

OPINION NO. 44

(Issued: November 1995)

LIMITATIONS ON ACCEPTING GIFTS UNDER THE CODE OF JUDICIAL ETHICS AND CCP § 170.9

I. Introduction

Last year the CJA Ethics Committee issued its Formal Opinion 43; that Opinion dealt exclusively with the ethical considerations under the Code of Judicial Conduct (now the Code of Judicial Ethics) pertaining to gifts from attorneys, including social hospitality and other entertainment typically offered to judicial officers.

In January of 1995, the Legislature enacted California Code of Civil Procedure § 170.9. The statute was amended in August, 1995. This statute had been introduced in response to perceived abuses in the acceptance of gifts, entertainment, travel and gratuities by judges¹ which were not strictly prohibited by the Code of Judicial Conduct.

The CJA Ethics Committee customarily does not render advisory opinions which relate to matters of statutory law, rather than the interpretation of the Code of Judicial Conduct. However, due to the overwhelming number of inquiries and interest raised with CJA, and based upon the fact that enforcement of the statute is vested in the Commission for Judicial Performance, this Committee was asked to assist CJA members by answering interpretative questions concerning the new law. This formal opinion is the Ethics Committee's effort to provide written guidance in applying the new statute to the most common hypothetical raised by CJA members. In analyzing a proposed activity under CCP § 170.9, it must be borne in mind that this statute is cumulative to the Code of Judicial Ethics. That is to say, a gift, entertainment, travel, or gratuity may be allowable under the Code of Judicial Ethics yet prohibited by CCP § 170.9. Similarly, although a "gift" may be allowable under the statute, the circumstances under which it is made may be nevertheless prohibited by the Code of Judicial Ethics. As a result, any questioned conduct must be evaluated separately under each. Formal Opinion No. 43 provides a basis for analysis of such gifts under the Code of Judicial Ethics while this opinion is limited to an analysis of a hypothetical under CCP § 170.9. Finally, (although beyond the scope of this opinion) judges must also take into account the Fair Political Practice Commission's rules.²

II. Limitations Under CCP Section 170.9

The statute can be subdivided into four sub-parts as follows:

1. The definition of a "gift" under the statute;
2. An aggregate dollar limit on gifts from a single source;
3. Travel, lodging, and subsistence payments which are allowable over the aggregate gift limit; and

¹ The definition of "judge" in the statute does not include commissioners, referees, nor does it appear to encompass retired judges who sit on assignment.

² These rules can be found in the FPPC Regulations at Title 2 of the California Administration Code Section 18900 to 18995.

4. A prohibition on the acceptance of honoraria.

A. "Gifts"

A gift includes any payment where consideration of equal or greater value is not received by the giver, and includes rebates or discounts of goods or services unless the same rebate or discount is available to members of the public in the regular course of business without regard to status (CCP § 170.9(1)). Specifically excluded from the definition by recent amendment³ are reduced or waived admission, tuition, and registration fees for informational conferences or seminars. Also excluded is the value of admission to events hosted by state or local bar associations, or judge's professional associations, including the value of incidental meals and beverages (CCP § 170.9(1)(7)).

B. Prohibition on Gifts Exceeding \$250

Gifts from a single source in any calendar year cannot exceed a total of \$250 (CCP § 170.9(a)). Thus, three \$100 "gifts" to a judge from a single source in any one year period is prohibited because the aggregate exceeds \$250 in value.

Excluded are payments for travel, lodging and subsistence otherwise allowed under the statute, as are exchange of gifts, including wedding gifts, which are culturally recognized (CCP 170.9(b)(1) and (2)). The statute does not specifically address gifts to a judge's spouse or family members. However, given the intent with which the enactment was passed and based upon historical interpretations of the Code of Judicial Conduct, a judge may not seek to avoid the scope and intent of the statute by directing the gift to the judge's spouse or family.

C. Travel Lodging and Subsistence

Payments, advances, or reimbursements for travel, lodging, and subsistence which exceed the \$250 limit are not prohibited if the purpose is reasonably related to a judicial or governmental purpose or public policy matter, and at least one of the following apply:

(1) The expense was incurred in connection with a speech, practice demonstration, or group or panel discussion in which the judge was a participant and the lodging and subsistence was limited to the day before, during, and immediately after the event (and travel must be within the United States).

