LEGAL STUDIES AND PRE-LAW PROGRAM INTERNSHIP/CLERKSHIP MANUAL

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CONCORD UNIVERSITY

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Program Structure

The Director of the Legal Studies and Pre-Law program will designate a faculty coordinator to coordinate the clerkship with field faculty. The field faculty then enters into a contract with the University to implement the clerkship on site. A formal contract is drafted by the faculty coordinator which clearly defines both the curricular and site-specific goals. Once agreed upon this contract is incorporated into a student contract which is negotiated between the student and the other two parties. The student contract includes the specific objectives that the student hopes to meet during the course of the clerkship.

The duties of the faculty coordinator are:

- To plan clerkships and periodically consult with the designated instructor to monitor the student's adjustment and progress.
- To provide ongoing communication with the instructor, including a minimum of two on-site visits and more frequently when needed and feasible.
- To conduct meetings regarding setting and clerkship questions and issues, and solicit suggestions and recommendations.
- To provide the necessary instruction and other pertinent information for setting instructor.
- To assign students who are academically qualified.
- To hold students accountable for conforming to professional standards of conduct. To acknowledge the right of the setting to require withdrawing any student for unprofessional conduct and/or unsatisfactory performance, provided negotiations involving the student, the program, and the setting are unsuccessful.

The duties of the field faculty are:

- To provide learning opportunities (a) with client systems of various sizes and types, (b) Opportunities to utilize legal systems and community resources, and (c) interaction with professionals within the legal system.
- To provide a regular workplace for the student.
- To provide the following directly or through a qualified designee:
    - Orient the student;
    - Suggest relevant reading materials for the student;
    - Assist the student in further development of professional oral and written communication skills;
    - Notify the faculty coordinator of student's progress and/or problems;
    - Conduct weekly supervisory conferences with the student;
    - Provide midterm and final evaluations of the student;
    - Assist and support the student in research as needed;

General Goals for the Clerkship Student:

- Develop and sustain appropriate relationships at various levels;
- Demonstrate the knowledge and skills necessary for success within a comprehensive range in types and sizes of systems;
- Work with, and advocate for, persons from a wide range of ethnic, religious, socioeconomic, age, and other characteristics representing a variety of life styles, capabilities, goals, and cultural experiences;
- Demonstrate awareness of values, social and cultural experiences, as they relate to work with persons from diverse populations;

- Demonstrate effective problem solving abilities;
- Incorporate the professional use of self;
- Integrate, as appropriate, legal and social theories;
- Identify existing social policy, the policy-making process, and the effects of policies on the clients being served;
- Demonstrate the willingness and ability to be reflective and self-evaluating;
- Promote social values of equality and justice;
- Develop a knowledge base through ongoing observation, inquiry, reflection, study, and dialogue with colleagues, clients, scholars, and other members of the legal system;
- Communicate appropriately as needed with the full spectrum of the legal system, including collateral practitioners and community members;
- Demonstrate adequate writing and documentation skills;
- Demonstrate critical thinking skills with respect to policy programs and problem solving;
- Effectively utilize supervision and other support systems;
- Demonstrate effective methods of legal research and use of research methods and tools, and

Student Requirements

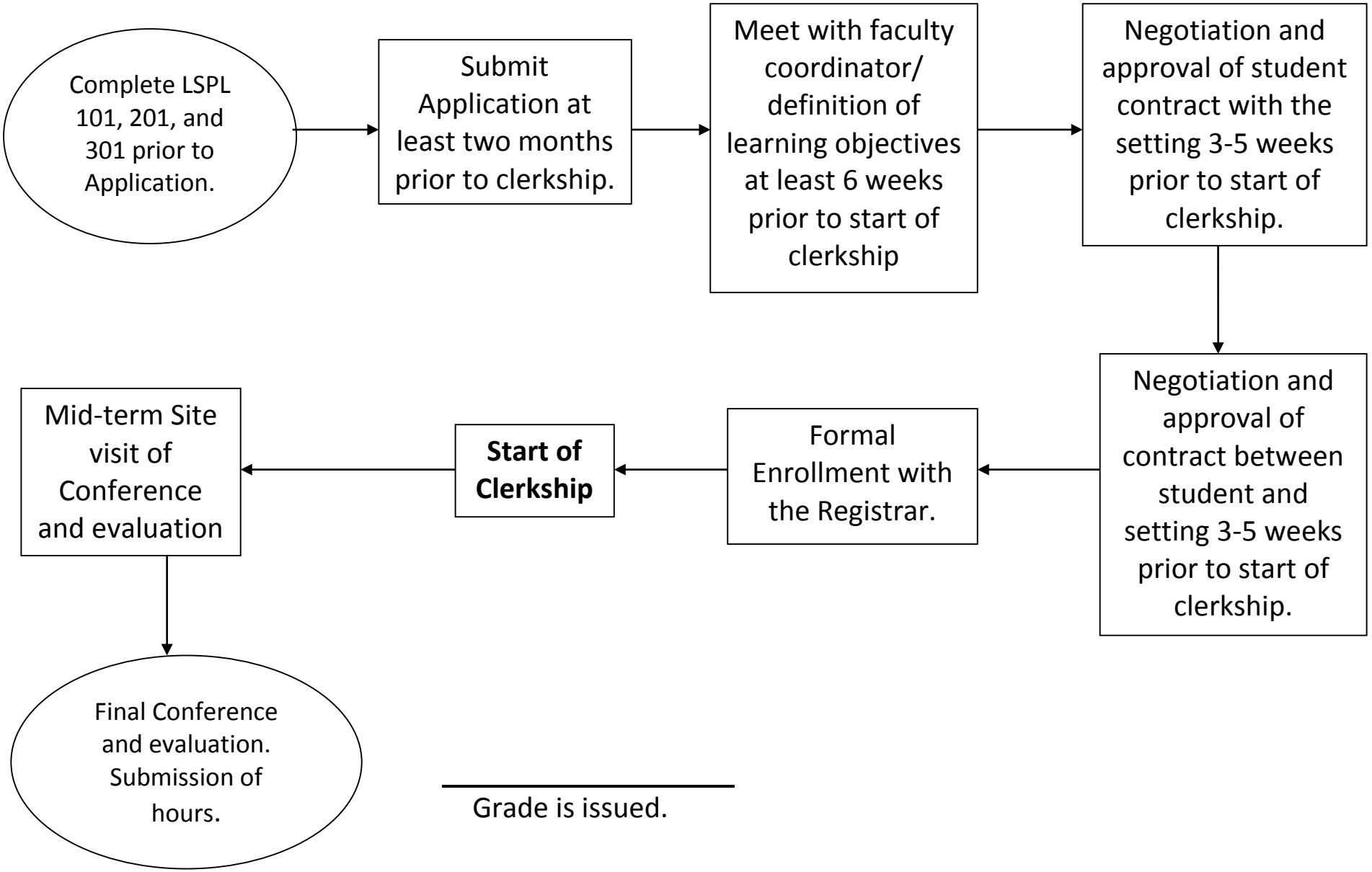
Prior to enrolling in the clerkship, students must have completed the following prerequisites:

- The student must complete LSPL 101, 201, and 301 with no less than a "C" in any.
- The student must submit a clerkship application to the faculty coordinator by no later than one month prior to the commencement of the semester in which the student intends to enroll in the clerkship program.

Once these prerequisites are met, the student must register and pay for the class as with any other class.

Students may enroll in the clerkship for three (3), six (6), nine (9), or twelve (12) credit hours. Since each summer term is five (5) weeks, it is not feasible to complete more than 200 hours in one term. Therefore, a student may receive no more than 6 credit hours per term during the summer; however, a student may elect to enroll in a 6 hour clerkship each summer term to receive 12 hours of credit. The Spring and Fall terms are fifteen (15) weeks, therefore a student may enroll in three, six, nine, or twelve hour clerkships.

Clerkship Progression



Field Roles and Responsibilities

Field Faculty: This role is usually filled by a Field Instructor and a Task Supervisor. The Field Instructor is the person charged with implementing the learning contract on site. The Field Instructor plays the single most important role in a successful clerkship and often leaves a lifelong impression on the student. The student often models his/her thinking, writing, and approach to law from the experience gained from the Field Instructor. The Field Instructor must have at least a Juris Doctorate in law and should be an experienced practitioner, jurist, or researcher. In the event that these requirements cannot be met, the student may apply for an exception from this. The Field instructor should try to dedicate at least one hour per week to evaluating the student and answering questions about the tasks that the student performed during the week. The Field Instructor may delegate some of these duties to a Task Supervisor who handles issues within his/her qualifications.

Faculty Coordinator: This role is filled by the Coordinator of the Legal Studies and Pre-Law Program or a faculty member designated by the Coordinator. The job of the faculty coordinator is to ascertain that the placement is proceeding appropriately. This is done primarily through on-site visits with the student and Field Instructor at the beginning, middle, and end of the clerkship.

Student Responsibilities

The Student carries a significant responsibility for having a successful placement experience. During the placement, the student will:

1. Participate actively in defining his/her learning objectives by facilitating development of the field placement contract.
2. Abide by the policies and procedures of the host firm, judge or organization.
3. Notify the agency of unavoidable absences in sufficient time for the agency to able to prepare for coverage of necessary tasks. If the absence is longer than one day in duration, the student should notify the faculty liaison.
4. Observe the agreed upon hours of the firm, organization, or setting.
5. Be punctual in carrying out work assignments and agreed upon responsibilities.
6. Make full use of the learning opportunity by taking an active role in designing work activities.
7. Maintain weekly logs and process recordings as required by the faculty coordinator.
8. Complete competency thesis as detailed in the guidelines provided.
9. Abide by the applicable codes of ethics.

Placement Duration

The internship/clerkship during the fall and spring semesters will coincide with the school semester schedule. The internship/clerkship will normally begin on the first day of classes and conclude with the last day of classes. This will allow the week of finals to be utilized for concluding reports, etc. The summer internship/clerkship will run for the duration of both summer semesters.

Absences

Students may observe Concord University holidays, including the regular fall and spring recess. If a student wants to use a school holiday at another time during the internship/clerkship, they should make advance arrangements for this with their Field Instructor. In a few cases there may be additional holidays observed by the firm, courthouse, or organization.

If a student must be absent, the student is to notify his/her Field Instructor and Task Instructor if this applies. If the absence exceeds one (1) day, the Faculty Coordinator must also be notified. In the case of inclement weather, the student is responsible for determining he/she can travel safely and will make necessary notifications if he/she is to be absent.

Evaluation

Through weekly meetings with field and task instructors and midterm/final evaluation forms students will receive ongoing feedback regarding their performance throughout the placement experience.

Each student will receive a mid-term and final written evaluation of his/her performance. A copy of the evaluation instrument is provided in the Appendices although forms will be provided during placement.

There will be a planned mid-term conference including the student and the Faculty Instructor with the primary issue being a review of the student performance during the first part of the placement.

The Field Faculty should contact the Faculty Coordinator if the student is performing in an unsatisfactory manner or if activities are observed that could result in the student not completing the clerkship satisfactorily. In the event this situation should arise, the Faculty Coordinator will meet with the Field Instructor and/or the student to determine a course of action to help the student reach an acceptable level of performance.

Students will actively participate in evaluation conferences. Students are to read the written evaluation, make comments as they wish, and sign the form.

