

Supreme Court Advisory Committee on the Code of Judicial Ethics

350 McAllister Street, San Francisco, California 94102-3688

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INVITATION TO COMMENT

SP18-07

Title

Proposed Adoption of New Canon 4D(6)(i) of the Code of Judicial Ethics—“Nominal Gift” Exception

Action Requested

Review and submit comments by May 31, 2018

Proposed Effective Date

August 1, 2018

Proposed by

Supreme Court Advisory Committee on the Code of Judicial Ethics
Hon. Richard D. Fybel, Chair

Contact

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Date

March 20, 2018

Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics seeks public comment on two different versions of a possible new exception to the prohibition against accepting gifts that would allow a judge to accept a “nominal gift.” One version uses objective language only; the other version uses both objective and subjective language. After receiving and reviewing comments on this proposal, the committee will make recommendations to the Supreme Court regarding any proposed amendment to canon 4D(6). The full text of the two different versions is attached.

Discussion

The California Judges Association (CJA) has proposed amending canon 4D(6), which provides that a judge may not accept gifts unless they fall within one of eight enumerated exceptions to the prohibition. The canon also provides that a gift is acceptable only if “acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties.” The proposal would create a new exception to the prohibition against accepting gifts that would allow a judge to accept a “nominal gift.” The proposal followed an opinion by the Supreme Court Committee on Judicial Ethics Opinions (CJEO) that defined the scope of “ordinary social hospitality”—one of the existing exceptions to the no-gift rule.¹

¹Cal. Com. Jud. Ethics Opns., CJEO Formal Opn. 2014-005.

The proposals have not been approved by the Supreme Court and are not intended to represent the views of the court. These proposals are circulated for comment purposes only.

Under the CJA’s proposed new exception, a “nominal gift” could be accepted so long as (1) acceptance of the gift could not reasonably be perceived as intended to influence the judge in the performance of judicial duties (the objective test), and (2) the judge reasonably believes that the gift is not intended to influence the judge in the performance of judicial duties (the subjective test). The CJA’s proposal does not define the term “nominal.” Rather, the CJA recommended that “nominal” remain undefined, which would permit use of its “everyday meaning.”

Although “nominal” is not defined in the proposed canon or Advisory Committee Commentary, the first paragraph of the commentary would provide context by giving an example of a nominal gift that would be acceptable, i.e., an art project from a school class after a presentation by a judge. Such a gift is obviously not intended to influence the judge, but it likely would not be considered ordinary social hospitality under the CJEO opinion referenced above. Including this example in the commentary decreases the likelihood that a judge may misinterpret the exception to apply to gifts that would not be considered nominal.

The proposed commentary would include cautionary language in the second paragraph of the commentary as a way of alerting judges that they must view the code as a whole. Such language with cross-references to other canons is used throughout the code.

The committee notes that the objective test is used throughout the code. According to the California Judicial Conduct Handbook:

Judicial conduct is reviewed by an objective, rather than a subjective, standard. The issue is not what the judge perceived his or her conduct to be, but rather how the conduct is perceived objectively. (*Geiler v. Commission* (1973) 10 Cal.3d 270, 277.) Canons 1 and 2 of the Code of Judicial Ethics, which speak of the need to uphold “high standards of conduct” and to avoid “the appearance of impropriety,” confirm the requirement of an objective standard.²

The only canon that contains a subjective test is canon 3E(3)(e), which provides that an appellate justice is disqualified if “the justice substantially doubts his or her capacity to be impartial.” This subjective language is modeled on the language of the disqualification provision for trial court judges in Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(ii) (a superior court judge is disqualified if “[t]he judge believes there is a substantial doubt as to his or her capacity to be impartial.”).

The proposed version of the new exception that uses subjective language in addition to objective language modifies the subjective test by requiring a judge’s belief that the gift is not intended to influence the judge to be reasonable.

² Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 12.81, pp. 839–840.

Canon 4D(6) would be amended to read as follows with either objective only language or objective and subjective language:

1 **OBJECTIVE LANGUAGE ONLY**

2
3 **CANON 4**

4
5 **A JUDGE SHALL SO CONDUCT THE JUDGE’S QUASI-JUDICIAL AND**
6 **EXTRAJUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF**
7 **CONFLICT WITH JUDICIAL OBLIGATIONS**

