice).

30 *See* Wagshal v. Foster, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (extending quasi-judicial immunity to case evaluators in the mediation program of the District of Columbia Superior Court).

31 *See* Menkel-Meadow, *supra* note 23, at 61 (noting that parties may rely on what mediators tell them).

32 "Rent-a-judge" or private judging is a dispute resolution process in which adversarial presentations are made to a party-selected neutral decisionmaker who renders a decision that is typically binding and subject to the usual appeals process through the courts. *See* GOLDBERG ET AL., *supra* note 1, at 280-81.

33 Arbitration is a private, voluntary dispute resolution process in which the parties to a dispute agree in writing to submit the dispute for resolution to a third-party neutral, chosen pursuant to the agreement of the parties. *See* Michele L. Giovagnoli, *To Be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547, 554-55 (1996). The parties make adversarial presentations to the third-party neutral, and the neutral determines the facts and makes an award. *See id.* at 555. The arbitrator's award is usually binding and not subject to appeal, but may be advisory, depending on the parties' agreement. *See id.*

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34 Early neutral evaluation is a private dispute resolution process in which a neutral with subject-matter expertise provides the parties with a nonbinding, reasoned evaluation of their cases to assist settlement. *See* J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1007, 1019-20 (1996).

35 A summary jury trial is a court-ordered dispute resolution process in which attorneys give brief presentations of their cases to a jury whose nonbinding verdict assists the parties in settling the case. *See* Frank Evans & Shadow Sloane, *Resolving Employment Disputes Through ADR Process*, 37 S. TEX. L. REV. 745, 762-63 (1996).

36 *See* Kovach & Love, *supra* note 10, at 32 (discussing mediation's distinctive role); Bush, *supra* note 10, at 267-70 (highlighting mediation's unique capacity for empowerment and recognition).

37 Alfini, *supra* note 26, at 66-73. Professor Alfini characterizes Florida circuit court mediation, which is conducted by legal professionals, as "trashing," "bashing," and "hashing it out." *Id.* at 66. "Trashers" tell parties how bad their case is to get each side to be more realistic. Effective trashers have litigation experience that lends to their "trashing" credibility. *See id.* at 66-68. "Bashers" focus on settlement offers and bash away at the offers, trying to get a midrange number. Most bashers are retired judges who use their prestige to "hammer sense" into parties. *See id.* at 68-71. "Hashers" are similar to facilitative mediators. *See id.* at 71-73.

38 *See id.* at 66.

39 *See id.* at 69.

40 Marc S. Klein, *Reframing the 'Tort Reform' Debate (and Our Participation in It)*, N.J. LAW., Jan. 1995, at 39 (quoting Albert Einstein).

41 I am arguing for a clear articulation of the mediator's role. *See* Bush, *supra* note 10, at 256 (stressing the importance of a governing conception of the mediator's role that articulates mediator qualifications and standards for practice). However, many different visions of the mediator's role exist. *See, e.g.,* Alfini, *supra* note 26, at 73-74 (summarizing a variety of mediation styles and concluding that a lack of consensus exists as to what constitutes "good mediation"); Bush, *supra* note 10, at 258 (describing three different conceptions of the mediator's role: efficiency, protection-of-rights, and "empowerment-and-recognition"); Riskin, *supra* note 8, at 23-34 (describing different mediator orientations based on evaluative-facilitative and narrow-issue-definition/broad-issue-definition continuums).

42 *See* Kovach & Love, *supra* note 10, at 32 (stating that "evaluative mediation" shifts mediation into the framework of the adversarial norm and thereby stifles parties' creative capacity to resolve their own disputes).

43 *See id.*

44 *See* JOHN LENNON, *Imagine*, *on* IMAGINE (Apple Records 1971) (suggesting the possibilities available).

45 *See* Riskin, *supra* note 8, at 28 n.67 (noting that assessments can impair a party's faith in the mediator's neutrality or restrict a party's flexibility).

46 *See* Kovach & Love, *supra* note 10, at 31 (describing this incident in more detail).

47 *See id.*

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48 *See id.*

49 *See id.*

50 *See id.*

51 Some argue that the mediator should provide the neutral evaluation as a "last step" when the evaluation represents the "sole opportunity for settlement." Aaron, *supra* note 10, at 62. Others who find evaluation consistent with the mediator's role say evaluations should be made only if parties are sufficiently sophisticated not to be unduly swayed by the mediator's opinion. *See* James J. Alfini, Moderator, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919, 928 (1997) (quoting Florida lawyer-mediator Lawrence M. Watson, Jr.). While a neutral evaluation can be critical in generating a settlement by expanding parties' information bases and deflating unrealistic positions, the potential harms of a mediator evaluating outweigh the potential benefits. The same result can be achieved by the mediator giving a party-requested evaluation only after notifying the parties that he or she is acting in a capacity other than that of a mediator. *See* discussion *infra* Part X.

52 *See* Kovach & Love, *supra* note 10, at 32 (discussing the importance of well-defined and uniform processes).

53 *See* CHIEF JUDGE'S N.Y. STATE COURT ALTERNATIVE DISP. RESOL. PROJECT, COURT-REFERRED ADR IN N.Y. STATE 7 (1996).

54 *Id.* at 7.

55 *See id.* at 8.

56 *See id.* at 9.

57 *Id.* at 37.

58 *See id.*

59 *Id.* at 54 (emphasis added). Although the mediator does not advise parties on the law and likely court outcomes, the report states that mediators "should be familiar with the law, court rules and procedures pertaining to the subject area of the case they are mediating." *Id.*

60 *See* Kovach & Love, *supra* note 10, at 32 (stating that the term "mediation" should have uniform meaning from state to state and from one court to another).

61 Noreen Connell, *Beware of Alternative Dispute Resolution: The "Touchy-Feely Trap"*, NOW-NYS ACTION REP., Summer 1996, at 7, 7.

62 *See* Laurence Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15, 15 (1996). Connor describes a two-phase process in which, in the first phase, the neutral evaluates, makes an award, and seals the award. *See id.* If the facilitation that follows does not result in settlement, the advisory award is shown to

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the parties as a "reality check." *Id.* Since the sealed award cannot be changed after facilitation begins, the parties can reveal sensitive matters and possible weaknesses to the neutral without fearing the award will be affected. *See id.*

63 A mini-trial is a private dispute resolution process in which attorneys for each party present their cases to the other side in an abbreviated format in a session chaired by a neutral advisor. *See* Evans & Sloane, *supra* note 35, at 761. After the case presentations, the parties attempt to negotiate a settlement, usually with the assistance of a neutral advisor who facilitates the discussion or renders a nonbinding opinion. *See id.*

64 In the context of employment disputes, mediation and neutral fact-finding have been successfully combined. *See, e.g.*, Carol Wittenberg et al., *Why Employment Disputes Mediation Is on the Rise*, LITIG. & TECH. MGMT. REP., Feb. 1996, at 8, 8.

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Articles

Peter Robinson [a1]

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ADDING JUDICIAL MEDIATION TO THEDEBATE ABOUT JUDGES ATTEMPTING TO SETTLE CASES ASSIGNED TO THEM FOR TRIAL

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***336 I. Introduction**

The propriety and desirability of judges attempting to settle cases assigned to them for trial is a subject of debate. Historically, scholars framed the debate in terms of judges conducting "settlement conferences" for cases assigned to them for trial. This article shares empirical data from a survey of all California judges in 2004 regarding their attitudes of approval or disapproval of judges conducting settlement conferences for cases assigned to them for trial. More importantly, it documents the extent to which those judges engage in the practice, differentiating the extent of the practice between judges with family law, general civil, limited civil, and complex civil assignments.

A contemporary wrinkle in the historic debate concerns judges conducting "mediations" of cases assigned to them for trial. There have been notable successes in some California jurisdictions with sitting judges serving as mediators, attracting the attention of legal commentators debating the issue. This article documents the extent to which judges conceptually approve of this practice and the extent they engage in it.

The phenomenon of judges mediating cases assigned to them for trial is examined from the perspective of judicial codes of ethics, which in current form permit the practice. This article considers both proposed revisions to such codes, and those in current force and effect. The confusion in the law created by the ***337** advent of judicial mediation is illustrated by examining California statutory and case law on confidentiality and standards of practice, which differ depending on whether the process is labeled a "settlement conference" or "mediation." California law relies heavily on the label of the process to determine the rights and responsibilities thereof. This article questions the "label of the process" methodology by documenting a strong degree of similarity in the content of the two processes as practiced by judges in California.

The article then explores the ramifications of the Uniform Mediation Act's express inapplicability of its confidentiality provisions to a mediation "conducted by a judge who might make a ruling on the case." [1] Finally, the article suggests how the advent of judicial mediation might lead to standards of practice that would clarify the law and resolve the debate about judges conducting either settlement conferences or mediations for cases assigned to them for trial.

II. There Is a Debate about Judges Attempting to Settle Cases Assigned to Them for Trial

A. Legal Commentators are Conflicted

Professor Marc Galanter documented the evolution in judicial attitude and practice regarding involvement in settlement from the late 1800s to 1986. [2] By the 1920s, early initiatives for "conciliation courts," where judges would encourage reconciliation, were affected by some judges' observations of opportunities for greater efficiency in judicial administration. [3]

Galanter documented "a considerable difference of opinion" among judges regarding whether settlement was the chief purpose of the Federal Rule of Civil Procedure (FRCP) 16 pretrial conference or whether settlement was a merely a byproduct. [4] The Judicial Conference of the United States resolved the matter by adopting the "byproduct" view in 1944 that, with notable pockets of contrary practice, prevailed for about a decade. [5]

***338** Galanter quotes three federal judges' ardent endorsement of settlement efforts in the early 1960's, and documents that by the 1970's federal judges had embraced the role of mediator because settlement was perceived as producing a superior quality of justice. [6] Galanter describes the 1983 amendment to FRCP 16, specifying the possibility of settlement as one of the appropriate topics at a pre-trial conference, as formal ratification of what had become the "unmistakably 'established' position in the federal judiciary." [7]

Professor Judith Resnik's 1982 article articulating concerns about managerial judging [8] became a reference point for much of the subsequent scholarship about the role of judges in settlement. [9] She claimed that managerial judging, which includes judges

conducting settlement conferences for their own cases, results in a reduction of distance between parties and the judge, a distance necessary to maintain the image of judge as dispassionate agent of justice. [10] She argued that it is especially problematic if a judge considered matters not admissible at trial because of the shielding from review enjoyed by pretrial procedures. [11] Resnik also argued that a "blurring [of] roles," motivated by too high a volume of cases, would cause acceptance of the view that "less judging and more settling" is generally appropriate. [12]

Professor Leroy Tornquist reviewed the pros and cons of judges being involved in settlement and recommended reforms including, "The judge who is to try the case on the merits should be barred from participating in settlement negotiations." [13]

Michael R. Hogan, a United States Magistrate Judge at the time, rebutted the criticisms of judges attempting to settle cases. [14] He countered the concern about accomplishing justice by referencing a study finding that participants in mediation were much more likely to perceive the outcome as fair than participants in adjudication. [15] The concern about settlement judges sacrificing the quality or justness of a resolution on the alter of efficiency and docket management he countered with, among other things, the commitment to assuring fairness in the judges' oath of office, and with FRCP 1 (requiring a judge mediator to consider the "justness" of ***339** settlement). [16] He addressed the concern about the lack of empirical documentation, showing that judicial settlement conferences create more or earlier settlements, by arguing that experienced judges are in the best position to determine on a case by case basis the amount of effort that should be invested in judicially supervised settlement conferences. [17]

Hogan also addressed the concerns about settlement judges presiding at subsequent trials. [18] First, he claimed that this concern "implies a misunderstanding of what the judge's role in the negotiation process should be." [19] He suggested that it is the rare judge who becomes "such a partisan advocate of a certain settlement" and tries to impose "sanctions for a party's failure to adopt the court's settlement figure." [20] In contrast, he suggested that "judges who understand and use successful intervention tactics in the negotiation process would (not) blame one particular party for a case not settling." [21] He stated that the desire to insulate judges from knowledge about cases before trial fails to acknowledge that "[j]udges frequently are called upon to compartmentalize their thoughts by separate rulings without defending claims of partiality." [22]

While making the case that the focus of settlement conferences should be better quality solutions rather than judicial efficiency, Professor Carrie Menkel-Meadow observed both sides of the debate: The settlement conference should not be managed by the trial judge "so that the interests and considerations that might effect a settlement but would be inadmissible in court will not prejudice a later trial." [23] Although, "some of the settlement authority of the third party may be directly related to the judge's power, control, or knowledge of the specific case and the value of the conference may be diminished if another person is used." [24]

Professor E. Donald Elliott argued that using managerial judicial powers to accomplish settlement under some circumstances will accomplish more just resolutions. [25] In his discourse he observed:
Managerial judging is evolving rapidly from a set of techniques for narrowing issues to a set of techniques for settling cases. On the other hand, other judges, including some staunch advocates of managerial judging oppose the use of managerial powers to encourage (or, some would say, to coerce) settlement Once managerial judging became established, it was inevitable that some judges would begin using their discretionary power to impose procedural costs on particular litigants to ***340** stimulate settlements that they considered to be in the interest of justice. However, these uses of the managerial powers of judges and masters to promote settlements are controversial and it is important to understand why. Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely 'neutral' in the sense that it does not affect substance. Increasing litigation costs does not merely increase the likelihood of settlement; it inevitably alters the amount that a rational party would be willing to pay to settle, and hence is likely to alter the terms of the settlement as well. [26]

He illustrated his argument by noting that "if there is a pronounced difference in the economic resources available to the parties of the lawsuit, a judge might very well promote a more just solution by restricting the ability of the wealthier parties to use their economic resources to tactical advantage." [27]

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Professors Menkel-Meadow and Elliot, as well as Hogan, have defended managerial judges using their powers to advance settlement based on judges using those powers "to stimulate settlements that the [judges] consider to be in the interest of justice." [28] Moreover, such use of judicial power is defensible because settlement offers "a substantive justice that may be more responsive to the parties' needs than adjudication." [29] These advantageous opportunities of settling judges must be weighed in light of some of the dangers of abuse.

Professor Peter H. Schuck's analysis of Chief Judge Jack B. Weinstein's orchestration of settlement of the Agent Orange class action case offers observations of how judges assist settlement, as well as the concurrent dangers of doing so. [30] Explaining the advantages of having judges involved in settlement, he stated:

In fact, a judge controls four distinct kinds of resources that may facilitate or even be indispensable to settlement, especially in complex cases. Typically, these resources are inaccessible to lawyers except insofar as the judge decides to make them available. They include control over the disposition of certain issues; knowledge about other factors relevant to settlement of the case; the judge's reputation for fairness; and control over certain inducements and administrative supports. [31]

Despite these advantages, he stated:

The analysis also suggests, however, that there are risks to justice, and to the appearance of justice when judges—especially those who are in a position to rule on the merits and thus control the outcome of a case—actively involve themselves in settlement. These risks exist even when settlement is thought to be a good thing, either in general or in a particular ***341** case. Even if the risks of judicial involvement are outweighed by the advantages, as I think they were in the Agent Orange case, they merit profound concern. These risks seem to me to be of three main types: judicial overreaching, judicial over-commitment, and procedural unfairness. [32]

He explained judicial overreaching by stating, "even if judges scrupulously avoid rewarding or punishing lawyers who do or do not cooperate in effecting settlement, the danger remains that lawyers will interpret judicial involvement as thinly-veiled coercion ." [33] He encouraged a sensitivity to this concern because there is little consensus on what constitutes judicial impropriety; settlement discussions are often highly emotional and interpretation is subject to perception, and there is no objective transcript of what was said and done. [34]

He explained judicial over-commitment with the statement,

[A] judge who makes such an investment [in helping to fashion a settlement] is unlikely to remain indifferent as to the outcome of the negotiations. The risk is that the judge's commitment may become excessive, compromising the appearance or reality of the judge's fairness as to whether the case will be litigated or settle, and possibly even with regard to the merits. [35]

He went on to explain that this is especially troubling in cases, such as the Agent Orange case, that require the judge to confirm the settlement as fair, reasonable, and adequate. [36]

He explained that the informal and secretive nature of settlement conferences threaten common aspects of procedural fairness such as accuracy, individual dignity, participation, and openness of decision making. [37] Especially when the judge meets privately with both sides, due process is wanting because parties may not be aware of accusations or interpretations presented outside their presence, and thus may not know of the need to rehabilitate or rebut. [38]

Professor Schuck concluded with the recommendation that trial judges be barred from participating in settlement negotiations. [39]

B. Active Judges Are Conflicted

In addition to legal academic debate, this issue is a source of controversy among the sitting bench. The debate surfaced anecdotally, and regularly, when this author led more than eight groups of about twenty-five California judges, each in mediation

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skills training programs over five years. California's Administrative ***342** Office of the Courts (AOC) was unequivocally supportive when the author became interested in documenting judicial attitudes and practices about settlement conferences and/or mediation. The data might assist academics and policy makers wrestling with an array of questions related to judges attempting to settle cases assigned to them for trial. It might also be of interest to those judges, who at times feel isolated and are curious about judicial norms.

1. Methodology for Surveying California Judges

California's AOC allowed the author to survey each of California's 1800 bench officers [40] regarding judges attempting to settle civil or family law cases. The data developed from this survey is suspect in that the judges were self reporting and thus prone to view and interpret themselves in the best possible light. [41] The AOC [42] participated in developing the survey, [43] which asks judges about their views regarding judges assisting in settling cases as well as their practices in the last four years. [44]

The surveys were mailed out in an AOC envelope with other AOC correspondence. [45] The responses were returned to a Post Office Box in Winnetka, California, a little-known community in the San Fernando Valley, as part of a comprehensive commitment to ensure that participants not know that a professor from the Straus Institute at Pepperdine University in Malibu, California, was the AOC's collaborator for this project. [46]

Three-hundred and sixty-eight out of 1,800 bench officers responded. While this was a little disappointing, it was not completely surprising because the survey was extensive, requiring about fifteen minutes to complete, and judges are notorious for not completing surveys. One weakness of the following analysis and conclusions is that they are based on a limited response. The 368 who responded ***343** stated that in the last four years, they had the most experience in conducting settlement conferences or mediations in the following areas:

Responding Judges by Assignment

General Civil [47]	129 respondents
Family Law [48]	72 respondents
Limited Jurisdiction Civil [49]	22 respondents
Complex Civil [50]	6 respondents [51]
Marked more than one of the above	10 respondents
Did not conduct mediations or settlement conferences in any of the above types of cases in the last four years	85 respondents [52]
Did not respond to this question	44 respondents

Table 1

2. Judges' Attitudes Toward Settlement Conferences

One of the first questions in the survey asked judges about the extent to which they agree or disagree [53] with the statement: "With the consent of the parties, I believe that civil or family law judges should be allowed to conduct settlement conferences for cases assigned to them for trial." The judges' reactions to this statement are summarized below in Table 2.

***344 Settlement Conferences Should Be Allowed: By Response Strength**

	Number of Responses (FREQ)
Strongly Disagree	28
Disagree	32
No Opinion	7
Agree	84
Strongly Agree	183

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DID NOT ANSWER	34

Table 2

Comparing the combined "Strongly Agree" and "Agree" categories with the combined "Strongly Disagree" and "Disagree" categories reveals a 267 to 60 (82% of those with an opinion) acceptance of judges conducting settlement conferences for their own cases. Among the interesting aspects of this data is the similarity to data reported 24 years earlier.[54] While documenting that a supermajority of judges support the proposition in concept, it is important to note that nearly one-fifth of the judges do not agree. The ratio was fairly consistent across the spectrum of judicial assignments.[55] The conflict among sizable segments of sitting judges reveals that the debate is not merely academic.

In order to gauge the impact of this conflict among judges, the survey went on to assess the frequency and prevalence of judicial settlement conferences. The difference in beliefs on this issue could be minimized or magnified depending on the number of settlement conferences judges conduct.

The demographics of the respondents evolves because the survey instructed judges who had not had a family or civil assignment in the last four years to answer questions about their beliefs regarding judges conducting settlement conferences and mediations, and then to not answer additional questions. Thus the focus of the survey was to quantify judicial attitudes of all judges, but only the practices of current civil and family law judges. "Current" was defined as having conducted a settlement conference or mediation within the last four years. Eighty-five judges without civil or family law assignments revealed their attitudes toward judicial settlement conferences and mediations, and then followed the instructions to not answer any further questions. The demographics for the judges who completed the rest of the survey are as follows: 72 family law judges, 129 general civil ***345** judges, 22 limited jurisdiction judges, 6 complex civil judges, and 10 judges who reported having assignments in more than one category. The judges with assignments in more than one category were not counted in any of the designated categories, but were included in the category of all judges, when used.

3. Frequency of Judicial Settlement Conferences

The survey asked, "The number of settlement meetings I conduct a week is about ____." Separate answers were requested for settlement conferences and mediations, if any. The responses, by the judges' assignments, for settlement conferences are summarized below in Table 4.

Number of Settlement Conferences per Week:

By Percentage of Respondents

Number	Family Law	General Civil	Limited Juris.	Complex Civil
0		1.9% (2)		
1/4-1	20.3% (12)	41.3% (43)	30% (6)	60% (3)
2-5	50.8% (42)	46 % (48)	65% (13)	40% (2)
6 - 9	6.7% (4)	5.7% (6)		
10 -15	15 % (9)	3.7% (4)	5% (1)	
16 - 27	6.7% (4)	0.9% (1)		
No Response	(12)	(25)	(2)	(1)

Table 4

First, it is interesting to note that only 2 judges stated that they do not conduct settlement conferences. A sizable number of judges did not answer, which could be interpreted a variety of ways.[56] The discussion above noted that a sizable minority of judges disapprove of judges conducting settlement conferences for cases assigned to them for trial. Nevertheless, those judges conduct settlement proceedings, presumably for cases not assigned to them for trial.

While this data establishes that almost all judges conduct settlement conferences, the mode[57] response for every judicial assignment except complex civil is the range of 2 to 5; that is, the most common judicial practice is to conduct between two

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and five settlement conferences per week. The practice of conducting between one-fourth and one settlement conference per week is significant, representing the practice of 20% of family law judges and 40% of general civil judges. Conducting more than five per week is fairly rare, with the exception of a significant ***346** cluster (15%) of family law judges who conduct between ten and fifteen per week. [58]

4. Percentage of Settlement Meetings Where the Settlement Judge Was Also the Trial Judge

The questionnaire asked the judge to fill in a blank for the question, "The percentage of my settlement meetings that are for cases in which I am assigned as the trial judge is about: ___." Separate answers were requested for settlement conferences and mediations, if any.

The responses, by judicial assignment, for settlement conferences are summarized in Table 5.

Grouped Percentages of Judges Responding

Percentage	Family Law	General Civil	Limited Juris.	Complex Civil
0	7.3% (5)	29.6% (35)	15.7% (3)	33.3% (2)
1-10	4.4% (3)	10.1% (12)	5.2% (1)	16.6% (1)
11-40	2.9% (2)	6.7% (8)	5.2% (1)	
41-89	13.2% (9)	15.2% (18)		16.6% (1)
90-99	14.7% (10)	20.3% (24)	5.2% (1)	
100	57.3% (39)	17.8% (21)	68.4% (13)	33.3% (2)

Table 5

This question is the core of the debate.

The responses to the first question in the survey revealed that 82% of the judges believed that it was appropriate to conduct settlement conferences for cases in which they were assigned as the trial judge. [59] This data confirms to what extent they engage in the practice.

The data also confirms the split in the judiciary about this practice. The general civil bench is most polarized with 17.8% of judges reporting that all their settlement conferences are for cases assigned to them for trial and 29.6% responding that they never conduct settlement conferences for cases assigned to them for trial. The comparison of combined "0-10%" and "90-100%" responses for general civil judges reveal an almost evenly balanced, polarized judiciary: 38.1% of judges report that they are the trial judge for 90% or more of the settlement conferences they conduct, compared to 39.7% of judges who report that they are the trial judge for 10% or less of the settlement conferences they conduct.

***347** It is especially interesting to contrast the frequency of the practice between family law judges and general civil judges. Of family law judges, 54.9% responded that all their settlement conferences are for cases assigned to them for trial, compared to only 17.8% of general civil judges. Combining the 90-99% category with the 100% category captures 72% of family law judges, but only 38.1% of general civil judges. While there are variations, the middle categories are roughly similar. Only 7.3% of family law judges decline to engage in the practice, compared to 29.5% of general civil judges. This indicates the existence of a highly polarized general civil bench, to be contrasted with a much more generally accepting family law bench. [60] Note that the profile for limited jurisdiction judges is similar to that of family law judges, and that the profile for the complex civil judges is similar to the general civil judges.

III. How Does the Advent of "Judicial Mediation" Affect This Debate?

A. San Luis Obispo County As an Example of the Advent of Judicial Mediation

The impact and momentum of judges embracing the concept of mediating cases assigned to them for trial is illustrated by the experiences of the Honorable E. Jeffrey Burke and the courts where he sits in San Luis Obispo County, California. [61] The

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journey began in the fall of 1998 when Judge Burke attended a six day workshop entitled, "Mediating the Litigated Case," presented by the Straus Institute for Dispute Resolution at Pepperdine University School of Law. [62]

Judge Burke was about to begin an assignment as the supervising civil judge for the San Luis Obispo County Superior Court. He only recently had been appointed to the Superior Court [63] and faced a daunting backlog of civil cases. [64] Judge Burke was unfamiliar with mediation and thought it might be helpful to learn whether mediation could be employed to help manage the backlog. [65]

San Luis Obispo County has a population of roughly 300,000 and is a regional commercial hub for the largely agricultural central California coast. In 1999, the San Luis Obispo County Superior Court had thirteen judicial officers ***348** assigned to four divisions: seven judges handled criminal cases and juvenile court matters; three judges handled civil cases, probate matters, and the court's appellate division; two judges handed family law matters; and one judge dealt with traffic and small claims. [66]

Before 1999, civil cases in San Luis Obispo County were managed in a Master Calendar system. In such a system the supervising civil judge is responsible for all of the civil cases in the courthouse, assigning hearings and trials to whoever on the civil team is available. [67] Judge Burke attended the Mediating the Litigated Case program because he had been informed that San Luis Obispo ranked thirty-fifth out of California's fifty-eight counties in its compliance with statewide case management standards for civil cases. [68]

In early 1999 there were 276 cases set for trial, and nearly every one of them had been called for trial before but had to be reset because there was no judge available to conduct the trial. Many of the 276 cases had been in the system for more than two years and the typical case that was actually tried was over three years old. [69] Only 53% of new civil filings were disposed of within one year, [70] compared to California's statewide "Fast Track" standards of 90%. [71] The cases that resolved within one year were matters the parties took care of on their own; judges were simply too busy dealing with the backlog to give much attention to settlement. [72]

Judge Burke's tenure as supervising civil judge began on April 1, 1999. In anticipation of his first week, Judge Burke realized that seven cases were set for jury trial, but only one department would be available. [73] The other civil judges were engaged in ongoing jury or court trials. [74] This progressively enlarging backlog was not because judges were not trying cases. In the three months between January 1, 1999 and March 31, 1999 there were 13 civil jury trials by five different judges. [75]

Judge Burke, with the support of the other judges in his county, initiated two significant changes to the administration of the civil docket in the spring of 1999. Judge Burke replaced the Master Calendaring system in which a judge is assigned for all purposes, and initiated an aggressive civil mediation program. [76]

The mediation program encourages, but does not require, litigants to attempt to resolve cases by mediation. Litigants can hire private mediators or ask any one of the judges to serve as the mediator. [77] Cases could be reassigned to another judge if the litigants, their attorneys, or the mediating judge believed that another ***349** judge should preside over the trial. [78] In the six years San Luis Obispo's mediation program has been in place, no one has requested a reassignment. [79]

The decision to make sitting judges available to serve as mediators was influenced by Judge Burke's belief that mediation should be available through the public courthouse. [80] Although California is the birthplace of Judicial Mediation and Arbitration Services (JAMS), and despite wide acceptance of the practice of utilizing retired judges as mediators since 1996, it is not a process that is available to everyone. Judge Burke acknowledged the important service that retired judges and private practice mediators provide to those who can afford it and recognized the important advantages of this alternative dispute resolution option, but he could not support a system that by reason of delays, abusive discovery, and high costs pressures litigants out of the courthouse and into a process that is unaccountable to anyone. [81] Burke thought that if the court was going to strongly encourage litigants to mediate, then mediation should be available at no cost, and sitting judges should make their singular accountability and strengths as mediators available for that purpose. [82]

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The seven cases set for trial the first week of April 1999 were calendared for three- to four-hour mediations with Judge Burke during the preceding week. All seven cases settled. Judge Burke then moved on to the cases set in the next week calendaring each of them for a three-hour mediation. [83] As trials cleared, other judges were able to schedule mediations, and the backlog in San Luis Obispo began to disappear. [84]

The adjustments to the civil calendar system in San Luis Obispo have been well-received, and the sitting judges are widely accepted as mediators. [85] The judges' times were reallocated to conducting half-day mediations instead of conducting trials. [86] The results were dramatic. By the end of 1999, only a handful of cases set for trial were reset, and only about a dozen were more than two years old. [87] By 2003, San Luis Obispo County was resolving 67% of new civil filings within a year, compared to 53% in 1998, and ranked third out of California's fifty-eight counties—compared to thirty-fifth in 1998—for statewide case processing compliance. [88]

In the beginning, Judge Burke, a former civil litigator from that county, was the judge most often selected to serve as mediator. In the last nine months of 1999, Judge Burke mediated 91 cases with an 81% settlement rate. [89] The two other civil judges combined to mediate only 2 more cases. [90] In 2000, the Consumer ***350** Attorneys of California, the dominant statewide plaintiff trial lawyers association selected Judge Burke as the Trial Judge of the Year. [91]

Any objective analysis of the Saint Louis Obispo experience must acknowledge that in the beginning the program was dependent on Judge Burke's vision, excellent relationship with the bar, and talent as a mediator. [92] Judge Burke's intention that this program would not be based on him personally has been established by the statistics showing that, over time, the other judges increasingly were selected and were successful as mediators. [93]

A passing of the torch occurred in 2003 when Judge Burke accepted an assignment as Supervising Family Law Judge, where he continues to serve today. In 2003, without Judge Burke, the civil judges in San Luis Obispo mediated 103 cases with a 58% settlement rate. [94] The importance of mediation in managing civil cases has not diminished; the civil team sets aside three days each week for mediation, and the court requires any judicial officer who applies for a position on the civil team to complete a week long mediation training program. [95]

1. San Luis Obispo's Statewide Influence

Judge Burke shared San Luis Obispo's positive experience in judicial mediation with the staff and governing body of the Education Division of the Administrative Office of the Courts for California (AOC) and requested permission to work with Pepperdine faculty to adapt its mediation workshop for presentation to judicial officers. The program was approved for a one-time trial. [96]

The first course had three times as many applicants as could be accommodated. The workshop has been offered twice a year between 2000 and 2002 and, because of California's budget crisis, once a year from 2003 to the present. It is one of the California Center for Judicial Education and Research's (CJER) most popular offerings and has trained more than 300 California judges. [97] The program has been retitled, “Mediation Skills for Judges,” and the emphasis is on how individual judges can use mediation skills to manage their dockets instead of starting a county-wide program like Judge Burke.

***351** One of the questions for the author conducting these training programs was whether the success of the San Luis Obispo experience was unique to Judge Burke or the idyllic environment of San Luis Obispo—that is, whether the San Luis Obispo experience could be replicated in other counties with different demographics, or whether this phenomenon was only possible with a relatively small bench and bar. Some of the judges who completed the training program took the time to anecdotally report to the author that after the course, they were increasingly encouraging mediation as well as serving as the mediator in cases assigned to them for trial. They reported that this focus not only helped manage their dockets, but it was also a source of great personal satisfaction. The judges reporting the positive experience with mediation were from the full range of size of counties and benches. [98] Because many of them had cases assigned for all purposes, they could implement a mediation emphasis for their calendar independent of a county-wide initiative such as Judge Burke's.

Reports of the San Luis Obispo experience and the regular offering of the Mediation Skills for Judges program encouraged the expansion of this practice. In addition to individual judges managing their calendars differently, in 2003, the Superior Court of Napa County, California, announced a judge-centered mediation program. Presiding Judge W. Scott Snowden stated, "Attorneys were coming into court asking for an alternative dispute resolution process. Many were unsatisfied with expensive private mediators whose decisions were not final. So we decided to cut through the red tape and give the litigants what they wanted directly from our judges." [99]

After the entire civil bench from Napa County attended Pepperdine's Mediating the Litigated Case, a mediation facility was opened in the courthouse and each judge set aside at least one day a week to mediate cases. [100] Judicial mediation would only occur at the request of the parties. [101] Litigants can request mediation from the judge assigned to the case or from another judge. [102] Presiding Judge Snowden is extremely enthusiastic about and committed to the project. [103]

2. Delaware's Contrast to San Luis Obispo and Napa

In 2003, the author had an opportunity to meet with a committee of judges from the state courts in Delaware commissioned with the revision of Delaware's Court Annexed Mediation Programs. Most of the judges had completed an ABA- ***352** sponsored mediation training program for judges that the author helped teach, and there was general support for judges serving as mediators.

When the issue of judges mediating cases assigned to them for trial arose, members of the committee expressed serious opposition. Creative brainstorming resulted in the suggestion of judges being organized into clusters that could mediate each others' cases, but concern about judges mediating cases assigned to them for trial was significant. [104] The committee decided that Delaware's court-annexed mediation program would avoid such a practice. [105]

Resolution of the controversy regarding judges mediating cases assigned to them for trial is necessary because either the blossoming of or refraining from the practice needs to be corrected. If legitimate concerns cannot be addressed, the court programs in San Luis Obispo and Napa Counties, and the increasing practice of individual judges, needs to be constrained. If the concerns can be resolved through, for example, a clarification of judicial ethics in settlement proceedings, then the restraint in Delaware should be relaxed.

B. Legal Commentators Are Conflicted about Judges Mediating Cases Assigned to Them for Trial

1. Concerns

The practice of judges mediating cases assigned to them for trial must come under careful scrutiny when thoughtful dispute resolution advocates such as Frank Sander and James Alfini argue against the practice. [106] Sander's Friendly Amendment article [107] identifies four reasons why Frank Sander's multi-door courthouse [108] does not include judges mediating cases assigned to them for trial: undue coercion, role confusion (leading to possible misuse of confidential information), competence and training, and appearance of impropriety. [109]

Dean Alfini observes that the convergence of the managerial judge and alternative dispute resolution movements has transformed the role of American civil trial judges. He argues that judges mediating cases assigned to them for trial is problematic because the only guidance provided by the judicial ethical standards are blanket statements in favor of impartiality and against coercion. The trial judge's personal interest in managing the docket, and the parties' awareness of that interest, creates too great a risk of coercion for the trial judge to be involved in settlement discussions. He concludes that updated standards of judicial ethics should require judges to receive mediation training as a prerequisite to intervening in settlement, clarify permissible limits of judicial intervention, and consider a ***353** "bright line rule" prohibiting judges from mediating cases assigned to them for trial. [110]

Other authorities agree that a trial judge should not act as the mediator in cases he or she might later try. Robert B. McKay, an ardent advocate of court-annexed alternative dispute resolution, assumes without explanation that "federal judges should not themselves function as mediators in cases which they might later try." [111] Chief Judge Robert F. Peckham suggests that

settlement negotiations be referred to a second judge or magistrate "to insure the appearance of impartiality and to encourage attorneys to participate with candor." [112] Describing his concerns about potential coercion, premature decision making, and a reluctance to share crucial information, Patrick E. Longan concluded, "[s]omeone other than the judge who will preside over trial needs to conduct the mediation." [113] Citing many similar concerns, Martin Frey concluded, "[t]he mediation process lacks fairness when the trial judge acts as the mediator in his or her own case." [114] One court even declared that "mediation should be left to the mediators and judging to the judges." [115]

2. Endorsements

The practice of judges mediating cases assigned to them for trial also has its supporters. Professor Marc Galanter's scholarship cites numerous sources supporting the practice. [116] Federal District Judge Harold Baer argues that judge-led mediation lends the process an air of legitimacy for clients who want to know that they are participating in a viable substitute for litigation and specifically refutes many of the criticisms with these explanations. [117]

Another central criticism of judicial mediation argues that, not only is it a waste of resources for a federal judge to act as mediator, but it is also unethical for a judge to mediate a case that appears on his own docket. An allied concern is that acting as a case manager is not part of a federal judge's job description and that a judge should do nothing of the kind.

Remarkably, though, this criticism does not spill over to the allied realm of settlement conferences. In order to understand the criticism more fully, then, we must examine the differences between settlement conferences and mediation. As mentioned above, settlement conferences are governed by Rule 16 of the Federal Rules of Civil Procedure. Rule 16 ***354** was amended in 1983 so as to "validate what many judges were already doing," and provided specific authority for judges who had up until then been reluctant to discuss settlement with parties because of uncertainty about their authority to do so. The Advisory Committee's notes to Rule 16 state that the amendment "recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowed court dockets and results in savings to the litigants and judicial system, settlement should be facilitated at as early a stage of the litigation as possible."

It is true that settlement conferences are generally less pro-active than mediations. Unlike settlement conferences, mediations involve an inquiry into the pros and cons contended for by each side, the presence and participation of the parties, submissions, ex parte caucus, and a search for creative solutions. They also take longer than do settlement conferences. There may, however, be a modicum of arm twisting in both settlement conferences and mediations, as both invariably involve an effort to convince one side or the other that a proposed resolution is a fair one Thus, although the judge is somewhat more involved in the mediation process than in a settlement conference, it is odd that critics frown upon participation in one and not the other, since both involve the judge's recommendation as to an appropriate resolution.

Particular criticism of an Article III judge's mediation of a case comes primarily from academics (who frequently possess little practical experience). Criticisms include a suggestion that judges either do not understand confidential communications or cannot be trusted to use them in an unbiased manner; and, too, that regardless of a judge's good intentions, if the judge conducts a mediation that does not come to closure and then tries the same case, he may "inflict his wrath" on the party he believes kept him from reaching closure. That this may happen is hard to deny categorically. However, it seems to me that such a judge would likely take sides at some stage of the litigation anyway. Therefore, ought judges be barred from the mediation process and all the advantages it holds on the unlikely chance that an extremely small percentage of judges will not act impartially? Judges who have sworn to do their job objectively do their job, and do it well—without regard to who the litigants may be and certainly without regard to whether six months earlier they had conducted a failed mediation. Further, the fact that any number of appellate decisions credit district judges with the ability in bench trials to make impartial, discretionary decisions, such as what statements do or do not constitute hearsay, lends support to this view. Most litigators will agree that hardly a trial goes by where some action by some lawyer could be off-putting to the judge—far more off-putting, I dare say, than not reaching closure after a couple of hours of mediation. No suggestion has ***355** been made, however, that a judge need recuse him or herself when a litigator is off-putting. [118]

It is important to note that even an ardent supporter of trial judges mediating their own cases, like Judge Baer, recommended against the practice in bench, as opposed to jury, trials. [119]

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Rather than refute criticisms, Edward Brunet articulated a unique advantage to judges being allowed to mediate cases assigned to them for trial. [120] Professor Brunet described his conversion from the "modern" view that trial judges should never be allowed to mediate cases [121] to a position against "an inflexible rule, mandating routine reassignment" of the settlement function away from the trial judge. [122] Professor Brunet explained that natural human behavior is that "[d]ecision makers do not wait until all the evidence relevant to a choice has been collected to begin their evaluations." [123] Thus, Professor Brunet argued that decision making is an evolving process, like keeping score in a nine-inning baseball game. [124] He then suggested there may be legitimate advantages for the participants to know the decision maker's view of the issues and arguments in interim stages. [125] Judicial mediation by the trial judge allows the ultimate decision maker to "signal" to the participants his or her evolving reactions to the case, empowering the participants to reach an informed settlement. [126] While Professor Brunet pointed out that this dynamic is controversial, it also provides a unique advantage to having the trial judge mediate her own cases. [127]

C. Empirical Data Regarding Judges' Attitudes and Practices

1. Attitudes

The survey [128] asked judges to indicate the degree to which they agreed or disagreed [129] with the statement: "With the consent of the parties, I believe that civil ***356** or family law judges should be allowed to mediate cases assigned to them for trial." Judges' reactions to this statement are summarized in Table 6.

Mediation Should Be Allowed: By Strength of Response

	Number of Responses (FREQ)
Strongly Disagree	38
Disagree	49
No Opinion	30
Agree	83
Strongly Agree	135
Did Not Answer	33

Table 6

Comparing the combined "Strongly Agree" and "Agree" categories with the combined "Strongly Disagree" and "Disagree" categories reveals a 218 to 87 (71% of those with an opinion) acceptance of judges mediating their own cases. The ratios are approximately consistent, regardless of family law, general civil, limited jurisdiction civil, or complex civil assignment by the responding judge. [130] While a 71% acceptance rate for judges mediating their own cases establishes a credible judicial community norm, it again reveals significant dissent within the community.

A point of reference to interpret this data would be the same judges' attitudes about conducting settlement conferences for cases assigned to them for trial. The questions were asked side by side, without defining or differentiating between the processes; the data reveals whether the judges perceive that the processes are different and should be treated differently.

It is both interesting and predictable that judges more readily accept the proposition of judges conducting settlement conferences for their own cases (82%), as compared to the proposition of judges mediating their own cases (71%). It is predictable because mediation is the "new kid on the block" compared to judicial settlement conferences. It is interesting because it is difficult to distinguish between the two processes.

To further explore this aspect of the data, the responses to these questions will be discussed in three categories: judges who supported both mediations and settlement conferences, judges who disapproved of both mediations and settlement conferences, and judges who were split in their opinions. The following percentages are of the 325 judges who answered both questions and expressed an opinion on one of the questions.

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***357** Sixty-one percent (203 out of 325) of the judges indicated that they agreed or strongly agreed with both statements about judges conducting mediations or settlement conferences for cases assigned to them for trial. These judges not only support both processes, but ranked their support identically for the two processes 89% percent of the time.

Sixteen percent (52 out of 325) of the judges indicated that they disagreed or strongly disagreed with both statements about judges mediating or conducting settlement conferences for cases assigned to them for trial.

Perhaps most interesting is that 17% (56 out of 325) of the judges had a different reaction for judges conducting settlement conferences versus judges conducting mediations. The criterion for this group was that their responses in the 1 to 5 rating in the survey were at least two degrees different. That means that judges who responded to one question with "Strongly Agree" and to the other question with "No Opinion" would be counted. Similarly, judges who responded with the combination of "Agree" and "Disagree," and "No Opinion" and "Strongly Disagree" would be included in the 17% of judges characterized as conflicted about this issue. This last point is interesting because these judges apparently perceive that there were, or should be, differences between the two processes.

Viewing the data more broadly, the sample of California judges in 2004 were largely supportive (71% agreed or strongly agreed) of the concept of judges mediating cases assigned to them for trial, with the parties' consent. Nevertheless, the support for this proposition was less than the support for judges conducting settlement conferences under the same circumstances (82%), and with respect to mediation, there was a larger percentage of judges (29%) with a dissenting view.

2. Practices

As with settlement conferences, the amount of attention that should be paid to this issue will depend on the pervasiveness of the practice. The survey attempted to document the frequency of the occurrence by asking the judges three questions: (1) how often they label judge-led settlement proceedings "mediations" (as compared to the label of "settlement conferences"); (2) the number of settlement proceedings that they labeled "mediations" they conduct per week; and (3) the percentage of those mediations that are for cases assigned to them for trial.

a. Extent Settlement Proceedings Are Labeled "Mediation"

First the survey asked judges to fill in blanks for the following question:

When I schedule meetings to try to help settle a case:
a.I label those meetings settlement conferences ___ % of the time; and
b.I label those meeting mediations ___% of the time. (The two answers should total 100%)

***358** The response to this question is important because it quantifies the degree to which the attitudinal support for judicial mediation reflected above [131] was manifest in practice. The following table reveals the frequency judges used the two labels for their settlement meetings:

Extent Settlement Proceedings Are Labeled "Mediation" versus "Settlement Conference"

Percentage of times labeled "settlement conference"	Percentage of times labeled "mediation"	Number of judges using the percentages
100	0	228
99.5	.5	1
99	1	1
92	2	4
95	5	6
90	10	6
80	20	4

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75	25	3
70	30	1
50	50	3
40	60	1
20	80	4
5	95	1
2	98	1
1	99	1
0	100	3
		Total 268

Table 8

Eighty-five percent (228 out of 268) of judges answering this question always use the label of "settlement conference" when meeting with the parties to help settle a case. Only 1.1% (3 out of 268) always use the label of "mediation," and only 5% (14 out of 268) use the label of "mediation" half of the time or more. The ratios are fairly consistent across assignments.

The small number of judges using the label, "mediation," was surprising in light of the theoretical support for the proposition that judges should be allowed to conduct mediations documented above. [132] The survey established that judicial attitudes support the right of a judge to mediate, but practice is to almost always label such meetings settlement conferences.

b. Frequency of Judicial Mediation

Second, the survey asked, "The number of settlement meetings I conduct a week is about ____." Separate answers were requested for mediations and settlement ***359** conferences. The responses, by the judges' assignments, for mediation are summarized below in Table 9.

Number of Mediations per Week: By Percentage of Judges Who Responded

Number	Family Law	General Civil	Limited Juris	Complex Civil
0		8.5% (1)	100% (1)	
1/4-1	29% (2)	41% (5)		50% (1)
2	29% (2)	34% (4)		50% (1)
3				
4-6	42% (3)	17% (2)		

Table 9

A major problem is that the prior question about using the label of "mediation" revealed that only 40 judges reported conducting any mediations. Of those 40, 18 either didn't answer this question or cannot be isolated by judicial assignment because they reported multiple assignments. The result is that the responses of only 22 judges can be reported. Such a small sample becomes increasingly suspect when it is divided into the four categories of judicial assignments. While informative, the small sample does not permit the data to be authoritative.

It is interesting that judges using the label, "mediations," are largely divided into three frequencies: those who conduct them once a week or less, those who do two a week, and those who do four to six per week. These fairly small frequencies of judicial mediations are important because it begins to document judicial norms at a given time in one region. The dramatic reallocations of judicial resources in San Luis Obispo and Napa Counties [133] are still very much the exception rather than the rule in California.

c. Extent Settlement Judge Is the Trial Judge

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Third, the questionnaire asked the judge to fill in a blank for the question, "The percentage of my settlement meetings that are for cases in which I am assigned as the trial judge is about: ___." Separate answers were requested for settlement conferences and mediations, if any. Table 10, below, describes the responses, by judicial assignment, for mediations.

Percentage of Mediations in Which Settlement Judge Is the Same as Trial Judge

Percentage	Family Law	General Civil	Limited Juris.	Complex Civil
0		17% (1)		
10	17% (1)	33% (2)		
50	17% (1)		33% (1)	
60				100% (1)
95		33% (3)		
99			33% (1)	
100	66% (4)		33% (1)	

Table 10

***360** Again the sample is so small that it may be informative, but not authoritative. The patterns are generally similar to the patterns for the settlement conferences. Half of the general civil judges who reported conducting "mediations" do it for cases assigned to them for trial 95% of the time while the other half do it 10% or less of the time. Like with settlement conferences, there is greater receptivity of the practice in family law assignments than in general civil. Again, the limited jurisdiction judges seem to have similar attitudes as the family law judges.

IV. Judicial Ethics Currently Authorize the Practice . . . But That Could Change

A. Analysis of Current Statements of Judicial Ethics

Another perspective on the propriety of the judicial settlement conference experience is to consider the rules articulating judicial ethics. Dean Alfini, a noted scholar on judicial ethics, concluded that the current ethical standards permit judges to attempt to settle cases assigned to them for trial, [134] but an exploration of the standards may be instructive.

The ABA publishes a Model Code of Judicial Conduct (hereinafter the ABA's Model Canons) which serves as a platform for various jurisdictions to make modifications and then adopt the controlling codes for judges under their authority. This article will consider the ABA's Model Canons, [135] and compare the Code of Conduct for United States Judges [136] and the California Code of Judicial Ethics. [137]

A review of the ABA's Model Canons for guidance on the boundaries of judges involved in settlement activity reveals the following pertinent provisions:

1. Canon 1 states, "A Judge Shall Uphold the Integrity and Independence of the Judiciary." [138]
2. Canon 2 states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." The advisory committee commentary specifies, "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." [139]

***361** 3. Canon 3 states, "A Judge Shall Perform the Duties of Judicial Office Impartiality and Diligently." Section B is titled, "Adjudicative Responsibilities" and has 11 subsections. [140] Pertinent provisions include:

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

. . . .

(4) A judge shall be patient, dignified and courteous to litigants, lawyers and others with whom the judge deals in an official capacity. .

. . . .

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly. [141]

The commentary for this subsection explains,

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In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts. [142]
Other pertinent provisions of Canon 3B include:
(7) A judge shall not initiate, permit, or consider ex parte communications concerning a pending or impending proceeding except that: (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. .
. . . .
(9) A judge shall not, while a proceeding is pending or impending in any court, make any non public comment that might substantially interfere with a fair trial or hearing. [143]

The ABA's Model Canons authorize judges to attempt to settle cases assigned to them for trial. [144] While explaining Canon 3B(8)'s duty to dispose of judicial ***362** matters promptly, efficiently and fairly, the commentary specifies that "a judge should encourage and seek to facilitate settlement." [145] Canon 3B(7)(d) clarifies that a judge needs the consent of the parties for ex parte communications when attempting to mediate or settle matters pending before the judge. [146] The implication is that, in the absence of ex parte communications, the judge does not need the consent of the parties to facilitate settlement in a matter pending before the judge.

The following six limitations for judges facilitating settlement for cases assigned to them for trial can be extrapolated from the ABA's Model Canons:

1. The settlement facilitating judge should not engage in any behavior that would undermine the integrity of the judiciary. [147]

2. A judge should not be the trial judge for a case that he has tried to settle if what the judge learned in settlement proceedings, including private sessions if utilized, "would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." [148]

3. A judge must "be patient, dignified, and courteous" to everyone she may have contact with in the course of facilitating settlement. [149]

4. A judge "must demonstrate due regard for the rights of the parties to be heard" and to "preserv[e] fundamental rights of parties." [150] The duty to "have ***363** issues resolved without unnecessary delay," [151] seems pointed at eliminating dilatory behavior by parties, but a case could be made that it imposes a duty on a judge to not unnecessarily delay a ruling or trial to force a settlement. Similarly, this provision imposes a duty that "parties should not feel coerced into surrendering the right to

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have their controversy resolved by the courts." This aspect of subsection (8) could be found to be reinforced by the duty on a judge "to hear and decide matters assigned to the judge." [152]

5. A judge must acquire the parties' permission to utilize ex parte conversations as part of the settlement effort of matters pending before that judge. [153]

6. A judge cannot make any nonpublic comment that might substantially interfere with a fair trial or hearing of a matter that is pending or impending in any court. [154] Thus, judges facilitating settlement must be cautious about private comments that might be construed to interfere with a fair trial. Examples could include comments to parties in caucus for cases assigned to that judge for trial and hallway comments to the trial judge if the settlement judge is not the trial judge. The provision states that judges can make "public statements in the course of their official duties." A judge's comments in ex parte caucus while facilitating settlement are probably part of his official duties, but those comments might not be deemed to be public.

There are only two provisions in the Codes of Conduct for Federal judges that differ enough from the ABA's Model Canons to mention. The prohibition against commenting on pending cases specifies public comments only and does not extend to non-public comments. [155] The requirement of acquiring parties' permission for ex parte conversations as part of settlement applies to "pending matters" as opposed to "matters pending before the judge." [156] This could suggest that such permission is necessary for all pending cases, including cases not assigned to the settlement judge for trial.

California's Code of Judicial Ethics follows the same structure as the ABA's Model Canons but provides a few modifications in language. An important difference is Canon 3B(9), which specifies that "This Canon does not prohibit judges from making statements in the course of their official duties ." The ABA's Model Canons use similar language, but only in reference to public statements. The difference could be significant in the case of private comments in an ex parte caucus while facilitating settlement. Another interesting difference is the Advisory Committee Commentary for California's Canon 3B(8), which states, "The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of matters fairly and with patience."

California's Advisory Comments set a clearer standard on the priority between docket management and better outcomes. Caseload management efficiency must not take precedence over patient judges disposing of matters fairly. The ***364** same message can be deduced from the language in the ABA's Model Canon, but it is unequivocal in California's provision.

