Advisory Opinions On Judicial Ethics
Rendered By The Judicial Ethics Committee Through January 24, 1996

The Judicial Section of the State Bar of Texas has appointed a Committee on Judicial Ethics to render advisory opinions on the Code of Judicial Conduct. The opinions of this committee that were handed down through January 24, 1996, are reproduced below.

Faculty Evaluations In Campaign Advertisements

Opinion No. 168 (1994)

FACTS ASSUMED: A municipal judge, who is also a candidate for a county-level judgeship, currently serves as a faculty member for the Texas Municipal Courts Education Center (TMCEC) and as a Discussion Leader for a course at the National Judicial College (NJC). Both the TMCEC and the NJC provide faculty evaluation forms where judges (whose identities are completely confidential) make comments about the judge.

QUESTION: May the judge use the comments from the faculty evaluation form in his campaign advertising, e.g., comments such as "as asset to the judiciary", "knowledgeable", a commonsense judge"? The comments would be used in the context of "this is what other judges from around the state think about Judge X". No comment would be attributed to any particular judge, since the identity of the judge making the comment is unknown.

Would Judge X be permitted to state "this is what lawyers from around the state say about Judge X" if Judge X can ascertain that the judge making the comment was a lawyer?

ANSWER: No. Even though the anonymity of the quotes would remove this question from the specific application of Canon 5(3)*, prohibiting a judge from authorizing the public use of his or her name endorsing another candidate for any public office, this type of advertising would nevertheless imply that other judges were endorsing this candidate. Such an implication would violate Canon 2(A) by causing the public to question the integrity and impartiality of the judiciary. Furthermore, the candidate would be causing the judges who made the evaluations to lend the prestige of judicial office to advance his private interests in violation of Canon 2(B).

Additionally, this type of campaign advertising referring to lawyers is questionable. Text, out of context, is pretext. The quotations in question were made about a faculty/discussion leader. To lift them from that context and apply them in a political campaign would be a misleading use of these speaker evaluations. The judges and/or lawyers who filled out the evaluations may or may not be supportive of the candidate. Canon 2* states that a judge should avoid impropriety and the appearance of impropriety in all the judge's activities. The Committee believes that the unauthorized use of these evaluation quotes would violate the trust in which they were given and should not be used.

Committee on Judicial Ethics

Judicial Section State Bar of Texas

1994-1995

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Campaign Statement That Opponent "Removed" From Office

Opinion No. 169 (1994)

QUESTION: Would a candidate for judicial office violate the Canons of Judicial Conduct by stating that his or her opponent had been "removed" as a District Judge when, in fact, the opponent had not been removed but had been defeated for reelection.?

ANSWER: Yes. The word "removed" could refer to the voters having previously voted for the candidate's opponent and therefore the candidate has lost his or her bench. However, Canon 5(2)(ii)* states that a judge or judicial candidate shall not "knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;".

The term "removed" suggests that a statutory or administrative process was used to expel a judge for misconduct or other matters that would make him or her unfit to serve. Although the voters are, in effect, "removing" an office holder by voting for the non-incumbent, this is a process of the electorate and does not state a reason for defeat. To suggest that a defeated judge was "removed" from office would be misleading and violate Canon 5(2)(ii).

Additionally, judges and judicial candidates should engage in the highest form of campaigning to reflect their understanding of the dignity and important public trust of the office they are seeking. To suggest, by the use of words that could be misleading or taken out of context, that a

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*All Canon references are to the Code of Judicial Conduct effective March 1, 1994.

defeated judge was removed for misconduct defeats not only the Canon, but also the spirit of the office.

CAMPAIGNING FOR OTHER CANDIDATES

OPINION NO. 170 (1994)

QUESTION NO. 1: May a judge of a district, county or J.P. court running for reelection or candidate for any such office hand out campaign material for candidates of one's own political party along with one's material and recommend to people that they vote for these candidates?

QUESTION NO. 2: May a judge of a district, county, or J.P. court running for reelection or candidate for any such office hand out campaign material for candidates of one's own political party along with one's material without making any endorsement but with the request that the voters consider these other candidates?

QUESTION NO. 3: May a judge of a district, county, or J.P. court running for reelection or candidate for any such office hand out a campaign piece produced and paid for by one's own political party that contains an advertisement for such judge along with advertisements for the other candidates?

QUESTION NO. 4: For any of the activities described above which are determined to violate the new code, would it be permissible for one's spouse to engage in such action?

