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To Write or Not To Write: The Ethics of Judicial Writings and Publishing

Nick Badgerow

Michael Hoeflich

Sarah Schmitz

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ARTICLE

J. Nick Badgerow | M. H. Hoeflich | Sarah Schmitz

To Write or Not To Write: The Ethics of Judicial Writings and Publishing

Abstract. Judges are bound by the Model Code of Judicial Conduct promulgated by the American Bar Association and adopted most states, including the federal judiciary. Within these rules governing judicial conduct, Judges owe duties to the public and to their calling, to be (and appear to be) objective, fair, judicious, and independent. When judges venture into the realm of extrajudicial writing—in the form of fiction novels, short stories, legal books, children’s books, and the like—they must consider the ethical bounds of that expression. The Model Code of Judicial Conduct imposes five main constraints upon extrajudicial writings: (a) a judge may not comment on any case he or she handled which is not yet final; (b) a judge must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” which is consistent with the corollary requirement; (c) that none of a judge’s activities, on and off the bench, “cast reasonable doubt on the judge’s capacity to act impartially;” or (d) “demean the judicial office;” and finally, (e) that political activities and commentary must relate to improvement of the law, the legal system or the administration of justice. This Article seeks to review each Canon of the Model Code of Judicial Conduct to explore the parameters of acceptable judicial publishing outside the confines of a judge’s official job duties. Ultimately, this Article concludes that judges are generally free to engage in most forms of published self-expression, so long as the judge abstains from writing on their own actual cases, and issues that have come before them or are likely to come before them.

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I. INTRODUCTION

Like regular lawyers or members of the public in general, many judges are moved by the Muses to express themselves in writing—in something other than a judicial opinion. These extrajudicial exercises sometimes take the form of recollections and reminiscences of days gone by, of the analysis and discussion of thorny legal issues, or even venturing into the realm of fiction and fantasy.

But judges are not like regular lawyers or the general public. Judges owe duties to the public and to their calling to be, and to appear to be, objective to the highest degree, fair, judicious, and independent. So, a judge who wishes to pen and publish a literary work should explore the ethical bounds of that expression before venturing further.

Most judges are bound by and must refer to the Model Code of Judicial Conduct (“Code”) for direction.¹ There are essentially five constraints on a judge’s freedom to publish at will. The first constraint limits a judge’s ability to comment on any case they handled which is not yet final.² Second, judges must “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,”³ which is consistent with the corollary requirements that none of the judge’s activities (either on or off the bench) should “cast reasonable doubt on the judge’s capacity to act impartially”⁴ or “demean the judicial office.”⁵ Finally, judges should limit political activity and commentary to efforts centered around the improvement of the law, the legal system or the administration of justice.⁶

The purpose of this Article is to review the Canons in the Code and explore cases and ethics opinions in the context of each Canon related to judges’ publications of fact, opinion, or fiction.⁷ This analysis serves to map the parameters of acceptable judicial publishing. At the most fundamental

1. MODEL CODE JUD. CONDUCT R. 1.1 (AM. BAR ASS’N 2020).

2. *Id.* R. 2.10.

3. *Id.* R. 1.2.

4. S.D. CODE JUD. CONDUCT, Canon 4(A)(1) (2022).

5. *Id.*

6. MODEL CODE JUD. CONDUCT R. 4.1.

7. It is beyond the scope of this Article—and perhaps beyond the skill of its Authors—to venture into a discussion of the differences among “fact,” “opinion” or “fiction,” and the crossroads where they may intersect. “Fact is fact and opinion is fiction.” Katie Crabtree, *Beyond Fact Versus Opinion: The Educational Value of Judgement*, AJEF. (Mar. 30, 2020), <http://www.ajeforum.com/beyond-fact-versus-opinion-the-educational-value-of-judgement-by-katie-crabtree/> [https://perma.cc/4B78-AH5D].

level, so long as judges—the authors—do not write about cases decided or pending before them, judges are generally free to engage in most forms of published self-expression.⁸ The analysis of this Article provides an opportunity to examine each of the Canons while acquainting (or reacquainting) those interested in this discussion with the Canons.

