

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-351
Issued: July 1992

In 2004, the Kentucky Supreme Court adopted comprehensive changes to the Code of Judicial Conduct. For example, this opinion refers to Canon 3C(1), which is now Canon 3E(1) and the term "should" has been changed to "shall." In addition, the cited portions of Canon 5 are now in Canon 4, and the provisions of Canon 7 are now in Canon 5. Lawyers should consult the current version of the Code of Judicial Conduct and Commentary, SCR 4.300 before relying on this opinion.

- Question:** To what extent is a lawyer permitted to provide loans, gifts, and campaign contributions to a judge before whom the lawyer practices?
- Answer:** A lawyer may not provide loans or gifts to a judge before whom the lawyer practices. A lawyer may extend "ordinary social hospitality" to a judge before whom the lawyer practices. As a matter of ethics, a lawyer may make a contribution to a judicial campaign in a manner consistent with Canon 7 of the Code of Judicial Conduct.
- References:** SCR 3.130 Rule of Professional Conduct 3.5; SCR 4.300 Code of Judicial Conduct Canons 2, 3, 5, and 7; SCR 3.530 (Advisory Opinions) and 4.310 (Judicial Ethics Committee and Opinions); E. Thode, Reporter's Notes to the Code of Judicial Conduct (ABA/ABF1973); J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics (Michie 1990).

OPINION

Rule of Professional Conduct 3.5 provides in pertinent part that;

A lawyer shall not: (a) seek to influence a judge... by means prohibited by law;... Comment (1) to this Rule elaborates: Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The Ethics Committee of the Kentucky Judiciary provides advisory opinions construing SCR 4.300 (Code of Judicial Conduct), but that committee will provide such opinions only at the request of a "justice, judge, or trial commissioner." SCR 4.310(2). The ethics committee provides the following observations for the guidance of Kentucky lawyers pursuant to SCR 3.530, in an effort to supplement Rule 3.5 and the comments thereto: (See also Rule 8.3(e).)

SCR 4.300 Code of Judicial Conduct Canon 2 states that “a judge should avoid impropriety and the appearance of impropriety in all of his (of the judge’s) activities.” Canon 2.A. further provides that “a judge should respect and comply with the law and should conduct himself (or herself) at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 2.B. provides that “a judge should not allow... family, social, or other relationships to influence ... judicial conduct or judgment... and should (not) convey or permit others to convey the impression that they are in a special position to influence (the judge).”

Canon 3.C. (1) provides that “a judge should disqualify himself (or herself) in a proceeding in which (the judge’s) impartiality might reasonably be questioned, including but not limited to (the instances enumerated in the text of the rule that follows).”

These general considerations may control a situation that is not covered by the following, more specific provisions relating to loans, gifts, and grants, and campaign contributions. See Shaman, Lubet and Alfini at 202-03 (citing both lawyer and judicial disciplinary cases).

Canon 5.C. (4) provides,

Neither a judge nor a member of (of the judge’s family) residing in (the judge’s) household should accept a gift, bequest, favor, or loan from anyone except as follows:

- (a) a judge may accept a gift incident to a public testimonial to (the judges); books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and (the judge’s) spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
- (b) a judge or a member of (the judges) family residing in (the judge’s) household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;
- (c) a judge or a member of (the judge’s) family residing in (the judge’s) household may accept any other gifts, bequests, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before (the judge).

Several of the Reporter’s Notes to the Code of Judicial Conduct are particularly helpful, and we are setting them out word for word

The “social hospitality” issue proved to be difficult. Should a judge be precluded from going to a party given by a lawyer because the food and drink is a gift or favor? Such questions could be continued in gradations of gifts ranging from a cigar to a month’s visit

at a mountain cabin. The committee opted for a standard of “ordinary social hospitality.” The judge should not be excluded from all social relationships with lawyers or persons who likely to be litigants in (the judge’s) court. The scope of permissible hospitality will vary somewhat from place to place, depending on local customs and practices. The committee felt that there are common sense limits and that the standard is understandable and defensible; for example, the offer to a judge a month at the mountain cabin of a lawyer friend who practices in the judge’s court is clearly not ordinary social hospitality, and acceptance is prohibited. Persons who think that the “ordinary social hospitality” test sets too relaxed a standard should keep in mind that the “impropriety and appearance of impropriety.” ...provisions of Canon 2 are applicable to all of a judge’s activities....

Perhaps the most important observation in the Reporter’s Notes is the following bit of common sense relating to the construction of Subsection (c),

The gift, bequest, favor, or loan cannot be accepted if the donor is a party to a proceeding before the judge. A lawyer who practices or has practiced before the judge falls into the last-mentioned category.

Nor is the “ordinary social hospitality” rule a loophole allowing lawyers to give otherwise prohibited gifts and favors. Shaman, Lubet, and Alfini observe (202-03) that “(a)lthough, again, ordinary social hospitality is permitted, the concept must be tempered by the circumstances. So, for example, a judge may be disciplined for regularly and publicly accepting gratuities from lawyers who frequently appear before him.” (collecting cases including *In re D’Auria*, 334 A.2d 332 (1974) (worker’s compensation judge a regular and frequent luncheon guest of attorneys and representatives of insurance companies); *In re Vaccaro*, 409 N.Y.S.2d 1009 (1977) (law firm paid for judge’s hotel bill and weekend at country club).)

Canon 7.B.(2) provides that a judicial candidate, including an incumbent, may accept campaign contributions, but only through a campaign committee. The candidate may not use or permit the use of such contributions for the private benefit of the candidate or his or her family. This section specifically provides that,

“Such committees are not prohibited from soliciting campaign contributions and public support from lawyers.”

On the other hand, KRS 121.045 and 121.990(4) appear to make lawyer contributions illegal, and provide for the draconian penalty of disbarment. In KBA E-277 (1984) the ethics committee opined that lawyers may make campaign contributions consistent with the Code of Judicial Conduct. The committee further opined that the above cited criminal statutes are unconstitutional. KBA E-277 is reaffirmed by this committee, with the important reservation that it is not the function of the committee to opine on questions of law or decide constitutional questions. In that regard the views of the committee in E-277 may be persuasive, but they were, nevertheless, gratuitous.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.