A student's placement can be terminated at any time by the Field Faculty. This would likely occur only after the consultation with the student Field Faculty. Non-attendance, unethical behavior, or non-performance are examples of reasons for termination.

Appendices

1. Sample Contracts
    a. Student Contract
    b. Field Faculty Contract
2. Evaluation Forms
    a. Evaluation of Student by Field Faculty
    b. Field Instructor Assessment of internship/clerkship program
    c. Student Evaluation of Faculty Liaison
3. Sample Bench Memorandum
4. Sample Order
5. West Virginia Code of Judicial Ethics
6. West Virginia Code of Legal Ethics

APPENDIX I: SAMPLE CONTRACTS

CLERKSHIP AGREEMENT

This Legal Studies and Pre-law Curriculum is designed to prepare students to work within the legal system at various levels and to synthesize and utilize the classroom content.

Section I. General Goals for the Clerkship Student

1. Develop and sustain appropriate relationships at various levels;
2. Demonstrate the knowledge and skills necessary for success within a comprehensive range in types and sizes of systems;
3. Work with, and advocate for, persons from a wide range of ethnic, religious, socioeconomic, age, and other characteristics representing a variety of life styles, capabilities, goals, and cultural experiences;
4. Demonstrate awareness of values, social and cultural experiences, as they relate to work with persons from diverse populations;
5. Demonstrate effective problem solving abilities;
6. Incorporate the professional use of self;
7. Integrate as appropriate, legal and social theories;
8. Identify existing social policy, the policy-making process, and the effects of policies on the clients being served;
9. Demonstrate the willingness and ability to be reflective and self-evaluating;
10. Promote social values of equality and justice;
11. Develop a knowledge base through ongoing observation, inquiry, reflection, study, and dialogue with colleagues, clients, scholars, and other members of the legal system;
12. Communicate appropriately as needed with the full spectrum of the legal system, including collateral practitioners and community members;
13. Demonstrate adequate writing and documentation skills;
14. Demonstrate critical thinking skills with respect to policy programs and problem solving;
15. Effectively utilize supervision and other support systems;
16. Demonstrate effective methods of legal research and use of research methods and tools, and
17. Develop skills necessary for effective resolution of disputes including alternative methods.

Section II. Goals and Objectives Specific to the Setting

1. Student will

    a. Goal 1
    b. Goal 2
    c. Goal 3
    d. Goal 4
    e. Goal 5
    f. Goal 6
    g. Goal 7
    h. Goal 8
    i. Goal 9

_____
Setting Administrator

_____
Student

_____
Clerkship Coordinator

Agreement Between
Concord University Legal Studies and Pre-Law Program And

(Party)

_____

Setting Address

This agreement is made between the Concord University Legal Studies and Pre-law Program, Athens, West Virginia, and (Party).
This agreement is proposed to effect a relationship between the two parties for the purpose of baccalaureate legal studies. Both parties agree that this agreement is indefinite in duration. However, it may be terminated/amended by either party at any time, provided reasonable notice is given prior to the desired effective date.

Section I. Responsibilities and Obligations of the Legal Studies and Pre-law Program

The Program:

- Will plan clerkships and will periodically consult with the designated instructor to monitor the student's adjustment and progress.
- Will provide ongoing communication with the instructor, including a minimum of two on-site visits, and more frequently when needed and feasible.
- Will conduct meetings regarding setting and clerkship questions and issues, and solicit suggestions and recommendations.
- Will provide the necessary instructions and other pertinent information for setting instructor.
- Will assign students who are academically qualified.
- Will hold students accountable for conforming to professional standards of conduct.
- Acknowledges the right of the setting to require the program to withdraw any student for unprofessional conduct and/or unsatisfactory performance, provided negotiations involving the student, the program, and the setting are unsuccessful.

Section II. Responsibilities and Obligations of the Setting

The Setting:

- Will provide learning opportunities (a) with client systems of various sizes and types, (b) opportunities to utilize legal systems and community resources, and (c) interaction with professionals within the legal system.
- Will provide a regular work place for the student
- Will perform the following directly or through a qualified designee:
    - Orient the student.
    - Suggest relevant reading materials for the student.
    - Assist the student in further development of professional oral and written communications skills.
    - Notify field liaison of student's progress and/or problems.
    - Conduct weekly supervisory conferences with the student.
    - Provide mid-term and final evaluations of the student.
    - Assist and support the student in research as needed.

The undersigned hereby agree to the terms of this Agreement as set out herein.

_____

Concord University Legal Studies
and Pre-law Program Director

_____

Setting Administrator

APPENDIX II: SAMPLE EVALUATION FORMS

Clerkship Student Evaluation

Evaluation is an important component of professional development. We appreciate you taking the time to contribute to our students' professional growth and development by completing this evaluation and sharing the contents with the placement student who will then add his/her comments. The form is to be completed at about halfway through the placement and again at the conclusion of the placement.

Student: _____
Agency:_____ _____
Field Instructor: ——————————
Date= _____

Part I Organizational/Administrative Expectations

Please indicate to what extent the student has met the following expectations:

1. Attendance: ___Satisfactory ___Needs Improvement

2. Punctuality: ___Satisfactory ___Needs Improvement

3. Appropriate attire: ___Satisfactory ___Needs Improvement

4. Dependability: ___Satisfactory ___Needs Improvement

5. Observance of Policies and procedures: ___Satisfactory ___Needs Improvement

6. Demonstration of Initiative and self-direction: ___Satisfactory ___Needs Improvement

If any area above is marked "Needs Improvement" please comment below:

_____
_____
_____
_____
_____
_____
_____

Part II: **General Goals for the Clerkship Student**
Please evaluate related to the following placement goals by circling the appropriate number.

1. **Develop and sustain appropriate relationships at various levels**.
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

2. **Demonstrate the knowledge and skills necessary for success within a comprehensive range in types and sizes of systems**.
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

3. **Work with, and advocate for, persons from a wide range of ethnic, religious, socioeconomic, age, and other characteristics representing a variety of life styles, capabilities, goals, and cultural experiences.**
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

4. **Demonstrate awareness of values, social and cultural experiences, as they relate to work with persons from diverse populations**.
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

5. **Demonstrate effective problem solving abilities.**
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

6. **Incorporate the professional use of self.**
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

7. **Integrate, as appropriate, legal and social theories**.
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

8. **Identify existing social policy, the policy-making process, and the effects of policies on the clients being served.**
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

9. **Demonstrate the willingness and ability to be reflective and self-evaluating.**
   10 9 8 7 6 5 4 3 2 1
   Outstanding Acceptable level of Progress Needs Significant Improvement

10. **Promote social values of equality and justice.**
    10 9 8 7 6 5 4 3 2 1
    Outstanding Acceptable level of Progress Needs Significant Improvement

11. **Develop a knowledge base through ongoing observation, inquiry, reflection, study, and dialogue with colleagues, clients, scholars, and other members of the legal system.**

10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

12. **Communicate appropriately as needed with the full spectrum of the legal system, including collateral practitioners and community members.**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

13. **Demonstrate adequate writing and documentation skills**.
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

14. **Demonstrate adequate writing and documentation skills.**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

15. **Effectively utilize supervision and other support systems.**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

16. **Demonstrate effective methods of legal research and use of research methods and tools.**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

17. **Develop skills necessary for effective resolution of disputes including alternative methods.**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

Part III: **Goals and Objectives Specific to the Setting**

1. **Goal 1**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

2. **Goal 2**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

3. **Goal 3**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

4. **Goal 4**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

5. **Goal 5**
10 9 8 7 6 5 4 3 2 1
Outstanding Acceptable level of Progress Needs Significant Improvement

6. Goal 6

10 9	8 7 6 5 4	3 2 1
Outstanding	Acceptable level of Progress	Needs Significant Improvement

7. Goal 7

10 9	8 7 6 5 4	3 2 1
Outstanding	Acceptable level of Progress	Needs Significant Improvement

8. Goal 8

10 9	8 7 6 5 4	3 2 1
Outstanding	Acceptable level of Progress	Needs Significant Improvement

9. Goal 9

10 9	8 7 6 5 4	3 2 1
Outstanding	Acceptable level of Progress	Needs Significant Improvement

APPENDIX III: BENCH MEMORANDUM OUTLINE

The purpose of a bench memorandum is to provide a judge with a convenient and brief summary of a specific issue that the judge is about to hear arguments about. Examples include but are not limited to, motions for summary judgment or a motions to compel. You must address the issues that will be raised in the hearing and form a preliminary opinion on the proper disposition of the issue based on a review of the case file, briefs, and relevant law. Often, the motion of the movant and the response of the respondent identify all of the legal issues that will be raised in the hearing. For example, if the movant cites a case in support of a motion, then you would have to jeopardize that case to see if it is still good law. If it is not good law, then you would present the judge with the good and applicable law on which his/her decision should be based (you may find this in the respondent's brief but be prepared to find it yourself).

It is important to research bench memoranda thoroughly and exhaustively because the judge may view the arguments in light of the motion. You want the judge to have the best law in front of him/her. The judge does not want to look incompetent on the stand so you must realize that your mistakes are potentially the judge's mistakes

LAW CLERK'S MEMO

To: Judge
Fr: Clerk
Re: Case, Case Number, Nature of Memorandum (i.e. Motion to Compel Discovery, Motion for Summary Judgment, etc.) (Hearing Date).
Date: Today's Date

FACTS

This is simply a retelling of all the events that occurred prior to this date including the facts of the case and its procedural history.

LAW AND ANALYSIS

This is an application of the facts present in the case applied to the relevant laws within the scope of the motion. For example, if the memorandum is in regard to a motion for summary judgment, then you would examine all of the facts and apply the relevant legal law from the point of view of a motion for summary judgment. In the case of summary judgment all you need to find is a relevant issue of material fact. Within this section you must also define the scope and identify the legal basis from which it is derived. For example:

"In Hunagle v. Reed Corp. 127 S.E.2d 356 (1997) it was stated that "summary judgment should only be granted when there is no genuine issue of material fact and inquiry into the facts is not desirable to render judgment as a matter of law."

You must further define the Legal elements of the standard:

Batson v. Griffith 146 S.E.2d 491 (1999) held that a 'genuine issue' is..."

Then you may begin to apply the Law to the specifics of the case.

CONCLUSION

This section will typically be a brief opinion about the appropriate disposition of the motion for the judge to consider. Any questions that remain that the judge will need to address during a hearing on the motion should be included here. They must be presented in a conclusive manner, for example: "unless the prosecution can show that there is a genuine issue of material fact regarding the reasonability of a I 0 year 200 mile trade restriction then the motion should be granted."

APPENDIX IV: SAMPLE ORDER

IN THE CIRCUIT COURT OF (COUNTY), (STATE)

(NAME OF PLAINTIFF, PETITONER, ETC.)

(party designation (i.e. Plaintiff, Petitioner, etc.))

v. CASE NO. (Case Number)
Judge (Name)

(NAME OF DEFENDANT, RESPONDANT, ETC.)

(party designation (i.e. Defendant, Respondent, etc.))

