

# JUDICIAL ETHICS

## BENCHGUIDE:



ANSWERS TO SIXTY-SIX FREQUENTLY ASKED QUESTIONS

2005

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## PREFACE

The Code of Judicial Conduct establishes standards for ethical behavior of judges and is not intended as an exhaustive guide for all conduct of judges. Judges should also be governed in their judicial and personal conduct by general ethical standards. The preamble, succinctly summarizing the role of the American judiciary, states:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

In 1994, the Florida Supreme Court recounted that the first American canons of judicial ethics were adopted by the American Bar Association in 1924 and were later adopted and made applicable to the federal courts and most state courts. *In re Code of Judicial Conduct*, 643 So.2d 1037 (Fla. 1994). The Supreme Court adopted the canons for use in Florida in 1941. In 1973, the court substantially adopted the American Bar Association's revisions of the Code of Judicial Conduct, and, in 1994, adopted revisions to the Code based largely on the Model Code of Judicial Conduct adopted by the American Bar Association in 1990.

# INTRODUCTION

## Scope and Format of Benchguide

This benchguide is designed to address questions that judges and/or candidates for judicial office may have regarding ethical judicial conduct, the regulation of judges, and judicial discipline. It concentrates on the Code of Judicial Conduct, the advisory opinions of the Judicial Ethics Advisory Committee, and Florida Supreme Court decisions involving judicial discipline. This benchguide is not a comprehensive discussion of judicial conduct in Florida but uses a question and answer format to answer sixty-six of the most frequently asked questions, including providing guidance and resources in the areas that can result in the most serious disciplinary consequences.

### 1. To Whom Does Code Apply?

The Code of Judicial Conduct applies to justices of the Florida Supreme Court and judges of the district courts of appeal, circuit courts, and county courts. The Application section of the Code of Judicial Conduct (which appears at the end of the Code) provides:

Anyone, whether or not a lawyer, who performs judicial functions, including but not limited to a magistrate, court commissioner, special magistrate, general magistrate, domestic relations commissioner, child support hearing officer, or judge of compensation claims, shall, while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed.

Any judge responsible for a person who performs a judicial function should require compliance with the applicable provisions of this Code.

A traffic magistrate:

(1) is not required to comply with Sections 5C(2), 5D(2) and (3), 5E, 5F, and 5G, and Sections 6B and 6C.

(2) should not practice law in the civil or criminal traffic court in any county in which the magistrate presides.

A judge who has retired from judicial service and who . . . [is] eligible for recall to judicial service should comply with all the provisions of this Code except Sections 5C(2), 5E, 5F, and 6A.

A retired justice or judge who chooses not to be assigned to judicial service and who is a member of The Florida Bar may practice law and still receive retirement compensation. The justice or judge has all the rights of an attorney and is no longer subject to the Code of Judicial Conduct.

An attorney who is a candidate for judicial office is subject to Rule Regulating The Florida Bar 4-8.2(b) and must also comply with Canon 7 of the Code. An unsuccessful candidate is subject to lawyer discipline for his or her campaign conduct.

A judge is subject to judicial discipline for conduct occurring before becoming a judge. *See Inquiry Concerning Davey*, 645 So.2d 398 (Fla. 1994); *In re Meyerson*, 581 So.2d 581 (Fla. 1991); *Inquiry Concerning a Judge, Carnesoltas*, 563 So.2d 83 (Fla. 1990); *In re Capua*, 561 So.2d 574 (Fla. 1990); *In re Sturgis*, 529 So.2d 281 (Fla. 1988); *Inquiry Concerning a Judge, Berkowitz*, 522 So.2d 843 (Fla. 1988); *In re Byrd*, 511 So.2d 958 (Fla. 1987); *In re Block*, 496 So.2d 133 (Fla. 1986). When a judge is removed from office by the Florida Supreme Court on the basis of a Judicial Qualifications Commission proceeding, the removal order may also order the suspension of the judge as an attorney pending further proceedings. R. Regulating Fla. Bar 3-4.5.

## **2. How Is Code Enforced?**

Article V, Section 12, Florida Constitution, establishes a Judicial Qualifications Commission, which has the power to investigate and recommend to the Florida Supreme Court the removal from office of any justice or judge whose conduct “demonstrates a present unfitness to hold office, and to investigate and recommend the discipline of a justice or judge whose conduct. . . warrants such discipline.” Art. V, §12(a). Upon recommendation from the Judicial Qualifications Commission's hearing panel, the “supreme court may order that the justice or judge be subjected to appropriate discipline, or be removed from office with termination of compensation for willful or persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, or be involuntarily retired for any permanent disability that seriously interferes with the performance of judicial duties.” Art. V, §12(c), Fla. Const.

In 1997, Article V, Section 12, was amended to expand the range of disciplinary measures available for recommendation by the Judicial Qualifications Commission and for imposition by the Florida Supreme Court. Before 1997, the only disciplinary consequences of a violation of the Code were either a public reprimand or removal from office. Now Article V, Section 12(a)(1), defines “discipline” to include “fine, suspension with or without pay or lawyer discipline.” *See, e.g., In re Rodriguez*, 829 So.2d 857 (Fla. 2002) (judge suspended and fined \$40,000.00 for Canon 7 violations including accepting contributions made for purpose of influencing judicial decisions and filing misleading campaign reports with Division of Elections).

Only fifteen judges have been removed from judicial office for improper conduct. *See In re McMillan*, 797 So.2d 560 (Fla. 2001); *In re Shea*, 759 So.2d 631 (Fla. 2000); *In re Ford-Kaus*, 730 So.2d 269 (Fla. 1999); *In re Hapner*, 718 So.2d 785 (Fla. 1998); *In re Graziano*, 696 So.2d 744 (Fla. 1997); *In re Johnson*, 692 So.2d 168 (Fla. 1997); *In re McAllister*, 646 So.2d 173 (Fla. 1994); *In re Graham*, 620 So.2d 1273 (Fla. 1993), *cert. den.*, 510 U.S. 1163 (1994); *In re Garrett*, 613 So.2d 463 (Fla. 1993); *In re Berkowitz*, 522 So.2d 843 (Fla. 1988); *In re Damron*, 487 So.2d 1 (Fla. 1986); *In re Leon*, 440 So.2d 1267 (Fla. 1983); *In re Crowell*, 379 So.2d 107 (Fla. 1979); *In re LaMotte*, 341 So.2d 513 (Fla. 1977). Additionally, justices of the Supreme

Court, judges of district courts of appeal, and judges of circuit and county courts are liable to impeachment for misdemeanor in office. Art. III, §17(a), Fla. Const.

### **3. What Are Judicial Ethics Advisory Committee Opinions?**

In 1976, the Florida Supreme Court created a Committee on Standards of Conduct Governing Judges, now called the “Judicial Ethics Advisory Committee“ (hereinafter “the Committee”). *Petition of the Committee on Standards of Conduct for Judges*, 327 So.2d 5 (Fla. 1976); *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So.2d 834 (Fla. 1997). The purpose of the Committee is to render written advisory opinions to inquiring judges and judicial candidates concerning the propriety of contemplated judicial and nonjudicial conduct. The Committee has rendered many advisory opinions interpreting the Code of Judicial Conduct.

Although the Judicial Qualifications Commission is not bound by Committee opinions, compliance with Committee advice is admissible as evidence of good faith in judicial discipline matters. You can find the opinions at

<http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/Opinions.html>.

# CHAPTER 1

## USE AND ABUSE OF JUDICIAL POWER

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## Chapter 1

### Use and Abuse of Judicial Power

#### 1. What Is Judicial Power and What Is Its Proper Use?

The canons both explicitly and implicitly describe judicial power by stating what judges can and cannot do pursuant to their authority as judges. The preamble states that “[i]ntrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.” Canon 1 provides as follows:

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

Canon 2A provides that “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 2B provides that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.” The Commentary to Canon 2B states that: “Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business, although a judge may use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code.”

Canon 3B(4) provides that “[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.” Canon 3C(4) provides that “[a] judge shall not make unnecessary appointments” and “shall exercise the power of appointment impartially and on the basis of merit.” It prohibits a judge from practicing nepotism and favoritism. It also prohibits a judge from approving compensation of appointees “beyond the fair value of services rendered.” Canon 4D(2)(d) provides that a judge “shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.”

Canon 3B(11) provides that “[a] judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.”

Canon 5D(1)(a) provides that “[a] judge shall not engage in financial business dealings that . . . may reasonably be perceived to exploit the judge's judicial position.” SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 33 (Michie/Butterworth 2000), describes judicial power thus:

In performing their adjudicative responsibilities, judges exercise considerable power and discretion. While conducting pretrial proceedings, ruling on motions, directing trials, fashioning remedies in civil cases, and sentencing defendants in criminal cases, the actions of the judge are definitive, often uncontrolled by fixed rules or by a higher authority.

Judicial discretion is perhaps best viewed as a subset of judicial power. That is, judicial discretion is the power to decide those matters that call for the exercise of personal judgment rather than the application of strict rules. *Id.*

## **2. What Is Abuse of Judicial Power?**

Abuse of judicial power is using the power of judicial office for the private gain of the judge or others. It is disregard for the meaning of the office by engaging in activities fraught with conflicts of interest or merely having the appearance of impropriety. It is using the office for self-aggrandizement for the purpose of depriving someone of legal rights or human dignity. Abuse of judicial power is failing, purposefully or carelessly, to uphold the honor of judicial office to the ultimate detriment of the American legal system.

In *In re Turner*, 421 So.2d 1077, 1081 (Fla. 1982), the Florida Supreme Court eloquently addressed the proper use of judicial power:

Judges must necessarily have a great deal of independence in executing [their] powers, but such authority should never be autocratic or abusive. We judges must always be mindful that it is our responsibility to serve the public interest by promoting justice and to avoid, in official conduct, any impropriety or appearance of impropriety. We must administer our offices with due regard to the system of law itself, remembering that we are not depositories of arbitrary power, but judges under the sanction of law. Judges are expected to be temperate, attentive, patient and impartial, diligent in ascertaining facts, and prompt in the performance of a judge's duties. Common courtesy and considerate treatment of [others] are traits properly expected of judges. Court proceedings and all other judicial acts must be conducted with fitting dignity and decorum, reflecting the importance and seriousness of the inquiry to ascertain the truth.

## **3. What Are Some Examples of Abuse of Judicial Power?**

A large number of Florida Supreme Court judicial discipline decisions involve the abuse of judicial power. Following are eighteen examples from a variety of cases. Those decisions include:

- ***In re Schwartz, 755 So.2d 110 (Fla. 2000)*** (judge publicly reprimanded for continually making rude and sarcastic remarks to counsel during different oral arguments - in addition to reprimand, judge required to offer written apology; enter counseling for stress management; and video and audiotape future oral argument panels).
- ***In re Inquiry Concerning a Judge, 832 So.2d 716 (Fla. 2002)*** (while serving as a witness in a friend's child custody hearing, judge had ex parte meeting with presiding judge in case, questioned that judge's impartiality by making crude remarks, contacted police during the investigation, and lied under oath; judge also used judicial position to get brother's case heard earlier). (Note: This judge resigned from the bench before Florida Supreme Court took final action).
- ***In re Shea, 759 So.2d 631 (Fla. 2000)*** (judge threatened to recuse himself from all of an attorney's cases unless attorney agreed to withdraw from representing client with whom judge had legal dispute; repeated instances of hostile behavior toward attorneys, court personnel, and other judges also led to removal from the bench).
- ***In re Inquiry Concerning a Judge re Graziano, 696 So.2d 714 (Fla. 1999)*** (judge removed from office after hiring friend as Guardian ad Litem despite friend's lesser qualifications than other applicants; granting her a raise despite poor performance evaluations; and using insulting or threatening language toward court employees).
- ***In re Richardson, 760 So.2d 932 (Fla. 2000)*** (judge tried to influence police officers who arrested him by announcing he was a judge, wanting to speak to the chief of police, and stating he was "pro police"; judge received public reprimand for improper attempts to influence law enforcement) (Note: The underlying charge for which the judge was arrested was ultimately dismissed, but the attempt to avoid arrest was serious enough alone to merit discipline.)
- ***In re Inquiry Concerning Ward, 654 So.2d 549 (Fla. 1995)*** (judge received public reprimand for writing character reference letter for criminal defendant recommending probation; letter was not response to official request by defendant's probation officer).
- ***In re Fogan, 646 So.2d 191 (Fla. 1994)*** (judge sanctioned for writing character reference letter on official court stationery for personal friend facing sentencing in federal court; friend's federal probation officer had not requested letter).
- ***In re McAllister, 646 So.2d 173, 178 (Fla. 1994)*** (judge removed from office for, among other things, "sexual harassment of a judicial assistant, a willingness to engage in ex parte communications and the intentional abuse directed toward the public defender's office").
- ***Inquiry Concerning Golden, 645 So.2d 970 (Fla. 1994)*** (judge reprimanded publicly for making sexist and racial remarks; using crude, profane, and inappropriate

language when presiding over legal proceedings; and failing to diligently perform duties of office).

- ***In re Inquiry Concerning Perry, 641 So.2d 366 (Fla. 1994)*** (judge publicly reprimanded for: (1) unnecessarily abusing and berating recruiting officer for wearing army dress uniform to court and (2) exercising contempt powers in arbitrary and improper manner without regard for due process of law).
- ***In re Graham, 620 So.2d 1273 (Fla. 1993), cert. den., 510 U.S. 1163 (1994)*** (judge removed from office for: (1) repeatedly using judicial position to make allegations against and improperly criticize fellow judges, elected officials, and others without reasonable factual basis or regard for their reputations; (2) exceeding and abusing judicial power by imposing improper sentences and by improperly using the contempt power; (3) acting in undignified and discourteous manner toward individuals appearing in his court; (4) acting in manner that impugned public perception of integrity and impartiality of judiciary; and (5) closing public proceedings).
- ***Inquiry Concerning a Judge, No. 90-311 re Perry, 586 So.2d 1054 (Fla. 1991)*** (judge publicly reprimanded for, among other things, verbally abusing and intimidating attorneys, witnesses, and parties).
- ***In re Trettis, 577 So.2d 1312 (Fla. 1991)*** (judge publicly reprimanded for rude and overbearing behavior in court, including engaging in improper tirades and outbursts, engaging in verbal abuse and intimidation of courthouse personnel and other judges, failing to disqualify self in proceedings when impartiality might reasonably have been questioned, allowing personal relationships to influence judicial conduct, and lending prestige of office in attempt to create employment position within judicial system for others; judge also agreed to undergo treatment to deal with stress).
- ***Inquiry Concerning a Judge, Carnesoltas, 563 So.2d 83 (Fla. 1990)*** (reprimanding judge publicly for, among other things, using judicial power to demean and ridicule attorney who had opposed judge in different case and, after having that attorney removed from courtroom, continuing to act as judge in matter to defendant's detriment).
- ***In re Capua, 561 So.2d 574 (Fla. 1990)*** (judge publicly reprimanded for, among other things, signing order releasing his son on own recognizance when son charged with nonbondable charge and required to go to bond hearing).
- ***In re Sturgis, 529 So.2d 281 (Fla. 1988)*** (judge publicly reprimanded for, among other things, twice displaying handgun while presiding at hearings and using position as circuit judge to prevent inspection of official court records relevant to matters involving judge's misdeeds).
- ***In re Eastmoore, 504 So.2d 756, 757 (Fla. 1987)*** (judge publicly reprimanded for compelling newspaper reporter to come to his chambers although reporter's

appearance not connected to legal proceeding but rather resulted from reporter's failure to respond to judge's greeting; for not giving child's mother full opportunity to testify while presiding over child custody matter; and for addressing the mother in an improperly raised voice and acting in an overbearing and dictatorial manner).

- ***In re Inquiry Concerning Judge Muszynski, 471 So.2d 1284 (Fla. 1985)*** (judge publicly reprimanded for ordering police officer to turn radio quieter or off while both were at restaurant; when police officer told judge that radio was as low as possible and regulations prohibited him from turning it off, judge, after identifying himself as circuit judge, "arrogantly castigated" officer. Later, judge sent officer letter directing him to appear at courthouse to explain alleged contemptuous conduct; letter stated failure to appear would constitute separate and independent contempt).

The above list of eighteen examples of abuse of judicial power resulting in some form of discipline is not comprehensive. Abuse of judicial power is frequently at the heart of the most serious discipline cases that result either in removal or in a resignation to avoid the indignity of such a proceeding. Judges will sometimes ask whether there are trends that can be identified in the cases that lead to removal from the bench. While the summaries show a diverse array of abusive behaviors, in five of the above cited cases, *McAllister*, *Golden*, *Graham*, *Graziano*, and *Shea*, there are common threads in the judges' ultimate removal from judicial office. These threads included repeated undignified, discourteous, threatening, and intimidating behavior or remarks. Perhaps the conduct could be most succinctly summarized as arrogant and arbitrary in word and deed. Moreover, these cases typically involve multiple instances of intimidating and abusive conduct across cases and various parties or aimed at a particular party, attorney, or court staff for whom the judge harbors personal animosity.

Other common threads in the most serious discipline cases include abuse of contempt power or judicial process, including threats to hold persons in contempt or compel their presence through threat of contempt proceedings. When these angry outbursts or overreaching of authority go unchecked, they can then intensify. Because attorneys and parties have much at stake and often must face the same judge on repeated occasions, they are often inclined to ignore all but the most outrageous of these misuses of power or process.

Less frequent components, but still prevalent enough to qualify as common threads, are influence peddling or intervention in court cases or police proceedings on the judge's own behalf or on behalf of a friend or family member; using influence to award someone a job, raise, or promotion; and writing prohibited character references for persons appearing before other disciplinary or adjudicatory authorities. As a caution, it bears repeating that what the actual summaries show is that a trends analysis alone can be misleading. While it seems that arrogance and unbridled anger are often at the core in each of the cases above (with the possible exception of the two cases involving letters of recommendation), the judges allowed arrogance and/or anger to cloud their judgment and typically engaged in multiple and increasingly serious abuses of power, after initial overstepping of the bounds went unchecked.