B. Proposed Revisions

The ABA's Model Canons are in the midst of a two-year revision project for the first time in eighteen years. [157] The ABA's Section of Dispute Resolution has proposed that the Model Canons include a new paragraph to address "Settlement Responsibilities." [158] In addition to prohibiting a judge from acting "in a manner that coerces a party into settlement," [159] this proposal also states, "Ordinarily, a judge should not conduct a settlement conference or mediation in a case in which the judge will serve as the adjudicator of the merits of the case." [160] This initiative has been presented to the joint commission revising the Model Canons by nationally prominent ADR leaders. [161]

The ABA's Dispute Resolution Section proposal includes a commentary that explains the proposed prohibition against judges mediating cases assigned to them for trial. The pertinent section of the commentary states,
When conducting settlement conferences or mediations, particularly when caucusing (i.e., ex parte conversations with parties and /or litigants) is used, judges become aware of parties' confidential information to which they would not be privy, had they not conducted the settlement activity. If the parties do not settle and the judge later tries the case, this confidential information is often difficult for the judge to separate from evidence that the judge hears when adjudicating the merits of a case. The result is that, often, the confidential information serves to bias the adjudicating judge in favor of or against one or more of the parties to the dispute, thus compromising the integrity of the adjudication process. Section 3C(2) recognizes these facts and additionally counsels against the settlement judge being the adjudicating judge. The word "ordinarily" recognizes that there may be instances where this section should not apply. For example, there may be situations where a jurisdiction may have only a single judge and/or where the parties, having been fully informed of the possible consequences of having one judge serve in both the settlement and adjudication role, nonetheless jointly agree to such procedure. [162]

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***365** The result of the equivocation in the proposed Canon and commentary is a failure to resolve the issue. On one hand, the commentary identifies the concerns, concluding that the process biases the judge and compromises the integrity of the adjudication process. On the other hand, it permits the process when agreed to by informed parties and acknowledges that at times it appears necessary. The proposal could have declared that this practice incurably compromises the integrity of the adjudicatory process and should be forbidden. Instead, the language is qualified by the word "ordinarily." The comment then explains that, arguably, the practice can continue as long as either the parties make a knowing waiver, or the judge faces logistical challenges. [163]

If this proposal is adopted, does it require a judge to acquire consent from the parties to conduct a non-caucus settlement conference? The current Model Code of Judicial Conduct already requires consent from the parties for ex parte communications (caucus) in settlement conferences. [164] How should judges reconcile the apparent conflict between this proposed judicial ethic and the statutory permission for judges to conduct settlement conferences? [165]

It is interesting that the proposal goes beyond the recent concern about judges mediating cases assigned to them for trial and includes the practice of conducting settlement conferences. Including both processes in the proposal acknowledges that the criticisms and concerns apply to both processes. It is noteworthy that both the proposed language and commentary use the word "or" between the processes to suggest they are distinctive. Should the commission distinguish between these processes by forbidding judges from conducting mediations, but accepting the comparatively established practice of judges conducting settlement conferences?

Illumination and, hopefully, resolution of the controversy about judges conducting settlement conferences and mediations for cases assigned to them for trial would be helpful to the entities responsible for regulating judicial conduct. Once these issues are resolved by the ABA's joint commission for the Model Code, it will be repeated on the state levels as states wrestle with updating their codes of judicial ethics.

V. Adding Judicial Mediation Further Confuses the Law

A. Confusion in the Law Regarding Settlement Conferences for Cases Assigned for Trial

Professor Daisy Hurst Floyd's article entitled, Can the Judge Do That? - The Need for Clearer Judicial Role in Settlement, [166] presents many of the pertinent ***366** aspects of the law regarding settlement conferences. She traces how case law relies on a trial court's inherent authority and Federal Rule of Civil Procedure 16 to establish the right of a federal district judge to conduct settlement conferences for her own cases. [167]

Professor Floyd examines many cases determining whether a judge's behavior in settlement constituted judicial misconduct for the purposes of either recusal of the trial judge or reversal of a trial court decision. [168] She summarizes an important aspect of the law in this arena:

> Unless a judge's remarks demonstrate such pervasive bias or prejudice that one party is actually prejudiced, the bias must stem from an extrajudicial source to be disqualifying. A source of bias is extrajudicial if the bias "is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." The requirement of an extrajudicial source for the bias has been the basis for many courts rejecting an argument that the trial court should be disqualified for bias based on conduct during pre-trial proceedings. [169]

Floyd's article described several pretrial behaviors by trial judges found to be acceptable:

- A statement that "he had seen better cases before and that the case did not impress him;" [170]

• Expressions of skepticism about the validity of a defense; [171]

• Forming opinions about the credibility of counsel; [172]

• A statement that the lawsuit was a "personal tragedy fo2 the defendants" who were "honest men of high character;" [173]

• A statement to plaintiff that "these matters never work out for a plaintiff unless they are settled and that he [the plaintiff] ought to settle because the judge could not rule in his favor ;" [174] and

• A statement that the judge was "outraged by the fact that in this day and age a man's life could be ruined because he stole a few sandwiches," which was the defendant's justification for firing an employee. [175]

Despite the clear authority for federal judges to conduct settlement conferences for their own cases and the difficulty of having a judge removed or reversed for bias due to pretrial behaviors, Floyd also revealed some mixed results when courts have attempted to define the limits of a federal judge's power in settlement. [176] For example, one appellate court found that a trial judge exceeded his authority when he followed through on his threat to impose sanctions if the parties ***367** waited until trial to settle within a suggested range. [177] Another appellate court, though, found that it was within a trial court's authority to impose sanctions for the parties' failure to comply with the trial court's deadline to conclude negotiations two weeks before trial. [178]

The confusion in the law regarding judges seeking to settle cases assigned to them for trial is amplified when considering state law. The Connecticut Supreme Court has ruled that "[w]hen a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety." [179] The Montana Supreme Court requires the disqualification of a judge who will be trier of fact if that judge participates in unsuccessful pretrial settlement negotiations and is requested to do so by one of the parties. [180] In contrast, the case law in Hawaii and California establishes that trial judges need not recuse themselves, even in bench trials, simply because they conduct settlement conferences in cases assigned to them for trial. [181]

B. California As an Example of How Judicial Mediation Creates Additional Confusion in the Law

1. Determining Mediation Confidentiality by the "Label of Process"

Like many states, California has a statute that provides for the confidentiality of mediations. [182] The application of these provisions was clarified by the California Supreme Court in Foxgate Homeowners Ass'n. v. Bramalea California, Inc. [183] ***368** The issue in Foxgate was whether a retired judge could submit a declaration in support of a motion for sanctions against a party who allegedly sabotaged a mediation. The court concluded that the statute prohibits such behavior. The structure of the statute and reasoning of the court creates a chaotic state of the law for judicial mediation.

The Foxgate court's reasoning attempts to conform to the statute's distinction between mediation and settlement conferences. The statute specifies, "This chapter does not apply to [a] settlement conference pursuant to Rule 222 of the California Rules of Court." [184]

Applying this statute, the court reasoned:

Had [the retired judge] been classified as a special master ordered to report to the court, his report would not have been subject to the mediation confidentiality statutes and would be governed by the parties' agreement to the CMO provision for reporting. The superior court CMO states: "[The] Judge is appointed as Special Master pursuant to Code of Civil Procedure Sec 638 et seq., and shall act as mediator for settlement conferences and as discovery referee. The Special Master shall rule on all discovery disputes, shall assist in the implementation of the Order and shall preside over mediation conferences and make any orders governing the attendance of parties and their representatives thereat." Amicus curiae suggests that Judge Smith acted as though he was conducting a settlement conference and asks this court to clarify the differences between a settlement conference at which a court may, on its own motion, sanction a party for not participating (Code of Civ. Proc., Sec 177.5) and mediation, We have no occasion to do so here. It seems clear from the record, and the parties appear to agree, that the proceeding about which Judge Smith reported was a mediation proceeding and the judge was acting as a mediator. [185]

The court thus predicated its upholding of mediation confidentiality on a finding that the judge was presiding over "a mediation proceeding and the judge was acting as a mediator." [186] The court appears to affirm that had the proceedings been found to be a settlement conference or had the judge been acting as a Special Master, the result would be different. [187] The Foxgate court could have found that the judge was serving in any one of three capacities: a Special Master who is required to submit reports to the court, a settlement conference judge who had power to sanction a party for not participating, or a mediator in a mediation proceeding who is required to maintain confidentiality. The propriety of the judge's conduct would be dramatically different depending on his status.

This creates confusion in the law regarding judicial mediation because of the difficulty of distinguishing between a settlement conference and judicial mediation. What standard should a court utilize in making such a determination? Statutory ***369** definitions of "mediation" would include settlement conferences. [188] Judges conducting settlement conferences fulfill the common dictionary definition of "mediate." [189] The Foxgate court's determination that "the judge was acting as a mediator" [190] is suspect because that would be true in both a mediation proceeding and a settlement conference. [191]

The scarcity of other differentiating factors is likely to put increased reliance on the process' label in determining whether a proceeding is a mediation, with all the rights and protections thereto appertaining, or a settlement conference, with different rights and protections. Even this criterion might be suspect, depending on the clarity of the appointing label. For example, in the Foxgate case, the operative language in the Case Management Order defined the judge's role as "act[ing] as a mediator for settlement conferences" and "presid[ing] over mediation conferences." [192] The likelihood of courts consistently interpreting this type of ambiguous language is problematic.

The Foxgate decision creates havoc by differentiating between the protections and powers associated with judicial mediations and settlement conferences, but then declining to provide guidance on how to differentiate between these processes. The court justifies its concluding that this was a mediation at least partly on the basis that, "It seems clear from the record, and the parties appear to agree, that the proceeding about which Judge Smith reported was a mediation proceeding ." [193]

Finding that the parties agree on this issue, which in Foxgate was raised in an Amicus brief, will not be of much assistance when the parties frame this as the issue in controversy for determination in subsequent litigation. Parties are certain to litigate whether a proceeding was a settlement conference or mediation now that the law is clear that serious ramifications follow that determination.

That is exactly what happened in Doe 1 v. Superior Court. [194] The party seeking to divulge information that had been created as part of a judicially supervised mediation or settlement conference argued that the proceeding was a settlement ***370** conference, and thus exempt from the mediation confidentiality provisions. The Doe 1 court recognized "the conceptual difficulties in distinguishing between a mediation and a settlement conference when a bench officer is presiding at those talks." [195] This court found that the proceeding was a mediation despite references to it in the record as both a settlement conference and mediation, because the record was "replete with numerous other references to an ongoing mediation." The court concluded its analysis by advising counsel and future appellate courts,

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If counsel wish to avoid the effect of mediation confidentiality rules, they should make clear at the outset that something other than a mediation is intended. Except where the parties have expressly agreed otherwise, appellate courts should not seize on an occasional reference to 'settlement' as a means to frustrate the mediation confidentiality statutes. [196]

The advent of judicial mediation further complicates the confusion in the law regarding judges seeking to settle cases assigned to them for trial, because under Foxgate, it could be determined that a settlement judge conducted either a settlement conference or a mediation, with different powers and protections dependent upon that determination.

2. Determining the Legitimacy of Settlement Techniques by the "Label of Process"

The progeny of the Foxgate precedent and reasoning includes another California appellate decision regarding whether a settlement judge exceeded his authority. The issue in Travelers Cas. & Sur. Co. v. The Superior Court of L.A. County [197] was whether the settlement judge exceeded his authority by making a finding that there was probable liability, and then finding the range of likely damages. [198] The judge made these findings because the defendant's insurers had threatened the defendant that they would forfeit their insurance coverage if the defendant settled the case without their consent and prior to determinations of liability and the amount of that liability. [199]

The appellate court acknowledged, "The stipulated order appointing Judge Lichtman as settlement and mediation judge stated that he could review the probable evidence, offer evaluations of the strength of the evidence, the applicable law, the amount of damages, and 'take any other steps or apply any other settlement techniques he finds appropriate .'" [200] Despite this apparent prior agreement among the parties (a stipulated order) to invest the settlement judge with broad powers, the defendant's insurers asked the appellate court to vacate the findings by the settlement judge. [201]

***371** The appellate court found that this was a "type of mediation conducted as part of voluntary settlement conferences." [202] Following the example of Foxgate, the Travelers court found that Judge Lichtman was conducting a mediation and that the process "was governed by the rules applicable to mediations, even though that mediation took place as part of a voluntary settlement process." [203]

Upon finding that this proceeding was governed by the rules applicable to mediations, the Travelers court applied the California Rules of Court for Court Annexed Mediations (California Rules). [204] The court acknowledged that the California Rules specifically exempt sitting judges and settlement conferences. [205] The Travelers Court justified its application of the California Rules to this settlement judge on the Advisory Committee Comment to California Rule 1620.1(d), which states:
Although these rules do not apply to them, judicial officers who serve as mediators in their courts' mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination. [206]

Because rule 1620.1(e) specifically states, "The rules in this part do not apply to settlement conferences conducted under rule 222 of the California Rules of Court," the only way the Travelers court could apply these rules was to find that the proceeding was a mediation rather than a settlement conference. As in Foxgate, the criteria for such a determination are unclear. [207]

Also similar to Foxgate, the Travelers court appeared to give great weight to the label of the proceeding. The description of the judge's extensive powers in the stipulated appointment might have justified a finding that this proceeding was more similar to a settlement conference than a mediation. The Travelers court confirms the confusion when it finds that this is "the type of mediation conducted as part of voluntary settlement conferences." [208]

The Travelers court found that "[a] mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self- ***372** determination by the parties." [209] It explained that neither the Judge's inherent authority nor the broad grant of authority in the stipulated order appointing him as settlement judge could allow the settlement judge "to exceed

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the neutral, non-factfinding role of a mediator."[210] The court vacated the findings of the settlement judge on the grounds that the judge "exceeded his authority by making factual findings and otherwise preparing a coercive order in violation of the fundamental principles governing mediation proceedings."[211]

The Travelers court clearly followed Foxgate's lead when it "expressly decline [d] to consider or clarify any differences that might exist between a mediation and voluntary settlement conference." The court wrote, "Therefore, our decision should not be construed as holding that all voluntary settlement conferences are mediations which are subject to the rules concerning the conduct of mediation proceedings. Instead, we apply the various mediation rules [in this case] because that order was the result of a mediation."[212]

As in Foxgate, then, the propriety of the judge's conduct might be dramatically different if the proceeding was a settlement conference instead of a mediation. Travelers requires judicial mediations to conform to at least the principles of voluntary participation and self-determination articulated in the California Rules.[213] Settlement conferences are specifically exempted from such standards by the California Rules and by the Travelers decision.[214] The primary distinction between the processes appears to be the label utilized for the proceedings.

The advent of judicial mediation creates confusion in the law because the powers and boundaries of judicial mediation are different from those in a settlement conference, and it is challenging to differentiate between the processes. California law appears to depend heavily on how the process is labeled.

3. Questioning the "Label of the Process" Approach with Empirical Data

Is California's reliance on the label of the process when determining confidentiality and standards of practice based on an assumption that the content and techniques in mediations are distinct from those of settlement conferences? If the processes are distinct, do those differences ameliorate or exasperate the concerns about judges conducting mediations? For example, it could be argued that the concern about pre-judging the case is absent if mediations consist of an interest-based, problem-solving approach instead of a bargaining-in-the-shadow-of-the- ***373** law approach. Likewise, there might be less concern about coercion if mediations are dramatically more facilitative than settlement conferences.

While the California courts might continue distinguishing between the powers and protections in judicial mediation compared to settlement conferences based on the label of the process, they might be persuaded to pursue a more substantive approach by empirical data showing that the processes are substantially the same. Toward that end, the survey of California judges[215] sought to document the content and technique of judicial mediations and settlement conferences.

As described above,[216] the survey of California judges asked those judges who had not had a family or civil assignment in the last four years to only answer questions about their attitudes, and nothing else. The objective of the survey was to quantify judicial attitudes of all judges, but only the practices of current civil and family law judges ("current" being defined as within the last four years). Eighty-five judges without civil or family assignments revealed their attitudes towards judicial mediation and settlement conferences, and then followed directions to not answer any further questions. Thus the demographics for the judges who completed the rest of the survey are: 72 family law judges, 129 general civil judges, 22 limited jurisdiction judges, 6 complex civil judges, and 10 judges who reported having assignments in more than one category. The judges with assignments in more than one category were not counted in any of the designated categories, but were included in the category of all judges.

Rather than imposing definitions on the judges, the survey accepted the labels used by judges to differentiate between the processes. Whenever a judge used the label of mediation for the settlement proceeding, then it was considered a mediation; likewise for settlement conferences.[217] Rather than focusing on definitions to label the processes, the survey deferred to the judges regarding labels and focused on the content of the proceedings. The result is documentation of the conduct and techniques judges used when they conducted processes they label "settlement conferences" and separate documentation of the conduct and techniques when judges label the proceeding "mediation."

The methodology used to document the judges' conduct and techniques was to ask each judge to provide an estimate of how often he used a specific technique in meetings he labeled, "settlement conferences," and a separate estimate how often he used

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the same technique for meetings he labeled, "mediations." The survey identified thirty-two techniques [218] and asks each judge to indicate whether that technique was used less than 10%, between 10% and 40%, between 41% and 60%, between 61% and 90%, or more than 90% of the time. The techniques queried were largely drawn from the characteristics identified in Professor Leonard Riskin's grid on mediator style. [219]

***374** The structure of the survey allows for comparison of the content of how a judge conducts each process. Unfortunately, only 40 judges acknowledged ever conducting processes they labeled mediations. Of that number, comparing the difference in how the same judge conducts a mediation and a settlement conference is impossible for three judges because they reported never conducting settlement conferences. Out of this group of 37 judges conducting both processes, only 27 completed the questions about their utilization frequencies of the thirty-two techniques once for settlement conferences and another time for mediations. Despite the extremely limited sample, it is interesting to examine the degree of similarity or difference for how each of these 27 judges conducts both processes. Specifically, the data allows the examination of how each judge's thirty-two measurements for settlement conferences compares with the thirty-two measurements for that same judge conducting mediations.

The first measure of the degree of similarity in technique between how the same judge conducts the two processes is the number of incidents in which the thirty-two techniques for that judge were different. The following table reveals the number of judges reporting the corresponding number of incidences in which the frequency of technique varied between the processes:

Frequency of Variation in Techniques Used in Mediations versus Settlement Conferences

Number of techniques (out of 32) used with different frequencies between the two processes	Number of judges reporting that number of variations
0	7
1	4
2	1
3	2
4	1
5	3
9	1
11	1
12	1
13	1
16	1
19	1
20	2
23	1

Table 11

Thus, the data shows that out of the judges that reported conducting both processes (37) and that also reported the content of how they conduct both processes (27), only 9 report a substantially different content between the processes. Of the 27 judges, more than one-fourth (7 judges) report no differences, and two-thirds (18 judges) report variations in the utilization frequency of five or fewer out of thirty-two techniques. One-third (9 judges) report differences in frequencies for nine or more of the techniques, with only 4 judges reporting differences in frequencies for more than sixteen techniques.

***375** The aggregate picture is that out of 864 measures (32 measures for each of 27 judges) there were a total of 174 reported variations between the processes. Eighty percent of the measures showed that techniques were used with the same frequency in a "mediation" as in a "settlement conference."

A second measure of the degree of difference between the content of these processes is the extent of variation in the frequency of utilization. For example, Judge A reports that he expresses his opinion on the likely outcome of the case at trial between 61% and 90% of the time in settlement conferences, but a different frequency in mediations; the amount of difference between the processes is greater if he reports that he uses this same technique in less than 10% of his mediations compared to between 41% and 60% of his mediations.

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The above data identifies a total of 174 variations between the frequencies of utilization of a technique by the same judge in a settlement conference compared to a mediation. Of those 174 variations, 106 were one category different, [220] 47 were two categories different, 16 were three categories different, and 5 were four categories different. This data reveals that of the 20% of all measures that showed a variation (174 out of 864), 60% (106 out of 174) were different by only one category. Thus, there were only 68 [221] out of the total 864 measures that were more dramatically different. The data shows a difference in frequency of two or more categories for only 7.9% of the measures.

The final aspect of this data that may be instructive is whether there is a trend in which of the techniques were different between the two processes. For example, it might be important if each of the 20 judges reporting variations in the processes [222] reported differences on the same technique.

The following table describes the number of judges (out of 20) who reported variations in use of a particular technique between processes labeled "mediations" and "settlement conferences." "Mediations over settlement conferences" is used to describe when a judge uses the technique in mediation more than in settlement conferences. Conversely, "Settlement conferences over mediations" is used to describe when a judge uses the technique in settlement conferences more than in mediation.

***376 Variations in Uses of Particula r Techniques: Mediations versus Settlement Conferences**

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Table 12

***378** Few will be surprised by the trends in the differences between judicial mediations and settlement conferences revealed by this data. Judicial mediations encourage parties to express their emotions more and are more about satisfying the parties' underlying needs, goals, fears, and feelings. In contrast, settlement conferences are more about the judge explaining her opinion of the legal strengths and weaknesses of the case and her opinion on the likely outcome of the case at trial.

But these differences are only a matter of slight degrees because differences were only reported in 174 out of 864 measures and the difference in frequency was only one category 80% of the time. The 68 measures showing a difference of more than one category were distributed among the techniques. In many instances, some of the judges reported using a particular technique more often in mediation, while other judges reported using the same technique more often in settlement conferences.

The fact that 7 of 27 judges reported no differences, the limited number of differences for many judges, and the large number of differences that were only one degree different supports the conclusion that often, when measured by comparing the techniques of judges who use both labels, the content of a mediation is substantially the same as the content of a settlement conference. The conclusion is qualified because of the limited sample and data.

C. The Uniform Mediation Act Uses "Subsequent Decision Making" to Determine Mediation Confidentiality

The most prominent and processed mediation confidentiality statute is the Uniform Mediation Act (UMA), [223] recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in 2001. [224] Regarding the issue of judges mediating cases assigned to them for trial, the UMA specifies, "The [Act] does not apply to a mediation conducted by a judge who might make a ruling on the case." [225]

The Comments to this section of the UMA explain that "this Section excludes certain judicially conducted mediations from [the confidentiality provided by] the Act." [226] The comments distinguish between "judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act's policies of promoting full and frank discussions between the parties would be furthered," and case management judicial conferences that could lead to court orders entered into the public record on issues like discovery in which "the parties hardly have an expectation of confidentiality." [227]

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Rather than maintaining this distinction, the proposed statutory language "excludes those settlement conferences in which information from the mediation is communicated to a judge with responsibility for the case." [228] Conversely, it extends ***379** confidentiality protection to "mediations conducted by judges specifically and exclusively assigned to mediate cases, so-called 'buddy judges' because such mediators do not make later rulings on the case." [229]

Note that the UMA chooses to not try to differentiate between a settlement conference and a judicial mediation. The language in the comment cited above lumps both processes together by referring to "settlement conferences in which information from the mediation ." [230]

Instead, the UMA uses the issue of whether trial judges should conduct settlement conferences/mediations for cases assigned to them for trial as the fulcrum point to determine confidentiality. [231] The standards reflected in the comments about promoting full and frank discussions between the parties and whether the parties have a reasonable expectation of confidentiality [232] were transformed into whether the judge might make a ruling on the case. When addressing judges facilitating settlement, the UMA could have distinguished between settlement discussions and other case management discussions. Instead, the proposed statute denies protection for all discussions with a judge who "might make a ruling on the case." [233]

The UMA's standard of whether the judge "might make a ruling on the case" does offer the clarity of a bright line test, as suggested by Professor Alfini. [234] The problem is that denying confidentiality protection to judicially supervised settlement discussions for cases assigned to that judge for trial creates confusion in the law. Adopting the standard of whether "a judge might make a ruling on the case" to determine confidentiality doesn't forbid the practice of trial judges facilitating settlement for their cases. It simply requires other authority for the customary confidentiality protections for such proceedings.

Most jurisdictions have other sources of authority for maintaining the confidentiality of a settlement conference. [235] While the UMA declines to distinguish between settlement conferences and mediations, some state laws may make distinctions. [236] The advent of judicial mediation creates additional havoc in the law because if a judge labels the proceeding a "mediation," the discussions might not be protected by the UMA (because the judge "might make a decision in the case") and also might not be protected by whatever the authority for confidentiality for ***380** settlement conferences, because the proceeding is a "mediation" rather than a "settlement conference ". It would almost certainly surprise most lawyers and clients to learn that comments in such a judicial mediation could be admissible at trial.

The UMA's approach of focusing on whether the judge might make a ruling on the case is in stark contrast to the focus in California law on the status of the judge and label of the process as determinative of the judge's authority and applicability of statutory confidentiality protections. The current law in California focuses on distinguishing between settlement conferences, with certain attached rights, and mediation, with other attached rights. [237] Notice that whether the judge will make a ruling on the case is irrelevant. If a judge labels a settlement proceeding a settlement conference, the mediation confidentiality protections would not apply, but other court rules protect those communications. [238] If a judge labels the settlement proceeding a mediation, the statute's confidentiality protections would appear to apply, even if the case was assigned to her for trial.

VI. How Judicial Mediation Could Assist in Resolving the Controversy and Clarifying the Law

The mediation movement is creating standards of practice and ethics for mediators. The advent of judicial mediation could assist in resolving the controversy about trial judges seeking to settle their own cases by using the standards for mediators as a basis to articulate ethical standards for settlement judges. The application of standards for self-determination and voluntary participation in the Travelers case was confusing only because the law exempts settlement conferences from such standards. The advent of judicial mediation could become the catalyst for clarifying ethical practices for any judge acting in any settlement capacity.

Professors Alfini and Floyd identified the need for such standards a decade ago. [239] The continued refinement in mediator ethical standards like the California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases [240] and the revised Standards of Practice jointly developed and adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution [241] provide increasingly refined guidelines for appropriate practices in the settlement support capacity. These standards should not be adopted and applied to judges en masse because perhaps there

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should be some unique characteristics when a judge, especially the trial judge, is the mediator. But the continued maturation of such standards for the private sector clarifies the thinking and provides the foundation for such standards for sitting judges. Creating explicit ethical standards for judges advancing settlement would be a vast improvement over the calls that trial judges should not mediate or conduct settlement conferences for their own cases, or that the rights and responsibilities ***381** for judges conducting settlement conferences should be different from those of judges conducting mediations.

VII. Conclusion

The advent of judicial mediation may provide an opportunity to resolve a decades-old controversy about judges attempting to settle cases assigned to them for trial. While it is uncontested that settlement has become a much more significant function for most modern day judges, judicial ethics have not yet evolved to provide clear ethical standards for judges attempting to assist in settling. While some propose a bright line test that would forbid judges from attempting to settle any case in which they might make a decision, such an approach would be contrary to prevailing practice and would eliminate the opportunity for judicial signaling to assist parties in their settlement strategies. Rather than arbitrarily differentiating between settlement conferences and mediations, this author suggests acknowledging that the content and techniques of the processes are virtually identical.

Once the processes are viewed as virtually identical, the judicial ethics community can build on the continuing refinement of standards of practice for mediators to develop specialized ethics for judges attempting to assist in settling cases. Clarifying that judges can assist in settling cases assigned to them for trial and the ethical standards when doing so would empower judges and judicial administrators in encouraging and implementing an important public service in the administration of justice.

*382 APPENDIX A

JUDICIAL VIEWS AND PRACTICES REGARDING JUDGES ATTEMPTING TO SETTLE CIVIL OR FAMILY LAW CASES

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Footnotes

a1 Peter Robinson is the Managing Director and Associate Professor at the Straus Institute for Dispute Resolution, Pepperdine University School of Law. The empirical dimension of this article would not have been possible without the partnership of California's Administrative Office of the Courts, ably represented by Kareen Alvarado. This article was inspired by the experience of Judge E. Jeffery Burke and prepared with the exceptional research assistance of Pepperdine law students Thomas Griffin and Sarah Gough.

1 UNIF. MEDIATION ACT § 3(b)(3) (2001).

2 Marc Galanter, The Emergence of the Judge as a Mediator in Civil Cases, 69 JUDICATURE 256 (1986). For a brief history of settlement conferences, see also Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. REV. 485, 490 (1985). Professor Galanter's documentation of the evolution of judicial practice is nicely complemented by Professor Judith Resnik's article on, among other things, "how and why federal judges came to reorient the processes of judging and, in essence, to redefine their jobs by adding the management and settlement of civil cases to their judicial role." Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 929 (2000). Professor Resnik describes the background conditions and organizational development that enabled this transformation: she cites the importance of rulemaking in the 1930s, protracted litigation in the 1950s, schools for judges in the following decades, judges who were committed advocates for the changes, and "official mandates for federal judges and in conceptions of the judicial role" as well as the creation of an "institutional voice" for the federal judiciary. Id. at 948.

3 Galanter, supra note 2, at 258.

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4 Id. at 259. See also Michael Hogan, Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation, 27 WILLAMETTE L. REV. 429 (1991). Hogan concludes that "from 1938 to 1983, settlement was generally considered to be only a by-product of a good pretrial procedure rather than a primary objective." Id. at 431.

5 Galanter, supra note 2, at 259-60.

6 Id. at 261.

7 Id. See also Carrie Menkel-Meadow's statement in 1985 that "My own view is that [judicial involvement in] settlement is now the norm." Menkel-Meadow, supra note 2, at 513.

8 Judith Resnik, Managerial Judges, 96 HARV. L. REV. 376 (1982).

9 See Menkel-Meadow, supra note 2, at 513.

10 See Resnik, supra note 8, at 383; see also Menkel-Meadow, supra, note 2, at 407.

11 Resnik, supra note 8, at 408.

12 Resnik, supra note 2, at 992-93.

13 Leroy Tornquist, The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry, 25 WILLAMETTE L. REV. 743, 773 (1989). In his opinion, "this conclusion is true whether or not there is a jury trial." Id. at 773 n.141.

14 Hogan, supra note 4.

15 Id. at 436, (citing Craig A. McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 ME. L. REV. 237, 245 (1981)); see also Marc Galanter and Mia Cahill, Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1354 (1994). But see E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 33-37, 44-47 (1989) (survey results of 286 personal injury tort litigants finding higher satisfaction with the outcome and perceived greater fairness in the process when cases were resolved by trial or arbitration as opposed to judicial settlement conferences).

16 Hogan, supra note 4, at 437.

17 Id. at 440.

18 Id. But he includes in his defense of this practice an assumption that "if the parties and attorneys request that an unsuccessfully negotiated case be assigned to another judge for trial, it is difficult to imagine that it would not be assigned. To insist on trying the case only to have a party object afterwards, based on a claim of partiality, would be a waste of time and money and would create more litigation." Id. at 439. This assumption may not always be the case.

19 Id. at 439.

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20 Id. at 439.

21 Id.

22 Id.

23 Menkel-Meadow, supra note 2, at 511.

24 Id. at 512.

25 E. Donald Elliot, Managerial Judging and the Evolution of Procedure, 53 U. CHI. L. REV. 306 (1986).

26 Id. at 324-25 (citations omitted).

27 Id. at 325-26.

28 Id. at 325.

29 Menkel-Meadow, supra note 2, at 504.

30 Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337 (1986).

31 Id. at 350.

32 Id. at 359.

33 Id. at 359-60.

34 Id. at 360.

35 Id. at 361.

36 Id. at 362.

37 Id. at 362-65.

38 Id. at 362.

39 Id. at 364-65.

40 This number includes all appellate judges and commissioners, as well as elected and appointed trial judges.

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41 "[P]eople's assessments of their own abilities to meet various challenges exceed the best dispassionate analyses of those abilities." Thomas Gilovich et al., Shallow Thoughts About the Self: The Automatic Components of Self-Assessment, in THE SELF IN SOCIAL JUDGMENT 67 (Mark D. Alicke, David A. Dunning, Joachim I. Krueger eds., Psychology Press 2005). "[P]eople's assessments of their own traits and abilities have been shown, time and time again, to be overly optimistic." Id.

42 Special appreciation is expressed to AOC staff attorneys Kareen Alvarado, Heather Anderson, and Alan Wiener, and Judge E. Jeffrey Burke.

43 See infra app. A.

44 The instructions stated that participation was completely voluntary and that respondents were free to not answer any question for any reason. The judges were told that participating would assist in documenting judicial norms and they could receive a composite summary of the responses by returning a separate postage paid postcard, even if they chose to not complete the survey.

45 The judges were informed of the AOC's partnership with a law school professor on this research project to insure the anonymity of their responses. The judges knew that even the law school professor would not know which judges responded and only the aggregate compilations of the data would be provided to the AOC.

46 The concern was that the responses from the approximately 200 judges who had completed the Straus training program might be positively biased because they appeared to appreciate the training and like the faculty. Pepperdine and Malibu were not identified in any way in the cover letter, return address envelope and post card or the questionnaire, until the last question which lists various training programs including JAMS, AAA, community mediation organizations, and Pepperdine.

47 The California Rules of Court define "General Civil Case" as "all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption proceedings), juvenile court proceedings, small claims proceedings, unlawful detainer proceedings, and "other civil petitions" as defined by the Judicial Branch Statistical Information Data Collection Standards." CAL. CT. R. 200.1.

48 Family law embodies "all family law matters like divorce, child custody, child support, and domestic violence." STATE OF CALIFORNIA, GUIDE TO COURTS 2 (2000), available at http://www.occourts.org/home/brochures/family_en.pdf; Black's Law Dictionary defines family law as "[t]he body of law dealing with marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, juvenile delinquency, and other domestic-relations issues." BLACK's LAW DICTIONARY 638 (8th ed. 2006).

49 In this context, limited jurisdiction means that a court has [pecuniary] restrictions on the cases it can decide. See BLACK's LAW DICTIONARY 869 (8th ed. 2006). E.g., small claims is a court of limited jurisdiction, because it can only hear cases that claim damages of $5,000 or less. In 2004, California's Limited Jurisdiction Courts handled cases that claimed damages up to $25,000. CAL. CIV. PROC. CODE § 86 (West 2006).

50 Complex civil cases are "cases that require exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants", and "may involve such areas as antitrust, securities claims, construction defects, toxic torts, mass torts, and class actions." CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, COMPLEX CIVIL LITIGATION FACT SHEET 1 (2006), available at http://www.courtinfo.ca.gov/reference/documents/comlit.pdf.

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51 While this number is small, there are only 18 Complex Civil Judges in the entire state of California.

52 The assumption is that the 85 respondents who had not conducted mediations or settlement conferences in any of the above categories had appellate or criminal law assignments.

53 Specifically, in response to a particular statement, the judges were asked to indicate "Strongly Disagree," "Disagree," "No Opinion," "Agree," or "Strongly Agree."

54 See Marc Galanter, "A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States, 12 J.L. & SOC'Y. 1, 7 n.41 (1985) (citing JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 170 (1980) (stating survey results which show that over 75 percent of judges as intervening in settlement discussion compared to almost 22 percent as non-intervening)).

55 Settlement Conferences Should Be Allowed: By Response Strength and Assignment

	Number of Responses (FREQ)			
	Family Law	General Civil	Limited Jurisdiction	Complex Civil
Strongly Disagree	59	1	0	
Disagree	7	12	1	1
No Opinion	1	1	0	0
Agree	18	28	5	1
Strongly Agree	38	71	14	4
DID NOT ANSWER	3	8	1	0

Table 3

56 For example there were 69 family law judges who answered the question about their beliefs regarding whether judges should be allowed to conduct settlement conferences for cases assigned to them for trial, compared to 62 family law judges who answered this question and the 12 who chose not to answer this question. Likewise for general civil judges, 121 answered the question about their beliefs, but only 98 answered this question with 25 choosing not to answer. Despite the availability of being able to indicate zero per week, some of the judges may have chosen not to answer this question because they do not conduct any settlement conferences.

57 In statistics, mode is defined as "[t]he value or item occurring most frequently in a series of observations or statistical data." AM. HERITAGE DICTIONARY 1160 (3d ed. 1992).

58 Another question in the survey documented that the average number of new cases per year for family law judges was about 1300 compared to about 450 for general civil judges. The greater frequency of settlement conferences may reflect the need to manage a greater caseload. This theory is not confirmed by the volume of cases assigned per year for limited jurisdiction civil judges, an average of nearly 1300, whose frequency for settlement conferences is more similar to judges with a general civil assignment. Interpreting the variances in the number of settlement conferences per week for the different judicial assignments requires a detailed examination of the differences in types of cases between the judicial assignments. For example, there are no jury trials in family law and some of the limited jurisdiction judges may handle small claims cases in which parties are prohibited from being represented.

59 See supra Part II.B.ii.

60 This is an important area for further investigation because it suggests that despite the greater concern about compromising the adjudicatory process (because family law trials are always bench trials), family law judges might be more accepting

of conducting settlement conferences for their own cases because it is necessary to manage the docket. See supra note 58 (discussing the greater volume of caseload for family law judges).

61 This incidence of documented enhanced court productivity or efficiency should be considered in the context of Professors Galanter's and Cahill's conclusion, after examining the research regarding court efficiency as a reason for judges to invest in settlement, that, "in conjunction with judges who are skilled and motivated mediators and supportive attorneys, a well designed program of judicial promotion of settlement may sometimes produce court savings. But there is no reason to think that in the ordinary mix of circumstances judicial settlement efforts produce significant payoffs in terms of court savings." Galanter & Cahill, supra note 15, at 1369.

62 Personal Statement of Judge E. Jeffrey Burke, Superior Court Judge in San Luis Obispo (on file with author) ¶ 7.

63 Id. ¶ 1. Judge Burke was sworn in on May 27, 1997. Id.

64 Id. ¶ 4.

65 Id. ¶ 8.

66 Id. ¶ 2.

67 Id. ¶ 3.

68 Id. ¶ 5.

69 Id. ¶ 4.

70 Id. ¶ 5.

71 Under the California Rules of Court, each court shall have the goal to resolve 75% of all civil cases classified as "unlimited" within one year. CAL. CT. R. § 2.1(f)(1) (2006) (resolution percentage goal amended from 90% effective Jan. 1, 2004).

72 Personal Statement of Judge E. Jeffrey Burke, supra note 62, ¶ 4.

73 Id. ¶ 9.

74 Id.

75 Id. ¶ 12.

76 Id. ¶¶ 10, 13.

77 Id. ¶ 14. Mediation was an exception to the judge-for-all-purposes system in that the parties could request any of the three civil judges to serve as their mediator. Id. ¶¶ 14, 16.

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78 Id. ¶ 15.

79 Id.

80 Id. ¶ 24.

81 Id. ¶ 25.

82 Id.

83 Id.

84 Id. ¶ 11.

85 Id. ¶ 17.

86 Id. ¶ 12. The 13 jury trials in the first three months of 1999 are contrasted with 7 court and 1 jury trials in the last nine months of 1999. On average, San Luis Obispo civil judges allocate about one-third of their time to conduct meditations. Id.

87 Id. ¶ 12.

88 Id. ¶¶ 5, 19, 20.

89 Id. ¶¶ 18, 19.

90 Id. at add. ¶ 1.

91 It seems particularly ironic that he was recognized as an exceptional trial judge by trial lawyers for essentially spending the vast majority of his time mediating.

92 The observation was first made to the author by another San Luis Obispo civil judge in January 2002. See also Personal Statement of Judge E. Jeffrey Burke, supra note 62, ¶ 18.

93 Id. at attachment ¶¶ 1, 2, 3, 4. Court statistics reveal that in 1999 Judge Burke conducted 91 out of a total of 93 mediations conducted by the Court; in 2000 Burke conducted 167 out of 261 mediations; in 2001 Burke conducted 79 out of 152 mediations; and in 2002 Burke conducted 71 out of 191 mediations. By 2002, there were five judges conducting from 22 to 71 mediations each with settlement rates ranging between 81 and 59%. Id.

94 Id. attachment ¶ 6.

95 Id. ¶¶ 21, 23.

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96 Id. ¶ 26. At first the AOC was reluctant because the last time it had offered a short three-hour course on mediation, only five persons expressed interest. The idea of offering a mediation program lasting five days and having it feature professional faculty instead of CJER's practice of having only judges teach other judges was met with skepticism. Members of the governing board, however, recognized the increasing popularity of mediation and saw the advantage of having judges trained in mediation as a way of resolving litigated disputes. Id.

97 Id. ¶ 27.

98 Conversations with Judge Peter Norell (San Bernadino), Judge Denise LeFluer (Santa Barbara), Alexander Williams (Los Angeles), Judge Robert B. Atact (Santa Cruz), and Judge John Van de Camp (Sacramento).

99 Napa Judges Cut Caseloads Using Mediation Skills, COURT NEWS [OF THE JUDICIAL COUNCIL OF CALIFORNIA], May-June 2004, at 8, available at http:// www.courtinfo.ca.gov/courtnews/mayjun04.pdf.

100 Id.

101 Id.

102 Id.

103 Id. Snowden states, "A court's place is to serve the community. We're trying to redefine what it is to be a superior court. This is the most exciting project I've been involved with in all my years as a judge. It's just a matter of reprioritizing resources to save trial time down the road. Litigants have been very receptive and grateful." Id.

104 Conversations with the author on May 28, 2003.

105 Id.

106 See James J. Alfini, Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial, DISP. RESOL. MAG., Fall 1999, at 11; Frank E. A. Sander, A Friendly Amendment, DISP. RESOL. MAG., Fall 1999, at 11.

107 Sander, supra note 106, at 11.

108 See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds., 1979) (for a history and explanation of the multi-door courthouse concept).

109 Sander, supra note 106, at 11.

110 Alfini, supra note 106, at 14.

111 Robert B. McKay, Rule 16 and Alternative Dispute Resolution, 63 NOTRE DAME L. REV. 818, 827 (1988).

112 Robert F. Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 RUTGERS L. REV. 253, 263 (1985).

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113 Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 NEB. L. REV. 712, 738 (1994).

114 Martin A. Frey, Does ADR Offer Second Class Justice?, 36 TULSA L.J. 727, 760 (2001).

115 Evans v. State, 603 So. 2d. 15, 17 (Fla. Dist. Ct. App. 1992).

116 See generally Galanter, supra note 54.

117 Harold Baer, Jr., Judges' Forum No. 2: History, Process, and a Role for Judges in Mediating Their Own Cases, 58 N.Y.U. ANN. SURV. AM. L. 131, 138 (2001).

118 Id. at 144-47. (internal citations omitted).

119 Id. at 150-51.

120 Edward Brunet, Judicial Mediation and Signaling, 3 NEV. L.J. 232 (2003).

121 Id. at 232-33.

122 Id. at 233.

123 Id. at 254.

124 Id. at 255.

125 Id. at 255-56.

126 Id. at 253-54. He explains:

> Viewed in this light, a signal from the bench may advance decisional efficiency and enhance the opportunity for settlement. Without a signal, the judge may feel, for example, that the defendant's affirmative defense looks unlikely to succeed, but the defense counsel may feel confident about her defense. A significant informational asymmetry exists. Once the court signals on the issue, the informational asymmetry is lessened substantially. The defendant and her lawyer know which way the judge is leaning and can adjust their settlement strategy accordingly.
>
> Id.

127 Id. at 239.

128 See infra app. A.

129 Again, judges were asked to indicate “Strongly Disagree,” “Disagree,” “No Opinion,” “Agree,” or “Strongly Agree.“

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130 Mediation Should be Allowed: By Response Strength and Assignment

	Number of Responses (FREQ)				
Q1A For Mediation	Overall	Family Law	General Civil	Limited Juris	Complex Civil
Strongly Disagree	38	7	14	1	1
Disagree	49	12	18	4	1
No Opinion	30	5	11	1	0
Agree	83	20	28	6	1
Strongly Agree	135	25	50	10	3
Did Not Answer	33	3	8	0	0

Table 7

131 See supra Part II.B.ii.

132 Id.

133 See supra notes 62-70 and accompanying text.

134 Alfini, supra note 106, at 11.

135 MODEL CODE OF JUDICIAL CONDUCT (2004), available at http:// www.abanet.org/cpr/mcjc/toc.html.

136 CODE OF CONDUCT FOR UNITED STATES JUDGES (2000), available at http://www.uscourts.gov/guide/vol2/ch1.html#N_1_.

137 CAL. CODE OF JUDICIAL ETHICS (2005), available at http:// www.courtinfo.ca.gov/rules/appendix/appdiv2.pdf.

138 MODEL CODE OF JUDICIAL CONDUCT at Canon 1.

139 Id. at Canon 2.

140 Id. at Canon 3.

141 Id. at Canon 3B(1), (4), (8).

142 Id. at Canon 3B(8) cmt.

143 Id. at Canon 3B(7), (9).

144 Id. at Canon 3B(7)(d).

145 Id. at Canon 3B(8). The rationale before this statement cautions that fundamental rights must be preserved, but seems to acknowledge that a judge should protect an interest of the general public in containing costs and reducing delay. It could be argued that these interests authorize the judicial encouragement of settlement for the purposes of docket

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management. Stating that judges should "monitor and supervise cases" for these ends suggest that the Rules of Judicial Conduct support the managerial judge. Id.

146 Id. at Canon 3B(7)(d).

147 Id. at Canon 1. This could lead to a special standard of mediation practice in which the sitting judge has a greater duty to protect the integrity of the process and his or her role. The relative absence of ethical standards for settlement judges is concerning. See, e.g., Alfini, supra note 106, at 12 ("The Model Code of Judicial Ethics admonishes judges not to be coercive in settlement, but provides no guidance as to how or when a judge's behavior may be deemed coercive"). The ABA Dispute Resolution Section's proposal to augment Canon 3B's statement of Adjudicatory Responsibilities with a new section specifying "Settlement Responsibilities" is a helpful beginning. MODEL CODE OF JUDICIAL CONDUCT (Proposed Addition by the ABA Section of Dispute Resolution Feb. 4, 2005), available at http:// www.abanet.org/judicialethics/resources/comm_rules_aba_disputeresolution_ 020405_ddt.pdf. The challenge becomes to conceptualize whether, and if so how, the duties of settling judges (with a duty of upholding the integrity of judiciary) are different than the duties of private sector mediators. For example, a federal judge strongly rebuked the Houston chapter head of the Association of Attorney-Mediators for publicly saying that "what most people might consider a little bullying is really just part of how mediation works." Allen v. Leal, 27 F. Supp. 2d 945, 947-48 (S.D. Tex. 1998). Similarly, the California Supreme Court has ruled that a judge's self-claimed "assertive" style of settling cases, which included shouting at a crying plaintiff, was inappropriate. Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1266, 1270 (Cal. 1996).

Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.

Id.

148 MODEL CODE OF JUDICIAL CONDUCT at Canon 2 cmt. This Canon is the foundation for Robert McKay's article on the subject. McKay, supra note 111.

149 MODEL CODE OF JUDICIAL CONDUCT at Canon 3B(4).

150 Id. at Canon 3B(8) cmt.

151 Id.

152 Id. at Canon 3B(1).

153 Id. at Canon 3B(7)(d).

154 Id. at Canon 3B(9).

155 CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(6), available at http://www.uscourts.gov/guide/vol2/ch1.html#3.

156 Id. at Canon 3A(4).

157 ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Introduction to Final Draft Report (2005), available at http:// www.abanet.org/judicialethics/IntroductoryReportFinal.pdf.

158 MODEL CODE OF JUDICIAL CONDUCT (Proposed Addition by the ABA Section of Dispute Resolution Feb. 4, 2005), available at http:// www.abanet.org/judicialethics/resources/comm_rules_aba_disputeresolution_020405_ddt.pdf.

159 Id. at C(1).

160 Id. at C(2).

161 See Molly McDonough, Meddling in Settling: Pressure to Clear Caseloads Spurs Judges to Coerce Settlements, Critics Say, 91-JUN A.B.A. J. 14 (2005).

162 MODEL CODE OF JUDICIAL CONDUCT (Proposed Addition by the ABA Section of Dispute Resolution Feb. 4, 2005) at cmt. (on file with author).

163 Id. The commentary seems to approve the practice if there is only one judge in a jurisdiction; but the question arises: what if there are other judges, but they are either unwilling or untalented at facilitating settlement? This is not quite the "bright line test" that Dean Alfini suggested be considered. Alfini, supra note 106, at 14.

164 MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (2004), available at http://www.abanet.org/cpr/mcjc/toc.html.

165 FED. R. CIV. P. 16. For one interpretation of the scope of FRCP 16, see McKay, supra note 111, at 822-23.

166 Daisy Hurst Floyd, Can the Judge Do That? - The Need for a Clearer Judicial Role in Settlement, 26 ARIZ. ST. L.J. 45 (1994).

167 Id. at 45 passim.

168 Id.

169 Id. at 68 (citations omitted).

170 Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 885 (9th Cir. 1991).

171 N.L.R.B. v. Honaker Mills, 789 F.2d 262, 265 (4th Cir. 1986).

172 In re Ellis, 108 B.R. 262, 266 (D. Haw. 1989).

173 Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir.1980).

174 Franks v. Nimmo, 796 F.2d 1230, 1233 (10th Cir. 1986).

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175 Fong v. American Airlines, Inc., 431 F. Supp. 1334, 1338 (N.D. Cal. 1977).

176 Hurst Floyd, supra note 166, at 57.

177 Kothe v. Smith 771 F.2d 667, 668-69 (2d Cir. 1985).

178 Newton v. A.C. & S., Inc., 918 F.2d 1121, 1126 (3d Cir. 1990).

179 Timm v. Timm, 487 A.2d 191, 193 (Conn. 1985).

180 Shields v. Thunem, 716 P.2d 217, 218-19 (Mont. 1985).

181 See, e.g., Moran v. Guerreiro, 37 P.3d 603, 621-23 (Haw. 2001).

Moran now argues that Judge Nakatani should have recused heself from presiding over the various order to show cause hearings because she was privy to confidential information as a result of settlement negotiations In light of [Associates Fin. Servs. v. Mijo, 950 P.2d 1219 (1998),] in which the Hawaii Supreme Court upheld the propriety of a trial judge encouraging settlement of a case on the eve of trial, we disagree with Moran that information Judge Nakatani was privy to during settlement negotiations disqualified her from reviewing the [later] settlement agreement").

Id. See also Roth v. Parker, 57 Cal. App. 4th 542, 547, 549 (Ct. App. 1997).

When the case was called for trial, defendants Perez and Parker, who had posted jury fees, informed the court that they were waiving a jury trial and would prefer a court trial. Roth's counsel stated then that '[U]nder those circumstances I would request that this court recuse itself from trying this case .Your honor participated intensely in a mandatory settlement conference. And there have been ex parte communications to the court by both sides. The court seemed to have formed [an opinion on the] value of this case .' The court responded, 'Well, Mr. Roth to take your position to an extreme, no IC [i.e., individual or all purpose calendar] court could ever participate in any settlement conference other than pro forma settlement discussions And there's nothing that I know of that indicates that a judge who fully participates in a settlement conference has to automatically recuse himself or herself from court trial. I don't force anybody to settle I have no preconceived ideas of the case.' We also note that the mere fact that Judge Romero participated in settlement discussions is not a proper ground for disqualification under Code of Civil Procedure section 170.2 . . . .

Id.

182 CAL. EVID. CODE §§ 1115-28 (2004).

183 25 P.3d 1117 (Cal. 2001).

184 CAL. EVID. CODE § 1117(b)(2).

185 Foxgate, 25 P.3d at 1125 n.8 (emphasis removed).

186 Id.

187 See, e.g., Id. at 1124-28.

188 The California Evidence Code defines mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." CAL. EVID. CODE § 1115. The Uniform Mediation Act similarly defines mediation as, "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." UNIF. MEDIATION ACT §2(1) (2002).

189 MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003). "Mediate" is defined as an adjective meaning "occupying a middle position " or as a verb meaning "to effect by action as an intermediary ." Id. See also Galanter, supra note 2 (where Marc Galanter traces the judicial role in settlement without differentiating between settlement conferences and mediations).

190 Foxgate, 25 P.3d at 1125 n.8.

191 But see Carrie Menkel-Meadow's opinion that,

> Judges who perform these functions [asking questions to explore the parties' interests and attempting to fashion tailor-made solutions from an objective perspective] are not necessarily mediators, though they are frequently called that by themselves and others. Strictly speaking, a mediator facilitates communication between the parties and helps them to reach their own solution. As a mediator becomes more directly involved in suggesting the substantive solution, his or her role can change and he or she can become an arbitrator or adjudicator. It appears that the role judges and magistrates assume in many settlement conferences is this hybrid form of med-arb.
>
> Menkel-Meadow, supra note 2, at 510 (internal citations omitted).

