Guide to Judiciary Policy

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

Ch. 2: Published Advisory Opinions

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§ 220 Committee on Codes of Conduct Advisory Opinions

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

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

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

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

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

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

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

- The judge must not personally engage in fund-raising for the organization, subject to the exceptions noted in Canon 4C regarding family members

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

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

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

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

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

June 2009

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

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

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

June 2009

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

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

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

June 2009

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

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

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

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

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

June 2009

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

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

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

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

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

June 2009

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

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

Canon 4H of the Code provides:

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

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

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

extended by lawyer organizations identified with a particular viewpoint regularly advanced in litigation.

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

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

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

June 2009

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

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

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

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

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

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

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

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

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

June 2009

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

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

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

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
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> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding[.]

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

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

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

June 2009

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

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

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

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

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

June 2009

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

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

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

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding[.]

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

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

could be affected in a slight degree by the result of the pending case in which Blue Cross was a party.

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

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

June 2009

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

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

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

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

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding[.]

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

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

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

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

June 2009

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

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

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

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

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

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

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

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

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

June 2009

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

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

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

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

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

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

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

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

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

> 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

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

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

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

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

June 2009

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

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

Canon 4C of the Code of Conduct for United States Judges states, in pertinent part:

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

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

June 2009

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

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

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

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

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

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

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

June 2009

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

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

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

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

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

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

More specifically, under Canon 4A(3):

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

The Commentary to Canon 4 reads, in part:

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

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

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

June 2009

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

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

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

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

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

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

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

Finally, the Committee advises that a judge may be included in a list of contributors disseminated by a nonprofit organization. The list may use the judge's title,

as long as the judge is designated in a similar manner to other contributors, and is in no way specially emphasized.

June 2009

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

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

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

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

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

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

Canon 4 provides, in pertinent part:

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

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

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

June 2009

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

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

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

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

June 2009

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

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

> Canon 3C(1)(d), Code of Conduct for United States Judges, provides in part:
>
> C. Disqualification.
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
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> * * *
>
> (d) the judge or the judge's spouse[1], or a person related to either within the third degree of relationship, or the spouse of such a person is:
>
> * * *
>
> (ii) acting as a lawyer in the proceeding[.]

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

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

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

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a

> peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

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

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

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

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

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

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

Note for Advisory Opinion No. 38

[1] For purposes of recusal, "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse

with whom the judge maintains both a household and an intimate relationship." Canon 3C Commentary.

June 2009

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

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

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

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

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

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

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

June 2009

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

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

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

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

June 2009

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

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

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

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

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

June 2009

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

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

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

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

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

Canon 4F provides:

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

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

("Retired Judge. A retired judge who is retired under 28 U.S.C. §§ 371(b) or 372(a), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 4F . . . .").

June 2009

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

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

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

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

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

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

June 2009

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

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

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

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

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

Applying these principles, the Committee has advised that in some circumstances a judge may accept discounted membership in a social or recreational club that offers multiple membership categories associated with different levels of membership privileges and sets membership dues or fees according to broad occupational categories that are not directed to judges or to a narrow category of members. Due to the wide variance in club bylaws and membership practices, it is difficult in the abstract to draw a bright line regarding which memberships are acceptable.

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

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

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

Before accepting a complimentary or discounted club membership, judges must consider the other restrictions on membership in organizations. They should ascertain that the club is not involved or likely to become regularly involved in litigation. Judges must also consider whether the offer of membership is designed to exploit the judicial position or the court. They must be cautious that membership in the club would not

convey the impression that lawyers who are also members are in a special position to influence the judge. Finally, the judge should not accept membership in an organization or club that practices invidious discrimination. *See also* Advisory Opinion Nos. 2 ("Service on Governing Boards of Nonprofit Organizations") and 82 ("Joining Organizations").

June 2009

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

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

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

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

The Act provides:

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

28 U.S.C. § 632(b).

The Judicial Conference took into account the special issues pertinent to part-time magistrates when devising the Conflict-of-Interest Rules for Part-time U.S. Magistrates. These conflict rules are set forth in *Guide to Judiciary Policy*, Vol. 2C, § 1110.

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

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

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

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

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

June 2009

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

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

Under Canon 3C:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

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

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

While the exceptions of Canon 3C(3)(c) do not specifically refer to trade associations, the judge's small financial interest in a member of the association should be considered a "similar proprietary interest" within the meaning of that provision.

Accordingly, the Committee sees no impropriety in a judge serving in a proceeding where a trade association appears as a party, even though the judge owns a small percentage of the publicly-traded shares of one or more members of the association, so long as that interest could not be substantially affected by the outcome of the proceeding.

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

June 2009

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

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

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

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

The accompanying Commentary states:

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

> is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

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

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

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

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

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

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

June 2009

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

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

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

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

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

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

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

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

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

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

Note for Advisory Opinion No. 51

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

June 2009

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

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

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

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that . . . [he or she] has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3) goes on to provide:

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

the proceeding could substantially affect the value of the interest;

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

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

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

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

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

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

June 2009

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

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

The judge should not, for example,

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

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

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

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

June 2009

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

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

Writing Generally

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

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

Writing About Cases the Judge Has Heard

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

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

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

Commentary to Canon 3A(6).

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

Advertising

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

June 2009

Committee on Codes of Conduct Advisory Opinion No. 57: Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party

This opinion considers the question of whether a judge should recuse when the judge owns stock in the parent corporation of a controlled subsidiary that is a party or owns stock in a controlled subsidiary and its parent corporation is a party.

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

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small." The provision enumerates exceptions to the definition, including ownership in a mutual or common investment fund; the proprietary interest of a policy-holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest; and ownership of government securities, where the outcome of the proceeding could not substantially affect the value of the securities. None of these exceptions directly apply, and the Committee does not consider the situation at issue to be analogous to the exceptions. *See also* Advisory Opinion Nos. 26 ("Disqualification Based on Holding Insurance Policy from Company that is a Party") and 49 ("Disqualification Based on Financial Interest in Member of a Trade Association").

The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a controlled subsidiary. Therefore, when a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should recuse. Canon 3C(3)(c). However, if the judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as a party in a proceeding, the judge must recuse only if the interest in the subsidiary could be substantially affected by the proceeding. *Id.*

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting

§§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

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

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

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

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such person is:
>
> * * *
>
> (ii) acting as a lawyer in the proceeding;
>
> (iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]

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

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

The judge, however, always must be mindful of Canon 2A, which directs that a judge should act at all times in a manner that "promotes public confidence in the integrity and impartiality of the judiciary," as well as the general command of Canon 3C(1) that a judge should recuse in a proceeding in which the "judge's impartiality might reasonably be questioned." Accordingly, although recusal may not be prescribed for participation by a relative who is an associate or non-equity partner, other circumstances may arise that in combination with the relative's status at the firm could raise a question about the judge's impartiality and thereby warrant recusal.

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

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

June 2009

Committee on Codes of Conduct Advisory Opinion No. 59: Providing Evaluation of Judicial Candidate to Screening or Appointing Authority

Judges are frequently asked by federal and state merit selection commissions for recommendations of suitable judicial nominees or for evaluations of judicial nominees. This opinion considers whether judges may properly respond.

Canon 2B of the Code of Conduct for United States Judges advises judges against lending the prestige of judicial office to advance the private interests of others and against conveying the impression that others are in a special position to influence the judge. A judge would likely act contrary to Canon 2B if he or she were to initiate communications with an appointing authority for the purpose of seeking, as a favor, the appointment of the judge's friend or acquaintance. Making such a request might also transgress Canon 5C and its proscriptions against engaging in political activity.

On the other hand, the Commentary to Canon 2B states that judges "may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship." "Appointing authority" is intended to include executive and legislative officers, such as the President and Senators, and their selection committees or commissions.

From the Commentary to Canon 2B, it follows that there would be no impropriety in a judge answering an inquiry from an appointing officer with respect to the judge's knowledge concerning the character and fitness of a candidate for appointment to any public office, including that of judge. Similarly, if the selection commission has requested that all candidates submit a recommendation from a judge, and the candidate has requested a letter of recommendation, the judge may respond.

In light of the Commentary, the Committee also believes that judges may – when they are requested to do so – communicate not only their evaluations of candidates mentioned by the appointing authorities, but also their recommendations of persons to be considered. The cautions of Canon 2B are consistent with judges providing, when asked, recommendations and evaluations, based on their insight and experience; judges may in this way further the public interest in a judiciary characterized by quality and integrity.

The strictures of Canons 2B and 5C should serve as guides to a judge communicating any recommendation or evaluation. Any opinion the judge offers should be, and should appear to be, directed only to factors relevant to performance of the judicial office; the judge's views should be objective and informative; the judge should avoid pleading for a candidate of the judge's choosing in opposition to others under consideration; and the judge should not lend his or her name to any publicity campaign for any candidate.

June 2009

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

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

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

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

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

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

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

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

June 2009

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

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

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

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

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

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

June 2009

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

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

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

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

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

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

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

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

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

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

June 2009

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

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

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

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

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

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

Same Court

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

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

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

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

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

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

Separate and Unrelated Courts

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

Related Courts

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

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

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

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

Advisory Opinion No. 51.

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

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

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

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

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

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

Conclusions

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

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

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

Notes for Advisory Opinion No. 64

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

[2] For simplicity's sake, we discuss the situation of court of appeals and district court judges. The same principles apply, however, to the judges of other courts in a hierarchical situation, such as the judges of the Court of International Trade, the Court of Appeals for Veterans Claims and the Court of Federal Claims, all of whose decisions are reviewed by the Court of Appeals for the Federal Circuit.

June 2009

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

This opinion considers whether upon request by a prisoner a judge should make a personal recommendation for a commutation of sentence or a pardon, or for parole. The Committee views such a personal recommendation as normally inadvisable under the Code of Conduct for United States Judges.

The present opinion is limited to the propriety of an action that may be interpreted as a judge's endorsement of an application for pardon or parole. It does not relate to a judge's transmission of objective information (without recommendation) the Justice Department may not have that would assist it in making its determination; nor does it apply to a judge's response to a Justice Department request for such information or for a recommendation (addressed, for example, to the sentencing judge).

The responsibility for making pardon and parole decisions falls to the executive branch. Indeed, in opposing transfer of the Parole Commission from the Justice Department to the judiciary, the Judicial Conference adopted the statement, *inter alia*, that "parole is a form of clemency inherently connected with the executive function of prosecution and incarceration." Further, the Conference cited the possible "problem with respect to Court review of Parole Commission policy, practices, or decisions." *See* Judicial Conference of the United States, *Report of the Proceedings* 74 (Sep. 1979).

The Committee's reason for advising against parole or pardon recommendations based on prisoner requests is rooted in Canon 2's charge to avoid impropriety or the appearance of impropriety. Because recommendations sought as personal favors would be addressed to the Justice Department, and because that department is a frequent litigant in the federal courts, the potential exists that undue influence would be felt. Thus an appearance of impropriety could arise from a judge's personal recommendation that the Justice Department act favorably with respect to a prisoner within its custody.

June 2009

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

Canon 3B(5) of the Code of Conduct for United States Judges requires that a judge "should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct." State laws often contain similar requirements. This opinion considers whether a judge must recuse if an attorney against whom the judge has filed a complaint of unprofessional conduct appears before the judge. The opinion also discusses whether a judge must recuse following a complaint filed by an attorney against the judge.

Canon 3C(1)(a) provides:

> C. Disqualification
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

The Committee concludes that when a judge files a complaint of unprofessional conduct against a lawyer, either in compliance with a state law or Canon 3B(5), and the lawyer is before the judge as counsel in the case giving rise to the unprofessional conduct, or in a later case, the judge is not required to recuse on grounds of bias or prejudice simply because the complaint was filed.

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

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

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 67: Attendance at Independent Educational Seminars

The Committee often receives inquiries as to whether judges may attend seminars and similar educational programs organized, sponsored, or funded by entities other than the federal judiciary and have the expenses of attendance paid or reimbursed by such entities. As discussed below, judges may ordinarily accept such invitations to independent educational seminars, except when particular circumstances make it inadvisable.[1] However, judges must comply with the requirements of the Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs (available at http://www.uscourts.gov/RulesAndPolicies/PrivateSeminarDisclosure.aspx) and the annual financial disclosure requirements for judges under the Ethics in Government Act, 5 U.S.C. app. §§ 101-111.

The education of judges in various academic and law-related disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them. Yet, notwithstanding the general principle that judges may attend independent seminars and accept the provision of or reimbursement for expenses, there are instances in which attendance at such seminars would be inconsistent with the Code of Conduct for United States Judges. It is consequently essential for judges to assess each invitation on a case-by-case basis.

Canon 4 of the Code of Conduct for United States Judges permits judges to engage in a wide range of outside activities, both law-related and non-law-related. Under Canon 4 and its Commentary, judges are encouraged to take part in law-related activities. The Commentary to Canon 4 observes, "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives." Judges who engage in extrajudicial activities are expected to conform their conduct to the standards set forth in Canon 4, which advises judges to ensure that their activities "do not detract from the dignity of judicial office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification. . . ." Consistent with these standards, judges are permitted to speak, write, lecture, teach, and participate in other extrajudicial activities concerning legal and non-legal subjects.

Participation in outside activities must also be consistent with Canons 2A and 3C(1). Canon 2A applies to judges' personal as well as professional conduct, and advises judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; judges therefore should not attend seminars sponsored by organizations with which the judge may not properly be associated (such as organizations referred to in Canon 2C). Canon 3C(1) advises judges to recuse from any proceedings in which their impartiality might reasonably be questioned. In

determining whether to attend and accept benefits associated with a particular seminar, a judge should be guided by Canon 2 and should consider any consequent recusal obligation under Canon 3C(1). In doing so, judges should keep in mind their obligation to conduct themselves in a manner that minimizes the occasion for recusal.

Payment of tuition and expenses involved in attendance at an independent seminar constitutes a gift within the meaning of the Code of Conduct and ethics regulations. Canon 4D(4) permits a judge to accept a gift as permitted by the Judicial Conference Gift Regulations. Under section 5(a) of the Gift Regulations, judicial officers may accept gifts as long as they are not from someone seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person or whose interests may be substantially affected by the performance or nonperformance of official duties. Gifts offered by such interested persons may be accepted only in narrowly-defined circumstances. In particular, section 5(b)(3) of the Gift Regulations permits a judicial officer or employee to accept a gift consisting of "an invitation and travel expenses, including the cost of transportation, lodging, and meals for the judicial officer or employee and a family member to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice." Judges who accept such benefits should be mindful of their financial disclosure obligations.

A variety of factors may affect the propriety of a judge's attendance at an independent seminar. These include:

(1) the identity of the seminar sponsor, for example:

(a) whether the sponsor is an accredited institution of higher learning or a bar association, which are recognized and customary providers of educational programs; sponsorship by such a provider usually raises fewer concerns than sponsorship by other entities;

(b) whether the sponsor is a business corporation, law firm, attorney, other for-profit entity or a non-profit organization not described above; invitations by such a provider should be carefully examined by the invited judge;

(2) the nature and source of seminar funding, for example:

(a) whether there are numerous contributors to seminar funding, none of which contributes a substantial portion of the cost; when no single entity contributes more than a small proportion of a seminar's cost, there is little reason for concern about the identity of individual contributors as the resulting benefits are too minor and attenuated to create ethical concerns;

(b) whether an entity other than the sponsor is a source of substantial funding of the seminar; factors applicable to seminar sponsors also apply to such contributors;

(c) whether the seminar is funded by contributions earmarked for specific seminar programs, or by general contributions to the sponsoring entity; in the latter situation, the benefits being provided are attributable to the sponsor and not to underlying contributors;

(3) whether a sponsor or a source of substantial funding of the seminar is currently involved as a party or attorney in litigation before the judge or is likely to be so involved;

(4) the subject matter of the seminar, including:

(a) whether the topics covered in the seminar are likely to be in some manner related to the subject matter of litigation before the judge in which the sponsor or source of substantial funding is involved as a party or attorney; for example, it would be improper for a judge to attend a seminar if the sponsor or source of substantial funding for the seminar is a litigant before the judge and the topics covered in the seminar are directly related to the subject matter of the litigation;

(b) whether contributors to seminar funding control the curriculum, faculty, or invitation list;

(5) the nature of expenses paid or reimbursed:

(a) whether the expenses are reasonable in amount;

(b) whether the seminar is primarily educational and not recreational in nature; and

(6) whether the seminar provider makes public disclosure about the sources of seminar funding and curriculum; public disclosure by the seminar provider will ordinarily obviate the need for further inquiry.

Factors other than those set forth above may be relevant in particular cases. A judge's determination whether to attend the seminar should be made considering the totality of the circumstances. If, in light of all the relevant factors, the judge concludes that there is a reasonable question concerning the propriety of attendance, the judge should not attend the seminar.

If there is insufficient information for the judge to decide whether to attend, the judge should decline the invitation or take reasonable steps to obtain additional information. Information about the seminar sponsor, subject matter, and curriculum will typically be apparent from the invitation and materials. Information about the nature and source of seminar funding may not be available unless it is requested from the sponsor.

If the necessary additional information is not available, whether through public disclosure, disclosure from the sponsor upon inquiry, or other sources, the judge should not attend the seminar. If the information obtained by the judge does not resolve the

question concerning the propriety of attendance, the judge should not attend. To the extent the judge obtains additional information from the sponsor of the seminar, the judge should make clear that the information is not confidential and that the judge may make the information public.

Note for Advisory Opinion No. 67

[1] This opinion does not address reimbursement of expenses for judges' participation in seminars or other programs as speakers or panelists.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 69: Removal of Disqualification by Disposal of Interest

Judges regularly inquire whether disposing of a disqualifying interest would remove the disqualification and permit them to continue to sit in a case. Ideally, the employment of careful conflict checks by the individual judge and the judge's court prevent a judge participating at all in a case in which the judge has a disqualifying interest. This opinion, however, addresses the circumstance of a disqualifying interest not surfacing until after the judge has been assigned a case. Inquiries to the Committee have demonstrated this circumstance arising in multiple variants. For example, a judge or judge's spouse owns stock in a corporation that intervenes as a party or that is found to be a corporate parent of a party. The existence of a disqualifying interest may be learned directly by the judge or may come to light in counsel's motion for recusal. The question may arise after the judge has taken minimal action, after years of discovery orders, or after trial but before decision. The issue arises in single and multi-judge districts and in appellate courts.

Canon 3C(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ." Canon 3C(1) then provides a non-exhaustive list of circumstances requiring disqualification. Canon 3C(4), however, recognizes that in some instances, such as those listed above, the disqualification may not exist or be known until after the judge has participated in the case, and addresses the propriety of the judge continuing to sit on such a case:

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

Canon 3C(4). *See also* 28 U.S.C. § 455.

The Committee believes that this provision applies to cases in which a judge has already expended a substantial amount of time, cases in which a judge has expended no time, and those in between. Accordingly, if a judge learns of a disqualifying financial interest in a party before expending judicial time on the case, the judge may avoid disqualification by divesting himself or herself of the interest. Because in this situation a judge could recuse, divest and then have the matter reassigned to the judge, the Committee has concluded that Canon 3C(4) should apply, as any other interpretation would require the judge to perform a futile act.

While disposing of a disqualifying interest may allow a judge to continue to sit on a case, Canon 3C(4) limits this option to the disposal of financial interests that will not be substantially affected by the outcome of the litigation. If the financial interest could be substantially affected, even after divestment the judge could not continue to sit on the case under Canon 3C(4). In determining whether a financial interest could be substantially affected, the Committee looks to the application of Canon 3C(1)(c), which provides for disqualification if the judge holds "any other interest that could be affected substantially by the outcome of the litigation." The natural reading of Canon 3C(1)(c) and 3C(4) is that it is the interest itself that must be substantially affected. Ultimately, an individual judge must decide the potential effect on the interest. The key inquiry is not the size of the interest, but the size of the impact on the interest.

The possibility that the judge may appear to be *seeking* to participate in a case by disposing of a disqualifying interest may under some circumstances create an appearance of impropriety. Though that possibility should be considered, the Committee considers the likelihood of such an appearance remote.

In a case in which a great deal of time and effort had been invested by the judge, counsel, and the litigants by the time the disqualifying interest came to light, the public interest in the efficient administration of justice would appear to outweigh concern for an appearance that the judge is seeking to continue participation in a particular case. Though disposal of the interest removes any question of the propriety of the judge's continued participation, the stage in the litigation at which the disqualifying interest is learned and the availability of another judge may, of course, influence the judge's decision to continue participation. The Committee further advises that, in general, the manner in which the fact of a disqualifying interest is learned, and the particular nature of the interest, are not important.

Finally, the Committee advises that should a judge decide to continue to participate in a matter following disposal of a disqualifying interest, the facts giving rise to the disqualification, the judge's disposal of the disqualifying interest, and the public interest in continued participation of the judge should generally be disclosed to the parties and on the record in the case.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 70: Disqualification When Former Judge Appears as Counsel

This opinion addresses recusal considerations when former judges, including judges who resign pursuant to 28 U.S.C. § 371(a), appear as counsel before the court in which they once held judicial office. It does not directly address the ethical obligations of the former judge who later appears as counsel, although these obligations may be relevant to whether the former judge or his or her law firm should be disqualified from representation. Those obligations are governed by the rules of professional responsibility applicable to attorneys in the relevant jurisdiction. *See, e.g.*, Rule 1.12, ABA Model Rules of Professional Conduct ("ABA Rule 1.12").

The Code of Conduct for United States Judges and 28 U.S.C. § 455(a) require recusal when the impartiality of a judge might reasonably be questioned. The Code also directs recusal where an appearance of impropriety might exist. These principles govern the duties of the judge when a former colleague appears as counsel. *See* Canon 2A and Canon 3B(3). Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting the recusal statutes, Canon 3C of the Code closely tracks the language of 28 U.S. C. § 455, and the Committee is authorized to provide advice regarding the application of the Code.

The Committee recommends that courts announce a policy that for a fixed period after the retirement or resignation of a colleague, judges recuse themselves in any case in which the former colleague appears as counsel. The Committee's experience suggests that a recusal period of one to two years would be appropriate, depending on the size of the bench and the degree and nature of interactions among the judges. The advantage of such a policy is that it is evenhanded, can be cited as supplying an objective basis for recusal, and may be formulated without respect to particular individuals. Advance adoption of a policy also gives fair notice of the practice restrictions a judge will face after resignation or retirement.

Even though a fixed period may have expired, a judge may be required to recuse in a case in which counsel for a party is a former judge with whom the sitting judge had a particularly close association. The standard applied here is the same as when a former associate or partner in a law firm, or a close friend, is an attorney in the case. The relevant considerations are set forth in Advisory Opinion No. 11 ("Disqualification Where Long-Time Friend or Friend's Law Firm Is Counsel"). We have suggested a two-fold test. First, does the judge feel capable of disregarding the relationship; second, can others reasonably be expected to believe the relationship is disregarded? In applying that test, the judge should consider the closeness of the relationship, the length of service together, the size of the bench, and the period that has elapsed since the former judge left the bench.

In a large court, personal or social associations may not have been close. If the former judge had been a colleague for a short time, it may be easier to disregard the

past relationship, and more likely that litigants will feel the relationship will play no part in the decision. When the association between the sitting and former judge has been long, close, and continuing, the judge's impartiality might reasonably be questioned, and the judge should consider recusal.

A discrete problem arises when a former judge appears as counsel in a case that was filed in his or her former court before he or she resigned. In such circumstances, the presiding judge should confirm that the attorney's representation is not in violation of the applicable rules of professional responsibility. Although the rules of some jurisdictions may allow waiver of conflicts resulting from an attorney's prior judicial service, the Committee concludes that waiver would not be appropriate to allow a former federal judge to represent parties in any case that had been assigned to the former judge's individual docket during his or her judicial tenure. *See generally* ABA Rule 1.12(a) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . unless all parties to the proceeding give informed consent, confirmed in writing."). Appropriate steps may include review of the docket sheet to insure the case was not previously assigned to the attorney during his or her judicial service or inquiry of the parties.

If the principles stated here are followed, the Committee finds no objection to appearances by former judges. That the former colleague may have superior knowledge of the viewpoints of the sitting judges does not require disqualification. The same information is available from a thorough study of the sitting judge's opinions, or from observation of the judge in the courtroom. Lawyers who frequently litigate before a particular judge may acquire the same type of information, yet no one would suggest recusal or disqualification in such cases.

If a judge sits in a case in which a former colleague appears as counsel, care should be exercised in the courtroom to avoid using or permitting indications of familiarity. The former colleague should not use or be called by his or her former title. *See* Advisory Opinion No. 72 ("Use of Title 'Judge' by Former Judges"). First names and references to past association, events, or discussions should be avoided.

Absent special circumstances giving rise to reasonable questions regarding the impartiality of the sitting judge, the fact that a former judge is an associate or partner of the law firm appearing in the case, where the former judge does not appear or work on the case, does not of itself require recusal of the judge. Advisory Opinion No. 11, pertaining to the law firm of a close friend, sets forth the considerations here. The judge should, however, be alert to concerns relating to disqualification of the firm which, like disqualification of the former judge, is governed by the relevant jurisdiction's rules of professional responsibility. *See, e.g.,* ABA Rule 1.12(c) ("If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the

fee therefrom; and (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.”).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 71: Disqualification After Oral Argument

This opinion considers the recusal obligations of the remaining judges on a panel when one judge must recuse after the matter has been argued. Inquiries have raised two questions regarding this situation: (1) whether a decision that has been entered must be vacated, and the case submitted to a new panel, when it is discovered after entry of the decision that one of the judges who participated in it was disqualified; and (2) whether, after a panel has conferred but has not reached a decision, a judge finds that he or she is disqualified, the other judges are also disqualified or may proceed to decide the case?

The first question encompasses areas beyond this Committee's authority. Determination of what circumstances may taint a decision already entered is a judicial function, not that of a committee established to advise on ethical standards of the conduct of judges.

The Committee does advise that a judge should disclose to the parties the facts bearing on disqualification as soon as those facts are learned, even though that may occur after entry of the decision. The parties may then determine what relief they may seek and a court (without the disqualified judge) will decide the legal consequence, if any, arising from the participation of the disqualified judge in the entered decision. Similar considerations would apply when a judgment is entered in a district court by a judge and it is later learned that the judge was disqualified.

The second question, because it concerns the appearance of impropriety and Canon 3C of the Code of Conduct for United States Judges, is within the Committee's purview. Canon 3C(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." The Committee is of the opinion that the remaining two judges on the panel are not disqualified merely because they conferred with the disqualified judge. Numerous situations arise in which a judge becomes aware of an important fact and yet must proceed to decide without regard to that fact (e.g., inadmissible evidence in a trial). Those who might believe that the disqualified judge exerted influence on the other two, and those who might believe the disqualified judge would attempt to influence his colleagues on the new panel, are unlikely to be satisfied regardless of what is done. Canon 3C looks to disqualification when the impartiality of the two remaining panel members can "reasonably be questioned." The Committee believes that no reasonable basis exists for questioning the impartiality of the remaining panel members when the third judge recuses, whether that recusal occurs after oral argument or after conference on the case.

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

interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 72: Use of Title "Judge" by Former Judges

This opinion considers the use of the title "judge" by former judges who have returned to the practice of law and whether sitting judges have any ethical responsibilities relating to such use.

Historically, former judges have been addressed as "judge" as a matter of courtesy. Until recently there have been very few former federal judges. With federal judges returning to the practice of law in increasing numbers, ethical considerations arise. The prospect of former federal judges actively practicing in federal courts turns what otherwise might be an academic question into a matter of practical significance.

Canon 2A of the Code of Conduct for United States Judges instructs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A litigant whose lawyer is called "Mr.," and whose adversary's lawyer is called "Judge," may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary. In addition, application of the same title to advocates and to the presiding judicial officer can tend to demean the court as an institution. Judges should insure that the title "judge" is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to accurately describe a person's status at a time pertinent to the lawsuit. The Committee notes that recusal obligations that may arise related to the appearance of a former judicial colleague are addressed in Advisory Opinion No. 70.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 73: Providing Letters of Recommendation and Similar Endorsements

Judges are often asked for letters of recommendation or other endorsements of particular persons. These requests come in a variety of circumstances. They may include requests on behalf of applicants for admission to colleges or law schools, persons seeking election or appointment to governmental offices, persons seeking appointment or employment by public and private entities, and persons seeking other forms of favor or consideration. This opinion considers how a judge should respond to such requests. It does not deal with recommendations for judicial office, a subject that is covered by Advisory Opinion No. 59.

Because such requests, and the entities to which a recommendation would be addressed, are so varied, no single rule is universally applicable. Judges receiving such requests should evaluate them in the light of certain established ethical considerations under the Code of Conduct for United States Judges.

To start, it is clear under Canon 5 of the Code that a judge should not recommend persons seeking election to political office, or otherwise permit himself or herself to become involved in politics.

With respect to non-political recommendations, judges should pay mind to the Canon 2B requirement that a judge "should [not] lend the prestige of the judicial office to advance the private interests of the judge or others . . . ." Accordingly, at the very least, a judge should not make a recommendation in support of a commercial venture, or when a recommendation is, or could reasonably appear to be, requested primarily because of the prestige of office. This is very likely to be the case whenever the relationship between the judge and the person seeking the recommendation is such that the judge is in no better position than many others would be to evaluate that person.

It must be recognized, however, that judges are members of society, and of the community at large, and that not every action of a judge is intended, or could reasonably be perceived, as an assertion of the prestige of judicial office. When a judge is personally aware of facts or circumstances that would facilitate an accurate assessment of the individual under consideration, a judge may properly communicate that knowledge, and his or her opinions based thereon, to those responsible for making decisions concerning the applicant. The judge's awareness may be based, for example, on a longstanding and intimate knowledge of the person or special knowledge derived from some relationship, such as that with a law clerk. The judge may communicate this information through a letter of recommendation or through another format.

In light of concerns under Canon 2B, some judges have adopted a policy of inviting the applicant to list the judge as a reference, instead of initiating letters of

recommendation, with the understanding that, if requested to do so, the judge would respond with information known to the judge concerning the applicant.

In any event, when responding to any type of request, the judge should carefully consider whether the recommendation or endorsement might reasonably be perceived as exerting pressure by reason of the judicial office, and should avoid any action that could be so understood.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 74: Pending Cases Involving Law Clerk's Future Employer

This opinion addresses the issue of appropriate procedures a judge should take when it is contemplated that a law clerk may accept employment with a lawyer or law firm that is participating in a pending case.

The Committee advises that such a circumstance does not in itself mandate disqualification of the judge. The law clerk, however, should have no involvement whatsoever in pending matters handled by the prospective employer. The Committee believes that the need to exclude the law clerk from pending matters handled by the prospective employer arises whenever an offer of employment has been extended to the law clerk and either has been, or may be, accepted by the law clerk; the formalities are not crucial.

The occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment, but there may be situations in which, because of the nature of the litigation, or the likelihood that a future employment relationship with the clerk will develop, the judge feels it advisable to take these precautionary measures even at a preliminary stage of the employment discussions.

To deal appropriately with this issue, the judge should take reasonable steps to require that law clerks keep the judge informed of their future employment plans and prospects. *See*, *generally*, Canon 4C(4) of the Code of Conduct for Judicial Employees.

In appropriate circumstances, the judge may elect to inform counsel that the law clerk may have a prospective employment relation with counsel and that the procedures described here are being followed.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 75: Disqualification Based on Military or Other Governmental Pensions

A number of judges receive pensions earned in the course of their military service or other governmental service. This opinion considers whether such a judge should disqualify when a military service or public body is a party.

