

CALIFORNIA JUDGES ASSOCIATION
Judicial Ethics Committee
Opinion 65

JUDGE AS AUTHOR

I. Introduction

Over the years the Ethics Committee has received numerous inquiries from bench officers regarding issues related to authorship of published materials. Judges who have sought advice have written everything from legal treatises to children's books. Judges may and have written a broad range of materials from fiction to memoirs to opinion pieces to legal texts. However, there are ethical limits on what judges can write. In addition, there are many ethical concerns that come into play when marketing works authored by the judge or when judges are used to market another person's works. This opinion will address a variety of issues that arise in the context of a judge as author.

II. Authority

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

Canon 2B (2): "A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others."

Canon 2B (2) Commentary: "In contracts for publication of a judge's writings, a judge should retain control over the advertising, to the extent feasible, to avoid exploitation of the judge's office."

Canon 3B(9): "A judge shall not make any public comment about a pending or impending proceeding in any court. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case."

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; or (3) interfere with the proper performance of judicial duties."

Canon 4B: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and non-legal subject matters, subject to the requirements of this Code."

Canon 4B Commentary: "It may be necessary to promote legal education programs and materials by identifying authors and speakers by judicial title. This is permissible, provided such use of the judicial title does not contravene Canons 2A and 2B."

Canon 4D(1)(a): "A judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position."

Canon 4D(2): “A judge shall not participate in, nor permit the judge's name to be used in connection with, any business venture or commercial advertising that indicates the judge's title or affiliation with the judiciary or otherwise lend the power or prestige of his/her office to promote a business or any commercial venture.”

Canon 5D: “Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.”

III. Subject Matter

A. Discussion

Canon 4B states it is permissible to “speak, write, lecture, and participate in activities concerning legal and non-legal subject matters, subject to the requirements of the code.” There are four principal constraints on what a judge may write about imposed by the requirements of the code. These are Canon 2A’s requirement that a judge “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” Canon 3B(9)’s prohibition on commenting on pending or impending cases, Canon 4A’s requirement that a judge’s extrajudicial activity not “cast reasonable doubt on the judge’s capacity to act impartially” or “demean the judicial office,” and Canon 5D’s prohibition against any political activity not related to improvement of the law, the legal system or the administration of justice.

Of these, the easiest to apply is 3B(9)’s prohibition against commenting on pending cases. A judge may not comment on any case he or she handled which is not yet final. On the other hand, the educational exception to 3B(9) does allow judges to comment on cases pending appeal in educational programs and materials so long as the judge did not personally participate in the case and the comments do not interfere with having a fair hearing on the case. If the judge personally participated in the case, limiting the information to matters that are of public record and avoiding any comment that could influence the appeal or other proceeding does not get around the prohibition; there is no exception for matters in the public record. For example, in writing a book on forensic DNA typing it was permissible for a judge to recount the salient facts of murder cases tried before the judge that were final, but it was not permissible to include facts from two death penalty cases pending appeal that the judge tried as a lawyer. Because the judge had participated in the cases as a lawyer, the educational exception to 3B(9) did not apply even though the judge included only facts in the public record and avoided any comments that might interfere with a fair hearing of the case.

Canon 5D prohibits the writing of any materials that would constitute impermissible political activity. This Canon is not as easily applied as Canon 3B(9). If the subject matter of the piece relates directly to the law, the legal system or the administration of justice it is not prohibited by Canon 5D. However, many policy issues that have broader implications may impact the legal system or the administration of justice. The mere fact that a policy could have some tangential impact on the legal system or the administration of justice does not permit a judge to publicly weigh in on the issue, unless the subject matter is limited to the impact of the policy in question on the legal system or the administration of justice. Thus,

it was permissible for a judge to write an article critical of Proposition 36, because it was a ballot measure dealing with the administration of justice, but it was impermissible for a judge to write an article generally opposing a ballot measure that would affect funding for the California Children and Family Trust Fund because that measure did not deal directly with improvement in the law, the legal system or the administration of justice. However, in this situation it would be permissible to write an article explaining the impact of the proposition on the court and the services provided to families and children in the legal system.

