Judicial Ethics:

What Every Lawyer Needs to Know

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Part II—
[Continued from November, 2000 Virginia Lawyer Register]

Canon 3
Judge's Responsibilities to the Judicial Office

Being Faithful to the Law
Judges are required to respect, comply with, and be faithful to the law and to maintain professional competence in it.[57] This provision appears both in Virginia and Federal Canon 2 (avoiding impropriety and its appearance) and Virginia Canon 3B(2) and Federal Canon 3A(1) (duties of office). It also applies to administrative duties (Va. Canon 3C(1) and Fed. Canon 3B(1)).

Similarly, attorneys are required to provide competent representation (including legal knowledge applicable to the matter)[58] within the permissible scope of representation[59] in the attorney's role as advisor,[60] to avoid frivolous actions,[61] to not knowingly fail to disclose controlling legal authority,[62] and to not knowingly assist a judge in conduct that is in violation of law.[63]

Judges have to follow the law. However, the law is a constantly developing matter with many nuances. Good faith efforts to develop the law or to exercise judicial discretion in the absence of abuse or discretion are appropriately reviewed only through the appellate process, even if the judge is later reversed on appeal. Similarly, because even good judges are not perfect, claims of mistakes of law ordinarily are reviewed only through the error-correction processes of rehearing, extraordinary writs, and appeal. As discussed earlier, the judicial disciplinary process is not a substitute for the judicial error-correction processes, and it cannot change a judge's decision.

However, the judicial disciplinary process does address a judge's failure to follow the law when it affects fundamental legal rights to a fair trial, such as denial of statutory right to counsel, the use of bail schedules instead of deciding bail on the merits of the defendant and the defendant's case, or denying a party an opportunity to present its case. It also addresses a clear failure to follow well-established law, such as exceeding a statute's maximum sentence, entering a nolle prosequi not requested by the Commonwealth, and denying the right to a first nonsuit.

There can be numerous causes for a judge failing to be faithful to the law. It can be the result of lack of knowledge, a dislike of a part of the law, or a result of bias or prejudice, which is an additional violation of the Canons (see below). Regardless of its cause, it needs to be addressed when it arises.

Performance of Judicial Duties
The largest segment of the Canons is Canon 3, dealing with performance of the duties of judicial office impartially and diligently. The Canon contains six major parts: general, adjudicative, administrative, disciplinary, disqualification, remittal of disqualification.

General—Priority to Judicial Duties
The first, Canon 3A, requires that judicial duties take precedence over all other activities and includes all duties of office prescribed by law. All of the remaining five parts are further definitions of this criteria. This does not mean that a judge is a slave to the office. It does mean that the judge should arrange his or her affairs so that judicial duties normally are completed in a timely fashion even if it conflicts with personal matters. Obviously, such matters that cannot be anticipated such as seeking treatment for severe illness should not be deferred until the docket is completed. However, regularly playing tennis on a weekday afternoon before the end of the usual business day will have to be abandoned if it causes additional delay in getting cases to trial or prevents the judge from timely completing the judge's administrative duties.

Adjudicative—Promptness
Promptness by judges is addressed in numerous parts of the Canons. In Virginia Canons 3B(1) and 3B(8) and Federal Canon 3A(5) and its Commentary, a judge has a duty to promptly hear, decide, and dispose of matters before the court. Where an ex parte communication is permitted, Virginia Canon 3B(7)(a)(ii) requires that a judge shall make provision to promptly notify all other parties of the substance of the ex parte communication and offer an opportunity to respond. The chief judge shall take reasonable measures to assure the prompt disposition of matters before the court under Virginia Canon 3C(3). Federal Canon 3B(5) employs the same concept.

Promptness by lawyers is also addressed in the Rules of Professional Conduct. The second paragraph of "PREAMBLE: A LAWYER'S RESPONSIBILITY" sets the tone: "In all professional functions a lawyer should be competent, prompt and diligent." Specific provisions are found in three places. Rule 1.3(a) requires a lawyer to act with reasonable promptness in representing a client. Rule 1.4(a) requires a lawyer to promptly comply with a client's reasonable requests for information. Rule 3.5(e)(2) prohibits communicating or causing another to communicate with a judge or official before whom an adversarial proceeding is pending except in writing if the lawyer promptly delivers a copy to opposing counsel and *pro se* parties.

It is not by accident that these directives about promptness are in both sets of Canons and the Rules, as one of the largest

sources of discontent by litigants and the general public is actual delay and the perception of delay. The consequences of delay can be catastrophic to litigants. It reduces confidence in both the bench and the bar, signaling that the bench and bar do not really care about the litigants' problems. In addition, where unnecessary continuances or hearings occur, it puts demands on judicial and clerical resources beyond the available resources in many courts and causes delays in other cases as well as the cases in which the continuance was granted or the hearing was held.

From the experience of the Judicial Inquiry and Review Commission come these types of delay that may come within the scope of the Canons:

- Starting the first case scheduled to be heard that day,
- Between the time of filing and the conclusion of the case (including entry of the final order), and
- Between the time of scheduled appearance (as set on court process or letter or oral communication) and actual commencement of the hearing.

Not every delay rises to the level of an ethics matter. Only when the delay becomes unreasonable does it become an ethics matter. Examples include:

- Persistently failing to call the first case of the day at the scheduled time,
- Repeatedly having all cases scheduled in court for 9:00 a.m., and not hearing the last one until 4:00 p.m.,
- Having a case under advisement for more than two months,
- Not giving a hearing date after a hearing was canceled, etc.,
- Repeatedly granting continuances without cause.

In some courts, the judges have taken the lead to address this issue. In some other courts, both bench and bar have worked to address this issue. The Office of the Executive Secretary of the Supreme Court of Virginia has provided significant amounts of assistance to many courts in both case processings and docket control to help reduce delay.

