

PROPOSED REVISIONS TO CODE OF CONDUCT FOR U.S. JUDGES

Public Comments

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The National Conference of Bankruptcy Judges would like to express on behalf of its members their appreciation for the opportunity to make comments concerning the proposed revisions to the Code and to offer the following observations to that end.

Canon 2C: A judge should not hold membership in any organization in any organization that practices invidious discrimination.

The proposed revision drops references to specific grounds of improper discrimination of “race, sex, religion, or national origin.” The suggested Commentary to the Canon recognizes the difficulty of determining exactly what is “invidious” discrimination and speaks in terms of exclusionary membership criteria which are “arbitrary, irrational, or the result of hostility or animus toward an identifiable group.” The term “invidious” implies bad, unwarranted and unjustified, but it is inherently an indefinite and uncertain term when applied to specific situations and can have something of an “eye of the beholder” flavor when one attempts to separate discrimination (i.e., choice) which is appropriate or permissible and that which is wrongful. What might be “invidious” discrimination in the eyes of one judge might be another judge’s religious or moral tenet. The Committee ought to consider whether this Canon might provide more helpful guidance by tying back to something a little more specific, such as, for example, discrimination (I) which is prohibited by specific policies adopted by the Judicial Conference of the United States, or (ii) which would be unlawful for a private employer subject to the federal civil right laws to practice under such laws, except as constitutionally guaranteed by the freedom of religion and association protections contained in the Bill of Rights.

Canon 3A(4)(a): A judge may initiate, permit, or consider ex parte communication as authorized by law.

While it is recognized that this language does not represent a substantive change in the language of the existing Canon, if it is to be changed at all, it ought to be improved as much as possible. The language “as authorized by law” in Canon 3A(4)(a) dealing with ex parte communications seems quite vague and indefinite. The term “law” itself is inherently one which is open to dispute as to its proper meaning. Use of some illustrative specific examples of permissible ex parte communications, either in the Canon or the accompanying Commentary, would be helpful. This language just does not offer much guidance to one attempting to discern its proper meaning and limits.

Commentary to Canon 3C: Recusal considerations applicable to a judge’s spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and intimate relationship.

Under this language a judge would be subject to the Canon with respect to a spouse with whom he or she is living separate and apart, but not with respect to an individual with whom the judge is involved in a continuing intimate personal relationship as long as they are not regularly living in the same household. As to such a person recusal “should also be considered” but it is not mandatory. While the term “intimate” in our present culture implies sexual, it traditionally has had a broader meaning. If a judge has that type of relationship with some person to whom he/she is not legally related, the question arises whether the Canon shouldn’t specify that the “spouse” rule applies rather than just simply saying that the judge ought to “consider” applying it. It is suggested that the Canon would be more helpful and more likely to inspire the confidence of litigants and the general public if it provided that a judge should treat as a relative for the purpose of the recusal rules any person with whom the judge has a continuing close personal relationship of such a nature that the judge is conscious that his/her own impartiality might be affected in some proceeding in which the other person has some interest or is otherwise involved or the judge determines that a party in interest might reasonably conclude that such judge’s impartiality in the matter before him/her would likely be affected by the existence of such relationship.

Canon 4C: Fund Raising. A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as on officer, director, or trustee of such an organization but should not personally participate in public fund-raising activities. A judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge’s family. Except as described above, a judge should not solicit funds for any organization and should not use or permit the use of the prestige of the judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

The use of the word “public” in the phrase “public fundraising activities” is somewhat ambiguous. Is a distinction being made between impermissible “public fund-raising activities” and permissible “non-public fund-raising activities”? It is not entirely clear what the effect of using that word is as contrasted with not using it at all. Judges are often encouraged, and quite properly so, not to set themselves completely apart from the normal civic activities of their communities. To be a member of a civic club ordinarily involves some participation in its activities, which can sometimes involve combined service and fund-raising aspects, such as working the refreshment stand at the high school football game for the band boosters organization or cooking pancakes, etc. for an occasion involving both community togetherness and fundraising in which all of the club’s members are not only expected to participate, they are needed. Such participation ought to be clearly permitted and encouraged, rather than arguably prohibited.

Canon 4G: Chambers, Resources and Staff. A judge should not use to any substantial degree judicial chambers, resources, or staff to engage in law-related activities permitted by this Canon. A judge should not use judicial chambers, resources, or staff to engage in other activities permitted by this Canon, except for uses that are *de minimis*.

Bankruptcy judges ordinarily perceive that it is part of their “job” to encourage and assist bar and other professional groups in continuing education in bankruptcy law and practice and the encouragement of high ethical standards among attorneys who practice in their courts. To do so often involves preparation of articles, seminar outlines and other similar materials. If such activities are appropriate and laudable, a judge ought to feel free to utilize his/her staff to assist in the preparation of such materials, so long as they do not involve personal compensation, directly or indirectly, to the judge. The language of this Canon seems to disfavor such use at all and leave its propriety in some doubt. It ought to expressly approve it, again assuming no compensation to the judge being involved.

Commentary to Canon 4, 3rd paragraph: A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge’s family for purposes of legal assistance, under Canon 4A(5), fund raising, under Canon 4C, and family business activities and gift solicitation and acceptance, under Canon 4D.

This Commentary to Canon 4 in part approves the giving of legal advice and preparation of legal documents for unrelated persons residing in the same household with whom the judge has an intimate relationship. The wisdom of such an approval is not apparent and ought to be reevaluated. The opportunities for abuse in such situations are so obvious that to give a green light to them is questionable at best. Indeed there are situations where even the preparation of legal documents for family members can be an invitation to abuse. It may be more appropriate to have the Canon say that a judge without being compensated therefore may prepare legal documents for, and give legal advice to, family members and other persons with whom the judge has a continuing close personal relationship, **except** in any situation where a reasonable person trained in the law would conclude that doing so might pose a conflict of interest for the judge or might not be in the best interest of the other person so advised.