



CJEO Draft Formal Opinion No. 2014-005:

**ACCEPTING GIFTS OF LITTLE OR NOMINAL VALUE UNDER THE
ORDINARY SOCIAL HOSPITALITY EXCEPTION**

Public Comments Submitted with a Waiver of Confidentiality

[Public comments submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); CJEO Rules, rule 5(b)(1), (e)). Below are all of the comments received by CJEO from the public commenting on CJEO Draft Formal Opinion 2014-005 that were submitted with a statement waiving confidentiality or consenting to disclosure.]



CALIFORNIA JUDGES ASSOCIATION

The Voice of the Judiciary

August 1, 2014

Ms. Nancy A. Black
Committee Counsel
The California Supreme Court Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

Re: CJEO Draft Formal Opinion 2014-005

Dear Ms. Black

The California Judges Association is submitting this letter in support of the opinion and analysis for the above-referenced draft opinion. The clarification of gifts in the context of ordinary social hospitality is one which the CJA believes will be helpful to judicial officers throughout the state.

Thank you and the Committee for all of your hard work and thoughtful opinions.

Sincerely,

Robert A. Glusman
President

Online submission:

Saturday, August 2, 2014 – 13:10

Draft Formal Opinion: Accepting Gifts of Little or Nominal Value Under the Ordinary Social Hospitality Exception

Name: Lois Stewart

Comment:

Small gift should be prohibited; it is not necessarily the monetary value of the gift that opens the door of suspicion, it is the fact that small gifts being presented to members of the judiciary may be the first step in the undoing of a judge's ability to remain unbiased. Any token of appreciation regardless of its value or form creates a subtle implication that some reciprocal act is owing to the donor. The judiciary should not be placed in a position of having to appear unbiased; by prohibiting gifts, small or large, the question of the appearance of bias becomes moot.

Waiver of Confidentiality: yes



The Superior Court

LOS ANGELES, CALIFORNIA 90012 CHAMBERS OF
DAVID S. WESLEY PRESIDING JUDGE

August 5, 2014

Ms. Nancy A. Black
Committee Counsel
The California Supreme Court Committee on Judicial Ethics Opinions
350 McAlister Street
San Francisco, CA 94102

**Re: Los Angeles Superior Court Ethics Working Group
Comments to CJEO Draft Formal Opinion No.
2014-005**

Dear Ms. Black:

Transmitted herewith are the requested comments of the Los Angeles Superior Court Ethics Working Group regarding CJEO Draft Formal Opinion No. 2014-005. The suggested changes are in redline/strikeout with explanatory comments.

The Los Angeles Superior Court and its Ethics Working Group appreciate the opportunity to provide this comment.

Very truly yours,

David S. Wesley
Presiding Judge

DSW:FB:gp

c: Hon. Carolyn B. Kuhl, Assistant Presiding Judge

Hon. Anthony J. Mohr, Chair LASC Ethics Working
Group
Hon. Amy D. Hogue, LASC Ethics Working Group
Hon. Daniel Brenner, LASC Ethics Working Group
Hon. Elia Weinbach, LASC Ethics Working Group
Hon. Gail R. Feuer, LASC Ethics Working
Group
Hon. Holly E. Kendig, LASC Ethics Working
Group
Hon. Holly Fujie, LASC Ethics Working
Group
Hon. Lisa B. Lench, LASC Ethics Working
Group
Hon. Monica Bachner, LASC Ethics Working
Group
Hon. Marc Marmaro, LASC Ethics Working
Group
Hon. Stephanie Bowick, LASC Ethics
Committee



CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS

350 McAllister Street, Room 1144A

San Francisco, CA 94102

(855) 854-5366

www.JudicialEthicsOpinions.ca.gov

CJEO Draft Formal Opinion No. 2014-005

ACCEPTING GIFTS OF LITTLE OR NOMINAL VALUE UNDER THE ORDINARY SOCIAL HOSPITALITY EXCEPTION

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

May judges accept items of little or nominal value under the ordinary social hospitality exception to the prohibitions against gifts in the California Code of Judicial Ethics?

