

VII. Confidentiality

Canon 3D of the Employees' Code provides in relevant part that a "judicial employee should avoid making public comment on the merits of a pending or impending action" Canon 3D further states that a judicial employee "should never disclose any confidential information received in the course of official duties except as required in performance of such duties, nor should a judicial employee employ such information for personal gain." Canon 3A(6) of the Judges' Code provides that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." Canon 4D(5) of the Judges' Code provides that "a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties." Most social media forums provide at least one—and often several—tools to communicate instantaneously with anywhere from a few to thousands of individuals. Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D. Such communications need not be case-specific to implicate Canon 3; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality concerns and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the employee may not reveal any confidential, sensitive, or non-public information obtained through the court. The Committee further advises that judicial employees who are on the judge's personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that frequently litigates in court. Lastly, the Committee reminds that former judicial employees should also observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

VIII. Political Activity

Canon 5 of the Employees' Code specifically addresses political activity: "A judicial employee should refrain from inappropriate political activity." Similarly, Canon 5 of the Judges' Code states that a "judge should not ... publicly endorse or oppose a candidate for public office" or "engage in any other political activity." Judges' Code, Canon 5A(2), 5(C). In the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, "liking" or becoming a "fan" of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate. Furthermore, the Committee advises that while there is not an obligation for a judicial employee to search out and modify or delete endorsements or statements of political views that predate the judicial employment, the Committee recommends that if such endorsements or statements appear to be current, they be

modified to clarify that they predate the judicial employment. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting the following statement on the applicable website: “I have taken a position that precludes me from making further public political comments or endorsements and this site will no longer be updated concerning these issues.” For example, on some social media it may be possible to remove one’s political affiliation, and replace it with the above statement, when it is impractical or impossible to remove all posts or likes that appear to be current political endorsements or statements. The Committee reminds that while Canon 5B of the Employees’ Code permits certain nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges’ personal staffs, and high-level court officers must refrain from all political activity.

IX. Conclusion

In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted, whether by the employee him/herself or by others on the employee’s webpage, that may raise questions about the propriety of the employee’s conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.

While the purpose of this opinion is to provide guidance with respect to ethical issues arising from the use of social media by judges and judicial employees, the Committee also notes that social media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of communication. There is no “one size fits all” approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.

Notes for Advisory Opinion No. 112

¹ The Code of Conduct for Judicial Employees (“the Employees’ Code”) defines a member of a judge’s personal staff as “a judge’s secretary, a judge’s law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge’s personal staff.” The term judicial employee also covers interns, externs, and other court volunteers.

April 2017

Committee on Codes of Conduct Advisory Opinion No. 113: Ethical Obligations for Recall-Eligible Magistrate and Bankruptcy Judges

Bankruptcy and magistrate judges who have retired or are considering doing so have several options to consider, depending on whether they continue to hear cases on recall status, practice law, or engage in pursuits outside the court system other than the practice of law. A retired judge's choice of status impacts whether that judge remains subject to both the Code of Conduct for United States Judges and the limitations on outside earned income. This advisory opinion sets out the options available to retired judges, as well as the effect of each on the retired judge's ethical obligations.

I. Judges serving on recall status

Retired judges may be recalled to service in accordance with regulations promulgated by the Judicial Conference under [28 U.S.C. § 155\(b\)](#) (for bankruptcy judges) or [§ 636\(h\)](#) (for magistrate judges). A circuit judicial council may recall a retired judge, but only with the judge's consent.

Retired bankruptcy judges recalled to serve, and almost all retired magistrate judges recalled to serve (the exceptions are described in Section IV below), are subject to the provisions of [28 U.S.C. §§ 153\(b\)](#) and [632\(a\)](#) and the Code of Conduct in the same manner as active judges. See *Guide to Judiciary Policy (Guide)*, Vol. 3, §§ 920.25, 1020.25, 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

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 \("Providing Evaluation of Judicial Candidate to Screening or Appointing Authority"\)](#).