#### **4. May Judge Write Letters of Recommendation or Serve as Character Witness?**

Canon 2B governs letters of recommendation and states in pertinent part: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.” Generally, Florida Supreme Court opinions allow, and Committee opinions advise, that it is ethically acceptable for judges to write letters of recommendation to educational institutions on behalf of persons about whom they have actual knowledge based on personal observation. *See In re Code of Judicial Conduct*, 643 So.2d 1037 (Fla. 1994) (citing Committee opinions 75-18, 75-22, 77-17, 79-3, 88-19, 92-2, 92-30, and 93-1, all identified as proper interpretations of the canon). Similarly, the opinions cited above indicate that a judge may write a letter of recommendation for a person applying for employment if the judge has actual knowledge and communicates factual information regarding character, knowledge, skills, and ability relevant to the job in question or relevant to professional competence generally.

#### **5. What Contact with Investigative or Adjudicatory Bodies Is Permitted?**

The case law and Committee opinions advise that a judge may not initiate contact with an investigatory or adjudicatory body determining rights, duties, privileges, or immunities of a person requesting that the judge contact the body in his or her behalf. *See In re Inquiry Concerning Ward*, 654 So.2d 549 (Fla. 1995) (judge wrote letter of character reference on official court stationery on behalf of friend awaiting sentencing in federal court, a violation of Canon 2B, for which judge received public reprimand). *See* Opinion 75-6 (improper to write character letter for attorney who is principal in disbarment proceeding); Opinion 75-18 (improper to write letter to bar grievance committee or Supreme Court in disciplinary proceeding or to federal judge in criminal sentencing without official request); Opinion 82-15 (improper to write letter voluntarily to Board of Bar Examiners); Opinion 88-11 (improper to communicate with Florida Bar members on behalf of Florida Bar presidential candidate); Opinion 89-4 (improper to ask Board of Bar Examiners to expedite application for law clerk); Opinion 89-15 (impermissible to appear before judicial nominating commission to introduce candidate or express opinion about who is best qualified to serve as judge).

Recent case law, in two notable decisions, does, however, suggest that some communications initiated by a judge with an investigatory or adjudicatory body may be permissible. In *In re Frank*, 753 So.2d 1228 (Fla. 2000), the court was faced with a judge who contacted Bar grievance attorneys to express frustration with their handling of a matter. Notably, the judge did not ask for or demand special treatment based on his position. The court noted at 1240-41:

Knowledge that one is a judicial officer or respectful conduct in response to such knowledge does not automatically translate into a determination that a judicial position has been abused. Judge Frank did not forfeit the right to make proper inquiry concerning the pending matters simply because he held judicial office. A judicial officer should not be sanctioned simply because those with whom he or she has interaction are aware of the official position. The use of a judicial position or power of the position in an

unbecoming manner requires more than simply someone being aware of one's position. The gravamen of the charge under the circumstances requires that there be some affirmative expectation or utilization of position to accomplish that which otherwise would not have occurred. The testimony here demonstrates that those interacting with Judge Frank were aware of his position, but their actions, while respectful of his position, were none other than those normally expected under any other circumstance.

So, simply criticizing or complaining about the performance of the investigative or adjudicatory body, as any citizen might do, appears to be permissible. Likewise, simply making “a proper inquiry concerning the pending matters” is likened to what anyone has a right to do. Also significant, however, appears to have been the testimony from those interacting with the judge that they did not perceive that the judge was leveraging his position to obtain special treatment. This should cause some concern among judges contemplating initiating contact with an adjudicatory or investigatory body since an outcome might hinge on subjective perceptions of those who deal with the judge on the matter.

This idea that a judge may in some circumstances appropriately initiate contact is nonetheless iterated more recently and expressly affirmed in *In re Inquiry Concerning a Judge*, 832 So.2d 716 (Fla. 2002). In that case, although the judge was suspended on other grounds, the court found it permissible that the judge in question had made a telephone call to a police officer investigating a custody issue for a friend of the judge. In this case, the judge did not attempt to exert influence but apparently only asked to receive the same amount of information that another caller would have been allowed to request and obtain. Again, as a caution, the results in these cases are highly fact specific, and the fact that they are reported cases at all suggests the need for a high degree of circumspection in such situations. As the holdings in *Ward* and *Fagan, supra*, indicate, unsolicited contact with the adjudicatory or investigative entity often involves the judge in impermissible lending of the prestige of office, whether intended or not. It is this appearance of impropriety judges must strive to avoid.

## **6. May Judge Use Judicial Letterhead for Permitted Letters of Recommendation?**

As the Florida Supreme Court noted in *In re Code of Judicial Conduct*, 643 So.2d 1037, 1039 (Fla. 1994), adopting major revisions to the Code of Judicial Conduct,

[T]he Committee [on Standards of Conduct] has questioned whether and under what circumstances a judge may write a character reference letter and under what circumstances a judge may use official court letterhead. The confusion over these issues was caused in part by our approval of the language used in the stipulation of fact and discipline in *In re Judge Abel*, 632 So.2d 600 (Fla.1994). Although we believe that the proposed Canon 2B sufficiently addresses the issues raised by the Committee, we have added the following underscored language to the commentary regarding judicial letterhead: “Similarly, judicial letterhead must

not be used for conducting a judge's personal business, *although a judge may use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code.*"

The court noted that bar admission authorities and law schools solicit recommendation letters from judges and found that if it is appropriate to write a letter, a judge may use stationery that reflects the judge's office. *See also In re Fogan*, 646 So.2d 191 (Fla. 1994) (reprimanding judge publicly for writing character reference on official court stationery for personal friend who was to be sentenced in federal court; probation officer had not solicited letter but rather defendant requested letter). It is very important that judges not send voluntarily submitted written statements with the knowledge and understanding that they will be used directly or indirectly in an adjudicatory proceeding. *Id.* at 192 (citing Opinion 75-6).

## **Chapter 2**

### **Ex Parte Communications**

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## Chapter 2

### Ex Parte Communications

#### 1. What Are Ex Parte Communications and When and Why Are They Prohibited?

Black's Law Dictionary defines "ex parte" as "On or from one party only, usually without notice to or argument from the adverse party." BLACK'S LAW DICTIONARY 576 (7th ed. 2000). Canon 3B(7) provides as follows:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

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

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

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

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

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

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

In SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 159–160 (Michie/Butterworth 2000), the authors explain the purpose of the rule against ex parte communications:

*Ex parte* communications are those that involve fewer than all the parties who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that “every person who is legally interested in a proceeding [is given the] full right to be heard according to law.”

*Ex parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge “may be incomplete or inaccurate, the problem can be incorrectly stated.” At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling of the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption. *Id.*

Ex parte communications include not only communications between judges and lawyers but can also include communications between judges and litigants, witnesses, and law enforcement personnel. Ex parte communications also include communications with another judge for the purpose of trying to influence that judge in behalf of a party appearing before him or her in a case. *See In re Inquiry Concerning a Judge re: Holloway*, 832 So.2d 716 (Fla. 2002) (judge suspended for, among other infractions, angrily engaging in ex parte communication with another judge regarding scheduling a hearing in a friend’s case and making crude comments about the other judge).

*Ex parte* communications are barred when they concern pending or impending litigation. Thus, general discussion of the law, outside of the explicit or implicit context of the case, would not usually be considered an *ex parte* communication. Similarly, incidental contact between a judge and a party or attorney, even in the midst of a trial, will not violate the rules so long as the case itself is not discussed.

SHAMAN, *supra* at 150.

## **2. Can Ex Parte Communication Be Remedied?**

According to SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 174 (Michie/Butterworth 2000), “[t]he Code of Judicial Conduct does not address the question of remedies, but courts have held that prompt disclosure of *ex parte* communication to all affected parties may avoid the need for other corrective action.” The text further states: “Where irremediable prejudice has occurred, of course, disclosure will not be sufficient to avoid disqualification or reversal.”

## **3. What Are Some Examples of Violations of Prohibition Against Ex Parte Communications?**

Several judges have been disciplined for engaging in improper ex parte communications. See the following examples:

- ***In re Damron*, 487 So.2d 1 (Fla. 1986)** (improper for judge to consider ex parte communications in making specific judicial decision and to grant ex parte request to set aside DUI conviction without notice to state; judge engaged in ex parte communications with parties, attorneys, and citizens concerning matters before his court).
- ***In re Inquiry Concerning a Judge, Leon*, 440 So.2d 1267 (Fla. 1983)** (judge disciplined for engaging in improper ex parte conversations with another judge and state attorney regarding cases).
- ***Inquiry Concerning a Judge, No. 90-311 re Perry*, 586 So.2d 1054 (Fla. 1991)** (judge engaged in improper ex parte communication concerning pending or impending proceedings in violation of Canon 3A(4) of Code of Judicial Conduct, including instance that required new trial).
- ***In re Inquiry Concerning a Judge: Clayton*, 504 So.2d 394 (Fla. 1987)** (on four occasions judge conducted improper ex parte proceedings with defendants or defense counsel to dispose of criminal cases; in some instances, dispositions took place without defendant's knowledge, including pleas and sentences, and in some cases were not done in open court. Court noted former Canon 3A(4) was written with clear intent of excluding all ex parte communications except when expressly authorized by statute or rule, citing Thode, *Reporter's Notes to Code of Judicial Conduct* (1973)).
- ***In re Turner*, 421 So.2d 1077 (Fla. 1982)** (judge had ex parte conference with party's attorney).
- ***In re Boyd*, 308 So.2d 13 (Fla. 1975)** (justice publicly reprimanded for improperly receiving ex parte memorandum from attorney representing parties in case before court).
- ***In re Dekle*, 308 So.2d 5 (Fla. 1975)** (justice publicly reprimanded for using ex parte memorandum from attorney for one party in case before him in preparing judicial opinion).
- ***In re Inquiry Concerning a Judge re: Holloway*, 832 So.2d 716 (Fla. 2002)** (judge suspended for, among other violations, engaging in angry ex parte communications with another judge and making crude remarks about that judge while trying to influence scheduling change for a friend).

## **Chapter 3**

### **Controlling Attorneys' Manifestations of Bias or Prejudice**

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## Chapter 3

### Controlling Attorneys' Manifestations Of Bias Or Prejudice

#### 1. Does Code of Judicial Conduct Require Judges to Discipline or Report Attorneys for Manifestations of Bias or Prejudice?

Canon 3B(6) expressly proscribes a lawyer “manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others.” It does not preclude legitimate advocacy when these statuses or other similar factors are issues in the proceeding. When made aware of these manifestations of bias, or any violation of the Rules Regulating The Florida Bar, the judge must take “appropriate action” pursuant to Canon 3D(2). The commentary to Canon 3D states, “Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender.” If the question raised is “substantial,” the judge “is required under this Canon to inform the appropriate authority.”

A judge also must be familiar with Rule 4-8.4(d), Rules Regulating The Florida Bar, containing three categories not mentioned in the Canon prohibiting certain manifestations of bias or prejudice in connection with the practice of law. Specifically, Rule 4-8.4(d) prohibits knowingly, or through callous indifference, disparaging, humiliating, or discriminating against litigants, jurors, witnesses, or other lawyers based on marital status, employment, or physical characteristics. These three categories are not enumerated in Canon 3B(6), but because Canon 3D(2) requires a judge to take action when a Bar rule is violated, judges must consider these three classifications when determining whether to take action against an attorney. Also relevant is Rule 4-8.3(a), which requires a lawyer to report another lawyer to The Florida Bar anytime that lawyer's conduct raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Attorney discipline for sexist and racist speech has been a subject of much controversy. Discussion of First Amendment challenges to similar rules promulgated by the American Bar Association or adopted in other states is beyond the scope of this chapter. For a detailed discussion of the First Amendment issues surrounding the curtailment of attorney speech, see Rotunda, *Attorney Discipline for Sexist and Racist Speech*, presentation at ABA-APRL-NOBC Conference in Miami, Florida (Feb. 10, 1995).

The Florida Supreme Court Racial and Ethnic Bias Study Commission and the Florida Supreme Court Gender Bias Commission identified significant problems experienced by minorities and women in the legal profession and by minority and female litigants in Florida's justice system. These problems are not unique to Florida, having been identified by similar task forces throughout the country. For thorough consideration of these issues, see generally Warshawsky, *The Judicial Canons: A First Step in Addressing Gender Bias in the Courtroom*, 7 *Geo. J. Legal Ethics* 1047–1056 (1994); Bowman, *Bibliographical Essay: Women and the Legal Profession*,

7 Am.U.J. Gender & Soc. Pol. L. 149 (1999). It also bears noting that Canon 3B(5) requires judges to adhere to the same standards in refraining from manifestations of bias. They must also take the same Canon 3D(2) appropriate action when judicial colleagues violate the rule.

## **2. What Is “Appropriate Action” Against Manifestations of Bias?**

In *In re Code of Judicial Conduct*, 656 So.2d 926 (Fla. 1995), the Florida Supreme Court amended the commentary to Canon 3D, which concerns what action a judge should take for an attorney's or another judge's misconduct.

According to the commentary, “[a]ppropriate action may include direct communication with the judge or lawyer . . . , other direct action if available, or reporting the violation to the appropriate authority.” There was a concern expressed before the amendment that all three steps were required no matter what the ethical infraction and irrespective of its seriousness. As noted above in the immediately preceding answer, a judge faced with a manifestation of bias must assess whether the infraction is minor or substantial. Judges now clearly have the power to respond progressively depending on the egregiousness of the infraction. The duty to act encompasses counseling in chambers, admonishing in court on the record, reporting misconduct to a senior partner or managing government lawyer, and ultimately, filing a formal grievance. Courts need this latitude and the public's trust in their discretion to address bias in the manner that best befits the circumstances and least jeopardizes the rights of the parties. Obviously, too, repeated instances of manifestations of bias must be handled with progressive severity.

**Chapter 4**  
**Errors of Law**

**Are Errors of Law Misconduct Under Code of Judicial Conduct? .....18**

## Chapter 4

### Are Errors of Law Misconduct Under Code of Judicial Conduct?

Generally, errors of law are not ethical violations. When an attorney believes the court has ruled incorrectly, the appropriate vehicle for addressing the concern is the appellate process. “When a judge commits a legal error, it usually is a matter for appeal and does not raise a question of improper judicial conduct subject to judicial discipline. In some instances, however, legal error may amount to judicial misconduct calling for discipline ranging from admonishment to removal from office.” SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 36 (Michie/Butterworth 2000). The whole concept of judicial independence is threatened by discipline for an error of law. “The preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings, other than in extreme or compelling circumstances.” SHAMAN, *supra* at 36 (noting the disciplinary process should not be used as a substitute for appeal; some take the position legal error never should be dealt with in a judicial misconduct proceeding). There are rare but recognized instances, however, in which an error of law can constitute misconduct. Both egregious legal error and legal error motivated by bad faith are appropriate subjects for discipline. In Florida, Canon 3B(2) requires that judges maintain professional competence. If a judge makes a legal error so extreme that it suggests a lack of minimal competence, this probably is an ethical problem. Likewise, if a judge purposely misapplies the law in bad faith, this undermines confidence in the integrity and impartiality required by Canon 2.

None of the recorded discipline cases in Florida specifically address legal error as an ethics violation. Nevertheless, a number of cases generally discuss the responsibility to follow the law.

In the interest of protecting and preserving a strong and independent judiciary, we must be careful never to judge a respondent and determine whether to remove him from office on the grounds that he possesses an unpopular philosophy, has offensive idiosyncrasies, has rendered unpopular decisions or is too compassionate. *Unless his attitudes, prejudices or beliefs are translated into action or inaction that constitutes a violation of law or the Code of Judicial Conduct, rendering him presently unfit to hold the office*, he should be free to make his decisions and administer his office without fearing an investigation by the [JQC] that could lead to removal from office. [Emphasis added]

*In re Inquiry Concerning a Judge, J. Q. C. No. 77-16, 357 So.2d 172, 177–178 (Fla. 1978).*

In the above case, a judge was reprimanded for placing himself in a position in which his impartiality could reasonably be questioned. The specific acts committed by the judge showed a pattern of misapplication of or failure to abide by the law. Although the court found the conduct to have been well intentioned and compassionate, the judge was nevertheless reprimanded for, among other things, improperly using county facilities and supplies, refusing to issue a writ of replevin and assess costs, conducting ex parte conference, and refusing to execute a judgment.

Similarly, in *In re Crowell*, 379 So.2d 107, 110 (Fla. 1980), a judge was removed from office for demonstrating a present unfitness after engaging in a “pattern of conduct over a long period of time, involving persistent abuse of the contempt power, which demonstrates a lack of proper judicial temperament and a tendency to abuse the authority of the office.” The removed judge in this matter clearly violated the law in a number of different proceedings by failing to apply proper standards for holding attorneys in contempt, attempting to have certain state employees suspended or fired, and demanding improper stipulations from counsel in another matter. Ultimately, the JQC concluded that the incidents showed “a propensity to summarily adjudicate and incarcerate.” 379 So.2d at 108. Therefore, when judicial disregard for law or procedure rises to the level of an abuse of power, it is certainly a basis for discipline and possible removal. For a more thorough discussion of abuse of judicial power, see Chapter 1.