(NATURE OF ORDER (Example: "ORDER DENYING HABEAS CORPUS RELIEF"))

This is a generic description on the nature or reason the order is being issued. For example:

On the 3"' day of March, 2005, this matter came before the court for an omnibus habeas corpus proceeding, the petitioner being represented by Raymond Jackson, Esq., and the State of West Virginia being represented by her Prosecuting Attorney, Alex Troy, Esq. Whereupon, the court heard the evidence and arguments of counsel, after which the Court retired to consider its decision.

FINDINGS OF FACT

This is where the FACTS of the case are presented as well as the procedural history. Only facts that are not in dispute belong here not conjectures or inferences.

1. On the 6th day of June, 2000, the Petitioner entered a plea of guilty to voluntary manslaughter, for the unlawful killing of John Doe. This was the result of a shooting that took place on October 21, 1999 at the Petitioner's residence, Route 12 Box 60 Astoria, West Virginia.

2. The Petitioner, victim and Biff Boothe, Petitioner's nephew, were in the Petitioner's living room prior to and during the shooting. The Petitioner and victim were having a few, 2-3, drinks during the conversation that was taking place. At a point at least 45 minutes prior to the shooting that killed the victim the Petitioner got out his gun, .22 caliber revolver.

3. 45 minutes prior to the fatal shooting the Petitioner fired a shot in the direction of the victim that missed him. After 45 minutes more conversation and drinking elapsed the Petitioner was heard to say by his nephew, Biff Boothe who planned to testify to the same, to the victim "I didn't shoot you last time, but I will shoot you now."

After this the Petitioner shot the victim in the head, only witness, Biff Boothe said "Damn David you Shot John" to which the Petitioner responded "By George I meant to."

4. The Petitioner alleges that the shooting happened by accident while he was cleaning the gun. He claims that he was unaware that there were bullets in the chamber and did not intend for the gun to fire.

5. Immediately after the shooting the Petitioner called 9-11 to report the shooting, this included an admission of shooting the victim and specific directions for the paramedics to find his home. The Petitioner's speech was slurred at the time of the call to the 9-11 dispatch; he claims this is a result of him having his teeth removed at the time.

6. Following the incident the police interviewed the Petitioner and he made the claim that it was an accidental shooting and that he was cleaning his gun at the time. On investigation the police discovered that the cleaning supplies were in a kitchen cupboard not in living room where the gun was.

7. Thereafter, the Petitioner was indicted for Murder in the First Degree, and later pied to Voluntary Manslaughter on advice of counsel.

CONCLUSIONS OF LAW

Here you must first present the issues of contention and then apply the relevant laws to each one.

The Petitioner now claims three grounds for relief: (1) He was unaware of what he was doing at the plea agreement hearing due to the copious amounts of drugs and alcohol he was consuming at the time, (2) He received ineffective council, that failed to make him aware of the charges he was pleading to and fully investigate the possible defenses, and provided him with erroneous legal advice, (3) There is an absence of a transcript of the plea proceeding.

I. The Absence of a record mandates the insurance of a Writ of Habeas Corpus

It has been determined that there is no transcribed record of the plea hearing or sentencing in this case; thusly, the Petitioner argues that this absence of a record mandates that a Writ of Habeas Corpus be issued. The West Virginia Supreme Court of Appeals has stated that "Habeas Corpus is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." State ex rel. McMannis v. Mohn 163 W.Va. 129, 254 S.E. 805 (1979). Therefore, the petitioner must demonstrate that the lack of a transcript is an error of constitutional dimension. It has been established by the United States Supreme Court that "the lack of verbatim transcript does not constitute a constitutional defect when a suitable alternative is provided "Mayer v. City of Chicago, 404 U.S. 189, 194, 92

S.Ct. 410, 414, 30 L.Ed.2d 372 (1971). This Court believed that such alternatives exist sufficient to satisfy the grounds on which the petitioner claims that a record must be present for him to assert. The Court finds it sufficient to employ the use of records other than a verbatim transcript to determine the validity of the petitioner's assertions.

The first argument that the petitioner asserts is that that the record contains important information regarding his state of mind. This court believes that it would be highly irregular in a criminal proceeding for a record to contain such information. Even more compelling is the petitioner's own description of the medications he was on the day he entered his plea in his testimony at his omnibus hearing and in his Petition for a Writ of Habeas Corpus. These along with other testimony and documents of record provide the court with a clear picture of the petitioner's mental state without the need for evidence documented in a court transcript.

The petitioner's second assertion is that the lack of a record is outcome-determinate citing City of Bluefield v. Larry Tolbert Case Number 04-M-AP-6; 04-M-AP-7; Case No. 04-M-AP-8. In that case, there was no record indicating that the judge advised the defendants of their right to a jury trial. Furthermore, the judge could not recall whether or not he had so advised. Though the counsel for the defendants stated that he informed the defendants of their rights it was determined by this court that

> 'The outcome-determinative logic in the present case is analogous to the Supreme Court of Appeals' logic in City of Bluefield v Williams because it involves one of the defendant's fundamental rights: the right to trial by jury. Since there is no evidence on record that shows that the Defendants were advised of their rights to a jury trial by the Municipal Court Judge and that they "clearly intended to waive" their rights based upon intelligent decisions, these matters should be remanded to the Municipal court for a jury trial."

The difference between the present case and Tolbert is that in Tolbert the judge himself could not recall whether or not he had informed the defendants of their right to a trial by jury therefore this court had sufficient doubt that the defendants had not been so informed."There has always been a presumption of regularity in trial court proceedings and judgments." Galpin v. Page, 18 Wall (85 U.S.) 350, 365, 21 L.Ed. 959 (1874). There is no testimony to indicate that the judge did not inform the petitioner of his rights at the pleading, but there is testimony by others present at the pleading that confirms that the judge did explain the petitioner's rights to him. Additionally, there are records in which the petitioner acknowledged that he was aware of what plea he was entering. The plea process also took forty-five minutes which would indicate that the presiding judge took the time to make the petitioner aware of his circumstances. All of these circumstances constitute a suitable alternative as prescribed by Mayer. This Court sees "no reason to presume irregularity because there is no suggestion or substantiation of irregularity beyond the defendant's bare allegation." Stat ex rel. Kisner v. Fox, 165 W.Va. 123, 267 S.E.2d 45.

II. Petitioner was incompetent as a Matter of Law to enter a guilty plea

The Petitioner claims that as a result of his drug and alcohol addictions and medical condition at the time of his plea and sentencing hearings he was unable to understand the proceeding and/or was he capable to enter such a plea.

The Petitioner asserts that the lack of a pretrial evaluation is a violation of his right to Due Process and cites Drope v. Missouri, 420 U.S.162 (1975) and State v. Milam, 226 S.E.2d 433 (W.Va. 1976) accordingly.

Drope held in Syl Pt 1 that:

> The Missouri courts failed to accord proper weight to the evidence suggesting petitioner's incompetence. When considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry

Id. However, in the case at bar there was neither a pretrial motion for evaluation nor there were no circumstances that were brought to the courts attention, like an attempted suicide, as in Drope.

Milam, "provides that a judge shall on motion or on his own initiative order a psychiatric examination whenever he has reasonable cause to believe that the accused has a mental disease which affects his fitness to proceed," in the case at bar neither did the Petitioner file a motion for an evaluation nor did the court determine it necessary.

It has been discovered that during the time of the plea, the sentencing and including the times he met with his council the Petitioner was taking a mixture of several drugs due to his addiction: Oxycontin 60 mg twice a day, OxyIR 5.0 mg 2-3 times daily, Xanax 1.0 mg three times daily, Neurontin 600 mg twice daily and a large dose of a valium class tranquilizer. The Petitioner claims this left him unable to understand the proceeding.

Furthermore, the Petitioner claims that he was further impaired due to a conditional brain injury that was the result of a blood clot that he previously suffered from.

As a result the Petitioner has been subject to a series of medical evaluations to determine his competency to understand his situation and enter his plea at the hearing at his request.

The evaluations served to answer both the claimed reasons for relief: (1) the brain injury condition and, (2) the effects of drugs and alcohol of the Petitioner at the hearings. Both medical evaluations came to identical diagnosis in regards to the Petitioner's mental capacity. They both found him to be of "the mental capacity sufficient to participate fully in the preparation of his defense" and "there is no indication that he was suffering from a mental defect which would have impaired his capacity to understand the legal proceeding in which he was engaged."

In regards to the effect of the drug and alcohol combinations he consumed prior to trial it was determined that:

> Whether a medication or combination of medications for that matter, has the "capacity to render one incompetent" should not be the deciding factor when considering one's psychological status at any point in time. Rather it is necessary to consider, even retrospectively, if there was evidence of impairment, which in this case, but for alcohol, there was none.

To this it has been determined that "it is assumed by this interviewer that he did not consume alcohol prior to going to court as there is no indication of such, nor did he admit the same." Additionally, due to the fact that the Petitioner's medication dosages were being consumed at stable levels there is no reason for the asserted effect of the said medications on the day of the plea procedure or the sentencing hearing.

III. Ineffective Assistance of Council

Petitioner claims two grounds on which he received ineffective council that should result in the granting of his Writ of Habeas Corpus: (1) His lawyer provided him with erroneous advice; and (2) His attorney failed to investigate potential defenses based on his mental state.

The State argues that the actions of trial counsel appear reasonable, and the Petitioner's counsel were competent and experienced attorneys. The State asserts that the Petitioner cannot show, but for these alleged errors, he would not have pled guilty.

The West Virginia Supreme Court of Appeals set forth the standard of review for ineffective assistance of counsel in Syl. Pts. 5 and 6, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995):

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.
> In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Additionally, the West Virginia Supreme Court of Appeals has set forth the following requirement for a habeas petitioner:

> In cases involving a criminal conviction based upon a guilty plea, the prejudice requirement of the two-part test established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), demands that a habeas petitioner show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. State ex rel. Vernatter v. Warden, 207 W. Va. 11, 528 S.E.2d 207 (1999).

Without engaging in hindsight or second-guessing trial counsel's strategic decisions, this Court does not believe that, in light of all the circumstances, the alleged acts or omissions of trial counsel were outside the broad range of professionally competent assistance. In Syl. Pt. 5, State ex rel. Vernatter, 207 W.VA. 11, 528 S.E.2d 207 (1999), the West Virginia Supreme Court of Appeals held that:

> The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

In the case at bar, the Petitioner was aware of the plea he was entering through communications with his attorney, Michael Gibson Esq., and agreed to the plea under his own will on advice from said council. It has been further determined through medical evaluation and testimony of family members that the Petitioner was fully capable of understanding the plea agreement he was accepting and the possible penalties included.

Also, the West Virginia Supreme Court of Appeals in State v. Miller, commented that, "counsel was not required to develop every conceivable defense. What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of strategic decision and it is one that we will seldom, if ever, second guess." State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Accordingly, the decision to forego a medical evaluation was a strategic decision made by the Petitioner and his council. The finding of an altered state would only serve to establish inconsistencies between the Petitioners original statements to the 9-11 dispatcher and police that he was not drunk or in an altered state, at the time of the shooting, with the more recent contention that he was incompetent.

RULING

Therefore, it is hereby **ORDERED, ADJUDGED,** and **DECREED** by this Court that the Petitioner's Motion for habeas corpus relief is hereby **DENIED.**

The Clerk is directed to forward a copy of this Order to the West Virginia Department of Corrections, 112 Inuit Avenue, Charleston, West Virginia 25305, the Petitioner at the Huttonsville Correctional Center, Raymond Jackson Esq., Belvoir County Prosecuting Attorney, Alex Troy Esq.