II. MODEL CODE

A. *The Original Code*

The American Bar Association (“ABA”) adopted the Model Code of Judicial Conduct in 1924 for the purpose of guiding judges’ actions across the state and federal levels of the Judicial Branch.⁹ The Code’s laudable purpose was expressed in its preamble:

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the [ABA], mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The [ABA] accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.¹⁰

The Code, as originally drafted, was comprised of thirty-four separate rules. Rule 31 of the original Code states: “He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefore, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.”¹¹

8. No opinion or judgment is expressed by these authors as to the quality or advisability of any of the actual or proposed publications mentioned herein.

9. See *generally About the Commission*, ABA, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background/ [https://perma.cc/8F2S-EEGH].

10. MODEL CODE JUD. CONDUCT Preamble (AM. BAR ASS’N 1924). See also MODEL RULES OF PROF’L CONDUCT.

11. *Id.* R. 31.

B. *The Current Code*

The ABA House of Delegates significantly amended the Model Code of Judicial Conduct on August 7, 1990, and the Code has seen at least four amendments since its inception.¹² The current version of the Code replaces the thirty-four rules set forth in the original Code, and now contains four general Canons, with specific Rules and Comments under each Canon. At least thirty-seven states have adopted the Code in its current form,¹³ as well as the federal judiciary.¹⁴

The preamble to the current Code sets forth aspirations similar to those stated in its predecessor. This preamble states, in pertinent part:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. . . . Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence. The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. . . . The Code is intended . . . to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.¹⁵

12. See *Model Code of Judicial Conduct*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ [https://perma.cc/YJ6P-7XP2] (referencing the amendments made to the Code over the years).

13. *Jurisdictional Adoption of Revised Code of Judicial Conduct*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/ [https://perma.cc/46SP-7DMF]. Additionally, eight states currently have the Code under review. *Id.*

14. *Code of Conduct for United States Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [https://perma.cc/2G8B-UTX7].

15. MODEL CODE JUD. CONDUCT, Preamble (AM. BAR ASS'N 2020).

III. JUDGES' PUBLICATIONS – SOME EXAMPLES

Publications made by judges are as widely varied as the personal histories and personalities of the judges themselves and cover the entire gamut of published writings. Some examples of judges' publications include: children's books;¹⁶ novels (often including legal issues central to the plot);¹⁷ legal thrillers;¹⁸ historical novels;¹⁹ crime novels, publishing under a pen name;²⁰ novels based on author's experiences as a trial judge;²¹ short stories and novels;²² law books;²³ manuals on criminal procedure;²⁴ non-fiction books related to family court and mental health issues;²⁵ and doctoral dissertations.²⁶

Perhaps the most recent and highly-publicized writing from this list is the children's book written by United States Supreme Court Associate Justice Sonia Sotomayor, in which she seeks to “inspire[] children to give back to their communities.”²⁷

IV. ANALYSIS – CANON 1

A. *Canon 1*

Canon 1 of the Code states:

16. Fla. Jud. Ethics Advisory Comm., Op. 9 (2022).

17. See Ill. Judges Ass'n, Op. 11 (1997) (“A judge may receive compensation for writing a novel in which legal issues are part of the plot.”).

18. Dana Gee, *Former Top Judge's New Novel Makes a Good Case for Legal Thrillers*, VANCOUVER SUN (Sept. 16, 2021), <https://vancouversun.com/entertainment/books/former-top-judges-new-novel-makes-a-good-case-for-legal-thrillers> [<https://perma.cc/8MW4-LRMC>].

19. Fla. Jud. Ethics Advisory Comm., Op. 30 (2019).

20. Fla. Jud. Ethics Advisory Comm., Op. 1 (1998).

21. La. Ethics Admin. Program, Advisory Op. 220 (2009).

22. Okla. Ethics Comm., Advisory Op. 02-5 (2005).

23. N.Y. Advisory Comm. on Jud. Ethics, Advisory Op. 145 (1995).

24. N.Y. Advisory Comm. on Jud. Ethics, Advisory Op. 37 (1993).

25. Fla. Jud. Ethics Advisory Comm., Op. 18 (2019). See generally GINGER LERNER-WREN & REBECCA A. ECKLAND, *A COURT OF REFUGE: STORIES FROM THE BENCH OF AMERICA'S FIRST MENTAL HEALTH COURT* (2018) (providing first-hand accounts of one judge's experience presiding over cases involving mental health).