## Chapter 5

### Disqualification And Recusal

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## Chapter 5

### Disqualification And Recusal

#### 1. Is There Difference Between “Legal” and “Ethical” Bases for Disqualification and Recusal?

There is a difference between legal and ethical bases for disqualification and recusal. The ethical bases for disqualification found in Canon 3E are the primary subject of this chapter. Canon 3E addresses instances involving conflicts of interest or perceived conflicts that require judges to disqualify themselves from hearing certain matters. Sometimes a judge may be compelled to disqualify on legal grounds, under court rule or statute. The legal requirements, which are beyond the scope of this volume, are found in Chapter 38, Florida Statutes, and the Florida Rules of Judicial Administration. Although this chapter concerns only the ethical requirements of Canon 3E, the legal and ethical grounds for disqualification overlap, and the connections are noted as they arise in the following discussion.

#### 2. What Are Five Ethical Bases for Disqualification in Canon 3E?

The ethical bases for disqualification fall generally into one of five categories:

- a. Personal bias or prejudice, Canon 3E(1)(a).
- b. Personal knowledge of disputed facts, Canon 3E(1)(a).
- c. Service of judge as lawyer, lower court judge, or material witness in the proceeding, Canon 3E(1)(b).
- d. Economic interest in the matter (personal, business, or family), Canon 3E(1)(c).
- e. Judge or family member as party, attorney, financial interest holder, or likely material witness in a proceeding, Canon 3E(1)(d).

All of the Florida Supreme Court cases and Committee opinions interpreting Canon 3E fall into one of these five categories, each of which is examined in detail below.

#### 3. Procedurally, What Must Judge Do When Faced with Motion to Disqualify?

In determining the legal sufficiency of motions alleging any of these grounds, the judge to whom the allegations are directed must determine only the legal sufficiency of the motion, not the truth or falsity of the statements. *See Fla.R.Jud.Admin. 2.160(f)*. *See also Taylor v. State*, 557 So.2d 138 (Fla. 1st DCA 1990); *Deren v. Williams*, 521 So.2d 150 (Fla. 5th DCA), *rev. den.*, 531 So.2d 169 (Fla. 1988) (cited in Hurley & Antoon, “Disqualification of a Judge,” *Ethics Outside the Courtroom* (Florida Judiciary Education 1996); *Tower Group, Inc., v. Doral Enterprises/Joint Ventures*, 760 So.2d 256 (Fla. 3d DCA 2000); *Kielbania v. Jasberg*, 744 So.2d 1027 (Fla. 4th DCA 1997); *Leveritt & Assocs., P.A. v. Williamson*, 698 So.2d 1316 (Fla. 2d DCA 1997);

*Nathanson v. Nathanson*, 693 So.2d 1061 (Fla. 4th DCA 1997).

Not only must the judge determine only the legal sufficiency of the motions, but the judge must do so quickly. In fact, according to Rule 2.160(f), the decision regarding legal sufficiency must be made immediately. While there is no definition of the required time frame, one year is too long (*Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 4th DCA 2000)), seven weeks is too long (*G.C. v. Department of Children and Families*, 804 So. 2d 525 (Fla. 5th DCA 2002)), and so is thirty days (*Anderson v. Glass*, 727 So.2d 1147 (Fla. 5th DCA 1999)).

#### **4. What Is “Personal Bias” or “Prejudice”?**

The terms personal bias or prejudice relate to allegations of a judge's particularized ill will or animosity toward a specific person in a case. These terms are not synonymous with racial, ethnic, or other status-based bias or prejudice, which is the subject of Canon 3B(5). One commentator has observed that personal bias or prejudice is more difficult to determine than other forms of partiality, such as established personal relationships, professional associations, or business interests. Abramson, *Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* 23 (American Judicature Society 1992). These sources of partiality are susceptible of a more objective definition than personal bias, prejudice, or dislike. *See generally* SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 113-126 (Michie/Butterworth 2000). This is an area in which the legal and ethical requirements overlap. Not only does Canon 3E(1)(a) mandate judicial disqualification when the judge holds a personal bias or prejudice against a party or counsel, but section 38.10, Florida Statutes, states that a party may move for disqualification of a judge when the party fears an unfair trial because the judge personally dislikes the party or favors the party's opponent. *See, e.g., Robbins v. Robbins*, 742 So.2d 395 (Fla. 2d DCA 1999) (judge should have recused because of personal friendship with one spouse in divorce proceeding); Opinion 99-2 (Committee advised judge to recuse when dating one of the attorneys in a case assigned to that judge).

#### **5. Does Personal Bias or Prejudice Include All Preconceived Notions or Preformed Ideas About Law or Issues in Case?**

The kind of bias or prejudice prohibited by Canon 3E is personal. A judge can have general opinions about legal or social issues involved in a case without harboring personal animosity against a party, witness, or attorney involved in the matter.

In addition, there is authority to support the notion that personal bias or prejudice does not even include personal opinions about a party, witness, or attorney formed during the case. The “extrajudicial source rule” suggests that bias or prejudice caused by events that occur during the court proceeding is not a basis for disqualification. SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 115-117 (Michie/Butterworth 2000) (discussing extrajudicial source rule extensively and citing *United States v. International Business Machine Corp.*, 475 F.Supp. 1372 (S.D. N.Y. 1979), *affirmed*, 618 F.2d 923 (2d Cir. 1980); *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). The authors in SHAMAN suggest that “[t]o

require recusal, bias or prejudice normally must be rooted in an extrajudicial source,” and state as follows:

A judge must be able to preside over court proceedings, and it is only natural (and probably unavoidable) that judges will react to the behavior of litigants and attorneys. Under the extrajudicial source rule, a judge will not be disqualified from rehearing a case that has been remanded by an appellate court to correct errors that the judge previously made. Nor is it improper for a judge to hear and to decide a case in which he heard a plea-bargain that was later withdrawn. Moreover, that a judge presided in a previous criminal trial is generally not a ground for disqualification in a subsequent trial involving the same defendant, because the source of any opinion the judge might hold about the defendant is not extrajudicial. In fact, one case goes so far as to take this position even though in the earlier trial involving the same defendant, the judge expressed strong disapproval of the defendant's behavior. Because the source of the judge's opinion was not extrajudicial, it was ruled that recusal was not necessary (citing *United States v. Hollis*, 718 F. 2d 277 (8th Cir. 1983), *cert. den.*, 465 U.S. 1036 (1984); *State v. Aubert*, 393 A. 2d 567 (1978); *Lena v. Commonwealth*, 340 N.E. 2d 884 (Mass. 1976); *Commonwealth v. Dane Entertainment Services, Inc.*, 467 N.E. 2d 222 (Mass. 1984)).

SHAMAN, *supra* at 116.

The “extrajudicial source rule,” as defined by SHAMAN, has been mentioned specifically by a Florida court only once — *Michaud-Berger v. Hurley*, 607 So.2d 441 (Fla. 4th DCA 1992), *rev. den.*, 614 So.2d 503 (Fla. 1993), and the citation is not especially helpful because the reference occurs in an excerpt from the trial judge's order denying the plaintiff's motion for disqualification, which the appellate court ultimately reversed. Moreover, the United States Supreme Court rejected the rule in *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Justice Scalia, writing for the Court, held that although a judge must be able to form judgments of the actors, and may develop opinions of parties and witnesses during a proceeding, there cannot be the “complete dichotomy between court-acquired and extrinsically acquired bias” that a blanket extrajudicial source rule implies. 114 S.Ct. at 1154. Nonetheless, despite its abrogation of an absolute rule, the Court observed:

First, judicial rulings alone almost never constitute [a] valid basis for a [motion to disqualify]. . . . Second, 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 [motion to disqualify] unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

114 S. Ct. at 1157.

This language from *Liteky* is consistent with Florida case law interpreting Canon 3 and the need to disqualify. *Gilliam v. State*, 582 So.2d 610 (Fla. 1991) (mere adverse ruling insufficient

ground for disqualification); *Thompson v. State*, 759 So.2d 650,659 (Fla. 2000) (“the fact that a judge has ruled adverse to a party does not constitute a legally sufficient ground for a motion to disqualify”); *Williams v. State*, 689 So.2d 393, 396 (Fla. 3d DCA 1997) (“a judge’s adverse ruling may not serve as a sufficient basis for recusal”); *Gieseke v. Grossman*, 418 So.2d 1055 (Fla. 4th DCA 1982); *but see Olszewska v. Ferro*, 590 So.2d 11 (Fla. 3d DCA 1991) (finding sufficient grounds for disqualification when judge “leaves the realm of civility and directs base vernacular towards an attorney or litigant in open court”).

While no judge is expected to come to a case as a blank slate, some preformed ideas can disqualify a judge, and there is case law that illustrates when such ideas can be disqualifying. “While it is well-settled that a judge may form mental impressions and opinions during the course of hearing evidence, he or she may not prejudge the case.” *Barnett v. Barnett*, 727 So.2d 311, 312 (Fla. 2d DCA 1999), referencing *Wargo v. Wargo*, 669 So.2d 1123 (Fla. 4th DCA 1996); *LeBruno Aluminum Co., Inc., v Lane*, 436 So.2d 1039 (Fla. 1st DCA 1983). The scope of Canon 3E is best defined by examining the cases and Committee opinions interpreting Canon 3E and former Canon 3C. The commentary to Canon 3E reads in part:

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

In *In re Code of Judicial Conduct*, 659 So.2d 692, 693 (Fla. 1995), the Florida Supreme Court added the following language to the above-quoted part of the commentary:

The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that fact does not automatically require disqualification of the judge. Such disqualification should also be on a case-by-case basis.

## **6. Are There Times When Judge's Public Expressions of Opinion or Sentiment Are Disqualifying?**

In one case, a judge who had publicly expressed sympathy for persons with cerebral palsy was required to recuse in a medical malpractice lawsuit involving a child with cerebral palsy. *Deren v. Williams*, 521 So.2d 150 (Fla. 5th DCA), *rev. den.*, 531 So.2d 169 (Fla. 1988). In another case, a judge's public statements about speedy imposition of death sentences were published in a newspaper, and the Florida Supreme Court deemed those statements a sufficient basis for recusal in a death penalty case. *Suarez v. Dugger*, 527 So.2d 190 (Fla. 1988). In *Roy v. Roy*, 687 So.2d 956 (Fla. 5th DCA 1997), the trial judge referred to one of the parties as “Mr. Deadbeat Man of the Year” before any evidence was taken. The party moved for disqualification, and the judge denied the motion and ultimately ruled against the party on the merits. The District Court of Appeal overturned the decision. *But see Waterhouse v. State*, 792 So.2d 1176 (Fla. 2001) (judge’s comments to Parole and Probation Commission that party was “a dangerous and sick man and that many other women have probably suffered because of him” was not deemed to be a

prejudicial comment warranting disqualification, as the party admitted having a “problem with sex and violence” and had been charged with two brutal murders and sexual assaults of women).

Also, in *In re Inquiry Concerning a Judge, Gridley*, 417 So.2d 950 (Fla. 1982), although disqualification was not the issue, the judge announced strongly held religious beliefs in opposition to the death penalty and wrote a series of editorials to a local newspaper. In this 4 to 3 Florida Supreme Court opinion, the judge was not disciplined because in every instance he said he would uphold his constitutional responsibility to follow the law. Three dissenting members of the court did believe, however, that Gridley should have been disciplined because he had thrown his impartiality into question and made it reasonable to believe that he would have difficulty imposing a death sentence. In *Royal Caribbean Cruises, Ltd., v. Doe*, 767 So.2d 626 (Fla. 3d DCA 2000), the appellate court said that a judge’s statements about the cruise line industry and its failure to safeguard its passengers and perform timely discovery should have been disqualifying.

There are also instances in which a judge's preformed opinion of a witness's credibility must result in disqualification. See *St. George Island, Ltd., v. Rudd*, 547 So.2d 958 (Fla. 1st DCA 1989), *approved*, 561 So.2d 253 (Fla. 1990).

## **7. When Does Manifestation of Personal Bias or Prejudice Against Attorney Disqualify Judge?**

A judge is disqualified when personal bias against an attorney adversely affects the client. *Hayslip v. Douglas*, 400 So.2d 553 (Fla. 4th DCA 1981). Not until the 1995 revision did Canon 3 expressly include counsel among those against whom a personal bias could warrant disqualification of the judge. Yet there has long been case law applying this portion of the canon to manifestations of bias against attorneys. See, e.g., *Ginsberg v. Holt*, 86 So.2d 650 (Fla. 1956).

When a judge harbors animosity toward a particular attorney or when an altercation with an attorney interferes with the court's impartiality, this creates a basis for disqualification. *Robinson v. Tobin*, 547 So.2d 714 (Fla. 3d DCA 1989); *Cardinal v. Wendy's of South Florida, Inc.*, 529 So.2d 335 (Fla. 4th DCA 1988), *rev. den.*, 541 So.2d 1172 (Fla. 1989). In *Gates v. State*, 784 So.2d 1235, 1236 (Fla. 2d DCA 2001), the appellate court overturned a conviction for second degree murder because the trial judge denied a proper motion to disqualify. The trial judge became increasingly “frustrated with what she perceived as incompetence “ by one of the defense attorneys, reprimanded the attorneys loudly in front of the jury and at side bar, and threatened to castigate counsel in open court. In *Marshall v. Bookstein*, 789 So.2d 455 (Fla. 4th DCA 2001), the appellate court held that a judge improperly denied a motion for disqualification when the judge, during a calendar hearing, “angrily denounc[ed] their “tactics” and derid[ed] them as substandard “Miami Lawyers,” who “may get away with it in Miami, but not up here.”

Not only does a manifestation of animosity cause a judge to risk disqualification, but also it can result in reversal on the merits with serious legal consequences.

Because personal bias against attorneys is now expressly prohibited in Canon 3, the potential for disqualification arguably might become greater than previous cases have indicated. However,

former Canon 3A(3) (now 3B(4)) has always provided a basis for disqualification when a judge's conduct is undignified or discourteous to anyone appearing before the court. A Canon 3E disqualification may be triggered by a violation of this more general Canon 3 admonition for judges to "be patient, dignified, and courteous to litigants, . . . lawyers, and others with whom the judge deals in an official capacity." Canon 3B(4); *see Olszewska v. Ferro*, 590 So.2d 11 (Fla. 3d DCA 1991). *See Gates, supra*. When the trial judge "leaves the realm of civility and directs base vernacular towards an attorney or litigant in open court, there are sufficient grounds to require disqualification." *Olszewska, supra* at 11 (citing *Lamendola v. Grossman*, 439 So.2d 960 (Fla. 3d DCA 1983); *Brown v. Rowe*, 96 Fla. 289, 118 So. 9 (1928)). Thus, although the 1994 revisions to Canon 3 appeared to extend protection from perceived bias to counsel for the first time, case law has long provided such protection. It is important to remember, nonetheless, that not every verbal altercation with an attorney requires disqualification; the altercation must be serious enough that it is reasonable to believe the judge's animosity will adversely affect the client. *See Ginsberg, supra*.

#### **8. What if Source of Conflict Between Judge and Attorney Is Unrelated to Case in Which Disqualification Is Sought?**

Animosity between a judge and an attorney can require disqualification even if it is unrelated to the case in which disqualification is sought. In *Town Centre of Islamorada, Inc., v. Overby*, 592 So.2d 774 (Fla. 3d DCA 1992), the court held that a dispute between counsel and the judge approximately eleven months before the clients filed their lawsuit was sufficient to warrant disqualification. In this case, an attorney announced at a local bar association luncheon that he planned to sue the clerk of the court and all of the judges in the circuit challenging a local rule requiring that notice of hearing be filed with each motion. Several days later, at a court hearing, Judge Overby stated that he would make no rulings in cases involving that attorney's law firm because the chief judge had imposed a stay in the firm's cases until an ethics committee issued an opinion about the propriety of the attorney's bar luncheon remarks. An altercation ensued in which the judge stated that he "did not consider a threat of a lawsuit to be friendly and that the remark might warrant disciplinary measures by the Florida Bar." *Id.* at 775. Based on these incidents, the attorney's law firm filed motions for disqualification in three cases before the judge, all of which motions were denied as untimely and legally insufficient. The appellate court reversed the judge in two of the cases, holding that the dispute, although unrelated to those cases, merited disqualification. In the third case, the district court affirmed the judge's denial of the motion to disqualify because the attorney had accepted the case as local co-counsel with knowledge that the case already had been assigned to Judge Overby.

#### **9. Must Judge Recuse When Judge Has Reported Party's Attorney to The Florida Bar?**

In *Town Centre of Islamorada, Inc., v. Overby*, 592 So.2d 774 (Fla. 3d DCA 1992), discussed above, Judge Overby stated that the attorney's conduct might merit discipline; there is no indication whether Judge Overby formally filed a grievance. Even if he had filed a grievance, under current case law, that fact alone would not be sufficient to require recusal. In *5-H Corp. v. Padovano*, 708 So.2d 244, 248 (Fla. 1997), the court held that "a Florida judge's mere reporting of perceived attorney unprofessionalism to The Florida Bar, in and of itself, is legally insufficient

to support judicial disqualification.” The court noted that other states, including Hawaii and Indiana, had reached this same result. In *Padovano*, an attorney filed a motion for a rehearing, arguing that the panel had favored opposing counsel, and referred to the arguments using profanity and claiming that “a Miami lawyer cannot simply get a fair shake up North.” The panel denied the motion and referred the motion to The Florida Bar as inappropriate. The attorney whose conduct was reported to the Bar then filed a motion to disqualify all sitting judges in the First District Court of Appeal, leading to this decision.

