

## **VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12<sup>th</sup> day of April, 2019.*

On March 18, 2019, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 19-1 pursuant to its authority established in this Court's order of October 20, 2015. Upon consideration whereof, the Court approves the opinion as set out below.

### **Judicial Ethics Advisory Committee Opinion 19-1**

**A judge should not wear his or her judicial robe while attending the funeral service for another judge.**

#### **ISSUE:**

May a judge wear his or her judicial robe while attending the funeral service of another judge?

**Answer:** No. A judge should not wear his or her judicial robe to the funeral service of another judge, where the judge is not attending the service in his or her official capacity, as doing so may improperly lend the prestige of judicial office to advance the private interests of the judge or others.

#### **FACTS:**

The family of a recently deceased judge planned a public funeral service to honor him. Details of the funeral arrangements were disseminated to other members of the judiciary. Those details included information that judges attending the funeral service wear their judicial robes, and information regarding a specific time of arrival and special area for enrobing was provided for attending judges. The requesting judge is one judge who was to attend the funeral service and has asked whether wearing a judicial robe to the funeral service would violate the Canons of Judicial Conduct for the Commonwealth of Virginia (the "Canons").

#### **DISCUSSION:**

The Preamble to the Canons provides that:

Intrinsic to all sections of these Canons 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.

Va. Sup. Ct. R., Part 6, § III, Preamble. As the Preamble recognizes that the judicial office is a public trust, the Canons then declare the importance of that public trust and the requirements that judges maintain that public trust.

The question presented is governed by Canon 2.

The commentary to Canon 2B explains the importance of maintaining the prestige of, and respect for, the judicial office. Canon 2B prohibits judges from lending that prestige of the judicial office “to advance the private interests of the judge or others.” Canon 2B. More generally, under Canon 2: “A judge shall avoid impropriety and the *appearance* of impropriety in all of the judge’s activities.” Canon 2 (emphasis added). When read together, it is apparent that a judge must safeguard the public trust and not use the prestige of the judicial office to advance his or her own private interests or the interests of others, and that judges must avoid even the appearance of improperly using the prestige of the judicial office.

Furthermore, the commentary to Canon 2A explains that “[t]he prohibition against behaving with impropriety or the appearance of impropriety applies to *both* the professional and personal conduct of a judge.” Canon 2A Commentary (emphasis added). The commentary to Canon 2B provides a similar caution, noting that “[j]udges should distinguish between proper and improper use of the prestige of office in *all* of their activities.” Canon 2B Commentary (emphasis added).

The Preamble to the Canons also recognizes that the judge is a “highly visible symbol of government.” In terms of symbols of the judicial office, there may be no more common, recognizable, and visible symbol than a judge wearing his or her judicial robe. The Arizona Supreme Court Judicial Ethics Advisory Committee (the “Arizona Committee”) recognized the importance of judicial robes when it considered an ethical question regarding the wearing of a pin on a judicial robe. *See* Ariz. Jud. Adv. Op. 18-03 (2018). The Arizona Committee opined that judicial robes should remain free of adornments such as symbols, pins, or messages. *Id.* In analyzing the question, the Arizona Committee began by noting the importance of the judicial robe:

The judicial robe powerfully and unmistakably invokes the prestige of judicial office. Using that prestige to express support for any particular message, organization, cause, or category of citizens necessarily excludes a large universe of equally worthy messages, organizations, causes, and citizens who might feel reassured upon encountering a judge displaying symbols meaningful to them.

*Id.* The Arizona Committee cited the criminal justice standards of the American Bar Association (“ABA”) and the ABA’s discussion of the symbolism of the judicial robe, noting that the robe reminds everyone – including the judge – that the prime concern of the court is justice, and that the robe adds dignity to the courtroom. *Id.* (citing ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.4, at 23 (3<sup>rd</sup> ed. 2000)). Furthermore, the ABA’s commentary on its criminal justice standards notes that “[t]he robe also symbolizes power and the authority of the office.” ABA, *supra*, at 23.

In the Commonwealth of Virginia, neither the Canons, the Code of Virginia, nor any other official rule or document for judges explicitly states or provides guidance as to when (or where) the wearing of judicial robes is required, permitted, or prohibited.<sup>1</sup> Despite this lack of written directives, time-honored practice and tradition in the Commonwealth has been for a member of the judiciary to wear his or her judicial robe only when acting in his or her official capacity in court proceedings or official ceremonies,<sup>2</sup> or in conjunction with professional, as opposed to personal, conduct on the part of the judge.

The precise question of the propriety of a judge wearing a robe to a funeral service has not been considered previously by the Committee, nor apparently by other states.<sup>3</sup> States that have considered the question of the wearing of judicial robes outside a judge's official duties have addressed a wide variety of activities including election campaigns, fundraising activities, advertising, promotional campaigns, and even charitable events – with varying opinions on the propriety of wearing judicial robes during such activities.

The Committee agrees with the general principle that the judicial robe is an important symbol of the prestige associated with judicial office. Therefore, a judge must carefully consider the propriety of wearing the judicial robe and the potential for lending that prestige to advance the private interests of the judge or others, especially where the robe is worn for occasions which are not part of his or her official duties. Based on the facts presented, attendance at the funeral service represents a personal activity on the part of the attending judge, and not part of his or her official duties. This is true even though the funeral service is for a fellow member of the judiciary, and where many fellow judges are expected to attend.