192 Foxgate, 25 P.3d at 1125 n.8 (emphasis omitted).

193 Id.

194 34 Cal.Rptr.3d 248 (Ct. App. 2005).

195 Id at 252.

196 Id. at 225-53.

197 Travelers Casualty & Surety Co. v. Superior Court, 24 Cal.Rptr.3d 751 (2005) [hereinafter Travelers].

198 Id. at 754-57.

199 Id. at 755-57.

200 Id. at 762 n.15.

201 Id. at 756.

202 Id. at 757-58, 758 n.8.

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203 Id. at 758 n.8.

204 Id. at 758.

205 Id. at 758. CAL. CT. R. 1620.1 (d) and (e) provide:

(d) The rules in this part do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

(e) The rules in this part do not apply to settlement conferences conducted under rule 222 of the California Rules of Court.

CAL. CT. R. 1620.1(d)-(e). These California rules apparently exempt judges because judges' ethical boundaries are articulated in the Code of Judicial Ethics. Id.

206 Travelers, 24 Cal. Rptr. 3d at 758; CAL. CT. R. 1620.1(d).

207 The Travelers court could be attributed the proposition that settlement proceedings conducted by the trial judge cannot be "mediations" on the ground of its statement that "[A] mediator should not have the authority to resolve or decide the mediated dispute and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decision making neutral." Travelers, 24 Cal.Rptr.3d at 758 (citations omitted). While this court specifically refuses to articulate the difference between a settlement conference and a mediation, a possible criterion that it appears to support is whether the judge will make later rulings on the case. See id.

208 Id. at 757, 758 n.8.

209 Id. at 758. According to the California Rules of Court, voluntary participation and self-determination require the mediator to:

(a)Inform the parties, at or before the outset of the first mediation session, that any resolution dispute in mediation requires a voluntary agreement of parties;

(b)Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and

(c)Refrain from coercing any party to make a decision or to continue to participate in the mediation.

CAL. CT. R. 1620.3.

210 Travelers, 24 Cal.Rptr.3d at 761.

211 Id. at 754.

212 Id. at 758 n.8.

213 Id. at 757-58.

214 CAL. CT. R. 1620.1(d)-(e); Travelers, 24 Cal.Rptr.3d at 757-58.

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215 See supra Part II.B, III.C and accompanying notes.

216 See supra Part II.B and accompanying notes.

217 See supra Part III.C and accompanying notes. This seems especially appropriate because of the times when the label of the process seems to have legal significance.

218 See infra app. A.

219 For a background in Riskin's Grid theory, see Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7, 25 (1996); Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid, 3 HARV. NEG. L. REV. 71 (1998); Leonard L. Riskin, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, 79 NOTRE DAME L. REV. 1 (2003).

220 The categories referred to are the categories of frequency available to the judges: less than 10%, 10 to 40%, 41 to 60%, 61 to 90%, and more than 90%. One category different would represent a level of frequency immediately greater or lesser than that being compared. Two categories different would be a level of frequency two categories greater or lesser than that being compared, ie 61 to 90% would be two categories different than 10 to 40%. Three categories different would be a level of frequency two categories removed from that being compared, i.e. more than 90% and 10 to 40%. The only way to have four categories different is the two extreme categories, less than 10% and more than 90%.

221 From above, 47 + 16 + 5 = 68

222 Twenty-seven judges reported data, but 7 reported no differences.

223 UNIF. MEDIATION ACT (2001), available at http:// www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf.

224 Id. at PREFATORY NOTE PART 3.

225 § 3(b)(3).

226 § 3 cmt. 4.

227 Id.

228 Id.

229 Id.

230 Id.

231 Id.

232 Id. “On the other hand, there are judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act's policies of promoting full and frank discussions between the parties would be furthered.”

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Id. The California Court Rules are more formal when discussing goals: "These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts." CAL. CT. R. 1620(a). Part of that confidence is, likely, confidentiality. See UNIF. MEDIATION ACT § 8; CAL. CT. R. 1624.

233 UNIF. MEDIATION ACT § 3(B)(3). It is especially interesting that the UMA does not appear to distinguish between a bench and jury trial. Since a judge in a jury trial makes evidentiary and other rulings, the UMA confidentiality protections would not extend to settlement proceedings supervised by the trial judge.

234 Alfini, supra note 106, at 14.

235 See, e.g., CAL. CT. R. 3(f)(4). "All settlement conference proceedings shall be confidential." Id. (CA ORDER 06-123).

236 See supra Part V.B.i. (discussing California law).

237 Id.

238 CAL. EVID. CODE §§ 1115-28 (2004).

239 Alfini, supra note 106, at 14; Hurst Floyd, supra note 166, at 90.

240 CAL. CT. R. §§ 1620-22.3.

241 MODEL STANDARDS OF PRACTICE FOR MEDIATORS (2005), available at http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal.

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Distinguished by In re Gorges, Bankr.E.D.Mich., October 12, 2018

525 B.R. 338
United States Bankruptcy Appellate
Panel of the Sixth Circuit.

In re ROYAL MANOR MANAGEMENT, INC., Debtor.

BAP Nos. 13–8054, 14–8018
|
Argued Aug. 26, 2014.
|
Decided and Filed Feb. 5, 2015.

Synopsis

Background: The United States Bankruptcy Court for the Northern District of Ohio entered sanctions of $207,004 against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases. Attorney appealed the sanctions order. Also, attorney appealed an order denying motion seeking recusal of the bankruptcy judge. In a separate appeal, attorney challenged the retention of special counsel to collect the sanctions judgment against him and also an order requiring him to submit to a debtor's examination and provide written discovery.

Holdings: The Bankruptcy Appellate Panel, Guy R. Humphrey, J., held that:

[1] bankruptcy court did not abuse its discretion in imposing sanctions against attorney based on both the court's inherent authority and under excessive costs statute;

[2] bankruptcy court's conclusion that claim was frivolous was not an abuse of discretion;

[3] bankruptcy court's determination that attorney vexatiously pursued claim and pursued frivolous arguments was not an abuse of discretion;

[4] specific bases for sanctions imposed against attorney were sufficiently delineated in bankruptcy court's decision;

[5] attorney was not denied due process concerning notice of issues to be addressed at sanctions hearings;

[6] bankruptcy judge's decision to deny motion to recuse was not abuse of discretion; and

[7] bankruptcy court did not abuse its discretion in determining that special counsel was needed to collect sanctions judgment against attorney.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (50)

[1] Bankruptcy Finality

For purposes of appeal, a bankruptcy court order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

2 Cases that cite this headnote

[2] Bankruptcy Finality

Bankruptcy court orders in jointly administered Chapter 11 cases related to sanctions judgment against attorney, retention of special counsel to collect the sanctions judgment, denial of attorney's recusal motion, and requiring attorney to submit to a debtor's examination and provide written discovery were deemed final, for purposes of appeal, because they all related to the sanctions judgment and that was the only issue remaining to complete the Chapter 11 cases.

3 Cases that cite this headnote

[3] Bankruptcy Finality

Bankruptcy court order sanctioning counsel for a sum certain amount generally is a final order, for purposes of appeal.

2 Cases that cite this headnote

[4] Bankruptcy Interlocutory orders; collateral order doctrine

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Bankruptcy court orders related to the retention of bankruptcy professionals, objections to interim fee applications, and denial of a recusal motion or motion compelling discovery ordinarily are considered interlocutory orders, for purposes of appeal.

2 Cases that cite this headnote

[5] **Bankruptcy** Discretion

Award of sanctions under bankruptcy court's inherent authority is reviewed for an abuse of discretion. 11 U.S.C.A. § 105(a).

6 Cases that cite this headnote

[6] **Bankruptcy** Discretion

Bankruptcy court order imposing sanctions on an attorney for unreasonably and vexatiously multiplying proceedings is reviewed for an abuse of discretion. 28 U.S.C.A. § 1927.

3 Cases that cite this headnote

[7] **Bankruptcy** Discretion

Abuse of discretion is defined as a definite and firm conviction that the court below committed a clear error of judgment.

4 Cases that cite this headnote

[8] **Bankruptcy** Discretion

Bankruptcy Harmless error

Abuse of discretion must be more than harmless error to provide cause for reversal.

2 Cases that cite this headnote

[9] **Bankruptcy** Frivolity or bad faith; sanctions

Sanctions based upon an erroneous view of the law or an erroneous assessment of the evidence are necessarily an abuse of discretion.

5 Cases that cite this headnote

[10] **Bankruptcy** Clear error

Bankruptcy Appellate Panel (BAP) must affirm underlying factual determinations unless they are clearly erroneous.

[11] **Bankruptcy** Frivolity or bad faith; sanctions

Sanctions are warranted under excessive costs statute if counsel falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. 28 U.S.C.A. § 1927.

5 Cases that cite this headnote

[12] **Bankruptcy** Frivolity or bad faith; sanctions

Sanctions under statute governing counsel's liability for excessive costs require more than negligence or incompetence but something less than subjective bad faith. 28 U.S.C.A. § 1927.

[13] **Bankruptcy** Frivolity or bad faith; sanctions

Sanctions under statute governing counsel's liability for excessive costs may not be imposed because a claim was ultimately unsuccessful; an attorney that reasonably believes his claim is meritorious is not subject to sanctions. 28 U.S.C.A. § 1927.

[14] **Bankruptcy** Frivolity or bad faith; sanctions

In imposing sanctions under statute governing counsel's liability for excessive costs, discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, even if bad faith was not present, whether they multiplied the proceedings. 28 U.S.C.A. § 1927.

[15] **Bankruptcy** Frivolity or bad faith; sanctions

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In imposing sanctions under statute governing counsel's liability for excessive costs, litigation conduct is reviewed for unreasonable and vexatious multiplication of litigation despite the absence of any conscious impropriety. 28 U.S.C.A. § 1927.

[16] **Bankruptcy** Frivolity or bad faith; sanctions

Absent a showing of bad faith, sanctions may be imposed under statute governing counsel's liability for excessive costs at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims. 28 U.S.C.A. § 1927.

3 Cases that cite this headnote

[17] **Bankruptcy** Frivolity or bad faith; sanctions

Mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied, for purposes of imposing sanctions under statute governing counsel's liability for excessive costs. 28 U.S.C.A. § 1927.

[18] **Bankruptcy** Frivolity or bad faith; sanctions

Attorney is liable under excessive costs statute solely for excessive costs resulting from violative conduct. 28 U.S.C.A. § 1927.

[19] **Bankruptcy** Frivolity or bad faith; sanctions

Simple inadvertence or negligence that frustrates the trial judge will not support a sanction under statute governing counsel's liability for excessive costs. 28 U.S.C.A. § 1927.

[20] **Bankruptcy** Frivolity or bad faith; sanctions

For purposes of imposing sanctions under statute governing counsel's liability for excessive costs, there must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. 28 U.S.C.A. § 1927.

5 Cases that cite this headnote

[21] **Bankruptcy** Frivolity or bad faith; sanctions

A sanction under excessive costs statute is generally improper where a successful motion could have avoided any additional legal expenses by defendants. 28 U.S.C.A. § 1927.

[22] **Bankruptcy** Frivolity or bad faith; sanctions

Purpose of sanctions under statute governing counsel's liability for excessive costs is to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy; a sanctioned attorney is thus required to personally satisfy the excess costs attributable to his conduct. 28 U.S.C.A. § 1927.

8 Cases that cite this headnote

[23] **Bankruptcy** Frivolity or bad faith; sanctions

Court may include in sanctions awarded under excessive costs statute the costs, expenses, and attorney fees that the party awarded sanctions incurred in obtaining the award. 28 U.S.C.A. § 1927.

5 Cases that cite this headnote

[24] **Bankruptcy** Frivolity or bad faith; sanctions

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When a court metes out a sanction under statute governing counsel's liability for excessive costs, it must exercise such power with restraint and discretion. 28 U.S.C.A. § 1927.

1 Case that cites this headnote

[25] **Bankruptcy** Frivolity or bad faith; sanctions

Sanctions under the bankruptcy court's inherent powers requires a finding of bad faith. 11 U.S.C.A. § 105(a).

2 Cases that cite this headnote

[26] **Bankruptcy** Frivolity or bad faith; sanctions

Award of sanctions under statute governing counsel's liability for excessive costs is appropriate when an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party, or when an attorney knows *or* reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims. 28 U.S.C.A. § 1927.

7 Cases that cite this headnote

[27] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court did not abuse its discretion in imposing sanctions against attorney, who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases, based on both the court's inherent authority and under excessive costs statute; attorney's entire pursuit of the claim was premised on a meritless argument, he vexatiously proceeded to endlessly argue minor points, and only pursued the claim to the extreme to coerce a settlement. 11 U.S.C.A. § 105(a); 28 U.S.C.A. § 1927.

[28] **Federal Courts** Inherent powers

Because of their very potency, federal courts' inherent powers must be exercised with restraint and discretion.

1 Case that cites this headnote

[29] **Bankruptcy** Frivolity or bad faith; sanctions

Federal courts' inherent authority includes the right, in narrowly defined circumstances, to assess attorney fees against counsel; court may do so when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

1 Case that cites this headnote

[30] **Bankruptcy** Frivolity or bad faith; sanctions

Sanctions may be appropriate pursuant to federal courts' inherent authority when a party shows bad faith by delaying or disrupting the litigation.

1 Case that cites this headnote

[31] **Bankruptcy** Frivolity or bad faith; sanctions

Unlike sanctions under excessive costs statute, sanctions under a federal court's inherent authority require a finding of bad faith or recklessness. 28 U.S.C.A. § 1927.

2 Cases that cite this headnote

[32] **Bankruptcy** Frivolity or bad faith; sanctions

Inherent authority to assess attorney fees against counsel based on finding of bad faith extends to the bankruptcy courts. 11 U.S.C.A. § 105(a).

[33] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court's conclusion that non-priority unsecured proof of claim in jointly administered Chapter 11 cases was frivolous, in context

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of imposing sanctions against attorney who represented the claimants pursuant to excessive costs statute and court's inherent authority, was not an abuse of discretion; basis for the claim was an agreement whereby claimants loaned funds to individuals who were the majority owners of debtor companies, the agreement did not provide nearly the type or quantum of evidence that would overcome the individual liability of owners and establish corporate liability, and claimants did not treat the agreement as a loan to debtor companies for tax purposes. 11 U.S.C.A. § 105(a); 28 U.S.C.A. § 1927.

[34] **Principal and Agent** Contracts in general

Under Ohio law, an agent who discloses neither the existence of the agency nor the identity of the principal is personally liable in his or her contractual dealings with third parties.

[35] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court's determination that attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases vexatiously pursued the claim and pursued frivolous arguments, in context of imposing sanctions against attorney pursuant to excessive costs statute and court's inherent authority, was not an abuse of discretion; attorney unnecessarily repeated arguments time and again, he filed repeated motions for recusal and re-raised the same essential arguments even after district court issued decision finding the bankruptcy judge had no discernable bias, attorney argued that certain creditor should bear liquidation trust's administrative expenses when he had no legal authority whatsoever to support that argument, and attorney had filed a motion to reconsider that ignored the basis for bankruptcy court's decision. 11 U.S.C.A. § 105(a); 28 U.S.C.A. § 1927.

[36] **Bankruptcy** Frivolity or bad faith; sanctions

Specific bases for sanctions imposed against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases, pursuant to excessive costs statute and court's inherent authority, were sufficiently delineated in bankruptcy court's decision, as the court was clear that attorney's claim theories lacked merit and were pursued vexatiously and sanctions opinion listed arguments attorney raised that were frivolous and explained the repetitive nature of his filings; bankruptcy court was not required to review every document filed and every argument made by attorney and separately find them to be frivolous. 11 U.S.C.A. § 105(a); 28 U.S.C.A. § 1927.

[37] **Bankruptcy** Frivolity or bad faith; sanctions

Constitutional Law Bankruptcy

Attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases was not denied due process concerning notice of issues to be addressed at sanctions hearings, even though attorney asserted that trustee's motion for sanctions only sought sanctions for specific items and attorney understood the hearing was limited to those items; while the motion alleged many discrete filings and positions to be frivolous, those examples were in addition to trustee's position that attorney's entire pursuit of the claim, and thus every filing related to it, was premised on sanctionable legal positions. U.S.C.A. Const.Amend. 5.

[38] **Bankruptcy** Extension of time

Bankruptcy Frivolity or bad faith; sanctions

Attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases was not denied "equal justice" when bankruptcy court enforced a deadline against him relating to a reply brief while allowing trustee to file a motion seeking sanctions against attorney one day late;

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bankruptcy court had no obligation to treat every tardy filing the same way, regardless of the circumstances, and the decisions were years apart and had little relationship to one another.

[39] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court's decision to not limit sanctions against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases for vexatiously pursuing the claim pursuant to excessive costs statute and under court's inherent authority, based on trustee's failure to file summary judgment at an earlier date, was not an abuse of discretion; trustee's decision whether to file motion for summary judgment or litigate issues concerning the claim at a hearing was not based on a clear fact pattern, as litigation became entangled in unusual discovery issues and appeals and a large volume of motions, and under such circumstances, the appellate court was loath to make a hind-sighted critique of trustee's and his counsel's litigation strategy. 11 U.S.C.A. § 105(a); 28 U.S.C.A. § 1927.

[40] **Bankruptcy** Frivolity or bad faith; sanctions

Attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases was not entitled to a credit against sanctions imposed by bankruptcy court for vexatiously pursuing the claim, pursuant to excessive costs statute and under court's inherent authority, based upon settlement reached as to one of the claimants; claimant settled her sanctions without a determination of liability, and settlement did not include "common damages" with the sanctions judgment against attorney. 11 U.S.C.A. § 105(a); 28 U.S.C.A. § 1927.

[41] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court did not abuse its discretion in denying motion filed by attorney, who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases, for reconsideration of issues arising during hearing related to trustee's motion for sanctions against attorney, including that trustee's counsel gave argument, rather than testimony, from the witness stand and other portions of her testimony were foundation for a summary that was never introduced; as the trier of fact and arbiter of law, bankruptcy court could separate argument from evidence and give little weight to evidence of marginal relevance, and the bankruptcy court's supplemental sanctions opinion did not credit argument as facts.

[42] **Judges** Rights and duties of judge as to recusal

Judges Determination of objections

Recusal is mandatory when, based on an objective standard of a reasonable person with knowledge of all the facts, the bankruptcy judge concludes that her impartiality is reasonably placed in question; however, a federal judge also has a mandatory duty not to recuse unless that standard has been met. 28 U.S.C.A. § 455; Fed.Rules Bankr.Proc.Rule 5004(a), 11 U.S.C.A.

4 Cases that cite this headnote

[43] **Judges** Statements and expressions of opinion by judge

Expressing an opinion about litigation is not a reason for bankruptcy judge's recusal. 28 U.S.C.A. § 455; Fed.Rules Bankr.Proc.Rule 5004(a).

3 Cases that cite this headnote

[44] **Judges** Determination of objections

Bankruptcy judge's decision to deny motion to recuse filed by attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases based on comment whether attorney would make a "substantial contribution" to settle

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trustee's motion for sanctions against attorney was not abuse of discretion; comment was made by bankruptcy judge to explore with the parties whether settlement discussions might be productive to avoid the further expenditure of resources by the parties and the court with respect to the sanctions motion, and bankruptcy judge did not mediate the dispute or engage in settlement discussions between the parties. 28 U.S.C.A. § 455; Fed.Rules Bankr.Proc.Rule 5004(a).

[45] **Judges** Statements and expressions of opinion by judge

Bankruptcy judge's alleged expressions of anger and hostility toward attorney's prosecution of appeals of non-priority unsecured proof of claim in jointly administered Chapter 11 cases did not support recusal; the balance of comments concerning attorney were from opinion relating to sanctions against attorney and were appropriate, as bankruptcy judge noted that attorney's appeals diminished the distribution to holders of allowed claims because the trustee incurred greater attorney fees and distributions were delayed. 28 U.S.C.A. § 455; Fed.Rules Bankr.Proc.Rule 5004(a).

1 Case that cites this headnote

[46] **Judges** Statements and expressions of opinion by judge

Asserted misstatements of the record by bankruptcy judge in opinion imposing sanctions against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases did not support recusal; the statements mostly represented exaggerations and mischaracterization of the record by attorney or nonmaterial factual errors, and none of the statements, individually or in the aggregate, demonstrated bias justifying recusal. 28 U.S.C.A. § 455; Fed.Rules Bankr.Proc.Rule 5004(a).

[47] **Bankruptcy** Process; service

Subpoena or other formal process was not required for trustee's service of requests for postjudgment discovery relating to trustee's attempt to execute upon sanctions judgment against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 bankruptcy cases; regular mail service attorney received was sufficient. Fed.Rules Civ.Proc.Rules 69(a)(2), 5, 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rules 7069, 9014, 11 U.S.C.A.

[48] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Attorneys

Bankruptcy court did not abuse its discretion in determining that special counsel was needed to collect a sanctions judgment against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases, which trustee believed attorney was not going to willingly pay.

[49] **Bankruptcy** Proceedings; which court

The procedure for any party to seek a stay pending an appeal of a judgment is mandatory. Fed.Rules Bankr.Proc.Rules 8005, 7062, 11 U.S.C.A.

1 Case that cites this headnote

[50] **Bankruptcy** Use and effect in evidence

Bankruptcy court did not abuse its discretion in declining to issue a protective order upon entering orders related to trustee's attempt to execute upon sanctions judgment against attorney who represented claimants who filed a non-priority unsecured proof of claim in jointly administered Chapter 11 cases, including order to provide written discovery; although attorney was concerned that private financial and tax information could be disclosed, bankruptcy court reasoned attorney could redact account numbers and social security numbers, and attorney never

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proposed in any motion a specific list of parties to whom access to the documents would be appropriately limited.

Attorneys and Law Firms

***344** ARGUED: Dennis Grossman, Great Neck, New York, for Appellant in 13–8054. Louise M. Mazur, Brouse McDowell, LPA, Akron, Ohio, for Appellee in 13–8054. ON BRIEF: Dennis Grossman, Great Neck, New York, for Appellant in 13–8054 and 14–8018. Louise M. Mazur, Marc B. Merklin, Brouse McDowell, LPA, Akron, Ohio, Caroline L. Marks, Brouse McDowell LPA, Cleveland, Ohio, for Appellee in 13–8054. Louise M. Mazur, Marc B. Merklin, Kate M. Bradley, ***345** Brouse McDowell, LPA, Akron, Ohio, for Appellee in 14–8018.

Before: HARRISON, HUMPHREY and PRESTON, Bankruptcy Appellate Panel Judges.

OPINION

GUY R. HUMPHREY, Bankruptcy Judge.

These two related appeals address monetary sanctions and post-judgment efforts to collect those sanctions arising out of an attorney's representation of claimants who filed a $2,142,000 non-priority unsecured proof of claim in jointly administered Chapter 11 bankruptcy cases. That claim was disallowed by the bankruptcy court, with that decision being affirmed by both the District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals. As a result of the multitude of filings, strategies employed and positions taken over a six year period, the bankruptcy court sanctioned the attorney, Dennis Grossman, the sum of $207,004 pursuant to 28 U.S.C. § 1927 and the court's inherent authority under 11 U.S.C. § 105, representing the attorney fees expended by counsel for the Official Committee of Unsecured Creditors (the "Committee") and, post-confirmation, the Liquidation Trustee and his counsel ("Trustee" or "Liquidation Trustee"), directly or indirectly related to the claim litigation. Grossman appeals the orders sanctioning him. He also appeals an order denying a motion which sought the recusal of the Bankruptcy Judge pursuant to 28 U.S.C. § 455 (collectively, the "First Appeal").

In a separate appeal, Grossman challenges the retention of special counsel to collect the judgment against him and also an order requiring him to submit to a debtor's examination and provide written discovery (collectively, the "Second Appeal").

ISSUES ON APPEAL

The issues in these appeals are whether the bankruptcy court erred in sanctioning Grossman $207,004 pursuant to 28 U.S.C. § 1927 and the court's inherent authority under 11 U.S.C. § 105(a); denying one of Grossman's motions seeking recusal under 28 U.S.C. § 455; approving the retention of special counsel to pursue collection of the sanctions judgment; and allowing the pursuit of post-judgment discovery to execute upon the $207,004 judgment.

JURISDICTION AND STANDARD OF REVIEW

[1] The Bankruptcy Appellate Panel of the Sixth Circuit has jurisdiction to decide these appeals. The United States District Court for the Northern District of Ohio has authorized appeals to the Panel, and no party has timely elected to have this appeal heard by the district court. 28 U.S.C. §§ 158(b)(6), (c)(1). A bankruptcy court's final order may be appealed as of right pursuant to 28 U.S.C. § 158(a)(1). For purposes of appeal, an order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798, 109 S.Ct. 1494, 1497, 103 L.Ed.2d 879 (1989) (citation and quotation marks omitted).

[2] **[3]** **[4]** An order sanctioning counsel for a sum certain amount generally is a final order. *Russell v. City of Farmington Hills,* 34 Fed.Appx. 196, 198 (6th Cir.2002). Orders related to the retention of bankruptcy professionals, objections to interim fee applications, and denial of a recusal motion or motion compelling discovery ordinarily are considered interlocutory orders. *See* ***346** *In re Union Home and Indus., Inc.,* 376 B.R. 298, 301–02 (10th Cir. BAP 2007) (employment of a professional and order approving interim fee applications are interlocutory); *Lopez v. Behles (In re Amer. Ready Mix, Inc.),* 14 F.3d 1497, 1499 (10th Cir.1994) (motion denying recusal of bankruptcy judge interlocutory and not immediately appealable); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.,* 444 F.3d 462, 471 (6th Cir.2006) ("Discovery orders generally are not final

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decisions and cannot be reviewed unless the trial court enters a final judgment disposing of all claims."). However, in these circumstances, these orders are deemed final because they all relate to the sanctions judgment and that is the only issue remaining to complete these Chapter 11 cases. *See also Huntington Nat'l Bank v. Richardson (In re Cyberco Holdings, Inc.),* 734 F.3d 432 (6th Cir.2013) (quoting *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.),* 86 F.3d 482, 488 (6th Cir.1996) ("finality requirement is considered 'in a more pragmatic and less technical way in bankruptcy cases than in other situations.' ")) (quoting *Cottrell v. Schilling (In re Cottrell),* 876 F.2d 540, 541–42 (6th Cir.1989)).

[5] **[6]** **[7]** **[8]** **[9]** An award of sanctions under a bankruptcy court's inherent authority is reviewed for an abuse of discretion. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 55, 111 S.Ct. 2123, 2138, 115 L.Ed.2d 27 (1991); *Stalley ex rel. U.S. v. Mountain States Health Alliance,* 644 F.3d 349, 351 (6th Cir.2011). In addition, an order granting sanctions under 28 U.S.C. § 1927 is also reviewed for an abuse of discretion. *Dixon v. Clem,* 492 F.3d 665, 671 (6th Cir.2007). "An abuse of discretion is defined as a definite and firm conviction that the [court below] committed a clear error of judgment." *Mayor and City Council of Baltimore, Md. v. W. Va. (In re Eagle–Picher Indus., Inc.),* 285 F.3d 522, 529 (6th Cir.2002) (internal quotation marks and citation omitted). The abuse of discretion must be more than harmless error to provide cause for reversal. *Tompkin v. Philip Morris USA, Inc.,* 362 F.3d 882, 897 (6th Cir.2004) (citations omitted). Sanctions based upon an erroneous view of the law or an erroneous assessment of the evidence are necessarily an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990); *Salkil v. Mount Sterling Tp. Police Dept.,* 458 F.3d 520, 527–28 (6th Cir.2006). *See also Parrott v. Corley,* 266 Fed.Appx. 412, 415 n. 1 (6th Cir.2008) (arguments concerning an error in statutory interpretation or due process related to sanctions are reviewed de novo).

Other determinations that Grossman has appealed are also subject to an abuse of discretion review. *Bell v. Johnson,* 404 F.3d 997, 1004 (6th Cir.2005) (denial of a motion to recuse); *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (evidentiary determinations); *Am. Civil Liberties Union of Ky. v. McCreary County, Ky.,* 607 F.3d 439, 451 (6th Cir.2010) (determination whether a late filing was due to "excusable neglect."); *Lavado v. Keohane,* 992 F.2d 601, 604 (6th Cir.1993) (scope of discovery); *Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.),* 44 F.3d 1310, 1315 (6th Cir.1995) (orders concerning the retention and compensation of bankruptcy professionals).

[10] Finally, "[t]he Panel must affirm the underlying factual determinations unless they are clearly erroneous." *Trudel v. United States Dep't of Educ. (In re Trudel),* 514 B.R. 219 (6th Cir. BAP 2014) (quoting *Hart v. Molino (In re Molino),* 225 B.R. 904, 906 (6th Cir. BAP 1998)).

*347 FACTS

I. *Events Prior to the Bankruptcy Court's Decision Sustaining the Trustee's Objection to the Gordons' Proof of Claim*

On February 12, 2008, Royal Manor Management, Inc. ("Royal Manor"), Darlington Nursing and Rehabilitation Center, Ltd. ("Darlington"), Dani Family, Ltd. ("Dani") and other related entities (collectively, the "Debtors") filed a petition for relief under Chapter 11 of the Bankruptcy Code. Sally and Abraham Schwartz were the majority owners (collectively, "Schwartz"). These cases were jointly administered and, on December 5, 2008, the Debtors confirmed their Third Amended Plan of Reorganization. The plan established a liquidating trust (the "Trust" or "Liquidation Trust") and upon the effective date of the plan, David Wehrle became the Liquidation Trustee.

During this same time frame, the litigation began as to the disputed claim. On June 26, 2008, Gertrude Gordon filed a proof of claim, through a power of attorney, on behalf of her children, David and Alison Gordon (the "Gordons") (the "Gordon Claim"). The Gordons are the niece and nephew of Schwartz. Gertrude Gordon is Sally Schwartz's sister. The Gordon Claim asserted a non-priority unsecured claim against Darlington in the total amount of $2,142,000. The basis for the Gordon Claim was a July 27, 2000 agreement, which was notarized on August 24, 2000 (the "Agreement"). The proof of claim did not contain the complete Agreement. It omitted a page which provided important evidence which would support the position that the loan was not to Darlington, but instead was an individual loan to Schwartz.

On September 5, 2008, the Committee, represented by Brouse McDowell, LPA ("Grouse"), objected to this claim for two fundamental reasons. First, the Committee argued that the Gordon Claim was a personal loan from the Gordons to Schwartz and not a loan to Darlington. Further, the Committee took the position that, at best, the Gordon Claim constituted an

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equity investment in Darlington. The objection was noticed for an October 7, 2008 hearing.

On September 9, 2008, an amended notice was filed and served to correct the date that the objection was filed. The hearing date remained the same. The hearing did not occur because neither the Gordons, nor any counsel representing the Gordons, responded to the objection or appeared to oppose the Committee's objection. On October 29, 2008, an order was entered disallowing the Gordon Claim.

On November 10, 2008, Grossman filed two motions. First, Grossman filed [1] a motion to appear pro hac vice, which was granted. Second, Grossman filed a motion to vacate the order (the "Motion to Vacate") sustaining the Committee's objection to the Gordon Claim. In the Motion to Vacate, Grossman argued that 1) the Committee failed to comply with Bankruptcy Rule 3007(a) because the Committee failed to give 30 days' notice of the hearing date and failed to serve the claim objection with the notice of hearing and 2) excusable neglect existed. [2]

The Committee's response to the Motion to Vacate noted that the original objection ***348** of September 5 objection informed the Gordons both of the October 7th hearing date and that any objection must be filed prior to the hearing. Therefore, the Committee took the position that it gave 30 days' notice to the Gordons and did serve the notice of the hearing with the objection. It acknowledged that the original notice did incorrectly list that the objection was filed on October 7, 2008, but nevertheless had the correct hearing date and time. The Committee further argued that excusable neglect did not exist in these circumstances. Grossman argued that, due to the errata in the original notice, it was superseded by the amended notice, and that notice failed to comply with Bankruptcy Rule 3007(a) because it provided only 28 days' notice. Grossman argued for exact compliance with the noticing requirements since the Gordons were pro se during that time. He also argued the Gordons' failure to file a timely response was the result of excusable neglect. The court scheduled a January 27, 2009 evidentiary hearing.

Grossman noticed Committee counsel for a deposition in order to challenge the Committee's assertion that vacating the order disallowing the Gordon Claim would be unfairly prejudicial because the Committee relied upon the disallowance of the Gordon Claim in negotiating with other claimants. In response, the Committee, in an email dated December 3, 2008, asserted to Grossman that he had less intrusive methods to acquire the discovery. On December 9, 2008, Grossman filed an emergency motion to compel Committee counsel to appear at a single deposition and, separately and alternatively, a request for a determination of the Motion to Vacate as a matter of law. As to the deposition, Grossman stated that the Committee had refused to provide a witness and, instead, provided Grossman with 13 different individuals with whom the Committee had settlement discussions. Additionally, the emergency motion essentially repeated the same arguments Grossman had made in the prior Motion to Vacate. The Committee moved for a protective order.

In response to this flurry of filings, the court conducted a scheduling conference and rescheduled the hearing on the Motion to Vacate for February 24, 2009. The court determined, in the interest of judicial economy, without prejudice to the procedural issues Grossman raised, to first address the merits of the Gordon Claim.

However, on January 13, 2009, Grossman filed another emergency motion. Grossman sought leave to amend the Gordon Claim to recover "unpaid dividends arising out of the same document as their original claim for the unpaid loan." Emergency Mot. of Claimants Alison Gordon and David Gordon for Leave to File Amended Claim Arising out of Identical Contract/Transaction as Original Claim and not Exceeding Amount of Original Claim at 1, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 441 (the "Amended Claim Motion"). The Amended Claim Motion was noticed to be heard February 24, 2009, the same day as the hearing on the Motion to Vacate. However, on February 9, 2009, Grossman filed an emergency agreed motion to continue the hearing on the Amended Claim Motion. The Committee filed a limited objection to that motion, which indicated that while the Committee had agreed to the continuance, it did not agree with the comments and arguments contained within the motion about the merits. Following a February 12th phone conference, the court entered an amended scheduling order. The court concluded that, in light of the recent filings, focusing upon the merits would not save time. Therefore, the court returned to its original position and decided to address the Motion to Vacate first and set that motion for hearing on March 31, 2009.

***349** On February 23, 2009, the Gordon Claim litigation took a new turn. Grossman filed a status report stating that the Gordons would file a motion to file a new claim. The report stated that the Gordons signatures were forged

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on the Darlington and Dani Family operating agreements. Based on this information, the report further stated the new claim would include grounds of rescission, unjust enrichment and the imposition of a constructive trust. According to the report, "[t]here is no way the GORDONS ever would have entered into the July 2000 transaction ($1 million principal) if the GORDONS had been aware of the forgeries or of the terms of the operating agreements on which the forgeries occurred." Status Report of Claimants Alison and David Gordon Concerning Status Conference Scheduled For Feb. 24, 2009 at 4, No. 08–50421, *In re Royal Manor Mgmt., Inc.*, ECF No. 467.

On March 17, 2009, Grossman filed two more motions on behalf of the Gordons. The first motion sought leave to file a new claim. Mot. of Alison Gordon and David Gordon For Leave To File New Recision/Unjust Enrichment Claim Based on Recently Disclosed (And Previously Concealed) Forgeries Of Their Signatures And Other Material Concealed Facts, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 474 (the "New Claim Motion"). In addition, Grossman filed another emergency motion to continue the March 31, 2009 hearing based on the theory that this new claim would moot out the Gordons' original claim or, in the alternative, render unnecessary a ruling on the pending motion to compel a single deposition of Committee counsel. Gordons's Emergency Motion To Continue, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 475. Grossman also filed a supplemental affidavit of the Gordons. The court scheduled a telephonic status conference for March 20, 2009. Following that conference, the court entered an order denying the motion to continue and, perhaps based on the New Claim Motion, reconsidered its position and indicated it would hold an evidentiary hearing on the Motion to Vacate on March 31, 2009. The court indicated it would hear evidence on the adequacy of the notice the Gordons received concerning the October 7, 2008 hearing, the receipt of such notice and any unresolved discovery issues.

However, prior to the March 31, 2009 hearing, the parties entered into an agreed order resolving the Motion to Vacate. The Motion to Vacate was granted and the order disallowing the Gordon Claim was vacated. The scheduled deposition of Marc Merklin, counsel for the Committee, was cancelled. Instead, the Liquidation Trustee and Grossman participated in a court phone conference on March 31st. The parties agreed on a response time to the New Claim Motion and the court set a further status conference for May 12, 2009. The Liquidating Trustee filed a brief in opposition to New Claim Motion. On April 13, 2009, the day the reply brief was due, Grossman sought one additional day—that is, by April 14, 2009—to file a reply brief. While that motion was pending, Grossman filed a reply brief on behalf of the movant on April 15, 2009 and an amended reply on April 16, 2009. On April 20, 2009, an agreed order was entered allowing Grossman until April 14, 2009 to file a reply brief.

The Liquidation Trustee moved to strike the reply brief as late and also indicated it violated the 20 page reply brief limit by using all 20 pages and adding additional arguments in a 9 page declaration of Gertrude Gordon and an 8 page declaration of Grossman. Alternatively, the Liquidation Trustee sought oral argument or leave to file a sur-reply. Grossman filed a response on May 1, 2009 in which he indicated ***350** the delay was caused by computer problems and there was no prejudice to anyone by the two-day delay. A hearing was scheduled for May 12, 2009.

As a result of the May 12, 2009 hearing, the court entered an order that denied the Amended Claim Motion and the New Claim Motion. However, the bankruptcy court made it plain that Grossman could pursue any and all theories of recovery based upon the original proof of claim. The court also granted the Trustee's motion to strike the reply brief. In addition, the court overruled Gordon's objection to the final fee application of Committee counsel and an application to employ financial advisors to the Trustee nunc pro tunc.[3] Grossman appealed the decision denying leave for the New Claim Motion and also the order to strike the reply brief as to that motion. Grossman elected the district court for these appeals (the "New Claim Appeal").

In addition, the May 18, 2009 order scheduled an evidentiary hearing concerning the Gordon Claim for June 30, 2009 and, among other things, required both parties to file proposed findings of fact and conclusions of law not later than June 29th.

Prior to the merit hearing on the Gordon Claim, on June 25, 2009, the Trustee filed a motion in limine to exclude the testimony of an expert on Jewish religious law.[4] The apparent purpose of this expert witness was to opine that Orthodox Jews may not lend money to other Jews and charge interest on such loans. This evidence was intended to relate to the issue whether the use of the term "investment" in the Agreement signified a loan or a capital contribution. The Trustee was willing to stipulate that Orthodox Jews may not charge interest for these loans, but Grossman sought stipulations

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beyond what the Trustee would accept. Grossman argued that the witness was relevant because the proposed stipulation was inadequate to explain that the use of the word "investment" is a code word for "loan" among Orthodox Jews. According to the Trustee, despite earlier extended communications, Grossman did not disclose an expert on this topic until a June 22nd e-mail. The bankruptcy court ultimately denied the motion because the parties stipulated during the hearing that the Agreement was clear and unambiguous. After further filings by Grossman, the court also denied a motion for a rehearing.

Both parties filed stipulations and proposed findings prior to the Gordon Claim hearing. The hearing was held on June 30, 2009. Following the hearing, Grossman renewed in writing an oral request to file a post-hearing memorandum to explain the legal theories for the Gordon Claim and provide appropriate legal authority. Grossman noted the lack of formal pleadings, pre-trial order, requirement to provide citations in the scheduling order, and lack of a local rule or standing practice of the bankruptcy court. In his response, the Liquidation Trustee noted that the bankruptcy court had made clear both in its November 26, 2008 scheduling order and in open court on December 6, 2008 that all such legal authority should be included in the proposed findings and conclusions. ***351** Additionally, the Liquidation Trustee opined that citations of authority are inherent in any proposed conclusions of law. The court, in its decision, concluded that post-trial briefing "would not be useful to the Court in reaching a decision. The request is denied." Memorandum Opinion RE: Objection To Claim at 3 n. 4, *In re Royal Manor Mgmt., Inc.,* No. 0850421, ECF No. 587 (the "Merit Opinion").

II. *Merit Opinion of the Bankruptcy Court Disallowing the Gordon Claim*

The Trustee's objection was sustained in the Merit Opinion. The following is a summary of the bankruptcy court's findings of fact and conclusions of law concerning the Gordon Claim:

Darlington operated a nursing home. The nursing home was located on real property owned by Dani. The majority owners of Dani, Darlington and the other related entities were Schwartz.

The Gordons or Gertrude Gordon loaned Schwartz funds through five different promissory notes from May 1994 through October 1995 for a total of $1,550,000. These notes were replaced with a single promissory note in January 2010. The Gordons agree these are personal obligations of Schwartz.

In July 2010, Gertrude Gordon sent two signed checks with the amount left blank to Schwartz. The checks were from an account in the names of the Gordons. Pursuant to instructions of Sally Schwartz, an employee of the nursing home wrote $500,000 on each check, Sally Schwartz on the payee line and "for Dani Family" on the memo lines. On July 27, 2010, these two checks were deposited into a "personal business account" of Schwartz at Bank One. The bankruptcy court found that the memo designation meant these funds were to be transferred to Dani. The $1,000,000 transaction was memorialized in the Agreement dated July 27, 2000 and notarized on August 24, 2000. The complete Agreement was admitted as a trial exhibit.

As with the prior promissory notes, the Agreement was signed by Schwartz in their individual capacities. A promissory note was not prepared, although it was referenced in the Agreement. The Gordons received a Schedule K–1, consistent with the treatment of the $1,000,000 as a capital contribution. The Gordons never received any funds due under the Agreement and prior to the filing of the proof of claim had never instituted any litigation concerning the Agreement. David Gordon testified that he understood from his mother that the Agreement was a loan with an "equity kicker" in Dani and Darlington. Merit Op. at 7.

In June 2007, prior counsel for Royal Manor, Dani, Darlington and other related corporate entities sought the Gordons' consent for a proposed sale of Darlington and Dani to Orion Care Services, LLC. The Gordons were not represented by counsel. Gertrude Gordon negotiated for the Gordons. Eventually the Gordons agreed to an understanding of the Agreement that the $1,000,000 initial investment would be paid after "mortgagees, secured creditors, trade creditors and related costs." Merit Op. at 8.

In the end, the bankruptcy court determined that "[t]he Gordons presented no credible evidence in support of their argument" that the debt was an obligation of Darlington. Merit Op. at 10.[5] From the ***352** Agreement, "it appears clear that the obligation held by the Gordons was to be satisfied by Schwartz individually" and included an agreement by Schwartz to provide an equity position in "the Darlington Nursing Home." Merit Op. at 10. Gertrude Gordon expected the Gordons to be paid by Schwartz. The bankruptcy

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court also found that the term "investment" was not relevant in determining who was the obligor of the Agreement.

The decision further found that, under Ohio law, an individual's failure to disclose an agency relationship renders that individual personally liable for agreements executed with third parties.

This portion of the decision concluded that, regardless of whether the Gordons had an equity interest in Dani or Darlington, Schwartz and not Darlington are the obligors under the Agreement.

Next, the decision addressed the Gordons' alternative argument that the transaction was intended to be a loan to Darlington, rather than providing for an equity investment in the Debtors. The decision reviewed the eleven factor test to re-characterize a debt claim as equity from *Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.)*:

> The factors are: (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments. No one factor is controlling or decisive. The factors must be considered within the particular circumstances of each case. We note that "[t]he more [a transaction] appears to reflect the characteristics of ... an arm's length negotiation, the more likely such a transaction is to be treated as debt."

269 F.3d 726, 749–50 (6th Cir.2001) (citations omitted).

The Merit Opinion found that no evidence was presented as to "the existence of a sinking fund, the extent to which the advances were used to acquire capital assets, the corporation's ability to obtain financing from outside sources, or the adequacy/inadequacy of the purported limited partnerships'/obligors' capitalization." Merit Op. at 12. Thus, factors 5, 8, 10 & 11 were not considered.

The court reviewed the other 7 factors. Concerning the first factor, the court found that there was no promissory note evidencing the indebtedness which *AutoStyle Plastics* found was a "strong indication" of a capital contribution. In addition, the Gordons, Dani and Darlington treated the transaction as a capital contribution for tax purposes.

The court found factors two and three suggested a loan because of the fixed interest and date for the return of funds. However, the court noted the funds re-payment was contingent on the success of the business and therefore found factor four suggested a capital contribution. Regarding the sixth factor, the ratio of contributions by equity holders to the Debtors ***353** was asymmetrical which suggested "slightly" a loan. Specifically, under the operating agreements, Schwartz held an 80% equity position for $0 contribution; the Gordons held a 5% equity interest for a $500,000 contribution and a third party, 1176913 Ontario Inc., held a 10% interest for a $1 million contribution. Concerning the seventh factor, while acknowledging that a security interest often is indicative of a loan, the collateral of "PS Realty" did not belong to Dani or Darlington. Therefore, the collateral did not support the theory of a loan to Dani or Darlington. Finally, the ninth factor, subordination to "outside creditors", supported the theory that the transaction was a capital contribution.

Finally, the Gordons argued that pursuant to section 4.7 of the Operating Agreement the Gordons' equity interest converted to unsecured debt. The court noted that no evidence was presented as to this point and the Gordons had alternatively argued that the court should "reject" the operating agreements because they include the forged signatures of the Gordons.

The Merit Opinion found that the Gordons had unnecessarily attempted to delay the final determination of the Gordon Claim:

> The Gordons, in a manner consistent with their efforts to draw this process out, have taken an appeal from the Court's order denying Gordons' motions for leave [to file a new claim] and requiring the Gordons' [sic] to proceed based on the Claim as filed, but allowing them the leeway to assert,

> at the evidentiary hearing, various theories in support of their Claim.

Merit Op. at 2, n. 2.

The conclusion of the Merit Opinion stated that:

> The Committee followed by the Liquidation Trustee were forced to expend a great deal of estate resources in prosecuting the Objection to the Claim of David and Allison Gordon, the nephew and niece of the pre-petition owners of Royal Manor and the Related Entities, perhaps as the result of unjustified, unsupported, or vexatious positions taken by Mr. Grossman in support of the Gordons' claim. Although no request for sanctions pursuant to Fed. R. Bankr.P. 9011 has been made to date, the Liquidating Trustee shall have twenty days from the entry of this memorandum opinion to file a motion seeking sanctions against Mr. Grossman, and if appropriate, against Gertrude Gordon or the Gordons pursuant to Fed. R. Bankr.P. 9011.

Merit Op. at 14—15.

Grossman appealed the Merit Opinion and elected to pursue the appeal with the district court.

III. *Appellate Decisions Concerning the Disallowance of the Gordon Claim* [6]

The New Claim Appeal was ruled upon by District Court Judge Patricia A. Gaughan. Mem. of Op. and Order, *Gordon v. Wehrle,* No. 5:09–cv–1506, ECF No. 26. The opinion affirmed the bankruptcy court's denial of the New Claim Motion. Judge Gaughan rejected Grossman's argument that the bankruptcy court summarily ***354** denied the New Claim Motion without explanation. The decision stated that "[u]pon review, the Court finds that appellants are blatantly mischaracterizing the record." *Id.* at 8. Grossman failed to reference the bankruptcy court's explanation at the May 12, 2009 hearing that the Gordons could raise any theory of recovery, but there was no legal basis for a separate proof of claim. Judge Gaughan found Grossman's decision to appeal inexplicable, given that the Gordons had won the right to present alternative theories. She also affirmed the previously discussed decision to strike Grossman's reply brief. Grossman appealed these decisions to the Sixth Circuit Court of Appeals.

The Liquidation Trustee moved the District Court for sanctions against Grossman pursuant to Federal Rule of Bankruptcy Procedure 8020, 28 U.S.C. § 1927 and the inherent authority of the district court. The Liquidation Trustee also sought to deny Grossman pro hac vice admission.

The Liquidation Trustee argued that 1) Grossman's pursuit of his first appeal of the decision denying the New Claim Motion violated the Ohio Rules of Professional Conduct; 2) Grossman further violated those rules by "attack[ing] the integrity of the Bankruptcy Court and the integrity of all judges in the Northern District ..." and 3) "Grossman has placed his honesty and integrity at issue by filing briefs containing statements that misrepresent court proceedings." Mem. of Op. and Order at 4, *Gordon v. Wehrle,* Nos. 5:09 CV 2687 and 5:09 CV 1506, ECF No. 32. Judge Gaughan agreed with the Liquidation Trustee. The decision found that Grossman lacked good faith in misstating the court record by asserting the bankruptcy court denied the New Claim Motion in a summary manner, with a decision consisting only of the word "denied" and was "without justification or explanation." *Id.* at 8. The transcript from the May 12, 2009 hearing showed that the bankruptcy court gave ample explanation for the decision. Even after the Liquidation Trustee raised the transcript in its appellee brief, Grossman did not alter his position. Judge Gaughan found that Grossman's "factual misstatements" were in violation of Ohio Rule of Professional Conduct 3.3(a)(1). [7] Further, Judge Gaughan found that "Grossman's disrespectful treatment of the Bankruptcy Court in this case also violates Ohio Rules of Professional Conduct Section 5 [8] and Rule 3.5(a)(6) [9]." *Id.* at 9 (footnotes ***355** omitted). [10]

Grossman claimed that all these statements were to address the standard for judicial disqualification, which depends upon the appearance of partiality to a reasonable observer. *See* 28 USC § 455. However, Judge Gaughan found that "these accusations are intemperate and degrading—Grossman is essentially accusing the Bankruptcy Court of maintaining

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a vendetta against him and his clients for the purpose of covering up wrongdoing by the trustee's attorney." Mem. of Op. and Order at 11, *Gordon v. Wehrle,* Nos. 5:09 CV 2687 and 5:09 CV 1506, ECF No. 32. Judge Gaughan found the statements did not concern what a reasonable person could observe, but attribute an improper motive to the bankruptcy court. Grossman also asserted that because the Bankruptcy Judge "is the Chief Judge in this District", a Judge outside the District with whom neither counsel has ever appeared should hear the motion for disqualification. *Id.* at 11, n. 6. Judge Gaughan found that this suggestion was completely unsupported.

However, with the exception of revoking his pro hac vice privileges, Judge Gaughan denied the motion for sanctions for that specific action and left the issue of further sanctions for the bankruptcy court to determine:

> Upon review, the Court finds that monetary sanctions are unwarranted. While the Gordons' first appeal is an example of overzealous advocacy given that the Bankruptcy Court indicated it would hear new-claim theories at the evidentiary hearing on the original claim, the Court finds that it does not rise to the level of being truly frivolous. Because the order from which the Gordons appealed became final during the pendency of the appeal, the appeal was properly before this Court. Additionally, appellee's statement that "this Court determined that the Agreement was a personal obligation of the Schwartz's, and not an obligation of Dani/Darlington" is simply incorrect. Appellee is referring to the Court's factual findings as to who signed the agreement at issue. The Court made no findings with respect to obligations arising out of the agreement, as the Bankruptcy Court had not yet ruled on allowing the Gordon's original claim. That issue was thus not before the Court on the first appeal. *Moreover, any instances of misconduct for which the Bankruptcy Court warned Grossman about the possibility of sanctions are properly dealt with by the Bankruptcy Court's resolution of the motion for sanctions against Grossman pending before it*.
>
> The Court agrees with appellee that Grossman's misstatements of the Bankruptcy Court's record in the Gordons' briefs are serious, however, the Court's ***356** denial of Grossman's motion for admission *pro hac vice* is a sufficient sanction for that misconduct. Accordingly, appellee's motion for sanctions is denied.

Id. at 12–13 (italics added).

Judge Gaughan subsequently denied Grossman's motion for rehearing and/or reconsideration of its decision denying him admission pro hac vice.

In September 2010, Judge Gaughan issued her decision in the consolidated appeals of the decision sustaining the Liquidation Trustee's objection to the Gordon Claim. *Gordon v. Wehrle,* 2010 WL 3835223 (N.D.Ohio Sept. 29, 2010). [11] The District Court found the document was a "personal obligation of Schwartz." *Id.* at *8. Concerning the question of whether the $1 million advance was a loan or an equity investment, the district court considered the previously discussed 11 factor test in *AutoStyle Plastics* and determined the Gordons had an equity interest rather than a loan in Darlington. Grossman appealed to the Sixth Circuit Court of Appeals.