When a party makes such allegations in a motion to disqualify, it is important for the judge to remember that in evaluating the legal sufficiency of the motion, the judge may determine only whether the facts alleged, presumed to be true, would make a reasonable person doubt that he or she would receive a fair and impartial trial before the named judge. Fla.R.Jud.Admin. 2.160(f); § 38.10, Fla. Stat.; *see also Taylor v. State*, 557 So.2d 138 (Fla. 1st DCA 1990); *Deren v. Williams*, 521 So.2d 150 (Fla. 5th DCA), *rev. den.*, 531 So.2d 169 (Fla. 1988). A mere claim that the judge made defamatory remarks, without specifying what the remarks were, does not mandate disqualification. *See Heier v. Fleet*, 642 So.2d 669 (Fla. 4th DCA 1994) (petitioner's allegation lacking in specificity and going almost entirely to judicial rulings). In *Heier*, although the petitioner alleged that defamatory remarks were made by the judge, the petitioner failed to state what remarks the judge had made and was not sufficiently explicit about the circumstances in which they were made. Had the allegations been specific, disqualification probably would have been required, irrespective of the veracity of the remarks. *See Fla.R.Jud.Admin. 2.160(d)(1) and (2), § 38.10, Fla.Stat.; Barnhill v. State*, 834 So.2d 836 (Fla. 2002) (petitioner's affidavit, as in *Heier*, did not state the specific facts which led petitioner to believe he would not receive a fair trial).

#### **10. Must Judge Be Disqualified When Attorney Previously Has Tried to Have Judge Impeached or Has Filed JQC Complaint Against Judge?**

The short answer is that the mere reporting alone does not automatically require disqualification. However, the answer is more complicated than that. In *Brewton v. Kelly*, 166 So.2d 834 (Fla. 2d DCA 1964), the judge was disqualified because the attorney had testified against the judge in an impeachment proceeding and opposing counsel had testified in the judge's favor. Similarly, in a case in which a judge had issued an order to show cause why an attorney should not be held in contempt in another case, and the attorney's firm had filed a JQC complaint against the judge, the Fourth District Court of Appeal held that the judge should have recused himself upon the attorney's motion to disqualify. *Levine v. State*, 650 So.2d 666 (Fla. 4th DCA 1995). However, depending on what additional facts might be present, *Brewton* and *Levine* might be decided much differently now in light of *5-H Corp. v. Padovano* discussed previously. *5-H Corp. v. Padovano*, 708 So.2d 244, 248 (Fla. 1997). In *Padovano*, the Florida Supreme Court also held that “mere report of ... perceived judicial unprofessionalism to the JQC” does not in and of itself support judicial disqualification. Florida Code of Judicial Conduct, Canon 3E(1) commentary, states, “If a lawyer has previously filed a complaint against a judge with the Judicial Qualifications Commission, that fact does not automatically require disqualification of the judge.”) The Court in *Padovano* excluded from its ruling cases which involved more than just a complaint to the JQC, including *Levine*.

Even before the Florida Supreme Court's express ruling in *Padovano*, the Judicial Ethics Advisory Committee came to the same conclusion when the question was asked of it. *See* Opinion 95-20 (expressing unanimous opinion that judges should disqualify themselves, but disagreeing on whether this should be “automatic” or “case-by-case”). The *Padovano* case clarifies that recusal under these circumstances should not be automatic but must be determined case-by-case.

#### **11. Is Recusal Required When Lawyer Appearing Before Judge Has Voiced Opposition to Judge's Election?**

There is a presumption that a judge will not harbor personal bias or prejudice against a lawyer who opposes the judge's election or re-election. However, when a motion to disqualify alleges that the presiding judge delivered a “tirade” to the moving attorney about the lack of support, the presumption is rebutted. *McDermott v. Grossman*, 429 So.2d 393 (Fla. 3d DCA 1983).

While recusal may be the safest course, an allegation that a party or attorney has made a legal campaign contribution to the political campaign of the trial judge or the trial judge's spouse, without more, is not a legally sufficient ground for disqualification. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990). Furthermore, allegations that the judge was biased against a party's attorney because the attorney did not contribute to the judge's campaign fund, and instead supported the judge's opponent, have been ruled legally insufficient to disqualify a judge. *Paul v. Nichols*, 627 So.2d 122 (Fla. 5th DCA 1993).

#### **12. Personal Knowledge: When Does Judge's Personal Knowledge of Disputed Facts Require Disqualification?**

Canon 3E(1)(a) requires disqualification when a judge has personal knowledge of disputed facts in a case. There are several Florida cases dealing specifically with the personal knowledge issue.

In *Walton v. State*, 481 So.2d 1197 (Fla. 1986), *cert. den.*, 493 U.S. 1036 (1990), the court held that a judge need not automatically recuse himself in a defendant's trial after hearing the co-defendant's case. The appellant's argument was that the judge's impartiality was impaired by a co-defendant's defense strategy based on the appellant's culpability. The appellant contended that because the trial judge presided at the co-defendant's trial and was exposed to evidence that inculpated the appellant, the trial judge should be disqualified because he might be “psychologically predisposed” to reject the appellant's defense that his co-defendants were responsible for the crime. The court rejected this argument, noting that the same degree of knowledge could have come from pretrial hearings or discovery in this co-defendant's case. The court determined that the appellant's assertion did not set forth a “well-grounded fear,” and the motion for disqualification failed “to show the personal bias or prejudice on the part of the trial judge necessary for disqualification.” 481 So.2d at 1199.

In *Mackey v. State*, 234 So.2d 418 (Fla. 3d DCA 1970), the appellate court ordered a new trial of two co-defendants tried together after one of the defendants made an unsworn statement to the court in which he implicated the co-defendant in the robbery in question. Although the defendant was entitled to a new trial with a new judge, *Mackey* was not a Canon 3E case. In fact, the court stated: “[t]his is not an instance of bias of the trial judge. It is to be assumed that

the judge was not biased, and that he conscientiously attempted to act fairly in the case.” 234 So.2d at 420. Therefore, there were no Canon 3 ethical consequences for the judge. The distinction between *Mackey* and *Walton, supra*, may have been that in *Mackey*, the defendant made a direct unsworn statement to the court regarding the robbery. The statement was not part of the record, as were the defendant's statements in *Walton*.

Not only may the same judge preside over separate trials of two co-defendants for the same crime, but a judge may preside over several proceedings involving the same defendant. *K.H. v. State, Dept. of Health & Rehabilitative Services*, 527 So.2d 230 (Fla. 1st DCA 1988). In that case, the appellant sought to disqualify the judge, who had presided over several hearings involving the removal of the appellant's child from her custody. Because the child had spent twenty-four months of his thirty-six-month life in the custody of the Department of Health and Rehabilitative Services (HRS) by virtue of the judge's rulings, the appellant feared that the judge would be predisposed in favor of HRS in the hearing for permanent placement. In affirming the trial court's denial of the motion to disqualify, the district court stated: “The rule is well-established that adverse judicial rulings do not constitute sufficient grounds to disqualify a judge.” *See also Jenkins v. C.A.J.*, 434 So.2d 9 (Fla. 1st DCA 1983) (finding it significant that there was nothing in the record to indicate trial judge favored permanent commitment before actual commitment hearing).

In *Fabber v. Wessel*, 604 So.2d 533 (Fla. 4th DCA 1992), *rev. den.*, 617 So.2d 322 (Fla. 1993), the judge saw privileged mediation communications. The plaintiff, feeling she might be prejudiced based on the disclosure of those communications alone, requested disqualification. She cited no particular prejudice apart from the disclosure itself but argued that the mere act of disclosure violated the mediation statute in question, Section 44.102(3), Florida Statutes. The judge refused to disqualify himself. The plaintiff then filed a motion for a writ of prohibition in the Fourth District Court of Appeal. The district court granted the writ of prohibition requiring the judge to disqualify himself.

*Fabber* is no longer good law, at least if cited for the proposition that an allegation that the judge has seen privileged mediation documents is sufficient to warrant recusal. In fact, the decision in *Fabber* has been expressly repudiated in *Enterprise Leasing Co. v. Jones*, 789 So.2d 964 (Fla. 2001). There the Florida Supreme Court specifically disapproved of *Fabber* and held that the disclosure of confidential mediation information to the trial judge, in and of itself, is not sufficient for disqualification. The facts were similar to *Fabber* in that the judge learned of the settlement offers made during mediation. The Court found that the statute used to disqualify the judge in *Fabber*, Section 44.102(3), Florida Statutes, does not give rise to a *per se* rule requiring confidentiality, only a privilege to refuse to disclose the information.

Even though *Fabber* has been overruled, it is nonetheless relevant to this discussion because it illustrates the importance of ruling on legal sufficiency and not commenting on the truth or falsity of the claims in the motion. A significant component of the court's decision in *Fabber* included a discussion of the fact that the judge took exception to the accuracy of facts stated in the motion to disqualify. The court stated that the response created “an intolerable adversary atmosphere between the trial judge and the litigant.” . . . On that ground alone, we are obliged to grant the writ” of prohibition. Although the district court stated that it was not holding that “any

response filed by a judge in a prohibition-disqualification proceeding is per se disqualifying,” it determined that it is “decidedly dangerous for the judge” to so respond. 604 So.2d at 534. This part of the *Fabber* opinion, cautioning against addressing the truth or falsity of the allegations in the motion, is still valid.

In short, it appears that disqualification is required of a judge when he or she has personal knowledge of evidentiary facts learned through some means outside the record or unobtainable from some general knowledge or source. Clearly, a judge may preside over the trial of a co-defendant even though the judge heard all of the evidence at the other defendant's trial that implicated the co-defendant. *Dragovich v. State*, 492 So.2d 350 (Fla. 1986). Moreover, it is clear that a judge can make limited comments about the evidence. See *Moser v. Coleman*, 460 So.2d 385 (Fla. 5th DCA 1984), *rev. den.*, 467 So.2d 1000 (Fla. 1985) (proper for judge to hear second probation violation after dismissing first warrant on basis of “sloppy pleading” and after stating “[t]he evidence is clear . . . that the Defendant committed the subsequent offense”). What a judge must never do is comment on the accuracy of the facts stated in a litigant's motion to disqualify. This will require disqualification on legal grounds.

### **13. Prior Service: Does Judge's Prior Service as Lawyer, Lower Court Judge, or Witness Require Disqualification?**

Canon 3E(1)(b) requires disqualification if the judge's impartiality might reasonably be questioned. There are a number of cases in which prior participation in a cause has been ruled a reasonable basis to require disqualification. In *Roberts v. State*, 161 So.2d 877 (Fla. 2d DCA 1964), a judge who had appeared as counsel of record in a lawsuit before becoming a judge was disqualified from handling the case even though a new attorney had taken over the representation and the judge had no personal knowledge regarding that representation. The judge previously had served as county solicitor and originally filed the information against the defendant. The judge's lack of recollection about the filing was irrelevant.

Prior participation in a cause is disqualifying even if the case before the court involves matters only supplemental to enforcement or avoidance of an earlier decree. See *State ex rel. Ambler v. Hocker*, 34 Fla. 25, 15 So. 581 (1894); *Hewitt v. State*, 839 So.2d 763 (Fla. 4th DCA 2003) (prior participation also disqualifying where judge was counsel for husband in divorce proceeding seven years prior to tax evasion case currently involving former wife).

Nothing in Canon 3E(1)(b), however, should be construed to preclude a judge from presiding over the rehearing of the judge's own decision. See *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964), *cert. den.*, 379 U.S. 1000 (1965) (stating that judges sit as matter of course on rehearing of their own decisions). Likewise, automatic disqualification is not required even when a judge has witnessed a defendant's act of indirect criminal contempt and may be called as a witness in the contempt proceeding. *Hope v. State*, 449 So.2d 1315 (Fla. 2d DCA 1984). When a judge is going to give testimony that will affect the merits of the cause and about which no other witness will testify, the judge is a material witness and must disqualify himself or herself. *Wingate v. Mach*, 117 Fla. 104, 157 So. 421 (1934).

Moreover, a judge is not automatically disqualified from a case simply because, while an

attorney, the judge represented one of the parties in a matter other than the one currently before the court, unless the earlier representation involved giving advice about the legal effect of an instrument now in controversy. *Tampa Street R. & Power Co. v. Tampa Suburban R. Co.*, 30 Fla. 595, 11 So. 562 (1892). *But see Hewitt v. State, supra.*

There is, however, an exception regarding government agencies in the commentary to Canon 3E(1)(b), which states:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Therefore, the intent is clear to hold to a higher standard judges who come from prior government service. This would include prosecutors who later become judges. *See, e.g., Fischer v. Knuck*, 497 So.2d 240 (Fla. 1986), cited by *W.I. v. State*, 696 So.2d 457, 458 (Fla. 4th DCA 1997) (“While the fact that the presiding judge prosecuted petitioner in a previous case does not present a direct conflict of interest, it does support petitioner's claim of a well founded fear that he will not receive a fair trial before this judge.”); *See also Goines v. State*, 708 So.2d 656 (Fla. 4th DCA 1998).

#### **14. When Is Economic Interest Disqualifying?**

An economic interest can be disqualifying under both Canon 3E(1)(c) and section 38.02, Florida Statutes. The interest must be direct and immediate and not uncertain or speculative. *See State v. Churchwell*, 195 So.2d 599 (Fla. 4th DCA 1967). If the judge, individually or as a fiduciary, or the judge's spouse, parent, child, or any other member of the judge's family residing in the judge's household, has an “economic interest” in the subject matter of the case or a party to the case or has more than a de minimis interest that could be “substantially affected,” the judge must disqualify himself or herself. Both “economic interest” and “de minimis” are defined in the “Definitions” section following the Preamble to the Code of Judicial Conduct. Economic interest, according to the Code, means “ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party.” According to the definition, there are four specific exceptions.

First, ownership of an interest in a mutual fund or a common investment fund that holds securities is not an economic interest for purposes of the canon unless the judge participates in management of the fund, or in some matter pending or impending before the judge, he or she might be called on to make a decision that would substantially affect the value of the interest.

The second exception to the economic interest definition involves a judge's service as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, sororal, or other civic organization. For a judge or a member of the judge's family to serve in such a capacity does not create an economic interest in any securities that the organization might hold.

The third exception involves deposits in a variety of financial institutions and proprietary interests as a policyholder in insurance companies. In other words, having an account in a bank or credit union or a proprietary interest in an insurance policy does not constitute an economic interest in the organization unless in a proceeding pending or impending before the judge, the judge's ruling could substantially affect the value of the interest.

The fourth exception involves ownership of government securities. These are specifically excluded from the definition of economic interest, and a judge need not worry about disclosure or disqualification unless in a proceeding pending or impending before the judge, his or her ruling could substantially affect the value of the securities.

As noted above, even an "economic interest" in a matter may not require disclosure or disqualification if the interest is de minimis. The definitions section of the Code defines "de minimis" as "an insignificant interest that could not raise reasonable questions as to a judge's impartiality." How the de minimis standard will be applied in the future is subject to question. Until the adoption of the 1995 canons, the degree or amount of interest was considered immaterial, and the judge was required to disqualify no matter how small the interest. *Skipper v. State*, 114 Fla. 312, 153 So. 853, *app. dismiss.*, 293 U.S. 517 (1934). Former Canon 3C(1) also referred to "financial interest" rather than the new Canon 3E(1) term "economic interest." Financial interest included any legal or equitable interest, however small, or relationship as or to an officer, trustee, director, advisor, or other active participant in the affairs of a party.

Despite the revisions, several Committee opinions issued before 1995 still provide useful guidance. Opinion 85-8 states that when a judge and an attorney are in a landlord-tenant or creditor-debtor relationship, the judge should disqualify himself or herself from all cases in which the attorney is counsel of record but still may hear cases involving the attorney's firm. Even before adoption of the 1995 "definitions" section, the Committee, in Opinion 85-14, advised an inquiring judge, who owned a minuscule part in a limited partnership, that the judge need not automatically recuse when attorneys who also are involved in the limited partnership come before the court. The Committee advised, however, that the judge must be careful to divulge this relationship to parties when necessary. Under new Canon 3E(1), the judge would appear to have a de minimis interest in the matter.

Although the Code specifically exempts from the definition of "economic interest" a deposit in a financial institution, the decision in *Southeast Bank, N.A. v. Capua*, 584 So.2d 101 (Fla. 3d DCA), *dismissed sub nom. Royal Trust Tower, Ltd., v. Southeast Bank, N.A.*, 592 So.2d 682 (Fla. 1991), *rev. denied*, 641 So.2d 1344 (Fla. 1994), merits attention. In that case, a judge was disqualified from presiding over a matter involving Southeast Bank when he was potentially in the identical position as the defendant in a pending case between the defendant and Southeast Bank. The judge had guaranteed a promissory note to the bank, on which the maker had defaulted. The judge paid only one installment, and no further action was taken by the bank against the judge. The note and the guarantee signed by the defendant in the matter pending before the judge were identical to those the judge had signed. In this instance, the proceeding pending before the judge obviously could substantially affect the judge himself. The judge knew that he had more than a de minimis interest in avoiding liability on a similar guarantee and that a

court ruling as to the validity of the guarantee would have an impact on any future actions the bank might pursue against him. Furthermore, the appellate court pointed out that even if the judge believed he could remain entirely impartial, it was not *his* belief but that of the movant that mattered legally. The court stated that the relationship caused a reasonable fear in the defendant that the defendant could not receive a fair trial before that judge. *See Livingston v. State*, 441 So.2d 1083 (Fla. 1983). In such a case it is not a question of how the judge feels, but rather “what feeling resides in the affiant's mind and the basis for such feeling.” *Southeast Bank*, 584 at 103.

In Opinion 89-5, in which the inquiring judge had decided not to preside in any dissolution of marriage or domestic relations cases that required entering an order and enforcing payment of or determining responsibility for payment of a financial obligation of a party to a bank in which the judge owned stock, unless the parties and their attorneys agreed in writing to the judge's presiding. A majority of the Committee found the judge's practice to be appropriate and “perhaps the safest” course. One member of the Committee found the judge's interest not sufficiently significant to require disclosure in any proceeding in which the bank was not a party and the judge would not be called on to enforce payment of any liability to the bank. Under the revised Canon, depending on the size of the ownership interest and the economic consequences to the litigants or the judge, the judge might not have to disclose the interest at all. As the Committee noted, however, it is always safer to disclose.

