ADVISORY OPINION

Code of Judicial Conduct   #2-88
    Canon 5

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The question before the Commission is whether a judge may obtain a bank loan for the purpose of meeting the costs of his defense in a criminal prosecution by arranging for co-signers or guarantors of the loan, some of whom would be attorneys.

ANALYSIS

It is clear that the act of co-signing a loan agreement is the giving of something of value and should be considered a gift or loan. Funds are made available to the judge by virtue of the co-signature, the co-signer is potentially liable on the loan, and his own credit standing may be affected by the guarantee. Therefore, this judge's proposed loan agreement implicates Canon 5 of the Code of Judicial Conduct which provides in pertinent part:

   (4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

           (a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Thus, Canon 5 does not prohibit a judge from accepting gifts or favors, even from lawyers. See, ABA/BNA Manual on Professional Conduct, 61:803. Indeed, pursuant to 5C(4)(a) and (b), a judge may accept ordinary social gifts, may obtain loans from lending institutions or relatives, may accept scholarships, tickets to certain functions, public testimonials, or books for official use. Canon 5 allows judges, to a reasonable degree, the privileges fairly afforded any citizen. See e.g., ABA/BNA Manual on Professional Conduct, ABA Model Standards, commentary to Canon 5, 1:343.

Canon 5C(4)(c), however, disallows gifts, loans, and favors in circumstances which would tend to taint the judiciary in fact or in appearance. Gifts other than those sanctioned in subsections (a) and (b) may not be received from individuals or parties whose interests have come or are likely to come before the judge. Clearly, the limitation applies to the attorneys of the interested parties as well. Thode, Reporter's Notes to Code of Judicial Conduct, 1973, p. 85. A gift or loan from an attorney or other interested party who has appeared or will appear before the judge, unless sanctioned outside of 5C(4)(c), creates the ineluctable appearance of impropriety. Matter of Litman (Minn.) 272 N.W.2d 264, 266 (1978). Therefore, this judge's proposed loan arrangement is appropriate only if the co-signers or guarantors have never and are unlikely to ever appear before him.

Those individuals who have appeared before the judge and therefore are not appropriate co-signers or guarantors can be identified easily by the judge. Those who are likely to appear in the future will be less easily ascertained. A judge should not accept as a guarantor an attorney whose practice involves court appearances in the county of the judge's jurisdiction, unless the limits of the attorney's practice and the judge's jurisdictional limits together make an appearance unlikely. Beyond this, the Commission is unable to draw clear lines and must require the judge to make ad hoc evaluations. It is not enough that the judge intends to disqualify himself if appearances are made in

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his court by co-signers or their associates. Canon 5C(4)(c) demands that the conflict be avoided, not simply remedied.

If the judge insures that his co-signers are not from a prohibited class of lawyers or litigants, he will have gone a long way toward avoiding Code violations. But he must proceed cautiously. Regardless of the propriety of this loan agreement under 5C(4)(c), the arrangement is not beyond scrutiny. Matter of Bonin (Mass.) 378 N.E.2d 669 (1978). The judge must be careful not to exploit his judicial position in arranging this loan, he must avoid the appearance of impropriety, and he may not trade on the prestige of his office to advance his private interests. Canon 2, Canon 2B, Canon 5C(1). Also, the judge may not accept a loan from a banking institution except on terms generally available to others. Canon 5C(4)(b). If the bank, or the co-signers for that matter, are motivated solely by the unique fact that the loan applicant is a judge, Canon 5C(4)(b) is violated. See, In Re McDonohough (Minn.) 296 N.W.2d 648.

CONCLUSION

A judge may obtain a bank loan with the aid of co-signers or guarantors, including attorneys, only if the co-signers have never appeared before the judge and are unlikely to do so in the future. Because the favor of co-signing is impossible to value, the Commission advises the judge to report these gifts as if their values exceed $100.00.