On May 8, 2012, the Sixth Circuit affirmed the consolidated appeals, concluding that the loan from Gertrude Gordon to Schwartz was in the Schwartz's individual capacity and not their corporate capacity with Dani or Darlington. *Gordon v. Official Committee of Unsecured Creditors (In re Royal Manor Mgmt., Inc.),* 480 Fed.Appx. 362 (6th Cir.2012). Further, the Sixth Circuit ruled that the bankruptcy court properly denied the New Claim Motion. It noted that nothing in the bankruptcy court's ruling prevented the Gordons from pursuing any theory for the claim at the hearing on the original claim, asking rhetorically: "What is the source of the confusion?" *Id.* at 365. The Sixth Circuit also denied a petition for rehearing en banc. [12]

On November 26, 2012, the Supreme Court, without comment, denied the Gordons' petition for certiorari. *Gordon v. Wehrle,* —— U.S. ——, 133 S.Ct. 653, 184 L.Ed.2d 460 (2012).

IV. *Sanctions Related to the Gordon Claim Litigation*

On October 21, 2009, the Trustee filed a motion for sanctions pursuant to Bankruptcy Rule 9011 against Gertrude Gordon, the Gordons, David Mucklow, local counsel for the Gordons, [13] and Grossman. In his response, Grossman argued, among other things, that the sanctions motion failed to comply with the "safe harbor" provision of Rule 9011.

Also on November 2, 2009, Grossman filed an emergency motion on behalf of himself and Gertrude Gordon for a one day extension. On November 4th, Grossman pro se filed

his opposition to sanctions. The Trustee filed a reply on November 9th. That document also included a "supplemental motion" seeking sanctions under an alternative basis—that being the court's inherent authority provided by 11 U.S.C. § 105.

***357** On November 11, 2009, Grossman, in the first of several attempts, filed a motion seeking the Bankruptcy Judge's recusal pursuant to 28 U.S.C. § 455(a). The motion listed various arguments including that "a reasonable observer would view [the Bankruptcy Judge] as having a vested interest in ruling against the GORDONS and their counsel in the sanctions proceeding, in order to validate Her Honor's previously hasty and improper approval of a deceptive disclosure statement filed by her appointee attorney MARC MERKLIN."[14] Mot. to Disqualify Judge Shea–Stonum in Sanctions Proceeding at 3, In re Royal Manor Mgmt., Inc., 08–50421, ECF No. 611. Grossman stated the Bankruptcy Judge had an "improper local bias." *Id.* at 4. He claimed he discovered the "deceptive disclosure statement" after the June 30, 2009 hearing on the merits of the Gordon Claim. That motion was denied on March 10, 2010.

On January 29, 2010, the bankruptcy court issued an order directing Grossman to show cause why she should not adopt the statement of facts in the Liquidation Trustee's sanctions motion and why Grossman should not be sanctioned pursuant to 28 U.S.C. § 1927. The order further provided that the court would not consider responses after February 12, 2010. On February 12th, Grossman filed an "emergency motion" seeking an extension until Tuesday, February 16th. Grossman filed his response (in its then current state) on February 12th. The Liquidation Trustee filed a response to the show cause order on February 19th. Grossman filed an additional response to that filing on March 1st.

On March 12, 2010, the Gordons filed a "partial opposition" to paying Liquidation Trustee and Trustee counsel expenses related to the Gordon Claim issues. Grossman argued that those fees and expenses should be paid by a creditor, the Hochman Trust, rather than the Liquidation Trust. Grossman reasoned that the Trustee had filed many claim objections mostly against other unsecured creditors. He further reasoned if those claim objections were successful, the unsecured creditors would be paid in full and, under the confirmed plan, the Hochman Trust would be paid its claim, which was in excess of $5,000,000. He concluded that therefore the Hochman Trust should pay the Trustee's expenses related to the Gordon Claim. Grossman cited no legal authority for this theory. Both the Trustee and the Hochman Trust responded to the objection, noting, among other things, Grossman's proposal was inconsistent with the Chapter 11 plan. Following a hearing for which Grossman appeared telephonically, the court entered an order approving the fees and expenses. The bankruptcy court stated:

> The only asserted basis for objecting to the Applications is that "all Gordon-related fees and expenses incurred by the trustee and by trustee's counsel should be paid only by the Hochman Trust, not by the estate (i.e., not by the unsecured creditors), because the Hochman Trust now appears to be the sole beneficiary of Gordon-related litigation by the trustee and trustee's counsel." The Response cites no legal authority, and at the hearing on this matter, Mr. Grossman admitted that he had no legal ***358** authority in support of the position he champions.
>
> During the hearing Mr. Grossman based his argument that the Hochman Trust should bear the expense of prosecuting the objection to the Gordons' claim on what he alleged were the Committee's counsel's prior representation that there would be a 100% distribution to creditors. Because Mr. Grossman could not cite with specificity the location of the representation he was relying upon, the Court directed Mr. Grossman to file with the Court a document citing to specific references in the record of this Court or any other court where counsel for the liquidating trustee made such representations. The Court further directed that if there is no such representation, Mr. Grossman was to note that there was no such unequivocal representation and file a document to that effect.
>
> Consistent with his historical practice in this case of distorting the record, Mr. Grossman's subsequent filing, rather than being a 1 page pleading indicating that there were no unequivocal representations made in this case that there would be a 100% distribution to the holders of unsecured claims in this case, points to language in the first and second amended disclosure statements in this case that holders of allowed general unsecured claims "shall receive in full and final satisfaction of such Claim an **estimated** 100% of its Allowed Claim" and attempts to weave a new story that the basis of the Gordons' Response were the "estimations of 100% payments" to holders of unsecured claims.
>
> Despite Mr. Grossman's unsupported assertion that it is not, the relief requested by the Gordons is inconsistent with the provisions of the plan confirmed in this case.

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> Under the confirmed plan, the Liquidation Trustee has an obligation to oppose the claims of creditors which have no merit and/or are frivolous. ***The confirmed plan, and the liquidation trust created thereunder, authorize the Liquidation Trustee to employ the services of attorneys and other professionals for this purpose and to pay the fees for those services out of the trust.*** Therefore, the fees and expenses related to the prosecution of objections to claims, including the objection to the Gordons' claim, are rightfully paid by the Liquidation Trustee out of the Liquidation Trust. There is no basis for shifting the responsibility of paying for fees and expenses associated with the prosecution of objections to claims to the Hochman Trust, the holder of an allowed claim, which was subordinated to general unsecured claims by agreement as part of the confirmed plan.
>
> The provisions of a confirmed plan are binding on all claimants, including the Gordons. 11 U.S.C. § 1141(a). The Response has no basis in law, either case law or statute, ignores the controlling effect of a confirmed plan and is based on an incorrect factual premise. Therefore, the Response is overruled.
>
> * * *
>
> ... Although it is not essential that the Court note such a reservation to a later hearing, the Court reserves the right to address the behavior of attorney Grossman with respect to these Applications to the time when the Court will consider the application of 28 U.S.C. § 1927. In addition, Mr. Grossman will henceforth be required to appear in person at any hearing at which he intends to be heard by the Court.

Order Granting Second Interim Application for Comp. and Reimbursement of Expenses for Brouse McDowell, LPA [# 645], Granting Second Interim Application for Comp. and Reimbursement of Expenses ***359** for David Wehrle [# 645] and Overruling Objection of David and Alison Gordon to Those Applications [# 691] at 2–4, *In re Royal Manor Mgmt., Inc.,* No. 0850421, ECF No. 776.

Grossman filed a motion to correct, amend or reconsider the order denying his motion concerning the Hochman Trust's payment of the Trustee's expenses. The court denied the motion, noting the issues raised by Grossman did not address the legal principle that the Liquidation Trust was required to pay the Trustee's expenses, including his counsel fees.

Also in March 2010, Grossman filed a motion to amend or for reconsideration of the order denying the earlier motion for recusal of the Bankruptcy Judge. In this filing, he stated that the order denying the motion for disqualification erroneously found that Grossman stated that the bankruptcy court knowingly approved a fraudulent disclosure statement in his recusal motion. However, Grossman asserted that he only stated that the court "failed to check" the disclosure statement. Mot. for Amendment and/or Recons. of Order Denying Mot. to Disqualify Judge Shea–Stonum in Sanctions Proceeding at 1, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 698. The bankruptcy court denied the motion for failure to articulate a basis under Federal Rules of Bankruptcy Procedure 9023 or 9024 (incorporating Federal Rules of Civil Procedure 59 and 60) for the relief sought. Order Denying Motion To Amend or Reconsider Order Denying Motion To Disqualify, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 783.

On October 19, 2010, the court held a status hearing regarding Grossman's motion to adjourn the pending sanctions motion while he pursued his appeals. The sanctions proceedings were adjourned until the appeals were completed.

From October 2010 until July 2012, while the various appeals were pursued up to and through the Sixth Circuit Court of Appeals, the bankruptcy court had a respite from any filings related to the Gordon Claim or sanctions against Grossman. Following the Sixth Circuit's denial of Grossman's motion for en banc rehearing on June 20, 2012, the Trustee filed a motion to extend the date for any motion for supplemental sanctions. An extension was granted until 14 days after the expiration of the stay of the Sixth Circuit mandate or a final ruling by the Supreme Court.

On November 26, 2012, the Supreme Court denied Grossman's for writ of certiorari. On December 11th, the Liquidation Trustee filed a renewed motion for sanctions against Grossman and Gertrude Gordon pursuant to the bankruptcy court's inherent power under 11 U.S.C. § 105 and separately under 28 U.S.C. § 1927.

The renewed sanctions motion alleges Gertrude Gordon and Grossman took positions that "were unjustified, unsupported, and vexatiously intended to multiply these proceedings." The Liquidation Trustee's Renewed Motion for Sanctions Pursuant to this Court's Inherent Power Under 11 U.S.C. § 105(a), and Under 28 U.S.C. § 1927 at 1, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 953. The motion

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states that "there was no credible evidence or legal basis to support the claim that the Gordons were general unsecured creditors of Dani, Darlington or any other debtor entity. Despite this fact, Gertrude Gordon and Attorney Grossman continued to file frivolous pleadings to vexatiously multiply these proceedings." *Id.* at 8.

The first sanctions hearing occurred on January 15, 2013.

On the morning of the sanctions hearing, Grossman filed another emergency motion, in this instance to withdraw the reference ***360** of the proceeding to the bankruptcy court pursuant to the general order of the district court. This motion was later denied by the district court. [15] The primary reason for the motion was Grossman's assertion that the Bankruptcy Judge made statements during a January 8, 2013 phone conference that demonstrated that she had already decided the issue. This assertion was in part based on the following statement by the Bankruptcy Judge: "[R]ecounting the procedural twists and turns that largely I would say were driven by Mr. Grossman, [the Gordon claim objection] drug on for some time." *See* Tr. of Jan. 8, 2013 Hr'g at 4, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 963.

Also on January 15, 2013, the Liquidation Trustee filed a motion to compromise the sanctions motion as it pertained to Gertrude Gordon. The agreement called for Gertrude Gordon to pay the Liquidation Trust $50,000 and provided for a mutual release, excepting any claims against Grossman. Grossman filed a response, indicating that he had no objection to the settlement if it did not prejudice him. [16] Specifically, Grossman was concerned that the language used in the proposed order was prejudicial to him. In reply, the Liquidation Trustee asserted that Grossman lacked standing and the response was without merit, but the Trustee was open to amending the proposed order to avoid further litigation. A hearing was set for February 12, 2013. Less than two hours before that hearing, Grossman filed a further response to the latest iteration of the proposed order.

The hearing was also used as an impromptu status conference concerning settling the sanctions issues relating to Grossman, at which the Bankruptcy Judge asked the parties whether they had an interest in discussing settlement. The following exchange occurred:

> THE COURT: I am now going to switch gears and make this a Section 105 status conference. And the resolution with Mrs. Gordon and her two adult children should be in the rearview mirror now, approved. I need to enter the order but it's approved.
>
> I have under advisement the matter of sanctions against Mr. Grossman based upon the January 15 hearing. Has there—Mr. Wehrle, have you any interest, since the three of you are all in Akron today, in discussing with Mr. Grossman a resolution of—a resolution of all matters that you might have? And I'm asking you—I mean I know—I know that you've got counsel. And I'll take a recess and let you confer with your counsel.
>
> This is a bad version of Zeno's [sic] paradox at this point. *And, Mr. Grossman, I would just ask you right now whether you would have any interest in talking about a —just conferring with Mr. Wehrle and his counsel about a* ***361** *resolution of these matters that would require a substantial contribution from you but might be less than what the Court would order based upon the January 15 hearing?*
>
> MR. GROSSMAN: Your Honor, I don't know that it's proper for your Honor to probe my willingness or not willingness to contribute money, as your Honor uses the phrase, in a settlement—
>
> THE COURT: Sir, I asked you a yes or no question.
>
> MR. GROSSMAN: Under objection, I think Your Honor's question is improper, but I will respond to it because Your Honor is the authority here, you're the boss, and I'll comply with Your Honor's order. My position is, Judge, that I have done nothing sanctionable.
>
> THE COURT: Okay. So your answer is no.
>
> MR. GROSSMAN: Under objection, my answer is no. I've done nothing sanctionable, Judge. I've lost. I've congratulated Ms. Mazur—
>
> The COURT: Sir, thank you very much. Thank you. Please have a seat. There's no reason for you, Ms. Mazur, to confer with Mr. Wehrle. The Court has done what it could today. Thank you.
>
> (END OF PROCEEDINGS)

Tr. of Feb. 12, 2013 Hr'g at 11–13, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 993 (italics added).

The court entered an order approving the compromise with the Gordons. The only reference to Grossman was in

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paragraph 3(b): "The Trustee and the Gordons shall mutually release each other and all professionals retained by either the Trustee or the Gordons, *with the exception of Attorney Dennis Grossman,* from all claims, liabilities, and causes of action in relation to the Gordons' Claim (and any appeals therefrom) and the sanctions issues in this Court." Order Granting Motion of the Liquidation Trustee to Approve Compromise at 3, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 988.

Grossman's concern about the Gertrude Gordon settlement continued. On February 27, 2013, Grossman filed a two-part motion. First, he asserted he is entitled to a $49,313.50 credit based upon the settlement with Gertrude Gordon. Second, Grossman sought a separate order confirming the settlement order did not deprive him of this credit.

On March 15, 2013, Grossman moved again for the Bankruptcy Judge to recuse herself. The basis for the motion was threefold. First, Grossman asserted the Bankruptcy Judge improperly entered the settlement process, repeatedly was hostile to Grossman in her statements, including raising sanctions sua sponte on three occasions, commented inappropriately concerning the appeals of the disallowance of the Gordon claim and ignored her own actions in causing delay.

On March 28, 2013, the court issued its first sanctions opinion. Op. re: Liquidation Trustee's Mot. for Sanctions Pursuant to 28 U.S.C. § 1927, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 999 (the "Sanctions Opinion"). The decision addressed whether Grossman should be sanctioned under 11 U.S.C. § 105 as well as 28 U.S.C. § 1927. The bankruptcy court noted that, due to funds reserved for the disputed Gordon Claim, a full distribution by the Liquidation Trustee could not occur. Further, the distribution to allowed claims was diminished by the Liquidation Trustee having to spend attorney fees defending three appeals Grossman filed on behalf of the Gordons.

The decision includes an appendix summarizing "Documents RE: Gordon's and Attorney Grossman pleadings with arguments." Sanctions Op. at 13–37. This ***362** appendix contains screen shots of ECF docketing along with a separately prepared summary of Grossman's positions related to those filings. There is also a one page Appendix B listing 16 separate arguments of Grossman concerning the Gordon Claim, the sanctions issues and documents related to those issues. Overall, this decision makes clear two fundamental points: 1) the theories that the Gordons had an unsecured claim lacked merit and 2) those theories and several collateral issues were pursued vexatiously. The charts were intended to show the "repetitive and vexatious nature of the filings." Sanctions Op. at 6.

At the conclusion of the Sanctions Opinion, the bankruptcy court awarded $150,000 in sanctions, concluding that "[t]he fees incurred by the Liquidation Trustee at the bankruptcy court level were proportionate to controversies that Grossman chose to frame."[17] Sanctions Op. at 12. The court gave the Liquidation Trustee five work days from the entry of the opinion to notify the court if he was seeking additional sanctions for fees incurred as a result of the hearing and additional filings after the hearing. Finally, the latest recusal motion was denied.

Grossman appealed the Sanctions Opinion. However, due to the sanctions issues not being fully resolved, this Panel dismissed the appeal as not being from a final, appealable order.

On April 2, 2013, the Liquidation Trustee filed a notice reflecting that since November 30, 2012, he had incurred $61,972.50 concerning the sanctions and related issues. The bankruptcy court scheduled a hearing for June 11, 2013, but it was rescheduled twice and ultimately occurred on August 27, 2013.

On June 6, 2013, Grossman filed his "testimony" in opposition to the trustee's request for sanctions. On July 5th, the Liquidation Trustee and Grossman filed proposed findings of fact and conclusions of law. On July 22nd, Grossman filed a motion to strike certain portions of the Trustee's proposed findings and conclusions.

On August 26, 2013, the day prior to the supplemental sanctions hearing, Grossman filed an "emergency supplemental motion" seeking the Bankruptcy Judge's recusal again.

The supplemental sanctions hearing occurred on August 27, 2013. The witnesses at the hearing were the Trustee, Trustee counsel Louise Mazur and Grossman.

The court entered its decision on December 2, 2013. Supp. to Op. re: Sanctions Against Dennis Grossman, Esq., *In Re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 1057 (the "Supplemental Sanctions Opinion"). It also entered a final judgment on December 3, 2013. The bases for the sanctions

were the court's inherent authority, 11 U.S.C. § 105 and 28 U.S.C. § 1927. The decision added an additional $57,004 in sanctions which covered attorney fees of the Trustee after the time covered by the original sanctions hearing, which was through November 30, 2012. The bankruptcy court stated:

> In the renewed sanctions motion, the Liquidation Trustee sought sanctions pursuant to the Court's inherent power, 11 U.S.C. § 105 and 28 U.S.C. § 1927. ***363** On January 15, 2013, this Court conducted an evidentiary hearing with respect to the request for sanctions against Grossman, including a request that Grossman be required to pay into the estate an amount of money equal to the attorneys' fees incurred by the Liquidation Trustee in responding to Grossman's ceaseless and ultimately baseless efforts to have a claim recognized in this chapter 11 case. I found the requested relief appropriate in this instance and determined that such an award would serve the dual purpose of (1) deterring future disregard of the minimum standards required under 28 U.S.C. § 1927 and (2) making up some of the value lost to the holders of legitimate claims in this case.

Id. at 3.

The Bankruptcy Judge's overall assessment of Grossman's role in the Chapter 11 case was clear:

> The actions of Grossman throughout the pendency of this case rise to the level of vexatious conduct designed to delay, multiply and increase the cost of the proceedings in this case. It is not one particular filing or the actions of Grossman in one hearing during the pendency of this case. Instead, it is the pervasive and constant behavior of Grossman over the course of the four plus years since he was admitted pro hac vice to this Court. The conduct of Grossman that is the basis for this Court's issuance of sanctions is detailed in the Court's March 28, 2013 Opinion. The conduct taking place after that date has been consistent with his prior patterns and is detailed herein.

Id. at 4. The decision found that following the original sanctions hearing "Grossman's pattern of practice continues to be the same." *Id.* at 8. The decision described the objection to the Gertrude Gordon settlement, the premature request for a credit, the multiple motions to recuse, and the motion to strike proposed findings of the Trustee as examples of this continuing conduct. The bankruptcy court also denied the most recent recusal motion.

On September 10, 2013, Grossman filed a motion to reconsider four discrete trial rulings. The rulings were (1) the denial of Grossman's motion to strike portions of the Trustee's proposed findings of fact and conclusions of law as addressing issues the court had ordered "closed"; (2) objection to the testimony of Mazur as being argument; (3) a denial of Grossman's motion to strike Mazur's testimony to lay a foundation for a purported summary that was not introduced into evidence; and (4) sustaining a work product objection to Grossman's cross-examination of the Trustee. That motion was denied.

On December 16, 2013, Grossman appealed the following orders: (1) the Sanctions Opinion; (2) the Supplemental Sanctions Opinion; (3) the December 2, 2013 order denying the motion to reconsider rulings from the supplemental sanctions hearing [Order Denying Motion to Reconsider Trial Rulings, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 1058]; (4) the order denying a motion for amendment of the bankruptcy court's September 5, 2013 orders approving interim fees for the Trustee and Trustee counsel. [Order Denying Motion for Amendment, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 1059]; and (5) the judgment for the $207,004 in sanctions [Entry of Judgment, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 1059].

V. *Post–Judgment Discovery and Collection Issues Relevant to the Second Appeal*

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Following the entry of the sanctions judgment, the Liquidation Trustee served ***364** Grossman with interrogatories and document requests.

While the sanctions judgment, never stayed, was on appeal with this Panel, the Trustee filed two new motions with the bankruptcy court. The first motion sought to employ two law firms as special counsel to attempt to collect the Grossman judgment on a contingent fee arrangement. The motion noted Grossman was a resident of either New York or Florida and practiced law in both states. Further, the Trustee expected Grossman to be "highly resistant to collection efforts." The second motion sought to compel Grossman to respond to written discovery and in addition appear for a debtor's examination pursuant to Ohio Revised Code § 2333.09 and Federal Rule of Civil Procedure 69.

Grossman argued that (1) the post-judgment discovery would prejudice him with other counsel and his clients; (2) that the judgment was "invalid"; (3) the judgment ended the bankruptcy court's jurisdiction and a subpoena was required; (4) the retention of New York counsel made it unfairly burdensome to participate in discovery in Ohio; (5) the discovery constitutes an invasion of privacy; (6) pursuit of post-judgment discovery would frustrate his ability to prosecute the sanctions appeal; (7) the discovery sought confidential information that would expose Grossman to, among other things, identity theft or hacking and (8) the disclosure of documents with Grossman's social security number would violate the Social Security Act. The response did not specifically address the retention of the special counsel except as to its effect on the Trustee's discovery requests.

Following a hearing, the bankruptcy court entered an order compelling discovery and Grossman's participation in the debtor's examination. Order Granting Motion of the Liquidation Trustee to Compel Dennis Grossman: (A) to Respond to Written Discovery Requests, And (B) to Appear for a Debtor's Examination, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 1111. Pursuant to the order, responses to the written discovery were due by March 19, 2014 and the debtor's examination was to be completed by March 29, 2014. The bankruptcy court also entered an order granting the Liquidating Trustee's application to retain special counsel to pursue collection of the sanctions from Grossman. Order Approving Application of the Liquidation Tr. to Employ Borges & Assocs., LLC and Rosenfeld Stein Batta, P.A. as Special Counsel Pursuant to Section 327(E) of the Bankruptcy Code, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 1112.

On March 26, 2014, Grossman timely appealed both orders.

DISCUSSION

I. *28 U.S.C. § 1927 and the Inherent Authority of the Bankruptcy Court under § 105 of the Bankruptcy Code Both Provide Legal Bases for Sanctioning Grossman*

The Panel will first address the bankruptcy court's $207,004 sanction award under 28 U.S.C. § 1927 and then the inherent authority of the bankruptcy court to issue those sanctions under 11 U.S.C. § 105(a). Section 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Case law is split as to whether bankruptcy courts are "court[s] of ***365** the United States" and, therefore, whether bankruptcy courts may sanction counsel under § 1927. *See In re Schaefer Salt Recovery, Inc.,* 542 F.3d 90 (3d Cir.2008) (finding bankruptcy courts had such authority and discussing cases on both sides of the issues). However, the Sixth Circuit Court of Appeals has affirmed a sanctions order of a bankruptcy court based, in part, on § 1927 and found bankruptcy courts had authority under that section. *Maloof v. Level Propane Gasses, Inc.,* 316 Fed.Appx. 373, 376 (6th Cir.2008). [18]

[11] [12] [13] [14] [15] [16] [17] [18] [19] [20] [21] Sanctions are warranted under § 1927 if counsel "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Rentz v. Dynasty Apparel Indus., Inc.,* 556 F.3d 389, 396 (6th Cir.2009) (citation omitted). Sanctions require "more than negligence or incompetence" but "something less than subjective bad faith." *Hall v. Liberty*

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Life Assurance Co. of Boston, 595 F.3d 270, 276 (6th Cir.2010) (citation omitted). Sanctions under § 1927 may not be imposed because a claim was ultimately unsuccessful. An attorney that reasonably believes his claim is meritorious is not subject to sanctions. *Ridder v. City of Springfield,* 109 F.3d 288, 297–98 (6th Cir.1997). "Discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, even if bad faith was not present, whether they multiplied the proceedings pursuant to 28 U.S.C. § 1927." *Riddle v. Egensperger,* 266 F.3d 542, 556 (6th Cir.2001) (quoting *In re Ruben,* 825 F.2d 977, 990 (6th Cir.1987)). As further explained by the Sixth Circuit:

> Litigation conduct is reviewed "for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety." *Jones,* 789 F.2d at 1230. Absent a showing of bad faith, sanctions may be imposed "at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." *Ridder,* 109 F.3d at 298, *quoting Jones,* 789 F.2d at 1230. "[T]he mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied." *Ridder,* 109 F.3d at 298. "An attorney is liable under § 1927 solely for excessive costs resulting from the violative conduct." *Id.* at 299. Simple inadvertence or negligence that frustrates the trial judge will not support a sanction under § 1927. *In re Ruben,* 825 F.2d at 984. "There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Id.* "A sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants." *Id.* at 988.

Id. at 553.

[22] **[23]** **[24]** The purpose of sanctions under § 1927 is "to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." ***366** *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater,* 465 F.3d 642, 646 (6th Cir.2006) (citing *Jones v. Continental Corp.,* 789 F.2d 1225, 1230–31 (6th Cir.1986)). "A sanctioned attorney is thus required to personally satisfy the excess costs attributable to his conduct." *Id.* (citing *Ruben,* 825 F.2d at 983). "A court may include in the sanctions awarded under § 1927 the "costs, expenses, and attorneys' fees" that the party awarded sanctions incurred in obtaining the award." *Norelus v. Denny's, Inc.,* 628 F.3d 1270, 1298 (11th Cir.2010) (quoting 28 U.S.C. § 1927). However, "when a court metes out a sanction, it must exercise such power with restraint and discretion." *Mapother & Mapother, P.S.C. v. Cooper (In re Downs),* 103 F.3d 472, 478 (6th Cir.1996) (citing *Chambers v. NASCO,* 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

The bankruptcy court found that sanctions were justified for all the attorney fees spent by the Committee, and subsequently the Trustee, in ensuring the disallowance of the Gordon Claim.[19] As will be explained, the bankruptcy court concluded that the Gordon Claim theories espoused by Grossman had no legitimate basis and were pursued in bad faith and vexatiously in order to increase administrative expenses for the Liquidation Trust and thereby coerce the Trustee to settle.

[25] **[26]** It is important to note that sanctions under the bankruptcy court's inherent powers requires a finding of bad faith. *Runfola & Assocs. v. Spectrum Reporting II,* 88 F.3d 368, 375 (6th Cir.1996); *Shimman v. Int'l Union of Operating Eng'rs, Local 18,* 744 F.2d 1226, 1229–30 (6th Cir.1984). However, the award of sanctions under § 1927 is appropriate "when an attorney has engaged in some sort of conduct that, from an objective standpoint, 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.' ... [or] when an attorney knows *or reasonably should know* that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims...." *Wilson–Simmons v. Lake County Sheriff's Dep't,* 207 F.3d 818, 824 (6th Cir.2000) (citations and internal quotation marks omitted). In *Red Carpet Studios Div. of Source Advantage, Ltd.,* the Sixth Circuit Court of Appeals stated that sanctions under § 1927 may be issued only when the attorney "intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." 465 F.3d 642, 646 (6th Cir.2006). The Bankruptcy Judge found Grossman engaged in a course of "vexatious conduct designed to delay, multiply and increase the cost of the proceedings in this case," a finding that would meet either standard. Supp. Sanctions Op. at 4. *See Garner v. Cuyahoga Cnty. Juvenile Court,* 554 F.3d 624, 645 (6th Cir.2009) (attorney fees from the filing of the

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complaint justified when the vexatious conduct began with the complaint filing and continued throughout the case).

[27] The bankruptcy court did not review whether every individual filing was ***367** pursued vexatiously, although, as will be discussed, there are a multitude of examples given. The record is sufficient to determine the bankruptcy court acted within her discretion to sanction Grossman for all the events that occurred since he entered his notice of appearance. *See id.* The bankruptcy court determined that the award of all of the Committee's and Trustee's fees and expenses related to the Gordon Claim was justified because the entire pursuit of the Gordon Claim was premised on a meritless argument and, perhaps even more importantly, was only pursued to the extreme to coerce a settlement. The methods used for the pursuit of the Gordon Claim were a continuing act of vexatious conduct.

However, Grossman has attacked virtually everything the Committee's and Trustee's counsel and the bankruptcy court did relating to the Gordon Claim as being unnecessary, multiplicative and unreasonable—attacking the Trustee and bankruptcy court for having vacillated on the issue of whether to address the Motion to Vacate first versus proceeding to the merits of the Gordon Claim; the Committee's or Trustee's decision not to proceed with a motion for summary judgment on the merits of the Claim; and the Trustee and Court having proceeded with several bases for seeking sanctions with multiple motions for sanctions. *See* Appellant's Corrected Brief at 40–72, In re Royal Manor Mgmt., Inc., 13–8054, ECF No. 29 ("Appellant Principal Br.").

A comparison of Grossman's arguments to the record shows he is second-guessing actions of the Trustee to justify his own vexatious conduct. None of his arguments absolve him of the responsibility for this conduct. The record does not suggest that counsel for the Committee and Trustee attempted to augment their fees unnecessarily.[20] Instead, counsel attempted to resolve multiple disputes, even when Grossman's arguments lacked any merit, such as Grossman's objections to the Gertrude Gordon settlement. The balance of this Panel's decision further details how Grossman relentlessly pursued frivolous arguments, and vexatiously proceeded to endlessly argue minor points, and sought removal of the Bankruptcy Judge for criticizing this approach.

Grossman has also argued that the language in the order approving interim fee applications of the Trustee and Trustee counsel prejudiced his defense of sanctions. This Panel disagrees. The appeal of the order denying the motion to amend orders approving certain interim fees of the Trustee and his counsel is not well taken because those orders did not prejudice Grossman's defense of the sanctions. The bankruptcy court provided Grossman with the opportunity at the sanctions hearings to establish that the fees and expenses charged were not reasonably incurred ***368** in defending against the Gordon Claim and Grossman did not present any meaningful evidence on this issue.

The alternative basis for sanctions was 11 U.S.C. § 105 and the inherent authority of the bankruptcy court to sanction. Section 105(a) provides that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105.

[28] **[29]** **[30]** **[31]** **[32]** The Supreme Court has found that federal courts have the inherent authority to sanction. *Chambers,* 501 U.S. at 44, 111 S.Ct. 2123. "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* Federal courts' inherent authority includes the right, in "narrowly defined circumstances," to assess attorney fees against counsel. *Id.* at 45, 111 S.Ct. 2123. The court may do so when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45–46, 111 S.Ct. 2123 (internal citations and quotation marks omitted). Sanctions may be appropriate when a party "shows bad faith by delaying or disrupting the litigation...." *Id.* at 46, 111 S.Ct. 2123 (quoting *Hutto v. Finney,* 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 2573, 57 L.Ed.2d 522 (1978)). Unlike sanctions under § 1927, sanctions under a court's inherent authority requires a finding of bad faith or recklessness. *Continental Corp.,* 789 F.2d at 1230. This inherent authority extends to the bankruptcy courts. *Mapother,* 103 F.3d at 477;

Knowles Bldg. Co. v. Zinni (In re Zinni), 261 B.R. 196, 203 (6th Cir. BAP 2001).

For all the reasons stated previously, the decision to sanction Grossman based on the court's inherent authority under 11 U.S.C. § 105 and 28 U.S.C. § 1927 was not an abuse of discretion. [21]

II. *The Bankruptcy Court's Conclusion that the Gordon Claim Was Frivolous was Not an Abuse of Discretion*

[33] The foundation for the sanctions against Grossman was his relentless pursuit of the Gordon Claim, not only through litigation of the substantive merits of the claim, but through repeated collateral attacks, including multiple motions seeking the Bankruptcy Judge's recusal, a motion to withdraw the reference on the morning of a significant hearing on the sanctions, an objection to the settlement of the sanctions against his former client, a motion trying to make a third-party creditor pay the Trustee's expenses, and objections to orders approving fee applications of professionals on the basis that the orders did not include Grossman's own self-serving protections. His tendency to file multiple and duplicative filings for each such matter, including sometimes "status reports" which argued the merits of his positions, further compounded the obstructive nature of this dogged pursuit. Thus, it was not simply whether certain filings or positions were frivolous—although that was a significant issue which was addressed by the bankruptcy court in its decision—it was that the theories of why the Gordons were ***369** entitled to an unsecured claim in the Chapter 11 case were frivolous and, moreover, pursued vexatiously almost without exception, including through multiple collateral attacks which forced the Committee and Trustee to expend significant resources to counter those filings.

In discussing the Agreement, Grossman argues what he refers to as "non-frivolous bases for company liability." Appellant Principal Br. at 42. For example, he notes that ¶ 3(b) provides for the $1 million to be an "investment in the ... Darlington Nursing Home." *Id.* But the Agreement begins (with its title) and ends (with the signatures) with a loan between individuals. The loan is secured by an interest in "P.S. Realty" [22], not Darlington. Simply referring to isolated phrases out of context does not give Grossman's corporate liability theory merit. Similarly, the phrase "[t]he principal investment is to be returned to Gordon on or before 7/25/2002" does not show a loan by Darlington. *See id.* The $1,000,000 was to be used by Schwartz for Darlington. Next, Grossman mentions that one of the investment benefits was "10% ... interest while the $1,000,000 is invested." *Id.* But again, the overall document shows a loan to Schwartz to be used for Darlington and was signed in that fashion.

As noted, the Agreement begins by referencing only individuals and is signed by Schwartz in their individual capacity. The Supreme Court of Ohio, as Grossman notes, has indicated that the exact form of the execution of the signature is not necessarily dispositive and the court may consider the whole instrument to determine intention as to liability. *Aungst v. Creque,* 72 Ohio St. 551, 74 N.E. 1073, 1073–74 (Ohio 1905). But he understates how significant the signatures are to an analysis of the Agreement under Ohio law. An analysis of the case law cited by Grossman shows that those cases do not support his position. In *Wells Fargo Bank, NA v. WSW Franchising, Inc.,* 2009 WL 2374559 (Ohio Ct.App. Aug. 4, 2009), the court found that the corporate president was a personal guarantor of a credit card agreement despite signing in his corporate capacity. The agreement specifically, in the clearest possible language imaginable, provided such a signature created liability for the corporation and the owners. The court held that this was consistent with Ohio law that "[a]n officer of a corporation is not personally liable on contracts for which his corporate principal is liable, unless he intentionally or inadvertently binds himself as an individual." *Id.* at *3 (citation omitted). Besides the fact that WSW Franchising addresses the issue of liability of an individual when signing in his corporate capacity, the opposite of the question relevant to this appeal, the facts in the instant case provide an ironclad agreement of liability on the part of Schwartz and not Darlington. *Baltes Comm'l Realty v. Harrison,* 2009 WL 3683681 (Ohio Ct.App. Nov. 6, 2009) is a similar decision where the individual was held liable, despite signing in his corporate capacity, because the agreement itself identified the individual as a guarantor. *See also Westgate Village Shopping Ctr. v. Parker,* 2008 WL 2221855 (Ohio Ct.App. May 30, 2008) (same proposition of law); *S–S–C Co. v. Hobby Ctr., Inc.,* 1992 WL 355205 (Ohio Ct.App. Dec. 4, 1992) (same). All of these cases are narrow exceptions to the general principle that a note signed by an officer in his corporate capacity does not create individual liability unless that liability is expressed in clear and unambiguous language. *Aungst,* 74 N.E. at 1073 (syllabus ***370** holding stating that "[a] promissory note which reads, 'Thirty days after date we promise to pay,' etc. and signed, 'The Akron White Sand & Stone Co., L.K. Mihills, Secy. & Treas., D.B. Aungst, Pres.,' is, on its face, the note of the company alone, and is not the

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note of L.K. Mihills and D.B. Aungst, and the latter are not personally bound thereon.").

[34] But what about cases similar to the Gordon Claim theory—in which the signature is in an individual capacity—but corporate liability was nevertheless imposed? The legal analysis is similar. Under Ohio law, "[i]t is well-settled in the law of agency that an agent who discloses neither the existence of the agency nor the identity of the principal is personally liable in his or her contractual dealings with third parties." *Dunn v. Westlake,* 61 Ohio St.3d 102, 573 N.E.2d 84, 87 (Ohio 1991). Again, as in the examples previously cited, "clear and unambiguous" contract terms may overcome the form of signature. *See Norfolk S. Ry. Co. v. Jacobs,* 549 F.Supp.2d 990, 1000 (N.D.Ohio 2008) ("The intentions of the parties that Jacob Industries, and not James Jacobs himself, be responsible for and liable on the contract is abundantly clear and carries over to the modification."). [23]

In the end, this entire line of case law cited merely stands for the common sense proposition that a signature in an individual or corporate capacity is not dispositive when the language in the document proves clear and unambiguous intent for dual liability. However, the Agreement does not provide nearly the type or quantum of evidence that would overcome the individual liability of the Schwartz, evidenced by the preface of the Agreement and the individual signatures of the Schwartz, and would establish the sole or dual liability of Darlington or any of the other Debtors.

Instead, the Agreement evidences a loan between family members with the consideration for that loan being a promise to repay with interest, a security interest in a non-debtor asset —"P.S. Realty," an equity interest in Darlington and a share of its profits and additional promises by Schwartz to pay certain incidental expenses and pay for nursing home care, if needed. In order to reasonably expect to overcome the Agreement beginning "Sally and Abraham Schwartz to Gertrude, David, Allison, Gordon" and ending with the Schwartz' individual signatures, the "whole instrument" would need to show clear and unambiguous language of corporate liability. It does not. Read contextually, there is not a single phrase in the document showing clear corporate liability for an unsecured loan. [24] The bankruptcy court did not abuse her discretion in finding Grossman's main argument wholly without merit nor did the Merit Opinion, incorporated into the Sanctions Opinion, misapply Ohio law.

The determination that Grossman's re-characterization argument was frivolous was also within the bankruptcy court's discretion. Grossman attempts to show the argument was not frivolous by the amount ***371** of pages the district court spent discussing it and how many factors were supportive of re-characterizing the equity as debt. However, the re-characterization argument cannot stand if the loan was between the Gordons and Schwartz and, perhaps for this reason, the Sixth Circuit Court of Appeals did not address it. It is only relevant if the overall transaction was between the Gordons and Darlington, and then, only to determine whether the $1,000,000 was given to Darlington as an investment or capital (i.e. equity) rather than a loan (i.e., debt). Moreover, the Gordons never pursued this theory of liability until the bankruptcy, did not treat the Agreement as a loan to Darlington for tax purposes, and agreed to be paid subsequent to all creditors in the event of a sale. At most, the Gordons had what amounted to a preferred equity position in Darlington, but not an unsecured debt.

The record also supports the bankruptcy court's conclusion that Grossman did not provide significant evidence during the Merit Hearing to support any other theory of allowance.

Based on the foregoing, the record is sufficient to show that the bankruptcy court did not abuse its discretion in concluding that the Gordon Claim was premised on frivolous legal theories.

III. *The Bankruptcy Court's Determination That Grossman Vexatiously Pursued the Gordon Claim and Pursued Frivolous Arguments was not an Abuse of Discretion*

[35] Grossman vexatiously pursued arguments and filed documents throughout the litigation that were frivolous. Particularly based on the deferential standard of review afforded the bankruptcy court, there is more than a sufficient basis to affirm the sanctions.

All of the objections to the allowance of the attorney fees of professionals after the Gordon Claim were disallowed and the repeated objections to the Gordon Claim settlement were frivolous. It should have been clear that none of these motions, nor the orders granting these motions, prejudiced Grossman and, further, he lacked standing to file these objections on his own behalf. But Grossman persisted in making these objections repeatedly, including arguments about how his due process would be prejudiced based upon the particular language chosen in proposed orders. The Panel

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finds the language chosen only clarified those orders and did not impact the sanctions issue.

A detailed review of the record shows that Grossman repeatedly interjected substantive arguments previously briefed into routine procedural motions. In one instance, the Trustee was forced to respond to such arguments contained within an agreed motion for a continuance. These types of filings, by forcing a response, drained the Liquidation Trust of funds by unnecessarily raising administrative expenses. He filed multiple status reports to the same effect.

The request for a "credit" in the Gertrude Gordon settlement order was frivolous and pursued vexatiously. Prior to being sanctioned, Grossman essentially wanted an advisory opinion before that issue was ripe. His arguments about being concerned about laches or waiver ring hollow. Also, as explained later, his substantive argument about a setoff was not supported by the case law he cited.

At the hearing on the New Claim Motion, despite the motion being denied, Grossman was plainly told he could pursue alternative legal theories. He appealed anyway and disingenuously claimed confusion when none reasonably existed. He accused the bankruptcy court of bias for ***372** criticizing his meritless arguments. On appeal, the district court and the Sixth Circuit Court of Appeals concluded, as does this Panel, that, contrary to Grossman's continued assertions, there was no "confusion" that prejudiced his clients' rights to pursue alternative legal arguments.

Grossman frivolously argued that he was denied due process because he was not entitled to file a post-hearing brief concerning the Gordon Claim. First, it was his responsibility to ensure he understood all court orders prior to the hearing, including the bankruptcy court's order requiring that proposed findings of fact and conclusions of law be filed prior to the hearing. Given such a requirement, Gordon had the opportunity to provide the bankruptcy court with legal authority for the propositions which he was espousing and a post-hearing brief was unnecessary. Second, litigants have no due process right to submit post-hearing briefs. Those decisions are left in the discretion of the bankruptcy judge presiding over the case. The record shows that every legal issue related to the objection to the Gordon Claim had been briefed well beyond what most litigants in bankruptcy courts ordinarily would do and the opportunities which Grossman had to brief such issues exceeded those which most practitioners would expect or receive.

Grossman unnecessarily repeated arguments time and again. As just one example, his voluminous filings concerning an expert witness were beyond what was reasonable and were vexatious. Grossman has taken the position this witness should have been allowed to testify to explain specialized terms. An exception is recognized to the parol evidence rule under Ohio law for this purpose, but when Grossman entered the stipulation during the hearing he failed to reference such an exception. Having not raised the expert witness issue at the time of the stipulation and having agreed to the stipulation, Grossman had no cause to raise arguments concerning parol evidence. Despite all of this, Grossman sought to have the Trustee pay the witness's travel expenses.

He filed repeated motions for recusal and re-raised the same essential arguments, even after the district court issued a decision finding the Bankruptcy Judge had no discernable bias. He filed a motion to withdraw the reference immediately prior to a sanctions hearing. He frivolously argued at that same hearing that his motion to withdraw the reference, without any ruling by the district court, somehow divested the bankruptcy court of its subject matter jurisdiction. He also frivolously asserted the sanctions issues should be decided by a federal judge outside the Northern District of Ohio because the Bankruptcy Judge was the "Chief Judge of the District." Grossman's argument that Judge Gaughan's decision regarding sanctions barred further sanctions is belied by a simple reading of the language used in her decision. As this decision details in the recusal section, many of his arguments take statements out of context to create a distorted impression of the record.

He frivolously argued that the Hochman Trust, a creditor, should bear the Liquidation Trust's administrative expenses. He had no legal authority whatsoever to support this argument and wasted counsel's time and judicial resources responding to this argument and his related filings. Nevertheless, he compounded the frivolousness by vexatiously pursuing a motion to reconsider that ignored the basis for the bankruptcy court's decision.

All these arguments that Grossman pursued, and others described in this decision, support the sanctions decision of the bankruptcy ***373** court. This Panel finds no abuse of discretion.

IV. *The Specific Bases for Sanctions were Sufficiently Delineated in the Bankruptcy Judge's Decision*

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[36] Grossman argues that the bankruptcy court failed to articulate the specific bases for sanctions against him. However, the bases for the sanctions may be found in the two sanctions decisions. The bankruptcy court was clear that the Gordon Claim theories lacked merit and, in addition, were pursued vexatiously. The decisions conclude that, perhaps motivated by his contingent fee arrangement, Grossman sought to use the Committee's concern for the bankruptcy estate and, later, the Trustee's concern for an efficient administration of the Liquidation Trust, to force a settlement. This conclusion was articulated, without any ambiguity, in the Sanctions Opinion:

> In short, Grossman well understood that his effort to convert the Gordons' claim against their aunt and uncle into a claim against the bankruptcy estate was delaying the distribution of approximately $750,000 to holders of allowed claims, while also causing the erosion of funds available for distribution due to the fees that the Liquidation Trust was incurring when the [sic] his counsel responded to Grossman's ever swelling and often frivolous filings. He compounded his absence of compelling arguments with needless multiplication and repetition of specious arguments. If an opportunity presented itself (or could be fabricated) to file a pleading, Grossman took it whether he had something new to say or not. He also repeatedly sought to depose lawyers from Brouse and McDowell. It appears that he sought to lever the collective desire for efficient administration that bankruptcy seeks to afford claim holders to gain recognition of a claim that had no merit. It appears that he thought his blockades to distribution might substitute for the lack of merit of the claims that he advanced. This Court can think of no other reason that he petitioned for *certiorari* on a settled issue of state law that had been so clearly articulated in Judge Sutton's opinion for the Sixth Circuit panel.

Sanctions Op. at 7.

Grossman makes much of the fact that the Sanctions Opinion did not cite any Ohio law, but it fully incorporated the Merit Opinion, which did cite Ohio law and, as discussed, shows why the bankruptcy court did not abuse her discretion in reaching the conclusion that the Gordon Claim had no reasonable chance of allowance. In addition, the Sanctions Opinion lists a series of arguments Grossman raised that were frivolous such as the theory of the Gordon Claim itself, and explains the repetitive nature of his filings. The Supplemental Sanctions Opinion provided further examples. The bankruptcy court was not required to review every document filed and every argument made by Grossman in the case and separately find them to be frivolous.

V. *Grossman was not Denied Due Process Concerning the Issues to be Addressed at the Sanctions Hearings*

[37] Grossman argues that he was not put on notice that all of his filings concerning the Gordon claim were subject to the sanctions motion. On December 11, 2012, following the Supreme Court's denial of the writ of certiorari which rendered the disallowance of the Gordon claim a final non-appealable order, the Trustee filed a renewed motion for sanctions. According to Grossman, that motion only sought sanctions for specific items. Grossman responded ***374** to those specific items and understood the hearing was limited to those items. However, the Trustee's motion does not support Grossman's position. It was clear from the motion that the Trustee believed the entire pursuit of the Gordon claim was "frivolous," was intended to "vexatiously multiply these proceedings" and was "intentionally geared to harass the Trustee and his counsel, and to significantly increase the costs of these proceedings thereby forcing a settlement." The Liquidation Trustee's Renewed Mot. for Sanctions Pursuant to this Court's Inherent Power Under 11 U.S.C. § 105(a), and Under 28 U.S.C. § 1927 at 2, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 953. In short, the Trustee argued the Gordon Claim was, from the very beginning, "meritless." While the motion also alleges many discrete filings and positions to be frivolous, those examples are in addition to the Trustee's position that the entire pursuit of the claim—and thus every filing related to it—was premised on sanctionable legal positions. The conclusion of the motion presses the point further: "[S]anctions should be awarded

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against Gertrude Gordon and Attorney Grossman because they have acted vexatiously and in bad faith throughout these proceedings, and have abused the bankruptcy process." *Id.* at 34. Finally, the motion attaches billing statements related to all the Gordon Claim fees and expenses and seeks recovery of all those amounts expended by the Committee and Trustee as sanctions. Grossman was given fair notice of the allegations against him and was not denied due process.

VI. *Grossman was not denied "Equal Justice" by the Striking of His Reply Brief or the Decision to Allow the Trustee to File an Updated Sanctions Motion One Day Late*

[38] Grossman vociferously argues that he was denied "equal justice" because the bankruptcy court enforced a deadline against him while allowing the Trustee to file a sanctions motion one day late. The deadline enforced against him was his reply brief to the New Claim Motion which was filed two days late by rule and one day late based upon an agreed order entered into by the parties. The Judge's ruling was explained during the hearing:

> THE COURT: Well, the arguments—at this point we're dealing with a claim that was filed. An objection was filed. No response to the objection. The objection is sustained. An order goes on sustaining the objection. And then comes a motion to vacate that order based upon some—some—something that was excusable. And quite frankly, this Court continues to reserve the right to deal with this claim based on that and that alone. In what we thought was the interest of economy we went to the merits. And again, the proliferation of issues in this case is, at least at certain times, completely inappropriate. I made very clear the deadlines for briefing on this matter. It is my normal procedure to say to counsel I discourage reply briefs. If there is an issue that's been raised in the response that could not have been anticipated, you can file the reply brief but you have to do it by X date. You filed a reply brief which, quite frankly, I haven't read. One of my law clerks has read it. I haven't read it. I don't intend to read it. It was two days out of rule and it is struck. And I would strongly urge you not to bill your clients for the reply that you gave to the motion to strike because deadlines in this Court mean something and this [is] a case about deadlines, among other things, and you seem to think that they're wholly and completely negotiable to your convenience and they are not.
>
> ***375** MR. GROSSMAN: That's not true, Your Honor.
>
> THE COURT: Sir, sir, I've ruled. The motion to strike is granted. Period.
>
> MR. GROSSMAN: Your Honor, I just—
>
> THE COURT: Sir, I do not want to hear another word about that. There was a deadline set. I'm not going to read the motion. I'm not going to read the reply brief. It has been reviewed by one of my law clerks. And in terms of the criteria that I apply with respect to, you know, does it address any issue that could not have been addressed in the initial brief, the assessment I got was no, it doesn't. The issues could have been briefed initially, probably were briefed initially. No reason to take up the time of this Court with the reply brief. I did read the motion to strike and the response thereto and the motion to strike is granted.
>
> We're going to proceed with this case in a rules based fashion. Ad [sic] now please tell me what discovery, what additional discovery you believe you need.

Partial Tr. of May 12, 2009 Hr'g at 28–29, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 566.

In essence, the bankruptcy court determined that, particularly in light of the fact the reply brief did not raise any new issues, it was appropriate to strike the brief as beyond rule time. A bankruptcy judge generally has broad discretion in such decisions and her decision that the computer problems did not warrant extra time was within her discretion. Grossman compares this situation to the decision of the Bankruptcy Judge to allow the Trustee to file a sanctions motion one day late. (This motion included additional fees since the issue had been held in abeyance by the pursuit of the appeals of the disallowance of the Gordon Claim). In a footnote to the Supplemental Sanctions Opinion, the Bankruptcy Judge stated:

> The renewed sanctions motion is a summary and update of the filing from October 21, 2009 through February 10, 2010 relating to the request for sanctions against Grossman and/or Gertrude Gordon.... Grossman has argued that the renewed sanctions motion was not filed timely. The renewed sanctions motion was filed within 14 days after the expiration of the stay of the Sixth Circuit's mandate.

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> Therefore, the Court finds that the deadline as set by this court, not be [sic] rule of statute was met by the Liquidation Trustee. The renewed sanctions motion was filed timely.

Supp. Sanctions Op. at 4, n. 3. The renewed sanctions motion was not timely filed and the finding otherwise is clearly erroneous. The mandate terminated on November 26, 2012 and, therefore, the renewed sanctions motion was to be filed no later than December 10, 2012. It was filed one late, on December 11th. The Trustee erroneously believed the 3 day "mailbox rule" in Bankruptcy Rule 9006(f) applied. However, that rule only applies when the response time is counted from service. In such a situation, the motion may only be permitted if there exists excusable neglect on the part of the filer. Fed. R. Bankr.P. 9006(b)(1). Grossman argues excusable neglect should not apply and he is being denied "equal justice." [25]

***376** The parties do not dispute that the Trustee missed the deadline due to a misinterpretation of the "mailbox rule", but dispute whether excusable neglect could allow the one-day tardy filing in these circumstances, which would provide an alternative basis for the bankruptcy court's ruling. The Supreme Court has stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer Inv. Svcs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 392, 113 S.Ct. 1489, 1496, 123 L.Ed.2d 74 (1993). However, each circumstance is fact specific. Grossman takes the position that excusable neglect may not be based on ignorance of the rules.