8
9 **A. – C. * * ***

10
11 **D. Financial Activities**

12
13 **(1) – (5) * * ***

14
15 (6) A judge shall not accept and shall discourage members of the judge’s family residing in the
16 judge’s household from accepting a gift, bequest, favor, or loan from anyone except as hereinafter
17 set forth, ~~provided that acceptance would not reasonably be perceived as intended to influence~~
18 ~~the judge in the performance of judicial duties:~~ Gifts that are permitted by Canons 4D(6)(a)
19 through (i) may only be accepted if acceptance would not reasonably be perceived as intended to
20 influence the judge in the performance of judicial duties.³

21
22 (a) a gift, bequest, favor, or loan from a person whose preexisting relationship with the
23 judge would prevent the judge under Canon 3E from hearing a case involving that person;

24
25 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(a)*

26 *Upon appointment or election as a judge or within a reasonable period of time thereafter,*
27 *a judge may attend an event honoring the judge’s appointment or election as a judge provided*
28 *that (1) the judge would otherwise be disqualified from hearing any matter involving the person*
29 *or entity holding or funding the event, and (2) a reasonable person would not conclude that*
30 *attendance at the event undermines the judge’s integrity, impartiality, or independence.*

31
32 (b) a gift for a special occasion from a relative or friend, if the gift is fairly commensurate
33 with the occasion and the relationship;

34
35 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(b)*

36 *A gift to a judge, or to a member of the judge’s family residing in the judge’s household,*
37 *that is excessive in value raises questions about the judge’s impartiality and the integrity of the*
38 *judicial office and might require disqualification of the judge where disqualification would not*
39 *otherwise be required. See, however, Canon 4D(6)(a).*

40

³ The strikethroughs and underlines in this paragraph reflect amendments recommended in Invitation to Comment SP18-06.

41 (c) commercial or financial opportunities and benefits, including special pricing and
42 discounts, and loans from lending institutions in their regular course of business, if the
43 same opportunities and benefits or loans are made available on the same terms to similarly
44 situated persons who are not judges;

45
46 (d) any gift incidental to a public testimonial, or educational or resource materials supplied
47 by publishers on a complimentary basis for official use, or an invitation to the judge and
48 the judge's spouse or registered domestic partner or guest to attend a bar-related function
49 or an activity devoted to the improvement of the law, the legal system, or the
50 administration of justice;

51
52 (e) advances or reimbursement for the reasonable cost of travel, transportation, lodging,
53 and subsistence that is directly related to participation in any judicial, educational, civic,
54 or governmental program or bar-related function or activity devoted to the improvement
55 of the law, the legal system, or the administration of justice;

56
57 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(e)*

58 *Acceptance of an invitation to a law-related function is governed by Canon 4D(6)(d);*
59 *acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by*
60 *Canon 4D(6)(g). See also Canon 4H(2) and accompanying Commentary.*

61
62 (f) a gift, award, or benefit incident to the business, profession, or other separate activity
63 of a spouse or registered domestic partner or other member of the judge's family residing
64 in the judge's household, including gifts, awards, and benefits for the use of both the
65 spouse or registered domestic partner or other family member and the judge;

66
67 (g) ordinary social hospitality;

68
69 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(g)*

70 *Although Canon 4D(6)(g) does not preclude ordinary social hospitality, a judge should*
71 *carefully weigh acceptance of such hospitality to avoid any appearance of impropriety or bias or*
72 *any appearance that the judge is misusing the prestige of judicial office. See Canons 2 and 2B. A*
73 *judge should also consider whether acceptance would affect the integrity, impartiality, or*
74 *independence of the judiciary. See Canon 2A.*

75
76 (h) an invitation to the judge and the judge's spouse, registered domestic partner, or guest
77 to attend an event sponsored by an educational, religious, charitable, service, or civic
78 organization with which the judge is associated or involved, if the same invitation is
79 offered to persons who are not judges and who are similarly engaged with the
80 organization.

81
82 (i) a nominal gift.

83
84 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(i)*

85 *An example of a nominal gift that would be acceptable under this canon is an art project*
86 *by an elementary school class after a presentation by the judge.*

87 A judge should carefully weigh acceptance of any nominal gift to avoid any appearance of
88 impropriety or bias or any appearance that the judge is misusing the prestige of judicial office.
89 See Canons 2 and 2B. A judge should also consider whether acceptance would affect the
90 integrity, impartiality, or independence of the judiciary. See Canon 2A.