The Committee advises that no reasonable basis for questioning the impartiality of the judge is raised when a judge who is receiving a military pension participates in a proceeding in which a military service is a party. *See* Canon 3C(1) of the Code of Conduct for United States Judges. Likewise, judges receiving a pension for other governmental service–local, state or federal–are not disqualified from cases in which the governmental entity is a party. Judges regularly participate in cases in which the federal government, from which the judge receives compensation for judicial services, is a party, without raising any reasonable question of the judge's impartiality.

Disqualification would be mandatory, however, when the outcome of the case could substantially affect the amount of the judge's pension or the judge's right to receive it. Canon 3C(1)(c). The mere presence of the military service or governmental entity as a party, however, when a judge's interest in the pension is not substantially affected, raises no question of disqualification.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 76: Service of State Employees as Part-Time United States Magistrate Judges

This opinion considers the propriety of appointing state or local public defenders or prosecutors as part-time United States Magistrate Judges.

The Committee advises that it would be inappropriate to appoint as part-time United States Magistrate Judges persons who are simultaneously serving as state or local public defenders or prosecutors. Likewise, it would be inappropriate for a part-time United States Magistrate Judge to serve as a state or local public defender or prosecutor.

The Judicial Conference has adopted Conflict-of-Interest Rules for Part-time Magistrate Judges. *See Guide to Judiciary Policy*, Vol. 2C, § 1110. Rule 3 provides that a part-time magistrate judge may appear as counsel in criminal actions in a state court. That provision relates to appearances as private counsel for the defendant and is permissible so long as it does not interfere with the performance of duty as a part-time magistrate judge.

Appearances in court of a part-time magistrate judge as a representative of the state or local government, whether as prosecutor or public defender, implicates two Canons of the Code of Conduct for United States Judges: Canon 1, that a judge should uphold the independence of the judiciary, and Canon 2, that a judge should avoid impropriety and the appearance of impropriety. Dual employment of the same person in the federal and in state or local judicial systems would be in conflict with the intent of these canons.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 78: Disqualification When Judge Is a Utility Ratepayer or Taxpayer

This opinion considers whether a judge needs to recuse when a party to a proceeding is a utility of which the judge is a customer or a governmental entity to which the judge pays taxes.

The Committee advises that mere status as a utility ratepayer, or as a taxpayer, is not in itself disqualifying. If the outcome of the proceeding could substantially affect the amount to be paid by the judge to the utility or in taxes, disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges would be required.

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

June 2009

Committee on Codes of Conduct Advisory Opinion No. 79: Use of Chambers, Resources, and Staff for Law-Related Activities Permitted by Canon 4

This opinion addresses the use of judicial resources for the preparation of writings, speeches, and teaching materials that are related to the law, the legal system, and the administration of justice. Although we have attempted to furnish some rules of general applicability to govern the use of such resources, we recognize that questions pertaining to particular uses will often be context dependent and will require line-drawing on the part of the judge involved. Consequently, we have incorporated a number of examples into our opinion to offer additional guidance with respect to this difficult issue.

Guidelines for determining whether an extrajudicial activity is law-related or non-law-related are contained in Advisory Opinion No. 93. This opinion addresses only the use of chambers, resources and staff for *law-related* extrajudicial activity. Advisory Opinion No. 80 addressed the use of judicial resources for activities that are not related to the law.

The use of judicial resources–including judicial chambers and staff, as well as legal research materials–for extrajudicial law-related activities is both authorized and limited by Canon 4 of the Code of Conduct for United States Judges. Under Canon 4, a "judge may engage in extrajudicial activities, including law-related pursuits" and "may speak, write, lecture, and teach on . . . law-related . . . subjects." In particular, the Code specifies that the following law-related pursuits are permissible:

A. Law-related Activities.

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

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

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

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

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

(3) Organizations. A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization

> devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

Canon A(1)-(3).[1]

In fact, the Code encourages judges to involve themselves in extrajudicial law-related activities:

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

Commentary to Canon 4.

Although the authorization is limited, the Code allows judges to use judicial resources when pursuing permissible extrajudicial law-related activities. In particular, the Code states the following: "*Chambers, Resources, and Staff*. A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon." Canon 4G. To some extent, then, the Code contemplates that a judge may properly use judicial resources in furtherance of permissible extrajudicial law-related activities. This opinion therefore gives guidance regarding the application of Canon 4G to a judge's involvement in law-related activities.

Two steps are required to determine whether the use of judicial resources for law-related activities is appropriate. First, the judge must determine whether the activity is "judicial" or "extrajudicial." If the activity is judicial, then the strictures of Canon 4G do not apply and a judge may make unlimited use of judicial resources. If the activity is extrajudicial, then the judge must next determine whether the use of judicial resources is "not to any substantial degree." Canon 4G.

In determining the scope of judicial duties, we start with the premise that a judge's central function is to decide cases. Accordingly, any activity directly related to this function is clearly judicial in nature. By itself, however, such a definition constitutes too limited a view of a judge's official duties. In addition to deciding cases, society properly expects a judge to supervise and educate members of the bar in the practice of

law in the judge's court and to act as an official representative of the judiciary. A federal judge is performing a judicial function when, for example, the judge gives a lecture to the local bar on the rules of procedure in the judge's court, gives a Law Day speech at the local high school, or presents a civics lecture on the judiciary to local community groups. Ultimately, however, the test for whether a particular activity qualifies as judicial rather than extrajudicial depends on whether the activity may properly be considered part of the judge's official duties.

Another rough way to gauge whether a judge is performing a judicial function is to look to who is paying the judge for the activity in question. A judge may not properly receive "compensation" beyond his or her normal salary for performance of a judicial activity. It generally follows that if a judge concludes it would be appropriate to receive compensation from a party other than the judicial branch of the United States for a law-related activity, the judge has necessarily determined that the activity is extrajudicial. However, this inference does not mean that all uncompensated activity should be regarded as judicial activity. *See, e.g.*, Ethics Reform Act, 5 U.S.C. App., §§ 501-505 (restricting the receipt of outside earned income and honoraria).

Once a law-related activity is determined to be extrajudicial, Canon 4G prohibits a judge from using judicial resources to any substantial degree. In interpreting this restriction, the Committee is mindful that judicial resources are held in public trust to assist judges in performing their official duties, and that to allow judges to draw upon these resources for extrajudicial activities diverts these resources from the function for which they were dedicated. At the same time, we recognize that judges are in a unique position to contribute to the improvement of the law and the judicial system by means of extrajudicial activities, and that these activities indirectly assist judges in the discharge of their official duties. *See* Commentary to Canon 4. Allowing judges some limited judicial resources to perform these activities permits such activities to be accomplished more efficiently, with resulting benefits for the functioning of the judge's entire office and the public more generally.

With these considerations in mind, we believe the following three criteria must be satisfied in order for a judge's use of judicial resources for extrajudicial activity to qualify as insubstantial. First, the absolute amount of staff time devoted to such activity must be minor or limited in amount. Ordinarily, the use of law clerks for one or two days for "blue-booking," cite-checking, editing, or discrete research assignments will qualify as a minor or limited use of law clerk time. By contrast, the use of law clerks for extensive research for, or drafting of, a substantial scholarly article ordinarily will not satisfy the requirements of this first criterion. These examples, of course, are not intended to represent bright-line rules; the amount of time for which a staff member is used must always be examined in the context of the individual's particular duties.

Second, if the extrajudicial activity is "compensated," a judge should not utilize judicial staff except as provided here. A judge may use judicial resources such as the library, chambers, and computers for compensated activity so long as this use is within

reasonable limits and the government incurs no incremental cost. However, the use of judicial personnel to assist the judge in performing activities for which extra compensation is to be received raises too great a risk of abuse to permit. The danger exists that a judge may pressure current or potential staff members to work on the judge's projects, and this danger is compounded by the difficulty of distinguishing between a staff member's official and unofficial time. Furthermore, extra compensation paid by the judge to the staff does not eliminate the danger that public resources will be misused for private gain. Thus, a judge may not avoid these restrictions on the use of judicial personnel for compensated activities, even if the judge offers to share this compensation with his or her staff.

We note that under the Code "compensation" is different than "expense reimbursement." *See*, *e.g.*, Canon 4H(1) & (2) (distinguishing "compensation" from "expense reimbursement"). "Expense reimbursement" within the meaning of the Code is limited "to *actual costs* of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative." Canon 4H(2) (emphasis added.). As a result, insubstantial use of chambers staff is generally permitted where the extrajudicial law-related activity results in "expense reimbursement" to the judge, but the judge does not receive "compensation." The absence of a profit motive reduces the risk of abuse mentioned in the preceding paragraph.

Third, the judge's use of judicial resources for extrajudicial law-related activity must not interfere with the judge's official duties. No judicial resources should be devoted to extrajudicial tasks if the judge needs these resources to perform judicial functions in a timely fashion. Accordingly, even a minor use of judicial resources may be regarded as substantial under Canon 4G if such use has an adverse impact on the business of the court.

Finally, when federal statutes or regulations impose other more stringent duties and obligations on judges pertaining to the appropriate use of government resources, these statutes or regulations, of course, control.

Note for Advisory Opinion No. 79

[1] Other legal activities outside the official judicial function, such as private arbitration or mediation and the practice of law, are prohibited. Canon 4A(4)-(5). For these prohibited activities, it would never be appropriate to use judicial resources.

June 2009

Committee on Codes of Conduct Advisory Opinion No. 80: Use of Chambers, Resources, and Staff for Activities Permitted by Canon 4 that are Not Related to the Law

In a pluralistic society, judges can enrich their communities and their own lives by participation in those civic, charitable, and avocational activities best suited to their talents, interests, and backgrounds. A judge can preserve the integrity of the judicial office without undergoing complete isolation from community life.

In this opinion, the Committee supplies advice concerning the use of judicial resources by judges for activities that are not related to the law. Guidelines for determining whether an extrajudicial activity is law-related or not are contained in Advisory Opinion No. 93. Advisory Opinion No. 79 addresses the use of judicial resources for law-related extrajudicial activities.

Canon 4 of the Code of Conduct for United States Judges permits judges to engage in a variety of activities not related to the law. In pertinent part, Canon 4B states: "A judge may engage in extrajudicial activities, including . . . civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on . . . nonlegal subjects." Noting that a "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise," and observing that "a judge should not become isolated from the society in which the judge lives[,] the Code makes plain that, subject to limitations, judges "may [] engage in a wide range of non-law-related activities." Commentary to Canon 4.

There are, however, both general and specific limitations to that authorization. For example, "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality [or] lead to frequent disqualification[.]" Canon 4. Specific limitations also apply, such as to a judge's involvement in civic and charitable activities; fund-raising activity; financial ventures; fiduciary matters; and governmental committees and commissions. Canon 4B-F. Judges must also refrain from political activity. Canon 5. Still further, a judge should not use "the judicial office to advance the private interests of the judge or others . . . ." Canon 2B.

We reaffirm the need for judges to observe these limits on non-law-related activities. That said, where a non-law-related activity is permitted by Canon 4, there is a further question whether the judge may make use of judicial resources, including chambers, facilities, and staff, and, if so, to what extent.

Although the authorization is limited, the Code allows judges to use judicial resources when pursuing permissible non-law-related activities. In particular, the Code states: "*Chambers, Resources, and Staff*. A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted

by this Canon." Canon 4G.[1] To some extent, then, the Code contemplates that a judge may properly use judicial resources in furtherance of the judge's permissible non-law-related activities; this Advisory Opinion gives guidance regarding the application of Canon 4G to a judge's involvement in non-law-related activities.

First, Canon 4G prohibits a judge from using judicial resources to any substantial degree. In interpreting this restriction, the Committee is mindful that judicial resources are held in public trust to assist judges in performing their official duties, and that to allow judges to draw upon these resources for extrajudicial activities diverts these resources from the function for which they were dedicated. We are also mindful that, unlike extrajudicial law-related activities, which are encouraged by the Code, non-law-related activities are permissible, but not specifically encouraged. *See* Commentary to Canon 4. Therefore, a judge contemplating the use of judicial resources for non-law-related activities should start with a sensitivity to these twin observations and limit use accordingly.

Second, we believe that many of the principles regarding use of judicial resources for law-related activities set forth in Advisory Opinion 79 are applicable to non-law-related activities. (Although we do not advise that a permissible use of judicial resources for a law-related activity is necessarily permissible for a non-law-related activity). Thus, the absolute amount of staff time devoted to non-law-related activities must be minor or limited in amount. For example, the use of staff to maintain extensive files, correspondence, or equipment regarding non-law-related activities would be inappropriate. Furthermore, if the non-law-related activity is "compensated," a judge should not utilize judicial staff. In addition, no judicial resources should be devoted to non-law-related activities if the judge needs these resources to perform his or her judicial functions in a timely fashion. Accordingly, even a minor use of judicial resources may be regarded as substantial under Canon 4G if it has an adverse impact on the business of the court.

Third, there are some categories of use that are generally appropriate. For example, a judge may perform a permissible non-law-related activity in chambers so long as the activity does not interfere with the full and prompt performance of judicial duties and so long as the government incurs no incremental costs. Appropriate use of judicial resources is also exemplified by occasional telephone calls, scheduling, and storage of files, books, or equipment.

Fourth, anything more than the most minor use of government-owned supplies for non-law-related activities is inadvisable. Thus, it is prudent to use the judge's own funds to purchase the supplies necessary to perform the non-law-related activity. For example, a judge should purchase postage for use in non-law-related activities.

Finally, when federal statutes or regulations impose other, more stringent duties and obligations on judges pertaining to the appropriate use of government resources, those statutes or regulations, of course, control.

Note for Advisory Opinion No. 80

[1] With the most recent revision of the Code, the prior "de minimis" standard for use of judicial resources for non-law-related activities was omitted. *Compare* Code of Conduct for United States Judges, Canon 4G (2009) *with* Code of Conduct for United States Judges, Canon 5H (last clarified, September, 2000). The standard stated in Canon 4G of the present Code is now the same for law-related and non-law-related activities.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 81: United States Attorney as Law Clerk's Future Employer

In Advisory Opinion No. 74, the Committee dealt with appropriate procedures when a law clerk has been extended an offer of employment by a lawyer or a law firm and the offer has been or may be accepted by the clerk. This opinion deals with appropriate procedures when a clerk has been offered employment by a particular United States Attorney's office, and the offer has been or may be accepted by the law clerk. The United States Attorney's office is not a law firm and the law clerk would have no financial interest in that office. *See* Advisory Opinion No. 38 ("Disqualification When Relative Is an Assistant United States Attorney"). Nonetheless, participation by the law clerk in a pending case involving the prospective employer may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel. *See* Canon 3F(1) of the Code of Conduct for Judicial Employees.

The judge should isolate the law clerk from cases in which that particular United States Attorney's office appears. *See* Advisory Opinion No. 74.

To avoid a future appearance of impropriety or potential grounds for questioning the impartiality of the court, a former law clerk should be disqualified from work in the United States Attorney's office on any cases that were pending in the court during the law clerk's employment with the court. A court rule may be adopted for this purpose. *See, e.g.*, Sup. Ct. R. 7; D.C. Circuit Rule 1(c).

June 2009

Committee on Codes of Conduct Advisory Opinion No. 82: Joining Organizations

Judges are interested in joining a wide variety of organizations and are often invited to join different organizations. Under Canon 4 of the Code of Conduct for United States Judges, judges are authorized to contribute their time and energy to a wide range of organizations, subject to certain limitations. *See* Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law"). Indeed, the Code recognizes that "a judge should not become isolated from the society in which the judge lives." Commentary to Canon 4.

When contemplating joining an organization, a judge must consider carefully the Code's fundamental commands to avoid impropriety or the appearance of impropriety, not lend the prestige of office, and not participate in activities that would detract from the dignity of the judge's office, interfere with the performance of official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification.

The motivation of the numerous organizations that have invited judges to join may vary from a simple desire to have the benefit of the judge's advice to a desire to employ the prestige of the judge's office to advance the organization's own interests. The activities of the inviting organization also vary widely. The Committee is neither equipped nor chartered to investigate or evaluate the motivation or activities of the inviting organization. Although the Committee is always available to provide specific guidance, in general individual judges must determine case-by-case whether it is appropriate to join a particular organization.

In Advisory Opinion No. 2, the Committee details factors that judges should consider when deciding whether to serve on the governing board of a nonprofit organization. The Committee believes the factors apply as well to the decision to join an organization (although the judge's determination may be affected by what role the judge anticipates in the organization) and so repeats them here. In addition to the basic principles outlined above, a judge should consider these factors before joining an organization:

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

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

- The judge may not join any organization that practices invidious discrimination. Canon 2C.

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

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

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

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

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 83: Payments to Law Clerks from Future Law Firm Employers

This opinion discusses the ethical propriety of law clerks receiving payments, either before or during their clerkships, from the law firms for which they have agreed to work following their clerkships. The Committee considers payments from law firms in the form of bonuses, payments for deferring employment start dates, salary advances, benefits such as health insurance, or reimbursement for bar-related and relocation expenses. The guidance in this opinion would also apply to any other form of payments offered to clerks by their prospective law firm employers. For the purposes of discussion, the Committee assumes that the clerk will not participate in any judicial decisions that involve the clerk's future employer. *See* Advisory Opinion No. 74 ("Pending Cases Involving Law Clerk's Future Employer").

The Committee notes that the guidance in this opinion applies equally to law clerks who are paid for their work by the United States government and to individuals who work for judges in an unpaid capacity.[1] It does not matter what term is used for these individuals: "volunteer law clerk," "extern," "intern," etc. Like paid clerks, these volunteers are subject to the Code of Conduct for Judicial Employees ("Employees' Code"). Voluntary and uncompensated services to the court are governed by 28 U.S.C. § 604(a)(17)(A), wherein the Clerk of Court is delegated by the Director of the Administrative Office to accept such services. *See Guide to Judiciary Policy*, Vol. 12, §§ 550.20 and 550.80. As a matter of judicial policy, most volunteers are deemed judicial employees, albeit uncompensated ones. *Id*. The Employees' Code applies to all judicial employees (except those officials or employees who have governing codes of conduct from other sources), and the Committee has previously recognized that unpaid interns should follow the Employees' Code. Additionally, 5 U.S.C. § 7353, which provides that employees of the judicial branch are restricted in when they can receive or solicit gifts or other things of value from those seeking official action or doing business with the court, also applies to unpaid externs.

Canon 4 of the Employees' Code provides guidance on whether law clerks may receive payments from prospective law firm employers during their clerkships. Canon 4C states that "a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States." Canon 4B(3) instructs that judicial employees "should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court." Additionally, 5 U.S.C. § 7353(a) provides that:

> no . . . employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person –
>
> > (1) seeking official action from [or] doing business with . . . the individual's employing entity; or

(2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.

Law clerks are offered payments by prospective law firm employers for a variety of reasons. Sometimes firms provide a "clerkship bonus" that is paid solely on the basis that the individual served as a law clerk for a judge. In other instances firms provide a bonus uniformly to all new associates of the firm, such as a "signing bonus" paid when the offer of employment is accepted. Some firms have developed programs through which associates will defer the start date to their firm employment in return for specified payments. Firms also often provide reimbursement for expenses related to relocation and taking the bar exam. Some firms offer salary advances that must be repaid when the law clerk begins working at the firm. Some of these assorted payments are scheduled for acceptance before the clerkship, some during, and some after. Based on the ethical considerations raised, we will discuss acceptance of payments according to when the payments would be accepted.

Acceptance of Payments Before the Clerkship: The Code of Conduct for Judicial Employees applies only to "employees of the Judicial Branch," not to prospective employees. Similarly, 5 U.S.C. § 7353 applies only to "employees" of the judicial branch. Accordingly, a prospective law clerk is not prohibited from accepting a payment from a law firm before the beginning of the clerkship, provided that the law clerk is not legally obligated to repay the firm. However, judges are advised against appointing volunteer externs who are provided payments by law firms before, during or after the externship that are dependent on the individual serving as a judicial extern, for instance through a starting date deferral program that included such a restriction. This restriction would not preclude appointing, subject to other ethical restrictions, an extern who would receive a deferral payment before or following (though not during) an externship that was not tied to serving as a judicial extern.

A judge should not permit a law clerk to accept a salary advance from a law firm, either before or during the clerkship. The Committee views a salary advance as a loan from the law firm to the law clerk, through which the law firm effectively provides a supplement to the law clerk's salary during the clerkship. Acceptance of a salary advance could undermine public confidence in the integrity and independence of the court, and is contrary to Canon 4B and 4E of the Employee Code.

Acceptance of Payments During the Clerkship: A law clerk may not, during his or her service as a law clerk, accept *any* payment or salary advance from a law firm, except as noted below regarding reimbursement. Accepting any payments during the clerkship would violate Canon 4B(3) and 4C, as well as the prohibitions of 5 U.S.C. § 7353. In addition, benefits paid for by a law firm may not be accepted during the period of service to the courts; for example, a volunteer extern may not accept health insurance benefits from a law firm during the term of the externship.

The Committee has also advised that a law clerk may not accept, during a clerkship, travel and other expenses associated with attending a "retreat" with a law firm that is the law clerk's future employer. Accepting such payments would be contrary to Canon 2 (avoiding the appearance of impropriety) and Canon 4C(2) of the Employee Code (prohibiting the acceptance of a gift from anyone seeking official action from or doing business with the court or whose interests might be substantially affected by the performance or nonperformance of an employee's official duties). *See also, Judicial Conference Gift Regulations § 3* (*Guide to Judiciary Policy,* Vol. 2C, § 620.35(a)).

Acceptance of Payments Following the Clerkship: As with prospective clerks, the Code and § 7353 do not apply to former clerks, and so would not prohibit acceptance by former clerks of payments such as clerkship bonuses. The Committee includes this category, however, to caution judges against appointing volunteer externs who may receive payments following their externships that are tied specifically to serving as a judicial extern.

Reimbursement for Bar-Related and Relocation Expenses: The Committee observes no problem with law clerks accepting reimbursement for relocation or bar-related expenses from a future employer, whenever that reimbursement is received. Prospective judicial employees are not covered by the Code, so the acceptance of reimbursement before the clerk begins work for the judge would not be prohibited. With regard to accepting such reimbursement payments during the clerkship, the Judicial Conference Gift Regulations, § 5(b)(6), specifically permits a judicial employee "who has obtained employment to commence after judicial employment ends" to accept "reimbursement of relocation and bar-related expenses customarily paid by the employer, so long as conflicts of interest are avoided." Judicial Conference Gift Regulations § 5(b)(6) (*Guide to Judiciary Policy,* Vol. 2C, § 620.35(b)(6)).

The Committee recognizes, of course, that some judges may prohibit their future or present law clerks from accepting bonuses or other payments that are permissible under this opinion. Accordingly, the present or future law clerk should consult with his or her judge before accepting any payment or reimbursement from the clerk's future law firm.

Note for Advisory Opinion No. 83

[1] This guidance may not apply to certain types of volunteers who are not considered to be judicial employees. *See, e.g., Guide to Judiciary Policy, Volume 12, § 550.60 (College Work-Study Programs); § 550.70 (Cooperative Education and Fellowship Programs); and § 550.80 (Volunteers).*

August 2011

Committee on Codes of Conduct Advisory Opinion
No. 84: Pursuit of Post-Judicial Employment

This opinion considers measures that judges contemplating retirement or resignation may appropriately take to explore post-judicial employment.

A judge is subject to a number of obligations under the Code of Conduct for United States Judges in relation to this exploration. Canon 2A directs judges to avoid impropriety and the appearance of impropriety, and to act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3 instructs that the "duties of judicial office take precedence over all other activities." Canon 3C(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 4D(3) provides that "as soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification." Canon 4D(1) also provides that, while a judge may engage in remunerative activity, the judge "should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves."

The Committee concludes that a judge contemplating retirement or resignation appropriately may explore a professional relationship with law firms or other potential employers, provided that the judge proceeds in a dignified manner and complies with the Code. Although this opinion discusses exploration of employment opportunities with a law firm, the principles discussed would apply to other potential employers.

After the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge must recuse, subject to remittal, on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned. In addition, judges who are contemplating post-judicial employment with any private entity must comply with relevant provisions of the STOCK Act, Pub. L. No. 112-105, 126 Stat. 291 (2012). Among other requirements, the STOCK Act requires judges to submit a statement within three days of the commencement of any negotiation or agreement for post-judicial employment, and to file similar statements concerning recusal with respect to a future employer. For further information on complying with the STOCK Act, refer to the *Guide to Judiciary Policy*, Vol. 2C, Ch. 14.

In deciding what law firms to contact, a judge should be sensitive to public perspective and to obligations under the Code. At one extreme, a judge steers far from any impropriety or appearance of impropriety by negotiating only with firms that have not appeared before the judge. At the other extreme, a judge should refrain from negotiating with a firm, if the firm's cases before the court are of a character or frequency such that the judge's recusal (which would be required) would adversely affect litigants or would have an impact on the court's ability to handle its docket. In

such cases, judicial duties would have to take precedence over the legitimate personal interest in post-judicial employment.

In this regard, the Committee believes that a judge properly may negotiate with a law firm that appears before the court on which the judge serves, but only if the judge's recusal in such cases would not unduly affect the litigants or the court's docket. For example, it may be feasible to transfer those cases to other judges on the court without undue burden. But a judge should not negotiate for future employment with a firm, if transferring the cases would unduly burden the court by causing undue delays to these and other pending cases, or unduly prejudice litigants by causing repetition and delays of proceedings.

A judge should not explore employment opportunities with a law firm that has appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned. The appropriate interval of time will depend upon all the particular facts and circumstances. If a judge begins negotiations for future employment, but later decides not to leave the bench, the judge should continue to recuse from cases involving the firms or entities with which the judge negotiated, subject to remittal. Again, the appropriate interval for such recusals depends on the circumstances, including the nature and scope of the negotiations, but the Committee recommends recusal, subject to remittal, for a period of at least one year from the conclusion of the negotiations.

The Committee has approved the propriety of the procedure whereby the judge makes known a future retirement or resignation date, and during a reasonable time in the interim between the announcement and the projected retirement date the judge would complete pending assignments but not take on new cases. However, in the case of an active judge, the Committee concluded that it would be inappropriate for a judge to withdraw from all judicial duties during the interim between such an announcement and the projected retirement date. That approach would violate the duty of an active judge to perform judicial duties and would violate the requirement that judicial duties take precedence over all other activities.

A variety of ethical questions may arise concerning activities related to a judge's future employer. The Committee has advised that it is generally inappropriate for a judge to attend meetings or engage in communications with the judge's future employer concerning the employer's business. The Committee has advised, more generally, that attending social functions sponsored by a future employer gives rise to an appearance of impropriety, and therefore should be avoided until the judge's resignation is effective.

Questions also may arise concerning a future employer's desire to announce or otherwise advertise a judge's post-judicial employment. On these questions, the Committee has advised that once the judge has actually resigned and joined the new employer, it is not improper for the employer's formal announcement of affiliation to identify the office and court from which the judge retired or resigned. However, that

guidance assumes the announcement is made after the judge has left the bench. A post-resignation announcement avoids the appearance of impropriety because, after a judge has left the bench, the judge has no judicial position, and therefore no position to exploit. However, while a judge remains in office, this risk remains. In addition, the Committee has advised that by allowing a future employer to advertise the judge's employment while the judge remains in office, the judge unavoidably lends the prestige of judicial office to advance the private interests of the future employer. Similarly, the prospect of a pre-resignation announcement raises Canon 2 concerns for the judge. Although the judge may not enjoy any immediate profit from the announcement, the judge's future employer likely benefits from its association with a sitting judge, and the judge arguably stands to gain indirectly from the public advertisement of the judge's post-judicial employment. It follows that announcements of the judge's future employment made through interviews or contacts with the media are subject to the same restrictions.

April 2016

Committee on Codes of Conduct Advisory Opinion
No. 85: Membership and Participation in the American Bar Association

This opinion considers the propriety of a judge holding membership in the American Bar Association and actively participating in ABA programs, such as speaking on panels, considering that the ABA occasionally takes positions on controversial issues. It also discusses whether a judge who is an ABA member is required to recuse in a case in which the ABA files an *amicus curiae* brief.

The Commentary to Canon 4 specifically encourages participation in bar associations:

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

Canon 4 further provides, however, that a judge should not participate in extrajudicial activities "that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below [in Canons 4A through 4H]." The Committee has set forth considerations judges should take into account when joining organizations or serving on the boards of organizations in Advisory Opinion Nos. 2 and 82. Advisory Opinion 93 discusses generally participation in extrajudicial activities related to the law.

The Committee advises that it is permissible for a judge to be a member or officer of an open membership bar association and that recusal is not required where such a bar association is a party or files an amicus curiae brief, so long as the judge has not participated in the development of the bar association position on the matter in question in the suit. *See* Advisory Opinion Nos. 34 ("Service as Officer or on Governing Board of Bar Association"), 52 ("American Bar Association or Other Open-Membership Bar Association Appearing as a Party"), 82 ("Joining Organizations"), and 93 ("Extrajudicial Activities Related to the Law").

In the Committee's view, the judge's membership in the ABA and participation on an ABA panel, as long as the panel is not devoted to a controversial subject, cannot

reasonably be viewed by the bar or the public as an endorsement of any of the positions the ABA has occasionally taken on controversial issues.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 86: Applying the Honoraria, Teaching, and Outside Earned Income Limitations

This opinion considers an application of the rules governing judges regarding honoraria, teaching and outside earned income. The Committee takes as an example a judge who has already received for the calendar year "outside earned income" equal to the 15% limit imposed by 5 U.S.C. App. § 501(a)(1), but, in addition, plans to deliver in the same year a lecture at a law school for which the school would ordinarily pay a stipend. (The Committee notes at the outset that § 502(b) was amended in 1991 to exclude from the 15% cap income received by senior justices and judges for approved teaching.) We discuss three questions arising from this situation.

1*. Is There An Option to Treat the Stipend for the Lecture Either as Honorarium or as Compensation from Teaching?*

The lecture falls squarely within the definition of teaching in the Judicial Conference Ethics Reform Act Regulations on Outside Earned Income, Honoraria, and Outside Employment, § 5(b) ("course of study at an accredited educational institution or participating in an educational program of any duration that is sponsored by such an institution and is part of its educational offering. Examples of the latter are a lecture . . . ."). Regulation § 4(b)(2) defines honorarium to mean a payment for, *inter alia*, a speech, but excludes from the definition of an honorarium "[c]ompensation received for teaching activity, . . . approved pursuant to § 5 hereof." The Committee addresses whether the regulation could be read to give the judge an option to treat the lecture stipend *either* as an honorarium *or* as compensation from teaching, i.e., by reading Regulation § 4(b)(2) as excluding teaching compensation from the definition of honoraria only if the teaching activity is actually approved in the prescribed manner. Thus, by declining to obtain such approval, the judge in the example could in effect elect to treat the lecture stipend as an honorarium. The judge would then be able to take advantage of § 501(c) of the statute, which would permit the law school on behalf of the judge to pay the lecture stipend (up to $2,000) to charity.

The Committee's interpretation of the statute and regulation is that the lecture stipend is compensation for teaching, and cannot be treated as an honorarium. The intent of the regulations was to define teaching to include the educational offerings (including a lecture or lecture series) of an accredited law school, and to exclude from the definition of honoraria compensation received for teaching as thus defined. The regulation was not intended to allow a judge an option to obtain prior approval and treat such an amount as teaching, or to fail to obtain prior approval and treat the amount as an honorarium. This interpretation is supported by the Commentary:

> The Act does not define "teaching." These regulations define it to include meaningful participation in *bona fide* components of an educational curriculum or plan, regardless of the duration or format

> of the particular program in which the [judicial officer] participates. The statutory authority to "teach" for compensation thus includes permission to participate in the educational program of an accredited institution in the manner in which that institution plans and carries out its teaching function. When speeches and lectures are sponsored by and presented within the overall educational program of an accredited institution, the Conference believes that they do not provide the occasion for any of the evils Congress was seeking to avert [in the ban on honoraria] and accordingly, they should qualify as "teaching." Thus, a lecture, lecture series, symposia, moot courts, and jurist-in-residence programs may be compensated as "teaching," provided, of course, the strictures of the Codes of Conduct are met.

