

NEW SUPERIOR COURT JUDGES: JUDICIAL ETHICS ORIENTATION

UNC SCHOOL OF GOVERNMENT


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THE JSC TODAY


- Article IV of the NC Constitution was amended in 1971 to allow the General Assembly to adopt an alternative to impeachment
- The Judicial Standards Commission was created in 1973 and today maintains the central features recommended by the Courts Commission:
 - ❑ Mixed composition of judges and citizens appointed by the three branches of government
 - ❑ Confidentiality of proceedings until the Supreme Court concludes that discipline is warranted
 - ❑ Investigation of complaints alleging violations of the Code of Judicial Conduct



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THE JSC AND HOW IT WORKS

- Who we are – Commission Members and Staff
- Review of Complaints
- Investigations & Confidentiality
- Letters of Caution, Disciplinary Proceedings & Recommendations
- Formal & Informal Advisory Opinions



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WHAT HAPPENS IF A STATEMENT OF CHARGES IS FILED?

- If a complaint is not dismissed after a formal investigation, a disciplinary recommendation proceeding is commenced by the filing of a statement of charges
- It is a confidential proceeding, and remains so unless the Supreme Court imposes discipline
- You are entitled to answer, engage in discovery, and defend yourself (with or without counsel) at a hearing before a DIFFERENT PANEL than the investigative panel
- At the conclusion of the hearing, the hearing Panel will either dismiss the charges or issue a RECOMMENDATION OF PUBLIC DISCIPLINE to the Supreme Court, and you may request a hearing and file briefs before the Court during its review



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WHAT ETHICS ASSISTANCE CAN I RECEIVE FROM THE COMMISSION?

- **Formal Advisory Opinions**
 - Issued by the Commission as a whole and posted on our [website](#) and published in the Appellate Reporter
 - Lengthy process of research, review and approval (6-8 months)
 - *Highly recommend taking a look*
- **Informal Advisory Opinions**
 - Commission staff receives calls and emails from judges around the state seeking confidential advice on how to proceed in a particular matter



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JUDICIAL ETHICS – 3 CORE VALUES

- ❖ Independence
- ❖ Integrity
- ❖ Impartiality



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CODE OF JUDICIAL CONDUCT: OVERVIEW

- ▶ Preamble
- ▶ Canons 1-7
 - ▶ Canons 1 & 2: Ethical duties of judges both on and off the bench
 - ▶ Canon 3: Ethical duties of judges while undertaking official duties
 - ▶ Canons 4 & 5: Ethical duties of judges in personal and civic activities
 - ▶ Canon 6: Gift and income reporting
 - ▶ Canon 7: Ethical duties of judges when engaged in political conduct
- ▶ Statute of Limitations
- ▶ Scope Note (Judicial Candidates, New Judges)



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CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY IN ALL THE JUDGE'S ACTIVITIES.

Canon 2A

- Ensures conduct of the judge is lawful at all times and promotes public confidence in the integrity and impartiality of the courts

Canon 2B

- Limits outside influence on the judge and abuse of the prestige of the office for personal gain or to help others

Canon 2C

- Restricts membership in discriminatory organizations



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CANON 2A:

"A JUDGE SHOULD RESPECT AND COMPLY WITH THE LAW AND CONDUCT HIMSELF/HERSELF AT ALL TIMES IN A MANNER THAT PROMOTES PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE COURTS"

- Violations of Canon 2A generally involve:
 - Unlawful conduct – examples:
 - criminal activity (e.g., DWI or more serious crimes)
 - violation of civil laws and regulations (e.g., sexual harassment and anti-discrimination laws, other civil regulations and laws; duty to file SEI)
 - Conduct that shows a lack of integrity or undermines public confidence in the impartiality of the courts – examples:
 - inappropriate commentary in public sphere (e.g., social media, media, lectures)
 - any conduct that involves dishonesty or moral turpitude, including lack of candor with the Commission during an investigation



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CANON 2B: IMPROPER INFLUENCE & ABUSE OF THE PRESTIGE OF THE OFFICE

- Violations of Canon 2B generally involve:
 - Outside influence on the judge's official conduct or judgment – examples:
 - Family or friends asking for favors, either with criminal or civil cases or in order to gain any other benefit (e.g., jobs, access)
 - Making poor decisions in order to please or protect friends and family
 - Abuse of the prestige of the office – examples:
 - Writing recommendations on official letterhead for purposes unrelated to the judge's official duties
 - Improperly invoking the judicial title ("Do you know who I am?")
 - Express prohibition on voluntarily testimony as a character witness



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CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE JUDGE'S OFFICE IMPARTIALLY AND DILIGENTLY.

The **judicial duties** of a judge **take precedence** over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law . . .