26. Fla. Jud. Ethics Advisory Comm., Op. 1 (2020).

27. Erika Ardila, *Judge Sonia Sotomayor Launches New Book for Kids*, AL DIA (Jan. 24, 2022), <https://aldianews.com/culture/books-and-authors/sotomayors-new-kids-book> [<https://perma.cc/R639-UY6C>].

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.²⁸

Canon 1, Rule 1.2 states:

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.²⁹

Additionally, several Comments to the Rule mentioned above are pertinent to the present discussion, such as:

Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.³⁰

Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.³¹

A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.³²

Thus, in choosing to author a publication, a judge should be aware of their obligation to not compromise or appear to compromise their independence, integrity, and impartiality. Judges should consider using the publication for purposes of promoting ethical conduct of lawyers and judges, as well as promoting a public understanding of, and confidence in, the judicial system.

Canon 1, Rule 1.3 states:

28. MODEL CODE JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2020).

29. *Id.* R. 1.2.

30. *Id.* R. 1.2 cmt. 3.

31. *Id.* R. 1.2 cmt. 4.

32. *Id.* R. 1.2 cmt. 6.

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.³³

Comment 4 is apropos:

Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.³⁴

B. *Canon 1 – Illustrative Authority*

One manner in which judges promote public confidence in the independence, integrity, and impartiality of the judiciary is by keeping confidential the personal details of cases before them. The Judicial Standards Commission for the State of North Carolina addressed this exact issue in a 2010 Advisory Opinion. In that opinion, the Judicial Standards Commission addressed the following question: “May a judge publish a book for retail sale, based on the judge’s experience in child support court that will feature true life stories of parents, some of whom still have matters pending, and how they became involved in the court system?”³⁵ The Judicial Standards Commission answered by clearly stating that a sitting judge may not publish a book for profit when it contains descriptions of cases and/or litigants who have appeared before her.³⁶ Though a judge may write on a myriad of topics, the “personal travails of litigants, some of whom currently have matters pending before the court” is one which is strictly off limits.³⁷ To write of such things would run afoul of the requirement of promoting the integrity and impartiality of the judiciary.³⁸

Canon 1 also requires judges to avoid abusing the prestige of judicial office.³⁹ This can be difficult to navigate when a judge has authored a work

33. *Id.* R. 1.3.

34. *Id.* R. 1.3 cmt. 4.

35. Jud. Standards Comm’n N.C., Formal Advisory Op. 2010-03 (Apr. 9, 2010).

36. *Id.*

37. *Id.*

38. *See id.* (explaining that judges who write about pending matters appear to be taking advantage of their position).

39. *See infra* notes 34–35; *see also supra* notes 43–46 and accompanying text.

and promotes it. Recently, the Massachusetts Committee on Judicial Ethics issued a Letter Opinion advising on judicial involvement with promotional activities related to a publication.⁴⁰ Judges, when working with a publisher and promoting their authorship, “may not use, or permit others to use, the judge’s judicial title or [position], or otherwise exploit the judicial [role].”⁴¹ Further, judges must ensure they are not abusing the prestige of the judicial office in an effort to promote their work.⁴² For example, a judge cannot participate in promotional activities “at a courthouse or any other location that would lend the prestige of judicial office to efforts to sell the judge’s novel.”⁴³ Additionally, a judge must be careful not to target lawyers when promoting their work.⁴⁴ This may be permitted if it is an educational book to be used by lawyers, but pieces for a wider audience must not target the promotions at lawyers to impermissibly trade on the attorney-judge relationship.⁴⁵

All of this is not to say, though, that a judge may never reference the judicial title or office; judges are not required to “hide their judicial identities.”⁴⁶ A judge may identify as a judge in biographical materials so long as the position or office is not needlessly emphasized.⁴⁷ The entire purpose behind these promotional requirements is to ensure that the public still sees the judge as a figure of independence, integrity, and impartiality.