Yet, any time a judge discloses, a possible conflict exists. If either of the litigants then moves for disqualification, the judge must comply. *See Pool Water Products, Inc., v. Pools by L.S. Rule*, 612 So.2d 705 (Fla. 4th DCA 1993). In *Pool Water*, the judge disclosed a potential conflict, which was relied on by a party in a motion to disqualify. The appellate court found the motion to disqualify legally sufficient, stating that “the legally sufficient reason for recusal is that the judge himself thought it was a matter by which his impartiality might reasonably be questioned.” 612 So.2d at 707. *See also* Opinion 00-34 (if the firm is making payments to the judge under the terms of a promissory note, disqualification is proper).

#### **15. Must Judge Disqualify Self When Judge or Member of Judge's Family Is Party, Attorney, Financial Interest Holder, or Likely Material Witness in Proceeding?**

Canon 3E(1)(d) requires a judge to disqualify when the judge or a member of the judge's family is a party, attorney, financial interest holder, or likely material witness in a proceeding. The first step in determining whether disqualification is necessary when a family member is a party, attorney, or material witness is to ascertain “what constitutes a third degree of relationship.” In the commentary to former Canon 3C(3)(a), the third degree of relationship test was calculated under the civil law system. According to former Florida Supreme Court Justice Ben F. Overton, *Analysis Concerning the Current and Former Codes of Judicial Conduct* at page 3 (1995 Annual Business Meeting, Florida Conference of Circuit Judges), “It . . . appears that the new code has expanded the definition of third degree of relations.” Formerly, third degree of relationship was calculated according to the “civil law system.” *See* former Canon 3C(3)(a).

In the revised Code, the “third degree of relationship” is defined in the definition section to include “great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild,

great-grandchild, nephew, or niece.” If any person related to the judge or the judge's spouse within this degree is a party, lawyer, or witness, or has more than a de minimis interest that could be substantially affected by the proceeding, the judge must disqualify himself or herself. *See State ex rel. Caro v. Reese*, 142 Fla. 734, 195 So. 918 (1940) (automatically disqualifying judge when judge's son was attorney for one of defendants); *Villeneuve v. State*, 127 Fla. 724, 173 So. 906 (1937) (requiring automatic disqualification when judge's sister and brother-in-law were prosecution witnesses in breaking and entering case). *See also Lytle v. Rosado*, 711 So.2d 213 (Fla. 3d DCA 1998) (judge's stepson was involved in a suit with an insurance company and judge had to disqualify himself in separate trial involving same insurance company). Also in *J&J Towing, Inc., v. Stokes*, 789 So.2d 1196 (Fla. 4th DCA 2001), disqualification was proper based on allegation that judge's wife was represented by plaintiff's counsel in a separate pending matter involving her individually and as a school board member.

**16. What Is Judge's Responsibility When Spouse Is Employed by or Works with Firm or Governmental Entity That Appears Before Court in Capacity of Party's Legal Representative?**

In Opinion 81-1, the inquiring judge wanted to know if, as the only circuit judge in a relatively small county, he would need to disqualify himself each time a local attorney employing the judge's spouse appeared in a case before the judge. The Committee advised the judge to recuse under these circumstances. More recently, in Opinion 97-8, the Committee said that a judge should disqualify himself from cases where his non-lawyer spouse, as a temporary worker, was employed to help a firm on a case scheduled to be heard before that judge.

In Opinion 87-11, the Committee advised a judge to take steps to ensure that the assistant public defender did not appear before him because the assistant public defender was engaged in the practice of law with the judge's spouse. Similarly, a judge must disqualify himself from a case in which the judge's spouse is a lawyer or supervises lawyers who will appear before the judge. *See* Opinion 99-28 (calling for a judge's recusal when his spouse, practicing in another county, represents insurance companies who, in unrelated matters, appear before the judge); Opinion 01-05 (advising that a judge should disqualify himself or herself from hearing cases involving the public defender when the judge's spouse is the elected public defender of the circuit).

In Opinion 91-17, the inquiring judge was married to an assistant public defender working in the judge's circuit. The judge asked whether she could preside over criminal cases in which the defendant was represented by an assistant public defender other than her husband. The Committee determined that the disqualification was not automatic simply because the judge's spouse worked with a lawyer who represented the defendant in a proceeding before the judge. The Committee issued a caveat, however, stating as follows: “If, though, the circumstances of the case somehow place your impartiality in question, e.g., your spouse assisted the trial attorney in the preparation of the case, you should disqualify yourself. Otherwise, you should advise the parties your spouse is an assistant public defender in that office, and offer to step down.”

Sometimes a judge's spouse is not an attorney but is employed by a governmental agency that frequently appears before the court. The Committee addressed this issue in Opinion 90-23. The inquiring judge in that opinion stated that his spouse was the district program administrator for

the Department of Health and Rehabilitative Services and, as such, was responsible for all aspects of child support enforcement throughout the district that encompassed the judge's court. The Committee unanimously agreed that the judge should not preside in any case over which the judge's spouse had supervisory authority. The Committee found relevant the fact that the spouse had direct control regarding compensation of attorneys who appeared in court, including the amount they were paid, especially because the compensation of attorneys was directly related to the amount of support collected by the family division judge.

In Opinion 85-2, the Committee recommended that a judge disqualify himself in cases involving his son's law firm unless both parties were notified of the relationship and entered into an agreement that the judge could preside. *See also* Opinion 89-21 (judge's father was certified mediator and Committee unanimously agreed it would be improper for judge to refer cases to his father); Opinion 77-4 (brother's position as chief assistant public defender did not by itself disqualify judge from sitting on cases handled by assistant public defender administratively assigned by brother); Opinion 77-12 (brother's service as assistant state attorney not necessarily disqualifying, and use of "waiver form" found advisable as long as judge immediately recuses if defendant or attorney in criminal case fails or refuses to file waiver).

#### **17. Must Judge Disqualify Self if Former Law Partner Is Appearing Before Judge?**

In Opinion 77-11, the Committee unanimously advised that there is no per se impropriety in a former law partner of the judge practicing before the court. The Committee also unanimously agreed that it would be improper for the judge to sit on any case in which the judge had a monetary interest.

More recently, in Opinion 01-06, the Committee elaborated, "assuming that no financial arrangement exists between the inquiring judge and the lawyer in question and, further, that a sufficient time has past so that no objective person would question the judge's impartiality, the judge need not observe a per se rule of disclosure or disqualification." In Opinion 01-06, the question was whether a judge could preside over a case in which the judge was previously employed as a law clerk by a non-suspended attorney appearing *pro se*.

## **CHAPTER 6**

### **CIVIC, CHARITABLE, QUASI-JUDICIAL, AND EXTRAJUDICIAL GOVERNMENTAL ACTIVITIES**

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## Chapter 6

### Civic, Charitable, Quasi-Judicial, and Extrajudicial Governmental Activities

#### 1. What Are General Rules Governing Such Activities?

The judicial conduct discussed in this chapter is regulated primarily by Canon 4, quasi-judicial activities, and Canon 5, extrajudicial activities.

#### 2. May Judge Serve on Board of Directors of Charitable Organization?

Providing service to a charitable organization is considered extrajudicial activity regulated by Canon 5. Specifically, Canon 5C(3) provides that “[a] judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, sororal or civic organization not conducted for profit,” subject to certain limitations. The judge is not permitted to serve in that capacity if the organization is likely to be engaged in proceedings that ordinarily would come before the judge or if it will be involved frequently in adversary proceedings in the judge's court or in any court subject to the appellate jurisdiction of the judge's court. In addition, a judge could not serve on the board of directors if doing so would violate any of the general provisions of Canon 5A, which state that the service must not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with judicial duties. Canon 5C(3)(b)(i) states that a judge “shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority.” Canon 5C(3)(b)(ii) provides that a judge “shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or . . . if the membership solicitation is essentially a funding-raising mechanism” and Canon 5C(3)(b)(iii) provides that a judge “shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.”

The commentary to Canon 5C(3)(a) states that judges must regularly examine the activities of each organization with which they are affiliated to determine whether the affiliation is proper. For example, the commentary mentions that in many jurisdictions, charitable hospitals frequently are involved in litigation. The Committee has advised judges to decline appointment to the boards of directors of charitable hospitals. In Opinion 94-2, the Committee noted that “hospitals are frequent litigants in courts involving hundreds of small claims actions as well as major malpractice cases.” *See also* Opinions 83-9, 91-25, 91-32, and 03-07.

Judges who serve on the boards of directors of charitable organizations also must be aware of Canon 5G, which prohibits judges from practicing law except under limited circumstances. A judge is prohibited from providing legal advice to the charitable organization.

### **3. May Judge Be Member or Serve on Board of Directors of Civic Organization?**

A judge may be a member or director of a civic organization, but the same requirements under Canon 5 that pertain to charitable organizations govern a judge's involvement in civic organizations. In addition, Canon 2C, which states that judges “should not hold membership in an organization that practices invidious discrimination,” is especially important with respect to such memberships. While some charitable organizations may practice invidious discrimination, it is far more likely that a judge would encounter this kind of discrimination in civic organizations.

Judges have been advised to decline an invitation to serve on the boards of directors of Mothers Against Drunk Drivers (MADD) and Students Against Drunk Drivers (SADD). Opinions 82-18 and 86-6. Such involvement could cast doubt on a judge's impartiality. *See* Canons 3 and 5A(1). It also could be seen to be advancing the private interests of others. Canon 2B.

With regard to a judge's involvement in civic organizations, the commentary to Canon 2C specifically provides that:

This canon is not intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross.

The following opinions are also of interest with regard to a judge's involvement in civic organizations:

- Opinion 95-34 (judge permitted to serve as uncompensated member of board or advisory committee of non-profit corporation in which main function is the researching, locating, recovering, restoring, and displaying of artifacts of historical interest);
- Opinion 96-4 (judge permitted to serve on board of “Character Counts” organization);
- Opinion 97-19 (judge allowed to serve on board of a lobbying organization);
- Opinion 00-25 (judge advised that it was appropriate to serve as officer/director of Kiwanis Club Foundation but that the nature of the Legal Aid Society would determine whether judge could serve as an officer or director);
- Opinion 01-13 (Committee approved of judge's membership in American Israel Public Affairs Committee);
- Opinion 02-17 (judge permitted to serve as president of non-profit civic organization that provides cultural events and outreach programs);

- Opinion 03-01 (judge may serve in organization dedicated to improving community quality of life through improved race relations);
- Opinions 94-47, 87-10 (membership in Benevolent and Protective Order of Elks and Rotary not proscribed by Code);
- Opinion 94-15 (serving on Board of Overseers of Stetson College of Law is permitted);
- Opinion 94-11 (serving as president of Community Foundations for Palm Beach and Martin Counties, private non-profit organization providing grants and scholarships, not prohibited as long as judge avoids personally soliciting funds or allowing prestige of office to be used for that purpose).

#### **4. What Does Invidious Discrimination Mean?**

“[A]n 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.” Commentary to Canon 2C. The Commentary to Canon 2C also states that the question of whether an organization practices invidious discrimination cannot be answered merely by looking at that organization's membership rolls. There are some legitimate reasons that organizations restrict their membership. For example, some organizations are dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interests to their members. Also, intimate, purely private organizations whose membership limitations could not be constitutionally prohibited may limit membership without being invidiously discriminatory. *See* Commentary to Canon 2B (listing citations).

Judges who belong to an organization that engaged in invidious discrimination as of January 1, 1995, the date the Code of Judicial Conduct became effective, may either resign from the organization or attempt to have the organization discontinue its invidiously discriminatory practices. A judge who attempts to convince the organization to change its discriminatory practices, however, is prohibited from participating in the organization's activities until the discrimination ceases, and the judge has only one year from the time the judge learns of the discriminatory practice in which either to persuade the organization to change its practices or resign.

#### **5. May Judge Be Member of Governmental Committee, Commission, or Task Force?**

Canons 4 and 5 provide that a judge may be a member of a governmental committee, commission, or task force, but there are numerous restrictions on such membership. In addition to the restrictions that apply to service on the boards of directors of charitable and civic organizations, the governmental committee must be involved in the improvement of the law, the legal system, or the administration of justice. Canons 4C, 5C(1) and(2).

The following opinions are of interest with regard to a judge's involvement in governmental committees, commissions, and task forces:

- Opinions 95-14, 94-38, 94-33 (serving on governor's task force on domestic violence is not prohibited if activities are law related and gender neutral and judge has evaluated reputation of task force to determine whether judge would be perceived as impartial and whether such service would result in frequent motions for disqualification);
- Opinions 93-46 and 93-39 (judge may serve on local children's advisory board that recommends how funds will be spent locally because such service is related to improvement of administration of justice; however, judge should not serve or should limit participation if board is likely to be engaged in proceedings that come before judge or if participation would reflect adversely on judge's impartiality or interfere with judicial duties);
- Opinions 88-30 and 88-24 (judge may serve on alcohol, drug abuse, and mental health district planning council);
- Opinion 87-5 (judge should not serve on governmental fine arts council because function of council is not law related);
- Opinion 87-20 (serving on governmental criminal justice advisory board to help qualify county for assistance from federal government for planning new jail facility is permitted because committee's work is law related);
- Opinion 97-9 (attending Education Assembly for revision of educational system is permitted);
- Opinion 97-20 (judge may serve on County Criminal Justice Commission);
- Opinion 98-26 (judge may serve on Mayor's Victim Assistance Advisory Council);
- Opinion 95-36 (judge may serve on Alcoholism Committee);
- Opinion 99-07 (judge may serve on County Commission on Substance Abuse);
- Opinion 99-20 (judge may serve on Florida Bar Civil Procedure Rules Committee);
- Opinion 01-16 (judge advised not to serve as appointed member of a commission of a municipal government charged with fiscal oversight of government funds).

**6. May Judge Participate in Raising Funds for Civic, Charitable, and Governmental Organizations?**

Canons 4 and 5 permit a judge to assist civic, charitable, and governmental organizations in planning fund-raising and in managing and investing funds, but both canons prohibit judges from participating in the solicitation of funds or other fund-raising activities, except that a judge may

solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority. In addition, a judge may not participate personally in membership solicitation if the solicitation is essentially for fund-raising purposes, and the judge must not permit the use of the prestige of judicial office for fund-raising or membership solicitation. Canons 4D(2) and 5C(3).

An organization in which a judge is an officer or director may use its letterhead for fund-raising or membership solicitation “provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.” In addition, a judge may attend an organization's fund-raising event if such attendance is otherwise consistent with the Code, but the judge is prohibited from being a speaker or guest of honor at such an event. Commentary to Canons 4D(2) and 5C(3)(b).

In the only Florida Supreme Court decision related to this subject, the court publicly reprimanded a judge who served on the Jack Byrd Memorial Invitation Golf Tournament Committee, which promoted, advertised, and conducted gambling with respect to a golf tournament. *In re Inquiry Concerning a Judge, James S. Byrd*, 460 So.2d 377 (Fla. 1984).

The following Committee opinions are of interest with regard to a judge's involvement with the financial activities of civic, charitable, and governmental organizations:

- Opinion 95-22 (judge should not personally participate as team member in ongoing bingo games at local senior citizens' center as fund-raising project for Kiwanis International);
- Opinion 94-33 (judge should not solicit in-kind donations as chair of domestic violence task force in judge's circuit);
- Opinion 94-30 (judge should not solicit businesses to contribute to cost of creating videotapes for court system project to create juvenile justice education videotape to be used in public school instruction);
- Opinion 92-38 (judge should not personally collect coats and gloves to be distributed through Salvation Army to needy persons);
- Opinion 93-61 (judge should not serve on honorary advisory board of directors of beach resort association because presence could lend prestige of judicial office to private interests of others);
- Opinion 89-19 (judge may participate in fund-raising sports event to extent that judge would hold sideline marker and would not be identified either before or during event as member of judiciary);
- Opinion 96-27 (judge may participate in building Habitat for Humanity house; judge may also “gently” solicit judicial colleagues over whom judge has no supervisory or appellate authority; judge may not present or portray habitat built as a project of the judge of the county and must not call attention to himself or herself as a judge);

- Opinion 98-32 (judge advised not to participate in charity fashion show as emcee);
- Opinion 99-09 (judge advised against receiving an award and being inducted into a county women's hall of fame at annual luncheon for which program advertisements have been sold to raise funds for the organization. Receiving award would lend prestige of judicial office for fund-raising);
- Opinion 99-15 (judge may not speak at alumni banquet fund-raiser);
- Opinion 00-15 (judge may not tape public service announcement advising community of different non-profit organizations in the area to which the community can lend its support);
- Opinion 00-17 (judge may not work behind concession stand for child's school fund-raiser);
- Opinion 00-31 (judge advised not to serve as chairperson for kick-off event preceding fund-raising auction);
- Opinion 01-09 (opinion lists breakdown of answers to multiple questions regarding proposed fund-raising and charitable organization activities; judge may decorate hall, set prices for sale items, and donate items for charitable sale as long as judge is not identified as donor; judge may not be featured speaker, host social gathering, nor be present if judge's spouse hosts charitable fund-raising event in the family home);
- Opinion 03-21 (receding from Opinion 80-1, the Committee advised the inquiring judge not to serve on board of trustees of community college).

Although Canon 5C(3) permits a judge to serve as a trustee of an educational organization not conducted for profit, there are limiting exceptions found in Canon 5C(2). That section prohibits judges from accepting appointments to governmental positions that are concerned with issues other than improvement of the law, the legal system, or the administration of justice. The Canon 5C Commentary makes this distinction clear where it says, “. . . service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 5C(2), but service on the board of a public law school or any private educational institution would generally be permitted under section 5C(3).”