ANSWERS: It is the opinion of the Committee that the first three questions are prohibited by Canon 5(3)* of the Code of Judicial Conduct which provides in the first sentence, "A judge or judicial candidate shall not authorize the public use of his own name endorsing another candidate for public office except that either may indicate support for a political party."

Public activity by handing out campaign material for another candidate by a judge or candidate for judge as set out in Questions 1 through 3 would be a public endorsement. Articulating a "recommendation" as set out in Question 1 or by asking "consideration" as set out in Question 2 would merely be another form of public endorsement.

Question 3, although it does not involve articulating support for another, still involves an overt act of personally handing out campaign material for another candidate and would be a public endorsement.

Opinion No. 1090 concluded that joint campaign activity by two judge candidates would violate the Canon 2 prohibition against lending the prestige of judidial office to advance the "private interests" include candidacy. See also Opinions No. 73, 92, 136, and 145.

Question 4 involves the conduct of a spouse of a judge. The Code does not attempt to regulate the activities of a judge's spouse so this conduct would not be prohibited.

JUDGE AS FACILITATOR OR MODERATOR

OPINION NO. 171 (1994)

QUESTION: May a judge facilitate or moderate a discussion between two factions of a community dispute (developer vs. environmentalist)?

The focus of the discussion is to find ways to improve communication in order to avoid conflicts that ultimately would require legislative or judicial determination. There would be no compensation for the judge.

ANSWER: No. The activity described is that of a mediator. Opinion 161 discusses the judge's role as mediator and clearly states that mediation is not a judicial activity. (See Opinion 161 for further discussion of judges and mediators.)

RECUSAL OF MUNICIPAL JUDGE

OPINION NO. 172 (1994)

QUESTION: Should the judge of a municipal court recuse himself from presiding over the trial of cases of a Defendant who has civil actions pending against the judge in state and federal courts?

FACTS: The question is submitted by an attorney in private practice who also serves as a part-time municipal court judge. In the municipal court over which he presides, there are a number of pending complaints against an individual who has named the judge as a party, along with a number of others, in state and federal lawsuits. There is some indication that the judge may have been added as a party defendant in the civil actions to secure his recusal from the municipal court cases.

ANSWER: Since this is a recusal question, there is a threshold issue which the Committee must address. Since the adoption of TEX. R. CIV. P. 18a and 18b and the companion TEX. R. APP. P. 15 and 15a, the Committee has not responded to questions regarding recusal. See Opinion No. 127 (1989). The facts presented by this inquiry, though, require that a limited exception to this rule be established. The judge presides over a municipal court, and it appears that no statute or rule of court specifically applies to recusal. For instance, TEX. R. CIV. P. 2 provides that the rules govern procedure "in the justice, county, and district courts of the State of Texas in all actions of civil nature, with such exceptions as may be hereafter stated." The judge in question presides over a municipal court, and the question submitted does not involve actions of a civil nature but rather actions of a criminal nature. There appears to be no provision of the Code of Criminal Procedure directly governing this matter. TEX. CODE CRIM. P. ANN. art. 30.01 deals with disqualification but does not appear to apply to this case. It seems that the specific question regarding recusal is not governed by any statute or rule of court. Since the reason for the Ethics Committee's reluctance to deliver opinions on

*All Canon references are to the Code of Judicial Conduct effective March 1, 1994.

recusal issues does not exist in this case, we conclude that we should proceed to render an opinion.

Canon 2A* provides that a judge should act in a way that promotes public confidence in the integrity and impartiality of the judiciary . Canon 2B provides that a judge should not allow "family, social, or other relationships to influence his or her judicial conduct or judgment." While not directly governing the issue, the spirit of Rule 18b(2), which provides that a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned, has applicability here. Consequently, it is the conclusion of the Committee that the judge should recuse himself. Procedural mechanisms which might effectively deal with the problem of a party making a practice of naming a judge and his successors as party defendants for the sole purpose of securing a recusal are beyond the scope of this Committee's authority.

Ex Parte Communications To Municipal Court Judge; Municipal Court Judge Acting As City Attorney For The Same Municipality; Municipal Court Judge As A Practicing Attorney

Opinion No. 173 (1994)

QUESTION NO. 1: What is a municipal court judge's ethical obligation upon receiving ex parte phone communications from a criminal defendant concerning a pending case?

QUESTION NO. 2: May a municipal court judge simultaneously serve as city attorney for the same city?