V. ANALYSIS – CANON 2

A. *Canon 2*

Canon 2 of the Code states:

40. Mass. Comm. on Jud. Ethics, Op. 2021-02 (June 7, 2021) (providing guidance regarding “Judges as Authors: Novels or Other Works of Fiction”).

41. *Id.*; *see also* MODEL CODE JUD. CONDUCT R. 1.3 cmt. 4 (AM. BAR ASS’N 2020) (“A judge should not permit anyone associated with the publication of such materials to exploit the judge’s office in a manner that violates this Rule or other applicable law.”).

42. *See* Judges as Authors, *supra* note 41.

43. *Id.* (citing MASS. CODE JUD. CONDUCT R 1.3.)

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

A judge shall perform the duties of judicial office impartially, competently, and diligently.⁴⁸

Canon 2, Rule 2.1 states:

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.⁴⁹

Comments 1 and 2 provide contrasting instructions. Importantly, Comment 1 warns:

To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to *minimize the risk* of conflicts that would result in frequent disqualification.⁵⁰

Whereas Comment 2 recommends:

Although it is not a duty of judicial office unless prescribed by law, judges are *encouraged to participate* in activities that promote public understanding of and confidence in the justice system.⁵¹

Canon 2, Rule 2.4 states:

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.⁵²

Therefore, in deciding to publish a written work, judges should be mindful to not let financial interests—such as potential income from the publication—influence their judicial decision-making as a judge.

48. MODEL CODE JUD. CONDUCT R. 2.

49. *Id.* R. 2.1.

50. *Id.* R. 2.1 cmt. 1 (emphasis added); *see also id.* Canon 3.

51. *Id.* R. 2.1 cmt. 2 (emphasis added).

52. *Id.* R. 2.4.

Canon 2, Rule 2.5 provides:

- (A) A judge shall perform judicial and administrative duties, competently and diligently.
- (B) A judge shall cooperate with other judges and court officials in the administration of court business.⁵³

Canon 2, Rule 2.10 states:

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.
- (C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).
- (D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.
- (E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.⁵⁴

Comment 1 to Rule 2.10 explains:

53. *Id.* R. 2.5.

54. *Id.* R. 2.10.

This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.⁵⁵

The sentiments expressed above could—and indeed, should—be extended to all the restrictions and limitations set forth in the Code.

B. *Canon 2 – Illustrative Authority*

As with Canon 1, Canon 2 has been addressed in multiple advisory opinions with regard to judicial authorship. A large part of Canon 2 is the focus on impartiality. In California, the Judicial Ethics Committee authored an Advisory Opinion discussing a variety of issues that come with the judge acting as an author; one such issue is that of impartiality. The California opinion provides examples of topics that would be compliant with Canon 2, and those that would not be. Two pieces which would contravene Canon 2's mandate for impartiality are illustrated below:

1. Judge wished to submit an article for a law review publication that was highly critical of the Correctional Officers union, recent administrations in Sacramento[,] and the get “tough on crime” movement. Though well written and thoroughly researched, the tone of the article and certain statements in it cast doubt on the judge's capacity to act impartially in cases involving prison guards, inmate brutality, three strikes sentencing and drug offenses.⁵⁶
2. Judge in a criminal law assignment was prohibited from writing training bulletins for law enforcement. Though available to anyone on-line, the site on which the bulletins appeared was maintained by a company run by active law enforcement officers and the bulletins were directed to law enforcement personnel. Authorship of these types of materials within this context gave rise to an appearance that the judge would not be impartial in criminal matters.⁵⁷

As described briefly in these two examples, the judge must steer clear of topics that would cast doubt on the judge's ability to act impartially if certain cases were to come to his or her docket. Indeed, no litigant or attorney wants to fear that the judge will rule a certain way just because of the topic of the case and prior or current writings of the judge. Part of the issue with

55. *Id.* R. 2.10 cmt. 1.

56. Cal. Judges Ass'n Jud. Ethics Comm., Op. 65 at 3 (2010).

57. *Id.*

impartiality comes with how the topic or issue is presented and addressed. Here is an example of a piece that would not contravene Canon 2's mandate for impartiality:

[A] judge may write an article critical of a recent Supreme Court decision where the criticism stems from the judge's legal analysis of the case and is to be published in a legal periodical.⁵⁸

However, what if the article was critical of the decision because of a certain subject matter? That would be impermissible as the judge would be providing an opinion on a matter that could be in front of the judge one day. This example is permissible because it is an opinion on the legal analysis. It does not threaten the judge's impartiality with certain topics.