2. *Can 5 U.S.C. App.§ 501(c) Be Expansively Read to Encompass Teaching Compensation as Well as Honoraria?*

We next address whether the rationale of § 501(c) of the statute (permitting an otherwise banned honorarium to be paid on behalf of a judge to charity) can be expanded to compensation for teaching, which the law school is willing to pay, but that the judge cannot receive because of the 15% cap. In other words, if a judge directs the law school to give to charity amounts (up to the § 501(c) limit of $2,000) that the law school otherwise would have paid the judge, will such amounts be "deemed not to be received" under § 501(c), thus avoiding the 15% limit on outside earned income under § 501(a)(1). It has been suggested that similarities between honoraria and teaching compensation would make it rational for the § 501(c) rule to apply to both. However, the Committee interprets the statute and regulations to permit § 501(c) payments to charity *only* for honoraria, and not for teaching compensation. The fact that Congress limited § 501(c) to honoraria evidences a congressional intent that § 501(c) apply only to honoraria and not to teaching compensation. Moreover, one of the purposes of the 15% cap was to provide a bright line limit on outside activities to ensure that primary effort was devoted to the governmental function. This interpretation furthers that purpose.

3. *Is the Lecture Stipend Excluded from "Outside Earned Income" under Regulation § 3(b)(6)?*

Finally, the Committee considers whether Regulation § 3(b)(6) might exclude the stipend from the definition of "outside earned income" if the stipend is paid directly to a charity designated by the judge. That regulation excludes from the definition of "outside earned income":

> Anything of value earned or received for services rendered which is not includible as gross income in the relevant calendar year under controlling provisions of the Internal Revenue Code[.]

It has been suggested that under the complex tax principle of assignment of income, it is uncertain whether such amounts would be included in gross income for tax purposes.

Regulation § 3(b)(6) was included in the regulations because the regulations could not possibly provide adequate guidance on all of the questions likely to arise about the concept of earned income and the allocation of earned income to reporting years. The reference to the Internal Revenue Code in that section was intended to simplify the administration of the cap on earned income and provide judges with greater assurance that their conduct would not be called into question in those instances in which they received something of value that clearly would be excludable from that year's "gross income" for tax purposes. Where it is doubtful whether the amount in issue would properly be excludable from the judge's gross income for tax purposes, the Committee advises that the judge include the amount when planning compliance with the 15% cap, particularly where to do otherwise would appear to undermine the purposes of the cap. Accordingly, unless a judge is confident that the amounts diverted to charity would not be includible in gross income for tax purposes in the reporting year as having been constructively received, the Committee's advice is that the judge include those amounts in planning compliance with the 15% cap on outside earned income.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 87: Participation in Continuing Legal Education Programs

The Committee regularly receives inquiries from judges concerning various forms of participation in continuing legal education (CLE) programs and the impact of the Code of Conduct for United States Judges, together with various statutory and regulatory provisions, on such participation. This opinion summarizes the Committee's views concerning the ethical implications of judicial participation in such programs, and sets out important caveats at the end of the opinion. In Advisory Opinion No. 105, the Committee addresses judges' participation in private law-related training programs *other* than those offered by CLE providers, accredited institutions, and similar established educational providers. The caveats at the end of this opinion are equally applicable to Advisory Opinion No. 105.

In general, under Canon 4, judges are permitted to teach and write, and to receive compensation and reimbursement of expenses for doing so: "A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety . . . ." Canon 4H. Judges are not, however, permitted to accept honoraria, defined as including payment for a personal appearance, speech, or article. *See* 5 U.S.C. App. § 501(b); § 505(3)-(4); *Judicial Conference Regulations On Outside Earned Income, Honoraria, and Outside Employment* § 4(b); *Guide to Judiciary Policy*, Vol. 2C, § 1020.30 ("Regulations").

The Regulations make clear that "participation in continuing legal education programs for which credit is given by licensing authorities or programs which are sponsored by recognized providers of continuing legal education" constitutes teaching activity for which compensation (and reimbursement of expenses) may properly be accepted, and that such compensation is not prohibited honoraria. Regulation § 5(b). *See also* Regulations § 4(b)(2); 5 U.S.C. App. § 505(3)-(4).

It is, of course, necessary for the judge to obtain advance approval from the chief judge of the circuit before engaging in such teaching activity. Regulation § 5(c)-(d). Additionally, the normal restrictions on extrajudicial compensation and reimbursement of expenses apply, including: the compensation must be reasonable in amount and no greater than a similarly situated non-judge would receive for the same service; the 15% cap on "outside earned income" is applicable to the compensation paid; expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative; any additional payment is treated as compensation; and the payment must be included in the judge's annual financial disclosure report. *See* Canon 4H; Regulation § 3.

Judges are permitted to receive separate or additional compensation for preparing written instructional materials for use in CLE programs. Ordinarily, such payments constitute compensation for teaching activities, rather than a sale of intellectual property or receipt of a royalty, and therefore such payments fall within the 15% "outside earned income" limitation. There may, however, be situations involving a CLE program and the sale of copyrighted material where the sale of intellectual property may not be considered as producing "outside earned income." The Regulations permit judges to receive "[r]oyalties, fees, and their functional equivalent, from the use or sale of copyright . . . received from established users or purchasers of those rights." Regulation § 3(b)(5). In addition, the Regulations permit judges to exclude such sums from the computation of the annual "earned income" cap. *Id.* (The Committee notes that it is authorized to address inquiries from judges regarding whether income is properly treated as "outside earned income" or excluded royalty income for purposes of the regulations. Regulation § 6.)

Avoiding Improper Exploitation of Judicial Office

The Code bars a judge from lending the "prestige of the judicial office to advance the private interests of the judge or others . . . ." Canon 2B. Thus, a "judge should be sensitive to possible abuse of the prestige of office." Commentary to Canon 2B. This caution applies to a judge deciding whether to participate in a CLE program.

The Committee believes that a judge who, when writing or teaching, utilizes the special insights derived from his or her judicial experience, is not engaging in improper exploitation of the judicial office if the subject is not principally concerned with the specific court on which the judge sits.

A judge who writes on a legal topic or teaches in the field of law inevitably draws to some degree upon his or her experience as a judge. This is unavoidable if judges are to write and teach as the Code encourages them to do. *See* Commentary to Canon 4 ("Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice."). And, as noted earlier, the Code expressly approves the receipt of reasonable compensation for permissible scholarly activity. But the Committee believes that there is a distinction between a judge's writing or teaching for compensation when the subject matter is how to practice before the judge's own court, and writing or teaching for compensation on other legal topics with respect to which the judge does not occupy a unique position by virtue of his or her own particular judgeship. The "unique position" mentioned in the Commentary to Canon 4 means the judicial position in general, rather than the particular judgeship of that particular judge.

For a judge to derive financial benefit, over and above the judicial salary, from the publication and sale of a book about his or her own court, or from participation in a seminar on the same topic, would constitute exploiting the judicial position for financial gain. It could also permit others—the publisher of the book, the sponsor of the seminar—to benefit from the judge's exploitation of his or her judicial position. When the subject matter is so limited, there is the likelihood that a lawyer practicing in that court could reasonably believe that purchase of the publication, or attendance at the seminar, is endorsed or expected by the judiciary.

In short, it is the Committee's view that it is inappropriate for a judge to sell his or her expertise on the idiosyncrasies of practice before that particular court. This does not mean that a judge cannot lecture or write on that subject, only that the judge may not properly do so for compensation. Nor does this mean that a judge who is lecturing or writing for profit about some aspect of legal practice or procedure is foreclosed from giving illustrations from his or her own experience on the court, only that a judge may not charge for giving a lecture or writing a book where the principal focus is how to practice before the judge's court and where, as a necessary result, a substantial part of the value and appeal to the audience arises from the fact that the lecturer or author is an "insider."

Limitations on Uncompensated Teaching or Writing

As stated above, when a judge's teaching or writing focuses upon the ins-and-outs of practice before that judge's court, his or her particular judicial position is being exploited, to some extent. It is therefore improper for the judge to receive compensation for such activities, because to do so would be to exploit the judicial office for his or her own private gain. By the same token, when the sponsoring entity of the seminar or course is a private individual or a for-profit entity, the judge could be said to be exploiting the judicial position for the private benefit of the sponsor, irrespective of whether the judge is being compensated. *See* Advisory Opinion No. 105 ("Participation in Private Law-Related Training Programs"). With the caveats noted below, where the sponsoring organization is a law-related non-profit entity, however, these restrictions do not normally apply: Canon 4 permits judges to assist in the activities of law-related entities, including to a limited degree their fund-raising activities, so long as the judge does not personally participate in fund-raising activities. Hence, there is no ethical impediment to a judge teaching or writing about the practices of his or her own court, if the sponsor is a law-related non-profit entity, provided the judge does not accept compensation for doing so and the judge's presentation is not essentially a fund-raising mechanism. In such a circumstance, the judge may accept reimbursement of expenses, but not compensation, from the law-related non-profit entity.

In summary, it is permissible for judges to engage in teaching and writing, including participating in CLE seminars, and to accept compensation for doing so, unless the subject matter primarily relates to practice before the judge's own particular

court. When the subject matter is thus focused, a judge may participate only if no compensation is accepted, and only if the sponsoring organization is a non-profit entity.

It is the continuing obligation of the participating judge to monitor any promotional activities associated with his or her participation to ensure that no improper exploitation of judicial office occurs. *See* Advisory Op. No. 55 ("Extrajudicial Writings and Publications").

Important Caveats

Canons 2A and 2B of the Code are concerned with (1) preserving the appearance of impartiality, (2) prohibiting the lending of a judge's prestige to advance the interests of others, and (3) avoiding the impression that others are in a position to influence the judge. Thus, even though Canon 4 encourages judges to assist with legal education, the Committee has previously applied Canon 2 principles to participation in legal training programs, whether such programs offer CLE credit or not and whether the sponsor is a "for-profit" or "non-profit" entity.

In other words, merely because a provider offers CLE credit or is a "non-profit" entity does not eliminate the requirement that a judge determine whether his or her participation runs afoul of Canon 2. The following four examples illustrate how Canon 2 concerns may override the general desirability of judicial participation in the education of lawyers.

Example 1. The way in which seminars are marketed is important when considering whether Canon 2 trumps Canon 4 regarding judicial participation in seminars providing CLE for lawyers. For example, the Committee has advised against judicial participation in a CLE seminar, even though the judge would not be compensated, where the seminar exhibited in varying degrees all of the following characteristics: (a) the seminar focused on specialized litigation topics (for example, employment discrimination litigation, ERISA litigation, or asbestos claims) and required the payment of substantial fees in order to attend; (b) the seminar was aggressively marketed by a for-profit provider using marketing materials that highlighted the judge's participation (sometimes including photographs of the judge in marketing materials) to the exclusion of other speakers; (c) the seminar marketing materials suggested that participants would obtain special or exclusive access to the judge; (d) the seminar marketing materials described judicial participation in non-neutral terms, suggesting that the judge's participation would help attendees be more effective in court; and (e) seminar attendees were predominantly lawyers with a particular orientation (for example, members of the defense bar). Considering all these factors together, the Committee concluded that judicial participation in such a seminar could lead a reasonable person to question the judge's impartiality, to believe that the judge is biased in favor of defendants, and

to conclude that the judge's prestige had been lent to advance the interests of the seminar sponsor or attendees. The Committee concluded that the special nature of the seminar and the privileged ability to learn helpful litigation tactics also suggested to a reasonable person that the sponsor or the attendees may be in a special position to influence a participating judge.

Example 2. In another "marketing" inquiry, the Committee recommended against judicial participation in a seminar (a) where the fees charged for attendance were likely to be substantially in excess of the direct cost of providing CLE credit to the seminar attendees; (b) where the marketing materials used by the sponsor prominently featured the biographies and photographs of the judges; (c) where the marketing materials suggested that participants would obtain special or exclusive access to the judges; and (d) where the seminar focused on the judges' courtroom practices. The Committee reasoned that when seminar marketing materials imply that a judge will give special access to a limited group of lawyers on matters pertaining to that particular judge's courtroom practices, and when lawyers pay a substantial fee to a third party to participate in the seminar, then the judge cannot be said to have avoided the appearance of impropriety. Rather, under those circumstances, it can be said that a judge has lent the prestige of his or her office to the sponsor by participating. In the foregoing example, the Committee recommended against participation even though the judges were to receive no compensation and even though the sponsor might have been a "non-profit" entity.

Example 3. As suggested by the preceding example, the fact that a sponsor is denominated a "non-profit" organization does not mean that the Committee automatically will treat the sponsor as a non-profit organization for purposes of applying Canon 2 of the Code of Conduct. Thus, if a seminar provider offering CLE credit (a) acts as if it is a private business when it offers seminars in which judges participate by aggressively emphasizing judicial participation as a marketing mechanism and (b) charges fees that are likely to be substantially in excess of the direct cost of providing CLE credit to seminar attendees, the Committee will consider the sponsor to be a "for-profit" entity without regard to its precise corporate or tax status.

Example 4. The involvement of lawyers from a single law firm in conjunction with a seminar providing CLE credit and offered by a separate third-party sponsor has caused the Committee to question the propriety of judicial participation. Thus, even though the judges were to receive no compensation, where (a) members from one law firm solicited judges to participate in a seminar offered by a separate provider; (b) those same law

firm members were scheduled to serve as the sole seminar moderators; and (c) the seminar was focused on practice in those particular judges' courtrooms, the Committee recommended against judicial participation. The Committee believed that a reasonable person could conclude that the law firm was in a special position to influence the judges.

September 2010

Committee on Codes of Conduct Advisory Opinion
No. 88: Receipt of Mementoes or Other Tokens Under the Prohibition Against the Receipt of Honoraria for Any Appearance, Speech, or Article

Judges making presentations to nonprofit organizations often receive mementoes. This opinion considers whether a memento falls within the definition of "honorarium" as defined in the Judicial Conference Ethics Reform Act Regulations on Outside Earned Income, Honoraria, and Outside Employment ("Regulations"), promulgated under Title VI of the Ethics Reform Act of 1989, 5 U.S.C. App., §§ 501, 505, and whether it is permissible for the judge to be reimbursed for travel expenses in connection with the presentation.

Section 4(a) of the Regulations provides that no judicial officer or employee shall receive an honorarium. Section 4(b) defines "honorarium" as:

> a payment of money or anything of value (excluding or reduced by travel expenses as provided in 5 U.S.C. App., §§ 505(3) and (4)) for an appearance, speech or article by a judicial officer or employee, provided that the following shall *not* constitute an honorarium:
>
> * * *
>
> (2) Compensation received for teaching activity . . . approved pursuant to Section 5 hereof.
>
> * * *
>
> (7) A suitable memento or other token in connection with an occasion or article, provided that it is neither money nor of commercial value.

Guide to Judiciary Policies and Procedures, Volume 2, Chapter 6, Part H (emphasis added) [*see Guide to Judiciary Policy*, Vol. 2C, Ch. 10].

The Committee notes at the outset that a presentation to a nonprofit institute may constitute a teaching activity that is exempt from the definition of "honorarium." The Commentary to the Regulations states that "[t]eaching may also include participation in programs sponsored by bar associations or professional associations or other established providers of continuing legal education programs for practicing lawyers." If the institute is an established provider of continuing legal education programs for practicing lawyers, a presentation sponsored by it would appear to be a teaching activity. If so, the receipt of a memento or other token would not constitute an honorarium for purposes of the Ethics Reform Act.

Assuming that the presentation was a teaching activity and the judge had no advance knowledge that the organization would provide anything other than expenses, the receipt of a memento or other token following a presentation would not, in the

Committee's view, convert the presentation into "compensated teaching" that required prior approval. Under these circumstances, the ethical propriety of accepting the gift is to be determined under the Judicial Conference Ethics Reform Act Gift Regulations, the Code of Conduct for United States Judges's gift provisions (Canon 4D(4)), and the Code's prohibition of conduct giving the appearance of impropriety (Canon 2). If the institute is a bona fide customary provider of continuing legal education programs, the Committee believes that receipt of a memento or other token would be a permissible gift under the Gift Regulations and Canon 4D(4) and would not violate Canon 2.

Assuming that the presentation was not a teaching activity, the determinative issue is whether the gift would constitute an "honorarium" or a "suitable memento or other token." In order to be a suitable memento or token under the Regulations, the item received must be (1) something other than money and (2) without "commercial value." The prohibition on receiving anything of "commercial value" is intended to foreclose compensation in kind for a speech or appearance as a substitute for the payment of cash. A judge could not properly receive, for example, securities or other resalable property as compensation for a speech. The Regulations must be construed with this overall purpose in mind.

In this context, without "commercial value" does not refer to the absence of any commercial value in the hands of the manufacturer of the article or in the hands of the sponsor of the presentation. Any article, including the letter opener referred to in the Commentary to the Regulations as an example of a suitable memento, will have some commercial value in the hands of the manufacturer or sponsor, and such an interpretation would render the "suitable memento or other token" exception meaningless. Rather, the appropriate question is whether the gift would have meaningful commercial value in the hands of the judge if accepted.

This advice does not mean that a judge is free to accept any gift in connection with a presentation, no matter what its commercial value in the hands of the manufacturer or the sponsor. The article tendered must be "suitable" as a reminder of the occasion and must be in the nature of a "token." Thus a judge may accept a gift in connection with an appearance, speech, or article if its value to the judge is solely as a reminder of the occasion; a judge may not accept such a gift if it confers any other benefit upon him or her. While the "suitability" of a memento has no necessary relationship to the commercial value of the gift in the hands of the manufacturer or sponsor, if that value is in the neighborhood of $300 or less, it will be unlikely to have either a utilitarian or a prestige value to the judge beyond its value as a reminder of the occasion.

Assuming that the gift is a "suitable memento" and not an "honorarium," there remains the issue of whether it is a permissible gift under the Gift Regulations, and therefore also permissible under Canon 4D(4). If the gift is properly viewed as a gift from the organization as an entity, and not as a gift on behalf of identifiable lawyers, the receipt of the gift would be permissible under Gift Regulations Section 3(I), which

excludes from the definition of gift those benefits “the acceptance of which is permitted by the Regulations of the Judicial Conference Concerning Outside Earned Income, Honoraria, and Outside Employment,” and Section 5(a), which restricts judges from accepting a gift “from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer’s or employee’s official duties.”

We now turn to the propriety of accepting reimbursement of travel expenses in connection with the presentation. Under the provisions of 5 U.S.C. App., § 505 cited in Regulation § 4(b) *supra*, which excludes travel expenses from the definition of “honorarium,” the term “travel expenses” means “necessary travel expenses incurred by such individual (and one relative)” and includes “the cost of transportation, and the cost of lodging and meals while away from his or her residence or principal place of employment.” Thus, acceptance of reimbursement for the costs of transportation, lodging, and meals associated with the presentation is appropriate.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 89: Acceptance of Honors Funded Through Voluntary Contributions

The Committee is often asked to advise on the propriety of a judge consenting to or participating in a project to raise funds for scholarships and similar beneficial enterprises to be named in honor of the judge. In the past, projects to honor judges involved, for example, endowment of professorships or research chairs, or construction of practice courtrooms, libraries and the like. In Advisory Opinion No. 46, the Committee discusses the considerations bearing on judges' acceptance of honors and awards, while this opinion addresses the considerations relating to accompanying fund-raising efforts.

Under Canon 4, a judge may participate in a wide variety of good causes, both law-related and non-law-related. For example, for law-related organizations:

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

Canon 4A(3).

But, the judge's fund-raising activities for any type of organization are restricted:

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

Canon 4C.

In addition to the restrictions placed on fund raising by Canon 4C, Canon 2's general prohibition against lending the prestige of the judicial office to a judge's activities includes those activities permissible under Canon 4. The Commentary to Canon 4 reflects the Committee's caution regarding lending the prestige of office to organizations for fund-raising purposes: "A judge may attend fund-raising activities of a law-related or other organization although the judge may not be a speaker, a guest of honor, or featured on the program of such an event."

The Committee has considered a number of proposals to raise funds for projects to honor a judge. Typically, but not exclusively, former law clerks of a judge come together to establish a scholarship named after the judge. The clerks may seek funds from lawyers outside their ranks. Our consideration of these matters has led us to conclude that a judge may consent to others raising funds for scholarships and similar enterprises to be named in honor of the judge, but the degree of the judge's involvement in the project is controlled by Canon 2 and 4C, which prohibit lending the prestige of judicial office to advance private interests - even when the interests are charitable.

Examined in this light, the Committee recognizes that scholarships, libraries, courtrooms, reading rooms, and the like are named after judges, and funded through voluntary contributions, with some regularity without hint of scandal or public disapproval. While there are concerns about using the prestige of the judicial office, we believe these concerns would be offset by the fact that the judge neither (a) initiates, (b) encourages, (c) solicits funds, nor (d) knows who gave money or even who was asked to give money for the project. Our opinion that a judge may accept an honor if the judge is distanced from the process of initiating, developing and financing it is not dependent on whether the honor is associated with a law-related institution or some other charitable or educational institution. Judges have distinguished themselves as practitioners or patrons of a wide range of arts and sciences. A judge may legitimately receive recognition for a life's effort in realms other than the law.

A judge may therefore accept an honor, such as a scholarship or reading room or professorship named after the judge, that is funded through voluntary contributions if (1) the honor is associated with an organization or institution in which the judge could participate consistent with the provisions of Canons 4A(3) and 4C, (2) the judge neither initiates nor participates in the conception or completion of the fund-raising project, and (3) the judge makes a reasonable effort to remain unaware of the identity of those who fund the project. A senior judge who no longer hears cases need not be shielded from learning the identity of contributors after contributions have been made.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 90: Duty to Inquire When Relatives May Be Members of Class Action

This opinion considers whether, in a class action brought pursuant to Rule 23(b)(3), a judge must investigate to determine whether the interests of any of the judge's (or the judge's spouse's) relatives within the third degree of relationship, or the spouses of such relatives, place the relatives within the definition of the class. Class membership by the relative would then require the judge's recusal. The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.

The Committee previously advised a judge to undertake such an investigation and, if any of such third degree relatives or their spouses happened to be within the class definition, to ask them if they would be willing to opt out of the class, as Rule 23(c)(2) permits. The Committee has reconsidered the subject and now reaches a different conclusion.

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

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:
>
> (i) a party to the proceeding, or an officer, director, or trustee of a party[.]

The Judicial Code contains a similar provision. 28 U.S.C. § 455(b)(5)(I). Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting § 455, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

Our previous advice was based on two considerations. First, we believed that all members of a Rule 23(b)(3) class action are parties within the meaning of Canon 3C(1)(d)(I). The Committee previously advised that all members of a class are parties, whether named or unnamed, so long as they have not opted out of the class. Second, we thought that if a judge failed to make these inquiries and then, at some later time, had to recuse upon discovering that a third degree relative or spouse thereof was a

class member, whatever rulings the judge had already made in the case might have to be vacated.

The effect of our advice was to place judges in the position of having to delve into the financial affairs of third degree relatives who were not members of their household. (Relatives "within the third degree of relationship" include one's parents, grandparents, great grandparents, children, grandchildren, great grandchildren, uncles, aunts, brothers, sisters, nieces and nephews but do not include first cousins. *See* Canon 3C(3)(a).) Our former advice on this point was somewhat at odds, although not entirely inconsistent, with advice we have previously given that a judge is not bound to keep informed of the financial interests of relatives other than his or her spouse and minor children residing in the household. *See generally* Canon 3C(2).

The Committee adheres to its previous position that Rule 23(b)(3) class members are "parties" for purposes of Canon 3C(1)(d)(I). (The Committee expresses no view regarding Rule 23(b)(2) class actions. *See In re City of Houston*, 745 F.2d 925 (5th Cir. 1984).) This straightforward approach not only is consistent with the reasoning of decisions such as *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), and *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986), but also avoids the considerable difficulties that would arise in trying to draw distinctions between Rule 23(b)(3) class members who should be considered parties and those who should not.

The Committee now concludes, however, that a judge in a Rule 23(b)(3) class action does not have a duty to investigate whether his or her relatives within the third degree and their spouses are class members. If at some point the judge discovers that one of them was a class member, Canon 3C(1)(d)(I) would require recusal, but this does not mean the judge, prior to such discovery, was acting unethically by sitting on the case. The situation is thus unlike *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), interpreting 28 U.S.C. § 455(a), a provision comparable to Canon 3C(1), which provides that a judge must disqualify "himself in any proceeding in which his impartiality might reasonably be questioned." *See Liteky v. United States*, 510 U.S. 540 (1994). *Liljeberg* applied § 455(a) "retroactively" because the provision's disqualification standard does not depend on the judge's knowledge of the disqualifying facts. In other words, the provision is violated although the judge is unaware of the facts creating the appearance of impropriety. *See* 486 U.S. at 859-61. However, when a rule contains a knowledge requirement, there can be no violation until the judge obtains the requisite knowledge.

The knowledge requirement flows from the structure of Canon 3C. As Chief Justice Rehnquist said in dissent in *Liljeberg*, 486 U.S. at 871, with respect to § 455, "[u]nlike the more open-ended provision adopted in subsection (a), the language of subsection (b) requires recusal only in specific circumstances, and is phrased in such a way as to suggest a requirement of actual knowledge of the disqualifying circumstances." The same is true with respect to Canon 3C. The other specifically

enumerated examples in Canon 3C either expressly contain a knowledge requirement, or involve situations in which it is almost impossible for the judge not to know of the disqualifying circumstance. *See* Canon 3C(1)(a)-(e); *Liteky v. United States*, 510 U.S. at 553-54 n.2.

In the case of Rule 23(b)(3) class actions, however, it is not necessarily true that a judge would know whether his or her relative is a party. If the judge later discovered this fact, the analysis in *Liljeberg* would not give rise to any retroactive consequences. Canon 3C(1)(d)(I) requires knowledge. Canon 3C(2) assures that judges will have such knowledge with respect to themselves, their spouses and their minor children living in the household: "A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household." The clear implication is – and the Committee has so concluded – that the judge is under no duty to acquire knowledge of the financial affairs of his or her other relatives within the third degree, or of their spouses. Without such information, a judge sitting on a case in which a relative was, without the judge's knowledge, a class member would not be acting in violation of the Code. In addition, cases in which third degree relatives turned out to be members of a class would doubtless fall within the Supreme Court's qualification in *Liljeberg* that "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." 486 U.S. at 862.

In short, the Committee is of the view that the *unknown* presence of a judge's relative as a party in a Rule 23(b)(3) class action does not create a risk of injustice to the parties, and does not undermine the public's confidence in the judicial process - so long as the judge recuses upon learning of the relative's status as a party. There is thus little risk of the sort of retroactive relief we sought to avoid when we previously advised that a judge should investigate to determine if any third degree relatives fit within the class definition. Accordingly, the Committee is now of the opinion that judges need not undertake such inquiries. Requiring judges to investigate imposes untenable burdens on them and puts judges in the potentially awkward and uncomfortable position of intruding into the personal affairs of those outside their households.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 91: Solicitation and Acceptance of Funds from Persons Doing Business With the Courts

This opinion addresses whether judicial employees may solicit funds from vendors who do business with the courts in order to defray the expenses of a conference devoted to improvement of the judicial system that is sponsored by an association whose members are judicial employees. The Committee also considers the related question of whether, if such solicitation is inappropriate, an unsolicited gift of funds for the conference may be accepted.

The Judicial Conference Regulations Concerning Gifts define a "gift" to mean "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value." Gift Regulations § 3(e). Funds to support a conference sponsored by an employee association fall under this definition. For the reasons that follow, the Committee advises that the Ethics Reform Act, the Gift Regulations, and the Code of Conduct for Judicial Employees ("Employees' Code") prohibit solicitation of such gifts from persons doing business with the courts.

The Ethics Reform Act provides, in part:

> (a) Except as permitted by subsection (b), no . . . employee of the . . . judicial branch shall solicit or accept anything of value from a person –
>
> > (1) seeking official action from, [or] doing business with . . . the individual's employing entity; or
> >
> > (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.
>
> (b)(1) Each supervising ethics office is authorized to issue rules or regulations implementing the provisions of this section and providing for such reasonable exceptions as may be appropriate.

5 U.S.C. § 7353. The Judicial Conference, the supervising ethics office for the judicial branch, implemented these provisions through Gift Regulations sections 4 and 5. The statute and Regulations bar both solicitation and acceptance of gifts from vendors doing business with the courts, as well as from vendors whose interests may be substantially affected by official action of the courts. Although the Regulations permit some exceptions with respect to acceptance of gifts, they allow no exceptions to the prohibition against solicitation of gifts from persons doing business with the courts. The fact that the purpose of the conference involves improvement of the judicial system is not sufficient to avoid the prohibition.

The Committee concludes that the Ethics Reform Act and implementing regulations prohibit the solicitation from vendors doing business with the courts for a conference sponsored by an employee association. The Committee also concludes that the solicitation of such gifts from court vendors is contrary to Canon 2 of the Employees' Code because it would create an appearance of impropriety. The Committee advises that judges should exercise their supervisory powers to preclude employees under their supervision from making such solicitations.

A related question is whether an employee association may accept funds from vendors doing business with the courts if the funds are not improperly solicited. In other words, this follow-up question contemplates a genuinely voluntary offer by a court vendor to provide substantial funding to defray the conference expenses. We need not address whether such gifts to the association would contravene the gift prohibitions in the Ethics Reform Act, the Gift Regulations, and the Employees' Code, because the Committee concludes that, in any event, it would create an appearance of impropriety under Canon 2 for judicial employees to make arrangements with a court vendor through which the vendor would provide substantial financial support to assist an employee association in putting on a conference. The Committee has advised in the past that it would create an appearance of impropriety for a group of judges or judicial personnel to arrange with a vendor known to be doing business with the court to provide financial support for an event to be held at a conference or meeting sponsored by the judges or judicial personnel. The same conclusion applies here, and, therefore, if it comes to the attention of a judge who has supervisory authority that the employee plans to accept such a gift, the judge should prohibit the acceptance.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 92: Political Activities Guidelines for Judicial Employees

The Committee on Codes of Conduct has developed the guidelines set forth below for judicial employees covered by the Code of Conduct for Judicial Employees ("Employees' Code") who are contemplating involvement in political activities. Judicial employees who are covered by the Employees' Code should comply with Canon 5, which regulates permissible political activity.[1] This opinion provides guidelines regarding clearly permissible and clearly impermissible activities under Canon 5. It then offers some cautionary guidelines for employees who are permitted under Canon 5B to participate in nonpartisan political activities. The guidelines in the opinion are not intended to be exclusive or all-encompassing. If questions remain after consulting these guidelines, covered judicial employees may seek advice as set forth in the Introduction to the Employees' Code.

I. Political Activities Permitted for All Covered Employees

The following activities are consistent with the provisions of Canon 5 of the Employees' Code. For example, covered employees may:

a. register and vote in any primary or general election, including register as a member of a political party;

b. express an opinion privately as an individual citizen regarding a political candidate or party; and

c. participate in the nonpolitical activities of a civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, or recreational organization described in Canon 4 of the Code.