Unreasonable delay is one of the few areas of ethics where the Commission will not hold the complaint in abeyance until the litigation before the judge in question is complete. It is also one in which attorneys can assist the court by making changes needed to reduce delay and to avoid delays that rise to an ethical concern for judges. For example, you should:

- Plan trial preparation so that last minute requests for continuances are avoided.
- Request continuances only for cause, and as soon as a need is perceived. If you wait until your case is called on the hearing date to request one, the judge is likely to deny your request because of inconvenience to others. Also, if a new client appears in the office to retain you shortly before trial, find out if he or she has already received one or more continuances to retain counsel. If so, do not be surprised if an additional continuance, if requested, is not granted.
- Make timely responses to various pleadings. Dilatory responses, especially if they result in additional enforcement hearings or delayed trials, detract from your image as a professional to both bench and bar. If you are having problems complying with discovery and cannot work it out with opposing counsel, you should promptly request a hearing so that you are not perceived as dilatory. Don't forget that Rule 3.4(e) provides that an attorney shall not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party—failure to do so may be grounds for attorney disciplinary action.[64]
- In scheduling court appearances, find out whether your case is the only one scheduled at the selected time:
  - If so, you will be expected to be on time without excuse (including the excuse of having another case in another court).
  - If not, and if you will be trying to set additional cases for trial that day with potential overlap between cases, you should find out if the court will proceed if you are not present when the case is called. Some courts will go ahead and try or dismiss your case; some will try another case and will handle your case later on the docket, etc. Do not assume anything, including that the judge will tolerate your not being in the courtroom when you are expected to be there. Plan accordingly.
  - In setting cases in different courts on the same day, allow reasonable travel time between courts, including parking.
- Give realistic time estimates in scheduling cases. Everyone gets upset when a case goes beyond the allocated time, and some courts will not give you any extra time that day because of case backlog. If this happens more than rarely, all participants will need to address the problem.
- Arrive on time for a hearing, prepared to try your case. Organize your documents and trial strategy in your office before court, not at counsel table just before trial.
- If the case is referred to a commissioner, ask the court to set a date by which the report is due, and put the date in your "tickler" system. Then cooperate with the commissioner in scheduling all further matters. If the report is not filed when due, take appropriate action, including discussing the matter with the commissioner and, if necessary, bringing it to the court's attention.
- If requested to prepare an order, do so promptly. Do not embarrass yourself by receiving a call from the court asking about the order.
- If a case is taken under advisement, ask when a decision should be expected, and put the date in your "tickler" system if a date is given. If the decision is not timely made (or within two months if no date was set), take appropriate

action, including asking the judge politely (after notice to opposing counsel and *pro se* parties) when a decision may be expected, after pointing out the last hearing date. NOTE: If the judge asked for briefs or other materials, be sure that you have timely complied with the request. If opposing counsel or an agency has not timely complied, use the same approach.

Adjudicative—Demeanor of others in courtroom
Demeanor is addressed in several parts of Canon 3B.

(1) Order, Decorum and Civility
The Canons provide that the judge shall require order, decorum and civility in proceedings before the judge.[65] This is not optional for the judge. This is addressed to everyone in the courtroom, and attorneys are not excepted. There is a not-so-fine line between diligent advocacy of a client's case and the failure to be orderly, decorous and civil. When an attorney gets close to that line, much less crosses it, the judge and jury start to lose respect for the attorney and the attorney's case. In addition, the judge has to maintain order, decorum and civility to maintain public confidence in the fairness of the judicial process because no one believes that fair and just decisions can be made if the courtroom turns into bedlam. It is a rule of reason,[66] but that is not a license to "push the envelope." The Virginia standard is more stringent than that in many other states and in the Federal Canons because the Supreme Court of Virginia, in promulgating this part, added the civility requirement.

Justice Donald Lemons, in a speech to the Richmond Bar Association on March 16, 2000, encouraged lawyers to ask judges to require civility. Why? Because the feedback from Virginia bench and bar surveys shows an overwhelming belief by both bench (91%) and bar (83%) that there are problems with lawyer incivility. Each lawyer can also do his or her part by setting a good example. Each lawyer can also deal with those attorneys who are not civil. For example, you should:

- Discuss with attorneys their courtroom behavior if it is not civil, either through more senior members of the attorney's firm or, if a sole practitioner, directly. It may be more effective to bring it to the local bar leadership's attention and ask that a representative of the bar discuss it with a senior member of the firm or directly with a solo practitioner. Also, the local bar can bring their concern to the local judges and ask the judge to discuss it with the offending attorney.

- In a pending case, tell the judge what you perceive to be the uncivil behavior and ask the judge to address it. Some judges will allow you to request a chambers conference or a sidebar, some will not. If it is in a jury trial, consider how you inform the court to avoid a mistrial or creating a bad impression of yourself in front of the jury, especially if the judge does not grant the request.

- If the attorney is badgering the witness, object!

- If the attorney is contemptuous, move for summary contempt.

Rule 3.5 also address courtroom decorum of the tribunal in a more limited fashion, as well as impartiality. Rule 3.5(a) concerns juries, and Rule 3.5(f) bars engaging in conduct intended to disrupt a tribunal. The Canons create a higher standard to be enforced by the judge.

As to civility, Rule 3.4, "Fairness to Opposing Party and Counsel," prohibits many different categories of behavior, from obstruction to access to evidence to engage in activity to harass or maliciously injure another. These are also matters of civility.

(2) Patience, Dignity and Courtesy
The Canon 3B(4) provides that the judge shall require lawyers, staff, court officials and others subject to the judge's direction and control to be patient, dignified and courteous.[67] These listed groups of courtroom participants are held to an even higher standard than civility because they are the court participants who set the example for all other court participants. Thus, more is expected of them in setting the tone of the court. Carefully note that this provision is not limited like the order-decorum-civility provision to behavior in proceedings, as it applies to all official dealings with the judge. What Justice Lemons said about civility also applies to this provision.

This provision does not conflict with provisions requiring the prompt disposition of the court's business.[68] While judges are responsible for seeing that both are achieved, lawyers are expected to participate in the process to see that both are achieved.

(3) Bias and Prejudice
Virginia Canon 3B(6) provides that the judge shall require everyone in court to refrain from manifesting bias or prejudice, and Virginia Canon 3C(2) extends that to court personnel both in and out of court. This is to maintain both public confidence in the fairness and impartiality of the judicial process and to eliminate a hostile environment that could inhibit the testimony of witness and the effective argument of counsel. Similarly, this is not optional for the judge. However, Virginia Canon 3B(6) does not prevent legitimate advocacy regarding one of these factors if it is an issue in the proceeding. Thus, these provisions focus on personal behavior, not issues in the case.

