

AJS Comments on Final Draft Report

Submitted to the ABA Joint Commission to
Evaluate the Model Code of Judicial Conduct
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CANON 4

A JUDGE SHALL CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES SO AS TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

RULE 4.01: EXTRA-JUDICIAL ACTIVITIES IN GENERAL

A judge may engage in extra-judicial activities to the extent that the activities do not:

- (A) lead to frequent disqualification of the judge or otherwise interfere with the proper performance of judicial duties;
- (B) demean the judicial office or detract from the dignity of the court;
- (C) cast reasonable doubt on the judge's ability to perform judicial duties with independence,* integrity,* and impartiality;*
- (D) involve the use of court premises, staff, stationery, equipment, or other resources, unless such use is permitted by law;* and
- (E) violate this Code.

COMMENT

[1] To the extent that time permits, and independence and impartiality are not compromised, judges are encouraged to engage in appropriate extra-judicial activities. Such participation will help prevent judges from becoming isolated from their communities, and will further public understanding of and respect for courts and the judicial system.

[2] Discriminatory actions and expressions of bias or prejudice by a judge are no more acceptable off the bench than on, because they may equally cast doubt on the judge's ability to act impartially as a judge. Thus, for example, a judge's extra-judicial activities must not be conducted in connection with or affiliation with an organization that practices invidious discrimination; see Rule 3.04 and Comments.

[3] As a judicial officer learned in the law, a judge is in a unique position to engage in extra-judicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research

projects. In addition, judges are permitted and encouraged to engage in civic or charitable extra-judicial activities, whether or not the activities involve legal subject matters, so long as the judge complies with this Rule and other provisions of this Code; see Rule 4.04.

RULE 4.02: APPEARANCES BEFORE GOVERNMENTAL BODIES

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official, except:

- (A) with respect to matters concerning the law, the legal system, or the administration of justice;
- (B) with respect to matters that might reasonably merit the attention and comment of the judge because of knowledge or expertise acquired in the course of the judge's judicial duties; or
- (C) when acting pro se in a matter involving the judge or the judge's interests.

COMMENT

[1] Judges possess special expertise on matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies. In addition, judges may acquire information on issues that will have an effect on the justice system, and upon which they may be well qualified to comment from their unique vantage point as jurists. Judges must be mindful, however, that their appearance before governmental bodies remains subject to other provisions of this Code, such as Rule 2.11, governing public comment on pending and impending matters; Rule 3.01, prohibiting judges from misusing the prestige of office to advance their own or others' interests; and Rule 4.01(C), prohibiting judges from engaging in extra-judicial activities that cast reasonable doubt on the judge's independence, integrity, and impartiality.

[2] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies on matters that are likely to have an effect upon them as private citizens, such as zoning proposals that will affect their real property or proposals having to do with the availability of health services. The judge must not refer to his or her judicial position, however, and must exercise caution to avoid misusing the prestige of judicial office to advance causes with respect to which the judge possesses no special judicial competence.

RULE 4.03: APPOINTMENTS TO GOVERNMENTAL BODIES

Except as required or permitted by law,* a judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

COMMENT

[1] A judge must assess the appropriateness of accepting extra-judicial assignments, in terms of availability and allocation of resources, and with due regard for the requirements of independence and impartiality of the judiciary. Thus, a judge should not serve on a governmental commission that requires an excessive time commitment or is embroiled in controversial subject matter, or whose members are limited to advocating only one side in a policy debate. A judge may, however, represent his or her country, state, or locality on ceremonial occasions in connection with historical, educational, or cultural activities.

RULE 4.04: PARTICIPATION IN CIVIC OR CHARITABLE ACTIVITIES

(A) Subject to the requirements of Rule 4.01, a judge may participate in activities on behalf of civic or charitable organizations, except that a judge:

- (1) shall not misuse or permit others to misuse the prestige of judicial office for fundraising or membership solicitation except as allowed by this rule;
- (2) shall not personally solicit contributions* for the organization; and
- (3) shall not personally participate in membership solicitation, if the solicitation is primarily a fundraising mechanism or if it might reasonably be perceived as coercive.