Canon 3 pertains to how you exercise your official duties:

- Canon 3A –adjudicative duties
- Canon 3B – administrative duties
- Canon 3C & D –disqualification



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CANON 3A: ADJUDICATIVE DUTIES

Judges must always strive to:

- Be "faithful to the law" and "maintain professional competence in it"
- Accord everyone, even pro se litigants, a "full right to be heard"
- Decide cases "unswayed by partisan interests, public clamor, or fear of criticism"
- Ensure "order and decorum" in the courtroom and ensure that you, everyone who appears before you, and everyone you supervise is "patient, dignified and courteous" at all times, even towards pro se litigants and sovereign citizens
- No ex parte communications, unreasonable delays, public comments on pending cases
 - In re Chapman, 371 N.C. 486, 819 S.E.2d 346 (2018)
 - In re Henderson, 371 N.C. 45, 812 S.E.2d 826 (2018)



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COMMON PROBLEMS

- Decisional delay and tardiness to court or adjourning early
 - Formal Advisory Opinion 2017-02
 - Excessive continuances
- Professionalism on the bench
 - Patience with pro se parties and sovereign citizens – full & fair opportunity to be heard
 - Sarcastic/abusive comments, including jokes only judge may find funny
 - Profanity
 - Cell phone use
 - Appearing to be asleep
 - Wearing unprofessional attire
 - Eating/chewing gum
- Abuse of the contempt power
- Abuse of other authority in the courtroom
- Ex parte communications and “telephone justice”



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WHY THE RESTRICTIONS ON EX PARTE COMMUNICATIONS IN CANON 3A(4)?

Problems with Ex Parte Communications:

- Undermines Fundamental Fairness
 - denies the absent party the right to respond and be heard
- Undermines Confidence in the Impartiality of the Judge
 - creates perception of ability to influence the judge
- Undermines the Adversarial System
 - Adversarial testing is necessary to vet facts and information presented to the finder of fact and judge
 - In *ex parte communications*, misleading or false information can be given to the judge without the benefit of adversarial testing
 - Jeopardizes search for the truth and justice

See State Bar Ethics Opinion 2019 FEO 4



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CANON 3B: ADMINISTRATIVE DUTIES

- Be professional, courteous and collegial with your judicial colleagues and court staff!
- Pay attention to best practices in judicial administration, including case management
- Make sure court staff are also professional, courteous and collegial to each other and members of the public – they should “observe the standards of fidelity and diligence” that you do
- No favoritism or nepotism in making appointments
- Inherent authority to discipline attorneys



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COMMON PROBLEMS: CANON 3B

- Failure to address rude and abusive behavior by employees/court staff
- How to address attorney misconduct
- How to address misconduct of other judges
- Failure to cooperate with the chief judge and other court personnel with responsibility for fair and efficient court administration
- Lack of collegiality/pettiness



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CANONS 3C & 3D: DISQUALIFICATION & REMITTAL

- You have a *duty* to hear and decide cases assigned to you – it is what the taxpayers pay you to do
- But, you **MUST** disqualify yourself from hearing cases where you have a conflict of interest, or where your “impartiality may reasonably be questioned”
- You **CAN** and **SHOULD** disqualify on your own initiative if you know of potential conflicts
- You can, in limited circumstances, seek **REMITTAL** (waiver) of the conflict
- **Subjective AND Objective Inquiry.**



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CANONS 3C & 3D: DISQUALIFICATION & REMITTAL

Common Disqualification Issues:

- Family members who are parties or witnesses
- Family members who are attorneys in the case
- Your prior involvement in the case (as an attorney)
- Your personal knowledge of facts of the case
- You or your family's financial interest in the outcome
- Your personal attorney is appearing before you
- Statements you made publicly or on social media that suggest a bias



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COMMON PROBLEMS: CANON 3C AND 3D

- When to disqualify:
 - Former colleagues?
 - Family members? Employers of family members?
 - Campaign opponents and staff?
 - Campaign contributors/endorsers?
 - Lawyers helping you with a personal matter?
 - Facebook friends?
- How to disqualify:
 - On your own motion - when and how much to disclose?
 - On motion of a party - when to refer to another judge?



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CANONS 4, 5A, 5B: REGULATING YOUR EXTRA-CURRICULAR AND PROFESSIONAL ACTIVITIES

- The Code distinguishes between activities as a judge (Canon 4) and those undertaken in your personal capacity (Canon 5). Most judges are active in their communities and in non-profit organizations, and this is a good thing!
- Things to **avoid** in all of these activities:
 - Belonging to groups or making public comments that may **cast doubt on your impartiality**
 - Helping organizations in **fundraising activities**
 - Being involved with **groups that often appear before you**
 - Too much time spent on outside activities, **neglecting your judicial duties**



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OUTSIDE PROFESSIONAL ACTIVITIES – CANON 4

Canon 4 governs a judge's outside activities in their **PROFESSIONAL CAPACITIES**: a judge may engage in "activities concerning the legal, economic, educational, or governmental system, or the administration of justice."