VI. ANALYSIS – CANON 3

A. *Canon 3*

Canon 3 of the Code states:

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.⁵⁹

Canon 3, Rule 3.1 states:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

58. *Id.* at 4.

59. MODEL CODE JUD. CONDUCT R. 3.

- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.⁶⁰

Comment 1 to Rule 3.1 states:

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial 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 educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.⁶¹

Canon 3, Rule 3.5 states:

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.⁶²

Comment 1 to Rule 3.5 states:

In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.⁶³

Thus, in authoring a work for publication, the judge/author must be careful not to use or disclose confidential or otherwise valuable information gained during a judicial proceeding.

Canon 3, Rule 3.12 states:

60. *Id.* R. 3.1.

61. *Id.* R. 3.1 cmt. 1 (emphasis added); *see also id.* R. 3.7.

62. *Id.* R. 3.5.

63. *Id.* R. 3.5 cmt 1.

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.⁶⁴

Comment 1 to Rule 3.12 states:

A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is *reasonable and commensurate* with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities.⁶⁵

This means that compensation for publishing a written work should not exceed the reasonable value for such work—thereby avoiding any implication that the payment is a cover-up for purchasing the judge's favor in a judicial matter, or “might be viewed as intended to influence the judge's decision in a case.”⁶⁶

Canon 3, Rule 3.14 states:

- (A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.
- (B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.
- (C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's

64. *Id.* R. 3.12.

65. *Id.* R. 3.12 cmt. 1 (emphasis added); *see also id.* R. 2.1.

66. *Id.* R. 3.13 cmt. 1.

spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.⁶⁷

A successful author may be privileged (or burdened) to take a book tour to promote his/her book. Under this Rule, the “necessary and reasonable expenses” for such travel may be reimbursed, without a bonus or extra charge added. “A judge’s decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances.”⁶⁸

Canon 3, Rule 3.15 states:

- (A) A judge shall publicly report the amount or value of:
 - (1) compensation received for extrajudicial activities as permitted by Rule 3.12;
 - (2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items, alone or in the aggregate with other items received from the same source in the same calendar year, does not exceed \$[insert amount]; and
 - (3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), unless the amount of reimbursement or waiver, alone or in the aggregate with other reimbursements or waivers received from the same source in the same calendar year, does not exceed \$[insert amount].
- (B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation; the description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.
- (C) The public report required by paragraph (A) shall be made at least annually, except that for reimbursement of expenses and waiver or partial waiver of fees or charges, the report shall be made within thirty days following the conclusion of the event or program.

67. *Id.* R. 3.14.

68. *Id.* R. 3.14 cmt. 2.

- (D) Reports made in compliance with this Rule shall be filed as public documents 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 by the court or office personnel on the court's website.⁶⁹

For example, under this Rule, a judge is required to report any income received from book publication, as well as any reimbursement for expenses associated with the publication.

B. *Canon 3 – Illustrative Authority*

Compensation is central to Canon 3's intersection with judicial authorship. Numerous advisory opinions have addressed this exact question—i.e., whether it is unethical for a judge to receive compensation for his or her authorship. Generally, the answer is no.

In 1997, Illinois provided an opinion as to this issue.⁷⁰ In its opinion, the Illinois Judicial Ethics Committee sought to answer whether a judge could receive compensation for writing a novel in which legal issues are essential to the plot.⁷¹ The committee responded by allowing such compensation, so long as the writing does not: (1) "interfere with or reflect adversely upon, the performance of the judge's duties;" (2) "cast doubt upon the judge's ability to decide impartially any issue that may come before the judge;" (3) "exploit the judge's position;" or (4) "involve the judge in frequent transactions with lawyers or non-lawyers likely to come before the judge."⁷² Thus, so long as the judge's novel does not violate any of the four rules, there is not an issue with the judge receiving compensation for a novel in which legal issues are part of the plot.⁷³

Similarly, an Ohio Advisory Opinion addressed the issue of compensation with regard to a judge's writings for a local newspaper. However, this situation differs from that outlined above in two ways. First, the judge would be writing directly on legal topics. Second, these would be weekly pieces in a local newspaper.⁷⁴ The Ohio opinion provides a judge may write legal articles for a local newspaper and receive compensation so

69. *Id.* R. 3.15.

