

## ETHICS ADVISORY OPINION

### 16-03

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

#### **Factual Background:**

Lawyer J has just been elected to the South Carolina judiciary. Lawyers A and B, friends of Lawyer J, would like to arrange a luncheon and give a gift to Lawyer J in celebration of this event.

#### **Questions Presented:**

Numerous questions were posed, which the Committee has restated as follows:

1. When, if ever, is it permissible for a group of lawyers to pay for an event (such as a luncheon or reception) to celebrate the investiture of a new judge?
  - A. May an event be paid for by a group of lawyers, all of whom have a pre-existing relationship with the new judge?
  - B. May an event be paid for by, or hosted at, a law firm, including the new judge's former firm?
  - C. May an event be paid for by a local bar association? If so:
2. May Lawyers A and B, or the new judge's former law firm, contribute funds to pay for the event?
3. May Lawyers A and B, or the new judge's former law firm, solicit funding for the event through direct contact with other lawyers and law firms?
4. When, if ever, is it permissible to collect funds for a gift for a new judge?
  - A. Can a group of lawyers, all of whom have a pre-existing relationship with the new judge, collectively pay for a gift?
  - B. Can the new judge's former law firm organize the collection of funds for a gift, or contribute funds toward the gift?
  - C. Is the dollar value of the gift relevant to the ethical inquiry?

## **Summary:**

Whether it is ethically permissible to host an event for, or give a gift to, a newly elected judge depends on the nature of the relationship between the host(s) or donor(s) and the new judge, as well as on the nature of the event or gift. Accordingly, it is neither possible or desirable for the Committee to offer specific opinions on many of the questions posed. Instead, the Committee's goal in this opinion is to identify the principles that should guide an individual attorney's conduct with respect to judges of the attorney's acquaintance.

Specific guidance is possible, however, with respect to questions 1(c) and 2(c):

1(c): A lawyer or law firm, individually or together with other lawyers or law firms, may anonymously contribute funds to a reception hosted by a local bar association.

2(c): The dollar value of a contemplated gift is never, by itself, determinative of the ethical propriety of a contemplated gift.

## **Opinion:**

### Summary of Pertinent Rules and Advisory Opinions:

#### South Carolina Rules of Professional Conduct

Rule 3.5(a) of the South Carolina Rules of Professional Conduct prohibits lawyers from "seek[ing] to influence a judge ... by means prohibited by law." The commentary to Rule 3.5 advises lawyers to be familiar with the Code of Judicial Conduct, Rule 501, SCACR, because "[a] lawyer is required to avoid contributing to a violation of such provisions." Rule 3.5, comment 1; see also *La. State Bar Ass'n v. Harrington*, 585 So.2d 514, 521-22 (La. 1990) (holding that the phrase "means prohibited by law" includes inducing a violation of the judicial canons). Similarly, Rule 8.4(g) prohibits lawyers from "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

This Committee has issued three opinions interpreting Rule 3.5(a) or its predecessor, Disciplinary Rule 7-110(A):

Op. 84-10. Construing DR 7-110(A), the Committee opined that while lawyers may ethically contribute to a portrait fund for a sitting judge, all contributions must be anonymous. Anonymity is required even if no contributing lawyer intends to influence the judge, and even if knowledge of contributors' identities would not actually influence the judge. The mere fact that the list was provided could "create an impression that persons on such a list may be bringing notice to themselves by way of the gift." See RPC 3.5(e)(3).

Op. 90-46. The Committee opined, citing ACSJC Opinion 07-1988, *infra*, that a county bar may invite judges to bar events so long as the invitation is neither intended to influence the judge nor

likely to actually do so. However, the Committee expressed concern that “testimonial gifts” could be “problematic” because such gifts might not truly be public, given that not all lawyers are members of a county bar. The Committee’s concern on this point would seem to be resolved by Canon 4D(5)(a), which explicitly permits “gift[s] incident to a public testimonial.”