II. Summary of Conclusions

Items of little or nominal value when offered for no consideration as social expressions of appreciation, esteem, or geniality are gifts within the meaning of the Code of Judicial Ethics and subject to the canons governing gifts. Such gifts may not be accepted if (1) they are offered by a party who has or is likely to appear before the judge, (2) they create a perception of influence or favor, or (3) a person aware of the gift would reasonably believe that advantage was intended or would be obtained. When determining if gifts are otherwise acceptable as ordinary social hospitality, judges should consider whether they are ordinary by community standards, consistent with social traditions, and hospitable in nature.

III. Authorities¹

A. Applicable Canons¹

Terminology: "'Gift' denotes anything of value to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status."

¹ [The canons and this opinion apply to subordinate judicial officers as well as judges.](#)

Comment [LASC1]: 1. Because the entire draft formal opinion deals only with the issue of gifts, we recommend that the ordinary social hospitality exception (OSHE) should be front and center and put in the context of the general "no gift" rule of Canon 4D(6). In other words, the Applicable Canons section (III.A) should start out with Canon 4D(5), note that there are seven exceptions, and that the last exception is the OSHE. The Advisory Committee Commentary for 4D(6)(g) should then follow. As it is now structured the general "no gift" rule lags behind in the middle of page 3 and the Commentary to it is referenced last in this section. We recommend that it be mentioned first.

2. It would be useful early on in the opinion to acknowledge that the OSHE has been problematical precisely because the notion of OSHE has been stretched over the years to include gifts which might not be considered "ordinary social hospitality" but nevertheless are of such minimal value that no reasonable person would believe that the gifts were given to obtain an advantage or that the donee (the judicial officer) would believe that the donor intended to obtain any advantage. See CJA Opinion No. 43, p. 4 [cited at p. 11 of the draft formal opinion]

3. Citing to the other applicable canons is fine e.g. 1, 2, etc. but we recommend that they follow the discussion above. In addition, the points are well-covered in the discussion on p. 7 (C. Canons Governing Gifts).

Canon 1: "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective. . . ."

Canon 2A: "A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . ."

Advisory Committee Commentary following canon 2A: ". . . A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly. [] The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence. . . ."

¹ All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

Canon 2B: "(1) A judge shall not allow . . . social . . . relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge. [] (2) A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including . . . to advance the pecuniary or personal interests of the judge or others."

Canon 3C(3): "A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct . . . in the performance of their duties."

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not

- (1) cast reasonable doubt on the judge's capacity to act impartially;
- (2) demean the judicial office;
- (3) interfere with the proper performance of judicial duties; or
- (4) lead to frequent disqualification of the judge."

Advisory Committee Commentary following canon 4A: "Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives. . . . [] Because a judge's judicial duties take precedence over all other activities (see Canon 3A), a judge must

avoid extrajudicial activities that might reasonably result in the judge being disqualified."

Canon 4D(5): "Under no circumstance shall a judge accept a gift, bequest, or favor if the donor is a party whose interests have come or are reasonably likely to come before the judge. . . . "

Advisory Committee Commentary following canon 4D(5): "In addition to the prohibitions set forth in Canon 4D(5) regarding gifts, other laws may be applicable to judges, including, for example, Code of Civil Procedure section 170.9 and the Political Reform Act of 1974 (Gov. Code, § 81000 et seq.). . . . [] The application of Canon 4D(5) requires recognition that a judge cannot reasonably be expected to anticipate all persons or interests that may come before the court."

Canon 4D(6): "A judge shall not accept . . . a gift, bequest, favor, or loan from anyone except as hereinafter set forth, provided that acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties:

"[¶] . . . [¶]"

"(g) ordinary social hospitality; . . ."

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

B. Other Authorities

California Code of Civil Procedure, section 170.9.

Government Code, sections 81000 et seq.

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866, 903-906.

Inquiry Concerning Wasilenko (2005) 49 Cal.4th CJP Supp. 26.

Commission On Judicial Performance, Annual Report (1992), Private Admonishments B and H, pp. 12-13 and Advisory Letters 15 and 17, p. 15, Annual Report (1998), *Inquiry Concerning Judge Shook*, Public Admonishment, pp. 24-26, Annual Report (2002), Private Admonishment 3, p. 22.