(2) The travel is provided by an entity defined by the statute which broadly includes governmental entities, organized bar associations, or nonprofit charitable or religious organizations.

(3) The travel is provided in connection with testimony by the judges before a governmental body or to enable the judge to attend a professional function hosted by a bar or judges' association, and the lodging and subsistence was limited to the day before, during and immediately after the function. (CCP 170.9(e))

D. Honorarium

Judges are prohibited from accepting any honorarium. An honorarium is defined as "any payment made in consideration for any speech given, article published, or attendance at any public or private conference,

³ These amendments were sponsored by CJA and passed by the legislature in August 1995. They do not take effect until January 1, 1995.

convention, meeting, social event, meal or like gathering." Importantly, honoraria do not include payments received for teaching or writing for a publisher or receiving of payment for performing a marriage.

With this general overview of the scope of the statute, the Committee offers below a number of common hypothetical factual situations as well as an analyses and conclusion concerning application of the rules to assist the reader in interpreting the reach of this new statute.

III. Application to Specific Factual Situations⁴

A. **Facts:** Judge is offered free admission to attend a two day lecture concerning the law, given by a well-known lawyer and author. The judge and the author are not friends. The cost of admission to the general public is \$425.

Analysis: CCP § 170.9 exempts free admission to such an event from its definition of a "gift" if the lecture is an "informational conference or seminar"⁵.

B. **Facts:** Judge is invited by criminal law section of the local bar association to a dinner costing \$60. Later, the business litigation section invites the judge to a dinner lecture for which the admission cost is \$55. In addition, the same bar association invites the judge to a "meet the judges" luncheon for which the cost of admission is \$55 and reimbursement for parking is \$20. The judge has now been offered free admission to the bar association's family law section symposium which costs \$110 to attend. All of these events occurred in the same calendar year. The judge did not make a speech at any of these events.

Analysis: CCP § 170(I)(1) as amended, now excludes from the definition of "gifts" reduced or waived tuition or registration fees for "informational conferences or seminars."

Accordingly, the bar section functions, which involve such offers, are permissible. Moreover, CCP § 170.9(I)(7) specifically exempts offers of reduced admission at bar association functions, and similarly excludes the value of meals and beverages served at these events.

As to the reimbursed expense for travel (parking), § 170.9 exempts payments, advances or reimbursements for travel, including transportation and related lodging and subsistence, which are reasonably related to a judicial or governmental purpose or to an issue of state, national or international public policy, if travel is provided by a state or local bar association in connection with attendance at a professional function. However, the travel and subsistence expenses are limited to the day immediately preceding, the day of and the day following the event.

C. **Facts:** Once a month, judge plays golf at a private club with a friend who is a member. Guests who play with members are charged \$50 per round. The judge pays the \$50 fee. Non-members must pay \$125 per round.

⁴ The analysis of each fact situation is based on CCP § 170.9 as revised by the legislature in August 1995, to take effect January 1, 1996.

⁵ The facts of this hypothetical qualify the "informational conference or seminar" to one concerning the law. A narrow reading of CCP § 170.9(1)(1) does not restrict the exemption to "informational conferences or seminars" concerned with the law or law related matters. Thus, under a narrow reading of the statute, if the well-known lawyer and author was giving an "informational seminar" concerning foreign travel, a judge could accept the discount. However, given the intent with which the enactment was passed and based upon historical interpretations of the Code of Judicial Conduct, a judge would be well-advised not to accept a discount unless the "informational seminar" was concerned with the law or a law-related matter.

Analysis: Pursuant to CCP § 170.9, a "gift" includes a rebate or discount in the price or 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." As the discount to the green fees is available to any person who is the guest of a member, the discount would not be considered a gift. As such, the reduced green fee is not a gift under the statute.

D. **Facts:** Judge's friend and spouse own a vacation condominium in Big Bear. For years starting before the judge's appointment the judge, the judge's friend and their families have celebrated Christmas and New Year's at the condo. The two families stay together 7 days each year. The fair rental value of the condo is \$200 per day.

Analysis: "Gift" is defined as including payments, rebates and discounts, none of which exactly fit this situation. However, a reasonable reading of the statute is that the judge and the judge's family are receiving a gift. If the gift is treated as one from the friend to the judge, and, assuming that the \$200 rental value is divided equally between the two families, the value of the gift is \$700. It is thus prohibited under the statute as being in excess of \$250 and not falling within any exception.