The case law Grossman cited addresses statutes of limitation, specific federal rules or policy issues that the relevant order in this appeal does not implicate. *Carlisle v. United States,* 517 U.S. 416, 418, 116 S.Ct. 1460, 1462, 134 L.Ed.2d 613 (1996) addressed whether a district court had "authority to grant a postverdict motion for judgment of acquittal filed one day outside the time prescribed by Federal Rule of Criminal Procedure 29(c)." In that instance, the Supreme Court found that the language of that rule did not provide any basis for such a late filing. *United States v. Locke,* 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) addressed a specific statutory filing deadline under the Federal Land Policy and Management Act. *Cook v. Comm'r of Social Security,* 480 F.3d 432 (6th Cir.2007) addresses a specific limitations statute for applying for social security disability benefits. *Merriweather v. City of Memphis,* 107 F.3d 396 (6th Cir.1997) addressed a one-year limitations statute to file a § 1983 action. *Graham–Humphreys v. Memphis Brooks Museum of Art, Inc.,* 209 F.3d 552 (6th Cir.2000) addressed a statute of limitation under Title VII. *See also Johnson v. U.S. Postal Service,* 863 F.2d 48, 1988 WL 122962 (6th Cir. Nov. 16, 1988) (table decision) (plaintiff's late appeal to the EEOC ultimately resulted in a dismissal of a Title VII complaint for failure to exhaust administrative remedies); *Watson v. Brady,* 9 F.3d 1548, 1993 WL 469078 (6th Cir. Nov. 12, 1993) (table decision) (the filing of an employment discrimination complaint against the federal government was dismissed for failure to follow the 30–day statutory limitation). *FHC Equities, LLC v. MBL Life Assurance Corp.,* 188 F.3d 678 (6th Cir.1999) addressed a late appeal. *In re KMart Corp.,* 381 F.3d 709 (7th Cir.2004) concerns an affirmance of a decision to deny a proof of claim filed after the Chapter 11 bar date, which has policy implications for all creditors and parties in interest not present here. *See also In re Sterling Rubber Prods. Co.,* 316 B.R. 485 (Bankr.S.D.Ohio 2004) (similar). [26]

***377** No per se rule exists preventing the application of excusable neglect to this fact pattern. The motion was a renewal of the original sanctions motion delayed when the disallowance of the Gordon Claim was appealed. It did not involve a jurisdictional rule, or even a claim processing deadline of some policy import. The bankruptcy court made it clear that the sanctions issue needed to be addressed and raised it sua sponte. *See Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999) ("district courts have wide discretion to manage their own dockets and to decide issues which have consumed considerable resources...."). Assuming that the harmless error doctrine does not apply, had the bankruptcy court determined that the late filing was due to excusable neglect, the decision would have been within her discretion. There was no unfair prejudice to Grossman, the renewed sanctions motion was meritorious and the cause of the one-day delay, although a misunderstanding of a procedural rule, was inadvertent and not in bad faith. The Panel may affirm the bankruptcy court based on alternative legal grounds. *Allen v. Diebold, Inc.,* 33 F.3d 674, 676 (6th Cir.1994).

As to the broader comparison to the striking of the reply brief, that decision did not deny Grossman a chance to prosecute his motion and was based on specific circumstances. The decision to deny the Trustee any opportunity to fully prosecute his sanctions motion is of an entirely different order. The bankruptcy court had no obligation to treat every tardy filing the same way, regardless of the circumstances, particularly when the ruling would deprive a party of any

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ruling on the merits and the sanctions issue originally was raised by the Bankruptcy Judge. There is an enormous difference between striking a reply brief and denying any hearing on the merits of a sanctions motion that renewed a pending motion. These decisions were years apart, have little relationship to one another and Grossman's "late is late" analysis cannot withstand scrutiny.

For these reasons, Grossman's argument about the denial of "equal justice" is not well taken.

VII. *The Bankruptcy Judge's Decision to not Limit the Sanctions Based on the Failure of the Trustee to File Summary Judgment was not an Abuse of Discretion*

[39] Grossman argues that the Trustee failed to mitigate damages by not filing for summary judgment at an earlier date. Grossman cites *Riddle v. Egensperger,* 266 F.3d 542, 553–54 (6th Cir.2001) for the proposition that sanctions are generally improper when a successful motion could have avoided the bulk of the fees which are sought. *See also Rathbun v. Warren City Sch. (In re Ruben),* 825 F.2d 977, 988 (6th Cir.1987) (failure to file a motion to dismiss precludes sanctions based on a groundless claim).

The convoluted circumstances surrounding the Gordon Claim litigation do not support an argument that the sanctions should be reversed because the Trustee failed to mitigate. The decision whether to file a motion for summary judgment or litigate the issue at a hearing was not based on the type of clear fact pattern as the precedent cited. Summary judgment ***378** may not have resolved other theories raised by the Amended Claim and New Claim Motion. Against this backdrop, the Trustee had to consider whether the bankruptcy court would agree that the Agreement was clear and unambiguous, which was only stipulated to during the Merit Hearing. More to the point, this litigation became entangled in unusual discovery issues and appeals and an extraordinary volume of motions for a dispute involving a single unsecured proof of claim. Often, bankruptcy hearings concerning an allowance of a proof of claim are fairly straightforward proceedings. The Trustee, more so than other litigants, must balance a multitude of issues in a collective proceeding. Under such circumstances, the Panel is loath to make a hind-sighted critique of counsel's litigation strategy and to, in effect, penalize the creditors of the Liquidation Trust, unless that strategy only increased fees without a reasonable purpose. As previously explained, those circumstances do not exist in this case.

VIII. *Grossman is not entitled to a Credit Based Upon the Gertrude Gordon Settlement*

[40] Grossman argues he was entitled to a $49,313.50 credit or setoff for the funds paid in the Gordon settlement that "overlapped" with the judgment against him.[27] He argues that this credit prevents a "double recovery" by the Trustee. In denying the credit, the bankruptcy court determined that "there is no basis for reducing the sanction against Grossman by that settlement amount." Sanctions Op. at 8. The bankruptcy court noted that the filing of the redacted proof of claim was an independent basis to sanction Gertrude Gordon. In addition, the bankruptcy court noted that Grossman did not begin to represent Gordon until three months after the filing of the proof of claim. Moreover, the bankruptcy court found that the Trust was harmed at an amount greater than the bankruptcy court sanctions so over-recovery was not a concern.

Grossman cites *BP Exp. & Oil Co. v. Maint. Svcs., Inc.,* 313 F.3d 936 (6th Cir.2002) and *E.D.S. Corp. v. W.A. Foote Mem'l Hosp., Inc. (In re Foote Mem'l Hosp./PCIS Litig.),* 25 F.3d 406 (6th Cir.1994). The *BP* decision determined that, under Ohio statutory law, a non-settling party in tort is entitled to a set-off for the amount paid to the claimant by a settling party for the same injury. *Id.* at 942. The court noted that closely related to that principle is the rule that an injured party who receives full compensation is not entitled to further compensation from another defendant. *Id.* However, the court noted that neither the statutory nor the common law rule applies unless there has been a determination of the settling defendant's liability. *Id. Foote Mem'l,* 25 F.3d at 410, refers to the same "one satisfaction" rule in the context of "common damages."

Even assuming for argument that the legal principles in this case law apply to federal sanctions, Gertrude Gordon settled her sanctions without a determination of liability. It was a mutual release without findings. In addition, the settlement did not include "common damages" with the sanctions judgment against Grossman. The sanction allegations against Gertrude Gordon included filing a fraudulent proof of claim. If proven, the bankruptcy court could have sanctioned Gertrude Gordon, regardless of whether the Trustee had spent attorney fees directly related to that filing. Without a finding of liability, a setoff or credit to Grossman cannot be applied.

***379** IX. *The Denial of Grossman's Motion for Reconsideration Was Not an Abuse of Discretion*

[41] Grossman raised four issues in his motion for reconsideration that all arose during the supplemental sanctions hearing. First, Grossman moved to strike portions of the Trustee's proposed findings because they addressed "closed" issues that were resolved by the court at the January 15, 2013 sanctions hearing. Specifically, Grossman cites a statement by the bankruptcy court at the hearing concerning Grossman's objection to the Gertrude Gordon settlement. At the hearing, the bankruptcy court appeared to be trying to impress upon Grossman that issues from the January 15, 2013 sanctions hearing would be separately determined and that record was "closed." Therefore, the Gertrude Gordon settlement was irrelevant to the sanctions issues facing Grossman. The Bankruptcy Judge stated:

> Mr. Grossman, I'm going to recount the recent chronology. The Court—there was a—the Court had a hearing, I believe it was on January 15th. It was an all day evidentiary hearing with respect to the Liquidation Trustee's request for sanctions.... But there was an all day hearing and that record is closed. And that matter is under advisement.

Tr. of Hr'g Feb. 12, 2013 at 6, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 993. Grossman takes this statement out of its context and argues that the Trustee's proposed findings of fact included time periods from the "closed" hearing. The bankruptcy court was free to ignore any of the proposed findings (or merely consider those findings as background) and the decision concerning supplemental sanctions was not based on a re-opening of the sanctions issues previously determined, but a continuation of Grossman's actions after that hearing. The Judge's denial of the motion to strike was not an abuse of discretion.

Second, Grossman objects that attorney Mazur gave argument, rather than testimony, from the witness stand and other portions of her testimony were foundation for a summary that was never introduced. As the trier of the fact and the arbiter of the law, a bankruptcy judge can separate argument from evidence and give little weight to evidence of marginal relevance. The Supplemental Sanctions Opinion does not credit argument as facts. Assuming any error in admitting Mazur's testimony, it is harmless. Grossman argues third that the bankruptcy court erred by prohibiting cross-examination as to how specific language Grossman wanted in the Gordon settlement order would have prejudiced the Trustee. The court sustained an objection to the questioning based upon the work product privilege. Grossman then argues that the privilege was waived because the direct examination of Mazur included a discussion of the negotiation with Grossman over the proposed language. That testimony had little meaning because the objections to the Gertrude Gordon settlement were frivolous anyway. Further, Grossman lacked standing to object to the settlement because he is not a beneficiary of the Liquidation Trust and, at that time, did not represent a beneficiary of the Trust. Grossman also had not yet been sanctioned. In any event, the bankruptcy's court's distinction between the basic facts of the negotiation and delving into a lawyer's legal impressions and reasoning was within her sound discretion.

X. *The Bankruptcy Judge's Decision to Deny the Motion to Recuse Was Not an Abuse of Discretion*

A. *Legal Standard for Recusal of a Bankruptcy Judge*

A federal judge "shall disqualify himself in any proceeding in which his impartiality ***380** might reasonably be questioned." 28 U.S.C. § 455(a). Further, a judge should disqualify herself for "personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). Bankruptcy Rule 5004(a) states that "[a] bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case." Fed. R. Bankr.P. 5004(a).

[42] Recusal is mandatory when, based on an objective standard of a reasonable person with knowledge of all the facts, the Bankruptcy Judge concludes that her impartiality is reasonably placed in question. *Barna v. Haas (In re Haas),* 292 B.R. 167, 175–76 (Bankr.S.D.Ohio 2003). However, a federal judge also has a mandatory duty not to recuse unless that standard has been met. *Id.*

[43] Expressing an opinion about litigation is not a reason for recusal. *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994) ("opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."). The

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Court has stated that "*[n]ot* establishing bias or partiality ... are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after being confirmed as federal judges, sometimes display." *Id.* at 555–56. Rather, bias must either be based on an extrajudicial source, which is not alleged, or because it is undeserved or excessive in degree or the behavior is "so extreme as to display clear inability to render fair judgment...." *Id.* at 550–51. *See also Schilling v. Heavrin (In re Triple S Rests., Inc.),* 422 F.3d 405, 417 (6th Cir.2005) (affirming bankruptcy judge's denial of motion to recuse when the record lacked "concrete examples of hostility.").

Although Grossman raised recusal concerns in this litigation on multiple occasions, the only order on appeal is the March 2013 order denying his motion for recusal. Grossman sought recusal based upon assertions that 1) the Bankruptcy Judge required him to answer, on the record, whether he would make a "substantial contribution" to settle the sanctions motion; 2) the Bankruptcy Judge "repeated expressions of hostility" toward him concerning his appeals and 3) the Bankruptcy Judge became a "judge in her own case."

B. *The "Substantial Contribution" Colloquy Does Not Provide a Sufficient Basis for Recusal*

[44] On the day that the Bankruptcy Judge approved the settlement with Gertrude Gordon, the "substantial contribution" comment was made by the Bankruptcy Judge to explore with the parties whether settlement discussions might be productive to avoid the further expenditure of resources by the parties and the court with respect to the sanctions motion. The Bankruptcy Judge had presided over the bench hearing concerning significant possible sanctions against Grossman. That contested matter was under advisement. The Bankruptcy Judge attempted to encourage a settlement, suggesting it would require a "substantial contribution" from Grossman. The question is whether a reasonable observer would question her partiality. The exchange appears to be an attempt to advise Grossman that a "significant contribution" might be less than what the Bankruptcy Judge, having heard the evidence as the determiner of both the ***381** facts and the law, might render against him. It also may have been an attempt by the Bankruptcy Judge to inform Grossman that she thought that the Trustee would not accept a de minimis payment to settle the sanctions motion, so it was not worth further delaying resolution of the matter if he was not going to make more than a de minimis offer. The incident does not reflect a bias that would justify recusal. The bankruptcy court did not mediate the dispute or engage in settlement discussions between the parties. *Compare Becker v. Tidewater, Inc.,* 405 F.3d 257, 260 (5th Cir.2005) (judge should recuse himself from being a fact finder when he mediated a settlement conference) and *Tucker v. Calloway County Bd. of Educ.,* 136 F.3d 495, 503 (6th Cir.1998) (judge voluntarily recused because he had been involved in settlement discussions and could not conduct bench trial). [28] The Bankruptcy Judge's decision to not recuse was not an abuse of discretion.

C. *The Asserted "Repeated Expressions of Anger and Hostility" Do Not Support Recusal*

[45] Grossman's argument that the Bankruptcy Judge made "repeated expressions of anger and hostility" toward Grossman's prosecution of the appeals of the Gordon Claim is not well taken. In *Webster v. Sowders,* the Sixth Circuit Court of Appeals stated:

> We recognize that in the course of a lawsuit, the proceedings often take place in both the trial and appellate courts, and that some motions or other actions, such as the motion to stay the pay orders pending appeal, may have impacts at both levels. Nevertheless, the sanction statutes, the rules, and the case law provide for fairly clear separation between conduct on appeal sanctionable by the appellate court and conduct in the trial court sanctionable by the trial court. Just as it appears clear that a trial judge cannot sanction a party or lawyer for taking an appeal, we do not believe that it is proper here for the District Judge to threaten to sanction the defendants or their attorney for filing a motion to stay his order pending appeal on the grounds that the underlying appeal is frivolous. The only purpose of such threat is to prevent an appeal. Appeals of district court orders should not be deterred by threats from district judges.

846 F.2d 1032, 1040 (6th Cir.1988) (footnote and citations omitted). However, the Bankruptcy Judge did not threaten

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Grossman if he appealed nor did she rule on a motion to stay (or anything else) interfering with the appeals. She negatively commented, as part of her larger discussion of Grossman's pattern of conduct throughout the litigation, upon the appeals as part of her consistent view of Grossman's filings as attempting to force a settlement.[29] Grossman argues the Bankruptcy Judge "took sides" in the appeals and her comments "destroys public confidence in the impartiality of the judiciary and warrants recusal." Grossman cites to ***382** *Nicodemus v. Chrysler Corp.,* 596 F.2d 152 (6th Cir.1979), but that case concerned a judge with a clear and expressed bias. *Id.* at 155–56.

Grossman exaggerates the Bankruptcy Judge's statement in the Sanctions Opinion by redacting portions of her comments. The impression sought is that the Bankruptcy Judge invited the appellate court to award further sanctions. Appellant Principal Br. at 24. She stated that, if the Trustee did not seek further sanctions, the final judgment would be $150,000, "subject to any amount which an appellate court might decide to add, in the event of an appeal of that final judgment." The record is clear that earlier in that decision, the Bankruptcy Judge acknowledged the sanctions would not include fees relating to any appeal because the Trustee determined that he would not seek such fees at the bankruptcy court level. The quotation is best read as another acknowledgment that the decision does not address such fees and that issue may be the province of appellate courts. The other "invitation" mentioned by Grossman is less an invitation when the entire statement is read, but more another explanation that the bankruptcy court is addressing fees at the bankruptcy court level, not appellate fees. *Compare* Appellant Principal Br. at 24 (Grossman's redacted version of the quotation) with Supp. Sanctions Op. at 8, n. 4. Grossman is ascribing a motive which the weight of the record cannot support.

Grossman's other examples also fail to support his narrative. At a January 8, 2013 discovery hearing, the Bankruptcy Judge stated that "dividends have been held hostage during this appellate process." Tr. of Hr'g at 23, *In re Royal Manor Mgmt., Inc.,* No. 08–50321, ECF No. 965. This statement was consistent with other statements of the Bankruptcy Judge that Grossman had pursued sanctionable conduct. The statement does not threaten Grossman from appealing any issue or reflect anger or hostility. This statement should be considered in the context of a hearing resulting in a 40 page transcript during which Grossman freely interjected his opinion that the Bankruptcy Judge was largely responsible for the delays in the litigation.

At the January 15, 2013 sanctions hearing, Grossman points to the Bankruptcy Judge questioning Grossman about how many additional months that distributions to creditors were delayed by Grossman's application for writ of certiorari to the Supreme Court. Tr. of Hr'g at 145, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 981. When read in context, Grossman was describing how the New Claim Motion was not frivolous and, as part of that, noted the Sixth Circuit stayed its decision to allow Grossman to pursue a writ of certiorari. As part of the colloquy, the Bankruptcy Judge asked about the delay by proceeding to the Supreme Court. It is unreasonable to view this statement as an expression of anger or hostility. Following that statement, Grossman and the Bankruptcy Judge continued to discuss the evidence during closing argument on a variety of points.

During a February 12, 2013 hearing on the motion to compromise the request for sanctions as to Gertrude Gordon, the Bankruptcy Judge stated that "[y]our activity in this court and other courts within the Northern District of Ohio will be judged by a review of activity." Tr. of Hr'g at 7, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 993. The statement is in context not an expression of anger or hostility nor is it a threat. The Bankruptcy Judge previously noted her view of the irony of Grossman's concern that the language in the Gordon compromise order would lead to further sanctions ***383** against him. The obvious implication was that his objections were possibly sanctionable because the settlement did not concern him. Rather than explain her comment to Grossman, the Bankruptcy Judge stated that those issues would be judged later, but the hearing that day concerned the Gertrude Gordon settlement. In essence, the Bankruptcy Judge re-focused the court and parties upon the hearing at hand and chose not to discuss what appellate courts might do, but instead stated those courts would judge it.

In the Supplemental Sanctions Opinion, the Bankruptcy Judge stated that filings related to appeals "contain largely frivolous and repetitive arguments designed to multiply and delay the ultimate resolution of this case." Supp. Sanctions Op. at 8, n. 4. This statement represents the Bankruptcy Judge's view of the litigation as part of the pattern of Grossman's filings. Merely commenting on her view of these appeals did not represent a persistent pattern of hostility or anger toward Grossman nor a threat. None of the sanctions concerned fees expended by the Trustee on appeals.

The balance of the comments which concern Grossman are from the Sanctions Opinion and were appropriate. She noted

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that Grossman's appeals diminished the distribution to holders of allowed claims because the Trustee incurred greater attorney fees and distributions were delayed. Sanctions Op. at 4. Later, the Bankruptcy Judge wrote "[f]or more than four years and continuing to the present Grossman seemed to find any and every occasion to multiply the ongoing proceedings." The paragraph also references the various appeals that were not included in an Appendix of his filings. *Id.* at 6. Similar statements were made about the delays to distribution and additional fees at other portions of the decision. *Id.* at 7–8 and 11. For a complete list, see the Appellant Principal Br. at 16. All these comments were appropriate for a sanctions decision.

Grossman also mentions three separate incidents, occurring over a period of 3 ½ years, in which the Bankruptcy Judge sua sponte invited the Trustee to seek sanctions. While Grossman appears to concede that sua sponte sanctions "invitations" are not per se impermissible, he states, without a citation, that "[t]hree (3) times is too much." Appellant Principal Br. at 23. Starting from the most recent, the Sanctions Opinion, the Bankruptcy Judge gave the Trustee the opportunity to file for supplemental sanctions for attorney fees and five days to make that decision. Over three years earlier, on January 29, 2010, the Bankruptcy Judge issued a sua sponte show cause order requiring Grossman to explain why he should not be sanctioned pursuant to the court's power under 28 U.S.C. § 1927 based on the findings proposed by the Liquidation Trustee. Finally, the Bankruptcy Judge invited the Trustee to seek sanctions under Bankruptcy Rule 9011 in her decision sustaining the Trustee's objection to the Gordon Claim.

The most recent mention of sanctions appears to be an attempt to fully and finally have all sanctions issues resolved by setting a final date for such motions. The first mention of sanctions was within the Bankruptcy Judge's discretion based on her views articulated in the Merit Opinion and, apparently based on issues with raising such claims under Bankruptcy Rule 9011, the Bankruptcy Judge subsequently issued a show cause under 28 U.S.C. § 1927, which was an alternative legal basis for sanctions. In the context of 4 1/2 years of contentious litigation, in which the Bankruptcy Judge determined and repeatedly told Grossman that he was consistently filing frivolous documents and raising frivolous arguments, the characterization ***384** of the sanctions "invitations" as "3–fold non-stop" is disingenuous. *See* Appellant Principal Br. at 23.

D. *The Theory that the Bankruptcy Judge was "Judging Her Own Case" does not Support Recusal*

Grossman attempts to frame a personal dispute between himself and the Bankruptcy Judge and reaches the conclusion that the Bankruptcy Judge was "judging her own case." Based on established case law that a judge cannot have a material (pecuniary or otherwise) interest in the litigation, he points to the fact that the Bankruptcy Judge criticized him of delay in pursuing the Gordon Claim while, in his view, poor case management was responsible for significant delay.[30] Therefore, Grossman concludes that she should have recused herself. The case law of a federal judge having an interest in her own case bears little, if any, relationship to this case.[31] Grossman attempts to personalize this issue in a demeaning way to the tribunal and the district court rightfully rejected this argument in denying Grossman's motion to withdraw the reference.

E. *The Asserted "Misstatements of the Record" by the Bankruptcy Judge Do Not Support Recusal*

[46] As further evidence of bias, Grossman raises the fact that the Sanctions Opinion mentions that Grossman had a 40 percent contingency interest in the Gordon Claim (reduced to 30 percent after his pro hac vice privileges were withdrawn by the District Court) and this interest was not disclosed in the pro hac vice motion. Grossman believes this was intended to create a "false impression of illegality." Appellant Principal Br. at 27. The record shows that the Bankruptcy Judge ultimately concluded this fee arrangement was part of what led to Grossman's actions. He would not be paid any legal fees if he did not successfully pursue the Gordon Claim. The statements in the opinion about the fee arrangement are factually correct and Grossman ascribes to them motives that the record cannot support.

Another asserted misstatement by the Bankruptcy Judge in the record is in the Supplemental Sanctions Opinion, in which the Bankruptcy Judge commented on Grossman's characterization (in a recusal motion and reply) of her previously discussed ***385** attempt to settle the sanctions issue. The decision stated that "[t]he exchange cited to by Grossman was not as he has characterized it to be." Supp. Sanctions Op. at 6 & 7. Grossman claims that this cannot be so because he directly quoted the transcript. But the recusal motion did more than quote the transcript, and included this statement of what occurred after the colloquy regarding the settlement: "At that point, the Bankruptcy Judge abruptly left the Bench, in anger over attorney Grossman's response that she had required over his repeated objections." Mot. by Att'y Dennis Grossman *Pro Se* to Recuse Bankruptcy Judge at 5,

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In re Royal Manor Mgmt., Inc., No. 08–50421, ECF No. 994. Since it is more than possible that the Bankruptcy Judge was referencing this statement and this characterization is not reviewable anywhere in the appellate record, her general statement cannot be a basis for a determination of bias. Again, in his reply brief to the motion to recuse, Grossman re-emphasizes the same point: "[the Bankruptcy Judge's] anger at attorney Grossman was obvious and undisputed." Reply in Support of Mot. by Att'y Dennis Grossman *Pro Se* to Recuse Bankruptcy Judge at 3, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 998. The Trustee did not dispute this argument for a specific reason and that reason was not his agreement with Grossman's characterization. As stated in the Trustee's short response brief: "Mr. Grossman's Motion to Recuse is replete with statements that are inaccurate, unprofessional and disrespectful. The Trustee will not 'take the bait' and therefore has chosen not to individually address his outlandish statements." The Liquidation Trustee's Br. in Opposition to Dennis Grossman's Mot. to Recuse Bankruptcy Judge Shea–Stonum in Sanctions Proceedings at 2 n. 3, *In re Royal Manor Mgmt., Inc.,* No. 08–50421, ECF No. 996. The characterization of the Judge's "anger" as "undisputed" is disingenuous at best.

The next asserted misstatement is that the Bankruptcy Judge referred to the "substantial contribution" settlement question to Trustee counsel as a "general inquiry regarding settlement." However, the record is cited in the Bankruptcy's Judge's decision and there is no intentional misstatement. The term "general inquiry" is a matter of reasonable interpretation—as is so many of Grossman's concerns—and is not a reason to find bias sufficient to justify recusal.

The next asserted misstatement ultimately is an argument about semantics that misses the point of the Bankruptcy Judge's concern. The Supplementary Sanctions Opinion discussed Grossman's objection to the Gertrude Gordon settlement. He states this was not an objection to the settlement, but instead, in essence, an attempt to obtain comfort type language that such settlement would not lead to further sanctions against him. Grossman believes the Bankruptcy Judge misstated the record by stating he opposed or objected to the settlement itself. The reality is Grossman filed an objection to approval of the settlement without specific language in the order that he wanted. The record is clear as to why he objected, which as discussed elsewhere, was based on a frivolous argument. It is of no moment that he was not objecting to the specific terms of the settlement itself. His objection required a further hearing and expense for the Trustee. The statement that Grossman objected to the Gertrude Gordon settlement is not inaccurate.

The next asserted misstatement is that the Bankruptcy Judge created a "false impression of repetitiveness" by stating in her Supplemental Sanctions Opinion that Grossman had filed 3 opposition responses to the Gertrude Gordon settlement motion, ***386** which were characterized as "nothing more than a restatement of prior arguments made in prior filings." Supp. Sanctions Op. at 6. Grossman states he was responding to three separate revised orders. First, the Bankruptcy Judge ultimately found Grossman lacked standing for any of the objections. Second, all the filings do include the same essential argument with specific comments on various iterations of proposed orders. The third response was filed the morning of the hearing. The Bankruptcy Judge was entitled to conclude these filings were repetitive, particularly since the objection itself was frivolous.

Next, Grossman asserts that the Bankruptcy Judge gave an appearance that Grossman's filings were excessive by noting he had filed a 46–page brief in opposition to the supplemental sanctions motion, but failed to mention the Trustee's motion was 45 pages. However, Grossman takes the comment out of its context. The Judge noted in the same paragraph that Grossman later, on January 13, 2013, filed an "opposition as a matter of right" to the reply brief of the Trustee that repeated arguments in the 46–page brief. Grossman mischaracterizes the record with this example and fails to state the Judge's actual concerns in her Supplemental Sanctions Opinion. Grossman's comparison with the Trustee's brief is a straw man argument.

Finally, Grossman states the Bankruptcy Judge misstated the record in her Supplemental Sanctions Opinion by indicating that Grossman "filed a motion to strike the Liquidation Trustee's proposed findings of fact and conclusions of law." Supp. Sanctions Op. at 7. Grossman had moved to strike parts of the findings of fact and conclusions of law because, in his view, the findings and conclusions addressed issues previously determined through the first sanctions hearing and the Judge had ruled those issues "closed." This statement in the Supplemental Sanctions Opinion, for what it is worth, is not completely correct. However, more salient to the decision is the Judge's determination that the motion to strike, regardless of the breadth, "has no basis in law or fact." *Id.* The Bankruptcy Judge continued: "It appears to this Court to be merely reflective of Grossman's inability to let pass any opportunity to reiterate and restate arguments that have

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already been fully briefed." *Id.* at 7–8. The Judge cited the relevant documents from the record and the decision showed no intention to stray from the record. Moreover, the notion that the Bankruptcy Judge, when deliberating sanctions, could not consider any past history because the previous proceeding was "closed" is itself an unnecessary vexatious argument.

Grossman characterizes these as an "extraordinary series of record misstatements" which showed bias indicating recusal is appropriate. For the reasons just detailed, the statements mostly represent exaggerations and mischaracterizations of the record by Grossman or nonmaterial factual errors. None of these statements, individually or in the aggregate, demonstrates bias which justified recusal.

XI. *The Orders Relating to the Trustee's Attempt to Execute Upon the Judgment against Grossman Were Not an Abuse of Discretion*

[47] Grossman argues that the Trustee's service of the requests for post-judgment discovery was improper because a subpoena or other formal process was required. Federal Rule of Civil Procedure 69(a)(2), applicable to this contested matter by Federal Rules of Bankruptcy Procedure 7069 and 9014, provides: "In the aid of judgment or execution, the judgment creditor or a successor in interest whose ***387** interest appears of record may obtain discovery from any person—including the judgment debtor—*as provided in these rules* or by the procedure of the state where the court is located." (Italics added). Neither Federal Rule of Civil Procedure 5 nor Federal Rule of Bankruptcy Procedure 9014(b) requires a subpoena and the regular mail service Grossman received was sufficient. The court maintained jurisdiction over the post-confirmation Liquidation Trust which includes liquidating this asset. All judgments which would benefit the Trust's beneficiaries must be attempted to be enforced to complete these Chapter 11 cases. Even if that were not true, Grossman has submitted himself to the jurisdiction of the bankruptcy court and the Trustee is not required to re-establish personal jurisdiction over Grossman in order to pursue discovery. *See N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir.1987) (federal courts maintain jurisdiction to enforce a judgment on appeal if it is not stayed, but may not alter or expand the judgment).

[48] **[49]** Grossman argues that "fundamental fairness" should require staying discovery because of delays in adjudicating his sanctions appeal. However, the procedure for any party to seek a stay pending an appeal of a judgment is mandatory. *See* Fed. R. Bankr.P. 8005 ("A motion for a stay of the judgment, order or decree of a bankruptcy judge ... or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.... A motion for [stay pending appeal] ... may be made to the ... bankruptcy appellate panel, but the motion shall show why the relief ... was not obtained from the bankruptcy judge.")[32] See also Fed. R. Bankr.P. 7062 ("[T]he appellant may obtain a stay by supersedeas bond...."). Additionally, as a matter of "fundamental fairness", delay in post-judgment discovery delays the collection of the judgment and, in this instance, the ability to distribute those funds to the beneficiaries of the Liquidation Trust. Grossman also argues the Trustee's retention of special counsel will force him to respond to discovery in three different venues: Ohio, Florida and New York. However, the bankruptcy court was within its discretion to determine that special counsel was needed to collect a judgment that the Trustee believed Grossman was not going to willingly pay. Even assuming Grossman had standing to object to the retention of special counsel without being a Trust beneficiary, having no assurance Grossman will pay the judgment willingly, Grossman's challenge to the amount of effort the Trustee deems necessary to collect it is unconvincing.

Grossman argues the order compelling him to appear at the debtor's examination was invalid. However, this type of examination is an entitlement of a judgment creditor pursuant to Ohio Revised Code § 2333.09 and the Bankruptcy Judge's authority to apply this Ohio statute is found in Federal Rule of Civil Procedure 69(a)(2).

[50] Grossman raises as error the Bankruptcy Judge's refusal to issue a protective order. Grossman was concerned that private financial and tax information could be disclosed. The bankruptcy court reasoned Grossman could redact account numbers and social security numbers and, moreover, the discovery would not be filed with the bankruptcy court. Grossman argues that documents could be filed later. However, Grossman may address that issue with any other tribunal in which this collection matter may land. As far as ***388** documents being shared with third parties, Grossman never proposed in any motion a specific list of parties to whom access to the documents would be appropriately limited. The Bankruptcy Judge was within her discretion to decline to issue a protective order.

Grossman argues that the interrogatories exceed the number allowed without leave of court. Federal Rule of Civil Procedure 33(a)(1) limits interrogatories to 25, "including

all discrete subparts" without leave of court or stipulation. The court found the interrogatories were within 25, but regardless of this finding, would have allowed the greater number. This determination was within the bankruptcy court's reasonable discretion. *See Harhara v. Norville,* 2007 WL 2897845 (E.D.Mich. Sept. 25, 2007) (related subparts may be treated as part of the primary question and not a "discrete subpart.").

CONCLUSION

The orders appealed from in both of Grossman's appeals are affirmed.

All Citations

525 B.R. 338

Footnotes

1 As the issues in these appeals largely are about sanctions against Grossman for his filings, this decision refers to filings by Grossman, whether they were on behalf of his clients or, later, pro se.

2 In the Motion to Vacate, the omitted portion of the proof of claim is included as an exhibit.

3 Grossman objected to the portion of the fee application related to the Gordon Claim litigation, arguing the fees must be judged at the conclusion of the litigation. The objection went through a litany of concerns as to how Brouse addressed various filings pertaining to the Gordon Claim. Through the objection, Grossman, in essence, took another opportunity to argue issues related to the New Claim Motion and the Amended Claim Motion.

4 This issue had been previewed at length during the May 12, 2009 hearing.

5 The parties stipulated during the hearing that the Agreement was unambiguous and, therefore, parol evidence would not be considered concerning the meaning of the Agreement. As to the merits of the Gordon Claim, the evidence outside the Agreement is only relevant to Grossman's alternative theories of recovery.

6 The appellate process concerning the bankruptcy court sanctions (the First Appeal) and post-judgment collection of the sanctions judgment (the Second Appeal) is addressed in separate sections. The district court sanction determination discussed in this section is part of what occurred during the appeal of the disallowance of the Gordon Claim. Although they provide important background, these sanctions are not part of the present appeals.

7 Ohio Rule of Professional Conduct 3.3(a)(1) states that "[a] lawyer shall not *knowingly* do any of the following: ... make a false statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer[.]"

8 Judge Gaughan quotes the Preamble of § 5:

> Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. Although a lawyer, as a citizen, has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements

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that tend to lessen public confidence in the legal system. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

9 Ohio Rule of Professional Conduct 3.5(a)(6) states that "[a] lawyer shall not do any of the following ... engage in undignified or discourteous conduct that is degrading to a *tribunal*."

10 The decision found:

> Grossman, in his motion to disqualify, has accused the Bankruptcy Court of the following: having a vested interest in ruling against the Gordons to validate a "hasty and improper approval of a deceptive disclosure statement filed by [the Bankruptcy Court's] appointee attorney"; approving a "deceptive disclosure statement without checking its figures and without giving interested parties adequate time to check its erroneous figures"; having "an interest in disparaging the Gordons, their claim and their counsel as much as possible"; "wrongfully prejudg[ing] the credibility and character of the Gordons and their counsel"; "wrongfully prejudg[ing] the alleged character and professionalism of trustee's attorney Marc Merklin (whom Her Honor appointed) where attorney Merklin's unclean hands is a material issue"; and having a local bias.

Mem. of Op. and Order at 9–10, *Gordon v. Wehrle,* Nos. 5:09 CV 2687 and 5:09 CV 1506 (N.D.Ohio Dec. 17, 2009), ECF No. 32.

11 The decision also rejected Grossman's attempt to revisit issues related to the denial of the New Claim Motion, which Judge Gaughan addressed in her prior decision.

12 The Sixth Circuit stayed the mandate to allow Grossman to file a writ of certiorari to the Supreme Court. Grossman argues that the decision of the Sixth Circuit to stay the mandate shows his arguments were not frivolous. Without knowing the reasoning behind that order, the order cannot be considered as evidence of his arguments being meritorious.

13 On November 3, 2009, Mucklow moved to withdraw from the case. That motion was granted without objection. Grossman has acknowledged, for purposes of sanctions, that he drafted all the relevant documents and is responsible for them.

14 The asserted deceptiveness was that the Gordon Claim was not included in the description or quantification of the unsecured claims in the amended disclosure statement filed in September 2008 instead describing $58,247 in filed unsecured claims. At that particular period of time, the Gordon Claim had not yet been disallowed. Based upon that omission, Grossman accused the Committee counsel of filing a fraudulent disclosure statement.

15 Grossman also made an oral motion to disqualify the Bankruptcy Judge at the sanctions hearing on January 15, 2013, which was denied. He asserted, without any authority, that the filing of his motion to withdraw the reference divested the bankruptcy court of jurisdiction. He alternatively asked the Bankruptcy Judge to continue the hearing until after the district court decided the motion to withdraw the reference.

16 Grossman argued that the reference to a singular "motion" by the Trustee was being used to thwart Grossman's argument that the sanctions process was being abused by the Trustee through six (6) separate sanctions motions. (The motion actually defines "Sanctions Motion" to include multiple filings). Grossman argued that the language in the order stating it did not constitute a release of "all claims, liabilities and causes of action in relation to the Gordons' claim" potentially exposed him to further sanctions liability.

17 $150,000 was based on fees of about $149,000 related to work on the Gordon Claim described in the sanctions motion and then the Bankruptcy Judge rounded the figure to $150,000 based on additional filings and work performed by Trustee counsel. The supplemental sanctions ultimately included all itemized fees

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of the Committee and Trustee for work related to the Gordon Claim, not including fees for work performed at the appellate level.

18 In her decision denying Grossman's motion to withdraw the reference, the district court also determined that the bankruptcy court had statutory authority under 28 U.S.C. § 1927 and rejected Grossman's argument that constitutional authority was lacking due to *Stern v. Marshall,* —— U.S. ——, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).

19 Initially the Trustee also sought fees for the appellate work, but later amended his request to not include those fees. *See Webster v. Sowders,* 846 F.2d 1032, 1040 (6th Cir.1988) ("the sanctions statutes, the rules and the case law provide for fairly clear separation between conduct on appeal sanctionable by an appellate court and conduct in the trial court sanctionable by the trial court."). While Grossman is correct that the Trustee discussed Grossman's appeals in support of his request for sanctions, the Trustee did not ultimately seek and the Bankruptcy Judge did not award the Trustee any fees and expenses incurred for time and expenses incurred in defending the appeals.

20 All of the fees in question were approved by the bankruptcy court as reasonable compensation for actual and necessary legal services through the Committee's and Trustee's counsel's fee applications filed and served throughout the pendency of the case. *See* 11 U.S.C. § 330. In addition, the bankruptcy court in its Sanctions Opinion found that the Trustee's fees were "proportionate to controversies that Grossman chose to frame." Sanctions Op. at 12. In the Supplemental Sanctions Opinion, the bankruptcy court determined that the hourly rates of counsel for the Trustee were reasonable. In addition, the bankruptcy court determined that the Trustee met any burden to show how the costs related to the sanctionable conduct, calculating the amounts and identifying the bases for the charges. The bankruptcy court specifically found the testimony of the Trustee and his counsel credible. The Trustee submitted detailed fee applications as evidence during the sanctions hearings. This Panel finds the record supports all of the sanctions, independent of the separate orders approving fee applications to be paid by the Trust.

21 Grossman argues that inherent authority and § 105 cannot be used when Bankruptcy Rule 9011 was not available because the Trustee failed to follow the procedures under Rule 9011. The Sixth Circuit has rejected this argument. *First Bank of Marietta v. Hartford Underwriters Ins. Co.,* 307 F.3d 501, 510–15 (6th Cir.2002).

22 At the hearing on the Trustee's objection to the allowance of the Gordon Claim, the bankruptcy court noted that no explanation was given as to what P.S. Realty is.

23 Grossman also cites *Federal Deposit Ins. Corp. v. Tennessee Wildcat Svcs., Inc.,* 839 F.2d 251 (6th Cir.1988) but it concerns notes covered by the Uniform Commercial Code, the precise form of signatures for individual liability for what are claimed to be notes signed by corporate agents, and when the court could look beyond those signatures. In any event, the bankruptcy court's determination that the Agreement cannot reasonably be read to show corporate liability was within her discretion and well-supported.

24 Grossman also provides examples from outside the Agreement, but, as noted, he stipulated at the hearing that the Agreement was clear and unambiguous and parol evidence was not needed.

25 The Trustee argues that, since this motion was a renewal of the original sanctions motion, any error is harmless. See Fed.R.Civ.P. 61 (applicable by Fed. R. Bankr.P. 9005) ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); 28 U.S.C. § 2111 ("On the hearing of any appeal ... the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). Specifically, the Trustee takes the position he could have proceeded for all the sanctions awarded based on the original sanctions motion, the supplement to that motion and the court's show cause sanctions order. The renewal of

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the sanctions motion concerned fees and filings subsequent to the original sanctions decision, but the Panel agrees the error is harmless because the renewed sanctions motion was not truly a new motion.

26 Grossman has argued that the bankruptcy court's retroactive changing of the filing deadline was an ex post facto violation because 28 U.S.C. § 1927 has "penal and quasi-criminal" aspects to it. *Stalley ex rel. U.S. v. Mountain States Health Alliance,* 644 F.3d 349, 352 (6th Cir.2011) (sanctions under § 1927 are in part punitive). Since this Panel finds the one-day delay either harmless error or excusable neglect, the point is moot. Also, the attorney discipline cases cited address lack of notice or substantive legal standards being changed after the fact. *See, e.g. In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The other case cited, *Stogner v. California,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), addresses the resurrection of an otherwise time-barred criminal prosecution. The deadline in this case did not change substantive law, or a statute of limitation or even a claim-processing deadline; it was imposed by an order providing for the reactivation of the already pending issue of sanctions after the appeals on the merits of the Gordon Claim were disposed of through a final order.

27 The Gordon settlement was $50,000 but Grossman backs out $686.50 for billing on the Gordon Claim litigation prior to Grossman entering his appearance in the case.

28 Grossman also references a later conference, in which he did not participate, in which the Bankruptcy Judge generically asked the Trustee's counsel a single question about whether settlement discussions with Grossman were pending. The counsel said no and the discussion ended there. While Grossman claims he was "shocked" by this event upon later reading it in a transcript, this extremely abbreviated colloquy does not show prejudice or bias.

29 The Trustee took the position that appellate filings were relevant to establishing the vexatiousness of Grossman's course of conduct; however, none of the sanctions award includes Trustee attorney fees or expenses incurred in defending the appeals.

30 Grossman's argument in large part centers on the bankruptcy court's changing course at the outset of the Gordon Claim litigation with respect to proceeding to the merits of the Gordon Claim versus first determining the Gordon's motion to vacate the order sustaining the Trustee's objection to the Claim. Ultimately the Trustee and the Gordons resolved that issue by entering into an agreed order which granted the motion to vacate, allowing the matter to proceed to the merits of the Gordon Claim.

31 In *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), the Court held it was a denial of constitutional due process for a judge who presided over a Michigan "one-man grand jury" to subsequently preside over a contempt hearing arising out of that grand jury. In *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), the Court held it was a denial of due process for an Alabama Supreme Court Justice to rule upon an appeal concerning the bad faith refusal of a health insurer to pay a claim because that Justice was pursuing litigation in an Alabama Circuit Court for bad faith refusal to pay claims, including a class action against a health insurer. In *Williams v. Anderson,* 460 F.3d 789, 813 (6th Cir.2006), a death penalty habeas corpus decision, that panel cited *Lavoie* for the proposition that bias may include non-pecuniary factors, but ultimately held a judge need not recuse because, in his former role as a federal attorney, he received investigative reports about an organization to which the petitioner belonged. In all of these examples, the judge was involved in a former case or related litigation. Nothing of the kind exists in this record.

32 Effective December 1, 2014, the rule for staying a judgment of a bankruptcy court pending an appeal may be found in Federal Rule of Bankruptcy Procedure 8007.

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KeyCite Yellow Flag
Distinguished by v. Macias, E.D.Cal., May 3, 2017

771 F.2d 667
United States Court of Appeals,
Second Circuit.

Patricia J. KOTHE, Plaintiff-Appellee,
v.
Dr. James W. SMITH, Dr. Andrew D. Kerr, Jr., M.D., P.C., and Andrew D. Kerr, Defendants,
Dr. James W. Smith, Defendant-Appellant.

No. 1230, Docket 85–7024.
|
Argued May 22, 1985.
|
Decided Sept. 4, 1985.

Synopsis
Following settlement of medical malpractice claim after one day of trial, the United States District Court for the Southern District of New York, Robert W. Sweet, J., directed physician to pay $1,000 to patient's attorney, $1,000 to patient's medical witness, and $480 to the clerk of court, and physician appealed. The Court of Appeals, Van Graafeiland, Circuit Judge, held that: (1) failure of physician to offer to settle claim for $20,000, as federal District Court had urged during pretrial conference, did not warrant imposition of sanctions against physician alone after claim was settled for $20,000 after one day of trial, and (2) fact that physician's attorney changed his evaluation and decided to settle claim after listening to patient's testimony during first day of trial did not warrant imposition of sanctions against physician alone.

Remanded with instructions to vacate.

Procedural Posture(s): On Appeal.

West Headnotes (6)

[1] **Compromise, Settlement, and Release** Duress

The law does not sanction efforts by trial judges to effect settlements through coercion. Fed.Rules Civ.Proc.Rule 16, 28 U.S.C.A.

14 Cases that cite this headnote

[2] **Compromise, Settlement, and Release** Duress

Pressure tactics by trial judge to coerce settlement simply are not permissible. Fed.Rules Civ.Proc.Rule 16, 28 U.S.C.A.

15 Cases that cite this headnote

[3] **Federal Civil Procedure** Pre-Trial Conference

Rule 16 was not designed as a means for clubbing the parties, or one of them, into an involuntary compromise of the litigation. Fed.Rules Civ.Proc.Rule 16, 28 U.S.C.A.

14 Cases that cite this headnote

[4] **Federal Civil Procedure** Settlement of case

Rule 16(c)(7), designed to encourage pretrial settlement discussions, was not intended to impose settlement negotiations on unwilling litigants. Fed.Rules Civ.Proc.Rule 16(c)(7), 28 U.S.C.A.

11 Cases that cite this headnote

[5] **Federal Civil Procedure** Effect

Failure of physician to offer to settle malpractice claim for $20,000, as federal district court had urged, did not warrant imposition of sanctions against physician alone after claim was settled for $20,000 after one day of trial, in that physician had never received a demand for settlement of less than $50,000 or indication from patient that offer somewhere in vicinity of $20,000 would at least be given careful consideration. Fed.Rules Civ.Proc.Rule 16(f), 28 U.S.C.A.

8 Cases that cite this headnote

[6] **Federal Civil Procedure** Effect

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Fact that physician's attorney changed his evaluation and decided to settle medical malpractice claim against physician for $20,000 after listening to patient's testimony during first day of trial did not warrant imposition of sanctions against physician alone, where federal district court had warned the parties during pretrial conference that sanctions would be imposed against dilatory party if claim were settled for a sum between $20,000 and $30,000 after trial had begun. Fed.Rules Civ.Proc.Rule 16(f), 28 U.S.C.A.

11 Cases that cite this headnote

Attorneys and Law Firms

***668** Alan W. Clark, Levittown, N.Y. (Blume, Easton & Clark, Levittown, N.Y., of counsel), for plaintiff-appellee.

Michael F. Close, New York City (Roger P. McTiernan and Barry, McTiernan & Moore, New York City, of counsel), for defendants/defendant-appellant.

Before LUMBARD, VAN GRAAFEILAND and PIERCE, Circuit Judges.

Opinion

VAN GRAAFEILAND, Circuit Judge:

Dr. James Smith appeals from a judgment of the United States District Court for the Southern District of New York (Sweet, J.), which directed him to pay $1,000 to plaintiff-appellee's attorney, $1,000 to plaintiff-appellee's medical witness, and $480 to the Clerk of the Court. For the reasons hereinafter discussed, we direct that the judgment be vacated.

Patricia Kothe brought this suit for medical malpractice against four defendants, Dr. Smith, Dr. Andrew Kerr, Dr. Kerr's professional corporation, and Doctors Hospital, seeking $2 million in damages. She discontinued her action against the hospital four months prior to trial. She discontinued against Dr. Kerr and his corporation on the opening day of trial.

Three weeks prior thereto, Judge Sweet held a pretrial conference, during which he directed counsel for the parties to conduct ***669** settlement negotiations. Although it is not clear from the record, it appears that Judge Sweet recommended that the case be settled for between $20,000 and $30,000. He also warned the parties that, if they settled for a comparable figure after trial had begun, he would impose sanctions against the dilatory party. Smith, whose defense has been conducted throughout this litigation by his malpractice insurer, offered $5,000 on the day before trial, but it was rejected.

Although Kothe's attorney had indicated to Judge Sweet that his client would settle for $20,000, he had requested that the figure not be disclosed to Smith. Kothe's counsel conceded at oral argument that the lowest pretrial settlement demand communicated to Smith was $50,000. Nevertheless, when the case was settled for $20,000 after one day of trial, the district court proceeded to penalize Smith alone. In imposing the penalty, the court stated that it was "determined to get the attention of the carrier" and that "the carriers are going to have to wake up when a judge tells them that they want [sic] to settle a case and they don't want to settle it." Under the circumstances of this case, we believe that the district court's imposition of a penalty against Smith was an abuse of the sanction power given it by Fed.R.Civ.P. 16(f).

[1] **[2]** Although the law favors the voluntary settlement of civil suits, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir.1983), it does not sanction efforts by trial judges to effect settlements through coercion. *Del Rio v. Northern Blower Co.*, 574 F.2d 23, 26 (1st Cir.1978) (*citing Wolff v. Laverne, Inc.*, 17 A.D.2d 213, 233 N.Y.S.2d 555 (1962)); *see MacLeod v. D.C. Transit System, Inc.*, 283 F.2d 194, 195 n. 1 (D.C.Cir.1960); 89 C.J.S., Trial, § 577 at 355. In the *Wolff* case, cited with approval in *Del Rio, supra,* the Court said:

We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law.

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17 A.D.2d at 215, 233 N.Y.S.2d 555. In short, pressure tactics to coerce settlement simply are not permissible. *Schunk v. Schunk,* 84 A.D.2d 904, 905, 446 N.Y.S.2d 672 (1981); *Chomski v. Alston Cab Co.,* 32 A.D.2d 627, 299 N.Y.S.2d 896 (1969). "The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged." *Brooks v. Great Atlantic & Pacific Tea Co.,* 92 F.2d 794, 796 (9th Cir.1937).

[3] **[4]** Rule 16 of the Fed.R.Civ.P. was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise. *See Padovani v. Bruchhausen,* 293 F.2d 546, 548 (2d Cir.1961); Clark, *To An Understanding Use of Pre-Trial,* 1961, 29 F.R.D. 454, 456; Smith, *Pretrial Conference—A Study of Methods,* 1961, 29 F.R.D. 348, 353; Moskowitz, *Glimpses of Federal Trials and Procedure,* 1946, 4 F.R.D. 216, 218. Although subsection (c)(7) of Rule 16, added in the 1983 amendments of the Rule, was designed to encourage pretrial settlement discussions, it was not its purpose to "impose settlement negotiations on unwilling litigants." *See Advisory Committee Note,* 1983, 97 F.R.D. 205, 210.

[5] We find the coercion in the instant case especially troublesome because the district court imposed sanctions on Smith alone. Offers to settle a claim are not made in a vacuum. They are part of a more complex process which includes "conferences, informal discussions, offers, counterdemands, more discussions, more haggling, and finally, in the great majority of cases, a compromise." J. & D. Sindell, *Let's Talk Settlement* 300 (1963). In other words, the process of settlement is a two-way street, and a defendant should not be expected to bid against himself. In the instant case, Smith never received a demand of less than $50,000. Having received no indication from Kothe that an ***670** offer somewhere in the vicinity of $20,000 would at least be given careful consideration, Smith should not have been required to make an offer in this amount simply because the court wanted him to.