## **7. Quasi-Judicial and Extrajudicial Activities: Questions to Ask Before Joining Organization or Serving on Committee or Board**

### **Quasi-Judicial Activities**

**1. Is the organization or governmental agency devoted to improvement of the law, the legal system, or the administration of justice?**

If so, then your membership is regulated by Canon 4, and the express authority for serving is Canon 4D.

**2. Will the organization be engaged in proceedings that will come before me, or will it be engaged in frequent adversary proceedings in the court of which I am a member or in any court subject to the appellate jurisdiction of the court of which I am a member?**

If yes, then Canon 4D(1) probably prohibits your membership, and if you already are a member, you should resign.

**3. Will my membership cast reasonable doubt on my impartiality; will it demean the judicial office; will it interfere with the proper performance of my duties?**

For the most part, you are encouraged to serve organizations devoted to improving the law, the legal system, and the administration of justice. However, there are organizations that from time to time advocate controversial legal positions about disputed matters, and the test for continued membership is whether your membership could raise a reasonable doubt about your impartiality as a judge or convey an impression that the organization or its supporters are in a special position to influence you.

Moreover, less common, but requiring consideration, is the dignified nature of the organization in question. You do not want to engage in any activity that would detract from the integrity, impartiality, or performance of your duties with diligence.

Finally, because of the need to devote full time to judicial duties and perform the judicial role diligently, you must ask yourself in each instance whether the commitment to membership or to service in some official capacity will interfere with the proper performance of judicial responsibilities.

**4. Is the organization involved in fund-raising of any sort and will I be called upon to participate in soliciting funds for the support of the organization?**

The mere fact that an organization solicits financial support does not disqualify you from membership or even from service on a board. However, according to Canon 4D, you must not directly participate in soliciting money with one narrow exception - you may solicit funds from other judges over whom you do not exercise supervisory or appellate authority.

Under Canon 2B, you cannot lend the prestige of your office to advance your own interests or the interests of others, so you have to be very careful to observe how the organization may use your name. You can assist the organization in planning fund-raising and in managing the funds once they are raised. Your name may appear on organizational letterhead along with the office you hold in the organization. Even your judicial designation may appear on the letterhead if comparable designations (e.g., "M.D."; "Ph.D."; "Attorney at Law") are listed for other persons. You must not, however, write or sign a fund-raising letter. You may attend the organization's fund-raising events, but you may not speak or be a guest of honor at the event.

**5. Is the nature and purpose of the organization changing; is it advocating new positions; are its membership rules changing; has it begun to appear in legal proceedings?**

As a caveat, you must continually engage in this question 5 analysis. Quasi-judicial organizations devoted to improving the law, the legal system, and the administration of, can from time to time shift focus and begin to take positions that advocate particular legal outcomes or suggest a proclivity for favoring one class of persons or potential legal parties over others. Some organizations might be viewed as having developed a plaintiff's bias, or as being pro-defense and anti-prosecutorial, or vice versa. A judge member of such an entity has to maintain current knowledge of the organization's official positions and policies and must be prepared to step away if judicial integrity or impartiality could reasonably be questioned based on the judge's membership.

**Extrajudicial Activities**

**1. What is the purpose of the organization?**

If the organization is not specifically devoted to improving the law, the legal system, or the administration of justice, then your membership is governed primarily by Canon 5. Because Canon 2A requires you to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, you need to be very much aware of the mission, purpose, goals, objectives, and activities of any organization in which you hold membership or office.

**2. Will the organization be involved in proceedings that will come before me, or will it be engaged in frequent adversary proceedings in the court of which I am a member or in any court subject to the appellate jurisdiction of the court of which I am a member?**

If so, like its parallel provision in Canon 4, Canon 5C(3)(a) likely precludes your membership because the need for frequent recusal would interfere with the performance of your judicial duties.

**3. Will my membership cast reasonable doubt on my impartiality; demean the office; or interfere with the proper performance of my judicial duties?**

Canon 5A requires you to conduct all extrajudicial activities so that they do not cast reasonable doubt on your impartiality. It is clear from reading Canon 5C(3)(a) that you may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, sororal, or civic organization not conducted for profit. Yet, you must be vigilant in monitoring organizational activities and positions the organization might take on controversial legal or political issues.

Regarding affiliations that might demean judicial office as well as compromise your judicial integrity and perception of impartiality, you may not maintain membership in any organization that engages in "invidious discrimination." According to the Commentary to Canon 2C, that means you must not join, or if you are currently a member, you must disassociate yourself from

any organization that “arbitrarily excludes” persons from membership on the basis of race, religion, sex, or national origin. There is only one exception to the requirement to disassociate yourself immediately; you may attempt to persuade the organization to discontinue the invidiously discriminatory practices, but if you do not succeed in convincing the organization to abandon the practices within one year, you must resign.

The Canon 2B Commentary acknowledges that there are some legitimate reasons for organizations to restrict membership, and it specifically mentions organizations dedicated to preserving religious, ethnic, or cultural values of legitimate common interest to members. The Commentary also acknowledges the existence of “intimate, purely private organizations whose membership limitations could not be constitutionally prohibited.” Although the list is not exclusive, by way of example, the Commentary mentions a number of non-prohibited organizations by name, including: Knights of Columbus, Masons, B'nai B'rith, Sons of Italy, Rotary, Kiwanis, The Junior League, Boy Scouts, Girl Scouts, Boy's Clubs, Girl's Clubs, United Way, and Red Cross.

These organizations are listed to assist you in your own individual analysis of a variety of analogous charitable, civic, and religious affiliations you might consider.

As with quasi-judicial organizational involvement under Canon 4, you must also ensure that commitments to extrajudicial activities under Canon 5 do not compromise your ability to devote full time to properly performing judicial duties.

**4. Is the organization involved in fund-raising of any sort, and will I be called upon to participate in soliciting funds to support the organization?**

As with quasi-judicial organizational involvement under Canon 4, you may not directly solicit funds from anyone other than another judge over whom you do not exercise supervision or appellate jurisdiction. You may plan fund-raising and manage organizational funds, but you may not lend the prestige of office to any fund-raising efforts. The same letterhead, attendance, and speaking restrictions apply to Canon 5, Extrajudicial Activities, as apply to Canon 4, Quasi-Judicial Activities.

**5. Is the nature and purpose of the organization changing; is it advocating new positions; are its membership rules changing; has it begun to appear in legal proceedings?**

As a caveat, question 5 is one that you must ask yourself regularly. Numerous Committee opinions advise judges to remain attuned to the changing nature of various organizations and caution them of the need to reconsider membership periodically based on the preceding criteria.

## CHAPTER 7

### Personal Finances and Financial Disclosure

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## Chapter 7

### Personal Finances and Financial Disclosure

#### 1. Must Judge File Public Financial Report?

Canon 6B(1) provides that a judge must file “such public report as may be required by law for all public officials to comply fully with the provisions of Article II, Section 8, of the Constitution of Florida.” The form for reporting must be the form recommended or adopted by the Florida Commission on Ethics for use by all public officials.

#### 2. What Gifts May Judge Receive and Must Gifts Be Reported?

Canon 6 requires that a judge file a public report of all gifts required to be disclosed under Canon 5D(5). Canon 5D(5) provides that a judge must not accept a gift, bequest, favor, or loan except the following:

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

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

(c) ordinary social hospitality;

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

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

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

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

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value, or the aggregate value in a calendar year of such gifts, bequests, favors, or loans from a single source, exceeds \$100.00, the judge reports it in the same manner as the judge reports gifts in Section 6B(2).

Below are summaries of relevant Committee opinions:

- □ Opinion 94-18 (judge need not report gift from father or bequest from mother's estate; gifts and bequests fall within purview of Canon 5C(4)(b) [now Canon 5D(5)(e)], not Canon 5C(4)(c) [now Canon 5D(5)(h)]);
- □ Opinion 94-12 (judge may accept \$500 in gift certificates from anonymous donors and local bar association in honor of judge's retirement);
- □ Opinion 93-67 (judge may accept Christmas gifts from tenant of business property judge owns, assuming tenant was not party or other person whose interests have recently come or may likely come before judge);
- □ Opinion 92-16 (judge who escorts newspaper columnist to various social and civic affairs and who has his tickets paid for by newspaper should report them as prescribed by Canon 6 when cumulative value exceeds \$100);
- □ Opinion 92-15 (accepting gift of free golf course membership from golf course developer not permitted; inquiring judge was only judge in circuit to whom gift was offered);
- □ Opinion 92-7 (judge should not accept free passage on cruise ship in exchange for lecture on law or judicial system; activity would detract from dignity of judicial office and exploit judicial position);
- □ Opinion 91-7 (baby shower gifts should be reported as other gifts are reported);
- □ Opinion 95-19 (a judge may accept complimentary tickets to American Jewish Committee dinner as long as the gift is reported);
- □ Opinion 97-27 (judge may not accept honorary membership in Air Force Officer's Club, even if offered to all judges and city officials, re-affirming Opinion 83-5 advising against gift acceptance when it seems to be attempt to gain favor with courts);
- □ Opinion 97-36 (even if non-judge spouse has disclosed gift publicly, judge must do so as well);

- Opinion 00-08 (judge is ethically obligated to instruct applicable court employees to act in a manner consistent with the judge’s ethical duties and obligations regarding the acceptance of gifts);
- Opinion 00-20 (judge may attend law related functions, including luncheons, to which fees are waived for the judiciary);
- Opinion 01-10 (judge may receive retirement or reassignment gifts, but gifts must be reported).

The most important recent development for judges to understand in these blanket honorary membership scenarios is that a careful reading of Opinion 97-27 shows that even if all judges are offered the same benefit, that alone is not sufficient to make acceptance of the benefit permissible. This was a possible misperception after Opinion 92-15, which was expressly receded from in Opinion 97-27. The Committee has made it clear that if an entity is attempting to gain favor, whether with an individual judge, or all judges in the circuit, acceptance of the benefit is prohibited by the Code, even when it is offered across the board to all judges in a geographic area.

### **3. May Judge Accept Honorarium for Presenting Lecture?**

Canon 6 provides that a judge may receive compensation for extrajudicial activities permitted by the Code if the source of payment does not give the appearance of influencing the judge in the performance of his or her duties or give the appearance of impropriety. The compensation may not exceed a reasonable amount or what a person who is not a judge would receive for the same activity. *See* Opinion 92-45 (judge may lecture at legal seminar scheduled during normal court hours and sponsored by private corporation if judge can show why or how time of lecture would not detract from proper performance of judicial duties and can also show that judge is devoting full time to judicial duties; judge would be paid honorarium and judge's expenses would be covered).

### **4. May Judge Serve as Officer or Employee of Business?**

A judge may, subject to the requirements of the Code, manage and participate in a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family. Canons 5D(3)(a) and (3)(b). *See* Opinion 90-14 (serving as paid consultant who evaluates profit-making enterprise's drug rehabilitation and related activities outside county in which judge sits not permitted because service would violate Canon 5C(2)).

A notable Committee opinion is Opinion 95-4, in which the inquiring judge asked whether it was permissible to sell Amway products. The Committee stopped short of a complete prohibition of such activity, but relying on the reasoning of an earlier opinion dealing with a judge who wished to offer his boat for charter fishing, the Committee suggested five critical time, place, and manner restrictions that are pertinent to any “for profit” venture a sitting judge might wish to consider. The restrictions are:

1. No solicitation allowed from lawyers who practice before the judge;
2. No use of judicial title permitted in connection with the business venture;
3. No use of court time or equipment allowed for the venture, which must also be conducted on personal time after hours, on the weekends, or during vacations;
4. No fees or rates for products or services may be charged that are not competitive or at the prevailing rate that a non-judge would charge for similar work; and
5. No transactions may be omitted from the full public financial disclosure required by Canon 6B(1).

A number of other opinions address extrajudicial employment and demonstrate the need to consider each business or employment opportunity carefully on a case-by-case basis:

- Opinion 95-31 (advising inquiring judge not to serve as bank director);
- Opinion 95-45 (warning against serving on credit union board of directors);
- Opinion 97-35 (advising against service as part-time director in for-profit corporation);
- Opinion 00-09 (judge may serve as board member for non-profit corporation as long as not involved in fund-raising);
- Opinion 01-07 (approving service on board of advisors for publication dedicated to criminal justice system and the mentally ill, for which position is unpaid and is related to the practice of law and improvement of legal system);
- Opinion 01-16 (disapproving service as appointed member of commission of municipal government charged with fiscal management of government funds);
- Opinion 02-17 (advising judge that it is permissible to be president of non-profit civic organization promoting cultural events for county);
- Opinion 03-21 (advising judge against service on board of trustees of community college because it is government service not related to the law, legal system, or administration of justice).

## **5. May Judge Practice Law?**

A judge may not practice law. However, a judge may act pro se and may, without compensation, give legal advice to, and draft or review documents, for members of the judge's family. Canon 5G. Article V, Section 13, of the Florida Constitution provides that judges must devote full time

to their judicial duties and may not engage in the practice of law or hold office in any political party.

#### **6. May Judge Manage His or Her Family's Financial Investments?**

A judge may, subject to the requirements of the Code, hold and manage investments of the judge and members of his or her family, including real estate, and engage in other remunerative activity subject to the restrictions of the Code. Canon 5D(2).

#### **7. Are There Restrictions on Judge's Financial and Business Dealings in Addition to Those Restrictions on Businesses or Membership Discussed Above?**

A judge is prohibited from engaging “in financial and business dealings that (a) may reasonably be perceived to exploit the judge's judicial position, or (b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.” Canon 5D(1). *See Inquiry Concerning a Judge, DeFoor*, 494 So.2d 1121 (Fla. 1986) (judge reprimanded publicly for several incidents, including using office and authority to promote electronic device for personal gain); Opinion 90-1 (judge should not enter into lease arrangement with governmental agency, but may sell property to governmental agency); Opinion 90-11 (judge may be paid in capacity as co-personal representative and co-trustee in estate arising from father's death; judge may receive commissions from family-owned real estate business in which judge participated as licensed broker as result of transactions that occurred before judge assumed bench, but judge may not maintain active real estate license); Opinion 99-07 (allowing fiduciary service and reasonable compensation for estate of judge's wife's grandmother).

#### **8. May Judge Serve as Fiduciary?**

Canon 5E(1) and Committee opinions hold that a judge is prohibited from acting as a fiduciary except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. A judge is prohibited from serving as a fiduciary if it is likely that the judge, as a fiduciary, will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction. Canon 5E(2). The restrictions on financial activities that apply to a judge personally apply to the judge while acting as a fiduciary. Canon 5E(3). A number of opinions address the restrictions on fiduciary service:

- Opinion 95-7 (judge may serve as co-trustee of estate of wife's grandmother and be paid reasonable fee);
- Opinion 93-2 (judge may serve as co-trustee of charitable trust created, funded, and named after judge and her spouse, assuming trust was not conducted for benefit of judge or family member and would not be involved in adversary proceedings; service must not reflect adversely on judge's impartiality or interfere with performance of judicial duties);

- Opinion 92-18 (judge may not serve with husband as co-trustee of trusts created for benefit of adult daughter of close friends; such service would violate Canon 5D (now Canon 5E(1)), which prohibits judge from serving as trustee except for close family members);
- Opinion 90-11 (judge may be paid in capacity as co-personal representative and co-trustee in estate arising from father's death);
- Opinion 97-4 (judge may not continue to serve as guardian of property for physically disabled man);
- Opinion 00-01 (judge may serve as trustee over property left to judge and his wife as life estate).

There is dispute over whether an ex-spouse and family constitute enough relationship to be considered as part of the judge's family. *See* Opinion 03-12.

### **9. May Judge Serve as Arbitrator or Mediator?**

A judge is prohibited from acting as an arbitrator or mediator or otherwise performing judicial functions in a private capacity unless expressly authorized by law or court rules. Canon 5F. A retired judge who is eligible for recall to judicial service is not required to comply with Canon 5F. Florida Code of Judicial Conduct, Application Section B. There are restrictions on a retired judge eligible for recall to judicial service serving as a mediator. Application Section; Opinion 02-01 (judge advised not to mediate a friend's divorce). Previously, sitting judges and retired judges eligible for recall could not co-mediate. Opinion 96-7 (judge advised not to co-mediate until after judicial retirement). Although Opinion 97-7 was reaffirmed by the Committee in Opinion 97-5, the Florida Supreme Court then addressed the issue of judges co-mediating in its opinion *In re Code of Judicial Conduct, Canon 5F*, 695 So.2d 352 (Fla. 1997). In that case, the court found that Canon 5F allows judges, subject to certain rules, to conduct actual arbitration or mediation proceedings as part of a certification process. Since the court's ruling in this case, the Committee has applied the same rationale to judicial employees. *See* Opinion 00-13 (opining that restrictions on a judge mediating or arbitrating must also apply).

### **10. May Judge Accept Fee Earned Before Assuming Bench?**

A judge may accept a fee earned before assuming the bench. *See* Opinion 94-7 (proper to accept fee earned before assuming bench if division of fees is in compliance with Rules of Professional Conduct (now Rules Regulating The Florida Bar)); Opinion 93-38 (permissible to continue to receive compensation for legal work performed before taking bench if compensation or fees are for work previously performed; judge may collect fair value of interest in fees to be collected in future for work done before departure from firm, but should not be sharing in profits of firm earned after departure; inquiring judge's reference to intangible factor of goodwill associated with new judicial reputation in community was unclear; five members of Committee said judge should not profit from judicial standing in community); Opinion 95-11 (finding it permissible to

accept fees in quantum meruit for services rendered before becoming judge, but not while judge).

