

ORANGE COUNTY BAR ASSOCIATION  
PROFESSIONALISM AND ETHICS COMMITTEE

FORMAL OPINION NO. 94-001

STATEMENT OF FACTS

Judges and attorneys often intermingle outside of the courthouse, in both social activities and professional organizations, such as the county bar association. As a result, there are times when judges and attorneys who are presently appearing before them are at a professional or social function together.

QUESTION PRESENTED

THE QUESTION, THEREFORE, IS UNDER WHAT CIRCUMSTANCES IS JUDGE-ATTORNEY CONTACT OUTSIDE OF THE COURTROOM PERMISSIBLE.

APPLICABLE RULES

California Rules of Professional Conduct 5-300; California Code of Judicial Conduct, Canons 1, 2, and 4.

ANALYSIS

1.

RULES PERTAINING TO CONDUCT OF ATTORNEYS

The issue of acceptable contact between attorneys and judges outside of the courtroom is dealt with in both the Rules of Professional Conduct and in the Code of Judicial Conduct. The Rules of Professional Conduct deal only with the giving of gifts and ex parte communications between a judge and an attorney:

"Rule 5-300. Contact With Officials

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

- (1) In open court; or
- (2) With the consent of all other counsel in such matter; or
- (3) In the presence of all other counsel in such matter; or
- (4) In writing with a copy thereof furnished to such

other counsel; or

(5) In ex parte matters.

(C) As used in this rule, "judge" and "judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process."

Therefore, the Rules of Professional Conduct contain no language which makes it unethical for an attorney to have social contact with a judge, either alone or in a group setting, regardless of whether or not the attorney is presently appearing before that judge. So long as the attorney is not giving the judge a gift of some sort, or communicating with the judge about the merits of an active case, the Rules of Professional Conduct put no restraints on an attorney's conduct vis-a-vis a judge outside the courtroom.

## 2.

### RULES PERTAINING TO CONDUCT BY JUDGES

A judge is under a somewhat greater restraint than is an attorney. It is therefore important for attorneys to be as aware of the rules governing judicial conduct as they are of the rules governing attorney conduct. This knowledge will enable attorneys to avoid putting members of the judiciary in compromising or awkward situations. The Code of Judicial Conduct contains language which, although not condemning social contact between court and counsel, creates the need for caution under certain circumstances. The specific areas of the Code which deal with the question of attorney-judge contacts are discussed in greater detail in the discussion which follows.

#### A. The Integrity and Independence of the Judiciary

The first Canon of the Code of Judicial Conduct is a general provision which formulates the responsibility of a judge to serve as an independent and honest official. The Canon and accompanying commentary reads as follows:

"Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary.

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 depend in turn upon their acting without fear or favor...Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility...The basic function of an independent and honorable judiciary is to maintain the utmost integrity in decision-making, and this Code should

be read and interpreted with that function in mind."<sup>1/</sup>

This Canon thus serves as a touchstone for ethical judicial behavior. All choices made by a judge in terms of extracurricular activities must be selected with the goal of an independent and honest judiciary in mind.

B. Avoidance of Impropriety and the Appearance of Impropriety

In keeping with the purposes articulated in Canon 1, Canon 2 of the Code of Judicial Conduct broadly proscribes behavior which involves either impropriety or the appearance of impropriety. Canon 2A provides that a judge should at all times act in a way that promotes public confidence in the integrity and impartiality of the judiciary. The related Commentary states:

"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.

The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence."

Canon 2B provides:

"A judge should not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge should not lend the prestige of judicial office to advance the private or personal interests of the judge or others; nor should a judge convey or permit others to convey the impression that they are in a special position to influence the judge..."

The related Commentary warns judges to distinguish between proper and improper use of the prestige of their office, in both public and private activities.

It is clear that these Canons give judges a great deal of leeway in their choice of outside activities. Nowhere do they definitively

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<sup>1/</sup>The Commentary is designed to provide guidance with respect to the purpose and meaning of the Canons. It is not intended to create additional rules of behavior.

proscribe socializing between judges and attorneys.<sup>2/</sup> They do not prevent judges from attending functions sponsored by bar associations or other legal groups. Rather, they require that a judge consider not only whether his ability to be impartial would be affected by the planned activity, but whether a member of the public would perceive his impartiality to be compromised by the activity.

### C. The Risk of Conflict with Judicial Obligations

A judge's activities outside the scope of his employment are more specifically dealt with in Canon 4:

"Canon 4. A Judge Should So Conduct the Quasi-Judicial and Other Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.

#### A. Extra-judicial Activities in General.

A judge should conduct all of the judge's extra-judicial activities so that they do not: (1) 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.

#### B. Quasi-Judicial and 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..."

A judge may serve on the board of a bar association, or any other organization which is devoted to improvement of the law or the administration of justice, or which is not likely to be involved in litigation before the court of which the judge is a member. (Code of Judicial Conduct 4C(2) and (3); California Judicial Conduct Handbook, 230.100, II-31-II-35).<sup>3/</sup>

The issue of the extent to which judges may accept gifts or benefits from attorneys is addressed by Canon 4D(4) and (5):

"(4) A judge should not 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: (a) a gift incidental to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for

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<sup>2/</sup>Indeed, the commentary to Canon 4A of the Code of Judicial Conduct states that it is unwise for judges to become isolated from the society in which they live.

<sup>3/</sup>However, a judge may not solicit funds for any charitable or civic organization. Canon 4C(3)(d).

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... (c) ordinary social hospitality...

(5) Except as otherwise permitted in Canon 4D(4), a judge should not 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 if the donor or lender is a party or other person who has come or is likely to come, or a person whose interests have come or are likely to come before the judge."

The Commentary states:

"Canon 4D(5) 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. Although Canon 4D(4)(c) does not preclude ordinary social hospitality between members of the bench and bar, a judge should carefully weigh acceptance of such hospitality to avoid any appearance of bias."

Therefore, for example, a judge may receive an award or special recognition from a group such as a bar association so long as that award does not reflect adversely upon impartiality, or lead itself to the impression that the group bestowing it is in a special position to influence the judge. (California Judicial Conduct Handbook, 210.500, II-11-II-12).

#### CONCLUSION

The Rules of Professional Conduct permit an attorney to socialize with a judge outside of the work environment without concern as to whether the attorney is presently appearing before that judge, provided that the two parties do not discuss any pending case and that the attorney does not give the judge anything of value (absent a relationship in which the giving of gifts is normal). The Code of Judicial Conduct permits a judge to socialize with an attorney outside of the work environment, without concern as to whether the attorney is presently appearing before that judge, providing that the nature of the conduct does not affect the judge's ability to be impartial, or the public's opinion about the judge's ability to be impartial. Both sets of behavioral rules are concerned only with the effect any such conduct might have on the ability of a litigant to have a fair and impartial trial. As the Preamble to the Code of Judicial Conduct states:

"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."

If neither the attorney nor the judge engages in activity which threatens this ideal of an independent and competent judiciary, they are both in compliance with the ethical code governing their activities.

CAUTIONARY NOTE

Opinions rendered by the Professionalism and Ethics Committee are given as an uncompensated service of the Orange County Bar Association. Opinions are advisory only and no liability whatsoever is assumed by the Committee or the OCBA in rendering such opinions. Opinions are relied upon at the risk of the user. Opinions of the Committee are not binding in any manner upon any courts, the State Bar of California, the Board of Governors, any of the disciplinary committees, the OCBA or the individual members of the Committee.

In using these opinions, you should be aware subsequent judicial opinions and revised rules of professional conduct may have dealt differently with the areas covered.