[6] Smith's attorney should not be condemned for changing his evaluation of the case after listening to Kothe's testimony during the first day of trial. As every experienced trial lawyer knows, the personalities of the parties and their witnesses play an important role in litigation. It is one thing to have a valid claim; it is quite another to convince a jury of this fact. It is not at all unusual, therefore, for a defendant to change his perception of a case based on the plaintiff's performance on the witness stand. We see nothing about that occurrence in the instant case that warranted the imposition of sanctions against the defendant alone.

Although we commend Judge Sweet for his efforts to encourage settlement negotiations, his excessive zeal leaves us no recourse but to remand the matter with instructions to vacate the judgment.

All Citations

771 F.2d 667, 2 Fed.R.Serv.3d 864

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KeyCite Yellow Flag
Not Followed as Dicta Halmos v. Insurance Co. of North America, S.D.Fla., May 2, 2011

405 F.3d 257
United States Court of Appeals, Fifth Circuit.

Seth A. BECKER, Plaintiff–Appellee,
v.
TIDEWATER, INC., et al., Defendants.
Tidewater, Inc.; Cliffs Drilling Co.; R&B Falcon Drilling USA, Inc.; Twenty Grand Offshore, Inc.; Tidewater Marine LLC; Pental Insurance Company, Ltd.; Certain Underwriters at Lloyds Insurance Co.; Subscribing to Risk No. LE010620O, Defendants–Appellees,
v.
Baker Hughes, Inc.; Baker Oil Tools, Inc., a division of Baker Hughes Oilfield Operations, Inc., Defendants–Appellants.

No. 04–30243
|
March 30, 2005.

Synopsis
Background: Injured employee sued employer under Jones Act, and, in the alternative, under Longshore and Harbor Workers' Compensation Act (LHWCA) and for negligence. Following reversal of jury verdict in favor of employee on Jones Act claims, and remand, 335 F.3d 376, the United States District Court for the Western District of Louisiana, Richard T. Haik, Sr., Chief Judge, granted employee leave to amend complaint and reassert declaration asking for bench trial. Employer appealed.

[Holding:] The Court of Appeals, Edith Brown Clement, Circuit Judge, held that employer had no right to jury trial on employee's LHWCA and negligence claims.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] Federal Courts Pleading

District court's order, granting employee leave to amend his complaint and reassert declaration identifying his claim as admiralty or maritime claim and requesting bench trial, would be reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rules 9(h), 39, 28 U.S.C.A.

13 Cases that cite this headnote

[2] Jury Workers' compensation

Offshore oil well operator had no right to jury trial on employee's LHWCA and negligence claims, after Court of Appeals had reversed jury verdict in favor of employee on his Jones Act claim and remanded for further consideration of his LHWCA and negligence claims, inasmuch as post-remand LHWCA and negligence claims did not alter historical exclusion of jury trials for admiralty suits, and employee never asserted any basis of jurisdiction that would provide employer with Seventh Amendment right to jury trial. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 38(e), 28 U.S.C.A.

18 Cases that cite this headnote

[3] Jury Labor and Employment

District court did not abuse its discretion in refusing to provide offshore oil well operator with jury trial on employee's LHWCA and negligence claims, after Court of Appeals had reversed jury verdict in favor of employee on his Jones Act claim and remanded for further consideration of his LHWCA and negligence claims, given that Court of Appeals had not required jury trial in remand order, and none of employee's available claims post-remand provided such right. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 38(e), 28 U.S.C.A.

3 Cases that cite this headnote

[4] Federal Courts Matters of Substance

> Court of Appeals had no power to review employer's argument that district judge displayed prejudice in favor of employee, and that LHWCA case thus should be transferred to another district judge in event of bench trial, where employee failed to raise such argument below. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; 28 U.S.C.A. § 144.
>
> 5 Cases that cite this headnote

Attorneys and Law Firms

***258** James Parkerson Roy (argued), Domengeaux, Wright, Roy & Edwards, Lafayette, LA, for Becker.

***259** Cliffe E. Laborde, III (argued), James D'Arensbourg Hollier, Laborde & Neuner, Lafayette, LA, for Tidewater, Inc., Twenty Grand Offshore, Inc., Tidewater Marine LLC, Pental Ins. Co. and Certain Underwriters at Lloyds.

Delos Edward Flint, Jr., Fowler, Rodriguez & Chalos, New Orleans, LA, for Cliffs Drilling Co. and R&B Falcon Drilling USA, Inc.

Edwin G. Preis, Jr., Jennifer Elmer Michel (argued), Tammy B. Scelfo, Preis, Kraft & Roy, Lafayette, LA, for Baker Hughes, Inc. and Baker Oil Tools, Inc.

Appeal from the United States District Court for the Western District of Louisiana.

Before JONES, WIENER, and CLEMENT, Circuit Judges.

Opinion

EDITH BROWN CLEMENT, Circuit Judge:

[1] As a result of his horrific injuries suffered aboard the rig *M/V REPUBLIC TIDE,* plaintiff-appellee Seth Becker filed suit against defendant-appellee Tidewater, Inc., the owner of the rig, defendant-appellant Baker Hughes, Inc. ("Baker Hughes"), Becker's employer, and defendant-appellee R&B Falcon Drilling USA, the rig's operator. *See Becker v. Tidewater, Inc.,* 335 F.3d 376, 381–86 (5th Cir.2003) ("*Becker I*") (recounting the factual and procedural history). Becker asserted claims under the Jones Act, under which Becker asked for a jury trial. Becker also brought, in the alternative, claims under the Longshore Harbor Workers' Compensation Act ("LHWCA"), as well as negligence claims under general maritime law. The jury found that Becker was a seaman and subsequently reached a verdict in his favor for $43 million in damages for violation of the Jones Act. On appeal, a panel of this Circuit ruled that Becker was not a seaman and thus could have no remedy under the Jones Act, reversing and remanding for further proceedings regarding only the LHWCA and negligence claims. *Id.* at 393. On remand, the district court granted Becker leave to amend his complaint and "reassert" a Rule 9(h) declaration, under which he asked for a bench trial for his remaining claims. Baker Hughes objects, and has filed this interlocutory appeal. We review the district court's order for abuse of discretion. *See* Fed.R.Civ.P. 39; *Hernandez v. Hill Country Tel. Co-op., Inc.,* 849 F.2d 139, 144–45 (5th Cir.1988).

[2] Baker Hughes has no right to a jury trial. Becker's post-*Becker I* LHWCA and negligence claims do not alter the historical exclusion of jury trials for admiralty suits. Importantly, Becker never asserted diversity jurisdiction, or any other basis of jurisdiction which would provide Baker Hughes a right to a jury trial under the Seventh Amendment. *See Rachal v. Ingram Corp.,* 795 F.2d 1210, 1216 (5th Cir.1986). Despite Baker Hughes's rhetoric that because factual diversity exists the right to a jury trial vests in Baker Hughes, it is well settled that the plaintiff is master of his complaint, and Becker has the exclusive power to invoke diversity jurisdiction. *See, e.g., Allen v. R&H Oil & Gas Co.,* 63 F.3d 1326, 1335 (5th Cir.1995). By failing to do so, the possible factual existence of diversity between parties does not give rise to the legal existence of diversity jurisdiction. Thus, Baker Hughes has no constitutionally or statutorily based right to a jury trial, and Baker Hughes cannot use the Federal Rules to create such a right where one does not already exist. FED.R.CIV.P. 38(e) ("These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim.").

***260** **[3]** In *Becker I,* this Court provided for the scope of the proceedings on remand:

> [T]he district court must reevaluate plaintiff's claims in light of the rights and remedies available to LHWCA plaintiffs with respect to both liability and damages.

335 F.3d at 393. Simply put, this Court did not require a jury trial for *Becker II,* and the district court did not abuse its discretion in refusing to provide one where none of Becker's available claims post-*Becker I* provided such a right.

[4] Finally, Baker Hughes conclusionally alleges, for the first time on appeal, that the district judge displayed prejudice in favor of Becker, urging that if a bench trial is to be held, the case should be transferred to another district judge. Apparently at the request of the parties, the district judge appears to have mediated the settlement conference, [1] in the course of which he would have gained significant knowledge of the parties' settlement positions. When the settlement negotiations failed, the judge was faced with the possibility of also becoming the trier of fact. Indeed, it was eminently reasonable to expect such an occurrence—had the jury found Becker to be a longshoreman rather than a seaman, the judge would have been the fact finder in a non-jury trial. This role would have been inappropriate given his discrete knowledge of the parties' evaluation of their respective financial positions on settlement. After that possibility materialized, he should have been recused, either by offering to do so *sua sponte* or by granting a recusal motion filed by a party. *See, e.g., Woodson v. Surgitek, Inc.,* 57 F.3d 1406, 1413 n. 10 (5th Cir.1995) (noting that the district court judge recused himself in similar circumstances); *Tucker by Tucker v. Calloway County Bd. of Educ.,* 136 F.3d 495, 503 (6th Cir.1998) (same). However, we have no power to review Baker Hughes's argument because it failed to raise the issue below, let alone meet the stringent procedural requirements set forth in 28 U.S.C. § 144. *See also Horton v. Bank One, N.A.,* 387 F.3d 426, 435 (5th Cir.2004) ("Arguments not raised in the district court cannot be asserted for the first time on appeal.") (quoting *In re Liljeberg Enters., Inc.,* 304 F.3d 410, 427 n. 29 (5th Cir.2002)).

The decision of the district court is AFFIRMED.

All Citations

405 F.3d 257, 2005 A.M.C. 1113, 61 Fed.R.Serv.3d 432

Footnotes

1 *See* Hearing Transcripts, No. 99–CV–1198 (October 11, 2001).

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Distinguished by S.T. v. 1515 Broad Street, LLC, N.J.Super.A.D., August 6, 2018

271 N.J.Super. 261
Superior Court of New Jersey,
Appellate Division.

Robin PESKIN, a/k/a Robin Shulman, Plaintiff–Respondent,
v.
Roger PESKIN, Defendant–Appellant.

Argued Nov. 30, 1993.
|
Decided March 3, 1994.

Synopsis
Divorce was sought. The Superior Court, Chancery Division, Family Part, Essex County, entered judgment of divorce incorporating settlement agreement and denied husband's motion to vacate judgment. Husband appealed. The Superior Court, Appellate Division, Michels, P.J.A.D., held that judge coerced settlement agreement.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (6)

[1] **Compromise, Settlement, and Release** Role, Authority, and Discretion of Court

Court's role in effecting settlement must always be exercised appropriately and with full recognition that court must remain fair and impartial in order to ensure that settlement is wrought by parties, not court.

5 Cases that cite this headnote

[2] **Compromise, Settlement, and Release** Contractual Nature and Requisites in General

Settlement between parties to lawsuit is contract like any other contract and must be voluntarily made and fairly entered into.

34 Cases that cite this headnote

[3] **Compromise, Settlement, and Release** Role, Authority, and Discretion of Court

Court should not work to coerce or compel litigant to make settlement.

4 Cases that cite this headnote

[4] **Compromise, Settlement, and Release** Particular Grounds of Invalidity or Unenforceability

Compromise, Settlement, and Release Capacity of parties

Settlement agreement must be set aside if it is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto.

32 Cases that cite this headnote

[5] **Divorce** Validity of Assent

Trial judge coerced husband's settlement of divorce case, even though judge possibly became frustrated by husband's failure to make decision and insistence on questioning terms of settlement and ability to satisfy financial obligation imposed by terms; judge threatened to hold husband in contempt if he stated more than "yes" or "no" in response to question whether he agreed to settlement, would consider a "no" in deciding fee application, and broke for lunch stating that case would be tried and settlement was out of husband's hands.

3 Cases that cite this headnote

[6] **Divorce** Actions and Proceedings in General

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Trial court had duty to exercise highest degree of patience and forebearance with husband who had trouble deciding whether to accept settlement.

1 Case that cites this headnote

Attorneys and Law Firms

***263** ****850** Herbert J. Stern, Roseland, argued the cause for appellant (Stern & Greenberg, attorneys; David S. Stone, of counsel; Mr. Stern, Mr. Stone and Howard D. Cohen, on the brief).

Gerald D. Miller, Jersey City, argued the cause for respondent (Miller, Meyerson, Schwartz & Corbo, attorneys; Mr. Miller, of counsel and on the brief).

Before Judges MICHELS, SKILLMAN and KESTIN.

Opinion

MICHELS, P.J.A.D.

Defendant Roger Peskin appeals from three post-judgment orders of the Chancery Division, Family Part, entered in this protracted matrimonial action involving his former wife, Robin Peskin, a/k/a Robin Shulman. The orders denied defendant's motion to vacate a final judgment of divorce and the settlement upon which it was based, denied his supplemental motion for an evidential hearing on the issues of duress and his capacity to enter into the settlement, enforced various provisions of the judgment, and awarded counsel fees to plaintiff's attorney, James P. Yudes, Esq. and to plaintiff's court-appointed guardian *ad litem,* David M. Paris, Esq.

The pivotal issue raised by this appeal is whether the trial court coerced the settlement, thereby rendering it a nullity and requiring that the final judgment of divorce and the settlement incorporated therein be vacated and set aside, and the matter remanded to the trial court for completion of the trial. Defendant contends essentially that he was suffering from severe clinical depression, he was taking powerful anti-depression medication at the time the settlement was negotiated, and he "was forced by way of a withering cross-examination conducted by the [trial court] to ***264** submit to [an] extraordinary 'settlement' which required him after a nine-year marriage, among other things, to pay equitable distribution in the amount of $525,000 in cash plus other assets, including his marital home in Short Hills, New Jersey; to purchase term [life] insurance policies totaling $500,000 on his own life payable to plaintiff at a progressively escalating cost; to pay attorney's fees and expert's fees in the amount of $250,000; and finally to pay permanent alimony of $120,000 per year to plaintiff."

This divorce action commenced in August 1988. After extensive pretrial discovery and the appointment of Mr. Paris as guardian *ad litem* for plaintiff, the trial commenced on October 17, 1991 and ended four months later on February 25, 1992, when the matter was settled in open court. The trial extended over a four-month period because it was not conducted on a continuous, day-to-day basis. In fact, the trial took place over a total of only sixteen days. The many interruptions were caused, in part, by the financially complex nature of this matter. On February 25, 1992, after the proofs dealing with the financial aspects of the divorce had been completed and the presentation of evidence with respect to plaintiff's tort claim under *Tevis v. Tevis,* 79 *N.J.* 422, 400 *A.*2d 1189 (1979), had begun, the parties settled the matter in open court. Defendant, who had been involved in extensive settlement discussions during the course of trial, later contended that the settlement was not voluntary but was the product of coercion by the trial court.

To put this issue in proper perspective, it is necessary to review in some detail the events and colloquies that took place in open court on February 24 and 25, 1992, prior to defendant's in-court agreement to settle. On February 24, 1992, after settlement discussions and immediately before plaintiff was to call her first witness with respect to the *Tevis* claim, defendant announced to the trial ****851** court that "I'd like to settle the case, but I'm concerned about my ability to meet the obligations here." After further discussion, the trial court informed defendant that "[t]here is no forced settlement in my courtroom, ever in any case" and further ***265** explained to defendant that "[t]here's no penalty for not settling" and that his failure to settle "will not affect one aspect of my decision." Defendant immediately apologized saying, "I'm sorry, I, I, I,—it's so hard for me to make a decision like this because—" The trial court interrupted defendant, advised him that he did not have to make a decision, and directed the witness to take the stand. Defendant again repeated that "I'd like to settle and I'd like to settle as long as there's some —" At this point, defendant's trial attorney, James Sharp, Esq., interrupted and stated, "There's no qualification, Roger. You either settle the case or you don't settle the case.... Do you agree to settle this case. Yes or no?" Defendant again tried to express his concern, but again was interrupted by his

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attorney who stated, “Roger, enough. Yes or no?” Defendant responded, “It's hard for me to do this because I'm not sure. I don't think I can make these—I can—I don't know if I can meet these obligations.” Without responding, the trial court then swore the witness and the trial continued.

On February 25, 1992, after completion of another witness' testimony but before plaintiff took the stand, further settlement discussions ensued in open court. At the conclusion of these discussions, the trial court asked defendant if he wanted to settle, or if another witness should be called. Defendant responded, “Okay, I'll settle the case.” The trial court thereupon asked Mr. Yudes to place the settlement on the record. While the terms of the settlement were being placed on the record and discussed by all parties, including defendant, defendant indicated that he was “having a problem” and commented, “I'm just kind of overwhelmed, that's all.” The trial court asked defendant if defendant had a question or if he wanted a drink of water. Defendant replied, “Can I just calm down because I, I, I don't feel—I'll tell you ... I haven't been able to think about all the ramifications—” Further discussion again ensued between the trial court and defendant concerning the latter's ability to obtain a mortgage to satisfy the financial obligations imposed upon him by the settlement. Finally, Mr. Sharp asked the trial court for permission to confer with Edward Snyder, Esq., defendant's lead attorney, ***266** because Mr. Sharp “would be a little bit more comfortable as I think Mr. Peskin would be if we could just ... reach out for [Mr. Snyder] ... to clarify the terms.” The trial court agreed and recessed the trial to enable defendant and Mr. Sharp to meet with Mr. Snyder, who was on trial in another courtroom in the building.

Defendant, Mr. Snyder and Mr. Sharp subsequently returned to the courtroom. Defendant advised the trial court that he “didn't finish talking ... with Mr. Snyder.” Mr. Sharp immediately informed the trial court that the only aspect of the discussion that had not been completed had nothing to do with the explanation of the terms, but concerned Mr. Snyder's apprehension about defendant's ability to answer questions that were going to be posed by the trial court regarding defendant's knowledge of the terms of the settlement and his acceptance of those terms. Mr. Sharp asked for more time to explain to defendant “what questions will be posed in that regard and why the answers must be as they should be.” The trial court gave defendant and his attorneys more time and asked them to step outside the courtroom. Shortly thereafter, defendant and his attorneys returned. Mr. Snyder then informed the trial court:

> Mr. Sharp and I have both recommended to Mr. Peskin that he accept the settlement. We're putting that on the record for obvious reasons. Mr. Peskin at this point and, and *I'm just throwing, I'm honestly throwing this in the Court's lap because I don't know what else to do, is unable to make a decision. He will not tell us yes, and he will not say reject it and go to trial.* That's all I have to say to, to Your Honor. I have nothing more—there's not, I don't know what *more time I can spend to attempt to convince Mr. Peskin.* [Emphasis added].

The trial court addressed defendant, noting that it had been led to believe that the ****852** case was being settled that morning “from words from your own mouth”, that the terms of the settlement were placed on the record, that defendant had asked to clarify certain points, and that defendant then asked to have the opportunity to talk to counsel, which opportunity was given to him. Then the following colloquy took place between the trial court and defendant:

> THE COURT: I will ask you and if you answer a word other than what I tell you to answer, *I'm going to hold you in contempt. Do we understand that?*
>
> ***267** You will just tell me very simply. If you agree to the settlement, I will then ask you a series of questions. And you will answer either yes or no. *And if it's a no, then I will just consider this portion when I do a fee application because I consider this to be waste of time, quite frankly, and I would rather just conclude with the witnesses that I had expected to be here today.* But I've given everybody at every juncture in this case the opportunity to settle.
>
> *So all I want to know from you is a yes or a no, not a question, not a qualification, not a clarification, as to whether or not you agreed to the settlement, yes or no? That word, if any other word comes out of your mouth, I'm going to hold you in contempt. Do you understand? Yes or no?* [Emphasis added].

(PAUSE)

* * * * * *

THE COURT: I could ask some humor and say I'll play the jeopardy song and we can figure we have thirty seconds to write it down. But you say yes or no and then we'll go into some other questions, or we'll proceed with a witness. Yes or no and you now have thirty seconds to give that word. A word. And you have the choice of the word. Which is it?

(PAUSE)

Yes or no?

(PAUSE)

Yes or no, Mr. Peskin? I'm done with the dancing now. Yes or no. Nothing else.

(PAUSE)

No, no more questions. Yes or no, Mr. Peskin? You have the freedom to say no. Which one is it?

(PAUSE)

Yes, or no. Don't give me anything else at this posture.

(PAUSE)

MR. SNYDER: Is there anything that we can do to help, Judge?

THE COURT: No, we'll, we'll just give him his time for that word to come out. A word has to come out. There's a question asked, I want an answer.

MR. SNYDER: And I feel—

***268** MR. SHARP: Maybe you should cut to a commercial Judge.

THE COURT: I understand. Alright. See we do this every day for a living, and after awhile it sometimes becomes humorous but this has lost its humor. I just want a yes or no from you at this point.

THE DEFENDANT: You think this is funny. It's not funny.

THE COURT: Yes or no? Yes or no? We've tried to deal with it in every way, yes or no?

MR. PARIS: May I step outside, please?

MR. YUDES: Maybe it'd be best if I go outside too, Your Honor.

THE COURT: No, he can, you can stay.

MR. SNYDER: It seems to me, Judge, if he can't say yes —

THE COURT: Okay. Alright. We'll note the passage of time.

THE DEFENDANT: Yes, yes, Judge, I, I—

* * * * * *

THE DEFENDANT: I just want to ask—there's a problem —

****853** THE COURT: I want the question answered first and then we'll go to all the problems that might exist. But I want the question answered.

MR. SNYDER: May, may, Your Honor, may I, may I express the problem that came up?

THE COURT: I've already done a number of them—not yet, because he's going to answer this and we're not going to get away from it. And then he can raise the problem.

(PAUSE)

THE DEFENDANT: Judge, I would like to say only that I just had a—

THE COURT: Doesn't sound like yes or no to me.

THE DEFENDANT: It, it's, it's yes I would like to but I—

THE COURT: No, not yes I would like to—yes, settle. That was the question.

THE DEFENDANT: I just don't know how I'm going to meet all the—yes, I would like to.

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MR. SHARP: Forget it.

THE COURT: Okay. Alright, let me just explain this so we all understand it. I think, and I will tell myself I think this is fine. *I'm going to break for lunch now. So we understand, when I step off this bench, I'm not taking a settlement in this case. Do we understand that? I am not going to take or listen to any prospect of settlement. I will not give one moment to the attorney to try and settle this case. I am trying the case to conclusion. Do we understand that?* Alright, and that is what we are going to do.

And I will decide the entire case, including this portion of the claim. Do you now understand that? That it's now out of your hands. You don't have anything left to say yes or no to. You will just proceed to the end of the trial.

***269** THE DEFENDANT: *So yes, I'll settle the case.* [Emphasis added].

THE COURT: Yes, you agree to the settlement or not?

MR. SNYDER: He said yes.

THE DEFENDANT: Yes, yes.

THE COURT: I want this clear.

THE DEFENDANT: Yes, I'll agree.

THE COURT: Bring Mr. Paris back in. Now you listen to the questions I ask and there will be an opportunity for you to ask questions. Do you understand that?

THE DEFENDANT: Yes.

Thereupon the trial court inquired of defendant if he understood the terms of the settlement and if he had any questions concerning the terms. After further discussion of the terms and conditions of the settlement and defendant's obligations thereunder, and after defendant again expressed concern over his ability to meet those obligations as well as his obligation to pay his attorney's fee, the trial court inquired of defendant:

> Now, Mr. Peskin, you have now understood the terms of the agreement as I see it. Under the circumstances, and I want you to be clear on this, in realizing this is a compromise of everyone's positions in this case, do you accept this agreement as fair and reasonable under the circumstances?

Defendant replied, "You know I don't really—," but before defendant could complete his statement, the trial court interrupted and stated:

> No, that's not acceptable to me, okay. I don't really. This one is do you accept it as fair and reasonable under the circumstances. It requires a yes or a no answer.

Defendant then answered, "Yes."

Following this exchange, the trial court asked defendant if he now accepted the terms and provisions of the agreement freely and voluntarily, to which defendant answered, "Yes." The trial court also asked defendant, "You are not under the influence of any drug or alcohol that would impede understanding or acceptance of the terms and provisions of the agreement, is that correct?", to which defendant answered, "Yes." The trial was then concluded.

***270** The following day, February 26, 1992, defendant contacted Lawrence Vastola, Esq., his real estate attorney. According to Mr. Vastola, defendant was "extremely distraught and confused over the events surrounding ****854** the proceedings in court in his matrimonial matter which had occurred the previous day," and defendant advised him that he had been "subjected to overwhelming pressure to make a decision that day regarding disposition of his matrimonial matter." After meeting with defendant on February 28, 1992, Vastola recommended that defendant consult with Albert B. Jeffers, Esq. to review and evaluate the disposition of the matrimonial action. On February 29, 1992, defendant met with Mr. Jeffers. According to Mr. Jeffers, defendant then seemed in a "very agitated state" and appeared "confused and emotionally distraught." Mr. Jeffers said that defendant told him that "he felt that he was pressured into consenting to the terms of the settlement."

On March 3, 1992, defendant visited his treating physician, Dr. Hugh Prentice, who noted that defendant, who had been

under Dr. Prentice's treatment for depression for the previous three months, "continued to suffer from depression." On March 4, 1992, defendant was hospitalized at the Carrier Foundation for psychiatric treatment for "severe depression." Defendant was treated on a daily basis by Dr. Philip M. Torrance II, a staff psychiatrist, until he was discharged on March 17, 1992. According to Dr. Torrance, defendant had grave difficulty deciding whether to engage in and continue psychiatric treatment, and defendant exhibited "a paralyzing degree of ambivalence and indecision." In his April 20, 1992 report, Dr. Torrance opined "with a reasonable degree of medical certainty" that defendant's "capacity to participate in decision making with regard to important issues with emotional implications was significantly impaired ... on 25 February 1992" due to his "anxiety, depression, and impaired cognition."

Dr. Torrance, in his June 16, 1992 certification, also expressed the opinion that, because defendant's "severe depression" on February 25, 1992 was "rooted in a thought disorder," to the "non-trained"'S ***271** eyes of laypersons, defendant "would seemingly appear to understand what was being said to him," but "inwardly," because of his mental condition, defendant was "unable to process that information into a decision." Dr. Torrance further explained that, on February 25, 1992, "[n]o one at that time, not even Mr. Peskin, could fully comprehend the total paralysis he was experiencing in coming to a decision on the issue of settlement."

Dr. Torrance opined that, while defendant "knew" on February 25, 1992 that "he had to make a decision," defendant's "depression and associated thought disorder prevented him from doing so—at least to the extent of his own free will." Defendant's "paralysis in decision making" rendered him vulnerable to being "coerced into making a decision" by others. As Dr. Torrance explained, defendant's "repeated equivocations with [his] counsel and with the Court, and their unawareness of his medical and mental condition" caused, albeit unintentionally, his counsel and the trial court to experience "substantial frustration." This resulting "frustration on the part of others" caused them, in turn, to exert "tremendous psychological pressure" on defendant "to make a decision." Faced with this "overwhelming pressure," defendant "finally acquiesced" and agreed to the settlement, but, according to Dr. Torrance, his decision cannot be characterized as his own. The influence of the others in the courtroom "ultimately overcame [defendant's] own will." Consequently, defendant unintentionally "allow[ed] others to make the choice for him."

Dr. Torrance summed up his opinion of what happened on February 25, 1992 as follows: "In my medical judgment, Mr. Peskin's medical and mental condition materially interfered with the exercise of his own free will on February 25, 1992, because the pressures brought to bear upon him that day to make a decision became overwhelming. In effect, he was subjectively overborne by an oppressive set of circumstances. While it may be that no one intended to cause Mr. Peskin to be placed in that position, the medical fact of the matter is, he was."

***272** Mr. Jeffers notified the trial court by letter dated March 13, 1992 of what transpired between February 25, 1992 and March 12, 1992, including defendant's "nervous breakdown" and hospitalization on March 4, 1992, and of his March 10, 1992 telephone communication with Dr. Torrance. During ****855** that conversation the doctor opined that on February 25, 1992, defendant had been "incapable of making a decision" to settle or not "because his decision making process was flawed by the depression." Mr. Jeffers also informed the trial court that he concluded that "it was tenable ... to request that Mr. Peskin's consent be set aside." However, because Mr. Peskin was still hospitalized, Mr. Jeffers decided to delay taking any action. Mr. Jeffers notified the trial court that he anticipated that upon Mr. Peskin's substantial recovery, "[Mr. Peskin] may very well wish to take some further action with respect to the entry of the judgment." Although Mr. Jeffers did not formally move for any court action, his letter essentially requested that the "matter be held in abeyance" until Mr. Peskin recovered and could decide whether or not to challenge the consent to settlement. Unfortunately, Mr. Jeffers' March 13, 1992 letter arrived too late. On March 11, 1992, the trial court had signed the final judgment of divorce, which incorporated the February 25, 1992 settlement agreement.

Defendant retained another attorney and, on May 1, 1992, moved to vacate the judgment and the settlement incorporated therein. On June 16, 1992, defendant filed a supplemental motion requesting an "evidentiary hearing to present testimony with respect to [his] condition which existed on February 25, 1992." This supplemental motion was supported by the certifications of defendant, his father, his treating physicians, and his various attorneys, including his trial attorney, Mr. Sharp. Plaintiff did not submit any certification or other evidence in an attempt to rebut the uncontroverted medical testimony submitted by defendant's treating physicians.

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Following argument, the trial court found that defendant "had the ability to understand, had the ability to make decisions, [and] ***273** chose his decision" to settle. The trial court denied defendant's motion to vacate the settlement and set aside the judgment, and denied defendant's supplemental motion for an evidential hearing, reasoning in part as follows:

> It's my belief that on the day in question, and whether my eyes deemed by reviewing authority to be untrained that the medical testimony outweighs my particular opinion, but also from the demeanor of the witness as it appeared during the days of trial commencing in October, and ending in February—that in fact at all times he understood what was transpiring here. At all times he exercised the decision making capacity that he ran a business during that time period—there was never one scintilla of testimony from any witness presented that he had difficulty in his daily operation of that business, or otherwise.
>
> * * * * * *
>
> Never once prior to February 25 does anyone ever say to me I have a problem with Mr. Peskin.
>
> Does anyone ever say to me, Mr. Peskin wants to present testimony as to his mental well being.
>
> Mr. Peskin makes attempts to delay, in my opinion, the decision making, and in fact the court affords that delay in my opinion, on numerous occasions so that Mr. Peskin can be sure when he makes a decision it's a correct one.
>
> * * * * * *
>
> The court will not in fact vacate the settlement placed upon the record and will hold both parties bound to that settlement. The court will not hold an evidentiary hearing in [the] alternative to determine that. I feel that the certifications placed in the record by counsel would be sufficient for Appellate review. I have in fact reviewed them, none of the individuals presented anything to the court prior to that date, and I question quite frankly, if during this time Mr. Peskin is seeing the individuals from a time and commencement in November, and then with more certainty of medication back in December, that aware that he's going through a trial, and having completed a component that someone doesn't cry out and say look you can't go through with this in this condition.
>
> Now, whether or not they only after the fact become aware of what they now tell me with some degree as they refer to it, of medical certainty, and I don't believe that ****856** this situation—quite frankly—based on what transpired on that date, and based on some of the testimony from a credibility standpoint that took place, tried to make every effort to be assured that Mr. Peskin had opportunity [to] consult with anyone he chose during this time period.

Finally, the trial court emphasized that it had made it clear to defendant that it did not compel defendant "to say yes he will settle." The trial court further explained that defendant "had the option to say no" and that this opportunity and the trial court's ***274** subsequent actions "made it clear to Mr. Peskin that no penalty would accrue to him, [and] no prejudice would occur, except [that] the matter would proceed to closure" if defendant did not settle the case. The trial court also entered an order enforcing the judgment and assessing counsel fees of $7,000 against defendant for his motion to vacate the prior settlement agreement. This appeal followed.

Defendant seeks a reversal of the challenged orders, a vacation of the judgment and the settlement incorporated therein, and a remand of the matter to the trial court with direction that the trial proceed to a conclusion in front of a different trial judge. Alternatively, defendant seeks a remand of the matter to a different trial judge for a plenary hearing on the validity of the settlement, with particular emphasis on the issues of duress and his capacity to voluntarily consent to the settlement agreement consistent with the principles discussed in *Shanley & Fisher, P.C. v. Sisselman,* 215 *N.J.Super.* 200, 521 *A.*2d 872 (App.Div.1987). Defendant argues that the record demonstrates that he was coerced by the trial court and his attorneys to settle the case and that such settlement occurred under extreme duress; that the unrebutted medical testimony demonstrates that he did not have the capacity to consent to a settlement; that the trial court erred in refusing to grant an evidentiary hearing on the issues of duress and his capacity to enter into the settlement; and that the matter must be remanded for any further trial or evidentiary hearing before another trial judge.

It is fundamental that the settlement of litigation ranks high in the public policy of this state. *Ziegelheim v. Apollo,* 128 *N.J.* 250, 263, 607 *A.*2d 1298 (1992); *Nolan v. Lee Ho,* 120 *N.J.* 465, 472, 577 *A.*2d 143 (1990); *Judson v. Peoples Bank & Trust Co.,* 25 *N.J.* 17, 35, 134 *A.*2d 761 (1957); *Lahue v. Pio Costa,* 263 *N.J.Super.* 575, 595, 623 *A.*2d 775 (App.Div.), *certif. denied,* 134 *N.J.* 477, 634 *A.*2d 524 (1993);

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American Home Assur. Co. v. Hermann's Warehouse Corp., 215 *N.J.Super.* 260, 265–66, 521 *A.*2d 903 (App.Div.1987), *aff'd* 117 *N.J.* 1, 563 *A.*2d 444 (1989); *Dep. of Pub. Advocate v.* ***275** *N.J. Bd. of Pub. Ut.*, 206 *N.J.Super.* 523, 528, 503 *A.*2d 331 (App.Div.1985); *Pascarella v. Bruck*, 190 *N.J.Super.* 118, 125, 462 *A.*2d 186 (App.Div.), *certif. denied*, 94 *N.J.* 600, 468 *A.*2d 233 (1983); *Honeywell v. Bubb*, 130 *N.J.Super.* 130, 135, 325 *A.*2d 832 (App.Div.1974); *Jannarone v. W.T. Co.*, 65 *N.J.Super.* 472, 476, 168 *A.*2d 72 (App.Div.), *certif. denied*, 35 *N.J.* 61, 171 *A.*2d 147 (1961). As such, settlements should be encouraged. *Ziegelheim v. Apollo, supra*, 128 *N.J.* at 263, 607 *A.*2d 1298; *Judson v. Peoples Bank & Trust Co., supra*, 25 *N.J.* at 35, 134 *A.*2d 761; *Davidson v. Davidson*, 194 *N.J.Super.* 547, 550, 477 *A.*2d 423 (Ch.Div.1984) (settlements should be encouraged especially in family law actions). The goal of the policy which encourages settlements, however, "is not the salutary effect of settlements on our overtaxed judicial and administrative calendars (although this is an undeniable benefit), but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." *Dep. of Pub. Advocate v. N.J. Bd. of Pub. Ut., supra*, 206 *N.J.Super.* at 528, 503 *A.*2d 331.

[1] **[2]** **[3]** Courts play an important role in effecting settlement. However, that role must always be exercised appropriately and with full recognition that the court must remain fair and impartial in order to ensure that the "settlement [is] wrought by the parties, not by [the court]." 75 *Am.Jur.*2d *Trial* § 287 at 505 (1991). A settlement between parties to a lawsuit is a contract like any other contract. *Nolan v. Lee Ho, supra*, 120 *N.J.* at 472, 577 *A.*2d 143; *see also De Caro v. De Caro*, 13 *N.J.* 36, 44, 97 *A.*2d 658 (1953). Settlement agreements must be voluntarily ****857** made and "freely entered into." *Pascarella v. Bruck, supra*, 190 *N.J.Super.* at 124, 462 *A.*2d 186. Consequently, courts should never work to coerce or compel a litigant to make a settlement. *In re NLO, Inc.*, 5 *F.*3d 154, 157 (6th Cir.1993); *Newton v. A.C. & S., Inc.*, 918 *F.*2d 1121, 1128 (3d Cir.1990); *Cropp v. Woleslagel*, 207 *Kan.* 627, 485 *P.*2d 1271, 1276 (1971); *Schunk v. Schunk*, 84 *A.D.*2d 904, 446 *N.Y.S.*2d 672, 672–73 (1981) (courts should not exert undue pressure ***276** on litigants to settle, especially in the context of a divorce settlement); *Chomski v. Alston Cab Co., Inc.*, 32 *A.D.*2d 627, 299 *N.Y.S.*2d 896, 897 (1969); *Wolff v. Laverne*, 17 *A.D.*2d 213, 233 *N.Y.S.*2d 555, 557 (1962). Courts should not use the threat of sanctions to force the settlement of a case. *See Shaffer v. Farm Fresh, Inc.*, 966 *F.*2d 142, 146 (4th Cir.), *cert. denied*, —— U.S. ——, 113 *S.Ct.* 657, 121 *L.Ed.*2d 583 (1992); *Kothe v. Smith*, 771 *F.*2d 667, 669 (2d Cir.1985); *Del Rio v. Northern Blower Co.*, 574 *F.*2d 23, 26 (1st Cir.1978). In sum, the law simply "does not countenance attempts by courts to coerce settlements" and, therefore, courts must "avoid the appearance (as well as the reality) of coercion" of settlements from "unwilling litigants." *In re Ashcroft*, 888 *F.*2d 546, 547 (8th Cir.1989). *See also, generally*, D.L. Spillman, Jr., Annotation, *Propriety and Prejudicial Effect of Suggestion or Comments by Judge as to Compromise or Settlement of Civil Case*, 6 *A.L.R.*3d 1457 (1966).

[4] If a settlement agreement is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto, the settlement agreement must be set aside. *See Nolan v. Lee Ho, supra*, 120 *N.J.* at 472, 577 *A.*2d 143; *De Caro v. De Caro*, 13 *N.J.* 36, 41–42, 44, 97 *A.*2d 658 (1953); *Honeywell v. Bubb, supra*, 130 *N.J.Super.* at 136–37, 325 *A.*2d 832. For example, in *Kothe v. Smith, supra*, the District Court judge recommended that the case be settled for between $20,000 and $30,000, and warned the parties that if they settled for a comparable figure after trial had begun, he would impose sanctions against the dilatory party. 771 *F.*2d at 669. Defendant's malpractice insurer offered $5,000 on the day before trial, which plaintiff rejected. Plaintiff's lowest pretrial settlement demand was $50,000. Nevertheless, when the case was settled for $20,000 after one day of trial, the judge penalized defendant alone. *Ibid.* Although the trial judge was not involved in the settlement negotiations, the Second Circuit Court of Appeals vacated the judgment, stating:

> Although the law favors the voluntary settlement of civil suits, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 *F.*2d 988, 997 (2d Cir.1983), it does not sanction ***277** efforts by trial judges to effect settlements through coercion. *Del Rio v. Northern Blower Co.*, 574 *F.*2d 23, 26 (1st Cir.1978) (*citing Wolff v. Laverne, Inc.*, 17 *A.D.*2d 213, 233 *N.Y.S.*2d 555 (1962)); *see MacLeod v. D.C. Transit System, Inc.*, 283 *F.*2d 194, 195 n. 1 (D.C.Cir.1960); 89 C.J.S., Trial, § 577 at 355. In the *Wolff* case, cited with approval in *Del Rio, supra*, the Court said:
>
> > We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law.

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> 17 *A.D.*2d at 215, 233 *N.Y.S.*2d 555. In short, pressure tactics to coerce settlement simply are not permissible. *Schunk v. Schunk,* 84 *A.D.*2d 904, 905, 446 *N.Y.S.*2d 672 (1981); *Chomski v. Alston Cab Co.,* 32 *A.D.*2d 627, 299 *N.Y.S.*2d 896 (1969). "The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged." *Brooks v. Great Atlantic & Pacific Tea Co.,* 92 *F.*2d 794, 796 (9th Cir.1937). [771 *F.*2d at 669].

* * * * * *

> Although we commend ... [the trial judge] for his efforts to encourage settlement negotiations, his excessive zeal leaves us no recourse but to remand the matter with instructions to vacate the judgment. [*Id.* at 670].

****858** Similarly, in *Newton v. A.C. & S., Inc.,* 918 *F.*2d 1121 (3d Cir.1990), although the Third Circuit Court of Appeals did not vacate a judgment entered on a settlement, it vacated the fines imposed upon defendants by the District Court judge because of their failure to settle by a certain date prior to the commencement of the trial, on the ground that the fines violated due process. The court commented:

> Although the facilitation of settlements is a laudable goal, "pressure tactics to coerce settlement simply are not permissible." *Kothe v. Smith,* 771 *F.*2d 667, 669 (2nd Cir.1985). "[T]he court should never work to coerce or compel a litigant to make a settlement." *Del Rio v. Northern Blower Co.,* 574 *F.*2d 23, 26 (1st Cir.1978) (quoting *Cropp v. Woleslagel,* 207 *Kan.* 627, 633, 485 *P.*2d 1271 (1971)). When the district court fined only the settling defendants, regardless of fault, it created impermissible pressure on the defendants to alter their course in settling cases. [*Id.* at 1128].

Analogously, in *Continental Ins. Co. v. First Wyoming Bank,* 771 *P.*2d 374, 376 (Wyo.1989), *vacated in part on other grounds,* 860 *P.*2d 1094 (Wyo.1993), the Wyoming Supreme Court vacated a judgment on the merits and reassigned the case to a different trial judge after the trial judge advised the parties and their attorneys ***278** that, if they did not "make an effort to take care of this case" and settle the matter, "I can guarantee you much pain."

[5] We are convinced from our study of the record that defendant was improperly coerced into settling this matter. The trial court commented that it would consider defendant's refusal to settle in connection with any fee application, that it would hold defendant in contempt if he answered the question as to settlement other than with a "yes" or "no", and finally, that when it took a "break for lunch" that it would not be "taking a settlement" but would be "trying the case to conclusion," informing defendant that "it's now out of your hands." Although these comments may have been intended merely to force defendant to make a decision as to settlement, they unquestionably had the effect of coercing defendant into agreeing to settle. The threatening nature of these remarks imposed impermissible pressure on defendant to settle. Thus, the settlement cannot stand and the judgment entered thereon must be vacated.

[6] In reaching this decision, we are not unmindful of the fact that the trial court may well have become frustrated by defendant's failure to make a decision as to settlement and his insistence on questioning the terms of the settlement and his ability to satisfy the financial obligation imposed by those terms. We also appreciate the trial court's responsibility to conserve judicial resources and conclude trials expeditiously. Nonetheless, the trial court had a duty to exercise the highest degree of patience and forbearance with defendant, which it failed to do.

Finally, we recognize the importance of settlement and we in no way intend to discourage proper efforts by courts to guide parties toward settlement. [1] In this context, we deem it worthwhile to ***279** repeat and reaffirm what the Third Circuit Court of Appeals aptly observed in *Newton v. A.C. & S., Inc., supra,* 918 *F.*2d at 1129:

> Our decision is not intended to discourage the settlement of cases in appropriate circumstances and in an appropriate manner. In this age of burgeoning complex litigation and limited judicial resources, settlements are to be encouraged. Parties who contemplate or participate in settlement negotiations should, in their own interest and in the common interest of the efficient management of court calendars, extend themselves as much as they reasonably can in consummating settlements to accommodate court schedules. However, the court's efforts to expedite the settlement ****859** of cases must be consistent with the dictates of due process. Furthermore, these efforts should not unduly pressure or coerce litigants into settlement. [918 *F.*2d at 1129].

Accordingly, we reverse the orders under review, vacate the judgment of divorce and settlement incorporated therein, and

remand the matter to the trial court to complete the trial based on the existing trial record, supplemented by such additional testimony and other evidence as the parties and the trial court may deem necessary for a full presentation of the contested issues. We direct that the matter be reassigned to another trial judge. Since we hold that the settlement was coerced, and that the judgment and settlement be vacated, there is no need to remand the matter to the trial court for a plenary hearing as to defendant's claim of lack of capacity to consent to the settlement.

All Citations

271 N.J.Super. 261, 638 A.2d 849

Footnotes

1 We note that the trial court, perhaps with the best of intentions and albeit with the consent of the attorneys for both parties, held a pre-trial, *ex parte* conference with plaintiff in chambers during which it explored with her some of the financial issues involved and solicited her views as to what she "envisioned" would be a fair settlement. In our view, this practice is inappropriate and, except in the most extraordinary of circumstances, should not be employed by our trial courts, particularly in non-jury cases.

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771 P.2d 374
Supreme Court of Wyoming.

CONTINENTAL INSURANCE COMPANY,
a foreign corporation, Petitioner,
v.
FIRST WYOMING BANK, N.A. —JACKSON HOLE,
and First Wyoming Bancorporation, Respondents.

No. 88–114.
|
March 31, 1989.

Synopsis

On petition for writ of prohibition, mandamus, certiorari, or other relief filed after trial court entered judgment in favor of respondent, the Supreme Court held that: (1) documents sought to be produced in discovery were privileged, and (2) comments made by trial judge at pretrial hearing supported reassignment of case to another judge for further proceedings.

Vacated and remanded.

Raper, J., Retired, filed dissenting opinion.

Cardine, C.J., filed concurring opinion.

West Headnotes (2)

[1] Pretrial Procedure Records and reports in general

Documents sought to be produced in discovery, including letters from counsel to client encompassing legal advice, in-house correspondence of client discussing advice furnished by attorney, reports of summaries of deposition testimony, and evaluation of client's position made by counsel, were privileged. Rules Civ.Proc., Rule 26.

[2] Judges Statements and expressions of opinion by judge

Comments made by trial judge at pretrial hearing encouraging parties to settle case and requesting that insurer's president be present at future hearings supported reassignment of case to another judge for further proceedings.

4 Cases that cite this headnote

Attorneys and Law Firms

***374** Richard E. Day and Patrick J. Murphy, Williams, Porter, Day & Neville, P.C., Casper, ***375** and Todd S. Welch, Bailey, Pickering, Stock & Welch, Cheyenne, for petitioner.

Peter K. Michael and William M. McKellar, Lathrop, Rutledge & Boley, P.C., Cheyenne, for respondents.

Before CARDINE, C.J., THOMAS, URBIGKIT and MACY, JJ., and RAPER, J., Retired.

ORDER VACATING JUDGMENT AND
DIRECTING REASSIGNMENT OF CASE

This matter came on before this Court upon the Petition for Writ of Prohibition and/or Writ of Mandamus and/or Writ of Certiorari and/or Other Relief filed herein by the Petitioner, Continental Insurance Company, on April 28, 1988; the Brief of Continental in Support of Petition for Writ of Prohibition and/or Writ of Mandamus and/or Writ of Certiorari and/or Other Relief filed herein on behalf of Petitioner on April 28, 1988, together with an Affidavit in Support of Request for Disqualification and other documents; the Brief of Respondents in Opposition to Continental Insurance Company's Various Writs filed herein on behalf of Respondents, First Wyoming Bank, N.A.—Jackson Hole, and First Wyoming Bancorporation, on May 23, 1988; the Reply Brief of Petitioner Continental Insurance Company filed herein on June 10, 1988, and the arguments of counsel heard on October 11, 1988, and the Court, having examined the file and record of the Court and being fully advised in the premises, finds that:

This case first came before this Court sub nomine, *Continental Insurance Company v. Robert B. Ranck, Honorable Judge of the District Court of the Ninth Judicial District of Teton County,* No. 88–32, in which we reviewed an order of the District Court that dismissed the Petitioner's complaint and in which we issued an order dated February

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24, 1988, reversing the District Court order and remanding the cause to the District Court with directions that the District Court conduct a hearing with respect to the issues raised by the Petitioner. This Court's order directed the District Court to consider the questions of privilege with respect to documents sought to be produced in discovery, to conduct an in camera inspection of documents which the Petitioner claimed to be privileged, if appropriate, and to consider such other matters as might appropriately be raised by the Petitioner at such a hearing.

In response to this Court's order of February 24, 1988, a hearing was conducted by the District Court on April 8, 1988. It was conducted pursuant to an Order for Hearing entered March 3, 1988 which directed "that each attorney having anything to do with this case shall personally appear and * * * that the president or chief executive officer of plaintiff company shall personally appear; the local president of the First Wyoming Bank shall appear, and the president or chief executive officer of First Wyoming Bancorporation shall appear; * * *." That Order for Hearing went on to state:

> "IT IS FURTHER NOTED BY THIS COURT, that this Order is made notwithstanding this Court's opinion that the Supreme Court of the State of Wyoming has no authority to tell the District Courts how to run their business."

At the hearing conducted on April 8, 1988, the District Court prefaced the proceedings with these remarks:

> Now, next, if you gentlemen are disappointed by being ordered here and have some grievance with the judicial system, I'm glad; and I invite you to write a letter to the Chief Justice of the Wyoming Supreme Court. * * * And inform Justice Brown that you would appreciate it if the Supreme Court would keep its nose out of district court business. You're here because the Supreme Court ordered me to do this. And I'm doing it. And I don't like it. And I don't like them sticking their nose in my business and I'm telling them so on this record right now, and I want them to keep their nose out of my business."

[1] In the course of the hearing, the District Court considered those matters suggested in the order entered by this Court in ***376** Continental Insurance Company v. Robert B. Ranck, Honorable Judge of the District Court of the Ninth Judicial District of Teton County, No. 88–32, as well as arguments of the parties relating to their respective motions for summary judgment which had been filed. The record does not demonstrate any in camera inspection of disputed discovery documents by the trial court although it does disclose a claim by the judge that he is completely familiar with the file. Pursuant to an Order Requesting Documents for In Camera Inspection, the documents were presented to this Court. Many of the documents are privileged or arguably privileged. *Thomas v. Harrison,* 634 P.2d 328 (Wyo.1981). Without being exhaustive, we note letters from counsel to the client encompassing legal advice; in-house correspondence of the client discussing advice furnished by the attorney; reports of summaries of deposition testimony; and evaluations of the client's position made by counsel. As we interpret Rule 26, W.R.C.P., no necessity exists to object to the furnishing of privileged material, and there is no waiver of the claim of privilege because of an untimely response to discovery. The Judgment, entered by the District Court on May 13, 1988, could not have been made in the absence of disregard of these precepts and, under the circumstances, the judgment constitutes a gross miscarriage of justice. Our conclusion as to the privileged nature of these documents is diametrically opposite to that apparently reached by the district court, and we are unable to justify the result reached by the district court within the purview of its discretion.

[2] Our examination of the record persuades us that this case should be assigned to another judge for further proceedings. This conclusion is supported by the District Court's own comments at the conclusion of the hearing on April 8, 1988. Addressing Petitioner's representative and the chief executive officer of the respondent, First Wyoming Bancorporation, the District Court said:

> "I would urge the two of you to get together with the lawyers while you're here and make an effort to take care

of this case, because I can guarantee you much pain. Much pain. I'll leave that up to you.

"Now, I hope I've made myself understood. The next thing I want to make clear is I'm running this Court. The Supreme Court is not running this Court. No one else is running this Court. And I'm going to run it for 14 months and 22 days more, and I intend to take care of this case while I'm still on the bench. * * *

"Now, you can do what you want but you know my attitude, and if it hasn't been made clear I would be happy to answer any questions about it. But we're going to run cases according to the rules, we're going to do it on time, we're going to do it according to my docket, and when I set the hearings I think we'll just start having everybody here all the time. Now, that will now include the President of Continental Insurance Company. You're the plaintiff in this case and you want to have a case in my court I would like to see all of your people here."

The judgment entered by the District Court on May 13, 1988, granted Respondent's motion for sanctions against Petitioner, entered judgment in favor of Respondent on Petitioner's complaint, and entered judgment in favor of Respondent on Respondent's counterclaim against Petitioner. The court order provided that a hearing on damages would be held at some unidentified future date.

It is from that judgment that Petitioner sought extraordinary relief in this Court, and we granted a Petition for Writ of Certiorari to further review this matter on May 17, 1988.