QUESTION NO. 3: May a municipal court judge who is a practicing attorney preside in a case when one of his clients is a party?

ANSWER: Judicial Ethics Opinion 154 (1993) discusses a judge's obligation when receiving ex parte communications in writing. The general considerations discussed there also apply here. It should be noted that Canon 3A(4) and (5) discussed in Opinion 154 have been amended by the new Code effective March 1, 1994. Comparable provisions are now found in Canon 3B(8) of the present Code; however, it should also be noted that Canon 3B(8) does not apply to justice and municipal court judges. See Canon 6C(1)(a). Instead, Canon 6C(2) of the present Code applies to municipal and justice court judges.

Canon 6C(2) provides that a justice or municipal court judge should not consider ex parte communications concerning the merits of a pending judicial proceeding, unless authorized by law or by one of the seven listed exceptions to the rule. Thus, justice and municipal court judges may comply with Canon 6C(2) by doing the following: 1. Upon receiving an ex parte phone call, the judge should inform the caller that ex parte communication is prohibited unless it falls within one of the exceptions of Canon 6C(2). The judge should then converse with the caller in order to determine if the call is a proper ex parte communication allowed by Canon 6C(2) or an improper ex parte communication. If improper, the judge should inform the caller that the communication is improper, that such communication should cease, that the judge will take no action whatsoever in response to the call, and that no improper communication should take place in the future. The call should then be ended.

Regarding Question No. 2, a municipal court judge should not simultaneously serve as an attorney for the same city. Such action compromises the independence of the judiciary. It violates numerous code provisions including, at least, the following: 1) Canon 1, which requires a judge to uphold the integrity and independence of the judiciary, 2) Canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, 3) Canon 2B, which provides that a judge should not allow any relationship to influence judicial conduct or judgment nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge, 4) Canon 3A, which requires that a judge's judicial duties take precedence over all the judge's other activities, 5) Canon 3B(2), which provides that a judge shall not be swayed by partisan interest, public clamor or fear of criticism, 6) Canon 3B(5), which requires that a judge perform judicial duties without bias, 7) Canon 4D(1), which requires that a judge refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with persons likely to come before the court on which the judge serves, 8) Canon 4I, which provides that a judge may receive compensation 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, 9) Canon 5(1), which provides that a judge shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which he holds.

Regarding Question 3, a municipal court judge who is a practicing attorney should not preside in a case in which one of his clients is a party. Doing so would violate all of the Canons listed in the previous paragraph. In such a case, the judge should recuse himself. See Judicial Ethics Opinion 172 for further guidance.

Passing Out Business Cards Of The Harris County Criminal Lawyers Association

Opinion No. 174 (1994)

QUESTION: Does the Code allow a judge to give to unrepresented criminal defendants business cards of the Harris County Criminal Lawyers Association?

ANSWER: The Harris County Criminal Lawyers Association is a private and voluntary organization of criminal defense attorneys. The organization has asked district and county court judges to provide unrepresented defendants with a business card urging the defendant to call the association for referral to a lawyer among its members.

Canon 2B states that a judge should not lend the prestige of judicial office to advance the private interests of others, nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. The Committee concludes that by presenting the association's business card, the judge would be advancing the private interests of the association and its members, in violation of Canon 2B.

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Advisory Opinions On Judicial Ethics Rendered By The Judicial Ethics Committee

Probate Court Investigator Serving Simultaneously As Master In The Same Court

Opinion No. 175 (1994)

QUESTION 1: May a probate judge appoint a person to serve simultaneously in the same court as both a master under Section 574.0085 of the Health and Safety Code and as a probate court investigator under Section 25.0025 of the Government Code?

QUESTION 2: May a person appointed to be a probate court master simultaneously serve in the same court as a court investigator?

FACT ASSUMED: The person serving as statutory probate court investigator would file applications for guardianship for indigent incapacitated persons.

ANSWER TO QUESTION 1: The Committee has previously declined to answer a question concerning who a judge may appoint as a master because that is a question of law as distinguished from a question of ethics. See Opinion No. 79 (1985). Whether a person is qualified to be appointed a master is a question of law. As we stated in Opinion No. 79, the only foreseeable ethical consideration would be if a judge knowingly appointed a person who was not qualified or made an appointment in disregard of Canon 3C(4). Because the Committee assumes the judge would only appoint a qualified person and would follow the requirements of Canon 3C(4), the Committee declines to answer the question for the same reasons it declined to answer a similar question in Opinion No. 79.

