

The Days of Wine and Roses: Paradise Lost or Good Riddance?

*By: Honorable Robert J. Burns (Ret.) and
Robert J. Burns, Jr.*

VITAE SUMMA BREVIS SPEM NOS VETET INCOHARE LONGAM

They are not long, the weeping and the laughter,
Love and desire and hate;
I think they have no portion in us after
We pass the gate.

They are not long, the days of wine and roses:
Out of a misty dream
Our path emerges for a while, then closes
Within a dream.

-- Ernest Dowson, 1867-1900 --

I. ETHICS REFORM AND THE JUDICIARY

The outcry for “ethics reform” in Louisiana was heard in all three branches of government, not just the executive and legislative branches. And, like the other two branches, effective January 1, 2009, the Louisiana Judiciary ushered in a new set of rules governing when, from whom, and under what circumstances its elected judges might accept gifts or other things of value. This article addresses the changes made to Canon 6 of the Code of Judicial Conduct¹ – and how those changes might apply to lawyers as well.

To some, these changes might signal the end of an era when questions about a judge’s integrity were considered in poor taste and a shot below the belt. To others, the changes might be viewed as a welcome relief to a system that was riddled with abuse. Still others might lament the passing of an honor system that gave way to the establishment of one that paints an ugly picture of the relationships between lawyers and judges.

But, whether they are embraced or rebuked, these changes will certainly affect the lives of judges and lawyers, alike. The days of “wine and roses” are gone.

II. CANON 6 OF THE CODE OF JUDICIAL CONDUCT

a. The Old Law:

¹ The Code of Judicial Conduct applies not only to elected judges but also to “...anyone, whether or not a lawyer, who is an officer of a court of record performing judicial functions, including an officer such as a judge ad hoc, judge pro tempore, referee, special master, court commissioner, judicially appointed hearing officer, or magistrate, and anyone who is a justice of the peace....”

Before it was amended, Canon 6(c) of the Code of Judicial Conduct warned simply that:

C. Gifts. A judge, a judge’s spouse, or a member of the judge’s immediate family residing in the judge’s household shall not accept any gifts or favors **which might reasonably appear as designed to affect the judgment of the judge or influence the judge’s official conduct.**

When a judge received a gift or favor, the “smell test” was vague and subjective. The judge’s dilemma -- whether to accept the gift (and face possible charges by the Judiciary Commission) or reject the gift (and thereby insult the giver) was difficult, particularly when considering re-election.

In the end, Canon 6 required that the judge predict whether others might perceive that his judgment would be affected by the gift. Black letter law was little help. Not only was the Canon subjective, but it easily allowed the discerning judge to rationalize that “no reasonable person would conclude that *this gift, such a small gesture*, would in any way affect my ability to be fair and impartial.”

In most cases, the prior rule was no help. When does a gift create an appearance of impropriety? Is it okay for my staff to accept a tray of chocolates during the holidays? Can I accept that Christmas ham? A weekend game of golf? Tickets to the football game? A fishing or hunting trip? The key question -- when does a gift give the public the perception of something inappropriate -- was often left unanswered.

That is one of the questions that the amendments seek to

answer. And the rule does so in a way that many lawyers and judges will find surprising because it *presumes* that most gifts from lawyers to judges are inappropriate.

b. Canon 6 Revised: If the Gift is From a Lawyer, the Rule Presumes an Appearance of Impropriety

Instead of simply leaving it to the judge to determine what a “reasonable person” might perceive, the new rule sets a different tone, entirely. It has made the determination that, where the gift comes from a lawyer or someone whose interests are likely to appear before the judge, the gift cannot be accepted (unless it falls within the narrow exceptions contained in Canon 6(B)(3) or 6(B)(4)).

As amended, Canon 6(B) now provides that:

- (1) A judge **shall not accept...** any gifts, loans, bequests, benefits, favors or other things of value which **might reasonably appear as designed to affect the judgment of the judge or influence the judge’s official conduct.**
- (2) Except as provided in Canon 6(B)(3) and (B)(4) below, a judge **shall not accept...** any gifts, loans, bequests, benefits, favors or other things of value **if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge,** or whose interests have come or are likely to come before the judge.

The amendment thus effects a drastic change in the judge's analysis whether to accept a gift or favor. In short, unless it is authorized by Canon 6(B)(3) or 6(B)(4), a judge will be hard-pressed to find a situation in which gifts may be accepted. And if the gift comes from a lawyer, the judge must be wary that the spirit of the new rule is to heavily scrutinize such gifts as it seems to presume that such gifts give the appearance of impropriety – and cannot be accepted.

c. No Report Required Under Canon 6(B)(3)

If the gift may be accepted, that does not end the inquiry. Certain gifts must be reported, even if they may be accepted. Here, Canons 6(B)(3) and 6(B)(4) come into play. These subsections outline those situations where the gift may be accepted, and which types of gifts nevertheless must be reported.