(B) Notwithstanding the provisions of paragraph (A), a judge:

- (1) may personally solicit contributions from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;
- (2) may assist a civic or charitable organization in planning related to fundraising, and participate in the management and investment of the organization's funds;
- (3) may appear at, speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of a civic or charitable organization concerned with the law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose, unless the organization's membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client the membership and purpose of the organization or the nature of event would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's impartiality, integrity, and independence.

(4) may recruit members for an organization concerned with the law, the legal system, or the administration of justice, even though the membership dues or fees generated may be used to support the objectives of the organization;

(5) may make recommendations to public and private fund-granting organizations with respect to programs and activities concerning the law, the legal system, or the administration of justice;

(6) may encourage lawyers to participate in programs providing pro bono publico legal services, including by making reference to a list of available programs; and

(7) may serve as an officer, director, trustee, or non-legal advisor of a civic or charitable organization or a governmental entity concerned with the law, the legal system, or the administration of justice, unless it is likely that the organization or governmental entity:

- (a) will be engaged in proceedings that would ordinarily come before the judge; or
- (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

COMMENT

[1] A judge is permitted to participate in civic or charitable activities for the benefit of the community of which the judge is a part, provided that such participation does not take inappropriate advantage of the judge's judicial position, or otherwise interfere with the performance of the judge's judicial duties.

[2] In addition to appointing lawyers to serve as counsel for impecunious parties in individual cases, judges may promote broader access for people unable to afford legal services by encouraging lawyers to participate in pro bono publico legal services programs, if in doing so the judge does not misuse the prestige of judicial office. It is also permissible and generally commendable for judges to assist in training lawyers to do pro bono publico legal work, and to participate in events recognizing lawyers who have done pro bono publico work.

[3] A judge's solicitation of contributions for an organization creates the danger that the person solicited will feel obligated to respond favorably, or will donate funds or services in order to curry favor with the judge. Accordingly, a judge's participation in fundraising for civic and charitable organizations is subject to the restrictions set forth in this Rule.

[4] So long as the judge does not engage in direct personal solicitation, and the judge's title is not used, it is permissible for a judge to engage in insignificant, incidental, or behind-the-scenes fundraising activities on behalf of a civic or charitable organization.

[5] Identification of a judge's position in a civic or charitable organization on letterhead used for fundraising or membership solicitation does not violate this Rule, provided that the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must make reasonable efforts to ensure that the judge's staff, court officials, and others subject to the judge's direction and control do not solicit contributions on the judge's behalf for any purpose.

[6] Because the nature of some organizations changes over time, judges should regularly reexamine the activities of each organization with which they are associated to determine if it is proper for them to continue such association.

[7] To prevent the prestige of the judge's office from being misused in fund-raising, a judge must inform all civic and charitable organizations with which the judge is associated of the limitations on the judge's participation.

[8] Even with respect to law related civic and charitable organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality. For example, it would be inappropriate for a judge to speak at a fund raising event for a specialty bar association whose members are closely identified with certain clients or particular positions on certain legal issues.

RULE 4.05: APPOINTMENTS TO FIDUCIARY* POSITIONS

(A) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(C) The same restrictions on financial activities that apply to a judge personally apply to the judge while acting in a fiduciary capacity.

COMMENT

[1] If a person who is already serving as a fiduciary becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge. See Application Part II.

[2] Other restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, Rule 4.08, which governs financial, business, remunerative, and investment activities, might require a judge serving as trustee to divest certain holdings, which could result in detriment to the trust. Serving as a fiduciary might also require frequent disqualification. In such situations, the judge should resign as fiduciary.

RULE 4.06: SERVICE AS ARBITRATOR OR MEDIATOR IN A PRIVATE CAPACITY

A judge shall not act as a private arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law* to do so.