Op. 97-40. Considering the same question posed by ACSJC Opinion 8-1998, *infra* (i.e., whether lawyer friends of a judge could organize a baby shower in the judge’s honor), the Committee opined that there is no ethical violation in a gift “predicated on the existence of a friendship ... outside of any judicial relationship,” provided the gift is “social in nature, is not intended to sway or influence the judge, and is fairly commensurate with the occasion and the relationship.”<sup>[1]</sup> The Committee further noted that “the lawyer must make a subjective analysis of the relationship with the judge, balancing the friendship against the appearance of attempting to influence the judge in a present or future case.”

#### South Carolina Code of Judicial Conduct

The Committee recognizes that lawyers are not required to comply with the Code of Judicial Conduct, nor are they responsible for policing judges’ compliance with the Code. Nevertheless, the commentary to Rule 3.5 indicates in evaluating the propriety of giving a gift to a judge, lawyers should consider any limitations imposed by the Code of Judicial Conduct on the judge’s acceptance of the gift. See EAO 90-46.

Turning to those limitations, Canon 2 of the Code of Judicial Conduct generally requires judges to “avoid impropriety and the appearance of impropriety in all of the judge’s activities.” The commentary defines “appearance of impropriety” as “conduct [that] would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

Canon 4D(5) specifically addresses the question of gifts to judges, and provides in relevant part:

A judge shall not accept ... a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial ... 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;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift ... from a relative or close personal friend whose appearance or interest in a case would in any event require [the judge's] disqualification under Section 3E;

...

(h) any other gift ... if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H

....

The Advisory Committee on Standards of Judicial Conduct (ACSJC) has issued a number of opinions touching on Canon 4D(5), several of which are directly pertinent to the inquiry before this Committee:

Opinion 32-1994. The ACSJC concluded it was not improper for a newly elected Associate Justice of the South Carolina Supreme Court to attend a reception organized by the Mayor and County Attorney for the new justice's home county. Invitees included various local and state elected officials, friends and relatives of the new justice, and the entire membership of several county bar associations. The ACSJC cautioned, however, that the event "should be done with appropriate discretion and regard for [the justice's] judicial obligations." Further, the ACSJC noted that the reception could be considered a public testimonial, previously defined by the ACSJC as "an event given by people generally expressive of their appreciation and esteem towards the individual being honored." Quoting an opinion by the U.S. Judicial Conference Committee on Codes of Conduct, the ACSJC opined that publicly honoring a preeminent judge is not only personally gratifying to the judge, but also benefits the entire judiciary through "public praise of one of its members."

Opinion 14-1996. The ACSJC concluded that a newly elected judge "may not participate in a reception funded by a financial institution because it creates an appearance of impropriety." The judge could, however, attend an event "funded only by the bar association" or "a party given by close friends who are attorneys." In distinguishing between the permissible and impermissible events, the ACSJC observed that "the purpose of allowing a judge to participate in parties and receptions in [the judge's] honor is to allow a judge to preserve the personal relationships ... fostered with family, friends and colleagues. A judge cannot have [the same kind of] personal relationship with a financial institution." With respect to an event hosted by friends who are attorneys, the ACSJC noted that "[j]udges naturally have friend, relatives and professional acquaintances, many of whom may be attorneys, with whom they wish to socialize or celebrate special occasions."