II. Partisan Political Activities Prohibited for All Covered Employees

Under Canon 5A, a covered judicial employee should refrain from partisan political activity, including the following:

a. taking an active role in a partisan political organization;

b. becoming a candidate for partisan political office;

c. publicly endorsing a partisan political candidate or organization by authorizing use of the employee's name, making speeches, or participating in a partisan political convention, caucus, rally, or fund-raising activity. However, employees who may permissibly participate in nonpartisan activities under Canon 5B may participate in caucuses in those states where caucuses substitute for primary elections, but only to the extent necessary to cast a vote. They may not participate beyond that

extent, for example by attempting to influence other voters, and they may not identify themselves as associated with the court;

d. publicly displaying a campaign picture, sign, sticker, badge, or button for a partisan political candidate or organization;

e. soliciting funds for or contributing to a partisan political organization, candidate, or event;

f. initiating or circulating a nominating petition for a candidate in a partisan political election;

g. participating in a campaign in support of or in opposition to a candidate in a partisan political election; or

h. serving in any position at a polling place in a partisan election or serving in any other position that relates to voting in a partisan election.

III. Nonpartisan Political Activities Prohibited for Members of a Judge's Personal Staff and Certain Court Unit Heads

Under Canon 5B, a member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, or district court executive, should refrain from nonpartisan political activity, including the following:

a. becoming a candidate for nonpartisan political office;

b. participating in a campaign in support of or in opposition to a candidate in a nonpartisan political election, including publicly displaying a campaign picture, sticker, badge or button or making speeches for or against nonpartisan candidates;

c. making speeches for or publicly endorsing or opposing a nonpartisan political candidate;

d. soliciting funds for or contributing to a nonpartisan political candidate or event;

e. initiating or circulating a nominating petition for a candidate for a nonpartisan political election; or

f. serving in any position at a polling place in a nonpartisan election or serving in any other position that relates to voting in a nonpartisan election.

IV. Nonpartisan Political Activities Permitted for Certain Covered Employees

Under Canon 5B, a judicial employee who is not a member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, or district court executive may participate in nonpartisan political activity "only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties." Canon 5B. When considering whether a nonpartisan political activity is permissible according to this standard, a judicial employee should consider, at a minimum, whether the following factors weigh against participation:

a. whether the nonpartisan activity involves a controversial issue that is being publicly debated;

b. whether the nonpartisan activity involves an issue that either currently is being litigated in federal court or may be litigated in federal court;

c. whether the nonpartisan activity involves an organization that frequently litigates in federal court;

d. the degree of responsibility and leadership the participation involves; and

e. whether the employee will be identified during the activity as an employee of the court.

If the judicial employee has any question about the propriety of engaging in a nonpartisan activity, the employee should first consult with the employee's supervisor or appointing authority. The employee and the supervisor or appointing authority are welcome to seek further guidance on the question from the Committee.

Note for Advisory Opinion No. 92

[1] The Code of Conduct for Judicial Employees, and these guidelines, cover all employees of the judicial branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the U.S. Courts, the Federal Judicial Center, the Sentencing Commission, and federal public defender offices. Judges and judicial employees who are not covered by the Employees' Code should consult the codes and ethical standards applicable to them for guidance on participation in political activities.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 93: Extrajudicial Activities Related to the Law

The Committee regularly is asked to give advice regarding involvement in extrajudicial activities related to the law. Canon 4 of the Code of Conduct for United States Judges applies to all extrajudicial activities; its heading states that "[a] judge may engage in extrajudicial activities that are consistent with the obligations of judicial office." This opinion is intended to explain the principles by which the Committee determines whether extrajudicial activity related to the law is consistent with the obligations of judicial office, and to clarify our precedents on the issue. Advisory Opinion No. 79 ("Use of Chambers, Resources, and Staff for Law-Related Activities Permitted by Canon 4") addresses, in part, whether an activity should be considered judicial or extrajudicial.

Canon 4 states that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects."

Canon 4 then continues: "However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations [in the following paragraphs of Canon 4]."

In assessing an extrajudicial activity, it is often useful to determine whether the activity is related to the law or not. While the Code permits judicial participation in non-law-related activities, judicial participation in law-related activities is actively encouraged. Canon 4A; Commentary to Canon 4 ("a judge is encouraged to" contribute to the law, the legal system, and the administration of justice). Accordingly, a judge will be given greater latitude when participating in law-related activities expressly encouraged by Canon 4A. An example of a distinction between law-related and non-law-related activity is found in Canon 4F, which permits a judge to accept appointment to a governmental position only if it concerns the law, the legal system, or the administration of justice, unless such an appointment is required by law. As another example, a judge may generally serve on the board of a law school, but may not serve on a state board responsible for operating a public university. Compare Commentary to 4A *with* Advisory Opinion No. 44. Whether a judge permissibly may use judicial resources to engage in law-related and non-law-related activities involves a variety of different factors, which are dealt with in Advisory Opinion Nos. 79 and 80.

A judge's participation in law-related activities is encouraged because "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute" to such endeavors. Commentary to Canon 4. However, not every activity that involves the law or the legal system is considered a permissible activity. Law is, after all, a tool by which many social, charitable and civic organizations seek to advance

a variety of policy objectives. We have concluded, for example, that participating in an organization lobbying for legislation to implement a particular policy pertaining to drug and alcohol abuse is not consistent with the obligations of judicial office. Similarly, we have advised that judicial participation in organizations that may engage in litigation in furtherance of stated policy goals is not permissible. Advisory Opinion No. 40. In addition, judicial participation as an arbitrator or mediator, or otherwise performing judicial functions apart from the judge's official duties, is prohibited unless expressly authorized by law. Canon 4A(4). Rather, to qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.

Two formulations emerge from our prior advice. First, permissible law-related activities are "limited to the kinds of matters a judge, by virtue of [the judge's] judicial experience, is uniquely qualified to address." If a judge's participation is sought for some reason other than his or her judicial expertise, the activity is less likely to be a permissible activity. For example, we have advised that service on a Senate Ethics Advisory Panel was not an activity designed to improve the law, where the judge's participation was sought primarily because of his previous experience as a state senator.

Consistent with this emphasis upon whether a judge brings to bear a special expertise, Canon 4A(2) provides that a judge may appear before or consult with an executive or legislative body or official only to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area at issue. We have accordingly advised that legislative appearances by a judge are generally permissible only where the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual. *See* Advisory Opinion No. 50 (suggesting that a judge should not testify before a legislative committee on social legislation). A similar inquiry pertains regarding appointment to governmental committees and commissions, which is covered by Canon 4F.

Second, we look to see if the beneficiary of the activity is the law or legal system itself. A permissible activity, in other words, is one that serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or enhances the prestige, efficiency or function of the legal system itself. The clearest examples of permissible activities are those addressing the legal process. Thus, we have concluded that judicial participation in such activities as an educational videotape to improve the quality of court reporters; a nonprofit organization to promote the concept of the resolution of disputes through arbitration; an organization that researches and provides information on the juvenile justice system; an organization sponsoring informative programs on trial practice; and an organization to eliminate gender bias in the judiciary is permissible. Whether an activity benefits a specific constituency or the

legal system as a whole will sometimes be a close question; it should be answered by evaluating how closely related the substance of the activity is to the core mission of the court of delivering unbiased, effective justice to all.

Although such matters as the administration of the business of the courts, the delivery of legal services, or the preparation of codifications of judicial decisions are the clearest examples of permissible activities, a broader range of activities is permissible. The Commentary to Canon 4 encourages judicial participation in the improvement of the law, the legal system, and the administration of justice, including "revising substantive and procedural law and improving criminal and juvenile justice." Therefore, activities directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group, may be permissible. We have concluded, for example, that activities of the National Conference of Commissioners on Uniform State Laws, whose purpose is to promote uniformity in the law across jurisdictions, and the American Law Institute, whose purpose is to distill, rationalize and restate the law, are permissible. Similarly, the Working Group on Detention of the United Nations Human Rights Commission, which reports to the United Nations on compliance with the Universal Declaration of Human Rights, was deemed an organization devoted to the improvement of the law. However, judicial participation in organizations that advocate particular causes rather than the general improvement of the law is prohibited. *See* Advisory Opinion No. 40.

Additionally, a judge may teach and write on substantive legal issues. Judicial scholarship is particularly encouraged by Canon 4. *See* Canon 4A. The evolution and exposition of the law is at the core of a judge's role. Judges, therefore, have the ability to make a unique contribution to academic activities such as teaching and scholarly writing, which similarly serve to advance the law. *See* Advisory Opinion No. 55.

A judge's extrajudicial activity related to the law will often implicate other canons aside from Canon 4. Sometimes we have referred to those canons explicitly; sometimes we have integrated the principles of those canons through explaining Canon 4. The key restrictions regarding extrajudicial activity contained in other canons are Canon 1's mandate that a judge uphold the independence of the judiciary; Canon 2's prohibition against impropriety and the appearance of impropriety in all activities; and Canon 5's restrictions on political activity.

Canon 1 provides that a judge should uphold the integrity and independence of the judiciary. A federal judge's extrajudicial activity directed toward improving the law may be impermissible, for example, to the extent that it enmeshes the judge in, or subordinates the judge to, the operation of a state or local government. For instance, we have advised that it would be inappropriate under Canon 4 for a judge to serve on a state law reform agency created by the state legislature and given quasi-legislative responsibilities, even though the goal of the agency was the improvement of state law. We noted that "a federal judge should not sit as a member of an official state body charged with quasi-legislative responsibilities." Although we did not explicitly discuss

Canon 1, Canon 1's prescription for an independent federal judiciary was at the core of the advice.

Other times we have invoked Canon 1 explicitly. For example, we expressly relied on Canon 1 in advising that a judge may not serve on a state board of law examiners, an arm of the state supreme court. Similarly, we invoked Canon 1 in concluding that a judge may not serve, through appointment by the state supreme court, upon a state supreme court commission on racial and ethnic bias in the state court system. Although in both cases we observed that such extrajudicial activity was related to the law, it was prohibited because it could compromise the independence of the federal judiciary. We noted that federal courts occasionally are required to consider decisions of the state supreme court, and thus a federal judge should not sit on a committee of the state court.

Canon 2 may also preclude a judge's participation in an extrajudicial activity designed to improve the law. Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all activities. We have advised, therefore, that although participation as a member or officer of an open member bar association is generally a permissible Canon 4 activity, *see* Advisory Opinion Nos. 85 and 34, a judge may not run for a contested position in a bar association because of the unseemliness and potential for creating an appearance of impropriety of a federal judge seeking votes.

Canon 2A's provision that a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary may preclude a judge's participation in law-related activities or organizations concerning highly controversial subjects. Thus, a judge may remain a member of a bar association that takes controversial positions on policy issues, so long as the judge abstains from participating in the debate or vote on such matters in a manner in which the public may be effectively informed of the judge's abstention (*see* Advisory Opinion Nos. 82 and 34); however, we have advised that a judge may not serve as the chair of a section of the American Bar Association that concentrates its efforts on many of the most controversial political issues of the day. *See* Advisory Opinion No. 82. On the other hand, we have advised that membership in a United Nations human rights group is permissible, as the group only rarely, if ever, becomes involved in matters so controversial that a judge's involvement could jeopardize his or her effectiveness as a judge at home. Further, Canon 2B's restrictions against lending the prestige of the judicial office to advance the private interests of others also applies to Canon 4 activities. *See* Advisory Opinion No. 89. We have advised, for example, that a bankruptcy judge should not serve on the board of an organization designed to certify individual lawyers as bankruptcy specialists because it would violate Canon 2's prohibition against lending the prestige of the judicial position to a private interest.

Finally, we note that Canon 5 states a judge should not engage in political activity. Although the political prohibitions in Canon 5A are absolute, the catch-all prohibition in Canon 5C against "other political activity" contains a qualification that

Canon 5C "should not prevent a judge from engaging in the activities described in Canon 4." However, engaging in law-related extrajudicial activities where the activity is political in nature is fraught with risks for judges. Thus, before deciding to engage in law-related activity with political overtones, a judge should consider whether the express or implied values of other canons will be contravened. For example, we have advised that a judge should not serve on an official state committee formed to select state trial and appellate court judges. Although such activity is law-related and thus is to be evaluated under Canons 4 and 5C it might compromise the judge's independence, and therefore violate Canon 1. A judge should be sensitive to the nature and tone of the activity, and should not be drawn into an activity in a manner that would contravene Canon 2's goals of propriety and impartiality or Canon 5A's prohibition of activities pertaining to political organizations and candidates. Further, because of the ethical risks associated with any politically-oriented activity, we construe permissible Canon 4 activities in this context narrowly, restricted to those activities that are most directly related to the law and legal process.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 94: Disqualification Based on Mineral Interests

This opinion addresses two issues involving mineral interests:

(1) whether a judge must recuse whenever a purchaser of oil or gas, in which the judge has a fractional royalty interest, is a party in a case before the judge; and

(2) whether a judge who holds the executory rights to lease minerals for production must recuse whenever the lessee is a party in a case before the judge.

Of course, if the subject of the case before the judge involves the judge's fractional mineral royalty interest or the lease to which the judge is a party, the judge must recuse. This opinion addresses situations where the case before the judge does *not* involve either the lease or the minerals in which the judge has a royalty interest, but nevertheless one of the parties happens to be the purchaser of oil or gas in which the judge owns a fractional royalty interest or is a lessee of a mineral estate leased by the judge, who holds the executory rights to lease.

It is not uncommon, particularly in regions of the country where oil and gas production is concentrated, for a party to appear before a judge to whom the party is making royalty payments based on purchases of oil or gas in which the judge has a fractional royalty interest. For example, if a judge owns a fractional royalty interest in oil or gas that is being purchased by a major oil or gas company, it is likely that, during a time the judge is receiving royalty payments from the company, that company will be a party in cases before the judge on issues entirely unrelated to the judge's royalty interest.

A variation of that scenario occurs when the judge holds the executory rights to lease the mineral estate for development. If the judge signs a lease with a major oil or gas company it is, once again, possible that the company will appear occasionally as a party before the judge on matters completely unrelated to the lease while it is still in effect. In this scenario, the judge may either have had a history of direct contract negotiations with that party or, at the least, the judge will be a direct signatory to a lease involving that party.

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

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

* * *

> (c) the judge knows that the judge, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Neither receiving royalty payments from a party nor leasing a mineral estate to a party qualifies as a "financial interest" in a party, which is defined in Canon 3C(3)(c) as "ownership of a legal or equitable interest, however small, . . . in the affairs of a party." *Compare* Advisory Opinion No. 75 (judge receiving military pension need not recuse when military service is a party); Advisory Opinion No. 27 (judge's spouse who is the beneficiary of a trust that leased property to defendant does not have a "financial interest" in the defendant).

The inquiry, however, does not end there. Canon 3C(1)(c) also requires a judge to recuse whenever he or she has "any other interest that could be affected substantially by the outcome of the proceeding." *See also* 28 U.S.C. § 455(b)(4). (We note that although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting recusal statute 28 U.S.C. § 455, Canon 3C of the Code of Conduct closely tracks the language of § 455, and we are authorized to provide advice regarding the application of the Code.) Recusal, therefore, would be necessary under Canon 3C(1)(c) when the value of the judge's fractional royalty interest could be "substantially" affected, even though it cannot be characterized as a legal or equitable interest in the party appearing before the judge. The fact that the amount of royalties received might be small is not decisive; it is not the size of the interest that is a concern under Canon 3C(1)(c), but rather whether the interest could be substantially affected. Thus, we have said that a $.60 per month increase would not have a substantial effect on a judge's utility bill, but that the doubling of a utility bill from $10 to $20 per month would be substantial. However, unless the suit before the judge was of such a magnitude that it could realistically impact the party's financial ability to pay royalties to the judge, the "interest that could be affected substantially" clause of Canon 3C(1)(c) is not implicated. Moreover, even if the suit were of that magnitude, it might not have the potential to substantially affect the judge's royalty interest if it is clear that the oil or gas could and would be marketed to others at a comparable price in the eventuality that the purchaser/party before the judge no longer remained a viable purchaser as a result of the suit.

We turn next to consideration of the more general prohibition in Canon 3C(1) that a judge must recuse when the judge's "impartiality might reasonably be questioned." We have said that a judge's impartiality might reasonably be questioned in a variety of situations where a judge is asked to hear a case involving a party with whom the judge does business. For example, where a judge's spouse was the principal beneficiary of a trust that leased property to a party in a case, and the amount of rent was substantial, we said that it would create an appearance of impropriety for the judge to hear that

case. Advisory Opinion No. 27. We also have said that it would create an appearance of impropriety for a judge who contracts with a party for the use of a service mark to hear cases involving that party. We also have advised that an appearance of impropriety is created when a party before the judge is either a lessor of real estate to the judge or a lessee of real estate owned by the judge. In all of these cases, the judge should recuse, subject to remittal under Canon 3D.

On the other hand, we have recognized that a judge must be allowed to manage his or her investments and to purchase goods and services, and that a commercial relationship with a party does not always require recusal. For example, we have said that a judge's impartiality cannot reasonably be questioned when a judge sits on a case involving an insurance company of which the judge is a policy holder, so long as the case will not substantially affect the judge's interest in the policy. A judge who is a bondholder and periodically receives interest payments on the bonds may hear cases involving the bond issuer so long as the case does not involve the bonds held by the judge. Maintaining a bank account does not require a judge to recuse from cases in which the bank is a party, nor does owing money to a bank require recusal, absent special circumstances such as unusually favorable terms or a default. A judge who is a utility customer may hear cases involving the utility. A judge who receives a military pension may sit on cases in which the military is a party. Advisory Opinion No. 75.

Consideration of several factors can help to reconcile these opinions and assist in identifying when recusal is necessary: (1) When a transaction is standardized and generally available to all who qualify, it is not likely to require recusal. To the extent that the parties to the transaction are fungible, with either party able to go elsewhere, the power of each party over the other is diminished, and therefore so is the appearance of impropriety. (2) When, during the pendency of the litigation before the judge, a relationship has previously been structured and is not likely to be restructured or to give rise to controversy regarding the duties of the parties, recusal is less likely to be required. The converse is also true: When a relationship is being negotiated or is likely to be renegotiated during the time a party is in court or there is a reasonable possibility that the relationship may become the subject of controversy during the pendency of the court proceeding before the judge, it is much more likely to require recusal. (3) The size of the investment is a relevant consideration in evaluating an appearance of impropriety. (4) It is relevant to consider whether the transaction gave rise to a personal and recurring relationship between the judge and the party or whether it is an impersonal market relationship. (5) Finally, it is necessary to consider whether there are any other unique characteristics of the transaction that give rise to an appearance of impropriety.

Applying these factors to the first question posed, we believe that the judge presiding over a suit involving a party who pays royalties to a judge on unrelated mineral production will not ordinarily give rise to an appearance of impropriety. First, typically the judge as a fractional royalty interest owner will not have had any direct personal negotiations or a direct personal relationship with the party. Second, ordinarily the interests of most fractional royalty interest owners are fairly standardized within a

particular community or producing field. Finally, many, although certainly not all, fractional royalty interests will be fairly small in both amount and percentage. Under these circumstances, we do not believe that an appearance of impropriety would arise merely because a party appearing before a judge is making royalty payments to the judge on an unrelated fractional royalty interest owned by the judge, and we do not believe that the judge is required to recuse in that situation. Of course, the various factors set forth above need to be evaluated in each situation because of the potential variability that may exist in the actual relationship. If the judge is uncertain whether the various factors in his or her particular situation might give rise to a reasonable concern regarding the judge's impartiality, then the judge should consider utilizing the remittal procedure set forth in Canon 3D.

We then turn to the second question of whether a judge properly could hear a case when one of the parties, in an unrelated matter, entered into a mineral lease with the judge who held the executory rights to lease those minerals for production. The difference between this situation and the previous situation is that here the judge is likely to have signed a lease with the party and to have been more directly involved with the party. The judge holding the executory rights to lease typically will be both the surface landowner and an owner of a royalty interest in the minerals to be developed under the lease. The judge could be expected to have continued direct involvement with the lessee as the lessee enters upon the land to develop and produce oil and gas and as it markets those minerals in which the judge likely has a royalty interest. Further, there is often a reasonable possibility that controversy may arise concerning either the meaning of the lease or the parties' performance under the lease, and if such a controversy does arise, the judge likely will be directly involved.

Once again, Canon 3C(1)(c) is not implicated because the judge does not have a financial interest in the lessee. Similarly, the judge could not preside over the suit if the suit before the judge could substantially affect the judge's interests. Canon 3C(1)(c). Here, however, the judge's role as a contracting party with the lessee, the likelihood of ongoing relations directly with the lessee, the reasonable possibility that controversy may arise concerning the lease that will implicate the judge directly, and the nature of the judge's interests all suggest that the judge's impartiality might reasonably be questioned, implicating Canon 3C(1), if he or she were to preside over any suit involving that lessee. Therefore, the judge should ordinarily recuse in this situation, subject, of course, to the possibility of remittal upon full disclosure to all the parties. *See* Canon 3D. However, once again, each case must be examined on its own facts because of the potential variability that may exist in the actual relationship.

The second scenario raises one other consideration of which the judge should be aware. Although a judge may manage his or her own real estate investments and may even act as a fiduciary for family members, a judge may not act as a fiduciary for non-family members. Canon 4E; Judicial Conference Ethics Reform Act Regulations Concerning Outside Earned Income, Honoraria, and Outside Employment § 5(a)(3) and Commentary ¶ 10, set forth in *Guide to Judiciary Policy*, Vol. 2C, Ch. 10. It is not

uncommon that non-family members will have fractional royalty interests in the oil and gas produced under the lease signed by the judge. If, under controlling state law, the judge's role as lessor of mineral rights in which non-family entities have an interest imposes fiduciary obligations upon the judge toward such non-family entities, the judge should remove himself or herself from that role.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 95: Judges Acting in a Settlement Capacity

Concerns have arisen about the practice of judges acting in a settlement capacity in a case. In this opinion, the Committee considers the following facets of this issue:

(1) whether a judge presiding over a trial may properly participate directly in settlement discussions with the parties;

(2) whether the existence of an established local rule permitting the practice has any bearing on the propriety of the judge's action;

(3) whether it makes any difference if the case is to be tried before a jury rather than the judge; and

(4) whether a judge may act as a mediator in a state court case.

The Code of Conduct for United States Judges contains two provisions bearing on the subject of judges' involvement in settlement discussions. First, Canon 3A(4) advises that judges should not engage in *ex parte* communications on the merits of the case. As an exception to this general advice, Canon 3A(4)(d) provides that a "judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." Second, Canon 3C(1) sets out the standard for impartiality that judges must meet in the performance of their judicial duties, including participation in settlement discussions. Canon 3C(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ."

Nothing in the Code expressly addresses the practice of judges discussing settlement with all parties simultaneously or presiding over joint settlement conferences. Since the drafters of the Code believed it was necessary to expressly permit *ex parte* settlement discussions between judges and parties with their consent, it is reasonable to infer that joint settlement discussions do not contravene the Code. We read the Code to acknowledge that judges may engage in a range of permissible settlement activities, and that recusal follows from those activities only where a judge's impartiality might reasonably be questioned because of what occurred during the course of those discussions.

Discussion of the possibility of settlement is a common practice at pretrial and status conferences and is expressly sanctioned in general terms by the Federal Rules of Civil Procedure. Rule 16(a)(5) allows judges to convene pretrial conferences for the purposes of facilitating settlement. Rule 16(c)(2)(I) authorizes the court to "use dispute resolution procedures authorized by statute or local rule." The clear implication in Rule 16 is that judges will be involved in facilitating settlement. Rule 16 does not prevent a judge who engaged in settlement discussions from presiding over a trial.

The Committee advises that a trial judge's participation in settlement efforts is not inherently improper under the Code. As with any aspect of a judge's conduct of a case, particular actions may raise ethical concerns in some cases, but there is no *per se* impropriety in a judge's participation in settlement discussions or in a judge's conduct of a trial following participation in settlement talks. The existence of local rules explicitly permitting judges to preside over settlement discussions lends support to the propriety of a judge's actions in this respect. On the other hand, the existence of local rules prohibiting judges from handling successive settlement and trial responsibilities forecloses judges in some jurisdictions from exercising certain combinations of settlement and trial responsibilities (or from doing so without consent). In the absence of a local rule prohibiting the judge's participation, whether ethical concerns arise in a particular proceeding is a specific determination that depends on the nature of the judge's actions and whether the judge's impartiality might reasonably be questioned. Judges should evaluate their actions under the standards discussed in this opinion.

Ethical concerns are less likely to arise when a judge handles settlement negotiations and then presides over a jury trial, or when the parties consent to the judge's handling of successive settlement and trial phases. Concerns are more likely to arise in nonjury trials. In that scenario, a judge may be involved in settlement discussions, probe the parties' assessments of the value of the case, review the parties' settlement offers (and perhaps suggest to them specific settlement amounts), and then, when settlement talks fail, try the case and award damages. In the latter circumstances of a nonjury trial, it may be reasonable to question whether the trial judge can be an objective trier of fact, or whether the case should instead be tried by another judge unfamiliar with the settlement discussions.

The Code's ethical standards are not violated every time a judge in a nonjury case learns of inadmissible information as a result of settlement discussions and then tries the case. Judges (and juries, as well) periodically receive information that is not admissible and exclude it from their deliberations before rendering judgment. It is not unreasonable to credit their ability to be impartial in these circumstances. Nor does it necessarily offend Canon 3C(1) for a trial judge to comment on the strengths and weaknesses of the parties' case before trial. On the other hand, comments a judge makes in the course of settlement discussions may create an appearance of bias. Similarly, a trial judge's awareness of information obtained during settlement discussions that is otherwise unlikely to be made known to the judge during the trial may undermine the judge's objectivity as a fact finder and give rise to questions about impartiality. When a judge's impartiality might reasonably be questioned, Canon 3C(1) advises that the judge "shall disqualify." *See also* 28 U.S.C. § 455(a). "An appearance of impropriety occurs, when reasonable minds, with knowledge of all relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament or fitness to serve as a judge is impaired." Canon 2A.

Participation in settlement efforts in a state court matter raises concerns under the Code. Canon 4A(4) states that "[a] judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law." The Commentary to Canon 4A(4) specifically observes that judges may not mediate state court matters, but contemplates an exception with respect to related matters: "This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter)."

In conclusion, the Committee advises that settlement practices must be examined on a case-by-case basis to determine their ethical propriety. Factored into this calculus should be a consideration of whether the case will be tried by judge or jury, whether the parties themselves or only counsel will be involved in the discussions, and whether the parties have consented to the discussions or to a subsequent trial by the settlement judge. Judges must be mindful of the effect settlement discussions can have not only on their actual objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts there may be instances where information obtained during settlement discussions could influence a judge's decision-making during trial. Parties who have confronted deficiencies in their cases, or who have negotiated candidly as to the value of their claims, may question whether the judge can set aside this knowledge in a case tried to the judge, whereas in a case tried to a jury, there may be less reason to question the judge's impartiality. The extent to which a judge's impartiality may be compromised, in either reality or appearance, will depend in part on the nature and degree of the judge's participation in settlement discussions and the extent to which the judge has become privy to information that relates directly to the issues the judge will be called upon to decide. In the end, a judge's recusal decision following involvement in settlement discussions will be specific to the facts of the situation and should be informed by an appropriate sensitivity to the requirements of maintaining impartiality and the appearance of impartiality.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 96: Service as Fiduciary of an Estate or Trust

The Committee frequently is asked to give advice regarding whether a judge may serve as a fiduciary of an estate or trust. This opinion will summarize the applicable principles.

Canon 4E of the Code of Conduct for United States Judges provides:

> E. *Fiduciary Activities*. A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:
>
> (1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
>
> (2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

Canon 4E places substantial restrictions on the ability of judges to serve as a trustee or other fiduciary. Judges may not serve as fiduciaries in non-family situations, even where the amount of work involved is minimal. *See* Advisory Opinion No. 33 (judge should not serve as co-trustee of pension trust). Although judges are permitted to serve as fiduciaries in family situations, Canon 4E(1) advises against doing so if it would interfere with judicial duties or lead to litigation in the judge's court. Canon 4D(4) contains a relatively expansive definition of family member for these purposes: Residence in the judge's household is not required in order for a person to be considered a member of the judge's family, nor must the person be related by blood, adoption, or marriage. However, more is required than mere residence in the household, longstanding affective ties, or an underlying business relationship. Persons must be treated by the judge as a member of the judge's family in order to be considered family members under Canon 4D(4).

Newly appointed judges who are serving as fiduciaries when they are appointed should refer to the Applicable Date of Compliance provision set out at the end of the Code. The compliance provision advises newly appointed judges to "arrange their financial and fiduciary affairs as soon as reasonably possible to comply with" the Code and to do so in any event within one year following appointment. This means that judges should discontinue their service as nonfamily fiduciaries within a year of their

appointment. However, the compliance provision provides for an exception to this advice in the following circumstances:

> If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

Under Canon 3C(1)(c), judges are required to recuse in any proceeding in which they know they hold a financial interest in a party, whether the interest is held individually or as a fiduciary. Canon 4E(2) confirms that judges acting as fiduciaries are subject to the same restrictions on financial activities that apply in their personal capacity. A judge who serves as a trustee is deemed to have a financial interest in all assets held by the trust and, therefore, is required to recuse in cases where a corporation whose securities are held by the trust is a party. In this event, the remittal provisions of Canon 3D are not available; in other words, the parties may not waive the judge's disqualification and permit the judge to serve. Judges have an obligation under Canon 3C(2) to keep informed about their fiduciary financial interests so they can recuse themselves when necessary.

Canon 4D(3) also bears on a judge's service as a trustee; it advises that judges "should divest investments and other financial interests that might require frequent disqualification" as soon as reasonably possible. A judge who serves as a trustee may be able to divest the trust of holdings whose retention would require the judge to recuse frequently, assuming this can be done consistently with the judge's fiduciary obligations as trustee. If not, and if the trust assets trigger frequent disqualifications that prove disruptive to the court, the judge should consider whether he or she may properly continue to serve or whether resignation would be appropriate, consistent with the judge's obligations under Canon 4D.

A judge who is permitted to serve as a trustee for a family trust may accept compensation for such service if the source of the compensation does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, if the compensation does not exceed a reasonable amount, and if it does not exceed what a person who is not a judge would receive for the same activity. Canon 4H. Such compensation must be reported on the judge's annual Financial Disclosure Form, and is subject to the limitations on outside earned income set forth in the Ethics Reform Act of 1989 and the regulations issued thereunder by the Judicial Conference. *See* Judicial Conference Regulations Concerning Outside Earned Income, Honoraria, and Outside Employment § 3 and Commentary ¶ 10. Although

these regulations also prohibit judges from serving as a fiduciary for compensation, that prohibition "does not apply to service . . . as an executor or trustee of a family estate or trust as permitted by the Codes of Conduct where the [judge] does no more than provide the service that would be provided by a lay person in the same capacity." *See id*. However, even in the limited circumstances where judges may continue to serve as a nonfamily trustee, as noted above, judges should not accept compensation for service as a nonfamily trustee.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 97: Disqualification of Magistrate Judge Based on Appointment or Reappointment Process

This opinion discusses the ethical obligations of a magistrate judge arising out of the relationship between members of the selection panel and the magistrate judge (1) following the initial appointment process, and (2) during and following the reappointment process.

We begin by briefly reviewing the appointment process. Magistrate judges are appointed and reappointed in accordance with the procedures set forth in 28 U.S.C. § 631 and regulations promulgated by the Judicial Conference of the United States. *See Guide to Judiciary Policy*, Vol. 3, Ch. 4. The active district judges appoint a selection panel with at least seven members consisting of lawyers and other members of the community. At least two members of the panel must be nonlawyers. The size and composition of panels varies from district to district, but the usual practice is to appoint active federal practitioners and prominent citizens of the community. Frequently United States Attorneys and Federal Defenders, or their designees, also serve on these panels.