The provisions in Virginia Canons 3B(6) are not found in the Federal Canons. The reason is that the Virginia Canons are based on the 1990 ABA Model Code of Judicial Conduct, which contained this language, while the Federal Canons are based on the 1972 ABA Code of Judicial Conduct, which did not contain this language. The reporter for the 1990 revision noted that:

> Sections 3B(5) and 3B(6) are new. They were added to emphasize the requirement of impartial decision-making and the appearance of fairness in the courtroom.[69]

However, in 1992, the Judicial Conference of the United States adopted a revision that was gender neutral and provided anti-bias provisions in several places. Canon 3A(3) Commentary (second paragraph) contains this sentence:

> For example, the duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, sex, religion, or national origin.

There is a difference between the scope of bias and invidious discrimination as used in the Canons. Invidious discrimination in Canon 2C is based upon race, sex, religion or national origin. It is narrower in scope than bias, which is based not only on race, sex, religion or national origin, but also on disability, age, sexual orientation, or socioeconomic status.[70]

Refraining from manifesting bias is a more detailed version of being civil and courteous.

Adjudicative—Judge's Personal Behavior

What the judge is required to expect from others is the minimum standard to which the judge's own behavior should be held. These include:

- Being patient, dignified and courteous.[71]
- Perform judicial duties without bias or prejudice, including discharging administrative duties.[72]
- Conducting extra-judicial activities so that they do not cast reasonable doubt on capacity to act impartially as a judge, including expression of bias or prejudice, even outside the office.[73]

(1) Failure to be patient, dignified and courteous

The failure to be patient, dignified and courteous is one of the largest, if not the largest, type of valid complaints received by judicial disciplinary organizations. The sources of such failures are manifold—physical ailments, job stress, familial difficulties, etc. While the source of this type of failure may explain the bad behavior, it does not excuse it. Such failures create distrust in the fairness and impartiality of the judge as a decision-maker.

A lawyer can help in two ways. First, by being patient, dignified and courteous,[74] you avoid creating a situation that leads to even a good judge failing to be patient, dignified and courteous. This does not mean that an attorney should not be a zealous advocate for his or her client—far from it. But both can be achieved at the same time. Second, if the case has proceeded for some time and the judge is getting irritable, suggest a short recess. This will probably work only in circuit court cases, as district court cases are generally short.

As mentioned before, dealing with minor violations before they develop into major behavioral patterns is strongly encouraged. It is not unusual for a judge (or anyone else) who is engaging in rude behavior to not realize that such is the case. If you do not bring it to the judge's attention directly, it should be brought to the attention of an appropriate authority, such as the chief judge or another judge whom the offending judge respects. If it continues past a reasonable time for correction, then it should be reported to the Judicial Inquiry and Review Commission.

(2) Bias and Prejudice

Words or conduct that manifest bias or prejudice by a judge have a similar effect upon the public's perception of the courts as does a judge's failure to be patient, dignified and courteous. The scope of factors applicable to bias or prejudice affecting a judge is broader than the factors affecting attorneys. This would include but not be limited to biases based on personal likes and dislikes, consanguinity, or financial interests (*see* **Disqualification and Waiver of Disqualification**, *supra*.) The bias or prejudice is not always against the client or other person—it can be in his or her favor. It goes beyond oral communication—facial expression and body language are included.[75]

Again, the difference between the Virginia and Federal Canons regarding expressions of bias and prejudice by others also applies here. The language of the 1990 ABA Canons as adopted by Virginia adds emphasis, not new requirements.[76]

While such provisions concerning bias and prejudice by lawyers are included in the Rules, it is professional misconduct to knowingly assist a judge in violating the Canons, including this one.[77] Therefore, if you pitch an argument so as to appeal to an improper bias or prejudice, and the judge acts upon it, such acts may constitute misconduct. For example:

- Your client is a college student on a bad check charge, and the student attends the judge's alma mater. You want to be careful not to seek favorable treatment by mentioning your client's attendance at the judge's alma mater (remember, Virginia Canon 3B(5) says, "including but not limited to" the list of factors therein). The same would apply to mentioning that your client is a college student (socioeconomic bias) unless you also describe the impact that an adverse decision would have on your client's future or attribute his or her action to youth, inexperience, etc.
- A landlord is seeking to evict for nonpayment of rent and for judgment for rent and damages from a husband and wife from Mexico. If you represent the landlord, you want to be careful that you do not appear to be disparaging the tenants because they are from a foreign country (national origin bias), but you certainly can describe in unbiased terms how they damaged or failed to maintain the premises.

Of course, if you choose such an approach and the judge does not like it, you risk chastisement for **your** manifestations of bias[78] whether you win or lose your case.

The prohibition of expressions manifesting bias or prejudice is not limited to in-court behavior. Probably the most likely out-of-court violations will involve off-color, racist or sexist jokes. They tend to propagate profusely after the first one is told. To avoid getting a judge in trouble, avoid them altogether when with a judge—there are enough other jokes to fill the void.

Adjudicative—Ex Parte Communications

An ex parte communication occurs when there is an oral or written communication for which one or more parties did not have notice and an opportunity to appear and participate. The provisions of Va. Canon 3B(7) and Fed. Canon 3A(4) spell out in much more detail than before when a judge may receive an ex parte communication, and from whom—all other ex parte communications are unethical. This provision is not just an abstract theory of due process—it is designed to avoid creating a bias or prejudice in the judge and an appearance of impropriety.

For judges, this is no small concern. It is not unusual for a judge to withdraw or limit the contacts that he or she had with other lawyers before becoming a judge because the judge does not want to inadvertently receive an ethically improper ex

parte communication about a pending case when talking with lawyers in a social context. Why? Because lawyers (like many professionals) "talk shop" in social conversations with fellow lawyers and judges. Similarly, there are those (usually lay persons) who try to purposely engage in ex parte communications.[79]

Most judges use the clerk or secretary to screen their calls and mail to avoid attempted ex parte communications. You should not take offense if, when you call the clerk or secretary, you are asked what is the nature of the call—it may be done to screen out such attempts (some attorneys have tried to engage in ex parte discussions, sometimes out of ignorance of this prohibition). Also, some judges restrict access to their chambers, especially before trial, not only to avoid the appearance of impropriety, but also to avoid improper ex parte communications.