Even where the subject matter of a piece is permitted under Canons 3B(9) and 5D, one must always be mindful of the overriding proscriptions of Canon 2A and 4A. Canon 2A mandates that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 4A requires that: “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; or (3) interfere with the proper performance of judicial duties.” Thus, even where a judge writes about the law or advocates for changes in the law, that judge must do so in a manner that does not undermine public confidence in the judiciary or cast doubt on the judge's ability to act impartially. At the same time, the commentary to Canon 4B encourages judges to be involved in the improvement of the law, the legal system and the administration of justice, recognizing that judges are in a unique position to do so. The following examples illustrate the tension between advocating for the improvement in the law, the legal system and administration of justice and the constraints placed on that advocacy by Canons 2A and 2B.

B. Examples

1. Cases where subject matter contravened Canon 2A or 4A.

a. Judge wished to submit an article for a law review publication that was highly critical of the Correctional Officers union, recent administrations in Sacramento and the get “tough on crime” movement. Though well written and thoroughly researched, the tone of the article and certain statements in it cast doubt on the judge's capacity to act impartially in cases involving prison guards, inmate brutality, three strikes sentencing and drug offenses.

b. Judge in a criminal law assignment was prohibited from writing training bulletins for law enforcement. Though available to anyone on-line, the site on which the bulletins appeared was maintained by a company run by active law enforcement officers and the bulletins were directed to law enforcement personnel. Authorship of these types of materials within this context gave rise to an appearance that the judge would not be impartial in criminal matters

c. It was improper for a Presiding Judge to write an op-ed piece highly critical of the use of CCP 170.6 affidavits to “sound a warning” to the judiciary. The impetus for writing the article was the exercise of several peremptory challenges against another judge. Therefore, the article could be viewed as intimidating to lawyers who had filed the affidavits of prejudice.

2. Cases where subject matter did not contravene Canon 2A or 4A.

- a. A judge may write an article critical of the Administrative Offices of the Courts and the Chief Justice for implementing court closures and voluntary salary waivers.
- b. A judge may write a book recounting the salient facts of murder cases tried before the judge where all of the included cases were final and the book was written in a fashion that respected the law and did not undermine public confidence in the integrity and impartiality of the judiciary.
- c. A judge may write an article critical of a recent Supreme Court decision where the criticism stems from the judge's legal analysis of the case and is to be published in a legal periodical.

IV. Publication and Marketing

A. Discussion

The next areas of concern with a judge as author are the ethical constraints on how works by judges may be marketed and on the permissibility of judges marketing works by other authors. May a judge-author use his/her title on the cover of a book? May the judge's position be included in biographical information on the book's jacket cover? May the judge's title be used in marketing the book? The answers to these questions may depend on the book's subject matter. While the text of the Canons themselves do not draw a distinction between legal and non-legal works, the commentaries to the applicable Canons do, making it clear that the rules apply differently to legal works. As previously discussed, Canon 4B expressly permits a judge to write about legal and non-legal topics, subject to the requirements of the Code. The commentary to that section recognizes that "a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice." The commentary goes on to state:

It may be necessary to promote legal education programs and materials by identifying authors and speakers by judicial title. This is permissible, provided such use of the judicial title does not contravene Canon 2A and 2B.

Canon 2B(2) states: "A judge shall not lend the prestige of judicial office or use the judicial title in any manner to advance the pecuniary or personal interests of the judge or others." However, in addressing "the use of the judge's title to identify a judge's role in the presentation and creation of legal education programs and materials," the commentary to Canon 2B refers specifically to the commentary to Canon 4B. Thus, the commentaries to the Canons expressly permit the use of a judge-author's title in the promotion of legal materials.¹ Law-related articles, treatises and books are obviously legal materials. Therefore, a judge who authors these types of materials may use his/her title in promoting them so long as doing so otherwise complies with Canon 2A and 2B.