70. Ill. Judges Ass'n., Op. 1997-11 (May 7, 1997).

71. *Id.*

72. *Id.*

73. *Id.*

74. Ohio Sup. Ct., Bd. Comm'rs on Grievances & Discipline, Op. 89-21 at 1 (June 16, 1989).

long as such payment does not give the appearance of influencing the judge or an appearance of impropriety.⁷⁵ Further, the judge must not write on legal topics which “would likely lead to the judge’s disqualification or impair the judge’s impartiality.”⁷⁶ If compensation is received in any scenario, that compensation must be reported pursuant to the requirements set forth in the Canon.

VII. ANALYSIS – CANON 4

A. *Canon 4*

Canon 4, Rule 4.2 states in pertinent part:

- (A) A judicial candidate in a partisan, nonpartisan, or retention public election shall:
 - (1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;
- (B) A candidate for elective judicial office may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general or retention election:
 -
 - (2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;
 -
- (C) A judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election:
 - (1) identify himself or herself as a candidate of a political organization; and
 - (2) seek, accept, and use endorsements of a political organization.⁷⁷

Comment 13 to Rule 4.1 states, in pertinent part:

The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would

75. *Id.*

76. *Id.* at 2.

77. MODEL CODE JUD. CONDUCT R. 4.2.

believe that the candidate for judicial office has specifically undertaken to reach a particular result.⁷⁸

Under this Rule, a judge—other than one engaged in a partisan election—may write and publish truthful self-promotional materials, so long as the judge's actions in doing so are within the bounds of independence, integrity and impartiality.

B. *Canon 4 – Illustrative Authority*

In 2020, the Florida Judicial Ethics Advisory Committee (JEAC) issued an Advisory Opinion discussing the actions of candidates running for judicial office. Specifically, with regard to authorship, the opinion posed two issues: (1) whether a candidate for judicial office may give away copies of books the candidate has written at campaign events; and (2) whether a candidate for judicial office may release campaign related videos that promote the availability of books the candidate has written.⁷⁹ The JEAC answered in the affirmative as to each issue. A judicial candidate may give away copies of materials at campaign events so long as the information distributed does not call into question the candidate's impartiality, integrity, or the independence of the judiciary.⁸⁰ As to the second issue, nothing precludes a candidate from discussing his or her prior works.⁸¹ However, the candidate must be aware that his actions must not undermine the integrity of the judicial candidate, demean the judicial office sought, or be in poor taste.⁸²

VIII. CONCLUSION

There are strong social policy reasons to permit judges to be authors, even while on the Bench. Often, judges have insights into the law and the legal system possessed by no others. They speak from a myriad of experience on and off the bench, experience that can help the general public understand aspects of the law. Further, many judges have a personal need to write; it is therapeutic for some and lets others exercise creativity that is inappropriate in more formal contexts. Forbidding judges from writing at all might well

78. MODEL CODE JUD. CONDUCT R. 4.1 cmt. 13.

79. Fla. Jud. Ethics Advisory Comm., Op. 2020-15 (Aug. 28, 2022).

80. *Id.*

81. *Id.*

82. *Id.*

dissuade some of the best judges from going onto or remaining on the Bench.

More than anything else, however, we are acutely aware of how much of a loss to literature it would be if judges could not author extrajudicial pieces. One need only think of the well-known books and essays written by prominent judges, such as O.W. Holmes, Benjamin Cardozo, and Jerome Frank, among others. However, as the Authors have explained in this Article, because of the unique and critical role judges play in our legal system and society, they must also always be aware of and compliant with the Model Code of Judicial Conduct as adopted in their jurisdictions. The Code exists to protect the public and maintain the legitimacy of the judiciary. Thus, in the end, judicial authorship is a balancing act, and every judge contemplating becoming an author must analyze their ability to both exercise their creative powers while never ceasing to comply with the Code.