There are several things that lawyers can do to avoid improper ex parte communications. First, learn what are permissible ex parte communications from the Canons and Rules 3.3(c) and 3.5(e) of the Rules of Professional Conduct, such as scheduling matters and where expressly authorized by law (temporary injunction, etc.), and avoid the rest. Second, be alert to clients or witnesses who may try to contact the judge so that they may be counseled to avoid improper ex parte communications. Everyone wants to avoid the embarrassing situation in which the judge writes or tells the person engaged in the improper ex parte communication that the communication is improper, and to cease the communication.[80] Disqualification by the judge is required only if the judge reasonably believes that the judge's impartiality might reasonably be questioned by the ex parte communication.[81]

The Canons spell out the exceptions to the prohibition against ex parte communications:

- Scheduling, administrative or emergencies not dealing with substantive matters or issues on the merits if the judge reasonably believes no one gains a procedural or tactical advantage and makes provision promptly to notify all parties of the substance of the communication and allows an opportunity to respond.[82]
  - A scheduling or emergency exception would be if you called the judge on the day before trial seeking a continuance because your client is sick. The judge would arrange for all other attorneys and *pro se* parties to be notified, which the judge can accomplish by directing you as the requesting attorney to promptly notify all other attorneys and *pro se* parties about the continuance. Alternatively, if you had called the other attorneys and *pro se* parties in the case and obtained their agreement both to the continuance **and to your contacting the judge to so request without their presence**, and you told the judge that you had done so, it would not be treated as an ex parte communication because all had notice and an opportunity to appear, which they waived when they agreed to both parts of your request. While this alternative is not required by the Rules,[83] because it does not involve the merits of the case, it is the professionally courteous way to proceed.
  - An emergency exception would be where a probation officer submits a **written** communication to determine if exigent circumstances exist to issue a bench warrant for a probation violation.[84]
- Obtaining advice from a disinterested expert on the law if the judge gives notice of the person consulted and the substance of the advice, and affords an opportunity to respond.[85] It may take the form of a brief *amicus curiae*.[86] A judge should not conduct an independent investigation, but rely only on evidence produced by counsel and *pro se* parties.[87] Otherwise, all information gathered would be an ex parte communication, and counsel could never be sure if a judge was influenced by information that he or she failed to disclose through inadvertence or design, thus depriving counsel of the ability to subject the information to scrutiny. However, the judge may use such an expert to gather information while providing counsel with an opportunity to subject the information to scrutiny.
- Consult with a law clerk.[88] This includes the use of the Court Legal Research Assistance Project of the Supreme Court of Virginia,[89] which is a pool of law clerks. Unlike the use of experts, there is no requirement of disclosure of the communications with law clerks.[90] However, the judge must make reasonable efforts to prevent improper ex parte communications through law clerks.[91]
- With consent, confer separately with each party to attempt a settlement.[92] Again, there is no disclosure requirement. When a judge (including a retired judge, substitute judge, or judge pro tempore) functions under this provision in a pending case, the judge is not subject to the provisions in the Rules of Professional Conduct concerning an intermediary,[93] a third party neutral,[94] or a mediator,[95] even though some of the functions are the same. An active judge may not serve as a mediator or arbitrator.[96] In the absence of a local rule prohibiting it, a federal judge may handle a trial subsequent to his or her handling of the settlement negotiations unless the judge's impartiality may reasonably be questioned.[97]
- Initiate or consider ex parte communications when expressly authorized by law. There are approximately 27 Virginia statutes authorizing ex parte proceedings, most having narrow application.[98]

The Commentary to Virginia Canon 3B(7) addresses some related matters:

- A judge may request a party to prepare proposed findings of fact and conclusions of law, provided all other parties are apprised of the request and are given an opportunity to respond. Note the complementary requirement of promptly providing a copy to all other parties in Rule 3.5(e). While still ex parte, the disclosure and opportunity to respond cure any procedural defects.
- A judge may teach, advise and mentor new lawyers, but should be careful not to give unfair advantage to the recipient or prejudice to others in a pending case. This qualifies the provision that judges may teach about the law, the legal system, and the administration of justice as an extra-judicial activity.[99]

The Judicial Ethics Advisory Committee recently opined that a Virginia circuit court judge may not have ex parte communications with a probation officer preparing a presentence report. It determined that such communications are not exempted from the prohibition against ex parte communications because of the Virginia statutory provisions regarding presentence reports and hearings,[100] which give more due process rights than is required by federal constitutional case law.[101] Because a different process and procedure applies to federal presentence reports, this opinion would not even be persuasive authority in federal matters.

Adjudicative—Comments about Cases

The Canons restrict judges' comments about cases to avoid creating undue influence on matters not yet decided or the appearance of impugning another judge's rulings and decisions. Thus, a judge may not publicly comment about a pending or impending case except where the judge is a litigant in a personal capacity,[102] nor may a Virginia judge commend or criticize jurors for their verdict except in a court order or opinion.[103] A judge may thank jurors off-the-record for their services.[104]

Because judges cannot speak publicly in their official capacity about pending or impending cases, it is important for lawyers, either individually or through the organized bar, to speak in defense of a judge if that judge is being unfairly criticized by the media. Similarly, while Rule 3.6 permits lawyers to speak within limits to the media about such cases, including disagreement with the judge's ruling, such comments should avoid attacks on the judge, who is unable to respond, especially if they are barred by Rule 8.2.

Administrative Duties (Appointments)

Other issues regarding bias, promptness and faithfulness to the law have been addressed elsewhere.

The Canons prohibiting judges from making unnecessary appointments, require that appointments be made impartially and on merit while avoiding nepotism and favoritism, and limiting compensation to fair value.[105] For Federal judges, both statutory and Canon provisions apply, and explicit interpretative provisions have been printed.[106] Much of these provisions also cite to Canon 2 concerning the avoidance of the appearance of impropriety.