ANSWER TO QUESTION 2: No. In Opinion No. 104 (1987) and again in Opinion No. 127 (1989), the Committee concluded that a judge should not prepare pleadings to begin the process of civil commitment for mentally ill persons. The Committee adheres to those conclusions and concludes that a master should not do so for the same reasons stated in Opinions 104 and 127.

Even if the master does not prepare applications for guardianship or other pleadings, the Committee concludes that he should not simultaneously serve in the same court as an investigator. In Opinion No. 166 (1993), the Committee concluded that a master conducting probable cause hearings and mental commitment cases should not appear as an attorney on unrelated matters in the same court he serves as a master. Opinion No. 166 was based on Canon 6D, which provides that a part-time master should not "practice law" in the court in which he or she serves. Although the duties of a court investigator may not include practicing law and may therefore not be expressly prohibited by Canon 6D(2), such simultaneous service would contravene other code provisions. These include, at least, the following: 1) Canon 1, which requires a judge to uphold the integrity and independence of the judiciary, 2) Canon 2(A), which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, 3) Canon 2B, which provides that a judge should not allow any relationship to influence judicial conduct or judgment nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge, 4) Canon 3A, which requires that a judge's judicial duty takes precedence over all the judge's other activities, 5) Canon 3B(2), which provides that a judge shall not be swayed by partisan interests, public clamor or fear of criticism, 6) Canon 3B(5), which requires that a judge perform judicial duties without bias, 7) Canon 4D(1), which requires that a judge refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with persons likely to come before the court on which the judge serves, 8) Canon 4I, which provides that a judge may receive compensation 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, and 9) Canon 5(1), which provides that a judge shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which he holds. The Committee concludes that serving simultaneously as a master and court investigator would be likely to cause a conflict with all of these provisions.

In Opinion No. 173 (1994), the Committee cited all these provisions in concluding that a municipal court judge should not simultaneously serve as city attorney for the same city. The Committee believes that the same conflicts are inherent when a probate court master serves simultaneously as the court's investigator.

Applicability Of Limitations on Judicial Fundraising In New Canon 5, Effective January 1, 1995, To Candidates In The 1994 General Election

Opinion No. 176 (1995)

QUESTION: May a judge or judicial candidate in the 1994 general election solicit and acccept contributions later than 120 days after the general election?

ANSWER: Yes. On January 1, 1995, a new version of Canon 5 of the Code of Judicial Conduct takes effect that imposes time limits on fundraising by judges and judicial candidates. The relevant parts provide:

(4) In addition to any other restrictions imposed by law a judge or judicial candidate shall not either personally or through others solicit or accept contributions:

(i) earlier than 210 days before the filing deadline for the office sought by the judge or

(ii) later than 120 days after the general election in which the judge or judicial candidate seeks office.

(5) The requirements of (4) above shall not apply to political contributions solicited or accepted solely for one or more of the purposes sent forth in Tex. Elec. Code Sec. 253.035(i).

The question is whether section (4) applies to the 1994 election, so that the 120 days begins to run on November 9, 1994, the day after the general election. The Committee concludes that it does not.

The Supreme Court adopted the order establishing the new Canon 5 on September 21, 1994, but did not make it effective until January 1, 1995. The Committee concludes that if the Supreme Court intended for the new limitation to apply

to judges and candidates in the 1994 election, it would have made the new Canon 5 effective on or before November 9, 1994. Because it did not do so, we conclude that the new Canon 5 imposes no limitations on fundraising by judges and judicial candidates in the 1994 general election.

DOLLAR LIMITS ON FUNDRAISING BY JUDGES

OPINION NO. 177 (1995)

QUESTION: Is there a dollar limit on the amount of money a judge who was elected in 1994 and who will not stand for reelection until 1998 may raise after January 1, 1995?

ANSWER: No. The Code of Judicial Conduct contains no provisions on this subject.

MAINTAINING A PART–TIME OFFICE AT A LAW SCHOOL OF A STATE UNIVERSITY

OPINION NO. 178 (1995)

QUESTIONS: 1. May a judge of a court of appeals maintain a part-time office at a state law school where a portion of his judicial duties would be performed? The office would be provided without charge, and the judge would be an occasional guest lecturer at the law school.

2. If the jduge may maintain such an office, would he be required to disqualify or recuse himself from any appeal involving the university?

