

## Judicial Ethics:

# What Every Lawyer Needs to Know

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### Part III

[Final of a three-part series]

#### Canon 4—EXTRA-JUDICIAL ACTIVITIES

No judge can effectively lead a cloistered life, nor would it be wise to try to do so. However, to maintain impartiality and to avoid the appearance of impropriety, Virginia Canon 4 and Federal Canons 4 and 5 place some restrictions on a judge's non-judicial activities. It is in this context that every attorney, even those with an office practice, may come into an ethics encounter.

#### General

The governing principles are described in Virginia Canon 4—a judge may engage in extra-judicial activities designed to improve the law, the legal system, and the administration of justice, and shall conduct any such extra-judicial activities in a manner that minimizes the risk of conflict with judicial obligation. The Federal Canons split the principles into Canon 4 (law related) and Canon 5 (other), but they are conceptually the same. The “minimizes the risk” provision applies to both law-related activities and other activities because the judicial duties of a judge take precedence over all the judge's other activities.<sup>193</sup> In engaging in extra-judicial activities, a judge may not do those things that cast *reasonable* doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties.<sup>194</sup> This includes out-of-court expressions that demean someone on the basis of race, gender, etc.,<sup>195</sup> which tracks the provisions of Va. Canons 3B(5) and 3B(6) for in-court conduct.

#### Avocational Activities

Canon 4B reflects a democratic philosophy that a judge may do anything except those specific things that are prohibited. In particular, judges are encouraged to speak, write, lecture, teach, etc., concerning the law, the legal system and the administration of justice,<sup>196</sup> both in individual and group activities. For example, they may speak to civic groups,<sup>197</sup> write law law books,<sup>198</sup> work with bar groups for legislative changes to civil and criminal procedure,<sup>199</sup> and talk about the legal system in school assemblies. In doing so, judges enhance the public's respect for the judicial process and educate the bar and the public. The Federal Canons Commentary noted: “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.”<sup>200</sup>

There are restrictions. For example, a judge should not publicly speak about a pending case.<sup>201</sup> Similarly, while a judge may

deliver a lecture about the law to a group that is not a general interest group (such as criminal defense attorneys or prosecutors), the judge should not give advice as to how to proceed.<sup>202</sup> Federal judges should not use judicial system resources to a substantial degree for extra-judicial activities.<sup>203</sup> In addition, Federal judges are subject to the provisions of various statutory ethics acts that are beyond the scope of this article.

Judges can also teach, write, speak, etc., on non-legal matters,<sup>204</sup> and some judges teach such non-legal subjects as business administration and history.

#### Governmental, Civic or Charitable Activities

These provisions apply to all active and retired judges. Virginia substitute judges are exempt except for use of prestige of office for fundraising and membership solicitation.<sup>205</sup>

#### Appearance Before Governmental Body

The Canons recognize that a judge does not give up all rights in dealing with the government when he or she becomes a judge. Therefore, the judge can appear *pro se* at a public hearing before, or otherwise consult with, an executive or legislative body or official in a matter involving the judge or the judge's interests,<sup>206</sup> but not those of a family member.<sup>207</sup> For example, a judge could appear before the board of zoning appeals *pro se* to oppose a rezoning of property adjacent to the judge's property. However, the judge should identify himself as a property owner, and not as a judge, to avoid using the prestige of office for the judge's personal, private benefit of others,<sup>208</sup> nor may the judge represent his or her neighbors.<sup>209</sup>

Otherwise, when a judge appears before a legislative or executive body, the subject matter is restricted to the law, the legal system or the administration of justice.<sup>210</sup> The further the subject matter gets from court procedure and resources, the more likely that it will not be considered within the ambit of “the law, the legal system or the administration of justice.”<sup>210</sup> For example, a request for another full-time judge would be within the ambit, while educational standards for prison guards would not.

#### Governmental Appointments

Similarly, the Canons do not allow a judge to accept appointment to a governmental body or position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or administration of justice.<sup>211</sup> For example, a judge should not serve on a parks commission because it is not concerned with improvements of the law, the legal system or the administration of justice even if it were to recommend allowing prepayment of violations of ordinances governing the parks. Its primary purpose is to deal with parks.<sup>212</sup> Similarly, a judge should not serve on a statewide crime commission because its powers extend beyond matters dealing with the law, the legal system and the administration of justice.<sup>213</sup>

There was substantial criticism of the late Chief Justice Earl Warren chairing the Kennedy assassination committee because his judicial expertise was not essential to the operations of the committee. It involved him in a controversial, non-judicial activity that detracted from public confidence in the courts because the prestige of office was lent to this committee.<sup>214</sup> The Federal Canons Commentary observed: "Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial resources created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary."<sup>215</sup>

Even where the entity is concerned with the law, the legal system, and the administration of justice, a judge may not participate if, in so doing, it could create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.<sup>216</sup> Justice Jackson's absence from the court for over a year while acting as prosecutor in the Nuremberg trials was criticized because, among other things, it took time away from his judicial duties.<sup>217</sup> While the Virginia State Bar Legal Ethics Committee opined that a substitute judge may serve as a member of a Board of Zoning Appeals because the substitute judge has no jurisdiction over appeals from the Board,<sup>218</sup> a substitute judge should not serve if such service would create such a perception.