This matter, having accomplished the purpose for which it was instituted, it is hereby ordered dismissed and omitted from the docket of this Court.

Entered this the _ day of January, 2005.

_____

Judge George Batson, 9th Judicial Circuit

APPENDIX V: CODE OF JUDICIAL CONDUCT

CODE OF JUDICIAL CONDUCT

Index

Editor's Notes. The former Code of Judicial Conduct was promulgated and adopted by the Supreme Court of Appeals on December 20, 1972, effective on and after January 1, 1973, superseding and replacing the Code of Judicial Ethics promulgated on March 28, 1947.

The former Code of Judicial Conduct was readopted by the Supreme Court of Appeals as the Judicial Code of Ethics by order dated July 16, 1976, amended by order approved March I, 1977, by order effective October I, 1981, and by order approved January 5, 1989, effective February I, 1989. This code was superseded by the Code of Judicial Conduct adopted by order entered October 21, 1992, effective January 1, 1993.

Preamble.

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.

Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, an Application Canon, Commentary, and a Terminology Section. The text of the Canons, the Sections, and the Terminology is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it

denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is the formal, written standard governing the conduct and discipline of judges and others serving in a judicial capacity. The ethical standards set forth in the Code of Judicial Conduct do not draw simplistic lines between right and wrong. Judges will find that acting responsibly, honestly, and ethically involves more than simply learning this or any other code. A true sense of professional responsibility derives from an understanding of the reasons that underlie the principles of the Code of Judicial Conduct. Good judgment and adherence to high moral and personal standards are also important.

Annotations

Cross References. Censure, Temporary Suspension, Retirement and Removal of Justices, Judges and Magistrates, W.Va. Const., art. VIII, § 8.

W.Va. Law Review. "Survey of Developments in West Virginia Law: 1984," 87 W.Va. L. Rev. 550 (1985).

Disciplinary authority. - West Virginia Const. art. VIII, § 8 empowers the supreme court of appeals to censure or temporarily suspend any judge, justice, or magistrate for any violation of the Judicial Code of Ethics. In re Grubb, 187 W.Va. 228, 417 S.E.2d 919 (1992).

The deliberate failure to follow mandatory criminal procedures constitutes a violation of the Judicial Code of Ethics. In re Saffle, 178 W.Va. 101, 357 S.E.2d 782 (1987).

Cited in Pritchard v. Crouser, 175 W.Va. 310, 332 S.E.2d 611 (1985).

Canon 1

A judge shall uphold the integrity and independence of the judiciary.

(A.) An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary. - Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law *, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

*** All terms marked with an asterisk (*) are defined in the terminology section at the end of this Code.**

Annotations

Editor's Notes. The text of Canon I is as received from the Supreme Court of Appeals.

Abuse of official position. - A magistrate's repeated confrontation of a litigant concerning that litigant's former testimony against the magistrate in the disciplinary proceeding established a prima facie case of violations of the Code of Judicial Conduct. In re Browning, 197 W.Va. 75, 475 S.E.2d 75 (1996).

Threats. - Magistrate's attempt to use her official position as an officer of the court to threaten her ex-husband with arrest for driving under the influence was a violation of this canon and Canon 2. In re Boese, 186 W.Va. 46, 410 S.E.2d 282 (1991).

Special treatment by magistrate. - Evidence supported finding that magistrate accorded special treatment to a criminal defendant in order to court favor with a state senator. In re Eplin, I87 W.Va. 131, 41 6 S.E.2d 248 (1992).

Sanction. - Where a former judge pleaded guilty to accepting an illegal cash campaign contribution, was fined $15,000 and resigned his public office, the only reasonable sanction was publicly to censure him, and a $1,000 fine was appropriate. In re Mendez, 192 W.Va. 57, 450 S.E.2d 646 (1994).

Comments concerning disciplinary proceeding. - Canons 1 and 2 cannot constitutionally be manipulated to apply to a judge's off-the-bench remarks about a subject of public concern that is neither presently pending before him nor likely to come before him and that does not violate some other more specific provision of the Code or the law. A judge may not be disciplined consistent with the U.S. Const., amend. I or with W.Va. Const., art. 3, § 7 for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel, and stated his intention to take some reactive and lawful measure against the panel member. In re Hey, 192 W.Va. 221, 452 S.E.2d 24 (1994).

Refusal to assist victim. - Where the court found that there was clear and convincing evidence that a magistrate told a victim of domestic violence that she would not assist her, then returned to her office to do paperwork, and later agreed to assist another man, the victim was badly beaten and was in desperate need of a protective order, to refuse to assist the victim was in total disregard of the magistrate's duty to uphold the public's confidence and the integrity of the judiciary. In re Browning, I92 W.Va. 231, 452 S.E.2d 34 (1994).

Solicitation of business. - No greater assault on the integrity and independence of the judiciary can be found than to have litigants exposed to judges soliciting them for whatever "fancy" judges might have. In re Phalen, I97 W.Va.
235, 475 S.E.2d 327 (1996).

A family law master violated this canon in having an ex parte communication with a party concerning the opportunity to earn extra income despite discovering, in a child support modification hearing, that the party's debilitating illness drastically decreased his income. In re Phalen, I97 W.Va. 235, 475 S.E.2d 327 (1996).

Applied in In re Pauley, 173 W.Va. 475, 318 S.E.2d 418 (1984); In re McGraw, 178 W.Va. 415, 359 S.E.2d 853 (1987); In re Neely, 178 W.Va. 722, 364 S.E.2d 250 (1987); In re Gainer, 185 W.Va. 8, 404 S.E.2d 251 (1991); In re Eplin, 186 W.Va. 207, 41 I S.E.2d 862 (1991); In re Egnor, 186 W.Va. 291, 412 S.E.2d 485 (1991); In re Verbage, 200 W.Va. 504, 490 S.E.2d 323 (1997).

Quoted in In re Wilson, 186 W.Va. 192, 411 S.E.2d 847 (1991); In re Hey, 193 W.Va. 572, 457 S.E.2d 509 (1995).

Cited in In re Atkinson, 188 W.Va. 293, 423 S.E.2d 902 (1992).
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Canon 2

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

(A.) A judge shall respect and comply with the law*, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary. - Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law *, including court rules or other specific provisions of this Code. Errors in finding facts or in interpreting or applying law are not violations of this canon unless such judicial determinations involve bad faith or are done willfully or deliberately. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

See also Commentary under Section 2C.

B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or knowingly permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Commentary. - Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation on official letterhead, which need not bear the words "personal and unofficial." However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of

justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. For the purposes of this Canon, an "organization which practices invidious discrimination" shall mean any organization which arbitrarily excludes persons from membership upon the basis of race, sex, religion, or national origin. The term "organization" shall not include, however, an association of individuals dedicated to the preservation of religious, ethnic, historical, or cultural values of legitimate common interest to its members; or an intimate, distinctly private association of persons whose membership limitations would be entitled to constitutional protection.

Commentary. - Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired because of the appearance of judicial bias against persons excluded from membership. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion, or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows * practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Annotations

W.Va. Law Review. Case Digest, 89 W.Va. L. Rev. 554 (1987).

Violation of federal or state law. - Conduct by a judge which violates federal or state criminal law may, unless the violation is trivial, constitute a violation of the requirement that a judge must comply with the law found in this canon. In re Vandelinde, 179 W.Va. 183, 366 S.E.2d 631 (1988).

Abuse of official position- A magistrate's repeated confrontation of a litigant concerning that litigant's former testimony against the magistrate in the disciplinary proceeding, established a prima facie case of violations of the Code of Judicial Conduct. In re Browning, 197 W.Va. 75, 475 S.E.2d 75 (1996).
Magistrate violated Canons 2A and 2B by contacting an arresting officer and prosecuting attorney concerning a criminal action pending against his son-in-law. In re Rice, 200 W.Va. 401, 489 S.E.2d 783 (1997).

Comments concerning disciplinary proceeding. - Canons 1 and 2 cannot constitutionally be manipulated to apply to a judge's off-the-bench remarks about a subject of public concern that is neither presently pending before him nor likely to come before him and that does not violate some other more specific provision of this code or the

law. A judge may not be disciplined consistent with the U.S. Const., amend. 1 or with W.Va. Const., art. 3, § 7 for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel, and stated his intention to take some reactive and lawful measure against the panel member. In re Hey, 192 W.Va. 221, 452 S.E.2d 24 (1994).

Legal error by judge. - When a judge, with no intent to prejudice the rights of a party, makes a legal error, his act does not constitute a violation of this canon or Canon 3. In re Greene, 173 W.Va. 406, 317 S.E.2d 169 (1984) (refusal to issue backfire warrants); In re Monroe, 174 W.Va. 401, 327 S.E.2d 163 (1985), overruled on other grounds, Harman v. Frye, 188 W.Va. 611, 425 S.E.2d 566 (1992); In re McGraw, 178 W.Va. 415, 359 S.E.2d 853 (1987).

Knowledge of canon. - There was no abuse of discretion in allowing cross-examination of the defendant judge as to his knowledge of Canon 2 during judge's federal Racketeer Influenced and Corrupt Organizations Act (RICO) trial. United States v. Grubb, 11 F.3d 426 (4th Cir. 1993).

Restrictions on speech. - This section cannot be stretched to restrict pure speech on a matter of public interest when the speech does not pertain to pending or impending cases and is not within a specific prohibition of this code or some other law. In re Hey, 192 W.Va. 221, 452 S.E.2d 24 (1994).

Intoxication while on duty. - Under Canon 2A, where a magistrate was intoxicated while on duty, which coincidentally required him to arraign an individual arrested for driving under the influence, not only did his actions reflect misconduct, but they also undermined public confidence in the judiciary. In re Jett, 179 W.Va. 521, 370 S.E.2d 485 (1988).

Intoxication impairs an individual's judgment, and the appearance of a judge on the bench in an intoxicated state creates the perception that the judge's ability to carry out his judicial responsibilities with integrity, impartiality, and competence, was impaired. In re Hey, 193 W.Va. 572, 457 S.E.2d 509 (1995).

Treatment of employees. - A judge or justice violates Canon 2A when he requires his secretary to care for his child as a condition of employment, because such action creates the appearance of impropriety and undermines public confidence in the judiciary. In re Neely, 178 W.Va. 722, 364 S.E.2d 250 (1987).

Family political campaigns. - Magistrate violated Canon 2 and former Canon 7B (1) of the Code of Judicial Conduct which states that a judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment, and restricts the campaign conduct of all candidates for judicial office, including an incumbent judge, where magistrate was directly, actively and heavily involved in his wife's campaign for circuit judge. In re Codispoti, 190 W.Va. 369, 438 S.E.2d 549 (1993).

Refusal to assist victim. - Where the court found that there was clear and convincing evidence that a magistrate told a victim of domestic violence that she would not assist her, then returned to her office to do paperwork, and later agreed to assist another man, the victim was badly beaten and was in desperate need of a protective order, to refuse to assist the victim was in total disregard of the magistrate's duty to uphold the public's confidence and the integrity of the judiciary. In re Browning, 192 W.Va. 231, 452 S.E.2d 34 (1994).