COMMENT

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of his or her judicial duties. Rendering private dispute resolution services, however, whether or not for pecuniary gain, is prohibited unless it is expressly authorized by law, including a rule of court.

RULE 4.07: PRACTICE OF LAW*

A judge shall not practice law, except that a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.*

COMMENT

[1] A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not misuse the prestige of office to advance the interests of the judge or the judge's family. See Rule 3.01.

[2] Although a judge is permitted to provide uncompensated legal advice and counseling to a member of the judge's family, the judge is prohibited from serving as the family member's advocate in any forum.

RULE 4.08: FINANCIAL, BUSINESS, REMUNERATIVE, AND INVESTMENT ACTIVITIES

A judge may engage in financial, business, or other remunerative activities, including managing the investments of the judge and members of the judge's family,* unless:

- (A) the activities will lead to frequent disqualification of the judge or otherwise interfere with the proper performance of judicial duties;
- (B) the activities may reasonably be perceived as exploiting the judge's judicial position or otherwise demeaning the judicial office or detracting from the dignity of the court;
- (C) the activities 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; or
- (D) the activities will result in violation of other provisions of this Code.

COMMENT

[1] Judges are generally permitted to engage in financial, business, and other remunerative activities, including managing real estate and other investments for themselves or for members of their families. However, participation in these activities is subject to other provisions of this Code. See, for example, Rule 4.01(A), avoiding activities that lead to frequent disqualification or interfere with the proper performance of judicial duties; Rule 4.01(B), avoiding activities that demean the judicial office or detract from the dignity of the court; and Rule 3.01, avoiding misuse of the prestige of judicial office. Such participation is also subject to the general prohibition of Rule 1.02 against engaging in activities involving impropriety or the appearance of impropriety.

[2] A judge should discourage members of the judge's family from engaging in financial or other transactions that would appear to a reasonable person to exploit the judge's judicial position. This is necessary to avoid creating the appearance that the judge is doing indirectly what the judge is prohibited from doing directly, and thus increasing the chances that the judge will later be subject to disqualification.

[3] As soon as a judge can do so without serious financial detriment, the judge must divest himself or herself of investments and other financial interests, including the interests of others whom the judge serves as a fiduciary under Rule 4.05, that might require frequent disqualification or otherwise violate the provisions of this Rule.

RULE 4.09: FOR-PROFIT ACTIVITIES

A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any for-profit entity, except that a judge may, subject to the requirements of Rule 4.08, manage and participate in a for-profit entity that is either closely held by the judge or members of the judge's family,* or primarily engaged in investment of the financial resources of the judge or members of the judge's family.

COMMENT

[1] Although participation by a judge in a closely held for-profit family business is generally permitted by this Rule, a judge may be prohibited from participation by the considerations set out in Rule 4.08, such as whether it would interfere with the performance of judicial duties, is likely to cause frequent disqualification, or creates the perception of misuse of the prestige of judicial office.

RULE 4.10: SOLICITATION, ACCEPTANCE, AND REPORTING OF GIFTS*

(A) A judge shall not solicit or accept gifts from any person or organization, except that, unless otherwise prohibited by law,* a judge may accept:

(1) a gift incident to a public testimonial;