Historically, the bar has responded well to requests by judges to serve as counsel, guardians, guardians ad litem, receivers, administrators, commissioners, etc. Some of these positions have been financially rewarding; some have not. Selection practices vary, but must conform to the applicable Canon, applicable statutes, and case law. For example, Virginia statutory criteria processes exist for guardians ad litem,[107] and for court-appointed counsel in capital cases.[108] Where no public defender office serves a court, court-appointed counsel are selected by a fair system of rotation,[109] but this is not an entirely mechanistic process since the judge will want counsel capable of handling the assigned case to avoid later habeas corpus challenge.

This can be a very sensitive topic, and one has to be wary to distinguish between envy and fact. If there is widespread perception that this problem exists locally, the local bar leaders should separate fact from fiction and, if factual, bring it to the judge's attention.

Use of Nonpublic Information

A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.[110] Similar provisions regarding disclosure and use of information applying to lawyers are found in the Rules of Professional Conduct.[111]

Disciplinary Responsibilities

Judges and lawyers have similar responsibilities for reporting disciplinary matters.[112] Because judges are also lawyers, they may have to comply with both sets of requirements. However, these differences exist:

- For reporting violations, the Canons use "should,"[113] the Rules use "shall."[114] The term "shall" is an imperative as used in the Rules.[115] The term "should," as used in the Virginia Canons, is intended as a statement of what is appropriate conduct but not as a binding rule. The term "should," as used in the Federal Canons, is not defined.

- The Canons and Code provide for taking appropriate action on reliable information of the likelihood of unprofessional conduct by a lawyer or a judge;[116] the Rules only require reliable information.[117]

- The Virginia Canons and the Rules require reporting where substantial questions of fitness are raised;[118] the Federal Canons do not.[119]

If a judge files a complaint with the Virginia State Bar against a lawyer, the judge is not required to recuse in cases in which that lawyer represents a party in the absence of bias or prejudice against the lawyer.[120]

A judge who has reliable evidence that a colleague engaged in unprofessional conduct, may initiate appropriate action short of filing a complaint with the appropriate judicial conduct organization, such as discussing it with his or her colleague or reporting it to the chief judge.[121] If it involves fitness for office, a Virginia judge should report it to the Judicial Inquiry and Review Commission.[122] The parallel obligations on attorneys were discussed earlier in analyzing Rule 8.3(b).

There is a conflict between the Rules and the Canons regarding whether a violation must be reported—the Rules use "shall" and the Canons use "should." Since all Virginia state court judges must be Virginia lawyers and all federal judges are Virginia lawyers, are judges required to report violations as lawyers even when they are not required to do so as judges? No provisions were found for resolving this matter.

Disqualification

Virginia Canon 3E is a significant change from prior Virginia Canons regarding when a judge's impartiality might reasonably be questioned. Formerly, the only criteria were general in nature. Now, many situations are more specifically described. These more specific provisions, in varying degrees and with some difference from jurisdiction to jurisdiction, have existed in other states and in the Federal Canons,[123] and their cases may be persuasive authority in these matters.[124]

Federal Canon 3C on disqualification, which the Virginia Canons now resemble, should be reviewed in connection with 28 U.S.C.A. §§ 144 and 455, which are not always the same as

the Federal Canons.[125] The correlation between Canon and statute is beyond the scope of this article.

The Virginia State Bar Legal Ethics Committee has issued many opinions dealing with disqualification issues. Most dealt with attorney ethics issues, although some dealt with judicial ethics issues. Of late, the Legal Ethics Committee has declined to opine on judicial ethics matters as being beyond its purview.

The keystone, then and now, is that a judge shall disqualify when the **judge's impartiality might reasonably be questioned**.[126] Note the term "reasonably." This reinforces the concept in the Virginia Canons Preamble that the Canons are rules of reason. Thus, the rule of necessity may override the rule of disqualification.[127] The rule of necessity has been created by case law, and provides that a judge who is otherwise disqualified may decide a case or conduct a hearing where no other judge who is not disqualified is available. Someone has to try the case involving judicial salaries. An otherwise disqualified judge who is the only one available may have to deal with a matter requiring immediate action, such as a hearing on probable cause or a temporary restraining order,[128] or to continue the case if the judge does recuse.

For many of the more specific provisions requiring disqualification, additional considerations should be examined. For example:

- Bias or prejudice[129]: It is not restricted to any specific types of bias or prejudice.[130] Note that the filing of a complaint by a Virginia judge against a lawyer with the Virginia State Bar does not result in automatic recusal—bias or prejudice against the lawyer must also be present.[131]

- Personal knowledge of disputed evidentiary facts concerning the proceedings[132]: It does not apply to knowledge learned from other cases in the course of trying such cases, but only to information gathered from extrajudicial sources.[133]

- Prior service as lawyer in matter in controversy[134]: Generally, a judge may not hear the case if it involves a former client and the former representation, no matter how long ago the representation ended.[135] This is different from recusal involving the same client, but in a different matter, in which case the recusal period should be for a reasonable time.[136] This provision does not preclude former prosecutor from hearing cases involving a person whom he or she previously prosecuted unless it involves the same facts under which the defendant formerly was prosecuted or was a case in the now-judge's office when or she was the prosecutor.[137]

This provision is narrower than the conflicts of interest provisions in the Rules of Professional Conduct regarding former clients,[138] which reflect the difference in roles between judge and lawyer. While a substitute judge may not handle a civil case arising from a traffic accident where he or she tried the traffic offense,[139] other members of the firm may do so,[140] (but see the discussion below about imputed disqualification). The Legal Ethics Committee declined to opine on whether a substitute judge's law firm may collect fines and costs for the court.[141] The Committee also observed that a lawyer who was the judge's law clerk three years ago has no duty to disclose the relationship since the matter before the court was not before the court when the lawyer served as a law clerk.[142]

- Practiced previously with an attorney while that attorney was involved as an attorney in the matter now before the court[143]—There is an exception to this imputed disqualification that generally excludes serving as a lawyer in a government agency, such as Commonwealth's Attorney or city attorney.[144] That exception does not apply to Federal judges who, while government attorneys, participated in the proceeding or expressed an opinion about the merits of the proceeding.[145] That exception also does not apply if the judge's impartiality might reasonably be questioned because of such association.[146] For example, if the judge were an assistant city attorney with supervisory authority, this provision would preclude the judge from hearing cases being handled by attorneys over whom he or she exercised supervisory control if the subordinates were involved with the case before he or she left that position.[147]