- Outside activities limited to those that "do not cast substantial doubt on the judge's capacity to decide impartially **any issue** that may come before the judge"
- **Permitted outside activities**: speaking, writing, lecturing, appearing at public hearings, consulting with legislative/executive bodies and officials; serving in leadership roles in governmental agencies; making recommendations to grant-funding agencies
- **Prohibited outside activities**: active assistance in fundraising; abusing the prestige of the office to benefit an organization; anything that undermines public confidence in the impartiality of the courts



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EXPRESSING YOUR PERSONAL OPINIONS ON CURRENT EVENTS OR HOT ISSUES

Other provisions of the Code of Judicial Conduct also inform how judges can engage in issues that may be deemed “controversial” or “sensitive”:

- **Canon 1:** judges must “**personally observe**” standards of conduct that reflect the **integrity and independence** of the judiciary
- **Canon 2:** judges must “**avoid impropriety**” in ALL of your activities and conduct yourself “at all times” in a way that promotes **public confidence in the integrity and impartiality of the judiciary**
- **Canon 3C:** disqualification is appropriate where the judge’s **impartiality could reasonably be questioned**



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COMMON ISSUES

GENERALLY RESTRICTED:

- Leadership in Advocacy Organizations that Promote the Interests of a Specific Class of Persons
- Showing Public Support for a Particular Class of Persons Likely to Appear in Your Court (think social media, gofundme, etc.)

PROCEED WITH CAUTION:

- Social Media Use/Public Commentary – beware posts/comments that suggest bias in favor of parties or an inability to be fair and impartial
- Participation in Marches and Vigils

PERMITTED:

- Serving on Task Forces and Community Initiatives
- Consulting with government officials or community stakeholders
- Speaking, writing or lecturing on the impact of a problem on the administration of justice



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CANON 5C-5G: REGULATING FINANCIAL ACTIVITIES, GIFTS AND OUTSIDE INCOME

Things You Can Do:

- Manage your own personal investments and those for immediate family members
- Be a fiduciary for family members
- Earn outside income in certain circumstances, but it may need to be disclosed annually (disclosure required over \$2000)
- Accept most gifts from people not appearing before you (disclosure required in some cases)

Things You Can't Do:

- Be an officer or manager in a for-profit entity business
- Practice law or provide legal advice to ANYONE– even on a pro bono basis or for family members
- Serve as a fiduciary, executor or trustee for non-family members
 - In re Brooks, 377 N.C. 146, 856 S.E.2d 777 (2021)
- Accept gifts from parties appearing before you
- Be a mediator or arbitrator, UNLESS you are a retired emergency judge



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CANON 6: OUTSIDE INCOME & ANNUAL REPORTING

- Each year by **May 15**, you **MUST FILE** with the appropriate Clerk of Court your Annual Gift and Income (Canon 6) Report
 - Describe sources of income in excess of \$2000 (e.g., compensation for teaching, rental income)
 - Gifts in excess of \$500 (unless from family members or for personal occasions)
 - This is **NOT THE SAME** as the required SEI form to be filed with the State Ethics Commission each year
- Canon 6 also addresses **expense reimbursement** – if you receive reimbursement for attending an event that is **MORE THAN THE ACTUAL COST**, it can be considered compensation and is reportable if more than \$2000 in excess of costs



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COMMON PROBLEMS: CANON 5 AND 6

- Failing to disclose outside income on your SEI or Canon 6 Form
- Promoting for-profit business enterprises or service on for-profit boards
- Serving as an executor or fiduciary for a non-family member
- Providing legal advice to family/friends (including advice on how to handle court matters)
- Managing real estate investments (landlord/tenant issues) and disclosing rental income
 - But see Formal Advisory Opinion 2018-01



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CANON 7: PERMISSIBLE POLITICAL CONDUCT

- **You MAY:**
 - Identify yourself as a member of a political party
 - Contribute to political PARTIES (not candidates)
 - Serve as a political party delegate or political party leader or officer
 - Attend, preside over and speak at political party meetings & conventions, campaign events including fundraisers for individual candidates



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CANON 7: PROHIBITED POLITICAL CONDUCT

- **You may NOT:**

- **Endorse** other candidates UNLESS you are also a candidate
- **Contribute** to individual campaigns
- **Solicit Donations or Engage in Fundraising** for other candidates, politicians or political organizations, either directly or indirectly
- **Misrepresent** your own qualifications, and as a general rule consistent with Canons 1 and 2, the qualifications of other candidates

NOTE: Your spouse and other family members are permitted to engage in political activity, but be careful that their conduct is not attributed to you – e.g., beware the joint checking account problem in contributions.



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CONSTITUTIONAL LIMITS ON REGULATING POLITICAL CONDUCT

- Protection of **First Amendment** rights of judges:

- *Republican Party of Minnesota v. White* (2002): judicial codes of conduct can violate the First Amendment when regulating campaign speech; applying strict scrutiny and striking down the restriction on “announcing” views on disputed legal issues in judicial elections
- *Williams-Yulee v. Florida State Bar* (2015): even applying strict scrutiny, there is a compelling state interest embodied in judicial codes of conduct that restrict judicial candidates from personally soliciting campaign contributions



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COMMON PROBLEMS: POLITICAL CONDUCT

- Contributing to campaigns – it is PROHIBITED
- Unprofessional and hyper-partisan attacks on opponents or elected/public officials
- Unprofessional campaign conduct that undermines confidence in the judiciary
- Assisting other candidates for elected office



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