Solicitation of business. - It is improper for a judge to take advantage of his position to reap a personal benefit, or even to appear to do so. In re Phalen, 197 W.Va. 235, 475 S.E.2d 327 (1996).

A family law master violated this canon in having an ex parte communication with a party concerning the opportunity to earn extra income despite discovering, in a child support modification hearing, that the party's debilitating illness drastically decreased his income. In re Phalen, 197 W.Va. 235, 475 S.E.2d 327 (1996).

Threats. - Magistrate's attempt to use her official position as an officer of the court to threaten her ex-husband with arrest for driving under the influence was a violation of Canon 1 and this canon. In re Boese, 186 W.Va. 46, 410 S.E.2d 282 (1991).

Entry of polling place where magistrate not registered. - A magistrate who entered a polling place where the polls were still open and where he was not registered to vote, in violation of § 3-1-37, violated Canon 2(A), and admonishment was the appropriate sanction. In re Harshbarger, 192 W.Va. 78, 450 S.E.2d 667 (1994).

Special treatment by magistrate. - Evidence supported finding that magistrate accorded special treatment to a criminal defendant in order to court favor with a state senator. In re Eplin, 187 W.Va. 131, 416 S.E.2d 248 (1992).

Applied in In re Pauley, 173 W.Va. 475, 318 S.E.2d 418 (1984); In re Gorby, 176 W.Va. 11, 339 S.E.2d 697 (1985); In re Baughman, 182 W.Va. 55, 385 S.E.2d 910 (1989); In re King, 184 W.Va. 177, 399 S.E.2d 888 (1990);

In re Eplin, 186 W.Va. 37, 410 S.E.2d 273 (1991); In re Eplin, 186 W.Va. 207, 411 S.E.2d 862 (1991); In re Egnor, 186 W.Va. 291, 412 S.E.2d 485 (1991); In re Codispoti, 186 W.Va. 710, 414 S.E.2d 628 (1992); In re Verbage, 200 W.Va. 504, 490 S.E.2d 323 (1997).

Quoted in Nagy v. Oakley, 172 W.Va. 569, 309 S.E.2d 68 (1983); In re Pauley, 173 W.Va. 228, 314 S.E.2d 391 (1983); In re Wilson, 186 W.Va. 192, 411 S.E.2d 847 (1991).

Cited in In re Atkinson, 188 W.Va. 293, 423 S.E.2d 902 (1992).

Canon 3.

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

A. Judicial duties in general. 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 *. In the performance of these duties, the following standards apply.

B. Adjudicative responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law * and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require * order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

Commentary. - The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary. - A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media, and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require * lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 38(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law *. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law * applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose functions include aiding the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when authorized by law *.

Commentary. - The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.
(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary. - In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for

the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court, and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

(9) Except for statements made in the course of official duties or to explain court procedures, a judge shall not make any public or nonpublic comment about any pending or impending proceeding which might reasonably be expected to affect its outcome or impair its fairness. The judge shall require * similar abstention on the part of court personnel *subject to the judge's direction and control.

Commentary. - The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Rules of Professional Conduct.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary. - Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

(12) A judge may permit, under guidelines approved by the West Virginia Supreme Court of Appeals, the broadcasting, televising, recording, and taking of photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions.

Commentary. - Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

C. Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism * and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary. - Appointees of a judge include assigned counsel; officials such as magistrates, referees, commissioners, special masters, receivers, and guardians; and personnel such as clerks, secretaries, court

reporters, probation officers, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C (4).

(5) A judge shall not require any personnel subject to the judge's direction to act contrary to any code of ethics applicable to the judge or to the personnel, or to engage in any activity or perform any work not reasonably related to the official position or functions of the personnel. A judge shall not require or knowingly * permit such personnel to act, in any official capacity, contrary to the law *.

D. Disciplinary responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority *.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority *.

(3) A judge who has knowledge * that another judge is incapacitated or impaired, raising a substantial question as to the judge's fitness for office, shall inform the Committee on Assistance and Intervention of the judiciary.

(4) Acts of a judge in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(l), 3D(2) and 3D(3), are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary. - Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority * or other agency or body.

E. Disqualification.

(I)) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary. - Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E (I) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge * of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows * that he or she, individually or as a fiduciary *, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household *, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis * interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee, of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known * by the judge to have a more than de minimis * interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge * likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary * economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children.

Annotations

Cross References. Administration of justice without delay, W.Va. Const., art. III, § 17.

ALR References. Disqualification of judge for bias against counsel for litigant, 54 ALR5th 575. W.Va. Law Review. Bowman, A Judicial Dilemma: Real or Imagined? 83 W.Va. L. Rev. 29 (1980).

Starcher, Cameras in the Courts, 84 W.Va. L. Rev. 267 (1982).

Case Digest, 89 W.Va. L. Rev. 508 (1987).

In general. - Where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the state and the accused, a judge should recuse himself.State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E.2d 47 (1994).

Abuse of official position- A magistrate's repeated confrontation of a litigant concerning that litigant's former testimony against the magistrate in the disciplinary proceeding, established a prima facie case of violations of the Code of Judicial Conduct. In re Browning, 197 W.Va. 75, 475 S.E.2d 75 (1996).

Comments concerning disciplinary proceeding. - These provisions certainly indicate that a judge's remarks, which alluded only to a proceeding in which he was a party and were not otherwise specifically prohibited by this code, are not within Canon 3's proscriptions. In re Hey, 192 W.Va. 221, 452 S.E.2d 24 (1994).

Nepotism. - The fact that a magistrate's spouse is the chief of police of a small police force does not automatically disqualify the magistrate, who is otherwise neutral and detached, from issuing a warrant sought by another member of such police force. State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E.2d 47 (1994).

Furnishing legal advice. - A magistrate or other magistrate court personnel should not furnish legal advice to a party to a proceeding in magistrate court. State v. Walters, 186 W.Va. 169, 411 S.E.2d 688 (1991).

While it is improper for a magistrate assistant to compose or draft a criminal complaint for a complainant, in the sense of providing the content of the complaint, it is not improper for a magistrate assistant to act merely as a scribe, in the sense of accurately reducing to written form the oral complaint of a complainant. State v. Walters, 186 W.Va. 169, 411 S.E.2d 688 (1991).

Public statements considered in the course of official duties. - Under Canon 3A (6) of the former Judicial Code of Ethics (see now these rules), judges' public statements shall be considered to be in the course of their official duties

when the statement is part of an official duty, or related to an official duty, or is sought from or given by the judge because of his or her official position. In re Hey, 188 W.Va. 545, 425 S.E.2d 221 (1992).

Public statements regarding subject matter of upcoming action. - Public statements by judge regarding the judiciary's independent budget-making power, made in advance of mandamus action regarding constitutional independence of the judicial budget, were insufficient to warrant his disqualification for claimed lack of impartiality. Judicial Inquiry Comm'n v. McGraw, 171 W.Va. 441, 299 S.E.2d 872 (1983).

Where judge made statements on television show concerning the pending case, questioned character of defendant, and demonstrated prejudice and bias, he was precluded from presiding over the case on remand. Judith R. v. Hey, 185 W.Va. 117, 405 S.E.2d 447 (1990).

Presiding over several cases involving same defendant. - It is not error for a trial judge to preside over more than one criminal case involving the same defendant even though some of the facts are the same in each of the cases.
State v Flint, 171 W.Va. 676, 301 S.E.2d 765 (1983).

Administrative actions of chief justice. - The administrative actions of the chief justice of the supreme court of appeals in a particular case do not necessarily represent a pecuniary or personal interest that would affect the chief justice's impartiality, nor render the chief justice incapable of hearing the same case in a judicial capacity. State ex rel. Hash v. McGraw, 180 W.Va. 428, 376 S.E.2d 634 (1988).

Special treatment by magistrate. - Evidence supported finding that magistrate accorded special treatment to a criminal defendant in order to court favor with a state senator. In re Eplin, 187 W.Va. 131, 416 S.E.2d 248 (1992).

Ex parte dismissal. - An ex parte dismissal by a magistrate of a criminal or civil case, without authorization by statute or rule or without other good cause shown, is a violation of this canon. In re Eplin, 187 W.Va. 131, 416 S.E.2d 248 (1992).

Ex parte communication - Where a trial judge initiated an a ex parte communication in order to advise the state upon the manner in which its closing argument should be conducted, the judge was reprimanded. In re Starcher, 193 W.Va. 470, 457 S.E.2d 147 (1995).

A family law master violated Canon 3B(7) in having an ex parte communication with a party concerning an opportunity to earn extra income despite discovering, in a child support modification hearing, that the party's debilitating illness drastically decreased his income. In re Phalen, 197 W.Va. 235, 475 S.E.2d 327 (1996).

Magistrate's premature departure from his post warranted censure. In re Harshbarger, 173 W.Va. 206, 314 S.E.2d 79 (1984).

Absence from office and performance of duties by assistant. - Magistrate failed to discharge his duties or perform competently when he was absent from his office when the prisoner was brought to his office, allowed his assistant to perform the magistrate's duties, and authorized the use of a rubber stamp containing the magistrate's signature. In re Osburn, 173 W.Va. 381, 315 S.E.2d 640 (1984).

Monitoring case progress. - This canon places an affirmative duty on circuit court judges to manage the progress of cases. Therefore, circuit court judges must take whatever steps are necessary to monitor abuse and neglect cases pending before them in a diligent and expeditious fashion. Johnson v. Nanny, 194 W.Va. 623, 461 S.E.2d 129 (1995).

Judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission. Graley v. Workman, 176 W.Va. 103, 341 S.E.2d 850 (1986).

Delay in rendering decision. - A delay of 33 months between the initial hearing and the filing of a mandamus action in rendering a decision on the petitioner's motion for summary judgment and the defendants' motion to dismiss was unreasonable, and justified commanding the respondent to render a final decision within 30 days. State ex rel. Patterson v. Aldredge, 173 W.Va. 446, 317 S.E.2d 805 (1984).

Child custody cases should be decided promptly. West Virginia Dep't of Human Servs. v. La Rea Ann C.L., 175

W.Va. 330, 332 S.E.2d 632 (1985).

Canon 3A(5) of former Code as well as the principle contained within its admonition, may be utilized as a foundation for the imposition of judicial discipline for unreasonable delays in the disposition of court business. In re Sommerville, 178 W.Va. 694, 364 S.E.2d 20 (1987).

A trial judge's 27-month delay in rendering a decision in an ejectment action was unreasonable, and mandamus was therefore the appropriate remedy to compel the judge to issue a ruling in the case. State ex rel. Earl E. Berkley, Inc. v. Irons, 481 S.E.2d 188 (W.Va. 1996).

Profanity. - Four-letter colloquialism for excrement was not profanity and its use was not a violation of Canon 3A(2) of former Code requiring the judge to maintain order and decorum in the proceedings before him, or Canon 3A(3) of former Code requiring the judge to be patient, dignified, and courteous to other individuals. In re Pauley, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Sexual harassment is a proscribed judicial activity. In re Hey, 193 W.Va. 572, 457 S.E.2d 509 (1995).