The concept of imputed disqualification of lawyers is addressed in the Rules of Professional Conduct generally,[148] as to successive government and private employment,[149] and for a former judge or arbitrator.[150] While the general concept is the same, the specific rules are different because of the difference in roles between judge and lawyer. Generally, if the former judge may not participate in the matter, other lawyers in that firm also may not participate unless the former judge is screened from the matter and the appropriate tribunal is notified so that the tribunal can ascertain compliance with the exception.[151] This new rule appears to have modified the opinion that there is no imputed disqualification where a former judge is a partner.[152]

A variation of this issue involves a firm who has a lawyer who served as a commissioner in chancery in a divorce before becoming a district court judge. A member of the firm may represent one of the parties because the former member's disqualification of the firm was personal to the officeholder.[153]

As a corollary, judges should recuse from hearing cases from their former firm for a reasonable period of time.

- Judge has been a material witness in the matter[154]—*See* personal knowledge of disputed facts, above. Also, with few exceptions, the Virginia judge is statutorily precluded from testifying as a witness to matters occurring before him in criminal or civil cases,[155] but the general prohibition does not apply to testifying in bar disciplinary proceedings.[156] In lieu of testifying personally, a district court judge is required to make a record of the events leading to a contempt finding, which may be introduced as evidence in a circuit court appeal.[157] Similarly, the Rules prohibit an attorney from acting as an advocate in a case where the attorney is likely to be a "necessary witness," with certain exceptions.[158]

- Judge knows that the judge (personally or as fiduciary) or certain family members have certain economic interest in the case.[159] For Virginia judges, it applies to the judge's spouse, parent or child wherever residing, and any family member in the household, not just those within the third degree of relationship as provided in Va. Canon 3E(1)(d). Also:

  - "has an economic interest in the subject matter—see "rule of necessity" exception.[160] For a discussion of the rule of necessity, see the beginning of this topic.

- "has an economic interest in . . . a party to the proceeding"—the ownership of a *de minimus* percentage of stock in a corporate party does not require recusal.[161]

- "has more than a *de minimus* interest that could be substantially affected by the proceeding—all parts of this provision ("more than *de minimus*," "could be" and "**substantially** affected") must be met for this provision to apply.

For Federal judges, it applies to only the judge's spouse and minor children residing in the judge's household. Also, "financial interest" is defined to apply to any interest, however small, with several different exemptions to this definition.[162] In contrast, a recent Virginia ethics opinion defined *de minimus* to be one percent (1%) or less of a publicly held corporation, but also cautioned that other circumstances may warrant recusal, such as the significance of the stock to the judge.[163]

n Judge or judge's spouse or a person "within the third degree of relationship"[164] or the spouse of a person who is, in the proceeding:

- A party (or officer, director or trustee of a party)[165]—Identifying the officers and directors **and their spouses**, especially for nonprofit organizations with a large number of directors or a bank with many vice-presidents, can be an easily overlooked matter of potential disqualification.
- *Acting as a lawyer in the proceeding.*[166] This includes acting as counsel, guardian, guardian *ad litem*, commissioner in chancery, special commissioner, etc. The Commentary to the Federal Canons applies its disqualification provision only if the attorney in the case is within the third degree of relationship. There is no imputed disqualification solely because a lawyer-relative is affiliated with a firm to which counsel of record is affiliated, but additional circumstances described in the Commentary could cause an imputed disqualification.[167]

  The Virginia State Bar Legal Ethics Committee opined several times that a judge or substitute judge may not hear cases in which a lawyer is from a firm in which a son, daughter, brother or brother-in-law practiced law unless the disqualification is waived,[168] but it is not unethical for the lawyer to so appear.[169] It is the judge's problem, not the attorney's problem. Two exceptions exist. First, an Assistant Commonwealth's Attorney may not appear before a judge when he or she is a spouse of the judge; appear in, inspect the files of, discuss with the spouse judge or other lawyers in the prosecutor's office any case assigned to the judge-spouse.[170] Second, an attorney whose spouse is a law clerk may not appear before the judge whom the law clerk serves or handles files or cases ultimately to be assigned to such judge.[171]

- *Known by the judge to have an interest that could be substantially affected by the proceeding.*[172] This is broader than the provision in Va. Canon 3E(1)(c) or Fed. Canon 3C(1)(c), which they overlap, because the person affected does not have to reside in the judge's household or be a Virginia judge's spouse, parent or child. The Virginia provision requires that the interest be more than a *de minimus* interest;[173] there is no such exception in the Federal provision.[174] The Virginia State Bar Legal Ethics Committee opined that a judge was not required to recuse solely because the judge's wife worked in the judge's son's law office if she does not handle cases being heard by the judge (but, see above for recusal where son is a lawyer in the firm)[175] or is an administrator in a law office not having a family member as an attorney if such fact is disclosed on the record.[176] Similarly, the judge is not required to disclose if a nephew is a lessee of a partner in a firm in which the judge's son is a member,[177] but see above for discussion about disqualification where family member is a lawyer practicing in the firm.

- *To the judge's knowledge, is likely to be a material witness in the proceeding.*[178] This is similar to the disqualification of a judge hearing a matter in which the judge may be a material witness.[179]

The Federal Canons' definition of "degree of relationship" includes whole and half blood relatives, and most step relatives,[180] while the Virginia Canons are silent on this point.

The Federal Canons contain a disqualification exception not found in the Virginia Canons. It allows a judge to whom a case has been assigned and who, after devoting substantial judicial time to the matter, learns that the judge or other family member residing in the judge's household has a financial interest in a party other than an interest that could be substantially affected by the outcome, is not required to disqualify if the person having the financial interest divests of the interest that provides for the disqualification.[181] The Virginia Canons do not have such a provision. However, as discussed below, the disqualification could be waived under Virginia Canon 3F, whereas it could not be waived under Federal Canon 3D.