Even where a judge is statutorily mandated to participate in a governmental entity, that judge should not participate in activities that would give the appearance of compromising his or her impartiality.<sup>219</sup> While there is an exception for Federal judges where the appointment is by an Act of Congress, there is cautionary language in the Canon and the Commentary about the priority of judicial duties and the nature of the extra-judicial activity.<sup>220</sup>

Note, however, that a judge may represent the locality or state in an historical, educational or cultural activity, such as the dedication of an historic site.<sup>221</sup> This exception exists because the activities are ceremonial in nature, do not substantially impinge on a judge's primary duties, and generally are not controversial.

#### Service for Governmental and Non-profit Organizations

When a judge can serve as an officer, director, trustee or non-legal advisor of a governmental body or a non-profit educational, religious, etc., organization, the judge cannot serve as a legal advisor,<sup>222</sup> nor may the judge serve if it is likely that the entity will be engaged in proceedings that ordinarily come before the judge or will be involved frequently in adversary proceedings that come before the judge's court or any subordinate court from which appeals would come to his or her court.<sup>223</sup> For example, a juvenile and domestic relations district court judge should not serve as president of a private environmental group that frequently litigates, even though none of that litigation would be in the judge's court because it would appear to be lending the prestige of office to anticipated litigation.<sup>224</sup>

#### Fundraising and Soliciting Memberships

The Canons permit, within limits, a judge to participate in the organization's fundraising activities. The judge may plan fundraising and may solicit funds from other judges over whom the judge does not exercise appellate or supervisory authority.<sup>225</sup> A judge otherwise may not personally solicit funds,<sup>226</sup> nor may the judge use or permit the use of the prestige of judicial office for fundraising.<sup>227</sup> However, the judge's name may appear on the letterhead of a fundraising letter (with some restrictions).<sup>228</sup> A judge may attend a fundraising event, but may not be the speaker or guest of honor.<sup>229</sup>

The Canons also permit a judge to personally solicit membership in such organizations if it is not reasonably perceived as coercive or is not essentially a fundraiser.<sup>230</sup> It is not coercive for a Virginia judge to solicit if neither the person solicited nor a person affiliated with the person solicited is ever likely to appear in the judge's court.<sup>231</sup> A Virginia judge may solicit membership from a judge to whom a solicitation for funds ethically could be directed.<sup>232</sup> If a Virginia judge is an officer, the judge may send a general membership solicitation letter signed by the judge.<sup>233</sup>

Lawyers historically have been very active in both governmental and non-profit activities and often have held leadership positions. These changes try to strike a reasoned and realistic balance between the need for public confidence in the impartiality and probity of the judge while continuing as a society to benefit from lawyer-judges' continued participation in public-spirited activities. Thus, a judge may help design and implement the membership solicitation and fundraising activities which occur behind the scene, while limiting his or her public activities in those efforts to those that reasonable people can agree do not create an appearance of impropriety. Of course, these efforts take second place to judicial duties.<sup>224</sup>

Because a Virginia substitute judge does not regularly sit as a judge, and generally is identified to the public as a lawyer rather than as a judge, there are no restrictions on his or her governmental, civic or charitable activities other than not lending the prestige of office for fundraising or membership solicitation.<sup>235</sup> In contrast, the federal restrictions apply to part-time and pro tempore Federal judges, but not to special masters (with one exception).<sup>236</sup> Also, a Virginia or Federal retired judge, senior judge or justice is so restricted except that he or she may serve on a governmental commission not concerned with issues involving the law, the legal system and the administration of justice.<sup>237</sup>

#### Financial Activities

Contact with a judge's financial activities is another area where nonlitigating lawyers are likely to come into contact with the Canons of Judicial Conduct. These Canons address general prohibitions, investments, business entities, and gifts.

#### Financial and Business Dealings Generally

The Canons provide that a judge may not engage in financial or business dealings that may be reasonably perceived to exploit his or her judicial position.<sup>238</sup> For example, a substitute judge may not accept payment for performing a marriage in the one instance where the substitute judge may perform a marriage.<sup>239</sup>

This can lead to some fine distinctions and some differences between Virginia and Federal judges. For example, a Federal judge may not ask for discounted or free services because he or she is a judge, but may accept professional courtesy extended to other attorneys in the locality *unless* the *law firm* appears or is likely to appear before the judge in the future.<sup>240</sup> Attorneys who represent judges may discount their fees to judges as a professional courtesy if they would do the same for other friends and colleagues, but the representation in the real estate transaction would have to have terminated before the attorney could appear in a case before the judge.<sup>241</sup> The difference between the Federal judge ethics provisions and the Virginia attorney ethics provisions is that an attorney may offer such professional courtesy discount to a judge as long as the *attorney is not appearing* before the judge during the representation on the real estate matter, but a Federal judge may not accept such a discounted fee as long as the *law firm is or is likely to appear before the judge*.