California Judges Association, Ethics Committee Advisory Opinion 43.

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 9.30, 9.37, 9.38, 9.44, 9.52, 9.57, append. 10 (2013 Supp.).

Geyh et al., *Judicial Conduct and Ethics* (5th ed. 2013) section 7.14[5].

IV. Discussion

A. Introduction

In the course of their daily lives, judges are sometimes offered items² of little or nominal value as tokens of appreciation, expressions of esteem, acts of generosity, or gestures of geniality. The personal and professional circumstances in which these items are offered are as varied as the items themselves. Examples provided to the committee include: a homemade food item brought to the judge by a juror; a coupon or gift card redeemable for a cup of coffee offered to a judge who has provided volunteer services; a baseball cap or jersey from the hometown team or the judge's alma mater; a bottle of wine offered at a holiday by a neighbor; a ticket to a local sporting or cultural event offered by an acquaintance; pizza delivered by a law firm to courtroom staff following a long trial. As varied as the examples are, the items are similarly low in extrinsic dollar value but high in intrinsic social value.

These items present ethical questions for judges because the canons prohibit the receipt of gifts except in the narrowest of circumstances. A judge may not accept gifts or favors under any circumstances from a party who has or is likely to appear before the judge (canon 4D(5)). A judge also may not accept a gift from a non-party if the gift would reasonably be perceived as intended to influence the judge in the performance of judicial duties (canon 4D(6)). Even when not prohibited under either of these provisions, gifts may only be accepted if they fall within specified exceptions, one of which is "ordinary social hospitality" (canon 4D(6)(g)).

The gracious and spontaneous offering of the small value items the committee has been asked to examine might lead an unwary judge to accept them based on several faulty assumptions. One is that the items are de minimus and therefore do not fall within the gift

Comment [LASC2]: The examples in Section IV.A. (on the top of page 5) include gifts that in some communities would not be nominal. We recommend noting that some of the examples, including a ticket to a local sporting or cultural event may not fall within the category of a nominal gift.

² "Items" refers to goods (e.g., muffins, polenta, cookies), services (e.g., free car wash), or other equivalents (e.g., Starbucks gift card).

ban in the canons. Another incorrect assumption is that the ordinary social hospitality exception is a catch-all covering any circumstance not otherwise specified in the gift exceptions. And finally, because the items are relatively insignificant in value, a judge might erroneously assume that any ethical violation incurred by acceptance would also be insignificant and easily cured by disclosing the gift or donating it to others.

The committee has been asked for guidance on avoiding these pitfalls. This opinion addresses whether items of little or nominal value are gifts within the meaning of the Code, and if so, how to determine whether they may or may not be accepted under the gift canons, and specifically, the ordinary social hospitality exception.

B. Gifts Defined

The Code of Judicial Ethics defines a gift as "anything of value to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status." (Code Jud. Ethics, Terminology, "Gift.") This definition was added by amendment to the terminology section of the Code in 2013. Prior to the amendment, there was some question as to whether an item of nominal value constituted a gift (see Cal. Judges Assoc., Formal Ethics Opinion No. 43 (1994, rev. 1996) p. 2 [only when property exchanged without consideration is truly "de minimis" can it be said that it does not constitute a gift] (CJA Opinion No. 43)). Under the broad definition provided in the terminology section, gifts are "anything of value." Even gifts of nominal value, therefore, are subject to the canons that govern gifts.

The Code definition of a gift references consideration, price, and the regular course of business, which suggests that a way to determine if an item is "anything of value" is to consider whether it could be exchanged for consideration on the open market. For example, commercially purchased food has market value by virtue of its purchase and would fall within the definition of a gift. Even homemade food items have a value because of the purchased ingredients and individual effort in preparation. In either case,

when a judge or the judge's staff³ is offered such an item, the judge must consider the item a gift governed by the canons, unless consideration of equal or greater value is received.