- (2) books, magazines, journals, audio-visual materials, and other resource materials supplied by publishers or organizations on a complimentary basis for official use;
- (3) an invitation to the judge and the judge's spouse,* domestic partner,* or guest to attend without charge a bar-related function or other activity relating to the law, the legal system, or the administration of justice, provided that the invitation could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;
- (4) a gift, award, or benefit associated with the business, profession, or other separate activity of a spouse, domestic partner, or other family member of a judge residing in the judge's household,* that incidentally benefits the judge, provided that the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of his or her judicial duties;
- (5) a gift from a relative or friend for a special occasion, such as a wedding, anniversary, or birthday, if the gift is commensurate with the occasion and the relationship;
- (6) a gift from a relative or personal friend whose appearance or interest in a case would in any event require disqualification under Rule 2.12; or
- (7) reduced membership dues for a bar association or other organization devoted to the improvement of the law, the legal system, or the administration of justice (excluding any organization whose members comprise or frequently represent the same side in litigation.)
- (87) any other individual gift, from any other source, valued at \$[] or less, or series of gifts from the same source whose value in the aggregate does not exceed \$[], unless the donor is:
- (a) a lawyer, party, or any other person who has come before the judge, or a person or entity whose interests have come before the judge, within the preceding three years; or
- (b) a lawyer, party, or any other person who is likely to come before the judge, or a person or entity whose interests are likely to come before the judge, in the foreseeable future.
- (B) A judge shall urge members of the judge's family residing in the judge's household not to solicit or accept gifts that the judge himself or herself is prohibited from soliciting or accepting.
- (C) For any gift, other than a gift from a member of the judge's family, that alone or in the aggregate with other gifts received from the same source in the same calendar year exceeds \$[] in value, the judge must publicly report receipt of the gift in the same manner as the judge reports compensation, reimbursement, or waiver of charges pursuant to Rule 4.13.

COMMENT

[1] The Terminology Section states that a "gift" denotes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, bequest, or anything of monetary value, but does not include:

- (a) ordinary social hospitality that is common among people in the judge's community, extended for a non-business purpose, and limited to the provision of modest items, such as food and refreshments;
- (b) items with little intrinsic value intended solely for presentation, such as plaques, certificates, trophies, and greeting cards;
- (c) loans from banks and other financial institutions on the same terms as are available to persons who are not judges;
- (d) opportunities and benefits, including favorable rates and commercial discounts, that are made available to persons who are not judges;
- (e) rewards and prizes given to competitors in random drawings, contests, or other events that are open to the public;
- (f) scholarships and fellowships awarded on the same terms and based on the same criteria applied to non-judge applicants;
- (g) reimbursement or waiver of charges for travel-related expenses governed by Rule 4.11; or
- (h) compensation for extra-judicial activities that is governed by Rule 4.12.

[2] In determining whether a gift qualifies as ordinary social hospitality, relevant considerations include the following:

- (a) the value of the gift;
- (b) whether the benefits conferred are greater in value than those traditionally furnished at similar events sponsored by bar associations or similar groups;
- (c) whether the benefits conferred are greater in value than those that the judge typically provides to his or her own guests;
- (d) whether the benefits conferred are typically exchanged only between friends or relatives;
- (e) whether there is a history or expectation of reciprocal social hospitality between the judge and the donor;
- (f) whether the event is a traditional one for social hospitality; and
- (g) whether the benefits received must be reported to any governmental entity.

[3] Because a gift to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform family members of the relevant ethical constraints upon the judge in this regard and discourage family members from violating them.

[4] A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office, and might require disqualification of the judge.

[5] This Rule does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of this Code, including Rule 5.06. Similarly, this Rule does not apply to reimbursement or waiver of charges for travel-related expenses; these are governed by Rule 4.11.

[6] Regardless of whether this Rule would permit receipt of a particular gift by a judge or a member of the judge's family residing in the judge's household, other Rules may prohibit the gift. For example, Rule 4.01(C) would apply if acceptance of the gift would cast reasonable doubt on the judge's ability to act with independence, integrity, and impartiality.

RULE 4.11: REIMBURSEMENT OR WAIVER OF CHARGES FOR TRAVEL-RELATED EXPENSES OF THE JUDGE OR THE JUDGE'S SPOUSE,* DOMESTIC PARTNER,* OR GUEST

(A) Unless otherwise prohibited by law,* a judge may accept reimbursement of, or a waiver of, charges from sources other than the judge's employing entity for necessary travel, food, and lodging expenses associated with the judge's participation in extra-judicial activities permitted by this Code, but only if such acceptance does not cast reasonable doubt on the judge's ability to act with independence,* integrity,* or impartiality.*

(B) Expense reimbursement and waiver of charges shall 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, domestic partner, or guest. Any reimbursement or waiver of charges that alone or in the aggregate with other expenses reimbursed from the same source in the preceding twelve months exceeds \$[] shall be reported. The report shall be made accessible to the public in the same manner as required by Rule 4.13.