3. Does the Code require that a judge perform judicial duties exclusively at the place where the ocurt of appeals sits?

ANSWERS TO QUESTIONS: 1. Yes, subject to certain qualifications.[1] Canon 4d.(4)(c) provides that a judge shall not accept a gift from anyone and lists certain exceptions. The pertinent exception provides that a judge may accept "any other gift," which means a gift not specifically prohibited in the Code, "only if the donor is not a part or person whose interests have come or are likely to come before the judge; ...." If the university's interests have not come and are not likely to come before the judge, the judge could accept the gift of a free part-time office without violating that provision. If, on the other had, the university has interests that have come or are likely to come before the judge, the jduge should not accept the gift of a free office.

Canon 3B.(11) provides, "The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion, or in accordance with Supreme Court guidelines for a court approved history project." Performing an appellate judge's duites outside of the court's offices creates a risk that confidences of the court will be lost. The affirmative answer to this question assumes that the judge could conduct his research, writing, and oral communications at the part-time office in a way that would preserve the confidences of the court. If that is not the case, the judge should not perform judicial duties in such a location.

2. Questions of disqualificaiton and recusal are not governed by the Code of Judicial Conduct. They are controlled by Tex. R. Civ. P. 18b and Tex. R. App. P. 15a. The Judicial Ethics Committee does not issue advisory opinions on questions of law.

3. The Code does not mention this issue, but Canon 2A provides that a judge shall comply with the law. Therefore, the judge is required to comply with any statute on this subject.

RENTAL OF FORMER LAW OFFICE TO PRACTICING LAWYERS

OPINION NO. 179 (1995)

QUESTION: Does a violation of the Code of Judicial Conduct occur if a judge's former law office now owned by a trust created to benefit judge's minor children is rented to lawyers who practice in judge's court?

FACTS: Judge owned office building where he practiced law. One year, prior to filing to run for his present position, the judge conveyed ownership of the building to a trust established to benefit the judge's minor children. Judge's brother is trustee. Since the judge assumed the bench (approximately 1-1/2 years after conveying the building to the trust), the trustee has made all decisions concerning management of the trust assets with no input from the judge. The portion of the building which is judge's former law office is now rented to lawyers who practice in judge's court.

FACTS ASSUMED: Judge's children are receiving a direct benefit from the rental of the building by lawyers. Lawyers are not paying greater than market value for the office space.

ANSWER: Yes.[2] This question is not governed by Opinion 153 nor is it a violation of Canon 4D. (1), (2), or (3), because this is not a financial or business dealing of the judge. It is not an economic interest of the judge since he is not an officer, advisor or other active participant in the affairs of the trust. See Canon 8B.(5).

The Code does not govern the conduct of judge's family members under the circumstances presented here, assuming the law office is being rented for fair market value. Canon 4.D(4) (d) specifically allows the judge's children to receive a benefit provided the benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

Canon 2A provides that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B requires that a judge not allow any relationship to influence his judicial conduct or judgment or permit others to convey the impression that they are in a special position to influence the judge.

Although the judge has made all efforts to remove himself from the management, control or involvement in the operation of the trust, the fact remains that his children are directly benefiting from the rents paid by lawyers who regularly appear before the judge. Because the judge has a statutory duty to support his minor children, any support the children receive from the trust provides an indirect benefit to the judge. He has a conflict between his desire to be removed and detached from the operations of the trust, but is required by Canon 4

[1]One member of the Judicial Ethics Committee dissents.
[2]One member of the Judicial Ethics Committee dissents.

D.(3) to "... make a reasonable effort to be informed about the personal economic interest of any family member residing in the judge's household."

It is the Committee's opinion that the judge cannot allow lawyers to appear in his court when those lawyers are renting his former law office from a trust established to benefit his minor children who are living in the judge's household. If this relationship continues, public confidence in the integrity and impartiality of the judiciary would be diminished, and the public would have the impression that some lawyers are in a special position to influence the judge.

JUDGE'S SPOUSE A CANDIDATE FOR ELECTIVE OFFICE

OPINION NO. 180(1995)

QUESTION: May a judge whose spouse is a candidate for elective office:

1) Allow the judge's name and title to be used in press releases or campaign literature identifying the candidate as the judge's spouse?

2) Attend campaign functions with the candidate?

3) Be introduced by name and title as the candidate's spouse?

4) Speak at public gatherings generally in support of the spouse's candidacy?