This provision is not conditioned on the judge initiating the deal—it would be inappropriate for a judge to accept an offer to invest in a local real estate development if told that he or she has to pay less for his or her share because he or she is a judge.

Judges should discourage family members from dealings that appear to exploit the judge's position.<sup>242</sup>

A judge may not engage in financial or business dealings that involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.<sup>243</sup> For example, a judge must recuse if a lawyer, who is also the judge's partner in a real estate matter, appears in court, unless the recusal is waived.<sup>244</sup> This can be a particular problem for new judges trying to make the transition from bar to bench. The immediate remedy is for a judge to recuse when a party or attorney having such dealings appears before the judge.<sup>245</sup>

Lawyers face similar prohibitions. Some examples of this are:

- A partner may not appear before another partner who is a substitute judge.<sup>246</sup>
- An attorney representing the judge may not accept court appointments from any judge of the judge's circuit during the representation.<sup>247</sup>
- An attorney may not serve as court-appointed counsel in mental commitment cases when the landlord for the attorney's office is the special justice.<sup>248</sup>
- An attorney may not rent space from a judge if the attorney expects to appear before the judge.<sup>249</sup>

Federal judges should also refrain from such transactions that tend to reflect adversely on the judge's impartiality or interfere with the proper performance of judicial duties.<sup>250</sup> This provision applies to Virginia judges through the provisions requiring judges to avoid the appearance of impropriety.<sup>251</sup>

A judge may own and manage property for himself and family members that does not cause frequent disqualification or appear to be exploiting the judicial office.<sup>252</sup> However, a judge may not take an active role in any capacity in a business unless it is closely held by the judge and/or members of the judge's family.<sup>253</sup> For a Virginia judge, the business also must be at

least fifty percent owned by the judge and/or the judge's family<sup>254</sup> or is primarily engaged in investing the judge's family's resources.<sup>255</sup> For a Federal judge, the business must be both owned and controlled by the judge and/or family members.<sup>256</sup> Also, the business must not take too much time from judicial duties, involve misuse of prestige of office, create the appearance of impropriety, subject the judge to criticism, or come before the judge's court.<sup>257</sup> Note carefully that the scope of "members of the judge's family" is not the same as that term used elsewhere—it includes not only relatives within the third degree of relationship, but also a relative or person with whom the judge maintains a close familial relationship.<sup>258</sup>

Except for the prohibitions against exploiting the judicial position or involving frequent transactions with those who appear before the judge's court, these business and investment provisions do not apply to Virginia substitute judges<sup>259</sup> or to retired judges, senior judges or justices.<sup>260</sup> They do not apply to part-time or pro tempore Federal judges.<sup>261</sup>

The purposes of these provisions are to complement the requirement that judicial duties take precedence over all other activities and to avoid lending the prestige of judicial office for the private benefit of the judge or others (for example, by sitting on a bank's board of directors). They can be achieved relatively easily when a judge is only an investor in a business, but not if he or she is serving in a more active capacity. An exception is made for the family business because of the possible hardship to the family if a judge could not participate, and in a family investment business because of the less demanding aspects of such a business. Notwithstanding that exception, other provisions in the Canons may prohibit a judge from managing a family business.<sup>262</sup>

A judge is required to arrange his or her financial affairs to minimize the number of cases in which the judge is disqualified, even being required to divest those financial interests that might require frequent disqualification.<sup>263</sup> No one is able to avoid all possible disqualifications. However, to meet the mandate that a judge's judicial duties take precedence over all the judge's other activities,<sup>264</sup> a judge must minimize both actual and potential conflicts arising from the judge's financial activities, although the Canons provide that a judge divest such conflicts as soon as can be done without serious financial detriment.<sup>265</sup> This especially affects not only new judges who need to rearrange their financial activities, but also judges who inherit property.

A lawyer putting together a business or other investment in which a judge is, or becomes, an investor needs to carefully consider whether the judge is also a client. If so, then the judge and lawyer need to consult not only the Canons dealing with financial activities, but also the disqualification provisions, especially as to whether there is an ongoing attorney-client relationship when the attorney appears in court in front of the judge.<sup>266</sup> The conflicts of interest provisions in the Rules about prohibited transactions with clients and their exceptions apply if a judge is the client.<sup>267</sup> Also, it may become important to establish when the attorney-client relationship terminates, as a judge should not hear cases in which counsel of record has an ongoing attorney-client relationship with the judge.

If the client is a Federal judge, the lawyer should consult not only the *Code of Judicial Conduct*, but also the advisory opinions and the *Compendium*. If outside earned income or outside

employment is involved, the *Ethics Reform Act Concerning Outside Earned Income, Honoraria, and Outside Employment* and the opinions in the *Compendium* should also be reviewed.