Legal error by judge. - When a judge, with no intent to prejudice the rights of a party, makes a legal error, his act does not constitute a violation of this canon. In re Greene, 173 W.Va. 406, 317 S.E.2d 169 (1984) (refusal to issue backfire warrants); In re Monroe, 174 W.Va. 401, 327 S.E.2d 163 (1985), overruled on other grounds, Harman v. Frye, 188 W.Va. 61 1, 425 S.E.2d 566 (1992); In re McGraw, 178 W.Va. 415, 359 S.E.2d 853 (1987).

Failure to follow procedure. - The deliberate failure to follow mandatory criminal procedures constitutes a violation of the Judicial Code of Ethics. In re Markle, 174 W.Va. 550, 328 S.E.2d 157 (1984); In re Wharton, 175 W.Va. 348, 332 S.E.2d 650 (1985).

Where, as a result of intoxication the magistrate failed to follow the appropriate criminal procedures, he violated Canon 3A(l). In re Jett, 179 W.Va. 521, 370 S.E.2d 485 (1988).

Magistrate who signed blank rearrest warrants and jail commitment release forms and who used such pre-signed blank warrants and forms, failed to comply with appropriate procedures for completing court documents, failed to maintain professional confidence in the law, and failed to maintain professional competence in discharging administrative responsibilities, and was in violation of Canon 3A(I) and 3B(I) and (2) of former Code. In re Eplin, 186 W.Va. 37, 410 S.E.2d 273 (1991).

When a circuit judge is the moving party in the attempted disqualification of a prosecuting attorney under W.Va. Code, § 7-7-8, he should disqualify himself under Canon 3C(1) of former Code and follow the procedure contained in T.C.R., Rule XVII, for the appointment of another circuit judge to hear the disqualification motion. State ex rel. Hamstead v. Dostert, 173 W.Va. 133, 313 S.E.2d 409 (1984).

Ex parte dismissal of a criminal or civil case. - A magistrate's ex parte dismissal of a criminal or civil case, without authorization by statute or rule or without other good cause shown, is a violation of this canon. In re Crislip, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Preventing execution of warrants. - Where magistrate retrieved unexecuted warrants from sheriff s office and placed them either in his desk or in court files to prevent them from being executed, he violated the magistrate's general duty under this canon to perform his official duties diligently and the mandate of Canon 3A(5) of former Code that the magistrate "should dispose promptly of the business of the court." In re Crislip, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Standard of proof. - The allegations of a complaint in a judicial disciplinary proceeding must be proved by clear and convincing evidence. In re Eplin, 186 W.Va. 207, 411 S.E.2d 862 (1991).

Necessity. - The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter. State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E.2d 47 (1994).

The rule of necessity is strictly construed and applied only when there is no other person having jurisdiction to handle the matter that can be brought in to hear it. State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E.2d 47 (1994).

Respectful to jurors. • It is the obligation of magistrates to be respectful to jurors. In re Browning, 192 W.Va. 231, 452 S.E.2d 34 (1994).

Magistrate disqualified. - It is not a violation of this code to fail to follow mandatory criminal procedure if a magistrate is disqualified from hearing the matter. In re Browning, 192 W.Va. 231, 452 S.E.2d 34 (1994).

Cooperation between magistrates. - It is essential that the public have access to the magistrate court system, and this goal cannot be accomplished if the magistrates cannot agree on a work schedule. In re Browning, 192 W.Va. 231, 452 S.E.2d 34 (1994).

Joint ownership. - Joint ownership of a land holding corporation, by an attorney and a family law master, whose home was on the property owned by the corporation, is an impermissible financial and business interest, and the master should have recused himself from the attorney's case. The appropriate sanction was a public reprimand. In re Means, 192 W.Va. 380, 452 S.E.2d 696 (1994).

Applied in In re Pauley, 173 W.Va. 475, 318 S.E.2d 418 (1984); State ex rel. Cohen v. Manchin, 175 W.Va. 525, 336 S.E.2d 171 (1984); Farber v. Strickler, 175 W.Va. 328, 332 S.E.2d 629 (1985); In re Mendez, 176 W.Va. 401, 344 S.E.2d 396 (1986); In re Hall, 177 W.Va. 682, 356 S.E.2d 21 (1987); In re King, 184 W.Va. 177, 399 S.E.2d 888 (1990); In re Egnor, 186 W.Va. 291, 412 S.E.2d 485 (1991); In re Codispoti, 186 W.Va. 710, 414 S.E.2d 628 (1992); In re Verbage, 200 W.Va. 504, 490 S.E.2d 323 (1997).

Quoted in Graley v. Workman, 176 W.Va. 103, 341 S.E.2d 850 (1986); Templeton v. Templeton, 179 W.Va. 597, 371 S.E.2d 175 (1988); In re Ferrell, 180 W.Va. 620, 378 S.E.2d 662 (1989); State ex rel. King v. MacQueen, 182 W.Va. 162, 386 S.E.2d 819 (1986); Carey v. Dostert, 185 W.Va. 247, 406 S.E.2d 678 (1991); In re Wilson, 186 W.Va. 192, 41 I S.E.2d 847 (1991); Roush v. Hey, 197 W.Va. 207, 475 S.E.2d 299 (1996); State ex rel. Gains v. Bradley, 199 W.Va. 412, 484 S.E.2d 921 (1997).

Cited in In re Saftle, 178 W.Va. IOI, 357 S.E.2d 782 (1987); State v. Nixon, 178 W.Va. 338, 359 S.E.2d 566 (1987); State ex rel. Redman v. Hedrick, 185 W.Va. 709, 408 S.E.2d 659 (1991); In re Atkinson, 188 W.Va. 293, 423 S.E.2d 902 (1992); State ex rel. Hendricks v. Hrko, 189 W.Va. 674, 434 S.E.2d 34 (1993); In re State Pub. Bldg. Asbestos Litig., 193 W.Va. 119, 454 S.E.2d 413 (1994), cert. denied, 515 U.S. 1160, 115 S. Ct. 2614, 132 L. Ed. 2d 857 (1995).

Canon 4

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(I) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

Commentary. - Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

B. Avocational activities. A judge may speak, write, lecture, teach, and participate in other extra-judicial

activities concerning the law *, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code.

Commentary. - As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law *, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic, or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

C. Governmental, civic, or charitable activities.

(1) Governmental activities. A judge may appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law*, the legal system, or the administration of justice or when acting pro se in a matter involving the judge or the judge's interests, subject to the requirements of this Code.

(2) Quasi-judicial activities. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law*, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law*, the legal system, and the administration of justice.

(3) Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal adviser of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members subject to the following limitations:

(a) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court

(b) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of office for that purpose; but a judge may be listed as an officer, director, or trustee of such an organization, so long as the listing is not used for fund-raising purposes. A judge should not be a speaker or the guest of honor at an organization's fund-raising events, but may attend such events.

(c) A judge should not give investment advice to such an organization, but ajudge may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary. - The changing nature of some civic and charitable organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of such organization with which the judge is affiliated to determine if it is proper to continue his or her relationship with it. For example, in many jurisdictions, charitable hospitals are in court now more frequently than in the past. Similarly, the boards of some organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

D. Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

Commentary. - The Time for Compliance provision of this Code (Canon 6, Section F) postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(J I).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of a judge with Jaw firms appearing before the judge, see Commentary to Section 3E(I) relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family*, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, adviser or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family*, or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.*

Commentary. - Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family*, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 40(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties.
Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, or knowingly * permit staff, court officials, and others subject to judge's direction and control to accept, and should urge members of the judge's family residing in the judge's household*, not to accept a gift, bequest, favor, or loan from anyone except for:

Commentary. - Section 40(5) does not apply to contributions to a judge's campaign for judicial office, a matter

governed by Canon 5.

Because a gift, bequest, favor, or loan to a member of the judge's staff, court officials, and others subject to the judge's direction and control and of the judge's family residing in the judge's household * might be viewed as intended to influence the judge, a judge should inform staff, court officials, and others subject to the judge's direction and control and those family members of the relevant ethical constraints upon the judge in this regard and discourage those subject to the judge's direction and control and those family members from violating them. A judge cannot, however, reasonably be expected to know * or control all of the financial or business activities of all family members residing in the judge's household.

(a) a gift incident to a public testimonial, books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar- related function or an activity devoted to the improvement of the law*, the legal system, or the administration of justice;

Commentary. - Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(l) and 2B.

(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a judge residing in the judge's household*, including gifts, awards, and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary. - 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 where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

Commentary. - Section 4D(5)(h) prohibits judges from accepting gifts, favors, bequests, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

E. Fiduciary activities.

(I) 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.

(2) 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.

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

Commentary. - The Time for Compliance provision of this Code (Section 6F) postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary*. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 40(4).

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

Commentary. - Section 4F does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties. Section 6B permits retired judges to act as mediators in a private capacity.

G. Practice of law. A judge shall not practice law. Notwithstanding this prohibition, 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*.

Commentary. - This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. 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 abuse the prestige of office to advance the interests of the judge or members of the judge's family*. See Section 2(B).

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family*, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

H. Compensation, reimbursement, and reporting.

(1) Compensation and reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) 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.

(b) Expense reimbursement 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 or guest. Any payment in excess of such an amount is compensation.

(2) Public reports. A judge shall report the name of a firm, corporation, or partnership in which the judge has an interest and relationship thereto. In addition, should the judge receive compensation during the calendar year exceeding $500 from sources other than those listed in the preceding sentence, the judge shall report the name of the payor and the reason for the compensation. Compensation or income of a judge's spouse contributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The report must be made annually by July 1 for the preceding calendar year, and must be filed as a public document in the office of the Clerk of the Supreme Court of Appeals or other office designated by rule of the Supreme Court of Appeals.

Commentary. - See Section 40(5) regarding reporting of gifts, bequests, and loans.

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 appear to trade on 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. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

I. Disclosure of a judge's income, debts, investments, or other assets is required only to the extent provided in this Canon and in Section 3E, or as otherwise required by law*.

Commentary. - Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest*. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section 4H requires a judge to report certain compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law * are required to safeguard the proper performance of the judge's duties.

Annotations

Public remarks. - Where the judge himself or herself is the target and his professional reputation and possibly his career are at stake, fairness to him and promotion of the search for truth in the public marketplace require that he have the right to respond and defend himself **in** the public debate as well as in formal proceedings; that is especially so in West Virginia, where judges are elected officials. In re Hey, 192 W.Va. 221, 452 S.E.2d 24 (1994).

Quoted in Roush v. Hey, 197 W.Va. 207, 475 S.E.2d 299 (1996).

Canon 5

A judge or judicial candidate shall refrain from inappropriate political activity.

A. All judges and candidates.

(1) Except as authorized in Sections 5B(2), 5C(l), and 5C(3), a judge or a candidate* for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization* ;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization*;

(d) publicly display any campaign paraphernalia in any area where judicial activities are conducted or knowingly* permit any such display;

(e) solicit funds for a political organization * or candidate.

Commentary. - A judge or candidate * for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate * having knowledge * of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(l)(a) does not prohibit a candidate * for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization*."

Section 5A(l)(b) does not prohibit a judge or judicial candidate* from privately expressing his or her views on judicial candidates or other candidates for public office.

A candidate* does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

(2) A judge shall resign from judicial office upon becoming a candidate* for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate * for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law* to do so.