Opinion 8-1998. The ACSJC concluded that a judge could attend a baby shower given in her honor, provided the shower was "hosted by non-attorney friends" and all gifts given were "commensurate with that occasion." The ACSJC also concluded, however, that a judge could not attend a baby shower hosted by "lawyers or their firms if they have come, or are likely to come,

before the judge.” Further, the ACSJC cited the commentary to the Code of Judicial Conduct, which construes Canon 4D(5)(h) as prohibiting a judge from accepting any gift from “lawyers or their firms if they have come, or are likely to come, before the judge.” But see Cal. Comm. on Jud. Ethics Ops., Formal Opinion 2014-005, at 9 (Aug. 26, 2014) (construing the same language and stating, “In most circumstances, attorneys do not appear in court as parties, so gifts from attorneys are usually not subject to the absolute ban on gifts from parties imposed by [California] canon 4D(5).”)[2]

Opinion 16-2003. The ACSJC concluded that a newly elected judge may attend a banquet in the judge’s honor, given by a chamber of commerce and sponsored by area businesses and law firms. The ACSJC cited Opinion 32-1994 and noted, “The purpose of allowing a judge to participate in parties and receptions in his honor is to allow a judge to preserve the personal relationships that [the judge] has fostered with family, friends and colleagues.”

#### Analysis

The Committee believes that certain general principles can be distilled from the text of the Rules of Professional Conduct, the Code of Judicial Conduct, and the advisory opinions summarized above. Where relevant, the Committee has also considered advisory opinions issued by ethics advisory and judicial conduct committees in other jurisdictions.

First, it is clear that lawyers do not ascend to the bench at the cost of relationships with friends, relatives, and professional acquaintances, many of whom may be lawyers. To the contrary, judges are no less entitled than others to celebrate significant events with friends and loved ones. EAC Op. 97-40.

Second, the overriding goal of ethical restrictions on gifts to judges is the preservation of public confidence in the integrity and independence of judges. See S.C. Code Jud. Conduct Canon 1(A) cmt. Accomplishing this goal “require[s] both the reality and the perception of impartiality on the part of judicial officers.” Restatement (Third) of the Law Governing Lawyers § 113 cmt. f. Accordingly, the ultimate touchstone for the analysis is that “participation in the event or the giving of the gift [must not be] intended to, nor appear to be intended to, influence the judge.” EAC Op. 97-40.

Third, the ethical propriety of a bar association or other membership organization giving a reception or gift to mark a new judge’s investiture is governed by Canon 4D(5)(a), which explicitly permits gifts “incident to a public testimonial,” as well as invitations to bar-related functions. See Canon 4D(5)(a), comment (“Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).”) A judge may attend a reception or accept a gift given by an organization in honor of the judge’s investiture if the reception or gift constitutes a public testimonial, i.e., it is “given by people generally expressive of their appreciation and esteem towards the individual being honored.” ACSJC Op. 32-1994.

Nevertheless, the leeway provided by Canon 4D(5)(a) is not limitless. A judge cannot accept, and correspondingly a lawyer cannot give, an unduly lavish reception or gift. ACSJC Op. 32-1994. Nor may judge accept a reception or gift offered by a private concern, such as a financial institution or a for-profit company.

In the Committee's view, it is ethically permissible for a local bar association to sponsor a reception or gift for a newly elected judge because a local bar association is comprised of numerous attorneys. A reception or gift provided by a general membership organization does not create the impression of an attempt to curry favor for a particular attorney or firm, mostly because the likelihood of actual influence under such circumstances is so minimal. However, for the reasons expressed in EAC Op. 84-10, all contributions toward funds for the event or gift must be anonymous.

Fourth, the ethical propriety of a reception or gift given by an individual lawyer or group of lawyers (including the judge's former law firm) has been approved by various advisory bodies as an instance of social hospitality under Canon 4D(5)(c), as a commemoration of a special occasion under Canon 4D(5)(d), and under Canon 4D(5)(h).

The Committee was divided regarding the applicability of Canon 4D(5)(d), which permits a judge to accept "a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship." All members of the Committee agreed, as a matter of simple textual analysis, that the examples given in the Canon (wedding, anniversary, or birthday) are personal milestones not unique to judges. Some members of the Committee concluded, based on the principle of *ejusdem generis*, that ascension to the bench—an event unique to judges—is not a "special occasion" under the Canon.