However, depending on the relationship of the people involved, the analysis might change. For example, if the condo is owned by the friend and the friend's spouse and the friendship truly involves the judge and the judge's spouse equally, it may be more appropriate to consider this as four \$175 gifts. Each of the gifts from the friend and the friend's spouse is then under the \$250 limit. (The gifts to the judge's spouse are not subject to CCP § 170.9.)

Similarly, if the friendship is really between the two spouses, there is no gift to the judge except for the "gift" which the judge's spouse makes to the judge in including the entire family on the vacation. (Intra family gifts are excluded under CCP § 170.9(1)(3).)

Section 170.9(1) states that discounts made "in the regular course of business to members of the public without regard to official status" are not gifts. Under the facts here, the discount is not given because of official status but because of long standing friendship. Nevertheless, the exception is not available unless the friend is engaged in the regular course of business of renting the condominium and regularly allowed others to stay in it rent free.

There are many variations to this fact situation, and the Committee cannot address each of them. Generally, judicial officers should employ a common sense approach in these situations, avoid a hyper-technical analysis of the statute, and consider the policies behind CCP § 170.9 in deciding whether to accept offers of this type.

E. **Facts:** Judge and judge's spouse are offered free tickets to a dinner dance. The event is not hosted by a state or local bar association or judges' professional group. The judge does not speak at the dinner. The cost of the function is normally \$130 per person.

Analysis: Assuming that the tickets are being offered because of the judge's position and it would be unexpected that the spouse would attend the dinner dance alone, then this is a \$260 "gift" to the judge. Again the safe course would be for the judge to not rationalize that the spouse's ticket was a gift to the spouse, thus allowing circumvention of the statute. One of the tickets should be paid for, or at least \$10 should be paid to bring the "gift" within the statutory limit.

F. **Facts:** Judge is invited to attend and participate in a legal ethics discussion in Reno being sponsored by the Nevada Bar Association. The conference runs from Friday morning to Monday mid-day. The judge is to speak on Friday afternoon. The judge will be reimbursed for travel and three days of lodging.

Analysis: The facts of this hypothetical fall within the ambit of two sub-sections of the statute. CCP § 170.9(1)(7) exempts admission, food and beverages incident to a state or local bar association activity "when attendance does not require 'travel' as described in paragraph (3) of subdivision (e)." However, in our hypothetical situation, one would assume that travel would be necessary and CCP § 170.9(e)(3) would be the controlling subsection.

CCP § 170.9(e)(3) allows the judge to accept reimbursement for travel, as well as lodging and subsistence, if the function is hosted by a state or local bar association or judges' professional association. However, the function must be reasonably related to a judicial or governmental purpose, or to an issue of state, national, or international public policy, and the judge must participate by giving a speech or participate in a panel discussion. If these conditions are met, the expenses may cover the day immediately preceding, the day of, and the day immediately following the professional function. Under this subsection travel is not limited to "within the United States." In our hypothetical the judge could accept these designated kinds of expenses for the period Thursday through Tuesday.

If under our hypothetical the facts remain the same, except that the function is sponsored by a community service club, the judge may be reimbursed for travel in connection with a speech, practice demonstration, or group or panel discussion. However, to be reimbursable the travel must be within the United States and lodging and subsistence expenses are limited to the day immediately preceding, the day of and the day immediately following the judge's participation (CCP 170.9(e)(1)).

In the event that the service club fell within the statute's definition of "an international service organization or a nonprofit charitable organization exempt from taxation under Internal Revenue Code Section 501(c)(3), the judge would be able to accept the travel in its totality, whether within or outside of the United States. However, a judge who accepts travel payments from an international service organization is prohibited from presiding over or participating in decisions regarding that organization, its state or local chapters, or its local members (CCP 170.9(e)(2). Note also that if the event were sponsored by the American Bar Association, and not a state or local bar association, the travel exception of CCP 170.9(e)(3) would not be available.

G. **Facts:** Judge has agreed to speak at a conference being held on a four-day cruise which travels from Los Angeles to Mexico and returns to Los Angeles. The judge will speak on the second and third days of the cruise. The conference's sponsor has agreed to pay the passage of both the judge and the judge's spouse.