### **11. May Judge Teach Class at Academic Institution?**

A judge may teach a class about the law (Canon 4B) or a non-legal subject (Canon 5B) and may do so for compensation as long as it does not detract from full time judicial duties and as long as the compensation received does not exceed a reasonable amount and is no greater compensation than a non-judge would receive for the same work. *See* Opinion 81-3 and Canon 6A(1).

### **12. May Judge Receive Compensation for Performing Wedding Ceremony?**

By virtue of judicial office, judges may officiate at marriage ceremonies. In Opinion 83-15, the Committee also determined that a judge who performs a wedding may receive reasonable compensation as long as the judge does not allow presiding at weddings to detract from full time judicial responsibilities. A judge may not accept compensation for performing marriages during normal working hours at the courthouse. As with any permitted extrajudicial compensation, the compensation must be reasonable and no higher than the compensation a person who is not a judge would receive for the same activity. Canon 6A(1).

### **13. Other Than Practice of Law, Are There Other Activities for Compensation from Which Judge Should Refrain?**

The answers to questions 4-8 above cover such matters as a judge's business ownership, the practice of law, management of the judge's personal investments, various personal financial transactions, and service as a fiduciary. This answer will suggest a method for evaluating the judicial ethics implications of any remunerative activity in which a judge might wish to engage. Judges must use a rule of reason and read several provisions of Canons 2 through 6 and the Florida Constitution *in para materia*:

First, in accordance with Article V, Section 13 of the Florida Constitution, every Florida jurist must devote full time to judicial duties. Consistently with that section, Canon 3A holds that judicial duties take precedence over all the judge's other activities. And, in light of Canon 3B(8), any activity that would prevent a judge from disposing of all judicial matters "promptly, efficiently, and fairly" must be avoided. Judges must also take care that any other activity, whether for compensation or not, does not cast reasonable doubt on the judge's ability to remain impartial, does not demean the judicial office, and does not interfere with the performance of judicial duties. Canon 4A.

Teaching is a frequent activity for judges, some of whom teach courses about the law, the legal system, and the administration of justice at community colleges, undergraduate universities, or law schools. Such activity is expressly allowed by Canon 4B. Similarly, Canon 5B recognizes that judges may also have expert knowledge in non-legal academic subject matter and may teach non-law related courses. Still, judges must consider each prospective teaching or lecturing

assignment carefully and do nothing to demean or detract from the dignity of office or imply any impartiality that could cause the public to question the judge's ability to hear and decide cases without favoritism or bias.

Canon 6A allows acceptance of reasonable compensation for non-judicial tasks. In no case may a judge participate in any arrangement or receive compensation for an activity that creates a conflict of interest or that appears to trade on the judicial position for personal advantage. Canon 6A also warns that the source of payment must not raise questions of undue influence.

In Opinion 96-25, members advised an inquiring judge not to serve as a legal commentator for a local television station. Citing Canons 2B, 3B(8), 5A, and 5D(1)(b), the Committee warned that such an arrangement with an electronic media outlet might lend the prestige of office to the station's commercial interest (violating Canon 2B), create the almost unavoidable hazard of putting the judge in the position of appearing to give legal advice or commentary on pending matters (Canon 3B(8)), or cast doubt on the judge's impartiality or demean the judicial office (Canon 5A). The Committee also discussed its concern that involvement in commercial and entertainment-related aspects of the business could outweigh any educational and public information-related purposes of the commentary. Additionally, the Committee addressed the Canon 5D(1)(b) consideration that the electronic media are frequently litigants and are likely to come before the court. This analysis employed in Opinion 96-25 is applicable to other prospective activities and should prove helpful in determining whether to engage in them. *See, e.g.,* Opinion 78-10 (cautioning judge not to appear voluntarily as expert witness, and not to accept compensation for testifying); Opinion 90-14 (opining that work as consultant for drug company would be prohibited by Canon 5); and Opinion 92-7 (advising judge that acceptance of free passage on cruise in exchange for lecture would detract from dignity of office and exploit judge's position in violation of Canons 5A and C).

Essentially, by incorporating the language of the Canons and the reasoning of the Committee Opinions discussed throughout this chapter, a judge can deduce eight relevant factors to weigh in deciding whether to engage in an extrajudicial or quasi-judicial activity with or without compensation. If the answer to any one of the following eight questions is yes, then the judge must decline to engage in the activity. The eight factors are:

1. Whether the activity will detract from full time duties;
2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;
3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;
4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;

5. Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;
6. Whether the activity will create any other conflict of interest for the judge;
7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and
8. Whether the activity will lack dignity or demean judicial office in any way.

## CHAPTER 8

### Political Activity

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## CHAPTER 8

### Political Activity

#### 1. What Are Sources of Authority and Guidance Regarding Judge's Political Activity?

There is a separate publication entitled “An Aid to Understanding Canon 7,” developed by the Office of the State Courts Administrator in conjunction with the Judicial Ethics Advisory Committee. Judges and candidates or applicants for appointment to judicial office should read that booklet.

Some sources of primary authority and guidance regarding permissible political activity of judges and candidates to judicial office also include:

- a. Canon 7, Florida Code of Judicial Conduct.
- b. Florida Supreme Court Decisions Relating to Canon 7.
- c. The Florida Election Code, Florida Statutes - Judicial candidates are subject to the Florida Election Code, Chapters 97 - 106, Florida Statutes (2004). Chapter 105 concerns qualifying and election procedures. Chapter 106 regulates campaign financing.
- d. Opinions of the Judicial Ethics Advisory Committee - These opinions have been published in the Florida Law Weekly Supplement since December 1993. Opinions rendered before March 1994 are available for reference at the Florida Supreme Court Library and may be in local courthouse libraries. All the opinions of the Committee are now available at <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/Opinions.html>

The Office of the State Courts Administrator also has information about obtaining copies of these opinions.

- e. Opinions of the Florida Division of Elections - The Division of Elections is authorized by Rule 1S-2.010, Florida Administrative Code, to give advisory opinions regarding the application of Chapters 97 through 106, Florida Statutes. Candidates for judicial office may request and receive such advisory opinions if they inquire in accordance with the instructions contained in Rule 1S-2.1010(4), Florida Administrative Code. Advisory opinions may be found at [election.dos.state.fl.us/opinion/TOC-opinions.html](http://election.dos.state.fl.us/opinion/TOC-opinions.html)

## **2. Who Must Comply with Canon 7?**

A judge or judicial candidate must comply with Canon 7.

## **3. May Judge or Judicial Candidate Attend Political Gatherings?**

A judge or judicial candidate may not attend political party functions except as authorized in Canons 7B(2), 7C(2), and 7C(3). Canon 7A(1)(d). Canon 7B(2) permits a non-judge candidate for appointment to judicial office to attend political gatherings. Canon 7C(2) provides that upon certifying that his or her candidacy has drawn active opposition, a candidate for merit retention in office may thereafter campaign in any manner authorized by law, subject to the restrictions of Canon 7A(3). Canon 7C(3) provides as follows:

A judicial candidate involved in an election or re-election, or a merit retention candidate who has certified that he or she has active opposition, may attend a political party function to speak in behalf of his or her candidacy or on a matter that relates to the law, the improvement of the legal system, or the administration of justice. The function must not be a fund-raiser, and the invitation to speak must also include the other candidates, if any, for that office. The candidate should refrain from commenting on the candidate's affiliation with any political party or other candidate, and should avoid expressing a position on any political issue. A judicial candidate attending a political party function must avoid conduct that suggests or appears to suggest support of or opposition to a political party, a political issue, or another candidate. Conduct limited to that described above does not constitute participation in a partisan political party activity.

Several Committee opinions help to navigate this section. Especially important is the recent insight into the issue of the invitation to speak at a political party function needing to include the other candidates. *See* Opinion 03-13. In that opinion, the Committee said a blanket invitation in a political party newsletter was sufficient to allow the candidate to appear. If a judge or judicial candidate attends a political party meeting, the Committee has advised that attendance should be to speak on behalf of the judge's candidacy, not to socialize informally. *See* Opinions 90-16 and 02-08.

Recently, the Committee has also given guidance on appropriate arrival and departure timing for attendance at a political gathering. In Opinion 02-11, the Committee advised a candidate that it was acceptable to attend, hand out campaign literature, and speak with the audience. The candidate may arrive at a reasonably early time but must leave when the portion of the meeting devoted to speaking on behalf of candidacy is concluded.

## **QUICK REFERENCE GUIDE FOR ATTENDANCE AT POLITICAL GATHERINGS**

**A. As a general rule, may a sitting judge attend political gatherings?**

No. See Canon 7A(1)(d).

**B. May a sitting judge involved in a contested election attend political gatherings?**

Yes, subject to the following six restrictions:

- If you are involved in a contested election, you may attend a political party function to speak on behalf of your own candidacy or to speak about the law, the improvement of the legal system, or the administration of justice;
- The function must not be a fund-raiser;
- The invitation to speak must include all other candidates, if any, for that office;
- You should avoid commenting on your own political party affiliation or your affiliation with any other candidate;
- You should avoid expressing a position on any political issue;
- You should avoid conduct that suggests or appears to suggest support of or opposition to a particular political party, a political issue, or another candidate.

**C. May an appellate judge standing for merit retention attend political gatherings?**

A judge who has certified that he or she has drawn active opposition may attend political gatherings subject to the same six limitations in B. above. If you have not drawn opposition, you should not attend such gatherings even if you are on the merit retention ballot.

**D. May an attorney running for judicial office attend political gatherings during the campaign?**

According to the Canon 7E, even if you are not yet a judge, an attorney who is a candidate for judicial office is subject to Rule 4-8.2(b) of the Rules Regulating The Florida Bar and must also comply with Canon 7.

During your judicial election campaign, you too should follow the limitations outlined in B. above.

**E. May a non-judge seeking a judgeship through the appointment process attend political gatherings?**

Yes. Canon 7B(2) specifically allows you to attend political gatherings while a non-judge applicant for appointment through the judicial appointment process. A judge applicant for appointment to a vacancy or newly created judgeship at another tier of court may not attend political gatherings, however, because a judge is bound by the general prohibition of Canon 7A(1)(d) referenced in A. above.

\* \* \*

**4. May Judge Solicit Funds in Support of the Judge's Own Candidacy?**

Canon 7B(1) provides that a candidate for appointment to judicial office or a judge seeking other governmental office may not solicit or accept funds - personally, through a committee, or otherwise - to support his or her candidacy. Canon 7C(1) provides that a candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates may not personally solicit campaign funds or solicit attorneys for publicly stated support. *See* Opinion 04-07 (Election).

**5. Who May Solicit Campaign Funds for Judicial Candidacy?**

Canon 7C(1) provides that a judge or judicial candidate subject to public election may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for his or her candidacy. *See* Opinion 04-07 (Election).

**6. When May Judicial Candidate Subject to Public Election Establish Campaign Committee?**

Canon 7C(1) formerly prohibited a candidate from establishing a campaign committee or expending funds earlier than one year before the general election. (Previously, there had been no time limit on the establishment of a campaign committee or on the expenditure of funds in furtherance of a judicial campaign.) However, this restriction was enjoined by the United States District Court for the Northern District of Florida in *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995), and the Florida Supreme Court deleted the time-restrictive language from Canon 7C(1) in *In re Code of Judicial Conduct*, 659 So.2d 692 (Fla. 1995).

**7. May Judicial Candidate Publicly Endorse Another Candidate for Public Office?**

Under Canon 7A(1)(b), a judicial candidate may not publicly endorse another candidate for public office.

**8. May Judicial Candidate Respond to Personal Attacks on Own Record?**

Canon 7A(3)(e) permits the candidate to respond to personal attacks or attacks on his or her record if the response does not violate Canon 7A(3)(d), which prohibits a candidate from knowingly misrepresenting the identity, qualifications, or present position of, or any other fact concerning, the candidate or an opponent.

**9. May Judge Publicly Discuss His or Her Views on Disputed Legal or Political Issues?**

Since 1995, Canon 7A(3)(d)(ii) has provided that a judicial candidate must not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” This section is less restrictive than the former version, which prohibited a candidate from announcing his or her views on disputed legal or political issues period. The commentary to Canon 7A(3)(d) states that a candidate should emphasize in any public statement his or her duty to uphold the law regardless of personal views.

The current language seems to take into account a judge's first amendment speech rights and balance those against the need in society for a fair, impartial, and unbiased judiciary. The language is more narrowly tailored so that individual judges weigh the implications of their speech more on a case-by-case basis, always cognizant, that by virtue of their office, their free speech rights are not unbridled. They must be able to hear cases with an open mind and be clear in public statements so that the public does not fear that disputes have been prejudged without benefit of judicial process.

**10. Will Attorney's Contribution to Judge's Campaign Require Recusal of Judge When Attorney Appears Before That Judge?**

A contribution alone, without more, is not sufficient to require recusal. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990).

**11. May Judge Participate in Campaigns of Other Political Candidates?**

The Commentary to Canon 7A(1)(b) states that a judge or judicial candidate is not prohibited from privately expressing his or her views on judicial candidates or other candidates for public office. *See also* Section 105.071, Florida Statutes; *Inquiry Concerning a Judge, DeFoor*, 494 So.2d 1121 (Fla. 1986). However, Canon 7A(1)(b) says judges are to provide no public support or opposition. Opinions 00-16 and 98-25 illustrate this point.

## **12. To Whom Should Violations of Canon 7 Be Reported?**

Violations of Canon 7 by judges should be reported to the Judicial Qualifications Commission, created by Article V, Section 12, of the Florida Constitution. A Canon 7 violation by an attorney candidate should be reported to The Florida Bar.

## **13. May Judge Belong to Organization That Is Bipartisan in Membership and Nonpartisan in Nature and Addresses Political and Societal Issues?**

A judge may belong to an organization that is bipartisan in membership and nonpartisan in nature and addresses political and societal issues. Opinion 95-1. The organization at issue in that opinion was the Tiger Bay Club. In an earlier opinion, Opinion 92-28, the Committee disallowed a judge's membership in the Tiger Bay Club because the club was a political organization, membership in which was proscribed by Canon 7A. In revisiting the issue in Opinion 95-1, the Committee found that Tiger Bay Clubs are “essentially public awareness organizations that address political and social issues,” are bipartisan in membership, are nonpartisan in nature, and do not appear to be proscribed by Canon 7.

## **14. May Judge Serve as Officer in Local Bar Association?**

A judge may not be an officer in a local bar association. Opinion 94-44. Citing Opinions 79-15 and 79-16, the Committee stated that a judge's participation in a bar election and service as an officer could result in conflicts of interest and the appearance of impropriety that violate the Code. However, the Committee believed that a judge may ethically serve as an appointed chair of a local bar association committee. In Opinion 98-18, the Committee also advised a judge that it is permissible to serve on the executive committee of a local bar association.

## **15. What are Some Examples of Canon 7 Violations?**

The most serious violations, which can result in removal from office, include making explicit campaign promises that suggest how a judge will rule in particular kinds of cases and making unfounded attacks on an opponent. Also serious and likely to result in a reprimand are suggestions in sample ballots or campaign literature of partisan endorsements in a non-partisan judicial race.

The following reported cases illustrate Canon 7 violations that have resulted in disciplinary action in Florida:

- *In re Inquiry Concerning a Judge, Lantz*, 402 So.2d 1144 (Fla. 1981) (judge who directly solicited election support from Bar member should be publicly remanded);
- *Inquiry Concerning a Judge, DeFoor*, 494 So.2d 1121 (Fla. 1986) (reprimanding judge publicly for participation in two political campaigns, which included lobbying, organizing, and developing strategies on behalf of candidates);

- ***In re Inquiry Concerning Judge, Pratt***, 508 So.2d 8 (Fla. 1987) (judge should be publicly remanded for financing and distributing sample ballots suggesting partisan endorsement in race for judicial office in which she was candidate);
- ***In re Kay***, 508 So.2d 329 (Fla. 1987) (reprimanding judge publicly for mailing sample ballots suggesting partisan endorsement of candidates in nonpartisan race);
- ***Inquiry Concerning a Judge, Berkowitz***, 522 So.2d 843 (Fla. 1988) (removing judge from office for several Code violations, including participation in mailing of sample ballots suggesting partisan endorsements of candidates in nonpartisan race);
- ***In re Turner***, 573 So.2d 1 (Fla. 1990) (reprimanding judge publicly for participation in son's campaign for judicial office);
- ***In re McGregor***, 614 So.2d 1089 (Fla. 1993) (judge publicly reprimanded for actively campaigning for spouse in political campaign);
- ***In re Glickstein***, 620 So.2d 1000 (Fla. 1993) (judge publicly reprimanded for endorsing, in a letter written on office stationery and published in newspaper, the retention of another judge);
- ***In re Alley***, 699 So.2d 1369 (Fla. 1997) (judge publicly reprimanded for conduct unbecoming candidate for judicial office, including misrepresenting qualifications, injecting party politics into non-partisan race, and misrepresenting opponent's qualifications);
- ***In re McMillan***, 797 So.2d 560 (Fla. 2001) (judge removed from bench for cumulative misconduct fundamentally inconsistent with the responsibilities of judicial office, including campaign promises to favor State and police in court proceedings, as well as unfounded attacks on incumbent judge and local court system);
- ***In re Rodriguez***, 829 So.2d 857 (Fla. 2002) (judge publicly reprimanded and fined \$40,000 for improper campaign finance activities and reporting practices);
- ***In re Kinsey***, 842 So.2d 77 (Fla. 2003) (judge publicly reprimanded and ordered to pay fine of \$50,000, plus costs, for making improper campaign statements which imply she would favor one group of citizens over another or would make rulings based upon sway of popular sentiment in the community); and
- ***In re Angel***, 867 So.2d 379 (Fla. 2004) (judge publicly reprimanded for engaging in a pattern of improper conduct, namely participating in prohibited partisan political activity).