Other members of the Committee, while not discounting the intuitive appeal of this argument, concluded that ascension to the bench is a "special occasion" under the Canon, for at least two reasons. First, while investiture is unique to judges, it is more generally a form of professional accomplishment. Professional accomplishments (such as being made a partner in a law firm, acquiring tenure, or obtaining an advanced degree) are by no means unique to judges and are often recognized by friends and family with gifts or festivities. Second, the ACSJC and similar bodies have universally recognized elevation to the bench as a "special occasion" under the Canon. See AJSCJ Op. 14-1996 ("This Committee recognizes that the election to the Circuit Court is a special occasion in a legal career that should be honored and celebrated ..."); see also, e.g., Advisory Op. No. 98, 2009 WL 8484592, at \*2 (U.S. Jud. Conf. Comm. Code Conduct June 2009) (noting that it is common and permissible for judges to receive gifts in connection with their investiture, including "a judicial robe given by former law partners; a clock given by a bar association; a chair given by former state judicial colleagues; and a gavel and \$500 monetary gift given by a former client"); Informal Op. 2013-09, 2013 WL 2898094, at \*1 (Conn. Com. on Jud. Ethics May 20, 2013) (concluding that a newly appointed judge would not commit an ethical violation by attending a dinner and accepting a piece of framed artwork from the judge's former

office); Formal Op. 01-11, 2001 WL1379401, at \*1 (Ill. Jud. Ethics Comm. Oct. 9, 2001) (concluding that “it would be common courtesy to permit” a new judge’s former law firm to sponsor a post-investiture reception).[3]

Regardless of the basis for concluding that a new judge may attend a reception, and accept a gift, from friends and former colleagues, advisory bodies are unanimous in cautioning judges that such celebrations must not be unduly lavish. See, e.g., Il. Jud. Ethics Comm. Op. 01-11 (a judge may attend a reception sponsored by the judge’s former law firm but, in order to avoid an appearance of impropriety, the judge “should be concerned about the magnitude or extravagance of the celebration and the number and nature of those invited”).

This Committee has previously recognized that while gifts to judges are “highly restricted,” EAC Op. 90-46, they are not always improper, EAC 97-40. Just as an attorney friend of a judge may give the judge a gift in celebration of an upcoming birth (*id.*), so also a friend or colleague may give a newly elected judge a gift to celebrate that occasion, provided it is commensurate with the relationship and the occasion. See U.S. Jud. Conf. Comm. on Codes of Conduct, Adv. Op. No. 98, Gifts to Newly Appointed Judges (June 2009). A judge is prohibited from accepting a gift from any person who is, or may come, before the judge as a party, or whose interests may come before the judge (Canon 4D(5)(h)), unless the judge would be disqualified regardless of the gift. A judge may, however, accept a gift from a friend or relative who is a lawyer, even if the lawyer may appear before the judge, provided the lawyer is not before the judge as a party to litigation, the gift is not given with the intent to influence the judge, and the gift is otherwise permissible under Canon 4D(5).

Fifth, compliance with the Rules of Professional Conduct requires that lawyers pay heed to the judicial canons when planning a reception or gift to celebrate a new judge’s investiture. On the one hand, a reception sponsored by a bar association and attended by a broad range of community members is not, barring undue extravagance, ethically problematic. On the other hand, the Rules of Professional Conduct would prohibit a lawyer’s involvement with a reception or gift that is excessive or that is sponsored or hosted by a private entity.

### Conclusions

In view of the foregoing analysis, the Committee responds as follows to the specific questions raised by the inquirer:

1. When, if ever, is it permissible for a group of lawyers to pay for an event (such as a luncheon or reception) to celebrate the investiture of a new judge?
  - A. May an event be paid for by a group of lawyers, all of whom have a pre-existing relationship with the new judge?
  - B. May an event be paid for by, or hosted at, a law firm, including the new judge’s former firm?
  - C. May an event be paid for by a local bar association? If so:

2. May Lawyers A and B, or the new judge's former law firm, contribute funds to pay for the event?

3. May Lawyers A and B, or the new judge's former law firm, solicit funding for the event through direct contact with other lawyers and law firms?