For Federal judges, there are many opinions about disqualification in the Compendium.[182] The table of contents of the Compendium is in Appendix, and the appropriate part should be consulted if it applies to the situation.

You should determine early in your case development if there is a possible disqualification situation:

- Have the client review Canon 3E and its Commentary, then ask the client if any of the provisions of Canon 3E apply to the trial judge (or judges if the case is not assigned to a particular judge before trial). If in federal court, do the same with Canon 3C. For example, did the judge represent your client or a family member before he or she became a judge? Is your client or your client's spouse related to the judge or the judge's spouse? Has your client had personal or business dealings with the judge, and what are they? Who are the officers and directors of your corporation-client, and are they related to the judge or the judge's spouse?

- Document this conversation to protect yourself if your client later "remembers" a disqualifying fact after an adverse ruling is made and the time for both an appeal and a rehearing have passed.

- If a disqualifying fact is found, bring it to the court's attention promptly, especially if it is coupled with an agreement for waiver of disqualification (see below). Do not wait until the day of trial or just before trial to raise the

issue. No one, least of all the judge, will appreciate your having caused a disruption and continuance if the judge has to recuse and get a replacement when inconvenience and cost to the other parties and witnesses could have been avoided and the judge could have used his or her time to handle another case. Don't forget that a waiver of disqualification is available for most situations if all concur (see below).

Waiver of Disqualification

The Virginia and Federal remittal of disqualification provisions are substantially the same. Please note these provisions:

- The clerk, as well as the judge, may ask if waiver will be considered.[183] Federal Canon 3D Commentary has a recommended form that creates a detailed procedure.

- The consideration of the waiver must take place out of the judge's presence and without any participation by the Virginia judge.[184]

- All grounds for disqualification can be waived except:

  - Virginia—personal bias or prejudice concerning a party.[185]

  - Federal—circumstances specifically set out in Canon 3C(1)(a through e).[186]

- Agreement for Waiver of Disqualification:

Virginia Canons: Agreement must be reduced to writing—oral waivers "on the records" are not sufficient (after all, many circuit court cases are never transcribed, and almost all Virginia district court cases have no court reporter).[187] Circuit courts have a copiable form in Appendix A of the Handbook for Judges and Clerks in Virginia, and district courts have a copiable form in DC-91, Disqualification and Waiver of Disqualification.

Federal Canons: Agreement may be in writing or on the record.[188] However, if the recommended form is used, all waivers are reduced to writing.[189]

- Each attorney **and each party** must agree to the waiver.[190] Virginia Canons require each attorney **and each party** to **sign** the waiver.[191]

- Unlike the mandatory nature of the grounds for disqualification, the decision to accept the agreement for waiver and continue hearing the case is in the judge's discretion.[192]

. . . to be continued in the March 2001 *Virginia Lawyer Register* with "Canon 4—Extra Judicial Activities."

Endnotes

57 Va. and Fed. Canon 2A, Va. Canon 3B(2) and Fed. Canon 3A(1).
58 Rule 1.1.
59 Rule 1.2(c and d).
60 Rule 2.1.
61 Rule 3.1.
62 Rule 3.3(a)(3).
63 Rule 8.4(e).
64 Rule 8.4(a).
65 Va. Canon 3B(3); Fed. Canon 3A(2)(does not specifically include civility).
66 Va. Canon 3B(3), Commentary; Fed. Code 3A(3), Commentary.
67 Va. Canon 3B(4); Fed. Canon 3A(4).
68 Va. Canon 3B(4), Commentary; Fed Canon 3A(3), Commentary (also requiring Federal judges to be respectful).
69 L. Milord, The Development of the ABA Judicial Code, pp. 18-19 (1992).
70 Va. Canons 3B(5), 3B(6).
71 Va. Canon 3B(4); Fed. Canon 3A(3).
72 Va. Canons 3B(5) and 3C(1).
73 Va. Canon 4A, Commentary; Fed. Canon 4 and Commentary and Canons 5A, 5B and 5C.
74 Va. Canon 3B(4); Fed. Canon 3A(3).
75 Va. Canon 3B(5), Commentary.
76 See text at Footnote 47.
77 Rule 8.4(e).
78 Va. Canon 3B(6).
79 Examples of such problems are addressed in Va. JEAC Op. 99-5 (prisoners) and 00-04 (probation officers).
80 Compendium § 3.9.2.
81 Compendium § 3.9.2.
82 Va. Canon 3B(7)(a). Although not explicitly stated, Fed. Canon 3A(4), first sentence, appears to allow this type of contact by not prohibiting it so long as they deal with the merits, or procedures affecting the merits, of a pending or impending proceeding.
83 Rule 3.5(e).
84 Va. JEAC Op. 00-04. The Judicial Ethics Advisory Committee opined only upon the ethics issue, and expressly declined to opine on the legality of this process.
85 Va. Canon 3B(7)(b); Fed. Canon 3A(4).
86 Va. Canon 3B(7), Commentary; Fed. Canon 3A(4), Commentary.
87 Va. Canon 3B(7), Commentary.
88 Va. Canon 3B(7)(c); Fed Canon 3A(4), Commentary.
89 Va. Canon 3B(7), Commentary.
90 Va. Canon 3B(7), Commentary; Fed. Canon 3A(4).
91 Va. Canon 3B(7), Commentary; Fed Canon 3A(4), Commentary.
92 Va. Canon 3B(7)(d); Fed. Canon 3A(4).
93 Rule 2.2.
94 Rule 2.10.
95 Rule 2.11.
96 Va. Canons 4F and 6; Fed. Canon 5E and Compliance.
97 Fed. Advisory Op. 95.
98 Va. Code §§ 6.1-110, 6.1-195.88, 8.01-114, 8.01-540, 9-183.4, 9-196.11, 16.1-251, 16.1-253, 16.1-253.1, 16.1-253.4, 18.2-54, 18.2-68,18.2-119, 18.2-152.8, 18.2-152.9, 19.2-392.3, 20-88.55, 32.1-324.1, 42.1-90, 54.1-307, 54.1-3936, 55-230, 63.1-198.04, 64.1-57.1, 64.1-85, and 64.1-151.4. No attempt has been made to search the U.S. Code for the same.
99 Va. Canon 4B. See also Fed. Canon 4A and Commentary to Canon 4.
100 Va. JEAC Op. No. 00-04.
101 *Williams v. New York*, 337 U.S. 241 (1949).
102 Va. Canon 3B(9); Fed. Canon 3A(6) and Commentary.
103 Va. Canon 3B(10).
104 Va. Canon 3B(10); Compendium 2.7(m).
105 Va. Canon 3C(4); Fed. Canon 3B(4).
106 *See generally* Compendium §§2.8 and 3.10-2, and sources cited therein.
107 Va. Code § 16.1-266.1.
108 Va. Code § 19.2-163.8.
109 Va. Code § 19.2-159.
110 Va. Canon 3B(11); Fed. Canon 5C(8).
111 Rules 1.6, 1.8(b), 1.9(b)(2) and (c), 1.11(c).
112 Va. Canon 3D(1 and 2), Rule 8.3.
113 Va. Canon 3D(1 and 2), Fed. Canon 3B(3).
114 Rule 8.3 (a, b and c).
115 Rules, Preamble, Scope.
116 Va. Canon 3D(1 and 2), Fed. Canon 3B(3). Virginia Canons require "substan tial likelihood."