When an appointment is being made to a vacant or newly created position, the panel is required to submit a list of five nominees to the court within ninety days of its creation. A majority of the active district judges selects a candidate from the list of five nominees. When a magistrate judge is being considered for reappointment, the panel reports to the court whether or not it recommends reappointment of the incumbent after the public and bar have been given notice and an opportunity to submit comments.

Throughout the appointment process, both the panel and the court are required to keep all information received, including the names of potential nominees and individuals recommended by the panel, in strict confidence.

The appointment and reappointment process for magistrate judges implicates Canons 2 and 3 of the Code of Conduct for United States Judges. Canon 2 provides:

> A judge should avoid impropriety and the appearance of impropriety in all activities.
>
> A. *Respect for Law*. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. . . .

Canon 3 provides:

> A judge should perform the duties of the office fairly, impartially and diligently . . . .
>
> C. Disqualification.
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .

Canon 3C(1) continues with a non-exhaustive list of circumstances under which a judge's impartiality might reasonably be questioned; however, none of these circumstances is applicable to this issue.

Canons 2 and 3 are designed not only to ensure against actual partiality, but also against the appearance of partiality. The critical consideration is whether reasonable persons would perceive the judge as partial. The Commentary to Canon 2A sets forth an objective test for the appearance of impropriety, and this test is also useful in evaluating the impartiality requirement under Canon 3, namely, whether "reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Of course, the perception of partiality will vary depending on the facts and circumstances of any particular situation.

We will consider several specific questions regarding ethical obligations during the different steps in the appointment and reappointment process.

Initial Appointment

1. Should a magistrate judge notify all parties of the fact that a lawyer or party in the case was a member of the panel that originally considered the judge's application?

2. If such notification is required, for what period of time must this notification be given?

3. Is a magistrate judge required to recuse whenever a member of the panel appears as either a lawyer or party to a case?

The panel fulfills its charge by recommending five nominees to the court and the court makes the appointment. While carrying out its responsibilities, the panel is under an obligation to conduct its activities in strict confidence. Therefore, the presumption is that a candidate has no knowledge of the views or positions of individual panel members with respect to any candidate. During the selection process, a candidate will undoubtedly be interviewed by members of the panel and may also be contacted by a

member of the panel to obtain approval before third parties are contacted about the candidate.

In the opinion of the Committee, a magistrate judge is not obligated following initial appointment to notify the parties in a case that either a lawyer or a party in that case was a member of the panel that considered the judge's application since there is no reasonable basis for questioning the magistrate judge's integrity, impartiality, or competence. The selection process is a formalized one established in a way that encourages an objective evaluation of candidates based on merit. It is unlikely that an interpersonal relationship will develop between the candidate and any member of the panel during the selection process. Since the panel operates under a requirement of strict confidentiality, a candidate is not privy to the individual opinions of the panel members concerning any candidate. At best, a candidate who is selected can infer that at least a majority of the panel agreed to place the candidate's name on the list of nominees. The candidate assumes the office of magistrate judge after the panel has completed its work.

Under these circumstances, a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would not perceive a magistrate judge's ability to carry out judicial responsibilities with integrity, impartiality and competence to be impaired merely because an attorney or a party who was a member of the panel that considered the judge's application was appearing in a case before that judge. Of course, in the unlikely event that during the selection process something were to occur between a panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member, then the facts of that particular situation would have to be evaluated by the magistrate judge to determine if recusal is warranted and if notification should be provided to the parties.

Reappointment Process

1. Should the incumbent recuse from any matter in which an attorney who is a member of the panel represents a party? Should such a recusal apply to all members of the attorney's firm?

2. If recusal is required, for how long is it required?

3. If recusal is not required, is the incumbent required to notify all parties in a case that one of the attorneys serves on the nomination panel? If so, for what period of time is the incumbent required to advise the parties of this situation?

4. If the United States Attorney or Federal Defender, or their designee, is a member of the panel, must the incumbent recuse in any matters involving these agencies during the reappointment process?

5. Both the nonlawyer and lawyer members of the panel tend to be prominent citizens of the community who have investments in and sit on boards of a number of businesses and community organizations. Should the incumbent recuse from any case in which a panel member has a financial interest? If so, how can the incumbent learn of the panel member's interests, since financial disclosures by panel members are not currently required?

6. May an incumbent advise attorneys and parties that the comment period is open and that they may make comments on the reappointment?

When a court is considering reappointing a magistrate judge, a panel is selected prior to the expiration of the incumbent's term, in the manner previously described. Public notice is given soliciting comments from the public and the bar. During the process, the incumbent continues to adjudicate cases. After the panel makes its recommendation on reappointment to the court, the court decides whether or not to reappoint. If the court decides not to reappoint the incumbent, the incumbent is notified and the selection procedures prescribed for filling a vacant position are commenced.

An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. In the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1), the magistrate judge is required to recuse in such a case. However, under Canon 3D, recusal in this situation would be subject to remittal should the magistrate judge decide to utilize the remittal procedure.

In the opinion of the Committee, recusal would be required only during that period of time when reappointment is under consideration by the panel and court. Following reappointment, the disqualifying factor is removed and recusal is not necessary unless, as previously noted, something occurred during the selection process between a panel member and the incumbent that directly related to the incumbent's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member.

A situation may also arise in which the incumbent is not reappointed. Due to the strict requirement of confidentiality, the recommendation of the panel presumably will not be known to the incumbent. However, since it is probable that failure to be reappointed is due at least in part to an adverse recommendation of some of the panel, a magistrate judge in such a situation should continue to recuse, subject to remittal, for the balance of the term of office.

When an attorney is a member of the panel, the magistrate judge need only recuse, subject to remittal, in those cases in which that attorney appears, and need not recuse in cases in which other members of that attorney's firm appear. The Committee believes the relationship between other members of the firm and the panel is sufficiently indirect and attenuated that a reasonable person, with knowledge of the relevant circumstances set forth above, would not perceive the magistrate judge's ability to carry out judicial responsibilities impartially to be impaired.

Similarly, where a designee of the United States Attorney or Federal Public Defender is a member of the panel, the magistrate judge must recuse, subject to remittal, only in cases in which those designees appear and not in cases involving other attorneys from those offices. However, in those situations where the United States Attorney or the Federal Public Defender serves on the panel, recusal is necessary, subject to remittal, in all cases (criminal and civil) involving that attorney and that attorney's office due to the direct supervisory role those officials have over the attorneys and the cases in their respective offices.

If the magistrate judge knows that a lawyer or nonlawyer member of a panel, who is neither a lawyer nor a party in a case, has a financial or other personal interest that could be substantially affected by the outcome of a case, then the magistrate judge should recuse, subject to remittal. A reasonable person with knowledge of the relevant circumstances would perceive that the magistrate judge's ability to carry out judicial responsibilities impartially in such a case was impaired. The mere fact that a panel member is on the board of a business or community organization that is a party in a case is not necessarily in and of itself a sufficient basis to require recusal unless, for example, the panel member has a financial or other personal interest that could be substantially affected by the outcome of the case, or will be involved in the case as a witness or as a board member, trustee, or officer with a decision-making role concerning the litigation. Such determinations will necessarily be specific to the facts in any given case.

In the event that a magistrate judge is aware of or concerned about whether a panel member has a financial or other personal interest or role in a case, the magistrate judge should inform counsel and the parties about the reappointment process and disclose the names of the panel members. Counsel and the parties should be requested to notify the magistrate judge if anybody involved in the case is a member of the panel, and, if so, whether to their knowledge that individual has a financial or other personal interest in the case that could be substantially affected by its outcome or will participate in any way in the litigation. Once the magistrate judge has the requested information, a determination concerning recusal can be made. Any recusal would be subject to the remittal procedure, at the magistrate judge's discretion.

The magistrate judge may not advise attorneys and parties that the comment period is open and that they can make comments on the reappointment. No matter how well intentioned the magistrate judge might be in providing this information to attorneys

and parties, there is a significant risk that they might feel pressured to comment favorably on the magistrate judge who is presiding over their case. Under Canon 2, a judge may not take advantage of the judicial office to promote personal interest. Any such action by a magistrate judge would run a significant risk of creating the appearance of impropriety.

Post Reappointment

After reappointment is the magistrate judge required to recuse or to notify the parties and attorneys in a proceeding in which a member of the panel is appearing as counsel or as a party?

In the opinion of the Committee, after reappointment the magistrate judge is not required to recuse or to notify the parties and attorneys in a proceeding in which a member of the panel is appearing as counsel or as a party for the same reasons that a magistrate judge is not required to do so after completion of the initial appointment procedure. The only exception to this would be if something occurred during the selection process between the panel member and the magistrate judge that bears directly on the magistrate judge's actual or perceived ability to be fair and impartial in a case involving that panel member. The particular facts of such a situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 98: Gifts to Newly Appointed Judges

Newly appointed judges frequently are offered gifts and benefits on the occasion of their investitures. These offers, arising at or near the time of the judge's appointment, warrant an early focus on ethical guidelines. This opinion provides guidance for new judges regarding the applicable restrictions.

The standards governing a judge's acceptance of gifts are set forth in Canon 4 of the Code of Conduct for United States Judges, the Ethics Reform Act, and the Judicial Conference Ethics Reform Act Gift Regulations. A "gift" is defined as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value." Gift Regulations § 3(e). Depending on the circumstances, the guidance contained in Canons 2 (avoid impropriety and appearance of impropriety) and 5 (refrain from political activity) of the Code may also bear on the propriety of accepting investiture-related benefits.

Canon 4D(4) requires that judges "comply with the restrictions on acceptance of gifts set forth in the Judicial Conference Gift Regulations." The Gift Regulations generally prohibit judges from accepting gifts unless the gifts fall within several enumerated exceptions:

> A judicial officer or employee shall not accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties.

Gift Regulations § 5(b)(a).

Sections 5(b)(1) and (b)(4) of the Gift Regulations describe relevant exceptions that may apply to investiture-related gifts:

> (b) Notwithstanding this general rule, a judicial officer or employee may accept a gift from a donor identified above in the following circumstances:
>
> > (1) the gift is made incident to a public testimonial and is fairly commensurate with the occasion;
> >
> > ***
> >
> > (4) the gift is from a relative or friend, if the relative's or friend's appearance or interest in a matter would in any event require that the officer or employee take no official action with respect to the matter, or if the gift is made in connection with a special occasion, such as a wedding, anniversary, or birthday, and the gift is fairly commensurate with the occasion and the relationship . . . .

In no event do the foregoing provisions permit a judge to solicit gifts on the occasion of an investiture or otherwise. The Ethics Reform Act, the implementing Gift Regulations, and the Code all prohibit the solicitation of gifts. 5 U.S.C. § 7353; Gift Regulations § 4; Canon 4D(4). As with any gift, judges should be aware that financial reporting provisions may require the disclosure of certain information. Canon 4H(3).

One benefit commonly extended to new judges is an offer by a private entity or individual either to sponsor or contribute to a reception in honor of the judge's investiture. Whether a judge may properly accept such an offer depends in part on the identity of the proposed donor and the donor's relationship to the judge. If the donor or sponsor is a former law firm, corporate employer, business client, or group of colleagues, the Gift Regulations recognize that the offer may be accepted as a gift from a friend on a special occasion, assuming the gift is fairly commensurate with the occasion and the relationship. It may also be accepted as a gift incident to a public testimonial. In addition, to the extent the judge plans to recuse for a period of time following appointment from cases in which the former employer, clients, or colleagues appear, the judge will not be taking any official action affecting the donors and thus no appearance of impropriety would be created.

Likewise, receptions sponsored by bar associations generally do not present ethical concern as they may properly be considered gifts incident to public testimonials. Also, as we have noted previously, "[w]hen hospitality is extended by lawyer organizations, the risk of an appearance of impropriety is markedly reduced, compared to hospitality conferred by a particular law firm or lawyer." Advisory Opinion No. 17 ("Acceptance of Hospitality and Travel Expense Reimbursements From Lawyers").

Concerns may arise with respect to other prospective donors. Where the proposed donor is a for-profit company that has no pre-existing or longstanding relationship with the judge, permitting the company to host an investiture reception would necessitate the judge's recusal from cases involving the company. This might also "permit others to convey the impression that they are in a special position to influence the judge," which would not be consistent with Canon 2B.

Some gifts may be impermissible because acceptance would be interpreted as endorsement of a donor or its activities, which may be inconsistent with a judge's independence and impartiality. Judges are advised not to associate themselves with entities that are publicly identified with controversial legal, social, or political positions or that regularly engage in adversarial proceedings in the federal courts. Canon 4B(1). Under Canon 5, judges are also advised to refrain from joining political organizations or engaging in political activities. Donors engaging in these sorts of activities should not be permitted to serve as a host or sponsor of a reception.

It is also common for judges to receive tangible gifts and mementoes in connection with their appointment and investiture. Judges may properly accept such gifts, consistent with the provisions outlined above. The Code and the Gift Regulations

recognize the propriety of accepting appropriate gifts from friends, relatives, and colleagues to mark this special occasion and serve as a form of public testimonial. Examples of gifts the Committee has found to be appropriate include: a judicial robe given by former law partners; a clock given by a bar association; a chair given by former state judicial colleagues; and a gavel and $500 monetary gift given by a former client.

Acceptance of a gift offered in connection with a judge's investiture may necessitate the judge's recusal from matters involving the donor. In many instances, the donors are likely to be persons whose appearance in a case would in any event necessitate the judge's recusal, at least for some period of time. These include former law partners, close friends, and former clients. Where the gift is given by a group and the cost is shared proportionately, recusal may not be required if the amount of each individual contribution is relatively small. A judge's determination whether to recuse, and for how long, should be guided by the standards set forth in Canon 3C(1).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 99: Disqualification Where Counsel Is Involved in a Separate Class Action in Which the Judge or a Relative Is a Class Member

In light of the number of class actions with very large classes, it sometimes happens that the attorneys in a case pending before a judge are involved in a separate class action in which the judge or one of the judge's relatives is a class member. This opinion addresses the considerations that bear on whether the judge should recuse in such a case.

Under Canon 3C(1) of the Code of Conduct for United States Judges, judges should recuse, subject to remittal, in cases in which one of the parties is represented by a lawyer who is a member of a firm that currently represents the judge in an unrelated matter. The same advice applies if, to the judge's knowledge, the lawyer's firm represents, in an unrelated matter, the judge's spouse or minor child residing in the judge's household. (The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.)

The question addressed here is whether, and to what extent, that general advice should apply to cases in which the representation of the judge or the judge's relative in an unrelated matter consists of representation in a Rule 23(b)(3) class action.

The Committee is of the view that there is no absolute requirement of recusal in cases in which the judge or the judge's relatives are represented in the unrelated matter solely in their capacity as class members. In some instances, the relationship between the judge (or the judge's relatives) and the attorney for the class may be quite similar to the relationship between attorney and client in a conventional setting and, in such cases, recusal would be required. However, where the class action is a large one, in which the judge (or the judge's relatives) are not lead plaintiffs or named plaintiffs, have had no role in selecting the attorney for the class, have not had – and do not expect to have – personal contact with the attorney, and have no reasonable expectation of a substantial personal recovery, the case for recusal is not nearly as strong. In that setting, the Committee is of the view that the mere fact that the judge, or a relative of the judge, is represented as a class member by the same attorney or firm that is appearing before the judge does not give rise to a reasonable question as to the judge's impartiality and therefore does not require recusal under Canon 3C(1).

A different case would be presented if the class of which the judge is a member is small, if the judge is a named plaintiff, or if the judge is playing an active role in the litigation, or if the judge has a reasonable expectation of a substantial recovery. In that setting, the judge would be required to recuse, subject to remittal, if an attorney appearing before the judge in the case in question is a member of the firm that represents the class in the class action.

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

June 2009

Committee on Codes of Conduct Advisory Opinion No. 100: Identifying Parties in Bankruptcy Cases for Purposes of Disqualification

Canon 3C(1)(c) of the Code of Conduct for United States Judges requires recusal when the judge knows that the judge, the judge's spouse, or a minor child residing in the judge's household "has a financial interest . . . in a party to the proceeding." (The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.) Similarly, Canon 3C(1)(d) requires a judge to recuse if the judge, the judge's spouse, "or a person related to either within the third degree of relationship, or the spouse of such a person is: (i) a party to the proceeding, or an officer, director, or trustee of a party." In most matters filed in the federal courts, it is easy to identify who is "a party to the proceeding" by reviewing the caption of the pleadings and proofs of service. However, bankruptcy cases are quite different because such cases regularly involve creditors who may have some interest in the proceedings, but no intention of participating in a capacity akin to a party.

Identifying who is "a party to the proceeding" for purposes of recusal in bankruptcy cases is important not only to the bankruptcy courts, but also to the district courts sitting as bankruptcy courts after withdrawal of the reference, to the district courts sitting as appellate courts, to the bankruptcy appellate panels, and to the circuit courts of appeal. The Committee consistently has taken the position that simply being a creditor or an interest holder of a bankruptcy estate is not a sufficient interest to make that creditor "a party to the proceeding." In that same vein, the acts of filing a proof of claim, or submitting a ballot on a proposed plan of reorganization, are not in themselves sufficient to raise the creditor or interest holder to the status of a party. It takes something more.

The Committee has advised that if a creditor accepts appointment to a committee of creditors, that change in status is sufficient to make each such creditor or interest holder "a party" because of the statutory responsibilities assumed by acceptance of such an appointment. In addition, the following participants in bankruptcy proceedings should be considered parties for these purposes: the debtor; a trustee; parties to an adversary proceeding; and participants in a contested matter. These entities occupy a central role in the proceedings or are actively involved in matters requiring judicial adjudication. As a consequence, we advise that they are sufficiently akin to parties that they should be treated as such for purposes of judicial disqualification.

Part of the ethical challenge in bankruptcy cases lies in the fact that the identity of "a party to the proceeding" may change with any motion, objection, or adversary proceeding. When the issue arises in this fashion, and a participant becomes a party for these purposes, the question of recusal must be considered. Judges sitting in bankruptcy matters should be vigilant to the possibility that a creditor or interest holder's

status may at some time change to “a party.” The Committee has advised, however, that in the ordinary bankruptcy case a judge has no obligation to review the schedules of creditors and interest holders to look for possibly disqualifying circumstances.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 101: Disqualification Due to Debt Interests

On their annual financial disclosure reports, judges must disclose various debt interests owned by themselves or their close relatives. This opinion addresses a judge's obligation to recuse due to ownership of a debt interest in a party. Debt interests include, for example, United States, state or municipal bonds, sewer revenue bonds, industrial development bonds, municipal transit authority bonds, and corporate bonds.

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

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest . . . in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

These provisions are substantially identical to those found in 28 U.S.C. § 455(b)(4). While the Committee is not authorized to interpret § 455, the Committee does have authority to interpret the provisions of the Code.

Canon 3C(3)(c) defines financial interest as "ownership of a legal or equitable interest, however small." Under Canon 3C(1)(c), judges therefore must recuse when: (1) they or their spouses or minor children "own[] a legal or equitable interest, however small" in a party or, (2) they have any other interest that could be affected substantially by the outcome of the proceeding. (The Committee notes that, for purposes of recusal, "[r]ecusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.)

Judges must also disclose stock holdings on their annual financial disclosure reports. Ownership of any stock in a party, however small, automatically requires a judge's disqualification because it constitutes a financial interest in the party. Disqualification under these circumstances is not subject to remittal. *See* Canon 3D.

Debt interests are not considered to give rise to a financial interest in the debtor that issued the debt security because the debt obligation does not convey an ownership interest in the issuer. Therefore, disqualification is not required solely because a party in a matter before the judge is a corporation or governmental entity that has issued a

debt security owned by the judge. Under the Code, governmental securities are an exception to the definition of "financial interest": Canon 3C(3)(c)(iv) states that "ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities."

However, a convertible debt security, that is, one that may be converted to stock, should be considered as stock for the purpose of determining a financial interest in a party because the value of such a security is inextricably related to the value of the issuer's stock. As with stocks, ownership of a convertible debt security interest in a party, however small, requires a judge's disqualification and such disqualification is not subject to remittal.

Ownership of any type of debt interest, including government securities, may in some circumstances occasion disqualification if the judge's interest is such that it could be substantially affected by the outcome of the proceeding. Canon 3C(1)(c). In determining whether a debt interest could be substantially affected, what must be evaluated is not the size of the interest but the extent to which that interest could be affected. In those rare cases where there is a potential that the judge's debt interest could be substantially affected by the outcome of the proceeding, the judge may need to obtain relevant information from the litigants in order to make the determination. When a debt interest is disqualifying on this basis, the disqualification is not subject to remittal. *See* Canon 3D.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 102: Disqualification Issues Relating to Judge Being Sued in Official Capacity, Including Representation By Department of Justice

This opinion discusses recusal issues that arise when a judge is sued in an official capacity, particularly recusal questions vis-a-vis representation of the judge. When judges are sued in an official capacity, it is not uncommon for representation to be provided by an attorney from the Department of Justice ("DOJ"), which includes members of the local U.S. Attorney's staff. In the event a DOJ attorney is assigned to represent a judge, it is not necessary for the judge to recuse in unrelated litigation in which other DOJ attorneys appear. It may even be unnecessary to recuse from cases handled by the same attorney assigned to represent the judge, depending upon the nature of the representation and the judge's relationship with the attorney.

Judicial disqualification in this situation is guided by the standards in Canon 3C of the Code of Conduct for United States Judges, which provides in relevant part, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In the Committee's view, a judge's impartiality cannot reasonably be questioned in unrelated matters handled by the DOJ simply because the Department provides representation in a lawsuit naming the judge in an official capacity. When accepting representation by the Department, a judge is not choosing a personal attorney, and the DOJ is not the same as a private law firm. *See* Advisory Opinion No. 38 ("Disqualification When Relative Is an Assistant United States Attorney"). Under 28 U.S.C. §§ 516 to 519, the DOJ has the statutory function to represent officers and agencies of the United States sued in an official capacity.

Nor is disqualification always required in unrelated matters handled by the individual attorney assigned to represent the judge. Numerous lawsuits against judges are filed by disgruntled litigants and are patently frivolous; they are often dismissed promptly and without any discovery on the basis of the judge's absolute judicial immunity. In these instances, a judge often will have little personal contact with the government attorney providing representation. Thus, disqualification is not always required, but instead depends on the particular facts and circumstances of the case and the nature of the relationship the judge develops with the attorney.

Similar advice applies to the related question of whether a judge's colleagues should recuse when a judge is named in a complaint. When a judge is a named defendant, the other judges of that court are not necessarily and automatically disqualified. If the litigation is patently frivolous, or if judicial immunity is plainly applicable, recusal would rarely be appropriate.

When a judge is sued and representation is provided through a local U.S. Attorney's office, the question arises whether the judge should seek representation by an attorney from outside his or her own judicial district. In the Committee's view, the Code does not require judges to seek representation by government attorneys outside

of their districts. But when a judge accepts government representation, he or she must be attentive to situations that require disqualification under Canon 3C(1).

Although disqualification is not routinely required from unrelated matters handled by a government attorney assigned to represent a judge, it may be appropriate in some instances. This situation may arise because of the nature of the claims (i.e., those involving personal liability and not subject to absolute immunity) or because of the attorney-client relationship necessary to mount a proper defense (i.e., where extensive factual development or discovery is needed). Often this circumstance will be apparent when the complaint is filed. In these situations, assignment of an Assistant U.S. Attorney or DOJ lawyer from outside the judge's district would reduce the potential for disruption of the judge's docket stemming from multiple disqualifications that might otherwise occur if the assigned attorney had an extensive docket before the judge. Some judges might prefer an out-of-district attorney, notwithstanding the administrative inconvenience of dealing with geographically remote counsel. If the local U.S. Attorney's office is to provide representation, disruptive disqualifications can be minimized through assignment of an attorney who appears only infrequently before the judge.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 103: Disqualification Based on Harassing Claims Against Judge

From time to time, the Committee receives inquiries from judges asking if they should recuse themselves from cases involving litigants who register complaints against judges in retaliation for unfavorable judicial decisions or setbacks in their legal proceedings. These complaints may take the form of a civil action, a complaint of misconduct or disability under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351 to 364, or other initiatives affecting judges' personal interests. Some litigants file repeated complaints naming the original judge, while others name additional judges with each succeeding setback. Occasionally, lawsuits are initiated naming all judges of a court. In some instances, a pattern of frivolous or vexatious filings may lead judges to enter protective orders restricting a litigant from submitting further filings without leave of court.

All of these situations – from initiation of a complaint against a single judge to review of successive pleadings under a protective order – can give rise to recusal considerations, which must be weighed carefully. Important reasons exist for a judge not to disqualify routinely, as this would permit and might even encourage litigants to manipulate and abuse the judicial process, which could undermine public confidence in the integrity of the judiciary. Automatic disqualification of a judge cannot be obtained by the simple act of suing the judge, particularly where the suit is primarily based on the judge's prior judicial rulings. On the other hand, a universal refusal to recuse could also lead to disrespect for and a loss of public confidence in the integrity of the judicial process.

This opinion summarizes the Committee's views concerning the decision to recuse in various situations involving harassing claims against judges. The Committee notes that the related recusal issues arising from a judge's representation by the U.S. Department of Justice in legal proceedings are addressed in Advisory Opinion No. 102.

Canon 3C(1) of the Code of Conduct for United States Judges governs many of the issues related to this type of harassing litigation. It provides, in relevant part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> > (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
> >
> > (c) the judge knows that the judge . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge . . . is:

(i) a party to the proceeding . . .

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

(iv) . . . likely to be a material witness in the proceeding.

When recusal is not mandated by one of the specifically enumerated categories in Canon 3C(1), the Committee has identified a number of non-exclusive factors to be considered in determining whether a "judge's impartiality might reasonably be questioned." These include the nature of the complaint, the applicable law, the possibility of factual issues involving the credibility of the named judge or judges, and any other circumstances that might provide a reasonable ground for questioning the impartiality of the assigned judge.

Civil Actions Against the Assigned Judge

A judge must recuse if he or she is named as a defendant in a proceeding that has been assigned to the judge. Canon 3C(1)(d)(I) provides that a judge shall recuse himself or herself when "the judge . . . is . . . a party to the proceeding."

Civil Actions Against Other Judges on the Assigned Judge's Court

If one or more of an assigned judge's judicial colleagues – but not the assigned judge – is named as a defendant in a civil action, the assigned judge need not automatically recuse from the case. This situation is governed by Canon 3C(1)'s general admonition against presiding over cases in which "the judge's impartiality might reasonably be questioned." Whether it would be appropriate for a judge to handle a matter naming judicial colleagues depends on the surrounding circumstances, including the factors identified above.

In typical harassing litigation, a claim against a judge is barred by the doctrine of judicial immunity, and the complaint is subject to prompt dismissal on judicial immunity or other grounds. Review of a complaint against a judicial colleague where the litigation is patently frivolous or judicial immunity is plainly applicable will not ordinarily give rise to a reasonable basis to question the assigned judge's impartiality, and disqualification would rarely be appropriate. Thus, the mere naming of a judicial colleague as a defendant does not require automatic recusal of every judge in the district or on the court under Canon 3C(1). Because each case must necessarily depend upon its own unique circumstances, however, it should be noted that if, after a review of all the surrounding circumstances, the assigned judge determines that his or her impartiality might reasonably be questioned, recusal would be appropriate.

Civil Actions Against All Judges on a Court

When all sitting judges of a court are named as defendants in a civil action, each defendant judge is ordinarily required to recuse from hearing the case under Canon 3C(1)(d)(I) because they are parties to the case. This situation may be addressed by assigning the matter to a newly appointed judge who joins the court after the filing of the complaint or by arranging for a judge from another district, or judges from another circuit, to handle the matter. Whether a judge may nevertheless handle such a matter under the rule of necessity is a question of law beyond the scope of this opinion. Judges should consult their circuit precedent on this question.

Unrelated Cases Involving Same Litigant

A litigant with a case pending before a judge may respond to an adverse ruling by initiating a complaint against the judge. The judge is disqualified from handling the new case against himself or herself for the reasons discussed above, but the question is whether the new complaint necessitates the judge's recusal from the pending, unrelated case he or she had already been handling.

A judge is not automatically disqualified from participating in other, unrelated cases involving the same litigant, whether they are filed before or after the complaint in which the judge is a defendant. Judicial immunity usually will be a complete defense against a new complaint of this nature, and the court in which the complaint is filed likely will dismiss it as frivolous. In such circumstances, the mere fact that a litigant has filed a new frivolous complaint against a judge based on the judge's official actions will not disqualify the judge from continuing to preside over the earlier, unrelated matter brought by the same litigant. The same holds true when a litigant who previously filed a complaint naming a judge subsequently files an unrelated case against others that is assigned to the named judge.

Although there might be some question regarding the impartiality of the judge in these situations, Canon 3C(1) requires that the basis for questioning a judge's impartiality must be "reasonable" for the judge to be required to recuse. The factors the judge should consider in making the reasonableness determination are identified above, i.e., the nature of the complaint, the applicable law, and other relevant circumstances. A complaint filed against a judge that is subject to prompt dismissal on judicial immunity grounds will not ordinarily give rise to a reasonable basis to question the judge's impartiality in unrelated cases filed against others by the same litigant. Such a nonmeritorious complaint, standing alone, will not lead reasonable minds to conclude that the judge is biased against the litigant or that the judge's impartiality can reasonably be questioned, and thus will not require the judge to recuse.

Issuance and Administration of Protective Orders

Some courts have entered protective orders against litigants who engage in a pattern of repeated frivolous filings, enjoining the litigants from future filings without the

approval of a designated judge. As a preliminary matter, the issuing of a protective order of broad applicability by a judge is not improper, even though it may indirectly or incidentally benefit the issuing judge.

For example, although any federal judge or federal employee may be a defendant in a future filing and may thus fall within the class of persons protected by the order, we do not believe a judge should refrain from entering the order solely on the basis that such relief could potentially extend to the judge. Of course, a judge's impartiality could reasonably be questioned if the judge issued an order – either at the request of others or on the judge's own initiative – naming or describing the judge individually, providing tangible relief for his or her own personal benefit, or otherwise directly protecting the judge's own personal interests.

Once a protective order is issued, a judge who has been sued by a litigant may be called upon to review that litigant's filings for compliance with the order. The actual review by a designated judge raises additional recusal issues. Again, Canon 3C(1)'s standard for assessing when a judge's impartiality might reasonably be questioned is the applicable standard. If the reviewing judge is named as a defendant in an action the litigant is attempting to file, that judge must recuse because one could reasonably question the judge's impartiality. If the assigned judge is not named as a defendant in the proposed filing, but is or was a defendant in another action brought by the same litigant, the judge ordinarily will not be prevented from assessing the litigant's compliance with the protective order. But the judge must still evaluate the factors enumerated above concerning whether his or her impartiality might reasonably be questioned. As in the situations described above, pending complaints against the designated judge that are subject to prompt dismissal on judicial immunity or other grounds will not ordinarily give rise to reasonable questions about the assigned judge's impartiality. Thus, generally speaking, a judge named by a litigant in one case is not disqualified in another case (not naming the judge) from assessing the litigant's compliance with an injunction restricting future filings.

Complaints of Misconduct or Disability Against the Assigned Judge

Harassing litigants occasionally file complaints of misconduct or disability against judges under the Judicial Conduct and Disability Act ("JCDA"), 28 U.S.C. §§ 351 to 364. When a JCDA complaint is filed, disqualification is governed by the same general principles as disqualification when a civil lawsuit is filed against the judge. In neither instance is a disgruntled litigant allowed to disqualify a judge from other cases by the simple expedient of filing a complaint. But judges must be attentive to the possibility that unusual circumstances may arise warranting recusal in individual cases.