### Gifts and Loans

Unlike most other provisions which allow the judge to do everything except that which is prohibited, Virginia Canon 4D(5) allows judges to accept only certain types of gifts, loans or benefits. They must be: (1) related to law, the legal system and the administration of justice,<sup>268</sup> (2) incident to a resident family member's activities,<sup>269</sup> (3) ordinary social hospitality,<sup>270</sup> (4) special occasion gift from a relative or friend (such as a birthday),<sup>271</sup> (5) from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification,<sup>272</sup> (6) loans obtained from lending institutions without special favors,<sup>273</sup> and (7) scholarship or fellowship without special terms.<sup>274</sup> Even then, such gifts, loans or benefits should not be excessive or with special terms to avoid questions about the judge's impartiality and integrity or that might create disqualification where such would not otherwise be required.<sup>275</sup>

On this topic, Federal Canon 5D(4) is different, as it lists only the gift transactions that are prohibited. It prohibits solicitation as well as acceptance of anything of value from anyone (1) seeking official action from or doing business with the court or other entity served by the judge, or (2) whose interests may be substantially affected by the performance or nonperformance of official duties. An exception is made for gifts as permitted by the Judicial Conference gift regulations. The Commentary to this Canon noted that reimbursement or direct payment of travel expenses may be a gift. It then permits judges to accept such in connection with a bar-related function or an activity for the improvement of the law, the legal system, or the administration of justice.

Gifts are areas where interactions between judges and lawyers are likely to be called into question. For example, "ordinary social hospitality" would include exchange of small gifts at Christmas and mutual exchange of dinner invitations because of mutuality and the comparatively small value of such hospitality. The further from both of these factors, the more likely that the item may not be "ordinary social hospitality." Thus, inviting a judge to complete a foursome for a round of golf at a country club to which the judge does not belong could be problematic if the other guests are clients of the host and there was no prior social relationship between the judge and the host. On the other hand, if all in the foursome were social acquaintances and did different things together, there probably would not be a violation. Similarly, under "special occasion gifts," an engraved silver tray from the judge's former partners on the judge's twenty-fifth wedding anniversary probably would not be a violation; whereas, the same gift from a lawyer who was not a social acquaintance would be a violation because the donor is not a relative or friend, and the judge should decline the gift.

Federal special masters are exempt from these gift provisions.<sup>276</sup>

Loans are a similar area of potential exposure. Lawyers are not lending institutions, and should not loan money to judges. That does not prevent a lending institution in which a lawyer has an interest from lending money to a judge on commercially reasonable terms available to others who are not judges. However, if the lawyer controls the lending institute, it would be difficult

for the judge to request or accept such a loan because of the appearance of impropriety and related ethical concerns.<sup>277</sup>

Somewhat less restrictive provisions apply to lawyers. Rule 3.5(d) only prohibits a lawyer from giving or lending anything of value to a judge under circumstances that might give the appearance that the gift or loan is made to influence official action. Thus, there are many other circumstances where a lawyer ethically may seek to give a gift to a judge. However, the judge ethically may not accept it if the acceptance would be in violation of the Canons.

To avoid embarrassment, a lawyer desiring to give a gift to a judge should consider the appropriate Canons (depending on whether the judge is a Virginia or Federal judge) in making that decision. If the recipient is a Federal judge, the lawyer should consult not only the *Code of Judicial Conduct*, but also the advisory opinions, the *Compendium*, the *Ethics Reform Act Concerning Gifts*, and the *Ethics Reform Act Concerning Outside Earned Income, Honoraria, and Outside Employment* should also be reviewed.

### Fiduciary Activities

Basically, an active judge may not serve as a fiduciary of any sort.<sup>278</sup> The only exception is serving as a fiduciary for a family member,<sup>279</sup> but only if it does not interfere with the proper performance of judicial duties.<sup>280</sup> It is not likely that the fiduciary-judge will be engaged in proceedings that ordinarily come before the judge's court, nor that the subject of the fiduciary relationship will become involved in adversary proceedings in the court where the judge serves or is under its appellate jurisdiction.<sup>281</sup> In addition, the financial activities provisions that affect a judge's financial activities personally also apply to the judge as a fiduciary,<sup>282</sup> such as being the executor of an estate having a partnership interest in an apartment complex that regularly files landlord-tenant actions in the judge's court.<sup>283</sup>

This Canon affects new judges who must rearrange their affairs before coming on the bench. There is no transition provision for new Virginia judges as in other financial affairs<sup>284</sup>—a judge must resign or otherwise terminate such fiduciary relationships before taking the oath of office. For new Federal judges, there is an one year transition period, and also an exception where continuing to serve as a fiduciary without compensation is permitted where termination would unnecessarily jeopardize a substantial interest and the circuit judicial council approves.<sup>285</sup>

It also affects active judges who were named trustees in deeds of trust or as fiduciaries in a will while practicing law before becoming a judge, and are now requested to serve because of default on the loan or death of the testator. In such circumstances, a judge must refuse to assume office.