The example provided to the committee of a coupon or gift card redeemable for a cup of coffee offered to a judge who has provided volunteer services in some circumstances would not be considered a gift because consideration was given. For example, if the judge participates in a mock trial with other volunteers, and all of the volunteers are given a gift card for a cup of coffee to thank them for their volunteer efforts, this would not be considered a gift because consideration was given in the form of volunteer services. Similarly, if snacks are provided to the judge in connection with the mock trial in which the judge volunteered his or her time as a judge, even if the only volunteer that evening was the judge, the snacks would not be considered a gift.

Comment [LASC3]: 1.

Section IV.B – “Gifts Defined” – This section correctly points out that determination of whether something is a gift involves determining whether consideration of equal or greater value is received. One of the examples in Section IV.A. is a “coupon or gift card redeemable for a cup of coffee offered to a judge who has provided volunteer services.” We recommend that this section clarify in what circumstances a nominal item is not a gift because consideration was given.

C. Canons Governing Gifts⁴

³ Items offered to staff that are related to court business fall within the canons governing gifts (canon 3C(3) [judges must require staff and court personnel under their direction and control to observe appropriate standards of conduct in the performance of their duties]; Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), § 9.57, pp. 503-504).

⁴ Section 170.9 of the Code of Civil Procedure also governs gifts and sets dollar limitations on gifts a judge is permitted to accept even if they are otherwise permissible under the Code of Judicial Ethics, which sets no monetary limit. Specifically, section 170.9 currently sets a \$390 limit on gifts a judge is permitted to accept from a non-party under several exceptions in canon 4D(6), including the ordinary social hospitality exception in canon 4D(6)(g). (Cal. Code Civ. Pro., § 170.9(f); see Rothman, *supra*, append. 10 (2013 Supp.), pp. 7-12.) This opinion does not address section 170.9 because gifts of nominal value fall below the set limit and would not otherwise be prohibited under the statute. This opinion also does not address financial interest disclosure and reporting requirements for gifts under the Political Reform Act of 1974 (see Gov. Code §§ 8100 et seq. and Cal. Code Regs., tit. 2, §§18110 et seq.; Rothman, *supra*, append. 10 (2013 Supp.), p. 12 (Rothman and MacLaren Guide to the No-Gift Rule).)

⁴ As Judge Rothman notes, donation of a gift is not a specified exception to the ban on gifts in canons 4D(5) or canon 4D(6). (Rothman, *supra*, § 9.51, pp. 496-497.) Accepting improper gifts and donating or re-gifting them to charity does not avoid a violation of the Code of Judicial Ethics. (*Id.*) However, CCP § 170.9(1)(2) excludes from the definition of a gift one that is not used and is returned to the donor within 30 days, or is delivered to a charitable organization by that time without being claimed as a deduction for tax purposes. (Rothman, California Judicial Conduct Handbook,

Once it is determined that a gift is involved, the canons prohibiting acceptance of gifts are fundamental to the principles of judicial independence and integrity: the purpose of the general gift ban is to ensure impartial decisions. "When a judge receives something of value from a litigant or a lawyer, there exists the potential that, at best, it will be perceived that the donor will receive some advantage from the judge or, at worst, that a bribe has been given." (Rothman, *supra*, § 9.30, p. 471.) To fulfill that purpose, canon 4D(5) prohibits gifts under any circumstance and without exception from "a party whose interests have come or are reasonably likely to come before the judge." Canon 4D(6) extends the prohibition to gifts from a non-party, except in specified circumstances, and even in those circumstances, "provided that acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties." The specified exceptions to the non-party gift ban include "ordinary social hospitality" (canon 4D(6)(g)).⁵

Read together, canons 4D(5) and 4D(6) require that when offered a gift of nominal value, a judge must consider three questions in order to determine if the gift might be accepted: (1) Is it offered by a party? (2) Would acceptance create a perception of influence? and (3) Is it otherwise acceptable as ordinary social hospitality?