When a complaint is filed against a judge under the JCDA, he or she is not required to recuse from a case involving the complainant unless, under the general principles of Canon 3C(1), the circumstances raise a reasonable question about the judge's impartiality. Such a reasonable question about the judge's impartiality arises if

there is a realistic potential for the complaint to lead to adverse consequences for the judge.

It may be possible for the judge to await an internal administrative decision on a JCDA complaint before making a recusal decision in a pending case involving the complainant. JCDA complaints are transmitted to the chief judge of the circuit, who is responsible for reviewing them and has the power to dismiss them on various statutory grounds. A dismissal may be appealed to the judicial council of the circuit. If a prompt dismissal is not ordered or the complaint is not otherwise concluded, the chief judge is required to arrange for an investigation and submission of a report to the judicial council. 28 U.S.C. § 353.

Thus, when a litigant files a JCDA complaint against a judge, it is preferable, if feasible, for the judge to await the initial decision of the chief judge before considering recusal from cases involving that litigant. If the chief judge declines to dismiss the complaint and an investigation begins, the judge should normally recuse immediately. But, if the chief judge dismisses the complaint, as occurs in most JCDA cases, the judge will not face the potential for any adverse consequences. No reasonable person would then question the ability of the judge to participate impartially in the complaining litigant's case. If the chief judge's dismissal is subsequently overturned by the judicial council, the judge should normally recuse upon receiving notice of that decision.

If it is not feasible to await the decision of the chief judge, it is appropriate for the judge who is the subject of the complaint to determine whether the complaint meets one of the statutory grounds for dismissal. If the judge determines that the complaint meets any of the statutory grounds for dismissal, the judge will not face an actual or apparent threat of adverse consequences from the complaint. In those circumstances, so long as the judge holds that view, no reasonable person would question the judge's impartiality in the complainant's case, and recusal is not necessary. If the chief judge thereafter decides that the complaint is not subject to dismissal and arranges for an investigation, the judge should re-evaluate his or her position and ordinarily recuse from the case.

Given that most misconduct complaints are dismissed by chief judges at the outset, the foregoing advice makes recusal unnecessary in most cases. With respect to complaints that are not dismissed by chief judges, we conclude that no across-the-board rule is appropriate. We do believe a relevant question in this situation is whether it appears that there is a realistic potential for a sanction of some kind to be ordered against the judge.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 104: Participation in Court Historical Societies and Learning Centers

Court historical societies have been established in many communities for the purpose of developing, preserving, and promoting historical information and materials pertaining to a court or circuit and its judges, attorneys, and notable litigation. In addition, learning centers have been established to perform educational and outreach functions to educate the public about the role of the federal courts in American society and to present the history of a court or circuit.

The involvement of judges and court personnel in court history preservation activities funded solely from court funds does not present ethical concerns under the Codes of Conduct. Often historical societies and learning centers are operated, however, by nonprofit corporations that raise funds to finance programs and activities. The society or center may employ staff to conduct its operations and to engage in fund raising. Their boards of directors and officers may include judges, judicial employees, and attorneys who practice in the court or circuit. This opinion addresses the ethical issues that may arise when judges and court personnel are involved in court historical societies or learning centers that engage in fund raising.

Under Canon 4A(3) and 4B of the Code of Conduct for United States Judges ("Judges' Code"), judges may participate in nonprofit organizations such as historical societies and learning centers, subject to certain conditions. Likewise, under Canon 4A of the Code of Conduct for Judicial Employees ("Employees' Code"), court personnel may participate in nonprofit organizations such as historical societies and learning centers, subject to restrictions.

The Codes place limitations, however, on how judges and employees may participate in fund-raising efforts by court historical societies and learning centers. Canon 4C of the Judges' Code sets out the restrictions for fund raising by judges on behalf of *any* organization:

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

Other Canons of the Judges' Code indirectly place restrictions on fund raising; for example, under Canon 2 a judge may not lend the prestige of office to a fund-raising effort (as is repeated in Canon 4C). Canon 2 also prohibits a judge from being involved with a fund-raising effort that would create an appearance of impropriety. *See also* Advisory Opinion No. 35 ("Solicitation of Funds for Nonprofit Organizations, Including Listing of Judges on Solicitation Materials").

Canon 4B of the Employees' Code states the restrictions on fund raising by court personnel:

> A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:
>
> (1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.
>
> (2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.
>
> (3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

Other provisions of the Employee's Code place independent restrictions on fund raising by court personnel. Like the Judges' Code, Canon 2 of the Employees' Code prohibits involvement with any fund raising that would raise an appearance of impropriety.

Judges and court personnel may therefore participate in fund raising efforts for court historical societies and learning centers only to the extent set out above. In light of these limitations, judges and court personnel should be sensitive to public perception of whether the court itself is engaged in fund-raising activities on behalf of a court historical society or learning center. Public perception of the court's involvement with fund-raising activities of a court historical society or learning center is affected by several factors including: (1) the extent of involvement of judges or court personnel as the organization's founders, incorporators, members of the governing board, chair, officers, or staff; (2) the physical location of the program inside the courthouse or in a separate facility; (3) the identification of the organization as independent of the court in its written materials and fund-raising activities; (4) the name chosen for the organization;

and (5) the location of activities or of permanent plaques designed to recognize financial contributors to the organization.

The public may reasonably perceive that fund-raising activities conducted by a court historical society or learning center whose creation, governance, and staffing is dominated by judges or court employees or whose programs and materials are housed inside the courthouse rather than in a separate facility are fund-raising activities of the judges and court employees themselves rather than those of an independent organization. Likewise, the public may reasonably attribute the organization's fund-raising activities to the court's judges and employees if a reception honoring financial donors is conducted in the courthouse or a permanent plaque recognizing contributors is placed inside the courthouse. The judge or court employee should assess how the factors listed above, or any other such factors that surface, affect the permissibility of participating in a court historical society or learning center or of becoming involved in that organization's fund-raising activities.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 105: Participation in Private Law-Related Training Programs

In Advisory Opinion No. 87, the Committee provides guidance about judges' participation in continuing legal education programs and sets forth important caveats at the end of that opinion. This opinion focuses on judges' participation in private law-related training programs *other* than those offered by CLE providers, accredited institutions, or similar established educational providers. The caveats in Advisory Opinion No. 87 are equally applicable to the issues discussed here, and, although not repeated below, should be read in conjunction with this opinion.

The law-related training programs considered in this opinion include varied programs of instruction on trial and appellate advocacy, judicial procedure, and substantive law. Programs of this nature are offered to a select audience of attorneys and/or litigants, and are designed to improve attendees' legal skills or performance in judicial proceedings. However, the training in question is not offered by established educational providers (such as universities, law schools, and CLE firms) and is not available to a broad spectrum of attendees; rather, it is offered by entities seeking to train their own employees, clients, or associates. This opinion summarizes the Committee's earlier advice and discusses ethical issues that judges should consider before accepting an invitation to participate in such programs.[1]

Invitations to participate in private law-related training programs should be distinguished from the array of invitations judges may receive to provide law-related education, for outreach to the public, or to maintain relations with the bar. For example, judges may be asked to speak to students, to welcome new bar members, to address bar association meetings and international conferences, or to offer general remarks to gatherings of civic or community groups. Events of this nature do not generally involve providing instruction and training on matters of legal advocacy or substantive law and procedure. The Commentary to Canon 4 of the Code of Conduct for United States Judges specifically encourages judges' participation in such opportunities because judges are "in a unique position to contribute" to programs dedicated to improving the law and promoting public understanding of the legal system. Judges may participate in public outreach of this nature so long as they avoid concerns about improperly lending the prestige of their office under Canon 2.

Participation in private law-related training programs implicates several provisions of the Code. Canon 2 advises judges to act with integrity and impartiality and counsels against lending "the prestige of the judicial office to advance the private interests of the judge or others . . . ." Canon 4A states that a "judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." The Commentary to Canon 4 encourages judges to participate in law-related activities, either independently or through bar associations and other organizations, reflecting a recognition of the special contributions judges may make to the improvement of the law and the administration of justice. Canon 4D(1)

mandates that a judge should "refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves." When speaking to an audience that predominantly includes attorneys or clients on one side of litigation, a judge should be mindful of not giving advice that would favor or assist that audience at the expense of their litigation adversaries to avoid an appearance of bias that could arise contrary to Canon 2A. A judge speaking to such an audience must be equally available to address the other litigation constituency.

The Committee has relied on several interrelated factors to distinguish permissible from impermissible law-related training activities. Because judges are invited to participate in such a broad range of programs—involving diverse sponsors, audiences, and subject matter—it is difficult to draw bright line rules in this area. This opinion focuses on situations in which the Committee has expressed caution, or alternatively, programs that generally do not raise ethical concerns. In general, the factors that may affect a judge's decision as to the propriety of participation in a law-related training program include:

1. the sponsor of the training program;
2. the subject matter;
3. whether there is a commercial motivation for the program;
4. the attendees, including whether members of different constituencies are invited to attend; and
5. other factors, including the location of the program and advertising or promotion of the event.

Below we discuss these factors in the context of specific types of programs.

Programs Sponsored by a Law Firm or Legal Department

Law-related training programs sponsored by law firms or business legal departments raise concerns on several levels. First, participation by a judge in a law firm's training program for its attorneys, or a similar program offered by a business legal department for in-house attorneys, provides direct assistance to a particular law firm or business entity in violation of Canon 2B. Involvement in such a program can create the impression of a special relationship between the judge and the sponsor—that the judge wishes to do the sponsor a favor, that the sponsor wishes to do the judge a favor, or that the firm or business entity has some special influence that enables it to enlist the judge's support for its private training programs. This can also be viewed as lending the prestige of judicial office to a private interest. Based on these same concerns, the Committee advised against participation in an educational program for in-house lawyers sponsored by a private, for-profit corporation. *See also* Advisory Opinion No. 87, [including "Important Caveats,"] Example 4 (the Committee questioned the propriety of judicial participation where there was significant involvement of lawyers from a single

law firm in the organization and presentation of a seminar offering CLE credit to anyone willing to pay a fee to a separate third-party sponsor).

The location of the training program is also an important consideration. For example, a judge's participation in private educational programs that are held at the offices of attorneys appearing before the judge, and that are closed to other members of the bar, creates an appearance of a special relationship, favoritism, or partiality.

As with any commercial, for-profit activity, judges should avoid participating in law firm and legal department training activities that improperly exploit the judicial position or lend the prestige of judicial office to advance private interests. For example, judges are advised to refrain from teaching at for-profit programs about "the ins-and-outs of practice before that judge's court." *See* Advisory Opinion No. 87 ("Participation in Continuing Legal Education Programs"). Judges also should take steps to ensure that their names or positions are not exploited in advertising or used as an endorsement of the law firm or business sponsor. *See* Advisory Opinion No. 55 ("Extrajudicial Writings and Publications"); *see also* Advisory Opinion No. 87, [including "Important Caveats,"] Examples 1 & 2.

Business-related Programs

Requests to speak at seminars sponsored by consulting firms or other business entities raise concerns under Canon 2B regarding lending the prestige of office. While not ruling out altogether judicial participation in such circumstances, the Committee recommends a variety of checks on both the judge's and the sponsor's activities to limit the possibility that the judicial office will be improperly exploited.

When a program is sponsored by a business entity, a judge should consider whether the program is designed to promote the sponsor's business services to current or prospective clients, and whether the program is presented in a way that suggests that the participating judge has endorsed the sponsor's services. The Committee has advised that the judge may properly participate in a business program where the judge's appearance, and the program's brochures, do not imply an endorsement by the judge. In contrast, a judge's participation in a conference intended to attract litigators and sponsored by a group that provides witnesses for court proceedings strongly implicates the concern that the prestige of the judicial office is being employed to benefit a commercial endeavor. For similar reasons the Committee has advised against speaking at a program on discovery issues hosted by a for-profit company offering discovery services, where the company marketed its services in part through the training program.

Seminars sponsored by for-profit educational providers that are open to attendees for a fee present differing considerations. As noted above, it is inappropriate for a judge to sell his or her expertise about the local rules and practices of the judge's own court by lecturing on this topic at a program sponsored by a for-profit entity. But

judges may lecture on other topics. For example, the Committee found no impropriety in a judge's lecture at a seminar sponsored by a for-profit entity on a law-related subject of interest to attorneys and lay persons alike, provided that the judge avoided exploitation of the judicial office in the advertising and promotional materials. Similarly, the Committee advised that a judge could properly speak at a for-profit program for corporate and government attorneys on topics unrelated to the operations of the judge's court.

The Committee cautions judges to remain vigilant that the organizers of business-related programs do not exploit judicial participation by overemphasizing judges' participation, either in promotional materials for the event or by otherwise implying that the participating judge endorses the sponsor's commercial activities. It is therefore inadvisable for judges to provide blanket authorization to sponsors to use their names, positions, or likenesses for advertising and marketing purposes. Judges have a continuing obligation to monitor promotional activities associated with their participation in such programs to ensure that no improper exploitation of judicial office occurs. *See* Advisory Opinion No. 87, [including "Important Caveats,"] Examples 1 & 2.

Programs sponsored by a bar association or other nonprofit entity

Bar associations and other nonprofit entities on occasion offer law-related educational programs that are not part of a CLE curriculum (as noted above, CLE programs are addressed in Advisory Opinion No. 87). These programs raise fewer concerns than those sponsored by for-profit entities, mainly because the sponsors do not have a commercial motivation and the programs are generally open to a broad audience. The Commentary to Canon 4 specifically encourages judges to participate in law-related activities such as those sponsored by bar associations. Bar association training programs offer valuable opportunities for judges to share their experience and expertise with the legal community by making themselves available to a large and diverse group of practitioners. Accordingly, the Committee has advised that a judge could properly participate in a law-related forum sponsored by a not-for-profit civic organization and open to the public, even though the organization charged admission to defray its costs.

However, not all nonprofit groups have the same characteristics. Thus, there will be instances when the precise corporate or tax status of an entity must be disregarded for ethical purposes. *See, e.g.,* Advisory Opinion No. 87, [including "Important Caveats,"] Example 3 (a nonprofit entity will be treated as a for-profit entity when offering CLE credit if that seminar provider (a) acts as if it were a private business by aggressively emphasizing judicial participation as a marketing mechanism and (b) charges fees that are likely to be substantially in excess of the direct cost of providing CLE credit to the seminar attendees). Moreover, a judge's participation in a training program that will only benefit a specific constituency, as opposed to the legal system as a whole, cannot be characterized as an activity to improve the law within the meaning of Canon 4. For example, judge participation in legal training offered by an issue-specific

advocacy group that appears regularly in the judge's court may be perceived as lending the prestige of the judicial office to advance the interests of the group.

Note for Advisory Opinion No. 105

[1] Judges who participate in the select programs addressed in this opinion should be aware that such law-related training activities (other than accredited teaching and CLE) generally do not constitute "teaching" for which compensation may be accepted (with proper approval). That is, compensation (beyond reimbursement for actual expenses) for such programs would instead likely constitute a prohibited "honorarium" under the *Judicial Conference Regulations On Outside Earned Income, Honoraria, and Outside Employment*; *Guide to Judiciary Policy*, Vol. 2C, Ch. 10 ("Regulations"). *Compare* Regulations § 4 (defining "honorarium") *with* § 5(b) (defining "teaching").

September 2010

Committee on Codes of Conduct Advisory Opinion
No. 106: Mutual or Common Investment Funds

This opinion addresses recusal considerations related to ownership of mutual or common investment funds ("mutual funds"). Canon 3C is intended to set a standard for economic disqualification that assures impartiality and the appearance of impartiality, while also allowing judges to make non-disqualifying investments. We approach our analysis with the following principle firmly in mind: that the Code should be interpreted to the extent reasonably possible to enable judges to invest in funds without transgressing the Code or engaging in a conflict of interest.

Canon 3C(1)(c) requires a judge to disqualify himself or herself when the judge knows that he or she "has a financial interest in the subject matter in controversy or in a party to the proceeding," or when the judge has "any other interest that could be affected substantially by the outcome of the proceeding." However, "ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund." Canon 3C(3)(c)(i). These Code provisions, read together, provide that investments in a mutual fund will normally avoid triggering recusal concerns with respect to the securities that the fund holds, with some exceptions discussed below.

Consistent with the "safe harbor" concept, the Committee has advised that investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds. We also have advised that a judge who invests in a mutual fund has no duty to affirmatively monitor the underlying investments of the fund for recusal purposes. For these reasons, it is important for a judge to determine whether a particular proposed investment is a "mutual or common investment fund" and, therefore, qualifies under the safe harbor provision of Canon 3C.

Determining whether a fund is a "mutual or common investment fund"

Although the Code does not define "mutual or common investment fund," determining whether a fund qualifies for the safe harbor contemplated under Canon 3C(3)(c)(i) involves several related considerations, including: (1) the number of participants in the fund; (2) the size and diversity of fund investments; (3) the ability of participants to direct their investments; (4) the ease of access to and frequency of information provided about the fund portfolio; (5) the pace of turnover in fund investments; and (6) any ownership interest investors have in the individual assets of the fund.

The Committee concludes that most mutual funds that are registered with the Securities and Exchange Commission and sold to the public as mutual funds will likely meet the criteria above.

The Committee has advised, however, that certain financial investments, including some that are registered and sold to the public, do not qualify as "mutual or common investment funds." For example, we have advised that a judge's former law firm's 401(k) retirement plan could not be considered a mutual fund under the Code because it was managed by the law firm, had a relatively small number of participants, and provided the participants with detailed access to investment information regarding the plan. Similarly, the Committee has advised that a judge's IRA did not meet the mutual fund exception where it owned units of an investment vehicle that held stock of 15 named corporations, the portfolio was not actively managed, and the securities would not be sold or exchanged before termination of the investment vehicle in ten years. In contrast, the Committee concluded that a law firm's retirement fund qualified for the mutual fund exception because there were a large number of participants, the participants could not directly control the investments, the participants could not easily access information about the fund's portfolio, and the fund's assets turned over frequently.

The Committee has also advised that the Code's mutual fund exception did not apply to a brokerage account in which stocks were held in the judge's name, the judge could receive immediate notice of transactions, and the judge controlled the asset mix and some investment decisions. Similarly, the Committee concluded that an investment program did not qualify as a mutual or common investment fund where title to securities was held in the judge's name, the judge had the legal authority to direct investment decisions, and the judge received regular information about the portfolio. Similarly, we advised that the mutual fund exception did not apply where a judge owned shares of stock purchased by the fund, and the judge had some control over the fund's investment decisions by designating areas of no investment and directing the sale of particular stocks from the judge's account.

Recusal considerations related to mutual or common investment funds

As discussed above, investment in a mutual fund normally will avoid recusal concerns because the judge is not considered to have a direct financial interest in the securities that the fund holds. However, there is an additional factor for a judge to consider in determining whether owning a particular mutual fund will effectively avoid recusal considerations related to that fund. In unusual circumstances, recusal may be required under Canon 3C(1)(c) because the judge has an "interest that could be affected substantially by the outcome of the proceeding."

For purposes of this analysis, the Committee assumes that a judge owning a particular mutual fund does not participate in the management of the fund or have authority to make investment decisions for it, and does not have an ownership interest in the individual assets of the fund. We also assume that a mutual fund is registered with the Securities and Exchange Commission and offered to the public.

The Committee notes that it is the value of the interest itself that must be substantially affected by the outcome of the proceeding; its effect on the judge's overall financial condition is irrelevant. For example, recusal may be required if a judge owns shares in a specific mutual fund that is involved in a matter before the judge and the outcome of the litigation could substantially increase or decrease the value of the judge's investment in the fund. Ultimately, the judge must decide the potential effect on his or her financial interest in the mutual fund

Whether litigation might have a substantial effect on the judge's interest in a mutual fund will often turn on the size and diversity of the fund's investments. The value of a mutual fund that invests in many companies in a variety of industries would rarely be substantially affected by the outcome of litigation involving one particular company. In contrast, a mutual fund that invests in only a few companies in a particular industry would be more likely to be substantially affected by certain types of litigation involving one of them. The same would be true if the outcome of the litigation might affect the value of non-party companies in the same industry, whose stock the fund also holds.

In recent years, certain types of mutual funds have raised these recusal considerations. These include funds that are "sector" or "industry" funds which specialize in an industrial sector, and certain types of exchange traded funds ("ETFs"). ETFs, a relatively new investment vehicle, differ principally from other mutual funds in that they are traded on an exchange all day, rather than being issued or redeemed by the fund itself based on the net asset value of the fund at the end of the day. ETFs hold assets such as stocks or bonds and are sometimes simply an exchange-traded version of a more conventional fund. They may also hold commodities or commodity-based instruments. Determining whether a particular sector fund, industry fund, or ETF qualifies as a "mutual or common investment fund" under the Code involves the same criteria applied to more conventional mutual funds, of which they are a species. We conclude that such funds normally should be treated as mutual or common investment funds under the Code, and are subject to the same recusal analysis as other funds.

At the same time, however, a judge who chooses to invest in such mutual funds should evaluate whether his or her "interest" in the fund might be affected substantially by the outcome of a particular case, which would require recusal under Canon 3C(1)(c). In purchasing shares of narrow industry or sector funds, judges also should be mindful of their obligation to avoid investments that might result in frequent recusal. Canon 4D(3) states that "[a] judge should divest investments and other financial interests that might require frequent disqualification." Thus, a judge who regularly hears matters involving a particular industry should carefully consider whether purchasing a mutual fund which focuses on that industry might result in frequent recusal.

Finally, Canon 3C(1) directs judges to disqualify if the judge's impartiality might reasonably be questioned. For example, if a case challenges the fees charged by the mutual fund management company to manage a particular fund, and the judge owns shares in that particular fund, then the judge's impartiality might reasonably be

questioned and recusal would be required. Situations such as these are likely to arise only rarely and should be assessed on a case-by-case basis.

Issues related to investment management and advisory companies

Additional questions may arise when the management or investment advisory company for the judge's mutual fund is a party. These companies have managerial responsibility for investing the funds of participants and fiduciary responsibility for doing so in accordance with principles of trust and securities law.

Ownership of shares in a particular mutual fund does not give rise to an ownership interest in the company managing the fund or providing it with investment advice. Even if the management company is technically owned by the shareholders of all the mutual funds operated by the company, those shareholders do not have a financial interest in the management company. They do not receive dividends from the management company (only from the funds) or benefit from any increase in value of the shares of the management company. Instead, these situations are analogous to a savings account or a mutual insurance company policy, ownership of which does not give the account or policy holder an equity ownership interest in the bank or insurance company.

The same analysis applies to ownership of a mutual fund. Because an investment in a fund does not convey an ownership interest in the fund management or investment advisory company, the fact that the management or investment advisory company for the judge's fund appears as a party does not require the judge's disqualification. Under Canon 3C(3)(c)(iii), the proprietary interest of such an account or policy holder is considered a disqualifying financial interest in the bank or insurance company only if the outcome of the proceeding could substantially affect the value of the interest.

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

March 2011

Committee on Codes of Conduct Advisory Opinion
No. 107: Disqualification Based on Spouse's Business Relationships

A spouse's business relationships with a party, law firm, or attorney appearing before a judge may result in the judge's disqualification under Canon 3C(1) of the Code of Conduct for United States Judges. For example, recusal is mandatory under Canon 3C(1)(c) and (d) when:

- the judge's spouse is an officer, director, or trustee of a party in a proceeding before the judge (Canon 3C(1)(d)(i));
- the judge's spouse is an attorney representing a party in a proceeding before the judge (Canon 3C(1)(d)(ii));
- the judge's spouse is known to have an interest that could be substantially affected by the outcome of a proceeding before the judge (as when the spouse is an equity partner at a law firm that appears before the judge) (Canon 3C(1)(c) and (d)(iii) and Advisory Opinion No. 58);
- the judge's spouse is to the judge's knowledge likely to be a material witness in a proceeding before the judge (Canon 3C(1)(d)(iv).

Recusal is not mandatory in other situations involving spousal business relationships that are less direct or consequential. Recusal in these situations will depend on a number of facts and circumstances that must be evaluated on a case-by-case basis to determine, in accordance with Canon 3C(1), whether "the judge's impartiality might reasonably be questioned."

This opinion offers guidance when a judge knows his or her spouse has a business relationship with a party, law firm, or attorney appearing before the judge in an unrelated proceeding. This opinion does not address situations described in Canon 3C(1)(c) or (d), above, which mandate the judge's recusal. The opinion also does not address situations in which the spouse or the spouse's business provides services in the proceeding before the judge. The Committee notes that, for purposes of recusal, "considerations applicable to a judge's spouse should be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Commentary to Canon 3C.

This opinion addresses two particular forms of business relationships: (1) client relationships, where the spouse or spouse's business provides services to a client and that client appears before the judge in an unrelated proceeding as a party, law firm, or attorney, and (2) service provider relationships, where a party, law firm, or attorney that appears before the judge provides services to the spouse or the spouse's business that are unrelated to the proceeding before the judge. As a general proposition, the fact that the spouse or the spouse's business has a business relationship with an entity that

appears in an unrelated proceeding before the judge usually does not require the judge's recusal.

I. Client Relationships

When a judge knows that a client of the judge's spouse or the spouse's business appears before the judge, the Committee has advised that the judge should evaluate certain factors to determine whether recusal is warranted. These factors include: (1) the spouse's personal role or lack of personal role in providing services to the client, (2) whether the services provided to the client are substantial and ongoing, (3) the nature of the client's relationship to the spouse or the spouse's business, and (4) the financial connection between the client, the business, and the judge's spouse (including the percentage of business revenue the client provides and the amount of compensation the spouse earns from the client). Additionally, judges should consider recusal whenever they become aware of circumstances suggesting that the hiring of the spouse or the spouse's business may have been influenced by the judge's position.

A. *Spouse Not Personally Engaged in Providing Services*. In the Committee's view, judges generally are not required to recuse from cases involving a current client of a spouse or a spouse's business if the spouse is not then personally engaged in work for that client. The spouse's connection to such a client is indirect and attenuated, and absent other factors a reasonable person would not question the judge's impartiality if the client appeared before the judge in an unrelated proceeding. This is true even if the spouse personally worked for the client in the past but is not currently engaged in work for the client.

B. *Spouse Personally Engaged in Providing Services*. When the judge knows that his or her spouse is personally engaged in providing services to a client appearing before the judge (including the supervision of services performed by other employees for the client), an additional consideration is the degree of involvement of the spouse or the spouse's business. If the relationship to the client involves only an occasional or isolated transaction, recusal is not required unless some other particular fact or circumstance gives rise to reasonable questions about the judge's impartiality.

The Committee has advised that a judge whose spouse was a clinical psychologist need not recuse when a law firm appearing before the judge had retained the judge's spouse on one or two occasions in an unrelated matter, where there was no ongoing relationship between the spouse and the law firm. The Committee gave similar advice where a spouse's notary business had an insubstantial, noncontinuous relationship with a client that appeared before the judge. The Committee has also advised that a judge whose spouse owned and operated a legal or executive recruitment business need not recuse merely because a law firm appearing before the judge engaged the judge's spouse, either currently or in the past, to recruit an additional lawyer, or because the spouse made preliminary overtures to recruit attorneys but no contract or employment negotiations resulted. Similarly, a judge need not recuse

because an attorney spouse represented members of a class action who filed unrelated actions in the judge's court, where the spouse had no close professional or personal relationship with the class members.

At the other end of the spectrum, when the spouse is personally engaged in providing services to a client who appears before the judge in an unrelated proceeding, recusal is appropriate if the judge knows that the spouse or the spouse's business has an exclusive arrangement, or a substantial and ongoing relationship, with a client that appears before the judge. For example, the Committee concluded that a current engagement of the spouse's executive recruitment business for the spouse to work on a law firm's merger would require the judge's recusal when the law firm appeared before the judge, as would other similar efforts that would result in a substantial change in the law firm and thus constitute an undertaking of similar importance for the future of the firm. A spouse who personally performed four high level executive recruitments in the same year for the same company for substantial fees for each recruitment would be considered to have a substantial and ongoing relationship with the company, requiring the judge's recusal, but if the work were spread out over a substantially longer period, recusal may not be required.

C. *Nature of Spouse/Client Relationship*. When a spouse is employed by or owns a business whose major or sustaining client appears before the judge, appearance concerns may arise even if the spouse personally performs no services for the client. These concerns are generally heightened when the spouse's business is small and the client is a significant client, so that the spouse is personally identified with the client, or the client can be reasonably perceived as the sustaining or sole client of the business.

The Committee has advised that if a judge knows a particular company appearing before the judge is the prime or sole client of the spouse's small business, and a ruling in the case could jeopardize the client's continued existence, the spouse would have an interest that could be substantially affected by the case and the judge should therefore recuse.

Concerns may also arise if a judge knows the spouse's business or law firm effectively serves as general counsel or in a managerial relationship to the client, rather than simply providing services in arms' length transactions. In a relationship of sufficient magnitude, the client may be considered equivalent to an employer of the spouse, in which case the judge should consider recusal based on the considerations applicable when a party or law firm before the judge directly employs the judge's spouse. *See, e.g.*, Advisory Opinion No. 58.

D. *Financial Considerations*. The nature and size of the client's financial connection to the spouse and the spouse's business can also affect the assessment of the judge's impartiality. A key consideration is the spouse's actual or potential financial benefit from the client. For example, the spouse's compensation may be paid by the

spouse's employer and related only indirectly, insignificantly, or not at all to the fees paid by the client to the spouse's employer. In this regard, the Committee has advised that a judge's impartiality could not reasonably be questioned because the judge was aware the spouse earned a relatively small sales commission, in an ordinary, arms' length contract, from a party appearing before the judge in an unrelated proceeding.

Alternatively, a spouse may receive a commission or direct payment from the client. The Committee concluded that a one-time payment made to a spouse for employment recruitment services rendered to a law firm did not require the judge's recusal, where the fee was but a small percentage of the spouse's compensation, was typical for the type of services rendered, was neither a major outlay nor a matter of great significance for the law firm client, and no other features of the transaction suggested impropriety. However, if the judge knew the spouse directly received a portion of client fees amounting to more than a small percentage of the spouse's income, the judge's impartiality might reasonably be questioned in a proceeding involving the client, in which case the judge should recuse. In situations of this nature, involving large fees paid by a client to the spouse, it is immaterial whether the spouse personally works for the client or collects fees in the nature of finders' fees or fees based on the services provided to the client by others.

The client's financial contribution to the spouse's business assumes more significance when the spouse is a partner, shareholder, or owner of the business. A major or sustaining client may provide more than a small percentage of the revenue of the spouse's business and, in turn, the spouse's income as a partner, shareholder, or owner. Departure of such a client could materially reduce the spouse's income or threaten the existence of the business. In such circumstances, the spouse's business, and the spouse as a partner, shareholder, or owner, may be so dependent upon the client that the judge's impartiality may reasonably be questioned in a proceeding involving the client. Additionally, the spouse who is a partner, shareholder, or owner may be so generally identified with the client that the judge's impartiality may reasonably be questioned in a proceeding before the judge involving the client. However, a judge is not automatically disqualified when a client of the spouse's business appears in a proceeding, even if the spouse is a shareholder, partner, or owner; this is simply one additional factor to consider. Further, if the client's financial contribution to the spouse's business is a relatively small percentage of the revenue of the spouse's business (and, in turn, of the spouse's income as a partner, shareholder, or owner), recusal is not required simply because the client appears before the judge in an unrelated proceeding.