A judge or judge-elect should take appropriate steps to see that someone else assumes the fiduciary office. Usually, a judge notifies a co-fiduciary or beneficiary and suggests that they take appropriate action. If no one is able to take action, a petition may have to be filed to have a different judge appoint a replacement fiduciary. If a deed of trust is involved and there is no co-trustee, the noteholder should be notified and, if needed, a substitute trustee should be appointed and he or she should petition for an order appointing a substitute trustee. It is not unusual for the successor attorneys to the judge's law practice to help handle these transition matters to the extent that

the judge was unable to complete them before taking the oath of office.

This Canon does not apply to Virginia substitute judges<sup>286</sup> nor to retired judges, senior judges or justices.<sup>287</sup> It does not apply to federal part-time and *pro tempore* judges.<sup>288</sup>

#### Serving as Arbitrator or Mediator

A judge may not serve as an arbitrator or mediator or otherwise perform judicial functions in a private capacity, but may participate in settlement conferences performed as part of the judicial duties.<sup>289</sup> The primary purpose is to insure that judicial duties take precedence over an active judge's other activities.<sup>290</sup> This does not apply to Virginia substitute judges<sup>291</sup> and retired judges or senior judges and justices<sup>292</sup> because their time is their own except when actually called to serve as a judge. It also does not apply to Federal part-time and *pro tempore* judges.<sup>293</sup>

#### Practice of Law

The general rule in the Canons and statutes is that a full-time judge may not practice law.<sup>294</sup>

One exception is that a judge may act *pro se*.<sup>295</sup> This provision is a bit redundant since the definition of the practice of law in the Rules of Court is derived from the attorney-client relationship<sup>296</sup> and a judge acting *pro se* has no client as contemplated by this definition. (Notwithstanding the aphorism, "A person who represents himself has a fool for a client," nothing in the definition addresses such self-representation.) The Commentary to the Virginia and Federal Canons notes that the prohibition refers to the practice of law in a representative capacity and not in a *pro se* capacity.<sup>297</sup> Thus, a judge may represent himself or herself before a city zoning commission, but may not represent the developer or neighbors.<sup>298</sup>

The other exception allows a judge, without compensation, to give legal advice to and draft or review documents for a member of the judge's family.<sup>299</sup> When compared with the definition of the practice of law in the Rules of Court,<sup>300</sup> the giving of legal advice or reviewing of documents without compensation does not appear to be one of the acts deemed to be practicing law. The drafting of certain documents, with or without compensation, is one of the acts deemed to be the practice of law. However, the provisions would be construed as not being an ethical violation since (1) both the definition of the practice of law and the *Canons of Judicial Conduct* are rules of the Supreme Court of Virginia, (2) the Canons were adopted later than the provisions defining the practice of law, and later enactments govern over earlier ones if in irreconcilable conflict.<sup>301</sup>

Both the Virginia and Federal Canons admonish judges not to abuse the prestige of office to advance the interests of a judge or the judge's family when exercising one of these two exceptions.<sup>302</sup>

A judge may respond to factual questions from successor counsel as to historical facts not readily apparent from the file, factual details in the judge's peculiar knowledge, and similar matters of clarification, but may not actively assist successor counsel on appeal, including advice, counsel or opinions about the legal issues or conducting the appeal.<sup>303</sup>

This Canon does not apply to substitute judges except to cases in which they acted as judge or proceeding relating thereto.<sup>304</sup> Also exempt are retired judges and senior judges and jus-

tices,<sup>305</sup> but they may not appear as counsel of record in a Commonwealth of Virginia court if they are drawing retirement benefits from the Judicial Retirement System.<sup>306</sup> Some judges have resigned from office and deferred drawing retirement benefits so that they could return to the courtroom in Virginia courts as counsel of record.

#### Compensation and Reimbursement—Extra-Judicial Activities

When any judge engages in extra-judicial activities permitted by these Canons, he or she may receive reasonable compensation and reimbursement for actual travel expenses.<sup>307</sup> There are limits on compensation to a reasonable amount that do not exceed what a non-judge would receive.<sup>308</sup> Reimbursement for travel expenses are limited to actual cost for the judge and spouse or guest, with anything in excess being treated as compensation.<sup>309</sup> The Federal Canon Commentary notes additional statutory restrictions that apply.<sup>310</sup>

Reporting requirements vary. Only Virginia active judges are required to report receipt of such funds.<sup>311</sup> These reports are filed with the Secretary of the Commonwealth and are open to public inspection.<sup>312</sup> An attorney may wish to examine them for purposes of determining if the judge has a conflict of interest. Federal active and retired judges are required to file such reports.<sup>313</sup>