1. Gifts Offered by a Party Are Banned

Canon 4D(5) prohibits acceptance of gifts from a party whose interests have come or are reasonably likely to come before the judge. On its face, this broadly includes past, present, and future parties. No exceptions or time limits are provided in the text of canon 4D(5) so it would appear that the absolute ban on gifts from parties extends to any party who has or will appear before the judge in the judge's career. (Rothman, *supra*, § 9.37, pp. 478-

[Appendix G, Gift Guide for Judges; Appendix H, Gift Guide for Subordinate Judicial Officers.](#)

⁵ As Judge Rothman notes, donation of a gift is not a specified exception to the ban on gifts in canons 4D(5) or canon 4D(6). (Rothman, *supra*, § 9.51, pp. 496-497.) Accepting improper gifts and donating or re-gifting them to charity does not avoid a violation of the Code of Judicial Ethics. (*Id.*)

499, append. 10 (2013 Supp.), p. 4 (Rothman and MacLaren Guide to the No- Gift Rule) [canon 4D(5) ban on party gifts lasts forever].)

A judge offered a gift of little or nominal value will know if the person offering the gift is a current party and has a duty to know whether the person offering the gift is a former party. Under either circumstance, the judge may not accept the gift even if it is offered in the context of ordinary social hospitality.

If the gift is not offered by a former or current party, the judge must next consider whether the person offering the gift is reasonably likely to appear before the judge in the future. The Advisory Committee commentary to canon 4D(5) acknowledges that "[t]he application of Canon 4D(5) requires recognition that a judge cannot reasonably be expected to anticipate all persons or interests that may come before the court." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4D(5).)

Although the list of reasonably likely parties could theoretically include anyone in the world, Judge Rothman observes that, in practical terms, the circumstances in which a judge may accept a gift are limited by the exceptions in 4D(6)(a)-(j), and in those circumstances, the judge will be in a position to know or find out whether the donor is reasonably likely to appear (Rothman, *supra*, § 9.37, pp. 479-498, append. 10 (2013 Supp.), p. 4 (Rothman and MacLaren Guide to the No-Gift Rule)). The committee agrees that judges will know or be able to reasonably determine if a person offering a gift of little or no value is likely to appear as a party before the judge.

The committee notes, however, that the size of the community and of the judge's court may factor into the likelihood of someone appearing before the judge. Although the prohibition against accepting gifts from a party applies equally to all judges, the reasonable likelihood of a party appearing before a judge varies with the circumstances of the judge's position and the community in which the judge sits. (*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46 [canons impose uniform statewide standards although ethical duties may arise more frequently in a small town where a judge knows a party than in a major metropolitan area].) If a judge is one of very few bench officers in a small community, the likelihood of hearing any particular community member's matter is

relatively high compared to that of a judge who is one of hundreds of judicial officers in a geographically large or densely populated community.

Because attorneys are not parties, gifts from attorneys are not subject to the absolute ban on gifts from parties imposed by canon 4D(5). (Rothman, *supra*, § 9.38, p. 480, append. 10 (2013 Supp.), p. 4 (Rothman and MacLaren Guide to the No-Gift Rule).) However, gifts from attorneys who appear before judges in the course of business may create a perception of influence, which would preclude acceptance under canon 4D(6), as discussed below.

2. *Non-Party Gifts That Raise a Perception of Influence Are Banned*

Canon 4D(6) prohibits judges from accepting gifts from a *non-party* that would reasonably be perceived as intended to influence the judge in the performance of judicial duties. Canon 4D(6) underscores that judicial impartiality is so fundamental to the public's trust in the integrity of the judiciary that it is repeated throughout the Code.⁶ The test for the appearance of impropriety is an objective one: "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. Canon 2A.)

Judges offered gifts of nominal value from a non-party must apply this objective test to determine if acceptance would create a perception of influence. Gifts offered by attorneys must be closely scrutinized. ~~*Adams v. Commission* (9195) 10 Cal.4th 866 (*Adams*), the court found that accepting gifts from attorneys that appeared before the judge is "inherently wrong" and "has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence." (*Id.*, p. 879.) Although in *Adams* the particular attorneys regularly appeared before the judge, the committee agrees with Judge Rothman that "[i]n light of this very strong statement from the California Supreme Court, whenever a judge is offered a gift from a lawyer or law firm the judge should view the offer as presumptively improper." (Rothman, *supra*, § 9.52, p. 497.) Indeed, when judges have been disciplined for improperly~~

Formatted: Indent: Left: 0.08", First line: 0.36", Right: -0.15", Space Before: 0.6 pt, Line spacing: Multiple 1.58 li

⁶ See canons 1 [upholding the integrity and independence of the judiciary], 2 [avoiding impropriety and the appearance of impropriety in all activities], 2A [promoting public confidence], 2B(1) [improper to permit others to convey a position of influence], and 4A(1) [prohibiting conduct that casts reasonable doubt on the judge's capacity to act impartially].