(3) A candidate* for a judicial office

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and should encourage members of the candidate's family* to adhere to the same standards of political conduct in support of the candidate* that apply to the candidate* ;

Commentary. - Although a judicial candidate * must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate*, and shall discourage other employees and officials subject to the candidate's* direction and control from doing on the candidate's* behalf what the candidate* is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly* permit any other person to do for the candidate* what the candidate* is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate* with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly* misrepresent the identity, qualifications, present position, or other fact concerning the candidate* or an opponent;

Commentary. - Section 5A(3)(d) prohibits a candidate* for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel * in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the Rules of Professional Conduct.

(e) may respond to personal attacks or attacks on the candidate's* record as long as the response does not violate Section 5A(3)(d).

B. Candidates seeking appointment to judicial or other governmental office.

(1) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment inconsistent with the provisions of Section 5A(I), but such persons may:

(a) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(b) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to office, and from individuals to the extent requested or required by those specified in Section SB(2)(a); and

(c) provide to those specified in Sections SB(2)(a) and SB(2)(b) information as to his or her qualifications for the office.

(3) A non-judge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law*, retain an office in a political organization*.

Commentary. - Section SB(2) provides a limited exception to the restrictions imposed by Sections SA(I) and SD. Under Section SB(2), candidates* seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section SB(2) non-judge candidates* seeking appointment to judicial office are permitted during candidacy to retain office in a political organization*, they remain subject to other provisions of this Code during candidacy. See Sections SB(I), SB(2)(a), SE and Canon 6.

C. Judges and candidates subject to public election.

(1) A judge or a candidate* subject to public election* may, except as prohibited by law* :

(a) at any time

(i) purchase tickets for and attend political gatherings;

(ii) identify himself or herself as a member of a political party; and

(iii) contribute to a political organization*;

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

(ii) appear in newspaper, television, and other media advertisements supporting his or her candidacy; and

(iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

Commentary. - Section SC(I) permits judges subject to public election* at any time to be involved in limited political activity. Section SD, applicable solely to incumbent judges, would otherwise bar this activity.

A candidate* shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate* may, however, establish committees of responsible persons to conduct campaigns for the candidate* through media advertisements, brochures, mailings, candidate forums, and other means not prohibited by law*. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate* shall not use or permit the use of campaign contributions for the private benefit of the candidate* or others.

Commentary. - Section SC(2) permits a candidate*, other than a candidate for appointment, to establish campaign

committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge*, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Campaign committees established under Section SC(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

Section 5C(2) does not prohibit a candidate* from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

(2) Except as prohibited by law *, a candidate* for judicial office in a public election* may permit the candidate's* name: (a) to be listed on election materials along with the names of other candidates for elective public office, and
(b) to appear in promotions of the ticket.

Commentary. - Section 5C(3) provides a limited exception to the restrictions imposed by Section 5A(l).

The Time for Compliance provision of this Code (Section 6F) postpones the time for compliance with certain provisions of this Section in some cases.

D. Incumbent judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law*, the legal system or the administration of justice, or (iii) as expressly authorized by law*.

Commentary. - Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law*, the legal system, and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary .

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates*. A candidate*, whether or not an incumbent* and whether or not successful, is subject to judicial discipline for his or her campaign conduct.

Commentary. - A lawyer who is a candidate* for judicial office may also be disciplined under the Rule of Professional Conduct for his or her campaign conduct. See especially Rule 8.2.

Annotations

W.Va. Law Review. Bowman, A Judicial Dilemma: Real or Imagined? 83 W.Va. L. Rev. 29 (1980).

"Judicial office." - The office of circuit clerk is not a "judicial office" as that term is used in W.Va. Const., art. VIII, § 7 and Canon 7A(3) of the Judicial Code of Ethics. Feltz v. Crabtree, 179 W.Va. 524, 370 S.E.2d 619 (1988).

Resign-to-run requirement. - The restriction on judicial employees requiring their resignation upon becoming a candidate for a non-judicial office is reasonable. Philyaw v. Gatson, 195 W.Va. 474, 466 S.E.2d 133 (l995).

Campaign funds. - Where a magistrate failed to form a campaign committee to receive contributions there was a technical violation of Canon 7B of former Code and the board's recommendation that the magistrate be admonished for committing a violation was upheld, In re Suder, 183 W.Va. 680, 398 S.E.2d 162 (1990).

Endorsement of candidates. - Canon 5A(l)(b) of the Code of Judicial Conduct, effective January 1, 1993, clearly states that a judge or a candidate for election or appointment to judicial office shall not "publicly endorse or

publicly oppose another candidate for public office," leaving no doubt that the endorsement of candidates by judges, candidates or otherwise, is not permitted. In re Hill, 190 W.Va. 165, 437 S.E.2d 738 (1993).

Sanction. - Where a former judge who pleaded guilty to accepting an illegal cash campaign contribution, was fined $15,000 and resigned his public office, the only reasonable sanction was publicly to censure him, and a $1,000 fine was appropriate. In re Mendez, I92 W.Va. 57, 450 S.E.2d 646 (l994).

Applied in West Virginia Judicial Hearing Bd. v. Romanello, 177 W.Va. 14, 350 S.E.2d 14 (1986).

Quoted in In re Vandelinde, 179 W.Va. 183, 366 S.E.2d 631 (1988).
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Canon 6

Application of the Code of Judicial Conduct.

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Law Masters, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners and Special Masters, is a judge within the meaning of the Code. All judges shall comply with this Code except as provided below. All candidates* for judicial office shall comply with the applicable provisions of this Code.

Commentary. - The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall, the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial = service.

The Code does not apply to an administrative law judge, hearing examiner, or similar officer within the executive branch of government.

B. Retired judges.

A retired judge admitted to senior status but who does not engage in the practice of law is not required to comply with Section 4E.

(2) A retired judge admitted to senior status but who engages in limited law practice is not required to comply with Sections 4E and 4G.

(3) A retired judge not admitted to senior status but who is recalled for specific cases or specific periods of service shall be deemed a pro tempore part-time judge subject to Section 6E.

(4) A retired judge, whether or not admitted to senior status and whether or not engaging in law practice, may be employed as a mediator or an arbitrator notwithstanding the provisions of Section 4F.

C. Continuing part-time judge. A continuing part-time judge* :

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9); and

(b) at any time with Sections 4D(3), 4E(l), 4F, 4G, 4H, 5A(I), 5B(2), and SD.

(2) may practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, but shall not act as a lawyer in a proceeding in which the judge has served as a judge in any other proceeding related thereto, or in any matter involving the same subject-matter jurisdiction.

Commentary. - A part-time Family Law Master shall not accept any domestic relations matter or serve as an

attorney in any proceeding related to a case in which he or she has served as a Family Law Master, nor shall a Mental Hygiene Commissioner accept any mental hygiene matters or serve as an attorney in any proceeding related to a case in which he or she has served as a Mental Hygiene Commissioner, nor shall a Juvenile Referee accept any juvenile matters or serve as an attorney in any proceeding related to a case in which he or she has served as a Juvenile Referee.

When a person who has been a continuing part-time judge is no longer a continuing part-time judge that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to Rule l.12(a) of the Rules of Professional Conduct.

D. Periodic part-time judge. A periodic part-time judge*

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9);

(b) at any time, with Sections 4C(3)(a), 4D(l)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(I), 5B(2) and 5D.

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Commentary. - When a person who has been a periodic part-time judge* is no longer a periodic part-time judge (no longer accepts appointments), that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to Rule I.I2(a) of the Rules of Professional Conduct.

E. Pro tempore part-time judge. A pro tempore part-time judge*:

(1) is not required to comply

(a) except while serving as a judge, with Sections 2A, 2B, 3B(9), and 4C(I);

(b) at any time with Sections 2C, 4C(3)(a), 4C(3)(b), 4D(l)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(I), 5A(2), 5B(2), and 5D.

(2) A person who has been a pro tempore part-time judge * shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule I.12(a) of the Rules of Professional Conduct.

F. Time for compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary. - If serving as a fiduciary* when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

History

[Amended by order entered June 14, 1994, effective July 1, 1994; and by order entered February 15, 1995, effective March **I,** 1995.]

Annotations

Plain meaning of canon to be accepted. - When the language of a canon under the Judicial Code of Ethics is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction. In re Karr, 182 W.Va. 221, 387 S.E.2d 126 (1989).

Campaign funds. - When a candidate, including an incumbent judge, for a judicial office that is to be filled by public election between competing candidates, personally solicits or personally accepts campaign funds, such action is in violation of Canon 7B(2) of the Judicial Code of Ethics. A committee established by a judicial candidate, including an incumbent judge, may solicit or accept funds for such candidate's campaign. In re Karr, 182 W.Va. 221, 387 S.E.2d 126 (1989).

Quoted in State ex rel. Hendricks v. Hrko, 189 W.Va. 674, 434 S.E.2d 34 (1993).

Terminology.

Terms explained below are noted with an asterisk (*) in the Sections where they appear. In addition, the Sections where terms appear are referred to after the explanation of each term below.

"Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(l) and 3D(2).

"Candidate." A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to non-judicial office. See Preamble and Sections 5A, 5B, 5C, 5E, and 6A.

"Continuing part-time judge."A continuing part-time judge is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, a part-time family law master, a juvenile referee, and a mental hygiene commissioner. See Section 6C.

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Sections 3E(l)(c) and 3E(l)(d).

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

See Sections 3E(l)(c) and 3E(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E and 4E.

"Knowingly," "knowledge," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Sections 2B, 3C(5), 3D, 3E(l), and 5A(l) and (3).

"Law" denotes court rules as well as statutes, constitutional provisions, and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 3C(5), 4B, 4C, 4D(5), 4F, 41, 5A(2), 5B(3), 5C, 5D, and 6B.

"Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship. See Section 5A(3)(a).

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D, 4E, and 4G.

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Sections 3E(I) and 4D(5).

"Nepotism" denotes favoritism shown in the treatment of a member of the judge's family or a person living in the judge's household. See Section 3C(4).

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded, or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Section 3B(l l).

"Periodic part-time judge." A periodic part-time judge is a judge who serves or expects to serve repeatedly on a part-time basis but under a separate appointment for each limited period of service or for each matter. See Section 6D.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Sections 5A(I), 5B(3), and 5C(l).

"Pro tempore part-time judge." A pro tempore part-time judge is a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. See Sections 6B and 6E.

"Public election." This term includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections. See Section 5C(l) and (3).

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(3), 3B(4), 3B(6), 3B(9), and 3C(2).

"**Third degree of relationship."** The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. See Section 3E(l)(d).

The West Virginia Bar Association Code of Professional Conduct

THE CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence.
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2. Scope of representation.
(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(b) A lawyer may limit the objectives of the representation if the client consents after consultation.
(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counselor assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
(d) When a lawyer knows that a client expects assistance not permitted by the rules of professional conductor other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.3. Diligence.
A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication.
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5. Fees.
(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.
(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the

outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:
(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.
(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations;
(2) the client is advised of and does not object to the participation of all the lawyers involved; and
(3) the total fee is reasonable.
(4) The requirements of "services performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and, (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community. (Amended by order entered June 26, 1990, effective July 1, 1990.)

Rule 1.6. Confidentiality of information.
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary :
(1) to prevent the client & from committing a criminal act; or
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

Rule 1.7. Conflict of interest: General rules.
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.