We conclude that the District Court's judgment is erroneous and must be vacated. We find that the judgment entered by the District Court is a gross miscarriage of justice. Pursuant to the Writ of Certiorari granted in this case and pursuant to the general superintending control over courts vested in this Court by Wyo. Const. art. 5, § 2, it therefore is

***377** ORDERED that the judgment entered by the District Court of the Ninth Judicial District of the State of Wyoming in and for Teton County in Continental Insurance Company, Plaintiff, v. First Wyoming Bank, N.A.—Jackson Hole, a Wyoming banking association; and First Wyoming Bancorporation, a Wyoming corporation, Civil No. 6917, be, and it hereby is, vacated in its entirety; and it further is

ORDERED that the case is remanded to the District Court with direction that the case immediately be, and in no event, not later than ten (10) days after the date of this order, reassigned to another district judge for further proceedings consistent with this order, the order of the Court in Continental Insurance Company v. Robert B. Ranck, Honorable Judge of the District Court, Ninth Judicial District of Teton County, No. 88–32, and the governing rules of procedure and principles of procedure and principles of law; and it further is

ORDERED that counsel for First Wyoming Bank, N.A. —Jackson Hole, and First Wyoming Bancorporation, Mr. William M. McKellar, as a result of a mistake initiated by this Court, having perused improperly the documents submitted to this Court for in camera inspection, immediately shall deliver to this Court any notes, memoranda, or other instruments he may have prepared as a product of his examination of those documents submitted for in camera inspection; Mr. McKellar shall not disclose to anyone the contents of the documents he did peruse; he shall advise this Court in writing, within ten (10) days, of the names and addresses of any persons to whom he has disclosed any such information; he shall make no use whatsoever of any of the documents or information contained therein which ultimately are ruled to be privileged; he shall make no reference to any privileged document revealed as a result of his perusal of the documents submitted for in camera inspection, either in examination, cross-examination, trial, colloquy, or in any manner whatsoever, and his failure to faithfully comply with these prohibitions will result in such appropriate sanctions as this Court may order.

CARDINE, C.J., concurs in the order of the Court and files a separate opinion.

RAPER, J., Retired, dissents from the order of the Court and files a separate opinion.

CARDINE, Chief Justice, concurring.

I find it necessary to concur in the order of the court to avoid misunderstanding. This court has not and will not undertake to "flex its muscles." This court will acknowledge and perform duties placed with the court by Article 5, §§ 2 and 3 of the Wyoming Constitution, which provide in part:

"The supreme court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts * * *." Art. 5, § 2, Wyoming Constitution.

> "The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." Art. 5, § 3, Wyoming Constitution.

In this case the supreme court concluded that the injustice of an improperly entered default should not continue. Therefore, pursuant to a petition for writ of prohibition and/or writ of mandamus and/or writ of certiorari the court issued a lawful order directing further proceedings in the case. The district court refused to accept or comply with that order. Although other action by the supreme court might be appropriate, the most reasonable disposition now seems that another judge should be assigned to proceed with this case.

RAPER, Justice, Retired, dissenting.
I dissent.

The Order Vacating Judgment and Directing Reassignment of the Case does not fairly represent what occurred in the district court at the district court hearing on April 8, 1988, conducted as required by ***378** Order of this court entered February 24, 1988. The cited statements of the district judge do not demonstrate any bias against petitioner Continental but do show a strong bias against the Supreme Court of Wyoming. I know of no way shown by the circumstances of this case how a bias against this court can be transferred to, and be a bias against, Continental. The trial judge at one point during the hearing stated to Continental's counsel, "No. No need to apologize. I'm not mad at anybody but the Supreme Court."

The trial judge allowed Continental's counsel to say everything and argue any point he desired during the hearing, other than what was in his briefs filed with the court, which the court pointed out he had read and understood. I would say that Judge Ranck had adequately responded to this court's order to hold a hearing on various questions.

This court's current order also seems to find some bias of the trial judge against Continental in the requirement that plaintiff have its president present at all hearings. This requirement also went to the defendant banking organization. The court did not require more of one party than the other. I see that requirement as an effort by the trial court to dispose of the case by dispute resolution in a fashion other than trial. This is not an uncommon practice in trial courts and, according to some of the best judicial thinking, is encouraged or should be. It is necessary that there be present someone with authority to close litigation.

I have no argument with the majority with respect to the right of this court to supervise district courts in proper cases. I do not consider this a proper case for the court's order as written. It seems to me that the majority has taken the wrong position in this matter and is flexing its muscles in a show of strength out of line with appropriate judicial behavior under the circumstances.

I must also disagree with the majority's position that the district judge improperly dismissed plaintiff's complaint, entered judgment for defendant on its counterclaim, and ordered a further hearing on the question of damages. This action by the trial judge is authorized by W.R.C.P. 37(b)(2)(C) providing that if a party fails to provide discovery, the court may make

> [a]n Order * * * dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

While it is true that, by the provisions of W.R.C.P. 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged," this does not excuse failure to respond. [1] The record discloses, and the trial judge found in his judgment, that discovery was propounded by defendants upon Continental in June of 1987, and thus they were required to object or respond no later than July of 1987. W.R.C.P. 33 and 34. Several months passed and no objection or response of any kind was forthcoming. The trial court entered an order requiring responses to discovery by a particular date and the order contained a warning of the consequences of dismissal and default judgment upon failure to do so. The trial judge even extended that time. Rather than responding to discovery, Continental filed several motions of protest.

The Wyoming Supreme Court has previously held such district court action in dismissal and default judgment an appropriate sanction for failure to file answers to interrogatories or excuse such failure. *Farrell v. Hursh Agency, Inc.,* 713 P.2d 1174 (Wyo.1986); *Zweifel v. State ex rel. Brimmer,* 517 P.2d 493 (Wyo.1974); *Welsh v. Welsh,* 469

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P.2d 404 (Wyo.1970). It was not an abuse of discretion; the trial judge only did what he was authorized to do.

The problem here is not that the plaintiff has been required to produce materials not available on discovery because privileged, but because plaintiff Continental made no response at all, nor did it timely object or ***379** timely seek a protective order. "A party may not defend against sanctions under Rule 37(d) by contending that the request was improper and objectionable. If he takes this view he is required to apply for a protective order under Rule 26(c)." Wright and Miller, Federal Practice and Procedure: Civil § 2291 at 810–11 (1970). Rule 26(c) does not specify a time for such a motion, but Wright and Miller, § 2035 at 262–63 (footnotes omitted) states that

> undoubtedly the courts will consider the timeliness of a motion under the amended rule, and will, as in the past, look to all of the circumstances in determining whether the motion is timely. Ordinarily the order must be obtained before the date set for the discovery, and failure to move at that time will be held to preclude objection later, but it may be that this rule will not be applied if there was no opportunity to move for a protective order. A party may not remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper. If he desired not to appear or not to respond he must seek a protective order, but if there are extenuating circumstances that explain his failure, the court may take these into account in determining what sanctions to impose.

I find no extenuating circumstances to excuse Continental's failure to timely seek a protective order. [2]

It is my view that the court is violating its own rule, as conceived by it, in requiring the district judge to step aside and assign another district judge to assume responsibility for the case. W.R.C.P. 40.1 clearly states that when a party seeks to disqualify a judge for cause, he must file a motion supported by adequate facts set out to show the existence of such grounds showing a bias or prejudice "*against the party or his counsel.*" Any other party may file counter-affidavits. "The *presiding judge shall rule on the motion and if he grants the same,* shall immediately call in another district judge to try the action." W.R.C.P. 40.1(b)(2)(E) (emphasis added). W.R.C.P. 40.1(b)(3) provides that:

> A ruling on a motion for a change of district judge shall not be an appealable order, but the ruling shall be entered on the docket and made a part of the record and may be assigned as error in an appeal of the case.

If the court is to willy-nilly disregard its own rules, then perhaps it should set aside all its rules. The district judge is entitled to make the initial decision here. Otherwise, it is imposing on the prerogative of the district trial judge granted by this court.

I can find no just reason for this court to verbally castigate Judge Ranck and divest him of his court. I would have denied extraordinary relief and sent the matter back to the district court for trial on the issue of damages to a final judgment and let these matters be taken up on appeal. If not, the trial judge has become the victim and the real scamps will escape.

All Citations

771 P.2d 374

Footnotes

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1 When I use the term “respond,” I regard it as meaning to object, seek a protective order or answer.

2 Wright & Miller, § 2291 at 331 (1988 pocket part) adds that:

> Once a motion for sanctions under Rule 37(d) has been made, the delinquent party cannot avoid the sanctions by then making the response to discovery requests that should have been made earlier. Although the court may consider the belated response in determining what sanction, if any, to impose, the rule does not become inapplicable because a response is made in the interim between the filing of the motion for sanctions and the hearing on the motion.

Continental applied for a protective order after the Bank's motion for sanctions.

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KeyCite Yellow Flag
Declined to Extend by W.S. v. X.Y., N.J.Super.A.D., May 30, 1996

120 N.J. 465
Supreme Court of New Jersey.

Tara NOLAN, an infant by her mother, Pauline NOLAN, and Pauline Nolan and Thomas Nolan, individually, Plaintiffs–Appellants,
v.
Luisita S. LEE HO, M.D., and Reuben Deulofeu, M.D., Defendants–Respondents.

A-124
|
Argued March 26, 1990.
|
Decided July 31, 1990.

Synopsis
After trial court denied motion to reinstate settlement reached in medical malpractice action, the Superior Court, Appellate Division, affirmed. On certification, the Supreme Court held that evidentiary hearing was required before settlement agreement could be set aside.

Remanded.

Pollock, J., filed dissenting opinion in which Garibaldi, J., joined.

West Headnotes (7)

[1] **Compromise, Settlement, and Release** Contractual Nature and Requisites in General

Settlement agreement between parties to a lawsuit is a contract.

247 Cases that cite this headnote

[2] **Compromise, Settlement, and Release** Particular Grounds of Invalidity or Unenforceability

Generally, settlement agreement will be honored absent demonstration of fraud or other compelling circumstances.

165 Cases that cite this headnote

[3] **Compromise, Settlement, and Release** Degree of proof

Before vacating settlement agreement, courts require clear and convincing proof that agreement should be vacated.

68 Cases that cite this headnote

[4] **Compromise, Settlement, and Release** Fraud, Misrepresentation, or Collusion

Like other contracts, when settlement is obtained by fraud, injured party may seek rescission.

32 Cases that cite this headnote

[5] **Contracts** Discharge of contract by breach

When there is breach of material term of agreement, nonbreaching party is relieved of its obligations under the agreement.

73 Cases that cite this headnote

[6] **Fraud** Elements of Actual Fraud

In order to prove equitable fraud, plaintiff must demonstrate material misrepresentation made with intent that it be relied on, coupled with actual detrimental reliance.

30 Cases that cite this headnote

[7] **Compromise, Settlement, and Release** Fraud, misrepresentation, or collusion

In medical malpractice action based on treating physicians' failure to advise plaintiff of risk of giving birth to child with genetic disease, evidentiary hearing was required before

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settlement agreement could be set aside on grounds that plaintiff failed to inform defendants that she had been previously advised to seek genetic counseling, where it was uncertain whether defendants were actually misled or whether their ability to engage in discovery and prepare defenses were significantly hindered.

10 Cases that cite this headnote

Attorneys and Law Firms

***467** ****143** Martin N. Crevina, Mahwah, argued the cause for plaintiffs-appellants (Frank J. Nostrame, Jersey City, attorney; Eric F. Frizzell, Mahwah, on the brief).

Robert W. Donnelly, Jr., argued the cause for defendant-respondent Luisita S. ****144** Lee Ho, M.D. (Dughi and Hewit, Cranford, attorneys).

Scott T. Heller, Oradell, argued the cause for defendant-respondent Reuben Deulofeu, M.D. (Giblin, Combs, Cooney & Conway, attorneys; E. Burke Giblin, Morristown, on the letter in lieu of brief).

Opinion

PER CURIAM.

The tragic circumstances underlying this medical malpractice suit do not immediately concern, yet cannot be divorced from, the issue before the Court: whether the trial court acted properly in vacating a final settlement agreement without having first conducted a testimonial hearing.

I.

Plaintiff Pauline Nolan is blind, the result of a binary enucleation to remove malignant tumors during her infancy. Pauline's daughter, Tara, was born on September 22, 1978. When Tara was nearly a year old, she was diagnosed as having bilateral retinoblastoma, "[a] malignant type of tumor arising from the retina ... [that] usually occurs before the third year of life, and ... shows a familial or hereditary tendency." 3 Schmidt's Attorneys' Dictionary of Medicine R–92 (1990).

Because of those malignant tumors, both of Tara's eyes were removed by surgery—the left eye immediately after the diagnosis, the right eye only after radiation and chemotherapy treatment had failed to shrink that tumor. Pauline Nolan testified at trial that until Tara was diagnosed as having malignant tumors, it had never occurred to her that they could be passed ***468** on to a child. According to Pauline Nolan, no doctor had ever indicated to her that the tumors might be congenital.

During her first pregnancy, in 1974, Pauline Nolan consulted Myron S. Soled, M.D., who refused to take her on as a patient. Pauline Nolan testified that Dr. Soled suggested she go to the Margaret Hague Hospital, a high risk center, for counseling. According to Dr. Soled, Pauline Nolan told him that in addition to having had her eyes removed because of malignant tumors, she suffered from "convulsive disorders" and "depressive reaction." Dr. Soled testified that he then consulted with a senior doctor in obstetrics and gynecology, Dr. Zondek Kubes, who suggested that the cause of Pauline Nolan's eye tumors was most likely retinoblastoma. On the advice of Dr. Kubes, Dr. Soled referred Pauline Nolan to the Margaret Hague Hospital, although he did not specifically inform her of the genetic risk to the unborn baby. Pauline Nolan did not go to the Margaret Hague, but instead found another doctor who treated her.

During a later pregnancy, which ended in a miscarriage in July 1975, Pauline Nolan came under the care of defendant Luisita S. Lee Ho, M.D., an obstetrician/gynecologist. In April 1976, Pauline Nolan again became pregnant and again consulted Dr. Lee Ho; that pregnancy produced a son, Brian, who was born without retinoblastoma on November 8, 1976.

The infant plaintiff, Tara Nolan, was born of Pauline Nolan's fourth pregnancy; Dr. Lee Ho again served as Pauline Nolan's obstetrician/gynecologist. Pauline Nolan testified that she had told Dr. Lee Ho that her blindness resulted from malignant tumors, but that neither Dr. Lee Ho nor anyone else had suggested to her that her childhood disease could be transmitted to her children. Pauline Nolan also testified that had she known before she became pregnant that she carried a disease with a fifty-percent chance of being passed on to a child, she would not have had children.

The Nolans brought suit against Dr. Lee Ho and Dr. Reuben Deulofeu, the Nolan's regular pediatrician, on November 2, ***469** 1981, asserting that both doctors negligently had failed to advise the Nolans that Pauline Nolan's blindness likely had a genetic cause, thus creating a high risk of blindness to potential children. The Nolans alleged that that failure to

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warn deprived them of the opportunity to make an informed decision on whether to conceive Tara (wrongful birth), and damaged Tara by failing to prevent her birth (wrongful life).

****145** The matter was ready for trial in May 1984. Shortly before the trial actually commenced, the court, on May 22, 1984, granted partial summary judgment to defendant Lee Ho on the wrongful-life claim, because New Jersey had not recognized that cause of action. *See, e.g., Berman v. Allen,* 80 *N.J.* 421, 404 *A.*2d 8 (1979). At that time the wrongful-birth claim against Dr. Lee was settled for $200,000, and the settlement was placed on the record. On May 23, the trial commenced against Dr. Deulofeu. On May 24, 1984, following direct and cross-examination of Thomas and Pauline Nolan, a settlement offer of $500,000 was made to plaintiffs on behalf of Dr. Deulofeu. That evening, plaintiffs' counsel telephoned the home of defense counsel and indicated to defense counsel's wife that plaintiffs agreed to the offer of settlement that had been made that afternoon.

Defense counsel, however, had become wary because Thomas Nolan had mentioned the name of Dr. Soled during his testimony on May 24. Until this reference, the defense was unaware of Dr. Soled and had never before heard that name. Defense counsel therefore communicated with Dr. Soled on the morning of May 25. Dr. Soled informed defense counsel that he had advised Pauline Nolan to seek genetic counseling in 1974. Further, Dr. Soled told defense counsel that he had informed plaintiffs' counsel of that history in writing on June 30, 1983, in response to an inquiry from plaintiffs' counsel.

On the same day that Dr. Deulofeu's counsel received this new information, he asked the court in chambers to vacate the settlement and declare a mistrial based on the existence of this ***470** newly discovered evidence that had been "deliberately concealed." The basis for that charge was plaintiffs' answer to a written interrogatory, Interrogatory # 38, from defendants asking Pauline Nolan to "set forth names and current addresses of each and every physician you *have seen* for any purpose whatsoever since 1965." (Emphasis added). She answered: "Since 1965, I have *been treated by* the following physicians: (a) Dr. Connant, Jersey City, New Jersey; (b) Dr. Cosgrove, Jersey City, New Jersey; (c) Dr. Lee Ho." (Emphasis added). Plaintiffs' counsel explained in argument to the trial court that the answer did not include Dr. Soled's name because Pauline Nolan had not been treated by him.

Plaintiffs' counsel also argued that the omission of Dr. Soled's name was not material because Pauline Nolan was never told before 1978 that she had a genetic disease, and that, therefore, "Dr. Soled [was] either grossly mistaken or lying" when he informed defense counsel that he had advised Pauline Nolan to seek genetic counseling and had furnished plaintiffs' attorney with a confirmatory written history.

The trial court concluded that plaintiffs "knowingly attempted to perpetrate a deception," and that "their attorney assisted in the attempt to perpetrate this deception and that he did not speak out." The court granted the motion for mistrial, based on its finding that by withholding information about Dr. Soled's examination of Pauline Nolan, plaintiffs' counsel had committed a fraud on defense counsel regardless of the truth of Dr. Soled's assertions. The court vacated the Deulofeu settlement and directed Dr. Lee Ho's counsel to file a formal motion to vacate her settlement with plaintiffs. On June 15, 1984, after that motion was filed, the court vacated the Lee Ho settlement. In addition, the court referred the matter of the conduct of plaintiffs' counsel to the District VI Ethics Committee (DEC).

On July 8, 1985, plaintiffs brought an action for malpractice against Dr. Soled. That suit was consolidated with the suits against Drs. Lee Ho and Deulofeu. Dr. Soled moved to dismiss ***471** the action on the ground that it was barred by the statute of limitations, *N.J.S.A.* 2A:14–2. At a *Lopez* hearing (*Lopez v. Swyer,* 62 *N.J.* 267, 300 *A.*2d 563 (1973)) it was established that Tara Nolan's doctors at Wills Eye Hospital had informed Pauline Nolan on September 16, 1979, that her eye disease was inheritable, and had also told her that her own doctors should have so informed her. Knowledge of both injury and fault almost six years before having been established, the suit was dismissed as time barred. Following ****146** that hearing, Drs. Deulofeu and Lee Ho also moved to dismiss on statute-of-limitations grounds. As a result, the court granted motions to dismiss in favor of all defendants, including Dr. Soled.

Meanwhile, the DEC, after conducting attorney-disciplinary hearings, recommended the complaint against plaintiffs' counsel be dismissed. The DEC found that the facts did not establish that counsel, by failing to name Dr. Soled in the answers to interrogatories, intentionally misled the defense or withheld information. Plaintiffs subsequently moved to reinstate the settlements. That motion was denied. The Appellate Division affirmed the denial of the motion, holding in an unreported opinion that both the vacation of

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the settlement agreements and the dismissal were proper. The Appellate Division held that because the discovery rules clearly had been circumvented, the trial court had been correct in vacating the settlement agreements. Moreover, the court found no procedural infirmity: "We agree with the trial judge that since the truth or falsity of the letter was not relevant there was no need for a testimonial hearing." Finally, the Appellate Division held that the trial court had correctly dismissed plaintiffs' complaint based on the expiration of the statute of limitations.

We granted certification, 117 *N.J.* 626, 569 A.2d 1330 (1989), limited solely to the question of whether the trial court erred in vacating the settlement agreement without an antecedent hearing.

***472** II.

[1] **[2]** **[3]** A settlement agreement between parties to a lawsuit is a contract. *Pascarella v. Bruck,* 190 *N.J.Super.* 118, 124, 462 *A.*2d 186 (App.Div.), *certif. denied,* 94 *N.J.* 600, 468 *A.*2d 233 (1983). "Settlement of litigation ranks high in our public policy." *Jannarone v. W.T. Co.,* 65 *N.J.Super.* 472, 168 *A.*2d 72 (App.Div.), *certif. denied,* 35 *N.J.* 61, 171 *A.*2d 147 (1961). Consequently, our courts have refused to vacate final settlements absent compelling circumstances. In general, settlement agreements will be honored "absent a demonstration of 'fraud or other compelling circumstances.' " *Pascarella, supra,* 190 *N.J.Super.* at 125, 462 *A.*2d 186 (quoting *Honeywell v. Bubb,* 130 *N.J.Super.* 130, 136, 325 *A.*2d 832 (App.Div.1974)). Before vacating a settlement agreement, our courts require "clear and convincing proof" that the agreement should be vacated. *DeCaro v. DeCaro,* 13 *N.J.* 36, 97 *A.*2d 658 (1953).

[4] **[5]** **[6]** Like other contracts, when a settlement is obtained by fraud, the injured party may seek rescission. When there is a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement. *Stamato & Co. v. Borough of Lodi,* 4 *N.J.* 14, 71 *A.*2d 336 (1950). Because defendants are not seeking damages, they need establish only equitable fraud, not legal fraud. In order to prove equitable fraud, a plaintiff must demonstrate a material misrepresentation made with intent that it be relied on, coupled with actual detrimental reliance. *Jewish Center of Sussex County v. Whale,* 86 *N.J.* 619, 625, 432 *A.*2d 521 (1981).

[7] Although the trial court did not explicitly employ an equitable-fraud thesis, its analysis proceeded, properly, along equitable-fraud lines. In deciding to vacate the settlement agreement, the trial court emphasized that plaintiffs had concealed a material fact. The court thus based its decision to vacate on the equitable principle that it would be unfair for the misrepresenting party to benefit from the bargain. The Appellate Division reasoned similarly, emphasizing that there was no ***473** need for a testimonial hearing because the truth or falsity of Dr. Soled's claim was irrelevant to the question of fraud. The Appellate Division found that plaintiffs' lack of candor had "hindered the search for the truth," and found clear prejudice to defendants "whether or not there was a disciplinary rule violation."

Plaintiffs argue that they did not misrepresent, but "openly qualified their answer to a poorly phrased interrogatory," expressly answering a question on physicians "seen" by referring explicitly to physicians ****147** "treated by." Plaintiffs thus claim that they answered a slightly different question from the one asked, and that defendants should have been alert to that.

Plaintiffs also argue that they were justified in omitting Dr. Soled's name because he referred Pauline Nolan for high-risk counselling, not genetic counselling, and that the omission was, therefore, not material to defendants' defenses and therefore not genuinely prejudicial. They claim further that because that dispute—whether plaintiffs withheld important information that had a significant bearing on the case—itself constitutes a genuine issue of material fact, its resolution required a testimonial hearing before the settlements were vacated or upheld.

As noted, the two lawsuits settled for a substantial amount—$700,000. Both courts below apparently believed that the fact that Pauline Nolan had merely been seen by Dr. Soled was material and that the truth or falsity of the other information related by Dr. Soled in his June 30, 1983 letter was irrelevant. Moreover, both courts concluded that this information was material in that defendants seemingly would not have settled when they did had they been aware of Dr. Soled and the letter he sent to plaintiffs' counsel.

Whether Dr. Soled ever actually warned Pauline Nolan of genetic risks, or whether she reasonably should have so interpreted his referral for high risk counselling, is unresolved. If Dr. Soled's version is proven to be mere fabrication, then, arguably, plaintiffs did not make a "material

misrepresentation." ***474** The critical inquiry, however, is whether the omitted information had a bearing on discovery in general and specifically on the ability of defendants to formulate and prepare their defenses. Further inquiry would focus on whether the omitted information, if true, would have a significant effect on the merits of both plaintiffs' cause of action and defendants' defenses. Those issues must be determined in the context of setting aside or rescinding a settlement. The extent to which defendants were actually misled and their ability to engage in discovery and prepare defenses significantly hindered are matters that can most properly be developed and determined through a hearing.

The cause is remanded to the Law Division for a testimonial hearing consistent with this opinion.

POLLOCK, J., dissenting.

This is a medical malpractice case against two doctors, Luisita S. Lee Ho and Reuben Deulofeu, in which plaintiffs assert "that both doctors negligently failed to advise [plaintiff] that Pauline Nolan's blindness likely had a genetic cause, thus creating a high risk of blindness to potential children." *Ante* at 469, 577 *A*.2d at 144. I agree with the lower courts that defendants need show only that plaintiffs' counsel made a material misrepresentation on which defendants relied, not that he intended to deceive them. As the Appellate Division concluded, the failure to disclose Dr. Soled's name, as plaintiffs' counsel was obliged to do, deprived defendants of the ability to conduct further discovery. Of even greater importance, defendants' knowledge of the existence of Dr. Soled's letter would have had a substantial effect on their willingness to enter a settlement agreement. A testimonial hearing is unnecessary to determine the materiality of the failure of plaintiffs' counsel to disclose that Dr. Soled had previously referred plaintiff Pauline Nolan for genetic or high-risk counselling. Furthermore, I would not require defendants to show that they had been prejudiced, or as the Court states, "whether the omitted information, ***475** if true, would have a significant effect on the merits of both plaintiffs' cause of action and defendants' defenses." *Ante* at 474, 577 *A*.2d at 147. Consequently, I dissent.

The relevant facts are undisputed. Plaintiff Tara Nolan was born on September 22, 1978, and came under the care of Dr. Deulofeu, a pediatrician. A year after her birth, on September 16, 1979, Tara was diagnosed at Wills Eye Hospital as having bilateral retinoblastoma, "a malignant type of tumor arising from the retina. It usually occurs before the third year of life, and it shows a familial or hereditary tendency." 3 *Schmidt's Attorneys' Dictionary of* ****148** *Medicine* R–92 (1989). Tara's birth followed by five years Pauline's first pregnancy in 1974. When she first became pregnant, Pauline consulted Dr. Myron Soled, who referred her on September 5, 1974, to Margaret Hague Hospital, a high-risk hospital. As plaintiff Thomas Nolan, husband of Pauline and father of Tara, testified, Dr. Soled said "something to [the effect] that I don't believe I can handle the case. I believe you ought to go to the Margaret Hague where you can get some sort of counselling."

That testimony was not elicited until the beginning of the trial, May 24, 1984. It was the first time that Dr. Soled's name had been brought to the attention of Dr. Deulofeu's counsel. That evening plaintiffs' counsel left a message on the answering machine of Dr. Deulofeu's counsel stating that plaintiffs would accept his $500,000 settlement offer made earlier that day. In the meantime, however, the doctor's counsel had called Dr. Soled, who returned the call on the morning of May 25. In that conversation, Dr. Soled said that he had told Mrs. Nolan that he could not treat her and that she should go to the Margaret Hague Hospital for genetic counselling.

Plaintiffs' counsel had known for a year that plaintiff Pauline Nolan had been seen by Dr. Soled. On June 30, 1983, in response to his inquiry, Dr. Soled had written plaintiffs' counsel a letter, stating:

> ***476** Dear Mr. Nostrame:
>
> Please be advised that this patient—Pauline Nolan, was seen in my office, not taken as a patient. She was advised to go to Margaret Hague Hospital for genetic counseling. She was also advised to be followed in the high risk center at the Margaret Hague Hospital.

Very truly yours,

/s/ Myron Soled, M.D.

Three months after having received the letter, plaintiffs' counsel answered an interrogatory propounded by defense counsel asking plaintiffs for "the names and current addresses of each and every physician you have seen for any purpose whatsoever since 1965." Plaintiffs' counsel failed to include Dr. Soled's name in the answer. For whatever reason, the answer misrepresented the facts. No one has debated, nor could one, the materiality of the omission. Based on

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that misrepresentation, the trial court set aside plaintiffs' settlement not only with Dr. Deulofeu, but also a $200,000 settlement reached with Dr. Lee Ho two days earlier.

Materiality hinges on one consideration: whether defendants' knowledge that Pauline Nolan had seen Dr. Soled would have substantially affected their willingness to settle. 2 J. Pomeroy, *Equity Jurisprudence* § 898 at 532–34 (5th ed. 1941). I agree with the trial court that "[i]t would have been very important for the defense to know that there is a person who contends that he did refer Mrs. Nolan for genetic counseling." We should not be concerned, as both lower courts observed, with the truth or falsity of Dr. Soled's letter. All that need be known is before us. Plaintiffs' counsel knew that Pauline had seen Dr. Soled and failed to disclose that fact to defense counsel, who relied on that misrepresentation in agreeing to pay $700,000. The immediate response of defense counsel in seeking to rescind the settlement agreement bears silent witness to the materiality of the non-disclosure.

Nor is a hearing necessary to establish that defendants were prejudiced. As we stated in *Jewish Center of Sussex County v. Whale,* "equity looks not to the loss suffered by the victim but rather to the unfairness of allowing the perpetrator to ***477** retain a benefit unjustly conferred." 86 *N.J.* 619, 626, 432 *A.*2d 521 (1981). Fairness in this instance rests not in providing plaintiffs with a hearing to salvage a settlement obtained through misrepresentation, but in relieving defendants of the burden of that settlement.

I would affirm.

Chief Justice WILENTZ and Justices HANDLER, O'HERN, and STEIN—4.

For reversal and remandment—4.

For affirmance—Justices POLLOCK and GARIBALDI—2.

All Citations

120 N.J. 465, 577 A.2d 143

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2007 WL 1310192

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Twelfth District, Preble County.

In the Matter of the ESTATE OF Kelly ROMERO aka Kelly Montine, Deceased.

No. CA2006-06-015.
|
Decided May 7, 2007.

Civil Appeal from Preble County Court of Common Pleas, Probate Division, Case No. 20041085.

Attorneys and Law Firms

Gray W. Bennett, Eaton, OH, for appellant, Phyllis Gray.

Mary A. Ditmer, Lewisburg, OH, for appellees, Coral & David Montine.

Earley & Earley, George J. Earley, Eaton, OH, for George J. Earley.

Courtney B. Justice, Logansport, IN, for appellee, Tanya Zimmerman.

Konrad Kuczak, Dayton, OH, for appellee, Tanya Zimmerman.

Earley & Earley, Dirk E. Earley, Eaton, OH, for appellee, Tanya Zimmerman.

Rendigs, Fry, Kiely & Dennis, Michael P. Foley, Cincinnati, OH, for intevenor, Dawn Trucking, Inc.

Opinion

YOUNG, P.J.

***1** {¶ 1} Appellant, Phyllis Gray, appeals an order of the Preble County Common Pleas Court, Probate Division ("the probate court"), awarding attorney fees to Indiana attorney Courtney B. Justice who represented appellee, Tanya Zimmerman, in a wrongful death action.

{¶ 2} This case involves two separate persons, appointed by two separate courts in two separate states, each claiming the authority to prosecute a wrongful death action in Ohio and each seeking the payment of their attorney fees.

{¶ 3} Kelly Romero (aka Kelly Montine) was killed in Preble County, Ohio on March 23, 2004, when her vehicle burst into flames after being rear-ended by a tractor trailer owned by Dawn Trucking, Inc. As relevant to this appeal, Kelly was survived by her two children, her mother (appellant), and a sister. Appellee Tanya Zimmerman is Kelly's former mother-in-law and the paternal grandmother of the children. Zimmerman lives in Indiana, appellant in Ohio. At the time of her death, Kelly was living in Preble County.

{¶ 4} On March 31, 2004, the probate court appointed appellant as the administratix of Kelly's estate. On April 20, Zimmerman was appointed in Indiana as special administrator for the purpose of prosecuting a wrongful death action on behalf of Kelly's children. Two days later, Zimmerman, in her capacity as special administrator, filed a wrongful death action against Dawn Trucking in the Butler County Common Pleas Court ("the common pleas court"). Appellant, in turn, filed a wrongful death action against Dawn Trucking in the Preble County Common Pleas Court, Civil Division, on May 21. The complaint was filed by appellant in her capacity as administratix, Kelly's mother, and the guardian and next friend of the children. Appellant was and is represented by Ohio attorney Gray W. Bennett. Appellant was later granted leave to intervene in the wrongful death action in Butler County.

{¶ 5} Appellant moved the probate court to order Zimmerman to stop acting in Ohio on behalf of the estate. Hence began the filing of motions, post-hearing briefs, and status reports in both the probate court and the common pleas court relentlessly challenging the parties' respective authority to prosecute the wrongful death action. Appellant also challenged Zimmerman's appointment by filing motions in Indiana courts. On September 3, 2004, the probate court granted appellant's motion and ordered Zimmerman "to stop acting on behalf of the estate in any matters and as to all assets of the estate, as they exist in * * * Ohio. The Court is aware that Mrs. Zimmerman has filed a wrongful death action in the Butler County Common Pleas Court. Zimmerman is hereby ordered to file a status report on said action, with this Court[.]" Zimmerman complained that the entry was granted ex parte without notice or a hearing, and moved to vacate the entry. She filed a status report as ordered.

{¶ 6} A hearing was held in the probate court on October 12, 2004 before Judge Wilfred Dues. The hearing addressed the September 3, 2004 "cease and desist" entry and Zimmerman's appointment as special administrator. In December 2004, "based upon the hostile and angry demeanor of Judge Dues" during the October 12, 2004 hearing, Zimmerman moved to disqualify him. Judge Dues recused himself on December 29, 2004, and on February 14, 2005, retired Judge Richard E. Hole, II of Darke County was assigned to the case in the probate court.

***2** {¶ 7} A conference was also held in the common pleas court on October 13, 2004. According to a status report filed by Zimmerman, the common pleas judge (1) stated he would not remove or substitute Zimmerman as special administrator, (2) admitted Indiana attorney Justice pro hac vice, and (3) strongly admonished the parties to "renew settlement negotiations for the benefit of the children, expressing deep concern that the wrongful death claim was being ignored to their detriment[.]" According to Zimmerman, the parties met with Judge Dues a few days after the parties' conference in the common pleas court on October 13, 2004. The parties met regarding a proposal for the joint prosecution of the wrongful death action and a fee contract for 40% of the recovery, including litigation costs, to be divided equally between the parties' attorneys; "Judge Dues orally gave his provisional approval." A proposal sent in November by Ohio attorney Bennett provided for litigation costs to be 30% of the recovery with the balance to be divided 20% to Bennett and ten per cent to Indiana attorney Justice.

{¶ 8} On May 10, 2005, appellant moved the probate court for authority to settle the wrongful death action filed in the common pleas court (and a survivorship action). The motion stated that Dawn Trucking was willing to pay into the common pleas court its policy limits of one million dollars for the settlement of the wrongful death action and two separate cases arising out of the accident in which Kelly was killed. The motion stated it was reasonable to anticipate that a minimum of $800,000 would be available to settle the wrongful death and survivorship actions, and that Zimmerman's appointment as special administrator had been appealed and argued in Indiana courts. [1]

{¶ 9} The record shows that Indiana attorney Justice received a letter dated March 18, 2005 and sent on behalf of Dawn Trucking, expressing the company's willingness to pay into the common pleas court the sum of one million dollars contingent upon a release. There is no mention in that letter of the other two cases. By April 4, however, correspondence sent to attorneys Justice and Bennett on behalf of Dawn Trucking or its insurance carrier refers to the additional cases. The correspondence also shows the company's mounting frustration and unhappiness with the parties and their respective attorneys. Indeed, because the parties were unable and/or unwilling to settle the issue of who was the proper representative, the company was unable to obtain the parties' permission to pay the policy proceeds into the court in exchange for a full and final release. Following the settlement of the other cases, the balance of monies available to settle the wrongful death action was $801,074. [2]

{¶ 10} By entry filed on September 27, 2005, the probate court found that Zimmerman had no relationship with Kelly, and therefore, no standing before the court. As a result, the probate court dismissed "all Motions and matters filed [with regard to the estate] by Courtney Justice other than the Motion to vacate the order to cease and desist operations in Ohio." The probate court then found that it had "no authority to rule on the suitability of * * * Zimmerman's appointment[.] It is hereby ordered that the Court's prior order [to cease and desist] of September 3, 2004 is hereby vacated." Finally, the probate court granted appellant's motion for authority to settle the wrongful death action. Meanwhile, the issue of which party was the proper representative remained before the common pleas court.

***3** {¶ 11} On November 4, oral argument was held in the common pleas court on the parties' cross motions to dismiss the other from the proceedings. At the end of the oral argument, the common pleas court ordered the parties to go to mediation. Two days before mediation, Ohio attorney Bennett faxed the following letter to the probate court:

{¶ 12} "This letter will serve the purpose of memorializing the orders, which you gave to me during our telephone conversation [today]. * * * Specifically, I am ordered to go to mediation in Butler County and offer to Zimmerman via her counsel the following: If Zimmerman will withdraw from the Butler County wrongful death proceedings and cease her pursuit to be designated the real party in interest in said proceedings, then you will preserve to her counsel the right to come to [the probate court] and make application for attorney fees at the appropriate time."

{¶ 13} On December 9, the parties attended mediation in Butler County. During laborious negotiations, the mediator called Probate Judge Hole as to his opinion regarding the

parties' attorney fees. Judge Hole's preliminary view was that 30% of the gross recovery would be divided equally between the parties for their attorney fees. The following mediation agreement was then read into the record, subject to approval by the probate court:

{¶ 14} (1) Dawn Trucking will pay $801,074 to an escrow agent in exchange for a full release; (2) Zimmerman and appellant will dismiss their claims in Butler County; (3) appellant will dismiss her wrongful death claims in Preble County; (4) Zimmerman will dismiss her special administrator appointment; (5) appellant will dismiss her appeal of Zimmerman's appointment; (6) Judge Hole will apportion the proceeds in the escrow agent's hands pursuant to Ohio law, including division of attorney fees between the parties' attorneys; (7) Zimmerman's participation in the agreement is contingent upon a 50/50 division of attorney fees of 30% of the gross recovery; (8) the agreement releases all claims as to all parties and their agents and attorneys; and (9) appellant and her attorney specifically make no recommendation as to the amount or division of attorney fees. On December 21, appellant moved the probate court to schedule a hearing on the parties' mediation agreement. At the end of 2005, the probate court ordered the parties to release all named defendants in the Butler County wrongful death action.

{¶ 15} On January 23, 2006, Zimmerman filed an application for attorney fees in the probate court. That same day, following a hearing on the parties' mediation agreement, the probate court ordered appellant to settle the wrongful death action in Butler County and ordered that the issue of attorney fees be addressed at a separate hearing.

{¶ 16} In response to Zimmerman's attorney fees application, appellant once again argued that Zimmerman had no authority in Ohio to settle the wrongful death action and no "probate standing" in Ohio. Appellant also asserted that no agreement as to attorney fees was reached during the December 9, 2005 mediation. Appellant filed her application for attorney fees in April.

***4** {¶ 17} The probate court held a hearing on the parties' attorney fees applications in June. Appellant argued that Zimmerman was not entitled to any attorney fees because she had no authority in Ohio to settle the wrongful death action and no "probate standing" in Ohio. Appellant acknowledged that because the common pleas court had ordered the parties to go to mediation, the issue of who was the proper representative for the wrongful death action was never resolved in Butler County. The probate court declined to interfere with Zimmerman's appointment as special administrator in Indiana and with rulings by the common pleas court.

{¶ 18} The probate court then referred to, and eventually adopted, the common pleas court's recommendation in the fall of 2004 that attorney fees be divided equally between the parties. The probate court expressed its astonishment the wrongful death action could not be settled for several months simply because the parties were arguing over attorney fees.

{¶ 19} (1) The probate court then allocated the proceeds as follows: (1) attorney fees of 30% of the proceeds to be divided equally between the parties, resulting in attorneys Justice and Bennett receiving $119,161.10 each; (2) $5,500 for the probate court for guardian ad litem fees previously paid; (3) $228,757.38 for each of Kelly's children; (4) $53,060.56 for appellant; and (5) $26,030.28 for Kelly's sister. The probate court declined to grant appellant's request to give $15,000 to the estate for the survivorship action. The checks for the attorney fees were given to Attorneys Justice and Bennett before the end of the hearing.

{¶ 20} Appellant appeals, raising three assignments of error.

{¶ 21} In her brief, Zimmerman argues that the appeal is moot and must be dismissed because Ohio attorney Bennett received and accepted a $119,161.10 check from the probate court as payment of his attorney fees. Thus, before we examine the merits of the assignments of error, we must first dispose of the mootness argument.

{¶ 22} It is well-established that satisfaction of a judgment renders an appeal from that judgment moot. *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 254. "Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away * * * the right to appeal or prosecute error or even to move for vacation of judgment." *Rauch v. Noble* (1959), 169 Ohio St. 314, 316. Likewise, accepting payment of the judgment renders an appeal from that judgment moot. See *Mason v. Mason,* Cuyahoga App. Nos. 80368 and 80407, 2002-Ohio-6042.

{¶ 23} The Ohio Civil Rules provide an appellant with the opportunity to seek a stay of a lower court's judgment pending appeal. Under Civ.R. 62(B), an appellant is entitled, as a

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matter of law, to a stay of execution pending appeal, provided that he posts an adequate supersedeas bond. Courts have consistently recognized such a stay as the proper remedy for an appellant seeking appellate redress of an allegedly erroneous monetary judgment. *Hagood v. Gail* (1995), 105 Ohio App.3d 780, 785. In the case at bar, at the end of the June 2006 hearing, attorney Bennett orally moved the probate court to stay distribution of the funds pending appeal. The motion was denied. Attorney Bennett never sought a stay under Civ.R. 62(B) after the probate court issued its judgment entry that same day.

***5** {¶ 24} Appellant, however, challenges the mootness argument on two grounds. First, there was no opportunity to seek a stay under Civ.R. 62(B) because the checks for the payment of the attorney fees were intentionally cut and distributed by the probate court before the end of the June 2006 hearing and before the probate court journalized its entry that same day. Appellant contends that in light of the fact that Civ.R. 62(B) deals with stays on appeal post-order but prior to distribution, once the funds were distributed, Civ.R. 62(B) was no longer applicable. Second, the appeal does not merely challenge an allegedly erroneous monetary judgment. Rather, it challenges Zimmerman's standing to apply for attorney fees and the probate court's authority to consider such application and award attorney fees to Zimmerman.

{¶ 25} Upon reviewing the record, we find that this case does not fit neatly in the types of mootness cases cited above. In addition, it is a basic tenet of Ohio jurisprudence that cases should be decided on their merits where possible rather than on procedural grounds. See *Madison Cty. Bd. of Commrs. V. Bell,* Madison App. No. CA2005-09-036, 2007-Ohio1373; *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.,* 72 Ohio St.3d 464, 1995-Ohio-49. Given the unusual unfolding of events as orchestrated by the probate court at the June 2006 hearing, we decline to find that this appeal is moot. We therefore address appellant's assignments of error.

{¶ 26} Assignment of Error No. 1:

{¶ 27} "THE [PROBATE] COURT ERRED WHEN IT CONSIDERED AND ACTED UPON ZIMMERMAN'S SUPP.R. 70 AND 71 APPLICATIONS." [SIC]

{¶ 28} Relying upon *Ramsey v. Neiman,* 69 Ohio St.3d 508, 1994-Ohio-359, appellant argues that a probate court has broad discretion to award attorney fees under a Sup. R. 70-71 application [3] as long as the application is made by a proper personal representative appointed by an Ohio probate court under R.C. 2125.02. Appellant argues that because Zimmerman was never appointed by an Ohio probate court, had no "probate standing" in Ohio, and therefore had no authority to settle the wrongful death action, it was inappropriate for the probate court to entertain her application and award her attorney fees.

{¶ 29} It is well-established that the payment of reasonable attorney fees lies within the probate court's sound discretion. *In re Estate of Fugate* (1993), 86 Ohio App.3d 293, 298. An abuse of discretion is more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. See *In re Estate of Brady,* Cuyahoga App. No. 88107, 2007-Ohio-1005. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. An abuse of discretion will be found where the probate court's decision is not supported by the record or is contrary to law. See *In re Stillwell* (Apr. 10, 2000), Butler App. No. CA99-06-112, *In re Estate of York* (1999), 133 Ohio App.3d 234.

***6** {¶ 30} In *Ramsey,* the issue before the Ohio Supreme Court was "whether a wrongful death action may be brought under R.C. Chapter 2125 by a person who has not been appointed by a court to be the decedent's personal representative." *Ramsey,* 69 Ohio St .3d 508. Under R.C. 2125.02(A)(1), an action for wrongful death must be brought in the name of the personal representative of the decedent. R.C. 2125.02(C), in turn, states that "[a] personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of an action for wrongful death, may settle with the defendant the amount to be paid." Relying upon the meaning of "personal representative" when R.C. Chapter 2125 was first enacted, and R.C. 2125.02(C), the supreme court held that "[a] cause of action in wrongful death arising under R.C. Chapter 2125 must be brought in the name of a person appointed by a court to be the administrator, executor, or personal representative of the decedent's estate." *Id.* at 512.

{¶ 31} Notwithstanding *Ramsey,* we note that the probate court and the common pleas court both declined to interfere with Zimmerman's appointment as special administrator and never specifically ruled on the issue of who was the proper representative. We decline to do so as well, and instead review the probate court's award of attorney fees under our decision in *In re Estate of Brown* (1992), 83 Ohio App.3d 540.

{¶ 32} Ohio probate courts have equitable powers. See R.C. 2101.24(C). "In rare cases, a probate court may authorize the payment of reasonable fees from the estate to an attorney employed by an heir or beneficiary where the attorney's services were rendered to the benefit of the whole estate." *Brown* at 542. "Compensation is based on 'the equitable doctrine that where one has created, augmented, or preserved a fund he may be compensated therefrom.' " *Id.* Where the beneficiary is reasonably justified in bringing suit, attorney fees are justified as long as they benefit the estate. *Id.* Attorney fees have been denied where heirs have been involved in efforts antagonistic to the interests of the estate and where heirs were serving their own particular interests and not the estate as a whole. *Id.* The term "for the benefit of the estate" has been defined as " 'whether or not all of the beneficiaries or distributees of the estate have become entitled to receive from the assets of the estate, when distributed, greater sums than those which they would have received had such attorney's services not been rendered.' " *Id.* at 543.

{¶ 33} Upon reviewing the voluminous record in its entirety, we find that the services of Indiana attorney Justice did benefit the estate and that the probate court did not abuse its discretion by awarding Zimmerman attorney fees.

{¶ 34} It is undisputed that Zimmerman did not file the wrongful death action on behalf of all next of kin, which would have included appellant and Kelly's sister. However, we note that under Indiana law, Zimmerman could only file a wrongful death action on behalf of Kelly's children. Although the statute of limitations to file a wrongful death action is two years, Zimmerman filed the action less than a month after Kelly's death. According to Zimmerman, while custody and visitation issues regarding Kelly's children were being sorted out, nothing was being done by appellant or her attorney to determine the extent of liability insurance and/or assets available for the payment of wrongful death/personal injury claims arising out of the accident. Dawn Trucking and its driver claimed to be judgment-proof.

***7** {¶ 35} Indiana attorney Justice retained the services of an Ohio attorney in early December 2004 for the purpose of determining Dawn Trucking's liability as well as the potential liability of Nissan (Kelly was driving a Nissan vehicle) and the Miller Brewing Company (which had loaded Dawn Trucking's trailer). During the June 2006 hearing, Ohio attorney Bennett acknowledged that the Ohio attorney retained by Zimmerman had fully investigated the liability issue of Nissan and the Miller Brewing Company and "did a great deal of work on that." As noted earlier, Indiana attorney Justice received a letter dated March 18, 2005 and sent on behalf of Dawn Trucking, expressing the company's willingness to pay into the common pleas court its one million dollar policy limits in exchange for a full release. There was no mention in that letter of other cases arising out of the accident. By April 4, 2005, however, correspondence sent to attorneys Justice and Bennett on behalf of Dawn Trucking or its insurance carrier refers to additional cases. By the time the other cases were settled, the balance of monies available to settle the wrongful death action was no longer a million dollars but $801,074.

{¶ 36} Further, the record shows that appellant negotiated the issue of the parties' attorney fees. Although the probate court ordered Zimmerman in September 2004 to stop acting on behalf of the estate, it nevertheless ordered her to file a status report on her wrongful death action. The September 2004 cease and desist entry was later vacated. Two days before a mediation agreement, which included the parties' attorney fees, was read into the record in December 2005, Ohio attorney Bennett faxed the following letter to the probate court: "Specifically, I am ordered to go to mediation in Butler County and offer to Zimmerman via her counsel the following: If Zimmerman will withdraw from the Butler County wrongful death proceedings and cease her pursuit to be designated the real party in interest in said proceedings, then you will preserve to her counsel the right to come to [the probate court] and make application for attorney fees at the appropriate time."

{¶ 37} In light of all of the foregoing, we cannot say that the probate court, based upon the record before us, acted so unreasonably, arbitrarily, or unconscionably that its attorney fees award to Zimmerman amounted to an abuse of discretion. Appellant's first assignment of error is overruled.

{¶ 38} Assignment of Error No. 3:

{¶ 39} "THE [PROBATE COURT] ERRED WHEN IT USED THE EXISTENCE OF THE CONCEPT OF AN OHIO SPECIAL ADMINISTRATOR TO JUSTIFY THE INVOLVEMENT OF AN INDIANA SPECIAL ADMINISTRATOR."

{¶ 40} Appellant argues that the probate court erred by relying on the Ohio statutory provision governing special administrators to justify Zimmerman's involvement in the wrongful death action. The record shows that during the

June 2006 hearing on attorney fees, the probate court briefly referred to "a provision of the Ohio Revised Code that a special administrator can be appointed to file a lawsuit for wrongful death action." The court then declined to interfere with Zimmerman's appointment as special administrator.

***8** {¶ 41} R.C. 2113.15 governs special administrators and provides in relevant part that "[w]hen there is a delay granting letters testamentary or of administration, the probate court may appoint a special administrator to collect and preserve the effects of the deceased." Appellant is correct that R.C. 2113.15 does not apply since appellant was appointed administratix before Zimmerman was appointed special administrator. We note, however, that the probate court did not cite a specific statutory provision and may have referred to R.C. 2113.75 instead, notwithstanding the court's use of the phrase "special administrator."

{¶ 42} R.C. 2113.75 states that "[a]n executor or administrator appointed in any other state or country may commence and prosecute an action or proceeding in any court in this state, in his capacity as executor or administrator, in like manner and under like restrictions as a nonresident is permitted to sue."

{¶ 43} Although R.C. 2113.75 simply refers to "an executor or administrator appointed in [another] state," courts have construed it to specifically allow "personal representatives" to maintain wrongful death actions in Ohio courts. See *Ahlrichs v. Tri-Tex Corp.* (1987), 41 Ohio App.3d 207 (R.C. 2113.75, in conjunction with R.C. 2125.02, empower a personal representative, appointed in another state, to institute and maintain an action for wrongful death in Ohio, provided that a personal representative, appointed in Ohio, has not already done so); *McCluskey v. Rob San Services, Inc.* (S.D.Ohio 1977), 443 F.Supp. 65 (a personal representative appointed in another state may bring a wrongful death action in Ohio; however, under R.C. 2113.75, a nonresident personal representative suing in Ohio is in the same position as other nonresident plaintiffs rather than of a personal representative appointed in Ohio); and *Glenn v. Trans World Airlines, Inc. (E.D.N .Y.* 1962), 210 F.Supp. 31 (Ohio allows foreign personal representatives to maintain wrongful death actions in its courts).

{¶ 44} We once again note that the probate court and the common pleas court both declined to interfere with Zimmerman's appointment as special administrator and never specifically ruled on the issue of who was the proper representative. Incorporating our analysis under the first assignment of error here, we find no error in the probate court's erroneous but brief reference to a "special administrator" immediately before its refusal to interfere with Zimmerman's appointment as special administrator. Appellant's third assignment of error is overruled.

{¶ 45} Assignment of Error No. 2:

{¶ 46} "THE PREBLE COUNTY PROBATE COURT ERRED BY ABUSING ITS DISCRETION WHEN IT INJECTED ITSELF INTO THE SETTLEMENT PROCEEDINGS IN THE BUTLER COUNTY WRONGFUL DEATH ACTION AND THEN HELD TO THAT POSITION IN THE SUPP.R. 70 & & 71 PROCESS." [SIC]

{¶ 47} Appellant takes issue with the probate court's reference to and adoption, during the June 2006 hearing, of the common pleas court's recommendation as to attorney fees. Appellant also asserts that when presented with the opportunity to move the wrongful death action through mediation, "Judge Hole injected himself into the wrongful death proceedings by making it very clear to counsel for both parties that he expected the mediation to be successful, that attorney fees would be established pursuant to the 2004 suggestion of [the common pleas court] and that if counsel did not make it happen, ramifications would result because he would 'report somebody to the ethics committee.' " Appellant takes issue with the fact that the foregoing position was taken before there was a proposed settlement and before the Sup.R. 70 applications were filed.