~~accepting gifts, the donor has most often been an attorney.⁷ Judges offered gifts of even nominal value from attorneys should presume they are likely to be improper and carefully consider whether a person aware of the gift might entertain a reasonable perception of influence. Factors that a judge might consider in this regard are: (1) whether the relationship between the judge and the attorney is purely social, purely professional, or a combination of both; (2) the length of the relationship; (3) whether the attorney has had or will have business before the court; (4) the nature of the gift; (5) the nature of the occasion when the gift is offered; and (6) the particular circumstances of the giving of the gift.~~ Judges offered gifts of even nominal value from attorneys.

Once a judge has determined that a gift of little or nominal value is not offered by a past, present or future party (canon 4D(5)) and does not create a perception of influence (canon 4D(6)), the judge must consider whether the gift falls within the exception for ordinary social hospitality.

3. *The Ordinary Social Hospitality Exception*

Canon 4D(6)(g) excepts a gift offered in the context of "ordinary social hospitality," provided the gift is not otherwise prohibited under canon 4D(5) and 4D(6).⁸

⁷ See *Adams v. Commission* (1995) 10 Cal.4th 866 (*Adams*) [improper gifts of dinner, computer, fee write offs, condo, and fishing trip from attorneys]. In *Adams* the court found that accepting such gifts from attorneys that appeared before the judge is "inherently wrong" and "has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence." (*Id.*, p. 879.) When judges have been disciplined for improperly accepting gifts, the donor has most often been an attorney. See *Adams, supra*, 10 Cal. 4th at p. 897-901 [improper gifts of dinner, computer, fee write offs, condo, and fishing trip from attorneys]; *Adams, supra*, 10 Cal. 4th at p. 897-901 [improper gifts of dinner, computer, fee write offs, condo, and fishing trip from attorneys]; *Inquiry Concerning Judge Shook*, Comm. On Jud. Performance, Ann. Rep. (1998), Public Admonishment, pp. 24-26 [improper gifts of lunch and transport for the judge and judge's staff by an attorney]; Comm. on Jud. Performance, Ann. Rep. (1992), Private Admonishments B and H, pp. 12-13 and Advisory Letters 15 and 17, p. 15 [improper unspecified gifts from attorneys who practiced before the judges]; Comm. on Jud. Performance, Ann. Rept. (2002), Private Admonishment 3, p. 22 [improper unspecified gifts from attorneys].

⁸ As the Advisory Committee commentary cautions, "[a]lthough Canon 4D(6)(g) does not preclude ordinary social hospitality, a judge should carefully weigh acceptance of such hospitality to avoid any appearance of impropriety or bias or any appearance that the judge is misusing the prestige of judicial office. . . . [and] should also consider whether acceptance would affect the integrity, impartiality, or independence of the judiciary." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4D(6)(g).)

Comment [LASC4]: We agree with the draft opinion's emphasis in this section on page 10 that the provision of gifts to judges from attorneys should be closely scrutinized. However, this paragraph does not sufficiently emphasize the importance of whether the attorney appears before the judge, and sets a standard that all such gifts are "presumptively improper," even where they may be given to the judge by an attorney in a context that does not create a perception of influence. For example, a gift to a judge from an attorney where the judge and the attorney are parents of children at the same school and the attorney brings snacks to an event that is shared by the judge and other parents would not in most circumstances create a reasonable perception of influence. We also note that the citation to the quote from Rothman is taken out of context. Section 9.52 of Rothman's Judicial Conduct Handbook provides more fully:

"In examining this issue, one begins with the concept that when a judge accepts a gift from anyone who has business before the court, including lawyers, there is an obvious appearance of impropriety. It is "inherently wrong" and "has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence." (Rothman, *supra* §9.52, p. 497.)