Canon 6(B)(3) provides, in pertinent part:

- (3) If not in violation of Canon 6(B)(1), a judge may accept the following without reporting such acceptance:
 - (a) Items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
 - (b) Gifts, loans, bequests, benefits, favors or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge, or if

the gift, bequest, benefit, favor or other thing of value is made in connection with a special occasion such as a wedding, anniversary or birthday and the gift is commensurate with the occasion and the relationship;

- (c) Ordinary social hospitality provided the total value of the food, drink, or refreshment given to a judge at any single event shall not exceed fifty dollars....
- (d) Commercial or financial opportunities and benefits... if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
- (e) Rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
- (f) Scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;
- (g) Books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use;
- (h) Gifts, awards or benefits associated with the

business, profession, or other separate activity of a spouse or immediate family member residing in the judge's household, but that incidentally benefit the judge; or

- (i) Complimentary admission to a political event if in compliance with this Code of Judicial Conduct, Canon 7.

d. Canon 6(B)(4): Gifts That Must Be Reported

Canon 6(B)(4) describes the types of gifts that must be reported. That subsection provides:

- (4) If not in violation of Canon 6(B)1), a judge may accept the following, and must report such acceptance subject to Canon 6(C)(2)(a):
 - (a) Gifts incidental to a public testimonial;
 - (b) Invitations to the judge and the judge's spouse or guest to attend without charge:
 - i. An event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or
 - ii. An event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by the Code of Judicial Conduct, if the same invitation is offered to non-judges who

are engaged in similar ways in the activity as is the judge;

- (c) Complimentary admission to a civic, non-profit or educational event when the judge is a program honoree, is a speech presenter, or is a panel member for a discussion occurring at the event; or

e. The Reporting Requirement

Beginning in 2010, on or before May 15 of each year, judges must complete and file a report with the Office of the Judicial Administrator, Supreme Court of Louisiana detailing any reportable gifts, loans, or other things of value as required by Canon 6. The reports cover activity for the preceding calendar year. All reports filed will be matters of public record and subject to public inspection. The report requires a comprehensive listing of all reportable items received during the calendar year.

III. WHAT ABOUT THE LAWYERS?

Recall that Canon 6(B)2 generally makes it improper for judges to accept gifts from lawyers, unless the gift falls within the exceptions noted above. So, one might ask, how does this affect the lawyer? The Canons apply to judges and those serving judicial functions – not lawyers, right?

First, it has long been true that a lawyer has the obligation to report judicial misconduct. Rule 8.3 of the Rules of Professional Conduct instructs that a “lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a question as to the judge’s honesty, trustworthiness or fitness for office shall

inform the Judiciary Commission.” In addition, Rule 8.4(f) of the Rules of Professional Conduct provides that it is misconduct for a lawyer to “[k]nowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law.”

Thus, the amendments to Canon 6 do indeed impact lawyers as well as judges. Take *In re Leblanc*, No. 2007-B-1353 (La. 11/27/07), 972 So. 2d 315, for example. In that case, lawyer Leblanc had recently tried a very serious personal injury case in the judge’s court. Within six months of the trial, the judge contacted the lawyer and asked him to contribute to his brother-in-law’s political campaign. That request was itself a violation of the Code of Judicial Conduct. The Office of Disciplinary Counsel brought charges against the lawyer for violating Rule 8.4 – assisting the judge to violate the restriction against political fundraising. The lawyer was suspended from the practice of law.

The significance of *In re Leblanc* is obvious: the underlying conduct (that of giving money to the political campaign) was legal. The rule violation came when the lawyer knowingly assisted the judge to violate the Canons of Judicial Ethics (because judges are restricted from political conduct such as fund-raising for other candidates). In view of the amendments to Canon 6, lawyers must now ponder whether their gifts, favors or even social hospitalities to judges might constitute ethical violations.

IV. CONCLUSION

Gifts, favors and even social hospitalities between judges and lawyers have been thrust into the political spotlight of “ethics reform.” Some will go grudgingly along with the changes, others might welcome the them as long overdue. But, change is indeed the intent of Canon 6.

Many judges willingly sacrifice lucrative careers as lawyers to devote themselves to public service. Sometimes coming as a gesture of respect for their position, other times in recognition that their peers at the bar were often better compensated, judges received the occasional “freebie.” A golf game here, a hunting trip there, a free lunch from time to time – all these were viewed as nothing more than accepted courtesy and common practice. Canon 6 previously allowed such gestures unless the reasonable onlooker would conclude something insidious. That was rarely the case.

Now, lawyers must exercise caution when they incline even the slightest nod to a judge. And judges must be wary that even the smallest gratuity might be the cause for censure or worse. The new rules presume that any favor, gift, or thing of value from a lawyer to a judge is out of bounds – and subject to disciplinary enforcement. And, that danger awaits not only the recipient, but the giver as well.