An event celebrating a new judge's investiture is clearly permissible when it is sponsored and hosted by a general-membership bar organization, such as a county or state bar. See Canon 4D(5)(a). However, such celebrations must not be unduly extravagant. Whether a particular celebration is too lavish will depend on the circumstances.

Individual lawyers or their law firms may contribute funds to pay for the event, provided that information regarding the identity of contributors and the amount of contributions are not disclosed to the judge. Individual lawyers or their law firm may solicit contributions for the event on behalf of the hosting organization, but any solicitation must comply with all applicable Rules of Professional Conduct, not just those discussed in this Opinion.

An individual lawyer, group of lawyers, or law firm may sponsor or host an event celebrating the investiture of a new judge only if neither the lawyers nor their clients are before, or likely to come before, the judge. See Canon 4D(5)(h). This Canon would not prohibit an individual lawyer, group of lawyers, or the new judge's former firm from hosting an event if the judge would otherwise be recused from hearing matters involving those lawyers or that firm. See, e.g., Canon 3E; Canon 4D(5)(e).

4. When, if ever, is it permissible to collect funds for a gift for a new judge?

A. Can a group of lawyers, all of whom have a pre-existing relationship with the new judge, collectively pay for a gift?

B. Can the new judge's former law firm organize the collection of funds for a gift, or contribute funds toward the gift?

C. Is the dollar value of the gift relevant to the ethical inquiry?

The ethical propriety of a gift from a lawyer to a judge is uniquely unsuited to one-size-fits-all rules. Ultimately, the decision whether a contemplated gift is ethically permissible under Rule 3.5(a) must be guided by an honest assessment of the lawyer's relationship with the judge, the occasion for the gift, and the nature of the gift itself. A lawyer must decide whether, in light of such considerations, an outsider to the relationship would perceive the gift to arise out of the recipient's status as a judge, rather than the recipient's status as a friend of the donor.

A gift to a new judge to mark his or her investiture, when given by a general-membership bar association, is likely permissible as a public testimonial. When the gift is given by lawyers who have a pre-existing relationship with the judge as friends or colleagues, the analysis must be more nuanced. A majority of the Committee concluded that investiture is a "special occasion"



within the meaning of Canon 4D(5)(d), such that a relative or friend may recognize the event with a gift that is fairly commensurate with the occasion and the relationship.

The dollar value of the gift is not, by itself, determinative of the ethical inquiry. There is, for example, no per se rule that a gift worth less than \$150 is permissible or that a gift worth more than \$150 is impermissible. The dollar value of a gift is relevant only in relation to the totality of the circumstances, including the nature and duration of the relationship, the norms and customs of the community, the number of lawyers contributing to the gift, and the nature of their practices.

[1] The conflict is regrettable for judges, who, being lawyers, must adhere to both the Rules of Professional Conduct and the Code of Judicial Conduct. Non-judge attorneys are bound only by the Rules. Readers should bear in mind that the EAC and the ACSJC are advisory bodies without disciplinary authority. Interpretation of the Rules and the Code is ultimately entrusted to the South Carolina Supreme Court.

[2] Opinion 8-1998 is difficult to reconcile with the text of Canon 4D(5)(d), which permits gifts from “a relative or friend, for a special occasion” without regard to whether the donor is an attorney who may appear before the judge, and with Opinion 32-1994, in which the ACSJC recognized that judges “naturally have friends, relatives and professional acquaintances, many of whom may be attorneys, with whom they may wish to socialize and/or celebrate happy occasions.”

[3] Many advisory opinions take care to note that receptions and gifts sponsored by a new judge’s former law firm are permissible, in part, on the assumption that for a period of time the new judge will be recused from cases involving the judge’s former firm.