On the other hand, not every use of a judge's title in a non-legal context would be an impermissible use. In the non-legal context, the inquiry would be whether the title is used to advance the pecuniary or other interest of the judge or

¹ These provisions and the language of Canon 4B itself, which deal specifically with the judge as author, take precedence over the more general provisions of Canon 4D(1) and (2).

others. For example, including the judge's position in biographical information about the author of a non-legal book would be permissible, but using that information to market the book would not. In the former situation, the use of the title is not for the purpose of advancing the pecuniary or personal interest of the judge or others. In the latter situation, it clearly is.

When and how a judge's name and title is used is also an important consideration in complying with the affirmative obligation to control advertising as required by Canon 2B: "In contracts for publication of a judge's writings, a judge should retain control over the advertising, to the extent feasible, to avoid exploitation of the judge's office." (Canon 2B, Commentary) A judge who enters into a contract for the publication of his or her writings should include language limiting how the judge's title can be used to avoid violating Canon 2B.

The following examples will attempt to illustrate the distinction between promoting legal versus non-legal works and provide guidance on what is permissible in each context.

B. Examples

1. Legal Works

a. It is permissible for a judge to use his/her title on the cover of a legal practice guide and a monthly newsletter on the same topic.

b. While a judge cannot promote a legal book written by another, a judge may promote a book on legal issues that the judge has authored or participated in preparing as a consultant, editor or reviewer if published by a non-profit public institution dedicated to the improvement of the law and administration of justice. Thus, a judge who reviews a draft CEB book and makes comments to the author may write a recommendation of the book for CEB. However, a judge not involved in the preparation of the book may not write a testimonial regarding the value of a CEB publication for use in marketing the book.

c. Judge moderating a panel discussion at the annual state bar convention may have a table set up at the convention which sells copies of a book written by the judge on the discussion topic so long as the judge does not personally solicit sales of the book.

d. Judge who authored a legal book may not use a laudatory quote from an appellate justice to promote sales of the book at the state bar convention.

e. Judge who writes a compendium on an area of law may send a letter to subscribers, including attorneys who may appear before the judge, notifying them that the previous publisher of the compendium is out of business and providing subscribers with information on how to continue receiving updates for the publication.

f. Judge may advertise legal work written by judge in the local county bar newsletter.

g. Judge who has authored a number of legal books may teach an MCLE course for attorneys at a breakfast sponsored by the books' publisher where the books will be sold, so long as the judge does not personally solicit sales of the book

2. Non-legal works

a. Biographical information included in the foreword of a legal thriller authored by a judge may include a reference to the author's position as a judge.

b. Judge may write a review of a book written about an historical event for a legal periodical even though any positive comments are likely to be used to market the book where the review was written as an academic exercise and not for commercial purposes.

c. Judge who authored children's books may speak about the process of writing and publishing the books at a local school and may sign copies of the books at the event, but it would be impermissible to sell books at the event to raise funds for the school, once author's position has been revealed.

d. Judge may not write a critique of a book written by a friend about the author's son's drug abuse. Moreover, since the primary purpose of including the judge's critique is that the critique was written by a judge, it would not make a difference if there were no mention of that fact on the jacket itself because the judge's position would likely be exploited in other particulars beyond the judge's control.

e. Judge may not write a commentary to be included in a book jacket and which would be used to market the book.

V. Conclusion

The Code of Judicial Ethics gives judges broad latitude in the type of works they may author and publish. In the context of publishing non-legal works, there are very few constraints on what a judge may write; rather the primary ethical concern of the Code is how those works are marketed. On the other hand, in authoring legal materials the Code imposes greater restrictions on what may be written, but provides greater latitude in marketing those works. It is not the intent of this opinion to set out every example of how the Code may affect what may be written or how a work may be marketed. This opinion is intended to provide judges with the ethical framework the Code puts in place when authoring materials for publication. The hope is that, when authoring or marketing a particular work, this opinion will supply sufficient guidance with respect to the ethical questions presented. However, the Committee acknowledges that many questions cannot be answered by this opinion and encourages judges to contact the ethics committee when they have questions or concerns about a work they wish to publish or market.

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