
COURTS & JUSTICE LAW JOURNAL

A LETTER FROM THE EDITOR: WHEN CAN A JUDGE WRITE?

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INTRODUCTION

When can a judge write? Better yet, when can a judge *not* write?¹ These questions plague the profession with unanswered questions and sought after answers. Our judicial system looks to judges, not as perfect beings who should remain untouched, but rather as imperfect practitioners who should remain above it all. This lofty goal is an admirable one and also one that we must continue to seek out. However, our system also needs our judges to write, speak, and advocate on behalf of our laws. Judges are in a unique position to know what works, what doesn't, and what will never. So then, how does a judge write without violating this sacred trust? Like so many other legal writers have done, I will analogize this situation to the

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¹ When discussing a judge's "writings," this article is referring to extra-judicial writings.

*Youngstown Steel*² case and follow the parameters set by the esteemed Justice Jackson.

I. EXPRESS OR IMPLIED AUTHORITY

At first blush it appears that the answer to this delicate question is staring us right in the face: The Judicial Canons. And to a degree this is true. However, these canons, while specific in some areas, leave a lot to be desired. Let us look to the most on-point canon³ that not only gives authority to judges to write and speak, but also encourages it:

Canon 4

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.

² Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (“Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”).

³ S.C. App. Ct. R. RULE 501 Canon 4. I am using the South Carolina Judicial Canons because those are the ones that apply to me. However, they are similar if not verbatim to national standards.

Right here we have it. Our answer. This canon gives judges the right to speak and teach on issues concerning the law. And not only that, but the commentary encourages judges to take on this task because of the unique position they have.

If a judge is going to write, then he or she should start here. The writing should focus on the area of improving the law and our legal system. They should use their specialized knowledge of the system to participate and contribute to the profession. But while this canon⁴ grants authority it also taketh away:

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.

And this leads us directly to Justice Jackson's second area of authority, or lack thereof - areas where judges are specifically prohibited from speaking and writing.

II. INCOMPATIBLE WITH EXPRESS WILL

Canon 4 brings us directly back to multiple canons that guide judges on what not to do. First we must start with Canon 1, which sets the stage of how a judge should act and how their candor should remain:⁵

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.

⁴ Canon 4.

⁵ S.C. App. Ct. R. RULE 501 Canon 1.

When in doubt, this canon will illuminate. It sets the stage for what is expected from a judge. The first sentence explains why a judge must act in such a way and gives credence to this requirement. If our system is to be followed and upheld, then we must have an independent and honorable judiciary. And a judiciary is not an abstract idea in a book. But rather, it is the men and women who sit on the bench and hold the gavel. The first canon speaks, and it expresses its will.

Our second canon also focuses on how a judge should carry his or herself – but this time with a little more specificity. Canon 2 states that “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”⁶ This canon not only dictates what a judge should do, but it also dictates about things that a judge might not do but could have the appearance of doing something. It is not merely enough for a judge to not act, sometimes an appearance requires less, and a requirement that is less is oftentimes recusal.

III. THE ZONE OF TWILIGHT

The final area (technically it’s the second, but who’s counting?) is what Justice Jackson considered the zone of twilight. This is the area where the authority has not spoken and thus it falls upon the judge to make a determination if is appropriate for them to write. What does this area include? I see this as a spectrum, with one end being a judge writing about a hypothetical case to the other end, a judge writing an amicus brief.⁷ A judge must always keep in mind that litigants and practitioners are watching and reading. This means that a judge cannot simply put forth an idea or statement and explain in their own mind why it is neutral. But rather, they must take off their shoes and walk to the other side. They must look at the writing from the perspective of different litigants and how it is perceived in that fashion. There is a mighty difference between a hypothetical a judge

⁶ S.C. App. Ct. R. RULE 501 Canon 2.

⁷ I considered writing an amicus brief for a case pending before the Supreme Court. Even though the brief would be written “in support of neither party,” Professor Eugene Volokh wisely suggested that I might want to consider Canon 3 and that my brief could potentially affect the outcome of a pending case.

may write about that focuses on broad constitutional law and a hypothetical that highlights a specific pending case and provides for an outcome that is otherwise not obvious. This twilight zone spectrum is not fixed nor is it standard. It is formulated by the topic the judge is writing about, the type of court the judge presides over, the litigants likely to appear before that judge, and many, many more factors.⁸ Taking this twilight zone spectrum and applying it to the case at hand, we must now formulate a conclusion.