***9** {¶ 48} Finally, appellant summarily challenges the probate court's allocation of the proceeds. The record shows that both attorneys, appellant, and Kelly's sister all received $1,000 less than anticipated. The probate court also declined appellant's request to give $15,000 to the estate for the survivorship action. According to appellant, "it is difficult to conceive a more unreasonable, arbitrary or unconscionable attitude on the part of the Court."

{¶ 49} We disagree.

{¶ 50} We note at the outset that there is nothing in the record to support the probate court's alleged threat to report somebody to the ethics committee. Upon reviewing the voluminous record and the numerous pleadings filed by the parties to dismiss one another, we cannot say that the probate

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court abused its discretion. The probate court was faced with parties that were unable and/or unwilling to settle their differences so that the proceeds could be deposited with the court (and earn interest). Dawn Trucking and its insurance carrier were both frustrated with the impact on the wrongful death action of the parties' fight over who was the proper representative.

{¶ 51} The record shows that while the probate court considered the common pleas court's recommendation as early as 2005, it did not adopt it until *after* the Sup.R. 70 applications were filed and *after* the June 2006 hearing on attorney fees. Simply because the probate court adopted the common pleas recommendation after being on the case for over a year does not equate to an abuse of discretion. In fact, the transcript of the June 2006 hearing shows the probate court's surprise that the common pleas court could "make a recommendation as to attorney fees * * * if [it] didn't know what was available [.]" As to the probate court's decision to give nothing to the estate and to subtract $1,000 from the persons listed above, appellant does not tell us how it was an abuse of discretion. We cannot say that it was so unreasonable, arbitrary, or unconscionable as to amount to an abuse of discretion.

{¶ 52} Appellant's second assignment of error is overruled.

{¶ 53} Judgment affirmed.

WALSH and POWELL, JJ., concur.

All Citations

Not Reported in N.E.2d, 2007 WL 1310192, 2007 -Ohio- 2157

Footnotes

1 In July 2005, the Indiana court found it had jurisdiction to appoint Zimmerman as special administrator and denied appellant's motion to dismiss the case. The Indiana court noted that although appellant was aware of Zimmerman's appointment as early as May 2004, she did not challenge the appointment in the Indiana court until February 2005. The court also noted that Zimmerman's appointment was further justified by the fact that, unlike appellant, she had no financial interest in the outcome of the wrongful death action or the administration of the estate. In a status report filed a few days later in the probate court, appellant vowed to appeal the Indiana court's decision.

2 A letter dated October 4, 2005 and sent on behalf of Dawn Trucking once again asked the parties to allow its insurance carrier to pay the funds into the common pleas court in exchange for a full and final release. The letter states that "[a]t least, if the money is paid into Court at this time while the two of you are fighting over who is the proper representative, the amount of the settlement will draw interest. In my opinion, your clients' interests are not protected unless the money is deposited into Court now. They are losing funds each day that the two of you fail to agree on the terms of the settlement. * * * Therefore, I would appreciate it if each of you would address the topic of settlement rather than fighting amongst yourselves as to who is the proper representative."

3 Sup.R. 70 governs applications to approve settlement and distribution of wrongful death and survival claims. Sup. R. 71 governs applications for and awards of attorney fees in probate court for the administration of estates.

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2025 International North American Insolvency Symposium

Cross-Border Update

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2025

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Shifting Sands: COMI, Chapter 15, and the Expanding Cross-Border Toolkit

Agenda

- Overview of Recent Trends
- Overview of COMI Determination
- Choose your own COMI Adventure (illustrative demonstration using recent cases)

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Overview of Recent Trends

- 2025: More plenary filings in other jurisdictions coupled with a Chapter 15
  - Purpose of Chapter 15
  - Availability of relief not available in US / Chapter 11
    - 3rd party releases – *In re Crédito Real*, *In re Odebrecht*
    - Reverse vesting orders – *Just Energy, Goli Nutrition Inc.*
    - Cannabis
  - Sale of assets through a Canadian proceeding – *Elevation Gold Mining Corporation (Re)*
- US Trustee concerns with abuse of Chapter 15

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Overview of COMI Determination

COMI under Part IV of the CCAA	COMI under Chapter 15
• Rebuttable registered office presumption • Relevant factors: (i) location of headquarters, (ii) location of management, (iii) location of primary assets, (iv) location of majority of creditors, and (v) jurisdiction whose law would apply to most disputes • Location ascertainable by third parties • Group analysis relevant, but entity level test	• Rebuttable registered office presumption • Relevant factors: (i) location where corporate decisions are made, (ii) location of key business functions, (iii) existence of shared management/consolidated business operations, and (iv) integration of international operations • Location ascertainable by third parties • Group analysis relevant, but entity level test

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The Scenario

- Shifting Sands Ltd. is a global investment group with operations across Canada, United States, Brazil, UK and Spain.
- Its investment arm is based in Toronto, financed through a secured lending facility provided by RBC.
- To fund expansion, the group also raised capital through US-law governed notes issued via a Delaware SPV.
- The group's largest portfolio investments, oil-fields in Brazil, generate most of its income and underlying cashflows.
- Canadian regulators discover that Shifting Sands, which also manages assets for pension funds, has improperly transferred portfolio assets to the US.
- **Recently, however, the Brazilian assets have suffered a sharp devaluation following oil-price declines, currency weakness, and rising domestic interest rates.**
- **Liquidity has tightened and RBC has issued a notice of default.**

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Where is COMI: Canada?

The Chief Judge Glenn Trio: *Giftcraft, Oak and Fort & Iovate* – American corporations in Canadian based restructurings

Takeaways:

1. Pre-filing activities may shift COMI.
2. Expectations of creditors is fundamental
3. Scope of relief should be narrow
4. Importance of sufficient evidence

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Where is COMI: Manipulation?

- Mega Newco is a subsidiary of a Mexican financial services company ("**ODS**").
- ODS wanted to pursue a debt restructuring that included the restructuring of New York-law governed notes such that noteholders would receive partial cash payments or equity.
- Restructuring could not occur in US outside of Ch. 11 without consent of 100% of noteholders. ODS created a new sub in UK to facilitate a restructuring of US notes under a UK scheme that is faster and cheaper than Ch. 11.
- Ch. 15 recognition granted largely because there were no objections – Bankruptcy Court argued the same structure might not be approved otherwise.

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COMI: Manipulation? Valuation Considerations

Melars Group Limited (2022)

- Re-emphasizes the registered-office presumption for COMI and that lack of activity at the RO doesn't discard the presumption.
- "Ascertainability" isn't limited to public-domain facts: creditor-specific, non-public dealings can count. Courts shouldn't invent a "typical creditor" to filter evidence.
- Practical pointers: English-law contracts, prior English litigation, or a UK bank account do not show COMI in England on their own.

Fossil (2025)

- Created UK company in Aug 2025 and changed the Notes' governing law from New York to England and Wales to establish "sufficient connection" in the UK through registered-office presumption.
- The purpose was to use UK plan features not available under Chapter 11 (ability to just restructure one slice of the stack (the $150MM notes).
- Filed Chapter 15 in S.D. Tex to recognize foreign main proceeding and enforce the UK sanction order (incl. note cancellation and releases) in the U.S.

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Safeguarding Assets

Premier Assurance Group SPC Ltd. (Case No. 20-20230-RAM)

- A licensed Cayman Islands insurer writing international health and unit-linked life insurance.
- Appointment of Joint Controllers by the Cayman Islands Monetary Authority ("**CIMA**"), followed by the appointment of Joint Provisional Liquidators ("**JPLs**") and subsequently Joint Official Liquidators ("**JOLs**") by the Grand Court of the Cayman Islands.
- Temporary Restraining Order and Order Granting Recognition of the Cayman Islands liquidation as a Foreign Main Proceeding under Chapter 15 of the United States Bankruptcy Code (U.S. Bankr. Ct., S.D. Fla.).

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Emerging trends: Receiverships (offshore)

- Multiple Use Cases - enforcement of security, preserving value through international enforcement and a tool to achieve a desired outcome.
  - Court-appointed receiverships;
  - Out-of-court appointments by secured creditors, under the terms of security documentation; and
  - Receiverships over a segregated portfolio of an SPC.
- Applicable in Cross-Border Proceedings.

Emerging trends: Canada

- Options in Canda: supermonitor trend vs receiverships
- Liability Management Transactions - Would this work with a Canadian lender?

Emerging trends: LME UK

- Part 26A English Restructuring Plans are being used to push "amend and extend" timelines, run single-class noteholder deals, and deploy priming new-money with cross-class cram down ("**CCCD**").
- But Adler case (January 2024) tightened the approach: courts must interrogate fairness, not just a broad "rationality" test. Expect more valuation/class evidence and less tolerance for brute force priming.
- Plans cramming down HMRC also face real discretionary risk (e.g.:, Nasmyth plan refused despite meeting CCCD conditions).
- Must have defensible relevant-alternative/no-worse-off and rationale for any priority departures.
- The UK remains (for now) the go-to LME laboratory (even for US corporates, e.g., Fossil), although, post-Adler, plans need tighter class structuring, cleaner pari passu narratives, and strong valuation evidence.

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Emerging LME trends: Elsewhere

- **Netherlands**: Dutch Supreme Court held that a plan cannot compel new financing but can reorder priority if statutory tests are met, enabling priming structures when properly justified.
- **Spain**: First major creditor-led plan (Celsa, 2023). Spanish law since 2022 allows CCCD and even "cram-up" of senior classes where safeguards are met.
- **Germany**: Usage rising. Leoni (2023) confirmed equity wipe/delisting via Corporate Restructuring Act. Stuttgart OLG (2024) court ruled that management does not need to obtain shareholder consent where insolvency is the only alternative.
- **Canada**: Still rare. Few cases (e.g.: Conuma, Mitel) with one-off facts (i.e.: new money participation in Conuma and NY-law credit agreement in Mitel) not otherwise common in Big Six-led financings.

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Questions

Purdue Doesn't Stop Chapter 15 Recognition and Enforcement of Third-Party Releases

The U.S. District Court for the District of Delaware has issued a significant ruling in the cross-border insolvency practice that reaffirms U.S. recognition of foreign restructuring plans containing third-party releases.

Crédito Real S.A.B. DE C.V., SOFOM, E.N.R. ("***Crédito Real***") was one of Mexico's largest non-banking financial lending institutions. In 2021, Crédito Real experienced a liquidity crisis and commenced negotiations with its creditors. The negotiations, which were long and drawn out, ultimately resulted in a restructuring support agreement (the "***RSA***"). The RSA provided for, among other things, a prepackaged restructuring proceeding in Mexico under Mexican law and recognition of that proceeding and the approved restructuring plan in the U.S. under Chapter 15 of the Bankruptcy Code. Under the Mexican proceeding, Crédito Real obtained court approval of its restructuring plan (the "***Plan***"). The Plan, which was supported by the creditors, contained releases of third-party claims and causes of action as permitted under Mexican law (the "***Release***").

After approval of the Plan, Crédito Real, through its foreign representative, filed a petition seeking recognition of the Mexican proceeding under Chapter 15. The United States Development Finance Corporation ("***DFC***"), a U.S. government agency, objected to the entry of an order enforcing the Plan in the U.S. because the Release violated U.S. public policy following the *Purdue* decision.

The Delaware Bankruptcy Court, after briefing and oral arguments, overruled the DFC objection. That court held that Chapter 15's broad grant of authority permits enforcement of the Plan, including the Release. According to the Bankruptcy Court, *Purdue*'s holding was inapplicable because of the limited nature of that decision to the Chapter 11 process, which has no bearing on Chapter 15's separate framework for

"international comity and cooperation with foreign courts in foreign insolvency proceedings." Further, the Bankruptcy Court found that the Release was not "manifestly contrary" to U.S. public policy.

DFC appealed the decision to the Delaware District Court. That court held that, notwithstanding *Purdue*, Chapter 15 permits recognition and enforcement of nonconsensual third-party releases approved in a foreign insolvency proceeding. In affirming the Bankruptcy Court's decision, the District Court analyzed the purpose of Chapter 15. Specifically, the court found that Chapter 15 was enacted to, among other things (i) promote cooperation between U.S. and foreign courts, (ii) facilitate cross-border insolvency administration, and (iii) give effect to foreign restructuring judgments unless doing so would violate fundamental U.S. public policy. Both the Bankruptcy Court and the District Court noted that Chapter 11 and Chapter 15 "are very different animals." Chapter 15 is a framework for recognition and promoting comity, while Chapter 11 is a process to develop and obtain approval of a restructuring plan.

In upholding the Bankruptcy Court's decision, the District Court focused on the underlying principles of Chapter 15, including international comity. This principle encourages U.S. courts to respect foreign insolvency judgments unless doing so would violate fundamental domestic policy. Both the Bankruptcy Court and the District Court, in analyzing the issue of recognition and enforcement, found that the Mexican proceeding was procedurally sound, creditor-approved, and court-supervised. In Chapter15, these factors weigh heavily in favor of recognition.

Further, the District Court analyzed the issue of whether the Release violates *fundamental* U.S. domestic policy. The District Court pointed out that U.S. law does not categorically prohibit third-party releases, citing to the fact that the Bankruptcy Code contains provisions for the approval of such releases, including, for example, asbestos channeling injunctions. Moreover, the District Court stated that the public policy exception relied upon by DFC in its objection "applies only when actions offend the most fundamental policies of the United States and is invoked only under exceptional circumstances concerning matters of fundamental importance for the [United States]."[1] The District Court concluded that the enforcement of the Release through Chapter 15 is not such a fundamental policy of the U.S. Indeed, the District Court noted that *Purdue* was not decided on policy grounds but was reached only through statutory interpretation. Thus, the District Court held that the Bankruptcy Court appropriately granted the Chapter 15 recognition request and order enforcing the Plan, which contained the Release.

This decision from the Delaware District Court adds strong and further support to the proposition that Chapter 15 can be used to obtain and enforce third-party releases that are otherwise not obtainable in Chapter 11 post-*Purdue*. This decision is part of a trend where U.S. courts recognize third-party releases obtained in foreign restructuring proceedings. Thus, it appears that there is an emerging judicial consensus that Chapter 15 remains a viable pathway for cross-border restructurings that rely on third-party releases. As a result, companies facing insolvency may increasingly consider foreign restructuring venues where third-party releases are available and seek recognition under Chapter 15.

Recently, an English restructuring plan was used to restructure US headquartered Fossil Group Inc, allowing the US company to preserve its listed status, preserve equity, deal with hold out creditors as well as enable third party releases. The English sanctioned plan was recognised under Chapter 15 with little difficult. New Fortress Energy looks to follow suit, having announced the launch of the English restructuring process. The convening hearing (at which the English court will consider whether to allow the company to convening meetings of creditors/shareholders) is listed to be heard on 14 May 2026. If the plan receives support in England and is sanctioned, given the recent trend in recognising foreign restructuring proceedings, the plan proposed by New Fortress Energy may well follow suit and receive Chapter 15 recognition if the restructuring is supported by creditors and the English court.

For further reading, please see our quick guide to Restructuring Foreign Companies in England Using a Restructuring Plan

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[1] Internal quotations omitted.

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The International Scene

By George W. Shuster, Jr. and Benjamin W. Loveland[1]

Recognition of Nonconsensual Third-Party Releases in Ch. 15 After *Purdue*

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The U.S. Supreme Court's decision in *Harrington v. Purdue Pharma LP*[2] has, in many respects, changed the landscape for nonconsensual third-party releases in chapter 11 cases. What effect, if any, has *Purdue* had on the viability of such releases in chapter 15 cases? As two recent decisions suggest, perhaps not much, and those decisions provide far more flexibility for nonconsensual third-party releases in chapter 15 than the Supreme Court allows in chapter 11.

In *Crédito Real*[3] and *Odebrecht*,[4] the U.S. Bankruptcy Courts for the District of Delaware and the Southern District of New York, respectively, held that bankruptcy courts could enforce nonconsensual third-party releases in chapter 15 proceedings, notwithstanding *Purdue*. In each decision, the courts focused on the express underlying policy objectives of chapter 15 — to facilitate comity and cooperation with foreign courts — and how these goals differ from the goals of chapter 11.

These fundamental differences between chapters 11 and 15 are well-recognized in pre-*Purdue* jurisprudence, which has often led courts to conclude that certain limitations imposed in chapter 11 are not always applicable in chapter 15. The *Crédito Real* and *Odebrecht* decisions suggest that this analysis has remained largely unaffected by *Purdue*, which arguably only imposes an express limitation on a court's power within chapter 11 proceedings — that is, in proceedings where the authority for releases originates in the U.S. Bankruptcy Code.

In re Crédito Real: Recognition of Releases in a Foreign Plan

In *Crédito Real*, Hon. **Thomas M. Horan** recognized a foreign debtor's reorganization plan that contained nonconsensual third-party releases that had been approved by a Mexican court overseeing the debtor's foreign insolvency proceedings. The U.S. International Development Finance Corp. (DFC), an active participant and claimant in the Mexican proceeding, objected to recognition of the plan. The DFC argued that (1) the court should read the "catchall" provisions of §§ 1521(a)(7) and 1507 in the same way that the *Purdue* Court read § 1123(b)(6), and concluded that these are limiting provisions that do not provide authority to grant the releases; and (2) the releases were "manifestly contrary to the public policy" of the U.S. within the meaning of § 1506.[5]

In overruling this objection, the court began by noting the key policy objective of chapter 15: to encourage "cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15."[6] With that guiding principle in mind, the court turned to a textual analysis of the relevant provisions. Judge Horan declined to apply *Purdue*'s reasoning to the interpretation of §§ 1521(a) and 1507, finding that this was not supported by the plain language of the statutes, the legislative history or any canon of statutory interpretation.

With respect to the plain language, the court determined that §§ 1521(a) and 1507 were more expansive than § 1123(b), which was the statute at issue in *Purdue*. Section 1521(a) permits a court to grant "any appropriate relief" upon recognition, "including" six enumerated examples and a "catchall" for "any relief that may be available to a trustee," subject to certain specific exceptions.[7] Whereas the "catchall" provision of § 1521(a) provides an express list of what it does not permit (by cross references to specific Bankruptcy Code sections), § 1123(b)'s "catchall" directs courts to look to "other" Code provisions.[8] The court explained that "[b]y specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can grant, bearing in mind the guiding principles of comity and cooperation."[9] Section 1507 establishes that a court may provide "additional assistance to a foreign representative" once the court has recognized the proceeding.[10]

1 The authors extend appreciation to **Allyson Pierce**, a senior associate with WilmerHale, for her significant contributions to this article.
2 603 U.S. 204 (2024).
3 *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, No. 25-10208 (TMH), 2025 WL 977967 (Bankr. D. Del. April 1, 2025).
4 *In re Odebrecht Engenharia e Construcao S.A. — Em Recuperacao Jud.*, 669 B.R. 457 (Bankr. S.D.N.Y. 2025).
5 *Crédito Real*, 2025 WL 977967, at *5.
6 *Id.* at *5-6.
7 *Id.* at *10.
8 *Id.*
9 *Id.*
10 *Id.*

The court also noted that the plain language of this provision suggests that this provision is even more expansive, as it implies that a court may grant relief under § 1507 even where it could not under § 1521.[11] Further, as with § 1521, § 1507 differs from § 1123(b) in that it enumerates its boundaries unambiguously.[12]

The court determined that the legislative history further supported this conclusion by highlighting chapter 15's purpose.[13] The court reasoned that "granting bankruptcy courts the authority to enforce nonconsensual third-party releases originating in foreign courts would promote chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings."[14] In addition, the court also considered the fact that nonconsensual third-party releases are widely accepted by foreign courts, and that Mexican law allows for such releases.[15]

The court agreed with the DFC that the statutes should be read within the greater context of the Code, pursuant to the canon of *ejusdem generis*, which requires that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[16] However, the court concluded that the DFC's analysis went astray because it "neglect[ed] the major differences between the contexts of chapters 11 and 15. Namely, chapter 15 exists to provide assistance to foreign courts by granting comity to their orders."[17]

Finally, Judge Horan also rejected the argument that granting the releases would be "manifestly contrary to public policy" under § 1506.[18] The court observed that this exception should only be applied very narrowly, and that the threshold requires a question as to the procedural fairness of the foreign proceedings, or that recognition would "impinge severely on a U.S. constitutional or statutory right."[19] The court noted that (1) the DFC did not argue a lack of fairness in the Mexican proceedings; (2) U.S. courts have frequently recognized the fairness of Mexican insolvency proceedings; and (3) the evidence at bar likewise indicated that the Mexican proceedings were fair.[20] The court also considered that the DFC had played an active role in those proceedings.[21]

The court determined that the releases at issue were similar to releases authorized under the Bankruptcy Code for asbestos cases. Because relief would be available in other contexts, the court concluded that it cannot be "manifestly contrary to public policy" and that, in any event, it would not impinge on constitutional or statutory rights.[22] The court specifically remarked that the "[l]ack of specific availability in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress."[23]

11 *Id.* at *11.
12 *Id.* at *12.
13 *Id.*
14 *Id.* at *13.
15 *Id.*
16 *Id.* (quoting *United States v. Miller*, 145 S. Ct. 839 (2025)).
17 *Crédito Real*, 2025 WL 977967, at *13.
18 *Id.* at *14.
19 *Id.* at *14-15.
20 *Id.* at *15.
21 *Id.*
22 *Id.*
23 *Id.*

In re Odebrecht: Imposition of Releases Supplemental to a Foreign Plan

In *Odebrecht*, Hon. **Martin Glenn** considered a proposed recognition order for a plan that was approved in a Brazilian insolvency proceeding. Although the underlying plan and the order from the Brazilian court approving it did not contain nonconsensual third-party releases, the U.S. Trustee objected to the proposed recognition order, arguing that the proposed language created such a release, and that § 1521 did not provide authorization for issuing such an order.[24]

Judge Glenn expressed some skepticism that the language at issue created a nonconsensual third-party release, but explained that even if so, "courts can enforce nonconsensual third-party releases found in foreign plans of reorganization."[25] In so holding, the court largely adopted Judge Horan's reasoning from *Crédito Real* as to the interpretation of §§ 1521 and 1507,[26] although in a decision somewhat divorced from the Delaware case's underlying factual basis.

The court also provided additional reasoning in support of its conclusion, looking first to pre-Bankruptcy Code case law and noting that "[l]ongstanding precedent holds that bankruptcy courts can strip U.S. parties of rights they have under the laws of the United States," and a "battery of similar cases makes it clear that a party can lose rights in an ancillary proceeding [that] it otherwise would have had in a plenary case under the Bankruptcy Code."[27] Under this line of precedent, Judge Glenn concluded that "deference to the foreign court is appropriate [as] long as the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States" and that "so long as these guidelines are respected ... bankruptcy courts may ... extinguish claims that would be available in plenary actions in the U.S. in the name of comity."[28]

The court then looked to pre-*Purdue* case law in the chapter 15 context, acknowledging that "ancillary cases are fundamentally different, and limitations that exist in plenary cases do not always carry over."[29] The logic of these cases "still holds after *Purdue*: *Purdue* only held that chapter 11 ... does not give courts the power to grant such releases, and did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15."[30]

Notably, in overruling the U.S. Trustee's objection, Judge Glenn determined that there was no distinction "between enforcing, via order, a foreign plan with a third-party release provision, and issuing an order enforcing a foreign plan, which order contains a third-party release which itself is not in the foreign plan," since either would result in an order that released claims subject to U.S. jurisdiction.[31] Accordingly, the *Odebrecht* ruling stands for the proposition that recognition orders containing nonconsensual third-party releases

24 *Odebrecht*, 669 B.R. at 463-64.
25 *Id.* at 473.
26 *Id.*
27 *Id.* at 474-75.
28 *Id.* at 475-76.
29 *Id.* at 476.
30 *Id.*

continued on page 81

The International Scene: Nonconsensual Third-Party Releases in Ch. 15

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could be granted under chapter 15, regardless of the language of the underlying plan, thereby expanding on both the ruling and the premise of *Crédito Real*.

Context for These Cases Within Pre-*Purdue* Jurisprudence

As Judge Glenn noted in *Odebrecht*, pre-*Purdue* case law that considered whether limitations on a court's powers in plenary chapter 11 cases carried over to ancillary chapter 15 cases often arrived at the conclusion that they do not, because of the fundamental differences between these two types of cases. As an example, Judge Glenn looked back to his previous decision in *Metcalfe & Mansfield*, where the court considered jurisdictional limitations on the approval of third-party releases in a chapter 15.

In *Metcalfe*, Judge Glenn held that the only relevant limitation was whether principles of comity would counsel in favor of entering the order.[32] Considering that decision in *Odebrecht*, he reasoned that because *Purdue* only imposed an explicit limitation on chapter 11 powers, and did not speak to the specific powers of an ancillary court, it should not affect the limitations imposed in chapter 15 proceedings.

However, not all pre-*Purdue* decisions considering nonconsensual third-party releases in chapter 15 have approved them. Notably, the Fifth Circuit declined to enforce such releases in *In re Vitro S.A.B. de C.V.*[33] The court determined that § 1521(a) did not provide the authority to approve the releases, adopting a narrower interpretation than employed by the *Crédito Real* or *Odebrecht* courts. However, it left the door open to the possibility that § 1507 could "theoretically provide ... for the relief."[34] The court explicitly noted that § 1507's intent was "to provide relief not otherwise available under the Bankruptcy Code or [U.S.] law."[35]

The *Vitro* court informed its analysis with the principles of comity. It noted that the "closest factual analog" to the case at bar was *Metcalfe* but ultimately found certain key facts to be distinguishable — specifically, that the *Vitro* plan was approved as a result of a vote of mostly insiders holding intercompany debt, whereas in *Metcalfe*, the plan had received the support of a majority of creditors.[36] Because it had concluded that the relief was unavailable under § 1507 under the facts present in that case, the *Vitro* court likewise left open the question as to whether nonconsensual third-party releases were contrary to public policy under § 1506.[37]

While the Fifth Circuit's analysis of the statutory provisions of chapter 15, and in particular § 1521(a), was narrower than that used by other courts, there are nevertheless common analytical themes among *Vitro* and such later cases as *Crédito Real* and *Odebrecht*, particularly as to the consideration of the purpose and policies of chapter 15. The *Crédito Real* court acknowledged as much in citing *Vitro* as supporting the proposition that the lack of available relief in the U.S. or under other chapters of the Bankruptcy Code is not a bar to relief in chapter 15.[38] This commonality is unsurprising, given the explicit emphasis on comity and cooperation throughout the provisions of chapter 15 and chapter 15 jurisprudence.

Conclusion

The *Crédito Real* and *Odebrecht* decisions demonstrate that *Purdue* did not influence the outcome/result of the analysis of nonconsensual third-party releases in the context of chapter 15. The general directive that ancillary courts presiding over chapter 15 proceedings should be somewhat deferential to their foreign counterparts, in the spirit of cooperation and comity that pervades chapter 15, drives these outcomes. However, this remains a developing area of case law.

Notably, the DFC has filed an appeal of the *Crédito Real* decision, pending in the U.S. District Court for the District of Delaware. It seems likely that parties — both debtors and objectors — will continue to test the boundaries of nonconsensual third-party releases in chapter 15 cases, particularly in light of the potentially reduced availability of those releases in chapter 11 cases following *Purdue*. abi

31 *Id.*
32 *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 695-96 (Bankr. S.D.N.Y. 2010).
33 *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012).
34 *Id.* at 1060.
35 *Id.* at 1062.
36 *Id.* at 1067, 1069-70.
37 *Id.* at 1070.
38 *Crédito Real*, 2025 WL 977967, at *16.

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2025 International European Insolvency Symposium

Third-Party Releases and Chapter 15 Implications

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2025

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THIRD-PARTY RELEASES AND CHAPTER 15 IMPLICATIONS

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State of the Law: Nonconsensual Third-Party Releases

- Ireland
- Singapore
- United Kingdom
- United States of America

U.S. Position - Nonconsensual Third-Party Releases

Held: "The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants."

- *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 204 (2024)

Opt-In Provision

- Opt-in mechanisms require creditors to take some affirmative step to "opt-in" or grant the third-party releases, usually voting in favor of the plan.
- However, some courts require a separate check-box to opt-in, not just a vote to accept the plan.

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Opt-In Provision

- *In re Red Lobster Management LLC*, No. 24-2486 (GER) (Bankr. M.D. Fla.) (requiring an opt-in mechanism for third-party releases for creditors who did not affirmatively vote in support of the plan (*e.g.*, claimants who did not vote or who turned in a blank ballot) and limiting the releases to those that voted to accept the Plan or expressly consented to the third-party releases in writing)

- *Sunpower Corporation*, et al., No. 24-11649 (CTG) (Bankr. D. Del.) Disclosure Statement (Sept. 30, 2024), ECF No. 651 (stating holders of claims who voted to reject the plan or are deemed to accept the plan must opt-in to grant third-party releases under the plan)

Opt-Out Provision

- Assume consent where a creditor, after proper notice, does not affirmatively object or decline the release. In any case, a third-party release under an opt-out mechanism is not deemed to be consensual without sufficient notice that satisfies due process.
- Typically, an opt-out provision in a plan takes the form of a check-box on a ballot or opt-out form included with the plan solicitation package.
- Other plans may provide that creditors not entitled to vote (because they are deemed to accept or reject the plan) may opt-out of the releases by filing an objection. Even in plans without these mechanics, a formal objection to the third-party release is sometimes deemed to be an opt-out.

Opt-Out Provision

- *In re True Value Co., L.L.C.*, et al., No. 24-12337 (KBO) (Bankr. D. Del.), Disclosure Statement Order (Feb. 12, 2025), ECF No. 911 (stating that *Purdue* did not define consent for third-party releases and holding that creditors who vote in favor of the plan and do not affirmatively opt-out are deemed to have consented). Plan was subsequently confirmed on April 17, 2025.
- *In re the Roman Catholic Diocese of Rochester*, No. 19-20905, (Bankr. W.D.N.Y.), Disclosure Statement Order (Mar. 15, 2025) ECF No. 3031 (approving solicitation packages with opt-out third-party releases, emphasizing that the committee representing abuse claimants actively participated in drafting and supporting the plan and that requiring an opt-in could allow non-voting claimants to derail the settlement and expose plan contributors to lingering liability).
- *In re Spirit Airlines Inc.*, et al., No. 24-11988 (SHL) (Bankr. S.D.N.Y), Memorandum Opinion (Mar. 7, 2025), ECF No. 520 (holding that the opt-out mechanisms were enough to establish the consent of creditors, given (i) how thoroughly the process was discussed, (ii) the number of people who chose to opt-out, and (iii) the inclusion of the release language in the plan from the beginning of the case, making it more likely for creditors to reach an informed decision whether to opt-out).
- *In re GOL Linhas Aéreas Inteligentes S.A.* et al., No. 24-10118 (MG) (Bankr. S.D.N.Y May 22, 2025) ECF No. 1658 (approving opt-outs for third-party releases because (i) the releases were prominently displayed on ballots and plan materials, (ii) the number of responses (both voting and choosing to opt out) indicate adequate service of process, and (iii) no impaired nonvoting creditors deemed to reject are subject to releases).

Case-by-Case Approach

- Some courts have adopted a case-by-case approach to determine whether opt-in or opt-out mechanisms are consensual. Further, courts have considered the appropriateness of opt-in or opt-out mechanism on a class-by-class basis within a single plan.

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Case-by-Case Approach

- *In re Lumio Holdings LLC*, No. 24-11916 (JKS) (Bankr. D. Del.), Disclosure Statement Hearing Audio (Jan. 3, 2025), ECF No. 418 (noting that "in light of Purdue, there's no prohibition on use of the opt-out releases, but that whether [an] opt-out is appropriate is subject to a case-by-case analysis" and rejecting an opt-out mechanism and requiring an opt-in procedure where impaired parties did not otherwise have to respond to the plan).

- *In re 2U, Inc.*, No. 24-11279 (MEW) (Bankr. S.D.N.Y.), Confirmation Hearing Transcript (Sept. 9, 2024), ECF No. 175 (approving an opt-in standard for non-voting creditors and an opt-out mechanism for voting creditors, concluding that voting in favor of the plan constituted valid consent to the third-party releases).

Financial Incentive Approach

- Non-debtor third parties who wish to collectively resolve overlapping claims against them by the debtor and third parties as part of the plan have turned to financial incentives to receive releases.
- Economic incentives to grant releases can take different forms, including a higher pro-rata share for holders of claims who grant releases or higher trust funding based on the number of holders of claims who grant releases.
- Cases to date have not yet explored whether the amount of such payments need to be derived based on the value of underlaying claims or another basis of determination, nor have holders of claims or other parties in interest challenged the appropriateness of such incentives (*e.g.*, whether they can be coercive in nature).

Financial Incentive Approach

- *Endo International plc*, No. 22-22549 (JLG) (Bankr. S.D.N.Y. Mar. 22, 2024) (providing for a 4x pro rata payment in exchange for third-party releases by holders of claims).
- *In re The Roman Catholic Diocese of Rockville Centre, New York* (*In re Rockville Centre*), No. 20-12345 (MG) (Bankr. S.D.N.Y. Dec. 4, 2024), ECF No. 3465 (providing for a graduated release of funds from insurance settlement and sale proceeds in reserve depending on the number of claimants that execute the consensual release).
- *In re Purdue Pharma L.P.*, No. 19-23649 (SHL) (Bankr. S.D.N.Y. Mar. 19, 2025), ECF No. 7306 (providing for reserves that (i) are based on the number of claims held by claimants who did not consent to third-party releases and (ii) are released over time and as such, claims are disallowed or releases are given).

Post *Purdue* Chapter 15 Cases

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Statutory Authority

- 11 U.S.C. § 1507
  - **(a)** Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
  - **(b)** In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure--
    - **(1)** just treatment of all holders of claims against or interests in the debtor's property;
    - **(2)** protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
    - **(3)** prevention of preferential or fraudulent dispositions of property of the debtor;
    - **(4)** distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
    - **(5)** if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Statutory Authority

- 11 U.S.C. § 1521(a)
- Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including--
  - **(1)** staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
  - **(2)** staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
  - **(3)** suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
  - **(4)** providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
  - **(5)** entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
  - **(6)** extending relief granted under section 1519(a); and
  - **(7)** granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

In re Odebrecht Engenharia e Construção S.A.

- Judge Martin Glenn found, in an insolvency that originated in Brazil, that section 1521 of the Bankruptcy Code "permits the grant of a nonconsensual third-party release in support of a foreign debtor's plan of reorganization."

In re Odebrecht Engenharia e Construção S.A., 2025 Bankr. LEXIS 990, *35 (Bankr. S.D.N.Y. Apr. 21, 2025).

In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.

- Judge Thomas Horan recognized and enforced a nonconsensual third-party release in a Mexican concurso mercantil pursuant to sections 1521(a)(7) and 1507 of the Bankruptcy Code.

In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., 670 B.R. 150 (Del. Apr. 1, 2025).

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In re Mega Newco Limited

- The debtor, based in Mexico, sought to restructure debt obligations created under U.S. law. Rather than file in the United States or Mexico—whose laws made the restructuring complicated—it created a U.K. subsidiary, which voluntarily took on the debt liabilities. That subsidiary then initiated U.K. proceedings, which resulted in a Scheme of Arrangement that included nonconsensual nondebtor releases. That subsidiary then sought and received Chapter 15 recognition in the Southern District of New York.
- Judge Wiles noted that this structure could be used in another case as a way of frustrating and thwarting the legitimate expectations of creditors—which was not the goal of Mega Newco—which was formed, and the English Scheme Proceeding was pursued, for "laudable objectives."

In re Mega Newco Limited, 2025 WL 601463, *4 (Bankr. S.D.N.Y. Feb. 24, 2025).

In re Americanas S.A.

"The relief granted hereby: (i) is within this Court's jurisdiction; (ii) is appropriate to effectuate the purposes and objectives of chapter 15 of the Bankruptcy Code; (iii) is in the interests of international comity; and (iv) is available and warranted pursuant to sections 1507(a) and 1521(a) of the Bankruptcy Code." (Insolvency originated in Brazil).

In re Americanas S.A., No. 23-10092 (MEW), 2024 WL 3506637, at *3 (Bankr. S.D.N.Y. July 22, 2024).

In re Yuzhou Group Holdings Company Ltd.

- Foreign Representative sought recognition of a Hong Kong scheme including a nonconsensual third-party release of Yuzhou's directors and officers, advisers, and various transaction parties. *In re Yuzhou Group Holdings Company Limited*, Case No. 24-11441, Dkt. No. 10, *Limited Objection of U.S. Trustee to the Verified Petition under Chapter 15 for Recognition* (UST Objection) (Sept. 25, 2024), at 4 – 5.
- On Sept. 25, 2024, the U.S. Trustee objected to the scheme's nonconsensual third-party releases, making many of the same arguments asserted by the U.S. Trustee in the *Crédito Real* Chapter 15 case: (i) that the "additional assistance" or "appropriate relief" permitted by Section 1521(a) does not extend to third-party releases; (ii) that there was insufficient evidence in the record to show that the principles of comity were satisfied under Section 1507(b); and (iii) that the releases were manifestly contrary to public policy following the Supreme Court's ruling in *Purdue*. *See* UST Objection.
- After the U.S. Trustee's objection was filed, the hearing on the foreign representative's request for recognition was delayed for several months, after which it appears that the parties resolved the objection by filing a revised proposed recognition order, which "resolves" the objection of the U.S. Trustee. *In re Yuzhou Group Holdings Company Limited*, Dkt. No. 21, *Notice of Filing of Revised Proposed Order* (Apr. 9, 2025), at 1.
- The Court entered the revised recognition order which includes a new paragraph clarifying that the proposed recognition order "does not recognize or enforce, act as an injunction enforcing, or grant relief or assistance with respect to, any nonconsensual Third-Party Release". Dkt No. 26 ¶ 9. As a result, the foreign representative no longer appears to be seeking enforcement of the nonconsensual third-party releases in the United States.

In re CB&I UK Limited, et al.

- Foreign Representative sought recognition in the Southern District of Texas and enforcement of restructuring plans approved by courts in the U.K. and Netherlands including a nonconsensual third-party release of other McDermott group entities, directors and officers, advisers, and various transaction parties. *In re CB&I UK Limited, et al.*, Case No. 23-90795 (March 21, 2024).
- No formal objection filed to the Motion for Recognition of the Foreign Proceedings.
- On March 22, 2024, the Court entered the order which granted recognition of the Dutch proceeding (Dkt. No. 161), and the U.K. Proceeding (Dkt. No. 162). That same day, the Court also entered the order recognizing and giving full force and effect to the restructuring plans approved in the U.K. and the Netherlands, as well as those court's orders sanctioning the respective plans. Dkt. No. 166.

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Releases in Singapore Insolvency Proceedings

SUBSTANTIAL CONNECTION WITH SINGAPORE FOR PURPOSES OF ESTABLISHING JURISDICTION

Liquidation, judicial management and scheme of arrangement proceedings are available to foreign companies having substantial connection with Singapore. Any of the following may ground the court's determination of substantial connection (IRDA, section 246(3)):

- Singapore is the center of main interests of the Company
- Company is carrying on business in Singapore / has place of business in Singapore
- Company is registered in Singapore
- Company has substantial assets in Singapore
- Company has chosen Singapore law to govern its loan, transaction or dispute resolution clause
- Company has submitted to the Singapore Court's jurisdiction

In the Matter of No Va Land Investment Group Corporation

- First of its kind prepack for a regional enterprise filed in the Singapore International Commercial Court.
- Significant ruling because it shows the ability of foreign companies to gain access to Singapore's courts—here, the Singapore International Commercial Court (SICC)–and its best practices restructuring regime.
- Companies, particularly those with assets in the ASEAN region and with U.S. law governed debt may find that Singapore is a friendly jurisdiction, especially for the restructuring of funded debt.
- Singapore has indicated a strong commitment to cross border cooperation.

In the Matter of No Va Land Investment Group Corporation

- No Va Land Investment Group – a major Vietnam real estate developer in financial distress.
- First ever cross-border pre-pack scheme filed in SICC.
- SICC approved the pre-pack covering US$300 million in bond debts in just 15 days.
- SICC satisfied that there was substantial connection, proper disclosure and fulfilment of voting requirements.

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Releases In United Kingdom Insolvency Proceedings

Mega Newco

Mega Newco was created for the sole purpose of obtaining jurisdiction in the U.K. and for the Debtor to avail itself of the U.K.'s laws. The Mega Newco:

- Parent was not a party to the English Scheme Proceeding;
- Parent's COMI was in Mexico, not the U.K; and
- Mega Newco was created, and then voluntarily subjected itself to the Parent's liabilities under the U.S. Notes, just so that the U.S. Notes issued by the Parent could be restructured in a jurisdiction that was not otherwise available to it.

Releases in Ireland Insolvency Proceedings

IRISH PART 9 SCHEMES – PROCESS & LEGAL PRINCIPLES FOR SANCTION

The Part 9 Scheme Process

- *Part 9 schemes follow a three-stage process:*

Stage 1: Convening Application (optional)

- Company applies to court for order convening creditor meetings
- Court reviews proposed class composition and scheme circular
- Court directs notice, advertising, and meeting procedures

Stage 2: Class Meetings & Voting

Approval threshold: majority in number representing at least 75% in value of those present and voting in each class

- Creditors vote by class on scheme proposals
- Remote participation typically available for international creditors

Stage 3: Sanction Hearing

- Court scrutinises fairness and compliance with statutory requirements
- Objectors may be heard
- If satisfied, court sanctions scheme which upon filing becomes binding on all creditors regardless of consent

Legal Principles Applied at Sanction

The court must be satisfied that:

- **(i) Adequate Notice:** Sufficient steps were taken to identify and notify all interested parties
- **(ii) Statutory Compliance:** Statutory requirements and court directions were complied with
- **(iii) Proper Class Composition:** Classes were properly constituted with creditors having sufficiently similar rights grouped together
- **(iv) No Improper Coercion:** There was no improper coercion of minority by majority
- **(v) "Intelligent and Honest Person" Test:** An intelligent and honest person in the relevant class, acting in their own interest, might reasonably approve the scheme
- **(vi) Within Powers:** The scheme is within the company's powers (not ultra vires)

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Irish Scheme of Arrangement

- *Re Ballantyne RE plc [2019] IEHC 407*
- *Re Nordic Aviation Capital DAC [2020] IEHC 445*
- *Re EFW 21 Renewable Energy [2023] IEHC 690*
- *Endo International plc (Irish High Court, April 2024)*

THIRD-PARTY RELEASES & MAIN PRINCIPLES

The Irish courts are pro- release and adopt a "sufficient nexus" approach – a release must have a sufficient connection to the creditor–debtor relationship with the scheme company.

Re Ballantyne RE plc [2019] IEHC 407 – Foundational Case

- *Court sanctioned a scheme releasing claims not only against the debtor but also against a guarantor (Ambac);*
- *Restructured approximately US$1.65 billion of New York-law governed notes with Chapter 15 recognition.*

Re Nordic Aviation Capital DAC [2020] IEHC 445 – Group Releases

- €5.9 billion aircraft lessor restructuring;
- Extended releases beyond guarantors to broader group entities based on economic interdependence; obtained US Chapter 15 recognition.

THIRD-PARTY RELEASES & MAIN PRINCIPLES

***Re EFW 21 Renewable Energy [2023] IEHC 690*– Insider/Adviser Releases**

- **Type of Release:** *Releases of claims against directors, officers, shareholders, and advisers with carve-outs for fraud, gross negligence, and wilful misconduct; exempted claims were stayed for three years, with limitation periods tolled for that period.*
- **Main Principle:** *With carve-outs and a time-limited stay, the court found no legal or policy "blot"; no party objected at sanction.*
- **Significance:** *Demonstrated breadth of permissible releases extending to D&O and affiliates with misconduct carve-outs and a defined procedural stay.*

***Endo International plc (Irish High Court, April 2024)*- Mass Tort Releases**

- **Type of Release:** *Mass tort (including opioids) context extending to non-debtors within the group.*
- **Facts:** *Used an Irish Part 9 scheme in tandem with U.S. Chapter 11 to recognise and enforce plan terms, including non-consensual third-party releases for the parent and Irish affiliates.*
- **Jurisdiction:** *the parent used a deed of indemnity and contribution to take on subsidiaries' liabilities to satisfy sufficient-connection considerations.*
- **Structure:** The Irish Scheme was used as a "bolt-on" to US Chapter 11 providing EU-wide recognition with the *U.S. plan expressly contemplating a concurrent Irish scheme sanctioned by the Irish High Court.*

PROCEDURAL SAFEGUARDS

Notice & Identification

- *Sufficient steps must be taken to identify and notify all interested parties; evidencing proper notice and advertising forms part of the court's sanction analysis.*

Disclosure & Information

- *The scheme circular must contain prescribed information; court directions (including on convening, advertising, and meeting conduct) must be observed.*

Class Composition

- *Classes must group creditors with sufficiently similar rights; the alternative comparator (often liquidation where insolvent) informs whether differences require separate classes.*

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PROCEDURAL SAFEGUARDS

Voting Safeguards

- *Dual threshold: majority in number AND 75% in value per class.*

Fairness Review

- *No improper coercion: while binding dissenters is inherent in schemes, the court considers whether there was improper pressure by a majority against a minority.*
- *"Intelligent and honest person" test: courts give weight to sophisticated creditor support but will intervene if no reasonable class member could have approved on the evidence.*

Release-Specific Safeguards

- *Carve-outs for fraud/gross negligence/wilful misconduct, and calibrated stays/tolling, can address due-process concerns where third-party releases are included.*

JURISDICTION OF IRISH COURTS

Irish Company Status

Jurisdiction to sanction commonly rests on Irish incorporation/registration, Irish registered office, substantial Irish operations, and Irish scheme creditors.

Automatic Jurisdiction:

- Irish incorporation or registered office provides clear jurisdictional basis.
- *Deed of indemnity and contribution can centralise liabilities at an Irish parent.*

Sufficient Connection to Ireland

A sufficient connection (short of COMI) can be established via Irish governing law obligations, Irish assets/operations, or group interdependence such that the scheme company's fortunes are tied to obligors whose liabilities are being addressed.

Connecting Factors:

- Irish law governing debt instruments or key contracts.
- Irish assets (tangible or intangible).
- Irish operations or business activities.
- Irish subsidiaries or affiliates.
- Irish creditors or creditor presence.
- Group restructuring involving Irish entities.

Multi-Jurisdictional Enforcement

European Union Recognition

- Brussels I Regulation (Recast) (Regulation 1215/2012)
- European Insolvency Regulation (Recast) (Regulation 2015/848)

United Kingdom

- Section 426 Insolvency Act 1986 (statutory assistance)
- Common law recognition principles

United States

- Chapter 15 where not manifestly contrary to U.S. public policy (relevance of Irish procedural safeguards)

Will *Purdue* ruling lead to opportunistic forum shopping?

- Are there suitable non-U.S. jurisdictions to begin insolvency proceedings to circumvent *Purdue*?
- Does the type of case (i.e. financial v. mass tort) make a difference?

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Faculty

Hon. Lisa G. Beckerman is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013-19. She is a Fellow and a member of the board of directors of the American College of Bankruptcy, as well as a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

Hon. Philip Bentley is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Sept. 7, 2022. Prior to joining the court, he has been a partner in the bankruptcy and restructuring department of Kramer Levin Naftalis & Frankel LLP, where his practice focused on complex litigation in bankruptcy courts, as well as other federal and state courts. In addition to occasionally representing debtors, trustees and examiners, Judge Bentley frequently litigated on behalf of official committees and creditor groups in large bankruptcies, including Purdue Pharma, Puerto Rico, Residential Capital, Madoff Investment Securities, General Motors, W.R. Grace, Adelphia Communications, WorldCom, Dow Corning and SGL Carbon. A regular speaker on bankruptcy issues, he is a member of the Federal Bar Council's Bankruptcy Litigation Committee and of the National Conference of Bankruptcy Judges, and he has served as a court-appointed mediator in several chapter 11 cases, including Celsius Network. Prior to his appointment, Judge Bentley was a member of the advisory board for ABI's annual New York City Bankruptcy Conference, as well as a longstanding member of the Policy Committee of Human Rights Watch. He received his B.A. *cum laude* from Yale University and his J.D. *cum laude* from Columbia Law School, where he was a Harlan Fiske Stone Scholar.

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-17 and as a conflicts judge in the Districts of Guam, Hawaii and Southern California. Previously, Judge Collins was a shareholder with the Collins, May, Potenza, Baran & Gillespie, P.C. in Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. Judge Collins was the 2023 president of the National Conference of Bankruptcy Judges, is a Fellow in the American College of Bankruptcy, served on the Ninth Circuit's Trial Improvement Committee, sits on the JCUS's Committee on the Administration of the Bankruptcy System and Bankruptcy Judges Advisory Group, served on ABI's Board of Directors and is currently a Business Court Representative in the American Bar Association's Business Law Section. In addition, he was a founder of the Arizona Bankruptcy American Inn of Court chapter, served as the board chair for the Foundation for Senior Living, was on the St. Teresa Parish Finance Committee and Parish Council, received the St. Thomas More Award for the St. Thomas

More Society, was named a Significant Sig by the Sigma Chi fraternity and was named to the Sigma Chi's Beta Phi Chapter Hall of Fame. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Hon. Heather Zubke Cooper is the Chief U.S. Bankruptcy Judge for the District of Vermont in Burlington. Prior to her appointment on March 14, 2022, she was a partner at Facey Goss & McPhee, P.C., a Vermont-based law firm, which she joined in 2006 as an associate and later became a partner. Judge Cooper has more than 20 years of experience in the financial and restructuring industry, having represented individual and corporate debtors and creditors in loan workouts and restructurings, liquidations, foreclosures, litigation, seizures and receiverships. During her partnership at Facey Goss & McPhee, P.C., she served as managing partner and became Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She also served as the Bankruptcy Law Section chair of the Vermont Bar Association from 2014-18 and has served on various task forces for the U.S. Bankruptcy Court for the District of Vermont since 2011. Judge Cooper is a member of the Texas, Massachusetts and Vermont Bar Associations, the Federal Bar Council, the National Conference of Bankruptcy Judges, ABI and the National Association of Bankruptcy Trustees. She serves as a member of the Human Resources Advisory Council of the Administrative Office of the U.S. Courts and various Second Circuit committees, and is a frequent lecturer at national conferences on bankruptcy-related issues. Judge Cooper previously clerked for former bankruptcy judge Colleen A. Brown and practiced with Murphy & King, P.C. and Dunn, Kacal, Adams, Pappas & Law, P.C. Before entering private practice, she served as briefing attorney to Justice David L. Richards of the Texas Court of Appeals, Second District. Judge Cooper received her B.A. from the University of Houston in 1993 and her J.D. *magna cum laude* from South Texas College of Law in 1998.

Hon. Vincent F. Papalia is a U.S. Bankruptcy Judge for the District of New Jersey in Newark, sworn in on Dec. 29, 2014, following a 30-year career in private practice. For 20 years, he had been a partner with the law firm of Saiber LLC and the head of its Bankruptcy and Creditors' Rights Department. Prior to joining Saiber LLC, he was an associate and then a partner with Clapp & Eisenberg, P.C. For virtually his entire career, Judge Papalia focused his practice on representing various parties-in-interest in bankruptcy and foreclosure-related litigation and proceedings before federal, state and bankruptcy courts. He also served for many years as a court-appointed mediator for the U.S. Bankruptcy Court for the District of New Jersey and was vice-chair of the District V-A Ethics Committee from 2013-14. He also chaired the Debtor-Creditor Committee of the Essex County Bar Association. Judge Papalia has authored or co-authored numerous articles on bankruptcy and creditors' rights issues and has often spoken on those topics. While in private practice, he was listed in *Chambers USA* and *New Jersey's Best Lawyers*. Judge Papalia received his B.B.A. in 1980 *summa cum laude* from Pace University and his J.D. *cum laude* from Fordham University School of Law in 1984, where he was a member of its law review.