#### CANON 5—POLITICAL ACTIVITY

Except for political activity in behalf of measures to improve the law, the legal system, and the administration of justice,<sup>314</sup> a judge may not engage in political activity.<sup>315</sup> These provisions do not apply to Federal special magistrates.<sup>316</sup> A recent Virginia judicial ethics opinion that judges should not vote in primaries<sup>317</sup> was the subject of a federal suit that was dismissed on jurisdictional grounds.<sup>318</sup> The Virginia State Bar Legal Ethics Committee opined that a member of a county board of supervisors may not serve as a substitute judge.<sup>319</sup>

#### Family Members

Because family members are not judges, the Canons of Judicial Conduct do not directly regulate their financial activities. However, the Canons do address family involvement in a judge's financial activities by directing the judge to discourage family activities that create ethics problems. For example, they should not engage in financial dealings that appear to exploit the judge's judicial position.<sup>320</sup> They should not accept gifts except as allowed by the Canons.<sup>321</sup> Virginia judges are to urge family members residing in the judge's household not to accept the types of gifts and loans that the judge may not accept<sup>322</sup> including gifts that could reasonably be perceived as intended to influence the judge in performing his or her judicial duties,<sup>323</sup> nor give excessive gifts, even on special occasions, to the judge.<sup>324</sup> Federal judges should endeavor to prevent such family members from soliciting or accepting anything of value except to the extent that the judge may accept such gifts.<sup>325</sup> In addition, the judge is to make reasonable efforts to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household for disqualification purposes.<sup>326</sup>

In dealing with a judge's "family," there are different scopes, depending upon the part of the Canons involved, and some differences between the definitions used in the Virginia and Federal Canons:

- **Disqualification:**
  - “Third degree of relationship”—Va. Canon 3E(1)(d) and Commentary, Fed. Canon 3C(1)(d).
  - “Judge’s spouse and minor children residing in the judge’s household”—Va. Canon 3E(2) and Commentary, Fed. Canon 3C(1)(c).
- **Investments:**
  - “Members of the judge’s family”—Va. Canon 4D(2), Canon 4D(3)(b) and Commentary; Fed. Canon 5C(2 and 5).
- **Gifts, loans, favors:**
  - “Members of the judge’s family residing in the judge’s household”—Va. Canons 4D(5), 4D(5)(b). Fed Canon 5C(4 and 5).
  - “Relative”—Va. Canon 4D(5)(e).
- **Fiduciary Activities:** “a member of the judge’s family”—Va. Canon 4E(1), Fed. Canon 5D and Commentary.
- **Practice of Law:** “a member of the judge’s family”—Va. Canon 4G and Fed. Canon 5F.

**EPILOGUE**

Remember the questions asked at the beginning? Here are the answers.


A judge may not ask a lawyer to handle a real estate closing on the judge’s marital abode for a reduced fee because the judge would be lending the prestige of the judge’s office to advance the private interests of the judge and others (spouse).<sup>327</sup> A Federal judge may accept discounted services (professional courtesy) if also extended to other lawyers in the locality, but not if the **law firm** appears or is likely to appear before the judge in the future.<sup>328</sup> Attorneys who represent judges may discount their fees as a professional courtesy if they would do the same for other friends and colleagues and are not appearing before the judge during the representation.<sup>329</sup>

A trust and estate lawyer generally should not name an active state court judge as the sole executor in a will or as sole trustee in a testamentary trust unless the testator is a member of the judge’s family, and then only after consulting with the judge, as judges may serve as a fiduciary only for family members, and if it does not interfere with his or her judicial duties and is not likely to come before him as a judge.<sup>330</sup> However,

that restriction does not apply to retired or substitute state court judges<sup>331</sup> or state court judges pro tempore.<sup>332</sup> There may be instances where an active state court judge is so named on the expectation that the judge will be retired by the time that he or she is called to serve as executor, in which case, the testator should be made aware that the judge may have to decline to serve if the testator dies before the judge retires.

Planning a charity fundraising dinner with a judge as the honoree, even if so honored because of the judge’s service when in private practice, creates a problem since a judge may not be the honoree at a fundraiser.<sup>333</sup> The judge could not attend the event.

A judge may not personally solicit your membership unless you are judge of a court over which the judge does not exercise supervisory or appellate authority, or you are a person who is not likely ever to appear in the court served by the judge.<sup>334</sup> A

judge and the judge’s spouse may accept an invitation to a bar association’s annual dinner as guests of the bar association.<sup>335</sup> A judge may accept from a lawyer the two hard-to-get tickets to a professional football game only if the gift is fairly commensurate with the occasion and relationship or is ordinary social hospitality;<sup>336</sup> a Federal judge would have to consult the Judicial Conference gift regulations.<sup>337</sup> In addition, if the lawyer has a case pending before the judge, the judge may have to decline the gift if it creates an appearance that the lawyer is in a position to influence the judge.<sup>338</sup> 