IV. THIS JOURNAL, THAT BLOG, AND THOSE PUBLICATIONS

First and foremost I must say that I am not an advocate for any side nor do my writings wish to give an upper hand to any litigant.⁹ My writings are meant to follow Canon 4: contribute to the improvement of the law and our judicial system. Our legal system and the laws within it have been evolving and growing since the Articles of Confederation. Our legal profession swells each year as thousands of new attorneys join the ranks eager to make their mark (and begin paying down an exorbitant debt). What is our role as current members of the bar, and what is my role specifically as a member of the judiciary?

A. *Those Publications*

The books I have written are meant to guide attorneys in court. They shed light on many issues that litigants will face and hopefully this light illuminates a path to the correct answer. The books are not meant to be one sided (and any great legal book will give both sides so parties can anticipate arguments). What I hope they accomplish at the very least is to give attorneys and judges a sense of confidence in their arguments. This confidence builds upon itself. And a confident¹⁰ attorney can better represent their client and become a more honorable officer of the court.

B. *That Blog*

⁸ It is also formulated by the judge's local disciplinary counsel on judicial conduct.

⁹ As we saw from Canon 2 though, my wishes sometimes might not be enough and I must consider the appearance of my writings.

¹⁰ See definition of confident (having or showing assurance and self-reliance); see also definition of arrogant (showing an offensive attitude of superiority).

The legal blog I write has two purposes. First, it is a good idea to stay up to date on current law and changes to that law. In the old days, laws were written on books and then shipped to legal libraries and then somehow attorneys figured out that something had changed and they needed to learn it. In the more recent, but still old, days, updates to the law were placed on websites and attorneys had to go to those websites and find out which laws had changed and what these changes meant to their practice. In today's world, these legal changes are finding attorneys not the other way around. Whether it is social media, Google searches, word of mouth, or legal blogs (hint, hint), the flow of change is a stream that is much more navigable than it has ever been. The simplicity of logging on to a computer and being a click away from a legal professor in California or two clicks away from knowing the difference between business entities and security interests¹¹ is a new power that one should not just be aware of, but also take advantage of.

C. *This Journal*

And last but not least, we are brought to the *Courts & Justice Law Journal*. Why do we need another law journal when there are so many out there now? That is a good question and one I have thought about on many occasions. While there are plenty of law journals throughout our nation, there are not as many law journals that are not student-run (there are plenty of law journals by academics and practitioners, but there are many more that are student led). This journal brings the perspective of a practitioner and wants to present articles that can have a positive effect in the here and now. I also believe that this journal puts a focus on Canon 4 (as discussed above). By focusing on improving our legal system from the perspective of practitioners and judges, I believe this journal can have a practical effect rather than an unfeasible goal. Don't get me wrong, the law journals currently in circulation present amazing ideas and do have a measurable and consequential effect on rulings by judges and statutes by legislatures. I just

¹¹ Eldar, Ofer and Verstein, Andrew, *The Enduring Distinction between Business Entities and Security Interests* 92 S. CAL. L. REV. 2 (January 2019) (available [here](#)).

hope that this journal can focus solely on that and emulate the good work done by those journals.

CONCLUSION

So after all of that, do we know when a judge can write? No. But we do know a few things since you began this article. First, I believe it is a net positive if a judge does write. Judges should offer an open window into their thinking so that litigants can have an idea and understanding of their reasoning for reaching their conclusion. Second, a judge should be aware of the canons that they must abide by while they are writing. The canons are not to hinder or set a judge up, but rather they are used to guide a judge and give them an opportunity to present their ideas and discussions. And finally, a judge should interact. Whether it is social media or a legal blog, a judge has an opportunity to start conversations that otherwise might not happen. These conversations need not be about specific cases, nor should they, but they should focus on giving the listener another view point.

In the end, all practitioners, academics, and judges bring a certain level of knowledge and specialty to the legal field. We should encourage this sharing of information and viewpoints as well as provide forums to facilitate and foster it. Hopefully judges will feel less burdened when they write and maybe one day...never mind, I've written enough.