Rule 1.8. Conflict of interest: Prohibited transactions.
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.
(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving

the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(I) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(t) A lawyer shall not accept compensation for representing a client from one other than the client unless: (I) the client consents after consultation;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
(i) A lawyer related to another lawyer as parent, child, sibling or spouse or a lawyer sharing living quarters with another lawyer shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer (j) is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.
(k) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness or to anyone referring a lawyer to a witness, contingent upon the content of the witness's testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
(1) expenses reasonably incurred by a witness in attending or testifying.
(2) reasonable compensation to a witness for his loss of time in attending or testifying.
(3) a reasonable fee for the professional services of an expert witness.

Rule 1.9. Conflict of interest: Former client.
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation; or
(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Rule 1.10. Imputed disqualification: General rule.
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so by Rules 1.7, l.8(c), 1.9 or 2.2.
(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and l.9(b) that is material to the matter.
(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and I.9(b) that is material to the matter.
(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7. (Amended by order entered April 20, 1994, effective May 1, 1994.)

Rule 1.11. Successive government and private employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(I) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule l.l2(b) and subject to the conditions stated in Rule l.l2(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.12. Former judge or arbitrator.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(I) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the

organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.
(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.14. Client under a disability.
(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Rule 1.15. Safekeeping property.
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
(d) A lawyer who receives client funds that are nominal in amount or are expected to be held for a brief period shall establish and maintain a pooled, interest-bearing, federally-insured depository account for the deposit of such funds, in compliance with the following provisions:
(I)) the account shall include only such client funds that are so nominal in amount or are expected to be held for such a brief period of time that administrative expenses would exceed interest earned from the investment thereof;

(2) no interest from such account shall be made available to the lawyer;
(3) funds deposited in such account must be available for withdrawal or transfer on demand, subject only to any notice period which the depository institution is required to observe by law or regulation;
(4) the lawyer shall direct the depository institution :
(i) to remit interest, on at least a quarterly basis, net any customary service charges or fees in accordance with the depository institution's standard accounting practice, to the West Virginia Bar Foundation, Inc.; and

(ii) to transmit with each remittance to the West Virginia Bar Foundation, Inc., a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to be transmitted to such lawyer or law firm; and,
(5) the lawyer shall review the account at reasonable intervals to determine whether circumstances warrant further action with respect to the funds of any client.
(e) A lawyer may not be charged with any breach of the Rules of Professional Conduct or other ethical violation with regard to either the good faith determination of whether client funds are nominal in amount or are expected to be held for a brief period or the failure to establish and maintain a pooled, interest-bearing, federally-insured depository account for the deposit of such funds in accordance with Rule l.15(d).
(f) All interest transmitted to the West Virginia Bar Foundation, Inc., shall be distributed by that entity as follows: (I)) an annual fee not to exceed fifty thousand dollars shall be retained by the West Virginia Bar Foundation, Inc., for administration of the fund, with a detailed annual accounting of services performed in consideration for such fee to be filed for public inspection with the Supreme Court of Appeals; (2) special grants not to exceed fifteen percent of the fund's annual receipts to WV CASA Network, coordinating agency for court- appointed special advocate programs, in the amount of forty-seven percent of special grant funds available; to the West Virginia Fund for Law in the Public Interest, Inc., to provide summer legal interns to West Virginia's four legal services organizations, in the amount of twenty percent of special grant funds available; to the Appalachian Center for Law and Public Service, a West Virginia University College of Law public service program providing legal services for the poor, in the amount of eight percent of special grant funds available; and to the Elder Law Program of the North Central West Virginia Legal Aid Society, Inc., in the amount of twenty-five percent of special grant funds available; and (3) the remaining funds to West Virginia's four legal services organizations in accordance with their percentage of poor population served using the most recent Bureau of the Census statistics or such other method of distribution as may hereinafter be adopted by order of the Supreme Court of Appeals. Any funds distributed by the West Virginia Bar Foundation, Inc., pursuant to this subdivision shall not be used by the recipient organization to support any lobbying activities. (Amended by order entered November 29, 1989, effective July 1, 1990; by order entered July25, 1991,
effective September 15, 1991; by order entered December 15, 1993, effective January 1 **,** 1994; by order entered May 5, 1994, effective June 1994; by order entered January 6, 1995, effective January 9, 1995; by order entered December 13, 1995, effective January l, 1996; by order entered July IO, 1996, effective September l, 1996; by order entered July 17, 1996, effective September l, 1996; and by order entered and effective October 3, 1996; and by order entered November 21, 1997 and effective January l, 1998.)

Rule 1.16. Declining or terminating representation.
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if
(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
(1) the client persists in a Course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(2) the client has used the lawyer's services to perpetrate a crime or fraud;
(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligations is fulfilled;
(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.17. Sale of law practice.
A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:
(a) The seller ceases to engage in the private practice of law in West Virginia;
(b) The practice is sold as an entirety to another lawyer or law firm;
(c) Actual written notice is given to each of the seller's clients
regarding: (I) the proposed sale;
(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);
(3) the client's right to retain other counselor take possession of the file; and
(4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.
If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.
The fees charged clients shall not be increased by reasons of the sale. The purchaser may, however, refuse to undertake representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations. (Adopted by order entered January 16, 1997, effective February 1, 1997.)

COUNSELOR.

Rule 2.1.Advisor.
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.2. Intermediary.

(a) A lawyer may act as intermediary between clients if:
(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Rule 2.3.Evaluation for use by third persons.
(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:
(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.
(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.
(c) In reporting an evaluation the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

ADVOCATE.

Rule 3.1. Meritorious claims and contentions.
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2. Expediting litigation.
A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

Rule 3.3. Candor toward the tribunal.
(a) A lawyer shall not knowingly:
(I) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision. whether or not the facts are adverse.

Rule 3.4. Fairness to opposing party and counsel.
A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counselor assist another person to do any such act;
(b) falsify evidence, counselor assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality and decorum in the tribunal.
A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate *ex parte* with such a person except as permitted by law; or
(c) engage in conduct intended to disrupt a tribunal.

Rule 3.6. Trial publicity.
(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement:
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
(c) Notwithstanding paragraphs (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
(1) the general nature of the claim or defense;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case:
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation. (Amended by order entered June 26, 1990, effective July 1, 1990.)

Rule 3.7. Lawyer as witness.
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8. Special responsibilities of a prosecutor.
The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to

a preliminary hearing;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Rule 3.9. Advocate in non-adjudicative proceedings.
A lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS.

Rule 4.1. Truthfulness in statements to others.
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited bv Rule 1.6.

Rule 4.2. Communication with person represented by counsel.
In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.3. Dealing with unrepresented person.
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 4.4. Respect for rights of third persons.
In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

LAW FIRMS AND ASSOCIATIONS.

Rule 5.1. Responsibilities of a partner or supervisory lawyer.
(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2. Responsibilities of a subordinate lawyer.
(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3. **Responsibilities regarding non lawyer assistants.**
With respect to a non-lawyer employed or retained by or associated with a lawyer:
(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the non lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4. Professional independence of a lawyer.
(a) A lawyer or law firm shall not share legal fees with a non lawyer, except that:
(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
(3) a lawyer or law firm purchasing the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer an agreed-upon purchase price; and
(4) a lawyer or law firm may include non lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
(b) A lawyer shall not form a partnership with a non lawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a non lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a non lawyer is a corporate director or officer thereof; or
(3) a non lawyer has the right to direct or control the professional judgment of a lawyer. (Amended by order entered September 5, 1996, effective October 1, 1996; and by order entered January 16, 1997, effective February l, 1997.)

Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.6. Restrictions on right to practice.
A lawyer shall not participate in offering or making:
(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Rule 5.7. Limited liability legal practice

(a) A lawyer may be a member of a law firm that is organized as a limited liability company or registered limited liability partnership (collectively, "limited liability organizations") solely to render professional legal services under the laws of West Virginia, including, but not limited to, the Uniform Limited Liability Act, W. Va. Code §§ 31B-l-IOI, et seq., and the Uniform Partnership Act, W. Va. Code §§ 47B-l-I, et seq., and may practice in or as such a

limited liability organization, provided that such lawyer is otherwise licensed to practice in West Virginia and such law firm is registered pursuant to rules promulgated by The West Virginia State Bar.
(b) Nothing in this rule or the laws under which a lawyer or law firm is organized shall relieve a lawyer from personal liability for the acts, errors, and omissions of such lawyer arising out of the performance of professional legal services.
(c) Law firms wishing to practice as limited liability organizations under this rule shall comply with the rules of The West Virginia State Bar with regard to registration of limited liability organizations.
(d) A law firm organized as a limited liability organization under the laws of any other state or jurisdiction of the United States solely for the purpose of rendering professional legal services and authorized to do business in West Virginia and which has at least one lawyer licensed to practice law in West Virginia may register in West Virginia as a limited liability organization under this rule by registering pursuant to rules promulgated by The West Virginia State Bar. (Adopted by order entered September 5, 1996, effective October 1, 1996.)

PUBLIC SERVICE.

Rule 6.1. Pro bono publico service.
A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organization, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal service to persons of limited means.

Rule 6.2. Accepting appointments.
A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Rule 6.3. Membership in legal services organization.
A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:
(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
(b) where the decision or action could have a material adverse affect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Rule 6.4. Law reform activities affecting client interests.
A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications concerning a lawyer's services.
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Rule 7.2. Advertising.
(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.
(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule; may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization; and may pay for a law practice in accordance with Rule 1.17.
(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content. (Amended by order entered December 15, 1988, effective January 1, 1989; and by order entered January 16, 1997, effective February 1, 1997.)

Rule 7.3. Direct contact with prospective clients.
(a) A lawyer shall not by in-person or telephone contact solicit professional employment from a prospective with

whom the lawyer has no family or prior professional relationship when a motive for the lawyer's doing so is the lawyer's pecuniary gain.
(a) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.
(b) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words" Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication and shall be maintained as required by Rule 7.2(b). (Adopted by order entered December 15. 1988. effective January 1, 1989.)

Rule 7.4. Communication of fields of practice.
A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty"' "Proctor in Admiralty" or a substantially similar designation.

Rule 7.5. Firm names and letterheads.
(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. (Amended by order entered June 26, 1990. effective July 1, 1990.)

MAINTAINING THE INTEGRITY OF THE PROFESSION.

Rule 8.1. Bar admission and disciplinary matters.
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2. Judicial and legal officials.
(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3.Reporting professional misconduct.
(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6. by Rule 1.6.

This Rule shall not apply to members of the West Virginia State Bar Committee on Assistance, and Intervention, the Committee on Lawyer Assistance, or the Lawyer Intervention Panel, or to a Committee's or Panel's interveners

and representatives, to the extent that they are acting in their official capacities as members, interveners, or representatives of a Committee or Panel. However, the Committees, the Panel, and their interveners and representatives shall not be relieved of the duty to inform the Ethics Committee of the State Bar of on-going or prospective violations of Rule 8.4(b), (c), or (d), unless the impaired lawyer agrees to discontinue the violation and to seek a program of rehabilitation, as prescribed by a Committee or Panel. (Amended by order entered December 20, 1988, effective January 1, 1989.)

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship. For purposes of this rule, "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse. (Amended by order entered July 12, 1995, effective September l, 1995.)

Rule 8.5. Jurisdiction.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.