If the judge's spouse is a salaried employee, rather than a partner or owner, and receives no bonus or commission based on the work performed for clients, the spouse will not be considered to have an interest in business clients that would require the judge's disqualification in an unrelated proceeding involving such clients. *See* Advisory Opinion No. 58 (a judge need not recuse from matters involving a relative's law firm, so long as the relative is not an equity partner and has not participated in the matter, and

the relative's compensation is in no manner dependent upon the outcome). This conclusion is not affected by the spouse's involvement in a client's matters, so long as matters in which the spouse is involved are not at issue in the proceeding before the judge.

II. Relationships with Service Providers

A spouse's business and professional employment may involve relationships with a variety of service providers, such as surety companies, landlords, banks or other lending institutions, and law firms. Companies that provide services to the spouse or the spouse's business may from time to time appear before the judge in unrelated proceedings. Whether such a business relationship warrants the judge's recusal depends on the nature of the relationship and services provided.

When a service provider's transactions with the judge's spouse or the spouse's business are in the regular course of business, routine in nature, and are unaccompanied by special circumstances suggesting that the selection of the spouse or the spouse's business may have been influenced by the judge's position, recusal is ordinarily not required. The Committee has advised against recusal in various situations where a party, law firm, or attorney appearing before the judge also provided services to the spouse's business. For example, the Committee advised that a judge need not recuse from proceedings involving banks and other lenders to the spouse's business where the relationship with the spouse's business involved traditional bank accounts and loans and no special circumstances were present (such as unusually favorable terms).

In other circumstances, the special character of the relationship between service providers and the spouse or the spouse's business may make recusal advisable should the service provider appear before the judge. In this regard, the Committee has advised that a judge should recuse from matters handled by a law firm subleasing space to the judge's spouse, because the judge's impartiality might reasonably be questioned. For similar reasons, the judge should recuse if the spouse's business is a tenant in the offices of a company that appears as a party before the judge.

Recusal considerations also arise when members of a law firm that provides services to a spouse's business appear before a judge in unrelated proceedings. In this situation, the Committee has advised that if the judge knows that the same attorney who represents the spouse's business even in a routine matter appears before the judge, the judge should recuse. The judge should also recuse if an attorney represents the judge's spouse's business in a matter that the judge knows could substantially affect the spouse's interest, and other members of the attorney's firm appear before the judge. However, if an attorney represents the spouse's business in routine matters that would have no substantial effect on the business or the spouse's interest therein, the judge's impartiality could not reasonably be questioned merely because another attorney from the same law firm appears before the judge.

III. Other Considerations

Most of the business relationships mentioned in this opinion do not fall within the definition of financial interest in Canon 3C(3)(c) and, consequently, judges have no obligation under Canon 3C(2) to ask their spouses about those business relationships. However, Canon 3C(2) does oblige judges to make a reasonable effort to keep informed about a spouse's personal financial interests. As defined in Canon 3C(3)(c), financial interest means a legal or equitable interest, such as stock ownership, or a relationship as director, advisor, or other active participant in the affairs of a party.

Further, if a judge is not aware that a party, law firm, or attorney in a proceeding before the judge has a business relationship with the spouse's business, the judge's impartiality could not reasonably be questioned. *See* Advisory Opinion No. 90 (advising that a judge need not investigate whether any relative is a member of a class action because "the *unknown* presence of a judge's relative as a party . . . does not create a risk of injustice to the parties, and does not undermine the public's confidence in the judicial process – so long as the judge recuses upon learning of the relative's status as a party"). If a judge nevertheless becomes aware that a client of or service provider to the spouse's business is involved in a proceeding before the judge, the judge should consider the facts presented and recuse under the circumstances set forth in this opinion.

When a spouse's business relationships with a party, law firm, or attorney appearing before the judge cause the judge's impartiality reasonably to be questioned, the judge must recuse, absent remittal. *See* Canon 3D. Remittal is not available for any of the mandatory recusal situations described in Canon 3C(1)(a)-(e), including when the judge knows the spouse has an interest that could be substantially affected by the outcome of the proceeding before the judge. In most of the circumstances described above, however, the judge's disqualification is pursuant to Canon 3C(1), and remittal is available.

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

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 108: Participation in Government-Sponsored Training of Government Attorneys

Judges may participate in government-sponsored training of attorneys employed by a governmental entity subject to the following limitations:

1. Judges may appear at "closed" programs (open only to a one-sided audience), but should be willing and available to participate in training for interested attorneys representing the other side;

2. Judges should not provide guidance on the ins-and-outs of practice before their courts if the audience is closed and includes attorneys likely to appear before them;[1]

3. Judges should not suggest a particular interpretation of a disputed legal issue or other predilection as to the application of the law;

4. Judges should not provide direct assistance in a given case; and

5. Judges should avoid the appearance of bias or favoritism in the content of their presentations.

We note that this advisory opinion represents a change to some of the Committee's previous guidance on this topic. The Committee previously has advised judges not to participate in *government-sponsored* training of *government attorneys* based on the limited nature of the audience (e.g., only prosecuting or only defense attorneys) and the likelihood that members of the audience would appear before the judge in the future. The Committee has reconsidered that advice and now reaches the conclusions outlined above.

This opinion modifies the Committee's prior advice only to the extent that such advice relates to judicial participation in government-sponsored training of attorneys employed by the government. It does not modify prior advice limiting judicial participation in privately sponsored legal training or in the training of witnesses. *See* Advisory Opinion No. 105 (addressing judicial participation in privately sponsored legal training). The Committee continues to advise, for example, that judges should not participate in programs for expert witnesses or programs designed to teach law enforcement officers how to be more effective witnesses in federal court.

Other court personnel may participate in any training in which it would be appropriate for a judge to participate, as explained above. In addition, court personnel (other than chambers staff) may participate in closed-audience training of local attorneys relating to technical matters such as court rules or procedures (e.g., electronic filing procedures) so long as similar training is made available to other similar closed audiences.

Note for Advisory Opinion No. 108

[1] *See generally* Advisory Opinions 87 and 105 (discussing this limitation in the context of privately sponsored training programs).

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 109: Providing Conflict Lists to Departing Law Clerks

Judges sometimes receive requests from law firms for which their law clerks will work after the clerkships end. These firms ask, for the purpose of screening for conflicts of interest, the clerk or judge to identify the matters that the clerk worked on or that passed through chambers during the clerkship period. This opinion addresses whether a judge should provide law firms and clerks with a list of matters the clerk worked on while in chambers, as well as whether a judge should provide a list of all matters that were pending before the judge or the court during the clerk's tenure.

A. Matters the Clerk Worked on While in Chambers

Judges and clerks should generally decline to provide law firms with lists of matters the clerks worked on while in chambers. Granting such requests may result in the disclosure of confidential information. The assignment of a law clerk to a particular case is rarely revealed by any court, whether appellate, district, or bankruptcy. Moreover, assignment of particular appellate judges to an appeal may remain confidential until shortly before oral argument. *See, e.g.*, Practitioners' Guide to the U.S. Court of Appeals for the Fifth Circuit at 69 (Nov. 2011) ("About 30 days before the beginning of oral argument sessions, we post the case names and numbers, and the locations of the arguments on our internet site. The week before argument we post the names of the judges who will hear the cases."), available at www.ca5.uscourts.gov/clerk/docs/pracguide.pdf. Also, the involvement of particular judges in some internal appellate proceedings, such as certain aspects of en banc activity, inquiry to other panels, holding mandates, etc., is not publicly disclosed.

Canon 3D of the Code of Conduct for Judicial Employees mandates that a judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. This provision binds clerks even after their clerkships end. Canon 3D states, "[a] former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority." Employees' Code, Canon 3D. This provision is intended to protect the ability of judges to confer privately with their law clerks without fear that those interactions will later be revealed, thus chilling the ability of judges to receive assistance from their clerks. Canon 3D also insures that present and former law clerks will not later use their privileged access to the judiciary for personal gain.

As a general matter, the Employees' Code respects the confidentiality owed by incoming law clerks to former employers or organizations by not requiring law clerks to provide a list of the cases they previously worked on or other confidential client information. Rather, the Employees' Code puts the onus on the law clerks to self-identify cases as to which they have disqualifying information due to personal relations,

financial investments, or former employment at the outset of their clerkships without requiring any case list. Under Canon 3F,

> When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

Employees' Code, Canon 3F(3). Just as law clerks identify conflicts to their judges instead of being required to submit a list of their former employer's matters or cases that may include confidential information, former clerks who are employed by law firms should be trusted to recognize those cases whose very pendency is confidential but from which they should be isolated due to clerkship-related conflicts. This process can occur without resorting to a case list divulging confidential information in violation of the continuing confidentiality obligation under Canon 3D.

We assume that a former clerk must refrain from working on all cases in which he or she participated during the clerkship, and may be required by the judge, by court rule, or by attorney ethical rules to refrain from work on cases pending before the judge even if the law clerk had no personal involvement in them. *See, e.g.*, 9th Cir. R. 46-5 (2011) ("No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule. . . . An attorney who is a former employee may apply to the Court for an exemption."); *accord* Fed. Cir. R. 50 (2011) ("No former employee of the court may participate or assist, by representation, consultation, or otherwise, in any case that was pending in the court during the period of employment."); Federal Judicial Center, Maintaining the Public Trust—Ethics for Federal Judicial Law Clerks at p. 25 (3d ed. 2012) ("You may not participate in any matter that was pending before your judge during your clerkship."); Advisory Opinion No. 81 ("United States Attorney as Law Clerk's Future Employer"); Advisory Opinion No. 74 ("Pending Cases Involving Law Clerk's Future Employer").

The Committee is mindful not only of attorneys' ethical obligations regarding conflicts but also the desire of firms to avoid disqualification, disgorgement of fees, or other consequences resulting from a failure to screen lawyers who have ethical conflicts. Although the Committee is not authorized to interpret the ABA Model Rules of Professional Conduct, we are not aware of any provision in these rules that would require the disclosure of broad lists of all matters that a former clerk worked on. Indeed, law firms themselves have recognized the pitfalls and barriers in obtaining confidential

information from lateral hires who are presumably subject to the ABA Model Rules or similar derivative rules. *See, e.g.*, Susan P. Shapiro, Tangled Loyalties: Conflict of Interest in Legal Practice 330 (U. of Mich. Press 2002) (quoting a Chicago law firm hiring partner about how he might screen for conflicts: "See, I can't ask an associate, 'What clients have you worked on?' That would be a breach of ethics for them to disclose it to me."); *see also* Paul R. Remblay, Migrating Lawyers and the Ethics of Conflict Checking, 19 Geo. J. Legal Ethics 489, 491-93 (Spring 2006) (noting that, because the ABA Model Rules lack specific guidance about the scope of permissible conflict checks, law firms tend to ask proposed lateral hires about "the work that they did at their old firms, and about their former and existing clients" while observing the rule not to reveal presumptively confidential client information).

In light of these considerations, judges and clerks should generally decline law firms' requests for lists of all matters the clerks participated in, because such requests may call for the disclosure of confidential information, especially for clerks currently employed by the court. The concerns underlying the requests can be effectively addressed through less intrusive means. First, judges may suggest to clerks that they maintain a list of cases in which they have participated in order to facilitate the identification of conflicts of interest during their future employment (keeping in mind that such lists are not to be disclosed to anyone). Second, law firms can also provide to the former clerk who joins the firm a list of cases whose pendency before a specific judge or court is a matter of public record, and ask the clerk to identify those cases where there is a conflict (without identifying to anyone the cases the clerk worked on). Third, at the start of the former clerk's employment and for whatever time period deemed appropriate, firms can isolate former clerks from all cases pending before a particular judge or court (as identified from the public docket).

B. Matters Pending Before the Judge or the Court During the Clerk's Tenure

Some law firms have requested that judges and clerks provide a list of all matters pending before the particular court—or the particular district, bankruptcy, or magistrate judge—during the clerk's tenure, not simply those on which the clerk worked. Although these requests present fewer problems because they do not associate a clerk with work on a particular case, they can still create confidentiality concerns, as well as practical problems.

On one hand, it is possible a clerk will not have knowledge of all cases pending before his or her judge during the clerkship. One way to avoid future conflicts would be for the court to provide to the clerk upon departure a list disclosing only publicly available information about pending cases. Such a list would not run afoul of Canon 3D's prohibition on disclosing confidential information. On the other hand, depending on the caseload of the particular court, it could create an administrative burden for the Clerk's Office to generate such lists for each departing clerk. Further, the lists may not be comprehensive, as judges on the same court sometimes confer with one another on a given case even when not assigned to that case. In the appellate context, such a list

should include cases considered by the court rather than by an individual judge, because the panel assigned to a case is often not publicly revealed until shortly before oral argument, and because non-panel judges may be involved in the resolution of cases, for instance in en banc considerations.

For the foregoing reasons, judges may decide on an individual basis to provide such lists to clerks of all cases assigned to the judge's court during the relevant time, or in the case of district, bankruptcy, or magistrate judges, all cases assigned to that judge. The Code does not preclude this. However, judges are under no obligation to provide such lists. The onus remains on the law clerks to identify cases as to which they have a disqualifying connection. Judges deciding to provide such lists should not provide them to law firms directly but instead to the individual clerk.

July 2012

Committee on Codes of Conduct Advisory Opinion No. 110: "Separately Managed" Accounts

This opinion addresses recusal considerations related to ownership of SMAs (sometimes known as "separately managed accounts," "single managed accounts," or "managed asset accounts"), an increasingly popular investment vehicle. SMAs are similar to mutual funds in many ways. Like mutual funds, SMAs are managed by investment firms; unlike mutual funds, however, investors own the underlying securities or assets. Such individual ownership permits investors to customize their SMAs, for instance, by exercising more or less control over the investment portfolios. *See, e.g.*, FINRA, "Managed account," 401(k) Glossary, http://www.finra.org/investors/401k-glossary (last visited May 18, 2015).

Some judges may assume that SMAs are functionally equivalent to mutual funds and therefore do not trigger any recusal obligations. This assumption misunderstands Canon 3C, which requires disqualification when a judge has a financial interest in the subject matter of the controversy or in a party, or has any other interest that could be affected substantially by the outcome of the proceeding. "Financial interest" means "ownership of a legal or equitable interest, however small." Canon 3C(3)(c). While the Canons create a safe harbor for mutual and common investment funds (hereinafter the "mutual fund safe harbor") by providing that "[o]wnership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund," Canon 3C(3)(c)(i), SMAs are not eligible for this safe harbor. We explore the safe harbor in Advisory Opinion No. 106 ("Mutual or Common Investment Funds"), in which we explain that "investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds." We have thus advised that an investment vehicle qualifies for the mutual fund safe harbor, inter alia, only if the fund, not the judge, owns the individual securities. In an SMA, the investor owns the individual securities, and this fact is dispositive. Whether or not a judge's SMA is otherwise similar to a mutual fund – for example, because both funds are managed – the judge's ownership of the underlying securities categorically precludes invocation of the safe harbor. (*See* Advisory Opinion No. 106 for a more detailed discussion of the mutual fund safe harbor.)

Although an SMA does not qualify for the mutual fund safe harbor, some judges may assume that an SMA structured like a "blind trust" triggers no recusal obligations. Generally, the beneficiary of a blind trust "has no knowledge of the trust's holdings and no right to participate in the trust's management." Black's Law Dictionary 1648 (9th ed. 2009). Thus, if a judge structures an SMA like a blind trust, the judge will not know – or control – what securities the SMA portfolio contains. Yet an SMA structured like a blind trust would remain ineligible for the mutual fund safe harbor, so the recusal obligations of Canon 3C would continue to apply. A judge's use of a blind trust does not obviate the judge's recusal obligations. *See* Canon 3C(2) ("A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor

children residing in the judge's household.") The Committee has consistently advised that the use of a blind trust would be incompatible with a judge's duty to "keep informed" about financial interests under Canon 3C(2).

We remind judges investing in SMAs to be mindful of both their recusal and their financial disclosure obligations. Under the Judicial Conference policy on electronic conflicts screening [*Guide to Judiciary Policy*, Vol. 2C, § 410.20], JCUS-SEP 06, at p. 11, a judge has a continuing obligation to update the judge's list of financial interests that would require recusal, which would include securities held in SMAs. Similarly, because judges investing in SMAs own the underlying securities, the scope of their financial disclosure obligations may change as their SMA portfolio develops. The Committee does not address financial disclosure issues, however, so judges should consider the guidance in the filing instructions for financial disclosure reports and contact the Financial Disclosure Committee with any questions.

August 2013

Committee on Codes of Conduct Advisory Opinion
No. 111: Interns, Externs and Other Volunteer Employees

The Code of Conduct for Judicial Employees [*Guide to Judiciary Policy*, Vol. 2A, Ch. 3] ("the Employees' Code") was amended in 2013 to expressly cover interns, externs, and other volunteer court employees. JCUS-MAR 13, p. 9. The amendment was an extension of the Committee on Codes of Conduct's precedents that advised that these groups were subject to the Employees' Code even though they were not expressly included. *See* Advisory Opinion No. 83. The amendment was made to insure that all those who perform substantive work (as opposed to mere observation) for the courts, even on a voluntary basis, were aware that they were bound by the same ethical restraints and considerations as compensated employees. The Committee also wanted to insure that all judges, who are required by Canon 1 of the Code of Conduct for United States Judges [*Guide*, Vol. 2A, Ch. 2] to maintain and enforce high standards of conduct for themselves and members of their staffs, will take an active part in explaining and applying the parameters of the Employees' Code to interns, externs, and other volunteer court employees.

This opinion addresses ethics issues that may arise concerning the employment of volunteers, either from the employees' perspective under the Employees' Code, or from the judges' perspective under the Judges' Code. It is important to note that although chambers' staff members are subject to some of the more restrictive constraints of the Employees' Code, the provisions of the Employees' Code addressed here apply to all judicial employees.

Canon 4E of the Employees' Code prohibits a judicial employee from receiving a salary, or any supplementation of salary, as compensation for official government services from any source other than the United States. *See* Advisory Opinion No. 83 (advising that a volunteer employee such as an extern may not accept during the externship any payment or salary advance from a law firm, or any benefits such as health insurance paid for by a law firm). The Committee recognizes that various courts have historically used unpaid interns, externs, or other volunteer court employees who received educational stipends while they perform work for the courts. While such an arrangement would ostensibly be prohibited by Canon 4E, the Committee's opinion is that this limited circumstance, as more fully delineated below, does not run afoul of the spirit or intent of the Code, and, therefore, is not prohibited by Canon 4E.

The spirit of the Employees' Code is to preserve the integrity and independence of the judiciary and of the judicial employee's office by requiring judicial employees to observe high standards of conduct (Canon 1), avoid conduct that might lead to an appearance of impropriety (Canon 2), avoid conflicts of interest and the disclosure of confidential or sensitive information (Canons 3D & 3F), and not engage in prohibited political activity (Canon 5), violations of which could diminish public confidence in the judiciary and possibly prevent the swift and unbiased administration of justice.

As a general proposition, an intern, extern, or other volunteer court employee may accept an educational stipend or similar payment after checking with the court or the judge to ensure that certain conditions are met. This would involve an evaluation by the judge to determine whether the funding arrangement would raise ethical concerns under either the Employees' Code or the Judges' Code. In making this evaluation, the judge should consider questions including the source of the funds (i.e., whether the funds are from a politically-based organization, a group that regularly appears before the federal courts, or attorneys who regularly appear before the federal court) and the nature of the payment arrangement (i.e., whether the funding is for a short-term, educationally-based position).

Examples of the Committee's advice on similar issues provide some guidance in addressing the various circumstances that may arise.

The Committee has found that there was no appearance of impropriety under Canon 2 of the Judges' Code in a judge's accepting the volunteer services of an intern who received a stipend from a foreign government, assuming the government was not a litigant in the judge's court. In that matter, the Committee viewed the intern, who was a foreign attorney seeking an internship with the court as part of her training to become a judge, to be in a situation similar to a law student extern or a "cooperative education" student performing services in the court in exchange for academic credit. *See Guide*, Vol. 12, § 550.80 et seq. ("Volunteers") and § 550.70 et seq. ("Cooperative Education and Fellowship Programs"). The Committee found no ethical impediment to the arrangement, and directed the judge to the applicable requirements for volunteer service programs so the judge could insure compliance with those rules and policies. *See* 28 U.S.C. § 604(a)(17)(A) (giving the Director of the Administrative Office of the United States Courts the authority to accept voluntary and uncompensated services to the court); *Guide*, Vol. 12, § 550.20(b) (indicating that the Director has delegated this authority to the heads of all units in the judiciary, including the Clerks of Court and Circuit Executives), § 550.70.20 ("Cooperative Education and Fellowship Program Roles and Responsibilities"), § 550.80.20 ("Roles and Responsibilities" governing court volunteers). Before commencement of such voluntary services to the court, the court unit executive must execute a Form AO 196A (Acknowledgment of Gratuitous Services), as provided in § 550.80.20(a)(1).

The Committee reached the same conclusion for a law school graduate who served as a volunteer law clerk and received a stipend through a law school fellowship program. The Committee found the fellowship program, being of limited duration (which to date has been found to include up to six months) and awarded through an academic institution, analogous to a cooperative educational program. The Committee opined that, assuming the law school was not a party to litigation in the judge's court or otherwise doing business with the court, there would be no appearance of impropriety in the intern accepting a modest stipend from the law school. Consequently, the Committee found that the arrangement was permissible under Canon 2A of the Judges' Code ("A judge ... should act at all times in a manner that promotes public confidence in

the integrity and impartiality of the judiciary.") The Committee also found no violation of the Employees' Code Canon 4B(3) (prohibiting the acceptance of funds from someone "likely to come before the judicial employee or the court") or Canon 4C(2) (prohibiting the acceptance of funds from "anyone seeking official action from or doing business with the court" or "anyone whose interests may be substantially affected by the performance or nonperformance of official duties") because the prospective intern's nominal stipend was not being paid in anticipation of future employment by her law school, and did not give rise to concerns regarding undue influence or other impropriety. The Committee noted that nothing in the law school's program indicated a special or exclusive relationship between the judge and the law school such as giving that law school's graduates preferred access to the judge's chambers or others on the judge's court.

The Committee has advised, however, that a judge should not accept the services of a volunteer law clerk who would be privately compensated by the law school from which the clerk graduated, where the funds would be solicited from lawyers. The Committee noted that the circumstances differed from previous opinions because it did not involve a short-term, academically-based internship, but rather was for a full-time law clerk compensated by alternative means involving funds solicited by the law school from attorneys and law firms.

An intern's funding provided by a pool of local law firms is also inadvisable. Thus, the Committee has advised against allowing payment of a law student intern stipend from a local bar association, even when the funding came from pooled contributions by law firms, because the funding sources were a group of specific local law firms that were likely to come before the court and whose interests may be substantially affected by the intern's performance of official duties under Canons 4B(3) and 4C(2) of the Employees' Code. The controlling factor was the source of funding, which was mostly specific local law firms. The Committee also found that the proposal raised concerns for the judge under Canon 2A of the Judges' Code because the funding, being from lawyers, might raise an appearance of impropriety. The Committee also repeated that "judges are advised against appointing volunteer externs who are provided payments by law firms before, during or after the externship that are dependent on the individual serving as a judicial extern." Advisory Op. No. 83. On the other hand, where the funding for an intern's stipend derives from a blind source, such as funding through a national bar association, educational institution, or charitable organization, comprised of sources that are not likely to have interests that may be substantially affected by the intern's performance, such a funding arrangement would not violate Canons 4B(3), 4C(2), or 4E of the Employees' Code. Remember that a judge should not personally participate in fund-raising activities or solicit funds for such an organization or institution consistent with Canon 4C of the Judges' Code.

In light of the conclusions reached here and in the past, it is the Committee's opinion that, as a general proposition, an intern, extern, or other volunteer court employee may accept a stipend or similar payment for a short-term, academically-

based (or other organizationally-sponsored) position after checking with the court or the judge to ensure that certain conditions are met. This would involve an evaluation by the judge to determine whether the funding arrangement would raise ethical concerns under either the Employees' Code or the Judges' Code. The evaluation should examine, among other issues, the source of the funds, the purpose of the funds, and the duration of the anticipated volunteer services.

It is also important to stress that the application of the Employees' Code to interns, externs, or other volunteer court employees affects other aspects of their conduct, and affects the conduct of the judges who use their services. In particular, volunteer employees are subject to the ethical rules on conflicts of interest set forth at Canon 3F of the Employees' Code. Under those rules, for instance, these volunteers, like law clerks, may not work on cases involving future employers (Advisory Opinion No. 74), may not work on cases in which a party is represented by a volunteer court employee's spouse's law firm (Advisory Opinion No. 51), are bound by the prohibition against engaging in certain political activities (Advisory Opinion No. 92), and are limited in their conduct and representations on social media outlets (Advisory Opinion No. 112). Likewise, because interns, externs, or other volunteer court employees are now expressly treated the same as compensated employees, they are implicated in provisions of the Judges' Code that address staff employment matters. For example, these volunteer employees are covered by the judges' restraints against employing the child of another federal judge. *See* Advisory Opinion No. 64. This is not an exhaustive list of the application of the Employees' Code or the Judges' Code to interns, externs, or other volunteer court employees, but merely an illustration of the reach of those Codes to provide some guidance for the future.

The Judicial Conference has also issued policy guidance concerning the acceptance of volunteer services in the courts. See *Guide to Judiciary Policy*, Vol. 12, § 550.35 (Policy Requirements Regarding Volunteer Services in Courts). The Judicial Conference policy emphasizes that conflict of interest rules and other related ethics guidance applies to volunteer court employees, and to courts when accepting services from volunteer employees. The policy also cautions against engaging in nepotism or favoritism in the hiring of volunteer employees, stating that courts may not accept volunteer services from individuals related to judges or a public official of the court, consistent with the limitation on the employment of certain relatives of a judge in 28 U.S.C. § 458(a)(1) and the limitation on the employment of certain relatives of a public official in 5 U.S.C. § 3110(a)-(c).

A judicial intern, extern, or other volunteer should not accept a simultaneous governmental appointment that has the potential for dual service with other branches of government or of the state government, in accordance with Canon 4A of the Employees' Code. For example, the Committee has advised that a judge should not appoint an intern who is paid by the Department of Justice. Similarly, a concurrent internship with a state attorney general's office or with an executive agency of the federal government would place the intern under the supervision of a federal judge and

of a state attorney general or federal agency head, contrary to the required separation from other governmental units or court systems.

An intern may not engage in the practice of law under Canon 4D. Thus, the Committee has advised that a judicial intern should not be permitted to perform legal or paralegal work at a law firm, as the performance of legal tasks for lawyers is treated as practicing law, in violation of Canon 4D. Also, an internship that is concurrent with providing assistance to a pro bono legal non-profit organization is permissible under Canon 4D(3) if it does not present an appearance of impropriety, does not take place while on duty or in chambers, does not interfere with the intern's service to the court, is uncompensated, does not involve appearing in any court or administrative agency, does not involve a matter of public controversy, does not involve an issue likely to come before the court, and does not involve litigation against the federal, state, or local government. *See* Employee's Code, Canon 4D.

November 2015

Committee on Codes of Conduct Advisory Opinion
No. 112: Use of Electronic Social Media by Judges and Judicial Employees

This opinion provides the Committee's guidance on an array of ethical issues that may arise from the use of social media by judges and judicial employees, particularly members of a judge's personal staff. This guidance is intended to supplement information the Committee developed in 2011 to assist courts with the development of guidelines on the use of social media by judicial employees. *See* Resource Packet for Developing Guidelines on Use of Social Media for Judicial Employees. The Committee noted in the Resource Packet that "[t]he Code of Conduct for Judicial Employees applies to all online activities, including social media. The advent of social media does not broaden ethical restrictions; rather, the existing Code extends to the use of social media." The Committee also recognizes that electronic social media may provide valuable new tools for the courts, and that some courts have begun to use social media for official court purposes. This opinion is not intended to discourage the official use of social media by the courts in a manner that does not otherwise raise ethics concerns. Nor is this opinion intended to supplant any social media policy enacted within each judge's chambers which may govern that specific judge's internal chambers' operation. If an individual judge's personal chambers' policy is stricter than that set forth below, the individual judge's policy should prevail.

I. Ethical Implications of Social Media

The use of social media by judges and judicial employees raises several ethical considerations, including: (1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate. These considerations implicate Canons 2, 3D, 4A, and 5 of the Code of Conduct for Judicial Employees, and Canons 2, 3A(6), 4, and 5 of the Code of Conduct for United States Judges. The Committee recognizes that due to the ever-broadening variety of social media forums and technologies available, different types of social media will implicate different Canons and to varying degrees. For that reason, many of the proscriptions set forth in this opinion, like those set forth in the Employees' and Judges' Code, are cast in general terms. The Committee's advice is to be construed to further the objective of "[a]n independent and honorable judiciary." Canon 1.

Social media include an array of different communication tools that can mimic interpersonal communication on the one hand, and act as a news broadcast to a larger audience on the other. For example, some social media sites can serve primarily as communication tools to connect families, friends, and colleagues and provide for sharing private and direct messages, posting of photos, comments, and articles in a tight-knit community limited by the user's security preferences. The same media,

however, can serve to broadcast to a broader audience with fewer restrictions. Similarly, some social media sites can serve as semi-private communication media depending on how they are used, or can instantly serve as a connection to a large audience. Aside from social communication sites, users also have access to others' sites where they may comment on everything from the posting of a photograph, to a legal or political argument, or to the quality of a meal at a restaurant. This type of media can implicate other concerns since the user is now validating or endorsing the image, person, product, or service. Finally, there are media where the user is personally publishing commentary in the form of blogs. The Committee recognizes that the Canons cover all aspects of communication, whatever form they may take, and therefore offers general advice that can be applied to the specific mode. In short, although the format may change, the considerations regarding impropriety, confidentiality, appearance of impropriety and security remain the same.

II. Appearance of Impropriety

Canon 2 of the Employees' Code provides: "A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Similarly, Canon 2 of the Judges' Code states that "a judge should avoid impropriety and the appearance of impropriety in all activities." The Codes forbid judges and judicial employees from using, or appearing to use, the prestige of the office to advance the private interests of others. Canon 2 therefore is implicated when an employee or judge engages in the use of social media while also listing his or her affiliation with the court. For example, the Committee has advised that a law clerk who chooses to maintain a blog should remove all references to the clerk's employment. The Committee concluded that such reference would implicate Canon 2 concerning the use of the prestige of the office and the appearance of impropriety. The same can be true for a judge if she is using the prestige of the office in some manner in social media that could be viewed as advancing the private interest of another. For example, if the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies herself as the supporter, the judge has used her office to aid that establishment's success. Similarly, if a judge comments on a blog that supports a particular cause or individual, the judge may be deemed as endorsing that position or individual. The Committee therefore cautions judges to analyze the post, comment, or blog in order to take into account the Canons that prohibit the judge from endorsing political views, engaging in dialogue that demeans the prestige of the office, commenting on issues that may arise before the court, or sending the impression that another has unique access to the Court.

III. Improper Communications with Lawyers or Others

Another example of social media activity that raises concerns under Canon 2 is the exchange of frequent messages, "wall posts," or "tweets" between a judge or judicial employee and a "friend" on a social network who is also counsel in a case pending

before the court. In the Committee's view, social media exchanges need not directly concern litigation to raise an appearance of impropriety issue; rather, any frequent interaction between a judge or judicial employee and a lawyer who appears before the court may "put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Employees' Code, Canon 2. With respect to judges, communication of this nature may "convey or permit others to convey the impression that they are in a special position to influence the judge." Judges' Code, Canon 2B. A similar concern arises where a judge or judicial employee uses social media to comment—favorably or unfavorably—about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized so as not to constitute an ex parte communication. At all times, the Court must be screening for potential conflicts with those she communicates with on social media, and the Canon 3C provisions which govern recusal situations may be implicated and may require analysis.