Attendance by a group of judges wearing their judicial robes would provide a visual reminder to all who attended of the deceased's status as a member of the judiciary. But honoring his service to the Commonwealth would be paying respect to but one aspect of his public life, a life that likely included many additional private and public interests. Under the facts presented, wearing a judicial robe would invoke a powerful symbol of the prestige of the judicial office, and potentially lend that prestige to the funeral service of the deceased judge and all the public and private interests that encompassed his life.

While a judge may certainly attend the funeral service of a fellow member of the judiciary, and may sit with other judges as a group, it would not be appropriate to do so while wearing his or her judicial robe. Based on the facts presented, the Committee believes wearing the judicial robe in this manner may improperly lend the prestige of the judicial office to the private interests of the judge or others in violation of Canon 2B. Even where the private interests may not be clear, the potential for such improper use of the prestige of the judicial office renders this use of the judicial robe problematic, because a judge must avoid even the appearance of impropriety in accordance with Canon 2.

## **CONCLUSION:**

Being selected to serve the Commonwealth as a judge or justice is an honor granted to few individuals. Upon the death of an esteemed member of the judiciary, it is natural for family, friends, and colleagues to pay respect not only to the individual who has passed away but also to provide tribute to the service he or she has provided to the Commonwealth. The Committee

recognizes that the request for judges attending the funeral service to wear their judicial robes is borne out of the normal and reasonable desire to honor the judge's service.

Against this backdrop and the facts presented, the Committee finds, however, that if the judge were to wear his or her robe to the funeral service, where attendance is not pursuant to his or her official duties, there exists the potential of lending the prestige of the judicial office to advance the private interests of the judge or others, and at the very least would result in the appearance of doing so. Therefore, consistent with the principles articulated in Canon 2, the judge should not wear his or her robe to the funeral.

A Copy,

Teste:

A handwritten signature in black ink, consisting of the letters 'DB' followed by a long horizontal line extending to the right.

Clerk

**REFERENCES:**

Canons of Judicial Conduct for the Commonwealth of Virginia, Preamble, Canon 2, Canon 2A, Canon 2B.

Ariz. Jud. Adv. Op. 18-03 (2018).

ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.4 (3<sup>rd</sup> ed. 2000).

NEW MEXICO JUDICIAL EDUCATION CENTER, NEW MEXICO JUDICIAL ETHICS HANDBOOK § 4-100 at 4-2 (2011).

Tex. Jud. Ethics Comm. Op. 253 (1999).

VA. CODE ANN. § 20-25 (1950).

Wis. Sup. Ct. Jud. Conduct Adv. Comm. Op. 98-8 (1998).

N.M. Adv. Comm. Jud. Ethics Op. 10-09 (2010).

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**FOOTNOTES:**

<sup>1</sup> See, e.g., NEW MEXICO JUDICIAL EDUCATION CENTER, NEW MEXICO JUDICIAL ETHICS HANDBOOK § 4-100 at 4-2 (2011) (explicitly prohibiting “[w]earing judicial robe when you are not conducting official judicial business”); Tex. Jud. Ethics Comm. Op. 253 (1999) (finding that a judge may appear on television for a public service announcement but that “it would be improper if he appeared in the announcement wearing his robe. The committee believes

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wearing the judicial robe other than while performing official duties or during official ceremonies inappropriately lends the prestige of office to the activity in which the robe is worn.”).

<sup>2</sup> For example, Virginia Code § 20-25 states that any “judge or justice of a court of record, any judge of a district court, any retired judge or justice of the Commonwealth, and any active, senior or retired federal judge or justice who is a resident of the Commonwealth may celebrate the rites of marriage anywhere in the Commonwealth.” In that circumstance, a judge or justice is acting in an official capacity in an official ceremony under statutory authority. For purposes of this analysis, wearing his or her judicial robe would not be prohibited.

<sup>3</sup> In 1998, the Judicial Conduct Advisory Committee of Wisconsin (the “Wisconsin Committee”) considered whether judges could wear their robes in church at a St. Thomas More Lawyers Society “Red Mass.” The Wisconsin Committee found in part that wearing robes would not violate Wisconsin’s Code of Judicial Conduct, because wearing robes would honor deceased colleagues, not the church, and it did not lend the prestige of judicial office to advance the interests of religion. Wis. Sup. Ct. Jud. Conduct Adv. Comm. Op. 98-8 (1998). However, the Wisconsin Committee’s analysis included their conclusion that the “Red Mass” was a once-a-year religious service which honors lawyers and judges who died in the previous year, and “therefore linked to the profession of law.” *Id.* In the question presented before us, the funeral service is for an *individual* who happens to be a member of the judiciary, and therefore the service is not linked to the profession of law. But even the view of the “Red Mass” as a professional activity is not universal. *See, e.g.*, N.M. Adv. Comm. Jud. Ethics Op. 10-09, where the New Mexico Advisory Committee on the Code of Judicial Conduct (the “New Mexico Committee”) found that the “Red Mass” is essentially a religious activity and therefore involved the personal activities of a judge rather than a part of the judge’s official duties. *Id.* The New Mexico Committee concluded that a judge’s use of his official position or title to solicit attendance or otherwise promote the “Red Mass” was inappropriate and prohibited by their Code of Judicial Conduct “because it lends the prestige of the judicial office to a private interest.” *Id.*

## **AUTHORITY:**

*The Judicial Ethics Advisory Committee is established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct. . . . A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same. Order of the Supreme Court of Virginia entered October 20, 2015.*