**Author’s Credits and Disclaimer**

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**ENDNOTES**

- 193 Va. Canon 3A; Fed. Canon 3.
- 194 Va. Canon 4A.
- 195 Va. Canon 4A, Commentary.
- 196 Va. Canons 3B(9) and 4B; Fed. Canons 3A(6) and 4A.
- 197 Compendium, § 4.3(g).
- 198 Compendium, § 4.2(a).
- 199 Va. Canon 4B, Commentary; Fed. Canon 4A, Commentary.
- 200 Fed. Canon 4, Commentary.
- 201 Va. Canon 3B(9); Fed Canon 3A(6).
- 202 Compendium § 1.2(g-1).
- 203 Fed. Canon 4D.
- 204 Va. Canon 4B; Fed. Canon 5A.
- 205 Va. Canon 6C.
- 206 Va. Canons 4C(1) and 4G; Fed. Canons 4B and 5F.
- 207 Va. Canon 4G, Commentary.
- 208 Va. Canons 2B, 4C(1), Commentary, and 4G, Commentary; Fed. Canon 2B, 4B, and 5F, Commentary.
- 209 Va. Canon 4G and Commentary; *see also* Va. Code §§16.1-69.12 and 17.1-102; Fed Canon 5F, Compendium § 5-6(i).
- 210 Va. Canon 4C(1); Fed. Canon 4B.
- 211 Va. Canon 4C(2); Fed. Canons 4B and 5G.
- 212 Compendium § 5.3-7[4](m).
- 213 Va. JEAC Op. 00-06.
- 214 Shaman, § 9.04.
- 215 Fed. Canon 5G, Commentary.
- 216 Va. JEAC Op. 00-3.
- 217 Shaman, § 9.04.
- 218 Va. LE Op. 500.
- 219 Va. JEAC Op. 00-2.
- 220 Fed. Canon 5G and Commentary.
- 221 Va. Canon 4C(2); Fed. Canon 5G.
- 222 Va. Canons 4C(3) and 4G, *see also* Va. Code §§16.1-69.12 and 17.1-102; Fed. Canon 4C and 5B and F.
- 223 Va. Canon 4C(3)(a)(i. and ii); Fed. Canons 5B(1).
- 224 Canon 2B.
- 225 Va. Canon 4C(3)(b)(i), Va. JEAC Op. 99-3.
- 226 Canon 4C(3)(b)(i), Va. JEAC Op. 99-3.
- 227 Va. Canon 4C(3)(b)(iv), Fed. Canon 5B(2).
- 228 Va. Canon 4C, Commentary; Fed. Canon 5B(2 and 3), Commentary.
- 229 Va. Canon 4C(3)(b)(v); Fed. Canons 4C, Commentary, and 5C(2 and 3), Commentary.
- 230 Va. Canon 4C(3)(b)(iii), and Commentary; Fed Canon 4C and 5B(2).
- 231 Va. Canon 4C(3)(b), Commentary.
- 232 Va. Canon 4C(b)(iii).
- 233 Va. Canon 4C(3)(b), Commentary.
- 234 Va. Canon 3A, Fed. Canon 3.
- 235 Va. Canon 6C.