ANSWERS: 1) No. Canon 2B provides that a judge should not lend the prestige of judicial office to advance the private interests of the judge or others. Additionally, the use of the judge's name and title in campaign literature could be perceived as a public endorsement of another candidate for public office in direct violation of Canon 5(3).

2) Yes. A judge may attend political events so long as any views expressed by the judge comport with the applicable canons. Canon 5(3).

3) No. Identifying the judge by title would lend the prestige of judicial office to advance the private interests of another. Canon 2B.

4) No. The judge's public support of the spouse's candidacy would violate Canon 2B and Canon 5(3). See opinions No. 60, 73, 130.

EFFECTIVE DATE OF FUNDRAISING LIMITATIONS

OPINION NO. 181 (1995)

QUESTION: May a judge elected in 1994 and who does not plan to seek judicial office in 1996 have a fundraising event in November 1995?

ANSWER: No. In Opinion 176, the Committee concluded that section 4(ii) of new Canon 5, the 120 day post-election fundraising deadline, did not apply to judges and candidates in the 1994 elections because it did not take effect until January 1, 1995. To have applied the new Canon to 1994 candidates would have required that the deadline period begin to run on November 9, 1994, which was before the new Canon took effect. There is no such problem, however, in applying section 4(i), the 210 day pre-election fundraising deadline, to candidates in the 1994 election, as well as to all other judges and candidates.

Section 4(i) provides a date when persons expecting to be candidates in the 1996 election may begin to raise funds. It allows fundraising after that date only by persons who, in good faith, expect to be candidates for judicial office in the 1996 election, and allows only such persons to begin raising funds 210 days before the filing deadline for the office to be sought in the 1996 election.

Because the judge who posed this question does not plan to seek office in 1996, she may not have a fundraising event on November 11, 1995. We further conclude, however, that the judge in question, like all candidates in the 1994 general election, may raise funds until the 210th day before the filing deadline for the 1996 elections. See Opinion 176.

BENEFITING RELATIVE WITH POWER OF APPOINTMENT

OPINION NO. 182 (1995)

QUESTION: The Texas Human Resources Code provides that the county judge and the district judges in the county shall comprise the county juvenile board. The Code requires the board to appoint an advisory council consisting of not more than nine citizens. By practice, the board has allowed each board [member] to appoint one member of the council. May a district judge, sitting as a member of the county juvenile board, appoint his brother-in-law to the county juvenile advisory council?

ANSWER: No. Canon 3C(4) provides that, "A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism." In Opinion No. 83 (1986), we found the canon prevented a judge from appointing the lawyer-employee of his father and brother to represent the indigent. Although Opinion No. 83 is primarily concerned with the extent to which the lawyer's compensation would benefit the father and brother, and thereby accomplish indirectly that which cannot be done directly, it is not based solely on the pecuniary benefits that would accrue to the judge's relatives. Opinion No. 83 is equally concerned with the appearance of impropriety and perception of favoritism inherent in the arrangement, which concerns, together with nepotism, are more obviously present in the instant case.

Although we do not render legal opinions, and therefore do not decide whether Section 573.041 of the Texas Government Code answers the question posed, we note that a brother-in-law is within the degree of affinity commonly addressed by nepotism statutes. *See* TEX. GOV'T. CODE ANN. §§ 573.041, .002, .024 (Vernon 1994). Thus, by appointing his brother-in-law, the judge would engage in nepotism. Because Canon 3C(4) proscribes nepotism, the judge may not appoint his brother-in-law to serve on the advisory council. Additionally, Such an appointment would run afoul of Canon 2B's requirement that a judge not allow any relationship to influence judicial conduct or judgment and of Canon 2A's requirement that a judge act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Advisory Opinions On Judicial Ethics
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Ex Parte Hearing Concerning Hiring of
Experts to Assist Indigent
Criminal Defendants

Opinion No. 183 (1995)

QUESTION: May a judge ethically conduct an ex parte hearing with appointed defense counsel representing an indigent client on the subject of expert witnesses?

BACKGROUND: A defendant is charged with capital murder, and the state is seeking the death penalty. Appointed counsel seeks judicial authorization to employ experts for assistance, but does not want the prosecutor to know the relief requested, the reasons urged in support of the motion, or the relief granted.