Analysis: The facts of this hypothetical as presented do not indicate the subject matter of the speech or the conference. Furthermore, the facts do not indicate if the sponsor of the cruise is one that would allow the judge to qualify for reimbursement under one of the exemptions. Assuming that the tickets are being given to the judge because of the judge's position, the value of the judge's ticket, if any, above the \$250 limit would constitute a prohibited "gift" to the judge. Furthermore, the cost of the cruise for the judge's spouse would also be counted toward the limit.

H. **Facts:** Judge receives a birthday gift from a lawyer friend. The gift is valued at \$750. The judge has never before given a birthday gift to the friend, and even if so inclined would not anticipate spending \$750.

Analysis: CCP § 170.9 exempts "gifts" exchanged between individuals on birthdays and similar occasions provided that the "gifts" exchanged are not substantially disproportionate in value. Given the facts as presented, the judge may not accept the gift. The judge does not exchange gifts with this particular friend, and if the judge were to do so, would not spend \$750; therefore, the gift does not fit within the stated exemption and is governed by the \$250 limit.

I. **Facts:** The presiding judge feels a duty to attend numerous meetings of the county bar association for various reasons, all related to the judge's position as presiding judge. These meetings are held in the city or county where the judge's court is located and travel costs are not an issue. The judge's spouse will usually accompany the judge to the functions, and their admission is paid for by the association. The average cost for individuals attending a function is \$140.

Analysis: As the functions are sponsored by a local bar association the cost of both tickets, regardless of whether the cost is allocable between admission, food and beverages, is exempt under CCP § 170.9(l)(7). Furthermore, since attendance at the functions is related to a judicial purpose the judge would be able to accept even if the functions were not sponsored by the bar association. In either case the price of the function would be exempt from the statute's \$250 limit.

J. **Facts:** Judge's spouse is travel agent. By virtue of that position, the spouse is able to secure 50% discounts on various travel packages for the spouse and the judge. These discounts are not available to the general public, but are not related to the judge's official status.

Analysis: The statute exempts from the definition of gift those discounts received "in the regular course of business to members of the public without regard to official status." Assuming the discounts are available to the spouse in the regular course of the spouse's employment as a travel agent, they would fall within this exemption and would not be governed by the \$250 limit.

K. **Facts:** Judge is a former president of a specialty bar association. The association has a practice of providing free admission to its annual meeting to all former presidents regardless of their current status. The regular price of admission is \$500, and covers the two-days of seminars and the cost of meals and a cocktail party. The judge will not be participating other than as an attendee.

Analysis: The practice does not constitute a "gift" under the statute. The free admission is available to all former presidents regardless of their status, and therefore is explicitly excluded from the definition of a "gift." The subsistence portion of the admission cost is excluded from the \$250 aggregate limit because the event is sponsored by a bar association (CCP § 170.9(e)(3)). Assuming there is no travel involved, and that the term "bar associations" as used in the statute is broad enough to include "specialty bar associations," CCP § 170.9(l)(7) would also apply and again there would be no dollar limitation.⁶

L. **Facts:** Judge has been invited to attend a legal seminar jointly sponsored by CJA and a private legal educator (such as West, Bancroft-Whitney, Rutter Group, CFLR, etc.). The "regular" price is \$300 to lawyers or members of the public to attend. The attendance fee for a judge is reduced or waived because of the judge's status.

⁶ If there is any question about whether a state or local bar includes "specialty bars" it is resolved by reference to CCP § 170.9(e)(2) which excludes specialty bars from the definition of "foreign bar associations". The Legislature obviously considered the specialty bar issue and excluded it from the meaning of bar association only in the limited foreign bar provision.

Analysis: Because the seminar is hosted by a judges' professional association, the amount of the reduction in the judge's fee is not a "gift" (CCP § 170.9(1)(7)). Furthermore, even if the exemption were to be lost by virtue of the fact that the event is co-hosted by a private legal educator, the value of tuition, admission, or registration is nevertheless exempt because the event is an informational conference or seminar (CCP § 170.9(1)(1)).

IV. Conclusion

There are doubtless numerous other factual hypotheticals one might propose to test the breadth of of this new statutory scheme. The above examples have been selected in the hope that at least the most prominent features of the new law have been discussed.

COMMITTEE ON JUDICIAL ETHICS

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