# A P P E N D I X

## OVERVIEW OF CANONS

### Introduction And Caveat

This summary serves as a reference guide to the various parts of the Code but should not be viewed as a substitute for reading the Code. If a Code provision in the summary appears relevant to an issue in which the judge or judicial candidate is interested, the judge or judicial candidate should read the entire Code provision and the Commentary that follows. In addition, when one Code provision appears to permit certain judicial conduct, other Code provisions should be consulted to ensure that the conduct in question is not prohibited elsewhere.

### Definitions

The Florida Supreme Court added a “definitions” section in the January 1, 1995, revision to the Code. Some of the words and phrases defined in this new section are “candidate,” “economic interest,” “member of the judge's family,” and “political organization.” The text of the canons does not indicate which words or phrases are contained in the definitions section, so it is important to refer regularly to that section for guidance and additional information.

### Specific Canons

#### 1. **Canon 1: A Judge Shall Uphold the Integrity and Independence of the Judiciary**

Canon 1 is a general provision that exhorts judges to uphold the integrity and independence of the judiciary by following high standards of conduct. This canon sets the tone for the entire Code of Judicial Conduct, but the only specific requirement is found in the Commentary, which states that judges “must comply with the law, including the provisions of this Code.” Therefore, as a general provision, Canon 1 is unlikely to be cited alone as a provision that was violated by a judge. Rather, when a judge violates other canons, which contain specific proscriptions that are usually the basis of guidance and discipline, Canon 1 is relevant because any Code violation is likely to damage the perception that the judiciary is “independent and honorable.”

#### 2. **Canon 2: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities**

Canon 2 provides that a judge must avoid impropriety and the appearance of impropriety by:

- a. respecting and complying with the law;

- b. not allowing relationships to influence the judge's judicial behavior, not lending the prestige of judicial office to advance private interests, not giving the appearance that others are in the position to influence the judge, and not testifying voluntarily as a character witness; and
- c. not holding membership in an organization that practices invidious discrimination.

Canon 2 is broad in its application to a judge's conduct. To avoid impropriety and the appearance of impropriety, a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2A. The Commentary to Canon 2A specifically states that "[t]he prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge."

While Canon 2A is a broad description of the conduct expected of judges, Canons 2B and 2C are more specific. Canon 2B regulates when a judge can write letters of recommendation because, by doing so, a judge is advancing the private interests of another. In addition, Canon 2B prohibits a judge from testifying voluntarily as a character witness because such testimony could lend the prestige of the judicial office to the party for whom the judge testifies.

Canon 2C, which prohibits a judge from holding membership in an organization that practices invidious discrimination, was added to the January 1, 1995, revised Code. The Commentary to Canon 2C states that "[m]embership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired."

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

#### **a. In General**

Canon 3A reiterates the theme in Canons 1 and 2 that a person becoming a judge must accept the fact that a judge's first responsibility is to the law, the Code of Judicial Conduct, and the duties that a judge must carry out. Canon 3A states: "The judicial duties of a judge take precedence over all the judge's other activities." The remainder of Canon 3 sets out the obligations that a judge has with respect to the various judicial duties that come with the position.

#### **b. Adjudicative Responsibilities**

Canon 3B provides that a judge must hear and decide matters assigned to the judge, must be faithful to and competent in the law, and must not be influenced by outside factors. In addition, a judge must keep order and decorum in all proceedings and be patient, dignified, and courteous to individuals he or she meets in an official capacity.

Paragraphs (5) and (6) of Canon 3B were added to the Code as part of the January 1, 1995, revision. Under these two paragraphs, a judge must "perform judicial duties without bias or

prejudice” and “require lawyers in proceedings before the judge to refrain from manifesting . . . bias or prejudice” against any persons in a proceeding.

Paragraph (7) of Canon 3B also contains new provisions. In addition to the former language providing that a judge must accord every person with a legal interest in a proceeding the opportunity to be heard, paragraph (7) now sets forth new rules regarding ex parte communications. Generally, “[a] judge shall not initiate, permit, or consider ex parte communications,” but some ex parte communications are permitted “for scheduling, administrative purposes, or emergencies that do not deal with substantive matters.” To engage in ex parte communication, however, the judge must believe that no party will gain an advantage as a result of the communication, and the judge must be sure that all parties are notified of the substance of the communication. A judge also may participate in ex parte communications in other limited circumstances, such as when the parties agree that the judge may confer separately with the parties and their lawyers for the purpose of mediating or settling a case.

Also included in Canon 3B's laundry list of required and prohibited conduct is that a judge must “dispose of all judicial matters promptly, efficiently, and fairly.” Canon 3B prohibits a judge from commending or criticizing jurors for their verdict but allows a judge to thank a jury for service; Canon 3B prohibits a judge from disclosing or using for nonjudicial purposes any nonpublic information that the judge acquires in his or her judicial capacity.

In another revision to the Code, paragraph (9) of Canon 3B sets less restrictive limits on the public comments that a judge may make regarding cases. “A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.”

### **c. Administrative Responsibilities**

As with the adjudicative responsibilities detailed in Canon 3B, Canon 3C requires that a judge discharge administrative responsibilities diligently, without bias or prejudice, and in a competent manner. The judge must require those under his or her authority to carry out their administrative duties in the same diligent manner that is required of the judge and also to refrain from manifesting bias or prejudice in their official duties. A 1995 addition to the Code is that “[a] judge shall not make unnecessary appointments.” Canon 3C(4). Also, appointments must be made impartially and on the basis of merit, and a judge must avoid nepotism and favoritism.

### **d. Disciplinary Responsibilities**

Under the disciplinary provisions, which are new to the 1995 version of the Code, a judge must take appropriate action when he or she has information or actual knowledge indicating that another judge has violated the Code of Judicial Conduct or that a lawyer has violated the Rules

Regulating The Florida Bar. The Florida Supreme Court issued an opinion clarifying the meaning of “appropriate action,” indicating that the taking may include directly communicating with the judge or lawyer who has committed the violation, taking other direct action if available, and reporting the violation to the appropriate authority or agency. *In re Code of Judicial Conduct*, 656 So.2d 926 (Fla. 1995).

#### **e. Disqualification**

Canon 3E instructs a judge regarding when disqualification is necessary on ethical grounds. Generally, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Canon 3E(1). Such instances include, but are not limited to, when the judge has a personal bias or prejudice toward a party or attorney or has personal knowledge of disputed evidentiary facts, when the judge previously served as a lawyer in the controversy, when the judge or a member of the judge’s family has an economic interest in the proceeding that is more than de minimis, or when the judge has a relative who is involved in the case.

#### **f. Remittal of Disqualification**

Canon 3F provides that a judge who is disqualified under Canon 3E may continue to preside in the case if the parties and the lawyers agree, out of the presence of the judge, to waive disqualification.

### **4. Canon 4: A Judge is Encouraged to Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice**

Canon 4 addresses a judge’s quasi-judicial activities, while Canon 5 addresses extrajudicial activities. Quasi-judicial activities refer to activities that are not directly related to a judge’s work as a judge but are related to the law, the legal system, and the administration of justice. Extrajudicial activities regulated under Canon 5 refer to activities not associated with the judge’s official duties.

Both Canon 4 and Canon 5 contain subparagraph A, which is part of the 1995 Code revision. Canons 4A and 5A provide a framework for deciding which quasi-judicial and extrajudicial activities are appropriate. Such activities must not (1) “cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.”

As long as a judge does not violate the general prohibitions under Canon 4A, he or she is encouraged to “speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government.” Canon 4B. The Commentary to Canon 4B notes that judges are uniquely qualified to participate in improving the law, the legal system, and the administration of justice, including, but not limited to, “the improvement of the role of the judiciary as an independent branch of government, the revision of substantive and procedural law, the improvement of criminal and juvenile justice, and the improvement of justice

in the areas of civil, criminal, family, domestic violence, juvenile delinquency, juvenile dependency, probate, and motor vehicle law.” The Commentary to Canon 4B also states that judges’ support of pro bono legal services is an activity that relates to improvement of the administration of justice. As with other Code provisions, however, judges are reminded in Canon 4B that the permission to participate in these activities is “subject to the requirements of this Code.” In other words, a judge cannot engage in the conduct permitted under Canon 4 if doing so would violate any other provision of the Code.

Canon 4C indicates that a judge may appear at a public hearing or may otherwise consult with the executive or legislative branches of government only on matters concerning the law, the legal system, or the administration of justice, or when the judge is acting pro se in a matter regarding the judge or his or her own interests.

Canon 4D provides that “[a] judge is encouraged to serve as a member, officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice,” subject to a number of restrictions. For example, the judge may not serve such an organization in an official capacity if the organization is likely to be involved in legal proceedings that ordinarily would come before the judge. A judge also would have to decline to serve if the organization is likely to be involved frequently in adversary proceedings in the judge’s court or in a court over which the judge’s court has appellate jurisdiction.

Judges may assist such organizations in planning fund-raising and in managing and investing the organization’s funds but are not permitted to solicit funds for the organization personally. The 1995 revision to the Code added language permitting judges to solicit funds from other judges “over whom the judge does not exercise supervisory or appellate authority.” Canon 4D(2)(a). In addition, a judge may solicit membership in such an organization unless the solicitation could be perceived as coercive or unless the membership solicitation is for the purpose of fund-raising. In no event may the judge use or permit the use of the prestige of the judicial office for fund-raising or membership solicitation.

## **5. Canon 5: A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict with Judicial Duties**

Canon 5 permits judges to participate in a wide range of extrajudicial activities, including speaking, writing, lecturing, and teaching concerning non-legal subjects. As with Canon 4, however, judges must abide by restrictions on these activities. All of the restrictions on a judge’s activities in educational, religious, charitable, fraternal, sororal, or civic organizations are the same as the restrictions on quasi-judicial conduct regulated by Canon 4, with one addition. Canon 5C(2) adds that a judge is prohibited from accepting an appointment to a governmental committee or position that is concerned with matters other than the improvement of the law, the legal system, the judicial branch, or the administration of justice.

The remainder of Canon 5 addresses Financial Activities (5D), Fiduciary Activities (5E), Service as Arbitrator or Mediator (5F), and Practice of Law (5G).

Canon 5D prohibits judges from engaging in financial and business dealings that would appear to exploit the judge's judicial position or involve the judge in ongoing business relationships with lawyers or other persons likely to come before the judge's court. Judges may, however, engage in a limited range of extrajudicial financial activities. Judges may hold and manage investments owned by the judge and members of the judge's family, and a judge may manage and participate in any business that is closely held by the judge or the judge's family or in a business that is engaged primarily in investing the judge's or the judge's family's financial resources. Otherwise, a judge is prohibited from engaging in such business ventures. Canon 5D also requires that judges minimize the number of cases in which financial interests would cause them to be disqualified.

Under Canon 5D(5), judges may accept gifts, bequests, favors, or loans only in limited circumstances. For example, a judge may accept a gift incident to a public testimonial, resource materials supplied by publishers for official use, invitations to bar-related functions, a gift, award, or benefit incident to the business of the judge's spouse, or a loan from a lending institution on the same terms available to the general public. Judges also may accept any other gift, bequest, favor, or loan if (1) the donor is not a party or someone who is likely to come before the judge's court or to have his or her interests come before the judge's court, and (2) when its value or the aggregate value in a calendar year of such gifts, bequests, favors, or loans from a single source exceeds \$100, the judge reports it in the same manner as it would be reported under Canon 6B.

The provisions under Canon 5 should be read together with the provisions of Canon 6, which regulates fiscal matters of a judge. Canon 6 addresses all of a judge's fiscal matters, including those related to judicial and extrajudicial conduct.

Canon 5E provides that a judge shall not serve as a fiduciary except for a member of the judge's family, and then only if doing so would not interfere with the judge's judicial duties.

Canon 5F prohibits a judge from acting as an arbitrator or mediator, while Canon 5G prohibits a judge from practicing law, except that a judge may act pro se and give legal advice to a member of the judge's family without compensation. (In Opinion 95-33, the Committee advised that a retired judge subject to recall could serve as a hearing officer for a city because, under the Application Section of the Code, such judges are expressly exempted from Canons 5C(2), 5E, 5F, and 6A.)

**6. Canon 6: Fiscal Matters of a Judge Shall be Conducted in a Manner That Does Not Give the Appearance of Influence or Impropriety; a Judge Shall Regularly File Public Reports As Required By Article II, Section 8, of the Constitution of Florida, and Shall Publicly Report Gifts; Additional Financial Information Shall be Filed With the Judicial Qualifications Commission to Ensure Full Financial Disclosure**

Canon 6 addresses both compensation for quasi-judicial and extrajudicial services and financial reporting. Under Canon 6A, judges may receive compensation and reimbursement of expenses for the quasi-judicial and extrajudicial activities described in Canons 4 and 5. There are, however, restrictions on compensation and expense reimbursement. The compensation must not

exceed a reasonable amount or an amount that a non-judge would receive, and expense reimbursements must be limited to actual costs incurred by the judge and, when appropriate, the judge's spouse. Most importantly, there must not be any appearance that the judge is being influenced in the performance of judicial duties or the appearance of any other impropriety. As with other canons, the activity permitted under Canon 6 is permissible only if it does not violate the provisions of any of the other canons. For example, a judge would be prohibited from speaking so frequently before groups that the speaking engagements interfered with the judge's judicial duties. Canon 3A; Commentary to Canon 6A.

Sections B and C of Canon 6 contain the judicial financial reporting requirements. A judge must file the same public reports required by law for all public officials under Article II, §8, of the Florida Constitution. Judges also must file a public report of all gifts that are required to be disclosed under Canon 5D(5)(h).

In addition, Canon 6C requires that judges provide to the Judicial Qualifications Commission a list of the corporations and other business entities in which the judge has a financial interest, unless the judge has provided that list in the report required under Canon 6B. The report to the Commission is confidential, except that a party may request information during or after the pendency of a cause as to whether the judge has a financial interest in particular business entities.

#### **7. Canon 7: A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity**

The provisions of Canon 7 apply both to judges and to candidates for judicial office. Generally, judges and candidates for election or appointment to judicial office are prohibited from acting as leaders in a political organization, publicly endorsing or opposing another candidate for public office, making speeches on behalf of political organizations, attending political gatherings, or asking for or making contributions to political organizations or candidates. Judges must also resign from judicial office when they become candidates for non-judicial offices except while a candidate for a position in a state constitutional convention.

Under Canon 7A(3), a candidate for judicial office is required to maintain the dignity appropriate to judicial office and to encourage his or her family to adhere to the same standards that apply to the candidate. A candidate must prohibit those who serve at his or her pleasure from doing on the candidate's behalf what the candidate is prohibited from doing under Canon 7.

Candidates for judicial office are prohibited from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” Canon 7A(3)(d)(i). Candidates may not make statements that commit or appear to commit them with respect to cases, controversies, or issues that are likely to come before the court. They may not knowingly misrepresent information concerning themselves or an opponent, but they may respond to personal attacks or attacks on their record, as long as they do so in accordance with Canon 7A(3)(d). In 2005, the Florida Supreme Court amended Canon 7A(3)(d) to add a provision that states that a judicial candidate shall not while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially

interfere with a fair trial or hearing. This section does not apply to proceedings in which the judicial candidate is a litigant in a personal capacity. Canon 7A(3)(d)(iv).

Canon 7B regulates candidates seeking appointment to judicial or other governmental office. Candidates for appointment to judicial office and judges seeking another governmental office are prohibited from soliciting or accepting funds in any way. Their political activities are limited to communicating with the appointing authority, seeking support or endorsement from organizations that and individuals who regularly make recommendations for appointment to the office, and providing information about their qualifications for the office. Non-judge candidates for appointment to judicial office may retain an office in a political organization, attend political gatherings, and continue to contribute financially to political organizations or candidates.

Canon 7C provides specific guidance for judges and judicial candidates subject to public election. All candidates for a judicial office that is filled by public election are prohibited from personally soliciting funds or attorneys for publicly-stated support. Such candidates may, however, establish committees to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy. Formerly, candidates were prohibited from spending funds for their campaign or establishing a committee to solicit contributions or public support earlier than one year before the general election. This prohibition was deleted from the Code in *In re Code of Judicial Conduct*, 659 So.2d 692 (Fla. 1995). Candidates may not use campaign contributions for their private benefit.

A candidate for merit retention in office may conduct only limited campaign activities until he or she certifies that the candidacy has drawn active opposition. Such merit retention candidates may campaign more freely after mailing a certificate in writing to the Secretary of State and Judicial Qualifications Commission that their candidacy has drawn active opposition.

Canon 7C(3) provides that a judicial candidate involved in an election or re-election who has qualified for judicial office, or a merit retention candidate who has certified that he or she has active opposition, may participate in some political functions. For example, the candidate may attend a political party function to speak on behalf of his or her candidacy or on a matter regarding the law, the improvement of the legal system, or the administration of justice. The function must not be a fund-raiser, and other candidates for that office must be invited. Such candidates attending a political party function must avoid suggesting that they support or oppose a political party, a political issue, or another candidate.

Canon 7D restricts the political activity that may be engaged in by incumbent judges. Canon 7E states that Canon 7 applies to all incumbent judges and judicial candidates. A successful candidate is subject to judicial discipline for his or her campaign conduct, while an unsuccessful candidate who is a lawyer is subject to lawyer discipline under Rule 4-8.2(b), Rules Regulating The Florida Bar.

### **Application of the Code of Judicial Conduct**

Generally, the Code applies to justices of the Supreme Court and judges of the district courts of appeal, circuit courts, and county courts. The Code applies in part to anyone who performs

judicial functions, including magistrates, court commissioners, special masters, general masters, domestic relations commissioners, child support hearing officers, and judges of compensation claims. Retired judges who are eligible for recall to judicial service are also bound by portions of the Code.

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