The connection with a litigant need not be so direct and obvious to raise ethics concerns. The same Canon 2 concern arises, for example, when a judge or judicial employee demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a "fan" of an organization), or where a judge or judicial employee circulates a fundraising appeal to a large group of social network site "friends" that includes individuals who practice before the court.

IV. Extrajudicial Activities

Circumstances such as those described above also implicate Canon 4 of both the Employees' and Judges' Codes, which govern participation in outside activities. Canon 4 of the Employees' Code provides that "[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements." Canon 4 of the Judges' Code states that a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification. Invoking Canon 4 of the Employees' Code, the Committee has advised that maintaining a blog that expresses opinions on topics that are both politically sensitive and currently active, and which could potentially come before the employee's own court, conflicts with Canon 4. Such opinions have the potential to reflect poorly upon the judiciary by suggesting that cases may not be impartially considered or decided. This advice would also apply to judges' use of social media. A judge would be permitted to discuss and exchange ideas about outside activities that would not pose any conflict with official duties, (e.g., gardening, sports, cooking), yet the judge must always consider whether those outside activities invoke a potentially debatable issue that might present itself to the court, or an issue that involves a political position.

V. Identification of the Judge or Judicial Employee

Canons 2 and 4 are also implicated when a judge or judicial employee identifies himself as such on a social networking site. Through self-description or the use of a court email address, for example, the judge or employee highlights his affiliation with the federal judiciary in a manner that may lend the court's prestige. This issue has previously been presented to the Committee, and it is the Committee's view that judicial employees should, at the very least, be restricted from identifying themselves with a specific judge. *See* Resource Packet, at 23 (describing a policy allowing judicial employees to identify themselves as an employee of the federal courts generally, without specifying which court or judge, as the "least restrictive" of several suggested recommendations). The Committee also advises against any use of a judge's or judicial employee's court email address to engage in social media or professional social networking. The court employee or judge should consult the court's policies on permitted and prohibited use of court email, and the court's guidance on the employee's conduct while using a court email server and court email address. Similarly, the court email address should not be used for forwarding "chain letter type" correspondences, the solicitation of donations, the posting of property for sale or rent, or the operation of a business enterprise. *See Guide to Judiciary Policy*, Vol. 15, § 525.50 ("Inappropriate personal use of government-owned equipment includes ... using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity...." This policy also prohibits use of the email system for "fund-raising activity, endorsing any product or service, participating in any lobbying activity, or engaging in any partisan political activity.")

VI. Dignity of the Court

Furthermore, Canon 4A of the Employees' Code provides that "[a] judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves." Certain uses of social media raise concerns under Canon 4A that are not within the ambit of Canon 2. For example, a judge or judicial employee may detract from the dignity of the court by posting inappropriate photos, videos, or comments on a social networking site. The Committee advises that all judges and judicial employees behave in a manner that avoids bringing embarrassment upon the court. Due to the ubiquitous nature of information transmitted through the use of social media, judges and employees should assume that virtually all communication through social media can be saved, electronically re-transmitted to others without the judge's or employee's knowledge or permission, or made available later for public consumption.

VII. Confidentiality

Canon 3D of the Employees' Code provides in relevant part that a "judicial employee should avoid making public comment on the merits of a pending or impending

action …." Canon 3D further states that a judicial employee "should never disclose any confidential information received in the course of official duties except as required in performance of such duties, nor should a judicial employee employ such information for personal gain." Canon 3A(6) of the Judges' Code provides that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." Canon 4D(5) of the Judges' Code provides that "a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties." Most social media forums provide at least one—and often several—tools to communicate instantaneously with anywhere from a few to thousands of individuals. Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D. Such communications need not be case-specific to implicate Canon 3; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality concerns and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the employee may not reveal any confidential, sensitive, or non-public information obtained through the court. The Committee further advises that judicial employees who are on the judge's personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that frequently litigates in court. Lastly, the Committee reminds that former judicial employees should also observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

VIII. Political Activity

Canon 5 of the Employees' Code specifically addresses political activity: "A judicial employee should refrain from inappropriate political activity." Similarly, Canon 5 of the Judges' Code states that a "judge should not … publicly endorse or oppose a candidate for public office" or "engage in any other political activity." Judges' Code, Canon 5A(2), 5(C). In the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, "liking" or becoming a "fan" of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate. Furthermore, the Committee advises that while there is not an obligation for a judicial employee to search out and modify or delete endorsements or statements of political views that predate the judicial employment, the Committee recommends that if such endorsements or statements appear to be current, they be modified to clarify that they predate the judicial employment. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting the following statement on the applicable website: "I have taken a position that precludes me from making further public political comments or

endorsements and this site will no longer be updated concerning these issues." For example, on some social media it may be possible to remove one's political affiliation, and replace it with the above statement, when it is impractical or impossible to remove all posts or likes that appear to be current political endorsements or statements. The Committee reminds that while Canon 5B of the Employees' Code permits certain nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges' personal staffs, and high-level court officers must refrain from all political activity.

IX. Conclusion

In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted that may raise questions about the propriety of the employee's conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.

While the purpose of this opinion is to provide guidance with respect to ethical issues arising from the use of social media by judges and judicial employees, the Committee also notes that social media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of communication. There is no "one size fits all" approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.

Notes for Advisory Opinion No. 112

[1] The Code of Conduct for Judicial Employees ("the Employees' Code") defines a member of a judge's personal staff as "a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff." The term judicial employee also covers interns, externs, and other court volunteers.

November 2015

Committee on Codes of Conduct Advisory Opinion No. 113: Ethical Obligations for Recall-Eligible Magistrate and Bankruptcy Judges

Bankruptcy and magistrate judges who have retired or are considering doing so have several options to consider, depending on whether they continue to hear cases on recall status, practice law, or engage in pursuits outside the court system other than the practice of law. A retired judge's choice of status impacts whether that judge remains subject to both the Code of Conduct for United States Judges and the limitations on outside earned income. This advisory opinion sets out the options available to retired judges, as well as the effect of each on the retired judge's ethical obligations.

I. Judges serving on recall status

Retired judges may be recalled to service in accordance with regulations promulgated by the Judicial Conference under 28 U.S.C. § 155(b) (for bankruptcy judges) or § 636(h) (for magistrate judges). A circuit judicial council may recall a retired judge, but only with the judge's consent.

Retired bankruptcy judges recalled to serve, and almost all retired magistrate judges recalled to serve (the exceptions are described in Section IV below), are subject to the provisions of 28 U.S.C. §§ 153(b) and 632(a) and the Code of Conduct in the same manner as active judges. *See Guide to Judiciary Policy* (*Guide*), Vol. 3, §§ 920.25, 1020.25, 1120.60, and 1220.60; Code of Conduct for United States Judges (*Guide*, Vol. 2A, Ch. 2), Compliance with the Code of Conduct. These judges are also subject to limitations on outside earned income. *See* 5 U.S.C. App. § 501(a)(1); *Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a). Recalled magistrate and bankruptcy judges do not qualify for an exemption from the outside earned income limitations for approved teaching. *See* 28 U.S.C. §§ 371(b) and 372(a); 5 U.S.C. App. § 502(b); *Guide*, Vol. 2C, § 1020.25(b)(7).

II. Judges eligible for recall status but not serving

Judges eligible for recall status but not serving are subject to the portions of the Code applicable to part-time judges. Compliance with the Code of Conduct ¶ C. Retired bankruptcy and magistrate judges who are eligible for recall to judicial service should review the Code of Conduct carefully, continue to follow the many parts of the Code that continue to apply to them, and conduct themselves accordingly during retirement. Many of the same ethics considerations that apply to sitting judges continue to apply to recall-eligible retired judges. The Compliance section of the Code provides that recall-eligible retired judges are subject to the provisions of the Code governing part-time judges. These include all sections of the Code other than Canon 4A(4) (arbitration and mediation), 4A(5) (practice of law), 4D(2) (business activities), 4E (fiduciary activities), 4F (governmental appointments), and 4H(3) (financial disclosures). For example, judges who are eligible to be recalled should:

- maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. Canon 1.

- neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 2.

- avoid membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Canon 2.

- not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. Canon 2.

- avoid testifying voluntarily as a character witness. Canon 2.

- refrain from public comment on the merits of a matter pending or impending in any court. Canon 3.

- avoid civic and charitable activities if it is likely that the organization will be regularly engaged in litigation. Canon 4B(1).

- avoid giving investment advice to civic and charitable organizations. Canon 4B(2).

- not serve on the board of a nonprofit organization if the judge perceives there is any other ethical obligation that would preclude such service (for example, if the organization takes public positions on controversial topics). Advisory Opinion No. 2.

- not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. Canon 4C.

- refrain from financial and business dealings that might exploit the judicial position or involve frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge served or may serve in the future. Canon 4D(1).

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

judge would be permitted to do so by the Judicial Conference Gift Regulations. Canon 4D(4).

- not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to official duties. Canons 2 and 4D(5).
- not act as a leader or hold any office in a political organization, make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office. Canons 5A(1) and 5A(2).
- refrain from soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate, or attending or purchasing a ticket for a dinner or other event sponsored by a political organization or candidate. Canon 5A(3).
- not become a candidate in a primary or general election for any office. Canon 5B.
- avoid engaging in any other political activity (but this provision does not prevent a judge from engaging in activities permitted by Canon 4). Canon 5C.

On the other hand, a retired judge who is eligible for recall is exempt from compliance with several parts of the Code, including the following:

- the restrictions on serving as an officer, director, active partner, manager, advisor, or employee of a nonfamily business set forth in Canon 4D(2).
- the prohibitions on engaging in various types of fiduciary activities for nonfamily members. Canon 4E.
- the restrictions on accepting certain types of governmental appointments. Canon 4F.
- the requirement to make and file financial disclosures. Canon 4H(3).

A judge who is eligible for recall service but not now serving is not subject to the outside earned income limitations. However, if such judge accepts a recall appointment during the year, that judge then becomes subject to the earned income limitations for such year. In some situations, that restriction may affect the timing of when during the year a judge accepts a recall appointment. In such a case, the outside income limitation is determined on a pro rata basis according to the method identified in the Outside Earned Income Regulations. *See* *Guide*, Vol. 2C, § 1020.50(c).

III. Judges eligible for recall status but who have filed a statement saying they will not accept a recall appointment

Judges who are eligible for recall status but have filed a statement saying they will not accept recall are not subject to the Code or the outside earned income limitations. The filing of such a statement, once made, is irrevocable. Any judge wishing to exercise this option should file a signed notice stating that "in accordance with Judicial Conference Recall Regulations (*Guide*, Vol. 3, Chs. 9–12) and the Compliance Section of the Code of Conduct, I have decided that I will not now, or in the future, consent to recall service. I understand that this notice is irrevocable and that, as a result, I will no longer be subject to the Code of Conduct for United States Judges." Unlike an election to practice law (Section V below), exercise of the option not to accept recall service does not affect the annuity to which the judge is entitled under 28 U.S.C. § 377.

IV. Special Rules Regarding Certain Part-time and "When Actually Employed" Magistrate Judges

The sets of rules applicable to a recalled magistrate judge serving on a less than full-time basis depends on whether the judge served as a full- or part-time magistrate judge **prior to** retirement, as well as whether the judge retired under the Judicial Retirement System ("JRS") or the Civil Service Retirement System ("CSRS"). Almost all recalled magistrate judges, whether they serve "full-time" or "less than full-time" are intended to be covered by the entire Code. The only exceptions are (1) judges who served on a part-time basis, and therefore were during active service able to practice law and engage in other outside business activities; and (2) judges who retired under Title 5 (the Civil Service Retirement System or the Federal Employees Retirement System ("FERS")) and are later recalled under a "when actually employed" basis.

The small number of judges falling into these two categories are subject to the Code of Conduct for part-time judges, meaning that such judges may practice law, conduct mediations or arbitrations, serve as fiduciaries, and conduct business activities not permissible for other judges serving on recall. *See Guide*, Vol. 3, § 1120.60(b); Compliance with the Code of Conduct. Such judges are also subject to the Conflict of Interest Rules for Part-Time Magistrate Judges. *See Guide*, Vol. 3, § 1120.60(b). They are not subject to limitations on outside earned income. *See Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a). We emphasize, though, that any recalled magistrate judge who retired pursuant to 28 U.S.C. § 377 is subject to the Code of Conduct for full-time judicial officers, as well as 28 U.S.C. § 632(a), which limits the outside activities of full-time magistrate judges, and the limitations on outside earned income. *See* Compliance with the Code of Conduct; *Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a); Vol. 3, §§ 1120.60 and 1220.60.

Magistrate judges who have retired under title 5 (the Civil Service Retirement System or the Federal Employees Retirement System) and are later recalled on a "when actually employed" (part-time) basis are subject to 28 U.S.C. § 632(b), the Code

of Conduct governing part-time magistrate judges, and the Conflict of Interest Rules for Part-Time Magistrate Judges. *See Guide*, Vol. 3, § 1120.60; Compliance with the Code of Conduct. However, magistrate judges who have retired under the Judicial Retirement System and are later recalled on a "when actually employed" (part-time) basis are subject to the Code of Conduct for full-time judicial officers, as well as 28 U.S.C. § 632(a), which limits the outside activities of full-time magistrate judges; the judges are also subject to the limitations on outside earned income found in the *Guide*, Vol. 2C, Ch. 10. *See* 5 U.S.C. App. § 501(a)(1); *Guide*, Vol. 2C, §§ 1020.20(b) and 1020.25(a), Vol. 3, § 1120.60. These recalled judges do not qualify for an exemption from the outside earned income limitations for approved teaching. *See* 28 U.S.C. §§ 371(b) and 372(a); 5 U.S.C. App. § 502(b); *Guide*, Vol. 2C, § 1020.25(b)(7).

V. Judges who have elected to practice law

Judges who have elected to practice law are not subject to either the Code or earned income limitations, but are no longer eligible for recall service.

A judge who retires under JRS [including "hybrid" JRS] and practices law without first filing an election to practice law, or practices law before the election becomes effective, forfeits the entire JRS annuity for life. 28 U.S.C. § 377(m)(1)(A). A judge who makes an election to practice law is entitled to receive a JRS annuity, but forfeits any future cost-of-living adjustments on that annuity after the election becomes effective. *Id.* at § 377(m)(1)(B)(i)(II). No such penalties apply to CSRS or FERS annuitants who practice law.

The election, once it takes effect, is irrevocable. *Id.* at § 377(m)(1)(B)(ii). A judge who retires under JRS and thereafter practices law for compensation is permanently ineligible for recall service. *Id.* at § 377(m)(2).

All rights to receive a JRS annuity are forfeited during any period in which compensation is received by a retired judge "for civil office or employment under the United States Government" (other than service as a recalled judge). *Id.* at § 377(m)(3). Under CSRS and FERS, a reemployed annuitant (including a recalled judge) generally continues to receive an annuity, but his or her compensation is offset by the amount of that annuity.

Notes for Advisory Opinion No. 113

[1] Compliance with the Code of Conduct ¶ C has been revised to include the following language: "However, bankruptcy judges and magistrate judges who are eligible for recall but who have notified the Administrative Office of the United States Courts that they will not consent to recall are not obligated to comply with the provisions of this Code governing part-time judges. Such notification may be made at any time after retirement, and is irrevocable."

July 2014

Committee on Codes of Conduct Advisory Opinion
No. 114: Promotional Activity Associated with Extrajudicial Writings and Publications

This opinion provides guidance about judicial participation in book promotions. It expands upon the Committee's advice in Advisory Opinion No. 55, which addresses ethical considerations related to extrajudicial writings and publications.

As a general matter, the Code of Conduct for United States Judges provides that a judge may write on both law-related and nonlegal subjects, and may receive compensation and reimbursement for doing so. Canons 4 & 4H. In addition, the Commentary to Canon 4 specifically encourages judges to engage in law-related extrajudicial pursuits, because "a judge is in a unique position to contribute to the law, the legal system, and the administration of justice."

In line with these provisions, the Committee has consistently advised that judges may engage in dignified promotions of the substance of their extrajudicial writings and publications. However, judges should avoid conduct that violates the Code, whether by appearing to exploit or to detract from the dignity of the office, or by reflecting adversely on judicial impartiality. *See* Canons 2B & 4.

In this opinion, we evaluate these Canons in the context of participation by judges in promotions of their books. Although the opinion is framed in terms of book promotions, our advice also applies to other forms of extrajudicial writings and publications. We assess advertising, personal appearances, media interviews, and book reviews and forewords.

Advertising

As far as possible, judges should make certain that the advertisements for their publications do not violate the language, spirit, or intent of the Code. Advisory Opinion No. 55. This duty continues after a judge's book is published. *Id.* Accordingly, to ensure ongoing compliance with the Canons, judicial authors should contract to retain control over advertising for the books they write. Commentary to Canon 2B; Advisory Opinion No. 55.

The following restrictions apply to advertising materials. A judge may mention his or her judicial position, length of service, and court in a book jacket or in other similar straightforward author summaries, provided that the identification is without embellishment and appears in the context of other biographical information. However, the Committee has generally advised against using the same information in other advertising materials. In addition, the Committee has advised against preceding a judge's name with the title "judge" in any advertisements. Finally, in advertising for a personal appearance by a judge, it would be improper to suggest that attendees would

obtain special access to or influence with the judge, or to suggest that attendees were expected to purchase the judge's book.

Judges should also avoid using government-owned equipment or systems, including court email systems, to promote judicial writings. *See Guide to Judiciary Policy*, Vol. 15, § 525.50 ("Inappropriate personal use of government-owned equipment includes . . . using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity, such as . . . selling goods or services.").

Personal Appearances

Judges who write books may appear as authors to speak about and to sign copies of their work. However, the intended composition of an audience affects the ethical considerations of an appearance.

On the one hand, a judge who writes books may appear as an author at book stores and other public venues, assuming the events are free, do not interfere with the performance of official duties, and are not associated with marketing materials that violate the advertising guidelines identified in the previous section of this opinion. At these events, which may be labeled "book signings" or "discussions," a judge may sign copies of his or her work, which may also be available for sale. However, there should be no suggestion that attendees are required to purchase books, or that participants may enjoy special influence over the judge. During the events, the judge may read from and discuss the work in a dignified manner that focuses on the substance of the work and not merely on the author's status as a federal judge. Discussing the contents of the book, or how it came to be written, would generally be acceptable. Urging attendees to buy the book would not.

Assuming these guidelines are met, selling a book to an individual who happens to be an attorney or responding to a subsequent request for a signature does not amount to engaging in a prohibited transaction or continuing business relationship with a person likely to come before the court, particularly if the book has not been marketed to the particular legal constituency the person represents and the judge is unaware of the person's relationship (if any) to cases before the judge's own court.

However, conducting a book signing or a discussion directed to attorneys or to other members of the legal community has the potential to raise additional concerns under the Code. In those circumstances, a judge should assume that members of the audience know of the judge's current position, and should take particular care to ensure that neither the events nor their marketing exploits the judicial office or leads to an appearance of impropriety.

An event that includes only representatives from a particular legal constituency also raises concerns under the Code, particularly if the event is held at a non-neutral location. In those circumstances, discussing or signing a book the judge has written

may lend the impression the judge has exploited the judicial office before a favored set of attorneys or litigants. For example, while it might be permissible for a judge to discuss a book during an event sponsored by a general membership bar association at a neutral location, it might be improper to engage in the same activity on behalf of or on the premises of a private law firm or advocacy organization, particularly if the event were closed to opposing constituencies.

This advice is consistent with the guidance the Committee has provided in the related but distinct context of judges appearing as speakers before particular legal constituencies. In that context, the Committee has advised that it is rarely permissible to accept an invitation to address an individual law firm or advocacy group, particularly if the event occurs at the offices of the firm or advocacy group, because doing so may suggest that the judge favors the organization and the interests it represents. *See* Advisory Opinion Nos. 87 & 105. It may be acceptable for a judge to speak at a neutral location before attorneys who specialize in certain practice areas or represent particular legal viewpoints, but the judge must be available to address opposing or contrasting constituencies and should take care to avoid any appearance of impropriety. The rationale for these guidelines is that a judge who speaks before a particular legal constituency at a non-neutral location may lend the prestige of the office to the interests of the constituency and create the impression of a special relationship between the judge and the sponsor. These concerns of favoritism are reduced if the events are open to a variety of attendees and held at neutral locations, and if the judge is available to address opposing or contrasting constituencies. A judge's signing or discussing books during an event before a narrow legal constituency at a non-neutral location raises similar concerns because the choice of attendees and location may suggest the judge favors the organization and the interests it represents. Moreover, the activity involves the judge's commercial interests in the sale of books and may lend the impression the judge has exploited the office before a preferred set of attorneys.

Media Interviews

Judges who participate in media interviews to discuss their books should do so in a dignified manner, ensuring that the discussions and any mentions of the judicial position do not appear to exploit or to detract from the office. During the interviews, the judges may read from and discuss the substance of the work, although the judges should not discuss pending or impending cases, confidential information, or controversial matters.

Judges should approach live interviews with particular caution, especially if they anticipate being questioned about subjects whose public discussion might lead (even if unintentionally) to an appearance of impropriety. The duty of a judge to promote public confidence in the integrity and impartiality of the judiciary may be at risk when a judge voluntarily injects him or herself into the limelight of public controversy or discussions of sensitive matters, including confidential aspects of the judicial process. Related commentary to the press may generate further disputes, lead to disqualification, or

embroil the judge in personal and professional disputes. Accordingly, judges should take care in their approach to press interactions, particularly live press interactions, although ultimately the judges themselves are in the best position to weigh the ethical considerations that apply to a particular situation and to choose the manner in which they respond.

Book Reviews and Forewords

Judges are sometimes asked to review or to write forewords for books. These activities are acceptable so long as the writings are bona fide contributions addressing the substance of the volumes, and neither the books nor the judicial writings exploit or detract from the dignity of the office. With respect to the second of these points, judges should undertake reasonable efforts to guard against the subsequent use of their reviews or forewords in promotional materials that may tend to exploit the prestige of the office or violate the guidelines outlined above.

November 2014

Committee on Codes of Conduct Advisory Opinion
No. 115: Appointment, Hiring, and Employment Considerations: Nepotism and Favoritism

The Committee on Codes of Conduct receives a variety of inquiries concerning appointment and employment issues that arise in the operation of our courts. This opinion summarizes the Committee's guidance for judges and court employees when confronted with making a decision about whether a particular person may be "appointed to" or "employed in" a particular court, as such decisions relate to nepotism and/or favoritism. Additional guidance related to this topic may be found in Advisory Opinion No. 61 ("Appointment of Law Partner of Judge's Relative as Special Master") and Advisory Opinion No. 64 ("Employing a Judge's Child as Law Clerk").

Canon 3B(3) of the Code of Conduct for United States Judges (the "Code") provides the starting point for analysis of these issues. In pertinent part, it states that "[a] judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism." Similarly, Canon 3E of the Code of Conduct for Judicial Employees (the "Employees' Code") provides that judicial employees "should not engage in nepotism prohibited by law."

I. Nepotism

The anti-nepotism provisions in the Codes of Conduct reflect, in part, statutory prohibitions on nepotism found in 28 U.S.C. § 458 and 5 U.S.C. § 3110. Under 28 U.S.C. § 458, "[n]o person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." 5 U.S.C. § 3110 provides that "a public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion or advancement in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official."

Although interpretation of the statutory provisions on nepotism is beyond the jurisdiction of the Committee, the Committee considers those provisions in the context of providing guidance about whether certain workplace or employment relationships violate Canon 3B(3).

A. Employment decisions implicating Canon 3B(3) of the Code

Considerations of nepotism can arise in a variety of circumstances involving appointment and hiring. The Commentary to Canon 3B(3) indicates the range of situations that may implicate this canon: "A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants."

Applying Canon 3B(3), the Committee has concluded that appointing the husband of another judicial colleague to act as a special master is one type of "duty" or "office" implicating the Code and found such an appointment to be impermissible. Similarly, in Advisory Opinion No. 61, the Committee counseled that the appointment of a law partner of a judge's nephew as a special master was also improper. Further, the Committee advised that a judge should not hire as a judicial assistant the spouse of another judge within the same district.

Canon 3B(3) also applies to the appointment and hiring of volunteer employees, for example when a judge appoints a law student as an unpaid voluntary extern. *See* Advisory Opinion No. 111 ("Interns, Externs and Other Volunteer Employees" noting that volunteer employees are subject to the Code of Conduct); and *Guide to Judiciary Policy*, Vol. 12, § 550.35 (Policy Requirements for Volunteer Services in Courts and FPDOs) (courts may not accept volunteer services from individuals related to judges or a public official of the court).

The Committee has counseled against appointing a judge's child to serve as defense counsel under the Criminal Justice Act, but has concluded that colleagues on the court may appoint another judge's child to serve as defense counsel, so long as the appointment does not constitute de facto full-time service and so long as no other unusual circumstances create the appearance that the court is favoring the child of one of its own judges.

The Committee has also concluded that the spouse of a bankruptcy judge may be listed on a register of mediators for the bankruptcy court when no member of the court is involved in the selection for placement on the register or in the selection of the mediator in a particular case and provided the spouse does not serve as a mediator in a case assigned to the judge.

Advisory Opinion No. 64, which discusses the appointment of law clerks in considerable depth, indicates that while a judge may not appoint as a law clerk a person related to a judge of the same court, the judge may appoint as a law clerk a person who is related to a judge of another federal court within the same circuit. The Committee reached this conclusion even though a Comptroller General Opinion in 1936 held that law clerks are not an "office" or "duty" within the ambit of the nepotism statute. *See* 15 Comp. Gen. 765 (Mar. 6, 1936). Under Advisory Opinion No. 64, it is clear that the appointment or employment of law clerks is within the ambit of Canon 3B.

Advisory Opinion No. 64 also comprehensively addresses the distinctions that may be drawn between appointment or employment in a judge's own court compared with appointment or employment in a related court or in a totally separate court. Applying this guidance, the Committee has advised that it is ordinarily improper for a district judge to hire the relative of a magistrate or bankruptcy judge in the same district and vice-versa. Similarly, in the case of bankruptcy and magistrate judges within the same district, it is inadvisable for one judge to hire the relative of another. *See* Advisory

Op. No. 64. The Committee has also concluded that a district court judge should not hire the child or the spouse of a grandchild of a senior district judge of the same court.

B. Employment circumstances not strictly involving appointment

Canon 3B(3) and the relevant statutes may also encompass workplace situations other than initial appointment or employment decisions. 28 U.S.C. § 458, for example, states that "[n]o person shall be … *employed in* any office or duty in any court" if the person is related to a judge within the degree of first cousin (emphasis added).

In these situations, the Committee has advised that Canon 3B(3) relating to nepotism and favoritism applies to the appointment of employees, but generally does not prevent the continued employment of an existing court employee who, for example, becomes a relative of a judge of the court after being hired. Even so, the Committee has cautioned judges to avoid the appearance of impropriety in these situations by ensuring that the affected employee is not supervised by, and promotions are not dependent on, the actions of the judge. In other words, the duty to avoid nepotism applies not only to the initial employment decision but also to the continuing employment relationship.

For example, the Committee has advised that a judge does not violate Canon 3B(3) by continuing to employ a law clerk who is related to another judge on the same court, where the law clerk was selected before the other judge was nominated or appointed to the court, and where the law clerk does not work on cases handled by the relative/judge. *See* Advisory Op. No. 64.

Similarly, the Committee concluded that the marriage of a magistrate judge to a law clerk already employed by another magistrate judge would not preclude the continued employment of the law clerk, because under those circumstances, the power of appointment has not been implicated.

C. Nepotism by judicial employees

Similar to the Judge's Code, under Canon 3E of the Employees' Code, "[a] judicial employee should not engage in nepotism prohibited by law." To clarify what acts are prohibited by law, Canon 3E directs readers to two statutory provisions: 5 U.S.C. § 3110 and 28 U.S.C. § 458.

28 U.S.C. § 458 applies to appointment and employment of judges and their relatives. Under that statute, a judicial employee with appointment and employment authority may not appoint or employ someone "in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." *See id.* § 458(a)(1).

5 U.S.C. § 3110 broadly prohibits a judicial employee from appointing, employing, or promoting his or her own relative "to a civilian position in the agency in which he is serving or over which he exercises jurisdiction." Section 3110 also prohibits

a judicial employee's relative from accepting or receiving compensation for such appointment, employment, or promotion. "Relative" is defined as the public official's "father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister." 5 U.S.C. § 3110(a)(3).

The Committee has applied Canon 3E of the Employee Code to a broad range of situations involving appointments and employment. For example, the Committee has advised that a chief probation officer should not make or influence any personnel decision affecting his spouse, who was a probation officer within the same office.

Likewise, the Committee concluded that the daughter of a federal judge should not be hired as a United States probation officer to serve the district court in which that judge sits. The Committee has also advised that a chief probation officer should not hire the spouse of the deputy chief probation officer.

II. Favoritism

A. Issues arising under Canon 3B(3) of the Code

Canon 3B(3) requires judges to avoid not only nepotism, but also "favoritism." In contrast to nepotism, favoritism is not a concept that is limited to defined family relationships. Instead, the focus of the Canon is on the appearance that someone may gain an advantage in the appointment or employment process, for reasons other than merit, because of his or her broader connections to a judge or judicial employee.

As noted in Advisory Opinion No. 61, by including "favoritism" as an impermissible condition in the appointment or employment process, the scope of Canon 3B(3) exceeds the statutory ban on nepotism found in 28 U.S.C. § 458. In the context of the acts described in Advisory Opinion No. 61, the Committee observed that some "circumstances raise the question of when an appointment, even though initially proposed on the basis of merit, ought to be precluded because of relationships that either indicate or create the appearance of favoritism."

Applying these principles, for example, the Committee advised that a judge should not hire a person with whom the judge is in a serious romantic relationship. Further, the Committee advised against the appointment of a retired federal district judge as a special master charged with the responsibility of resolving claims for large amounts of attorney's fees sought in a complex lawsuit. Concerned that the court would be setting the special master's compensation, the Committee concluded that the appointment created the appearance of favoritism and might undermine public confidence in the impartiality of the judiciary. However, the Committee did not find an improper appearance of favoritism when a judge hired a law clerk who was the child of

a legislative branch official, where it was clear that the appointment was based on a merit selection process.

Favoritism principles may also counsel against an appointment where the appointment poses a significant risk of ongoing conflicts of interest. In the context of a magistrate judge appointment, for example, the Committee advised that although the appointment of the spouse of the clerk of court as a magistrate judge in the same court would not violate the nepotism canon (where neither clerk nor the clerk's spouse are related to a judge on the court), each judge involved in the appointment process should evaluate whether, if selected, the judge's relationship to the clerk of court would give rise to the appearance of favoritism.

B. Issues arising under Canons 2A and 2B of the Code

The provisions of Canons 2A and 2B also bear on issues of favoritism in hiring and employment practices:

> CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES
>
> A. Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

Concerns under these Canons often arise when a judge is asked to recommend someone for appointment to a judicial or other office. The Commentary to Canon 2B is helpful when discerning a judge's role in the selection of other judges. That Commentary provides that "[j]udges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship." Commentary to Canon 2B. For example, responding to an inquiry from the ABA concerning a potential candidate's qualifications for appointment to the bench would be proper where the response is based on the judge's personal observations of the candidate. A judge may also respond to official inquiries concerning a person being considered for a judgeship but should not "initiate communications" on such topic. *See* Advisory Opinion No. 59 ("Providing Evaluation of Judicial Candidate to Screening or Appointing Authority").