117 Rule 8.3 (a, b, and c).
118 Va. Canon 3D (1 and 2), Rule 8.3 (a, b, and c).
119 Fed. Canon 3B(3).
120 Va. JEAC Op. 99-4; Fed. Advisory Op. 66, Compendium § 3.6-7(b).
121 Compendium, § 3.10-4(a).
122 Va. Canon 3D(1).
123 Fed. Canon 3C.
124 For examples, *see* R. E. Flamm, *Judicial Disqualification*, Little, Brown (now Aspen) 1996.
125 For a more detailed discussion of the statutes, see Flamm, *infra*, at ch. 23-26.
126 Former Va. Canon 3C, current Va. Canon 3E(1); Fed. Canon 3C.
127 Va. Canon 3E(1), Commentary.
128 Va. Canon 3E(1), Commentary.
129 Va. Canon 3E(1)(a); Fed. Canon 3C(1)(a), 28 U.S.C.A. §§144 (an affidavit of bias is required under the statute) and 455(1).
130 For similar provision, see Va. Canon 3B(5).
131 Va. JEAC Op. 99-4.
132 Va. Canon 3E(1)(a); Fed. Canon 3C(1)(a), 28 U.S.C.A. § 455(1).
133 *Liteky v. U. S.*, 510 U.S. 540, 114 S. Ct. 1147 (1994).
134 Va. Canon 3E(1)(b); Fed. Canon 3C(1)(b), 28 U.S.C.A. § 455(2).
135 Compendium, § 3.6-5(a), Va. LE Op. No. 1070.
136 Compendium, § 3.6-5(b,d), which recommends a two year period.
137 Compendium, § 3.4-4, Va. LE Op. No. 1070.
138 Rules 1.7 and 1.9.
139 Va. LE Op. No. 686.
140 Va. LE Op. Nos. 520 and 686.
141 Va. LE Op. No, 1548.
142 Va. LE Op. No. 1624.
143 Va. Canon 3E(1)(b) Fed. Canon 3C(1)(b), 28 U.S.C.A. § 455(2).
144 Va. Canon 3E(1)(b), Commentary.
145 28 U.S.C.A. § 455(3), Compendium § 3.4-4.
146 Va. Canon 3E(1)(b), Commentary.
147 Compendium, § 3.4-4(b).
148 Rule 1.10.
149 Rule 1.11.
150 Rule 1.12.
151 Rule 1.12(c).
152 Va. LE Op. No. 502.
153 Va. LE Op. No. 1439.
154 Va. Canon 3E(1)(b); Fed. Canon 3C(1)(b), 28 U.S.C.A. § 455(2).
155 Va. Code § 19.2-271.
156 1982-83 Op. Va. Att'y Gen. 744.
157 Va. Code § 18.2-459.
158 Rule 3.7.
159 Va. Canon 3E(1)(c); Fed. Canon 3C(1)(c), 28 U.S.C.A. § 455(4).
160 Va. Canon 3E(1), Commentary.
161 Va. Canon 3E(2), Commentary.
162 Fed. Canon 3C(3)(c).
163 Va. JEAC Op. 00-05.
164 As defined in Va. Canon 3E(1)(d), Commentary, and Fed. Canon 3C(3)(a).
165 Va. Canon 3E(1)(d)(i); Fed. Code 3C(1)(d)(I), 28 U.S.C.A. § 455(5)(I).
166 Va. Canon 3E(1)(e)(ii); Fed. Canon 3C(1)(d)(ii) and Commentary, 28 U.S.C.A.§ 455(5)(ii).
167 Fed. Canon 3C(1)(d)(ii),Commentary.
168 Va. LE Op. No. 623, 676 and 750.
169 Va. LE Op. No. 676 and 750.
170 Va. LE Op. No. 624.
171 Va. LE Op. No. 881.
172 Va. Canon 3E(1)(e)(iii); Fed. Canon 3C(1)(d)(iii), 28 U.S.C.A. § 455(5)(iii).
173 Va. Canon 3E(1)(d)(iii).
174 Fed. Canon 3C(1)(d)(iii).
175 Va. LE Op. No. 676.
176 Va. LE Op. No. 845.
177 Va. LE Op. 676.
178 Va. Canon 3E(1)(d)(iv); Fed. Canon 3C(1)(d)(iv), 28 U.S.C.A. §45(5)(iv).
179 Va. Canon 3E(1)(b); Fed Canon 3C(1)(b).
180 Fed. Canon 3C(3)(a).
181 Fed. Canon 3C(4).
182 Compendium, §§ 3.0 to 3.8-2[1].
183 Va. Canon 3F, and Commentary; Fed. Canon 3D, Commentary.
184 Va. Canon 3F, and Commentary.
185 Va. Canon 3F.
186 Fed. Canon 3D.
187 Va. JEAC Op. 00-4.
188 Fed. Canon 3D.
189 Fed. Canon 3D, Commentary.
190 Va. Canon 3F; Fed. Canon 3D.
191 Va. Canon 3F.
192 Va. Canon 3F; Fed. Canon 3D.

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