This same paragraph then states, "[i]n light of this very strong statement by the California Supreme Court, whenever a judge is offered a gift from a lawyer or law firm, the judge should view the offer as presumptively improper." (*Id.*)

We recommend that the Committee use the first quote from Rothman, but not the second sentence as to the giving of a gift from a lawyer or law firm always being "presumptively improper" because the overall paragraph is focusing on the context of where the judge accepts a gift from someone who has business before the court. Indeed, in the next section entitled "Social events Hosted by Lawyers," Rothman states that judges can accept ordinary social hospitality from lawyers with whom they have personal relationships, and that this exception to the "no-gift" rule "would cover such events where there is no business purpose and nothing about the contact would raise questions of currying favor with the judge." (*Id.* §9.53.) We therefore recommend that the Committee not state in the Opinion that there is a presumption that all gifts made by attorneys – regardless of the relationship – be considered presumptively improper. We suggest instead that the Committee provide factors for a judge to consider when scrutinizing gifts.

Formatted: Font color: Custom
Color(59,59,59)), Expanded by 0.65 pt

Although the term "ordinary social hospitality" is not defined in the Code, guidance is provided elsewhere.

Seeking to address when invitations to social events hosted by attorneys cease to be ordinary social hospitality and become unacceptable gifts, the California Judges Association (CJA) provides the following definition in an advisory opinion:

""[O]rdinary social hospitality' . . . is that type of social event or other gift which is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage." (CJA Opinion No. 43, *supra*, p. 4.)

This definition has been cited in a wide variety of jurisdictions and sources (*Adams, supra*, 10 Cal.4th at p. 880; Rothman, *supra*, § 9.44, p. 489; Geyh, *supra*, § 7.14[5], p. 7-57; Ariz. Jud. Ethics Advis. Comm., Opinion 95-13, pp. 1-2; Okla. Jud. Ethics Advis. Panel, Opinion 2005-1, p. 2). The committee agrees with this definition, which incorporates the prohibitions of canons 4D(5) and 4D(6), as discussed above, and focuses on a reasonable perception of an intent to gain advantage. (See *Adams, supra*, 10 Cal.4th at p. 880 [“in determining the propriety of activity that arguably might qualify as social hospitality, the focus is upon the reasonable perceptions of an objective observer . . .”].)

CJA Opinion No. 43 also focuses on the "commonness" of the gift in the judge's community. This focus reflects the concept "that within a judges' community, residents will socialize in the normal course of their lives and that judges should not be barred from joining them." (Geyh et al., *Judicial Conduct and Ethics* (5th ed. 2013) § 7.14[5], p. 7-57 (Geyh); see also Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4A [complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives].) The words of the ordinary social hospitality exception reflect that concept and provide analytical tools for judges to use in determining whether the exception applies to gifts they have determined are not otherwise banned under canons 4D(5) and (6).

a. Ordinary

Ordinary social hospitality gifts are those that are ordinary by community standards (CJA Opinion No. 43, *supra*, p. 4, factor 1). In the context of a gift of nominal value, a judge should consider whether the gift appears customary or reasonable, rather than excessive, in the community in which it is offered. A gift that would fall within the exception would be one that is ordinarily exchanged among members of the community. A gift card offered in thanks to volunteers, for example, may be ~~an~~an ordinary and reasonable practice in some communities, but not in others.

b. Social

Social traditions and purposes are also indicators of whether gifts are ordinary social hospitality (CJA Opinion No. 43, *supra*, p. 4, factors 2, 6). Judge Rothman makes the distinction between relationships for the purpose of socializing and relationships for the purpose of advancing business interests. (Rothman, *supra*, § 9.44, p.p. 489-490.) Gifts that have a business purpose or advance the business interests of the person offering the gift do not fall within the ordinary social hospitality exception. (*Id.*; see canon 2B(2) [prohibiting use of prestige of office for personal or pecuniary advantage of others].) When offered a gift of nominal value, a judge should consider whether it is something that would traditionally be offered in circumstances involving socializing rather than business.