COMMENT

[1] Judges are encouraged to participate in educational programs in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Attendance at educational activities where the expenses are paid for by persons or entities other than the judge, however, must be evaluated by the judge to determine whether attendance is consistent with the requirements of this Code.

[2] A judge's decision whether to accept the gift of expenses or a waiver of fees in attending an educational activity should be based on an assessment of all of the circumstances, and the judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment. The judge should, for example, consider whether the sponsor or the funding source of the educational activity is currently appearing or likely to appear before the judge in a matter, thus possibly requiring disqualification of the judge. See Rule 2.12.

[3] A judge also should not attend educational activities sponsored by organizations with which the judge may not properly be associated, such as organizations that practice invidious discrimination; to do so would violate Rule 1.01 if the judge's attendance might be perceived as manifesting approval of the organization's policies. See Rule 3.04, Comment [2].

- [4] The factors that a judge should consider when deciding whether to attend a particular educational activity on an expenses-paid basis include:
- (a) whether the sponsor is an accredited educational institution or bar association rather than a for-profit entity or trade association;
 - (b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;
 - (c) whether the content is unrelated to the subject matter of litigation before the judge or is related to matters that are, or are likely to come before the judge;
 - (d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;
 - (e) whether information concerning the activity and its funding sources are available upon inquiry;
 - (f) whether the sponsor or the source of funding are generally associated with particular parties or interests likely to appear in the judge's court;
 - (g) whether differing viewpoints are presented; and
 - (h) the number of participants, whether a broad range of judicial and non-judicial participants are invited, and whether the program is designed specifically for judges.

In addition, the judge should determine whether attendance may create a conflict of interest, may result in disqualification or recusal in matters coming before the judge, may give rise to a judge's independence being questioned, or may interfere with the judge's performance of his or her judicial duties.

- [5] In addition to disclosure required by paragraph (B) and Rule 4.13, a judge must take reasonable steps to ensure that information concerning the judge's participation in educational activities and other events, as well as reasonable information regarding the nature and circumstances of such events, is made available to the public. A judge should therefore promptly and publicly disclose participation in extra-judicial events at which the expenses are paid by persons or entities other than the judge.

RULE 4.12: COMPENSATION FOR EXTRA-JUDICIAL ACTIVITIES

(A) A judge may accept compensation for extra-judicial activities permitted by this Code, unless such acceptance casts reasonable doubt on the judge's capacity to act with independence,* integrity,* or impartiality.*

(B) Compensation shall not exceed a reasonable amount, nor shall it exceed what a person who is not a judge would receive for the same activity.

COMMENT

[1] The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed.

A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not exploit or appear to exploit the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. The source of the payment of any such compensation must not raise any question of undue influence or the judge's ability or willingness to be impartial. See Rule 4.01.

RULE 4.13: REPORTING OF COMPENSATION, REIMBURSEMENT OF EXPENSES, AND WAIVER OF CHARGES

A judge shall report the date, place, and nature of any activity for which the judge received compensation, reimbursement of expenses, or waiver of charges, the name of the payor or waivor, and the amount of compensation, reimbursement of expenses, or waiver of charges so received. The judge's report shall be made at least annually, except with respect to reimbursements and waivers, which shall be reported at least quarterly, and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law,* and when technically feasible, posted on the website of that court or office.

COMMENT

[1] By reporting and publicly disclosing their compensation, reimbursement of expenses, or waiver of charges for extrajudicial activities, judges promote transparency and public confidence in the integrity, impartiality, and independence of the judiciary.