ANSWER: Yes. Canon 3B(8) generally prohibits ex parte communications concerning the merits of a pending or impending judicial proceeding, but it does not prohibit ex parte communications expressly authorized by law. *See* Canon 3B(8)(e). At least 10 states have judicially allowed ex parte hearings on such requests. *State of Louisiana v. Touchet*, 642 So. 2d. 1213, 1218 (La. 1994). At least two have held that such ex parte hearings are required by the United States Constitution. *State v. Touchet, supra; State of North Carolina v. Ballard*, 428 S.E. 2d 178, 183, (N.C. 1993). In *Ballard*, the court limited the requirement to psychiatric experts, but in *Touchet*, the rule was extended to hearings to authorize funds for experts to examine physical evidence gathered by the state. *See also Ake v. Oklahoma*, 105 S.Ct. 1087, 1096 (1985) (referring to ex parte hearing).

The Committee concludes that a judge would not violate Canon 3B(8) by conducting such an ex parte hearing, assuming the judge believed that it was expressly authorized by law.

The Committee on Judicial Ethics expresses no opinion on questions of law; therefore, it expresses no opinion on the issue of whether an ex parte hearing is constitutionally required in any particular case. The cases above are mentioned only to demonstrate that a judge could reasonably conclude that the ex parte communication was expressly authorized by law so as to fall within the exception provided by Canon 3B(8)(e).

Political Advertising:
Endorsements, Stand on Abortion

Opinion No. 184 (1995)[1]

QUESTION NO. 1: May a judicial candidate ethically list in political advertising the endorsement of special interests groups with an obvious political agenda, such as Texans Against Drunk Driving, Texans for Tort Reform, Texas Prosecutors Association, Texas Peace Officers Association, Texans for Law Enforcement, Pro-Life Texans, or Texans for Choice?

ANSWER: Yes, a judicial candidate may list endorsing groups. Canon 5 speaks to political activity and states:

1. A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held.

2. A judge or judicial candidate shall not make pledges or promises of conduct in office other than faithful and impartial performance of judicial duties.

It is obvious that the endorsing organizations have made strong political statements. The judge or candidate by listing the organizations has made no statment indicating an opinion on an area subject to judicial interpretation. The only statement the candidate is making is that these groups endorse him/her.

QUESTION NO. 2: May a judicial candidate advertise or state a position on abortion, i.e. "I am the pro-choice/pro-life candidate"?

ANSWER: No, a judicial candidate may not make a statement on abortion.

A judge or candidate may not make a statement declaring that he/she is pro-life or pro-choice, based on Canon 5 paraphrased above. The judge or candidate is clearly making a statement that indicates an opinion on an issue possibly subject to judicial interpretation. Further, there is a strong implication of a promise of particular conduct in office other that the faithful performance of official duties.

Public Support for Anti–Crime Luncheon

Opinion No. 185 (1996)

BACKGROUND: A luncheon is being held as part of a "Walk Out on Crime" weekend sponsored by the Citizens Crime Commission of Tarrant County. The speaker will be a nationally recognized expert on domestic terrorism and workplace violence. He will provide an overview of current activities in American cities and their implications for Tarrant County. The luncheon is one of many events of the weekend.

QUESTION: May a judge be on the host committee, attend the event, promote it within the community, and have her name on the invitation?

ANSWER: Yes. Canon 4 provides that a judge may participate in activities concerning the law, the legal system, and the administration of justice so long as such participation does not cast doubt on her capacity to decide any issue that may come before the court.

It appears from the description of the luncheon that the focus of the Citizens Crime Commission is to explain problems that are facing the legal system and suggest possible solutions. The judge may be on the host committee, attend the luncheon, and allow her name on the invitation.

In promoting the luncheon, the judge should not lend the prestige of her office to advance the private interests of any vendors or others associated with the event as prohibited by Canon 2.

See also Opinions 82 and 163.

[1] Two Committee members dissent. One would answer both questions in the affirmative, and the other would answer both in the negative.

Advisory Opinions On Judicial Ethics Rendered By The Judicial Ethics Committee

Applicability of Code to Retired Judge Not Subject to Assignment

Opinion No. 186 (1996)

QUESTION NO. 1: Does the Code of Judicial Conduct apply to a former judge who is now retired and has not elected to take judicial assignments?

ANSWER TO QUESTION 1: No. Canon 6F provides that "a Senior Judge, or a former district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer" shall comply with all provisions of the Code, with minimal exceptions. However, compliance with the Code is not required for a former judge, now defined as a "Retired Judge" by Canon 8B(14), who has not consented to be subject to assignment pursuant to Tex. Gov't. Code Ann. § 75.001 (Vernon Supp. 1996).