Careful consideration of this distinction should be given in the example of a baseball cap or jersey bearing the logo of the hometown team or the judge's alma mater. Is the cap being offered for the purpose of socializing as opposed to advancing the interests of the team or school, and is it traditionally offered regardless of judicial office?

c. Hospitality

Gifts of ordinary social hospitality must also be hospitable in nature and bear some relationship to hosting or being hosted. A judge's own social conduct is a reasonable measure of hospitality (CJA Opinion No. 43, *supra*, p. 4, factors 3, 5). If the judge is hosting a social event, is the gift being offered something the judge would give a host if the judge were a guest? If the judge is a guest, is the gift something the judge would offer his or her guests when hosting a similar event? A history of reciprocal hospitality between the judge and the person offering the

gift supports an inference that the gift is ordinary social hospitality. A gift that is commensurate with the occasion is also hospitable in nature, such as a bottle of wine offered at a holiday by a neighbor. A gift of a ticket to a local sporting or cultural event offered by an acquaintance, however, may not qualify as hospitality. If the acquaintance is not hosting the event, and the judge will not be the acquaintance's guest, the ticket may not be hospitable in nature.⁹

VI. Conclusions

Items of little or nominal value are subject to the canons governing gifts. Under canons 4D(5) and 4D(6), judges may not accept items of little or nominal value if the gift is offered by a party, if acceptance of the gift would create a perception of influence, or if a reasonable person would believe that advantage was intended or would be obtained by acceptance of the gift.

In the committee's opinion, items of little or nominal value that are not otherwise banned may be accepted under the ordinary social hospitality exception in canon 4(6)(g) if the gift is ordinary by community standards, offered for social traditions or purposes, and hospitable in nature.



This opinion is advisory only (Cal. Rules of Court, rules 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rules 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).

⁹ Judge Rothman provides a similar example of an attorney who offers a judge two tickets to a professional sporting event that the attorney cannot use (Rothman, *supra*, § 9.52, p. 498). He similarly concludes that it would not be appropriate for the judge to accept the tickets, unless the relationship with the attorney is such that the judge would not sit on any case involving the attorney. For support, he cites another exception under canon 4D(6) allowing gifts from a person whose preexisting relationship with the judge would require disqualification (*id.*, citing former canon 4D(6)(f), now canon 4D(6)(a)). Although this opinion examines only the ordinary social hospitality exception, Judge Rothman's example illustrates that judges may want to be familiar with all of the canon 4D(6) exceptions when considering whether gifts that are not otherwise banned may be accepted.

From: Judge Margaret S. Henry
Sent: Thursday, August 07, 2014 5:06 PM
To: Judicial Ethics
Subject: Draft Formal Opinion 2014-005

Dear Committee:

This draft opinion is written as if it applies to judges sitting in Juvenile Court assignments, just as in all other courts. It is problematic and particularly in Dependency, where I have sat for 13 years.

Children are parties in our cases. By statute the judicial officer is to rule in the best interest of each child who is a party. There is no influence, favor or advantage to be achieved by a gift from a child that is higher than the legal obligation to make each ruling in a child's best interest.

Children's cases in Dependency can last 21 years. They may see the same judicial officer every six months, or even more frequently, for the length of the case. Some children like to draw pictures or give other little presents to "their judge." Without question it is difficult to make a child understand why a judge would turn down his or her gift. For children who have suffered rejection, this could be taken as another one.

I recall taking an ethics class my first year on the Dependency bench and the judge who was lecturing said gifts from parties were not allowed, ever, and no exceptions. My hand shot up. I asked, "What about a drawing from an 8 year old autistic boy in Dependency Court?" She paused and stared at me. After a moment she said, "Ok, there may be an exception."

Juvenile Court is different. I urge you to look at the book *The Role of the Juvenile Court Judge: Practice and Ethics* by Judge Leonard Edwards (Ret.) Particularly at pages 69 to 70 he discusses gifts of minimal value (monetarily) from children to judicial officers. I believe your opinion should either refer to or incorporate that discussion, or state that this opinion does not necessarily apply in Juvenile court.

Thank you for your consideration,

Margaret S. Henry
Supervising Judge, Dependency
Los Angeles Superior Court