91
92 (7) * * *

93
94 **E. – H. * * ***

95 **OBJECTIVE AND SUBJECTIVE LANGUAGE**

96
97 **CANON 4**

98
99 **A JUDGE SHALL SO CONDUCT THE JUDGE'S QUASI-JUDICIAL AND**
100 **EXTRAJUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF**
101 **CONFLICT WITH JUDICIAL OBLIGATIONS**

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103 **A. – C. * * ***

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108
109 (6) A judge shall not accept and shall discourage members of the judge's family residing in the
110 judge's household from accepting a gift, bequest, favor, or loan from anyone except as hereinafter
111 set forth, ~~provided that acceptance would not reasonably be perceived as intended to influence~~
112 ~~the judge in the performance of judicial duties:~~ Gifts that are permitted by Canons 4D(6)(a)
113 through (h) may only be accepted if acceptance would not reasonably be perceived as intended to
114 influence the judge in the performance of judicial duties.⁴

115
116 (a) a gift, bequest, favor, or loan from a person whose preexisting relationship with the
117 judge would prevent the judge under Canon 3E from hearing a case involving that person;

118
119 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(a)*

120 *Upon appointment or election as a judge or within a reasonable period of time thereafter,*
121 *a judge may attend an event honoring the judge's appointment or election as a judge provided*
122 *that (1) the judge would otherwise be disqualified from hearing any matter involving the person*
123 *or entity holding or funding the event, and (2) a reasonable person would not conclude that*
124 *attendance at the event undermines the judge's integrity, impartiality, or independence.*

125
126 (b) a gift for a special occasion from a relative or friend, if the gift is fairly commensurate
127 with the occasion and the relationship;

128
129 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(b)*

130 *A gift to a judge, or to a member of the judge's family residing in the judge's household,*
131 *that is excessive in value raises questions about the judge's impartiality and the integrity of the*
132 *judicial office and might require disqualification of the judge where disqualification would not*
133 *otherwise be required. See, however, Canon 4D(6)(a).*

134
135 (c) commercial or financial opportunities and benefits, including special pricing and
136 discounts, and loans from lending institutions in their regular course of business, if the

⁴ The strikethroughs and underlines in this paragraph reflect amendments recommended in Invitation to Comment SP18-06.

137 same opportunities and benefits or loans are made available on the same terms to similarly
138 situated persons who are not judges;

139
140 (d) any gift incidental to a public testimonial, or educational or resource materials supplied
141 by publishers on a complimentary basis for official use, or an invitation to the judge and
142 the judge's spouse or registered domestic partner or guest to attend a bar-related function
143 or an activity devoted to the improvement of the law, the legal system, or the
144 administration of justice;

145
146 (e) advances or reimbursement for the reasonable cost of travel, transportation, lodging,
147 and subsistence that is directly related to participation in any judicial, educational, civic,
148 or governmental program or bar-related function or activity devoted to the improvement
149 of the law, the legal system, or the administration of justice;

150
151 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(e)*

152 *Acceptance of an invitation to a law-related function is governed by Canon 4D(6)(d);*
153 *acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by*
154 *Canon 4D(6)(g). See also Canon 4H(2) and accompanying Commentary.*

155
156 (f) a gift, award, or benefit incident to the business, profession, or other separate activity
157 of a spouse or registered domestic partner or other member of the judge's family residing
158 in the judge's household, including gifts, awards, and benefits for the use of both the
159 spouse or registered domestic partner or other family member and the judge;

160
161 (g) ordinary social hospitality;

162
163 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(g)*

164 *Although Canon 4D(6)(g) does not preclude ordinary social hospitality, a judge should*
165 *carefully weigh acceptance of such hospitality to avoid any appearance of impropriety or bias or*
166 *any appearance that the judge is misusing the prestige of judicial office. See Canons 2 and 2B. A*
167 *judge should also consider whether acceptance would affect the integrity, impartiality, or*
168 *independence of the judiciary. See Canon 2A.*

169
170 (h) an invitation to the judge and the judge's spouse, registered domestic partner, or guest
171 to attend an event sponsored by an educational, religious, charitable, service, or civic
172 organization with which the judge is associated or involved, if the same invitation is
173 offered to persons who are not judges and who are similarly engaged with the
174 organization.

175
176 (i) a nominal gift, as long as acceptance would not reasonably be perceived by the judge,
177 and would not reasonably be perceived by the public, as intended to influence the judge in
178 the performance of judicial duties.

179
180 *ADVISORY COMMITTEE COMMENTARY: Canon 4D(6)(i)*

181 *An example of a nominal gift that would be acceptable under this canon is an art project*
182 *by an elementary school class after a presentation by the judge.*

183 A judge should carefully weigh acceptance of any nominal gift to avoid any appearance of
184 impropriety or bias or any appearance that the judge is misusing the prestige of judicial office.
185 See Canons 2 and 2B. A judge should also consider whether acceptance would affect the
186 integrity, impartiality, or independence of the judiciary. See Canon 2A.

187
188 (7) * * *

189
190 **E. – H. * * ***