QUESTION NO. 2: Does the Code of Judicial Conduct prohibit a former judge who is not retired and has not elected to take judicial assignments from writing to Texas district and appellate judges requesting their contribution to a fund to be used to seek an increase in judicial pay?

ANSWER TO QUESTION 2: No. Given the resolution to Question No. 1 above, the current Code of Judicial Conduct does not prohibit a former judge who is now retired and has not elected to take judicial assignments from writing to Texas district and appellate judges requesting their contribution to a fund to be used to seek an increase in judicial salary.

Municipal Judge as Part-Time Master

Opinion No. 187 (1996)

QUESTION: May an associate municipal court judge serve as a part-time Special Master under the authority of Article 11.07 3(d), V.A.C.C.P.?

ANSWER: The Committee is of the opinion that this is a question of law not a question of ethics.

The Committee on Judicial Ethics writes advisory opinions interpreting the Code of Judicial Conduct. The Committee declines to answer the question and suggests the judge seek a legal opinion from the proper forum.

Newly Elected District Judge "Winding Down" Obligations as Ex County Judge

District Judge on Criminal Justice Policy Committee

Opinion No. 188 (1996)

QUESTION: (A) May a newly appointed district judge "wind down" his service on the North Central Texas Council of Governments by attending three meetings in his capacity as immediate past president? Similarly may he attend two meetings remaining during his term as the Texas representative on the board of the National Association of Regional Councils of Government?

(B) Additionally, this district judge asks if he can sit on the Criminal Justice Policy Committee of the local Council of Governments, a committee which deals exclusively with criminal justice and juvenile and juvenile justice policy issues.

ANSWER: (A) No. Canon 4H prohibits judges from accepting appointment to a governmental committee that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. There is no provision for "winding down" a previous appointment; if it is improper to accept such an appointment, it is improper to continue such an appointment after assuming the bench.

(B) Yes. Service on a local council of governments committee concerned exclusively with criminal justice and juvenile justice policy issues is permitted by the language of Canon 4H allowing judges to accept appointment to governmental committees concerned only with issues of fact or policy involving the improvement of the law, the legal system, or the administration of justice. However, service on such a committee must comply with Canon 4A's admonition that the activities not interfere with judge's proper performance of judicial duties and not cast reasonable doubt on his capacity to act impartially as a judge.

County Judge Serving on United Way Board of Directors

Opinion No. 189 (1996)

QUESTION: May a constitutional county court judge who performs judicial functions serve on the board of directors of a local United Way charitable organization, provided that the board does not participate in fund raising and only sets policy?

ANSWER: Yes. A county judge who performs judicial functions is subject to the provisions of the Code of Judicial Conduct under Canon 6(B), subject to exceptions not relevant to this inquiry. Canon 4(C) of the Code authorizes a judge to serve as a director of a charitable organization, provided that he or she does not personally solicit funds and provided that service on the board will not otherwise interfere with the performance of his or her judicial duties.

Part-Time Associate Judges and Partners Prohibited from Practicing in Court Where Associate Judge Appointed

Opinion No. 190 (1996)

QUESTION: May the partners or associate attorneys of a part-time associate judge practice in the court of the district judge where the associate judge is appointed to serve?

ANSWER: No, they may not. Canon 6D(2) states that a part-time commissioner, master, magistrate, or referee should not practice law in the court in which he or she serves. Canon 2B provides that a judge shall not permit others to convey the impression that they are in a special position to influence the judge. In this situation, partners or associates of the part-time associate judge would be in a position to convey this impression.

Advisory Opinions On Judicial Ethics Rendered By The Judicial Ethics Committee

Appellate Judge Writing Article Discussing Prior Decision

Opinion No. 191 (1996)

QUESTION: May a judge on the Court of Criminal Appeals or the Supreme Court write a newspaper article in the form of an opinion/editorial piece discussing his/her stated position on a case that has been finally resolved by the Court?

ANSWER: No. Canon 3(B) prohibits a judge from discussing a matter which may show his/her probable decision in a matter. Even though a matter has already been decided, it can be revisited and the opinion/editorial would be talking about more than just particular procedures of the court, which is what this Canon allows. More importantly, this would be a direct violation of Canon 3(B)11 where a judge is not allowed to talk about "discussions, ..., positions taken," and/or "writings of appellate judges..." as these "shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines...."