- 236 Fed. Canons, Compliance, A and B.  
 237 Va. Canon 6B, Va. JEAC Op. 99-3; Fed Canon Compliance, C.  
 238 Va. Canon 4D(1), *see also* Canon 2B; Fed. Canon 5C(1).  
 239 Va. JEAC Op. 99-2.  
 240 Compendium, § 5.4-4(b).  
 241 Va. LE Op. 1730.  
 242 Va. Canon 4D(1) Commentary; Fed. Canon 5C(4).  
 243 Va. Canon 4D(1)(b), *see also* Canon 2B; Fed. Canon 5C(1).  
 244 Va. LE Op. Nos. 552 and 1034.  
 245 Va. Canons 3E and 4D(4); Fed. Canons 3C and 5C(2 and 5).  
 246 Va. LE Op. No. 215.  
 247 Va. LE Op. Nos. 422 and 1730.  
 248 Va. LE Op. No. 791.  
 249 Va. LE Op. No. 368.  
 250 Fed. Canon 5C(1).  
 251 Va. Canon 2.  
 252 Va. Canon 4D(2); Fed. Canon 5C(2). For who constitutes members of the judge's family, *see* Va. Canon 4D(3) Commentary and Fed. Canon 5C(2).  
 253 Va. Canon 4D(3); Fed. Canon 5C(2).  
 254 Va. Canons 4D(3) and Commentary.  
 255 Va. Canon 4D(2).  
 256 Fed. Canon 5C(2).  
 257 Va. Canon 4D(3), Commentary; Fed. Canon 5C, Commentary.  
 258 Va. Canon 4D(3), Commentary; Fed. Canon 5C(2).  
 259 Va. Canon 6C.  
 260 Va. Canon 6B.  
 261 Fed. Canon, Compliance A and B.  
 262 Va. Canon 4D(3), Commentary; Fed. Canon 5C(2), Commentary.  
 263 Va. Canon 4D(4), *see also* Canon 4D(1), Commentary; Fed. Canon 5C(3).  
 264 Va. Canon 3A; Fed. Canon 3.  
 265 Va. Canon 4D(4); Fed. Canon 5C(3).  
 266 Va Canon 3E; Fed. Canon 3C. *See also* Rules of the Supreme Court of Virginia, Part 6, § 1(B), "Definition of the Practice of Law," that describe when the attorney-client relationship arises.  
 267 Rule 1.8.  
 268 Va. Canon 4D(5)(a).  
 269 Va. Canon 4D(5)(b).  
 270 Va. Canon 4D(5)(c).  
 271 Va. Canon 4D(5)(d).  
 272 Va. Canon 4D(5)(e).  
 273 Va. Canon 4D(5)(f).  
 274 Va. Canon 4D(5)(g).  
 275 *See* Va. Canon 4D(5) and Commentaries.  
 276 Fed. Canons, Compliance B.  
 277 *See also* Va. Canons 2, 2A and 2B; Fed. Canons 2, 2A, 2B and 5C(1).  
 278 Va. Canon 4E(1through 3); Fed. Canon 5D.  
 279 Va. Canon 4E(1); Fed. Canon 5D.  
 280 Va. Canon 4E(1), *see also* Canon 3A; Fed. Canon 5D.  
 281 Va. Canon 4E(2); Fed. Canon 5D(1).  
 282 Va. Canon 4E(3); Fed. Canon 5D(2).  
 283 Va. Canon 4E, Commentary; Fed. Canon 5D(2), Commentary.  
 284 For example, financial affairs—Va. Canon 4D(4).  
 285 Fed. Canon, Applicable Date of Compliance.  
 286 Va. Canon 6C.  
 287 Va. Canon 6B.  
 288 Fed. Canon, Compliance, A and B.  
 289 Va. Canon 4F and Commentary; Fed. Canon 5E.  
 290 Va. Canon 3A; Fed. Canon 3.  
 291 Canon 6C.  
 292 Canon 6B.  
 293 Fed. Canon, Compliance A and B.  
 294 Va. Canon 4G, Va. Code §§ 16.1-69.12, 17.1-102; Fed. Canon 5F.  
 295 Va. Canon 4G; Fed Canon 5F.  
 296 Rules of the Supreme Court of Virginia, Part 6, § 1(B), "Definition of the Practice of Law"  
 297 Va. Canon 4G, Commentary; Fed. Canon 5F, Commentary.  
 298 Compendium, § 5-6(i).  
 299 Canon 4G.  
 300 Rules of the Supreme Court of Virginia, Part 6, § 1(B), "Definition of the Practice of Law"  
 301 N. Singer, Sutherland Statutory Construction, § 51.02, n.5, 14 (5th Ed. 1992)  
 302 Va. Canon 4G, Commentary; Fed. Canon 5F, Commentary.  
 303 Compendium, § 5-6 (g).  
 304 Canon 6C, *see also* Va. Code s 16.1-69.12.  
 305 Va. Canon 6B.  
 306 Va. Code § 51.1-309.  
 307 Va. Canon 4H(1); Fed Canons 6, 6A, 6B.  
 308 Va. Canons 4H and 4H(1)(a); Fed. Canon 6A.  
 309 Va. Canon 4H(1)(b); Fed. Canon 6B.  
 310 Fed. Canon 6, Commentary.  
 311 Va. Canons 4H(2), 6B, 6C.  
 312 Va. Code § 2.1-639.13.  
 313 Fed. Canon 6C, Compliance A and B.  
 314 Va. Canon 5A(3), *see also* Canons 4B, 4C(1) and 4C(2); Fed. Canon 7C, *see also* Canon 4C.  
 315 Va. Canon 5A; Fed. Canon 7.  
 316 Fed. Canon, Compliance B.  
 317 Va. JEAC Op. 99-6, *aff'd*. Va. JEAC Op. 00-1.  
 318 *Kemlar, et al. v. Poston, et al.*, Civ. No. 3:00cv146 (E. D. Va. 8/11/00).  
 319 Va. LE Op. No. 476.  
 320 Va. Canon 4D(1) Commentary, *see also* Va. Canon 2B.  
 321 Va. Canon 4D(5) and Commentary; Fed. Canon 5C(4).  
 322 Va. Canon 4D(5).  
 323 Va. Canon 4D(5)(b).  
 324 Va. Canon 4D(5)(d).  
 325 Fed. Canon 5C(4).  
 326 Va. Canon 3E(2), Fed. Canon 3C(2).  
 327 Canon 2B.  
 328 Compendium, § 5.4-4.  
 329 Va. LE Op. 1730.  
 330 Canon 4E.  
 331 Canon 6B and 6C.  
 332 Canon 6A.  
 333 Canon 4C(3)(b)(v).  
 334 Va. Canon 3C(3)(b)(iii) and Commentary; Fed. Canon 5B(2).  
 335 Va. Canon 4D(5)(a); Fed. Canon 4C and Fed. Advisory Op. 17.  
 336 Va Canon 4D(5)(b, c, and d).  
 337 Fed. Canon 5C(4).  
 338 Va. and Fed. Canon 2B.