

Report of the Canon 6 Subcommittee

October 24, 2004

The members of this subcommittee are: Judge Monica Gonzalez, Judge Margaret Keliher, Judge Abe Lopez, Justice Brian Quinn, Judge Marcia Weiner and Judge Ben Woodward. Executive Director Seana Willing also attended our meetings and contributed to the committee's work.

Canon 6 "Compliance With the Code of Judicial Conduct" lists the judicial officers who must comply with the Canons. The Committee examined whether the list of judicial officers in Canon 6 was sufficient. In addition, Canon 6 includes specific exceptions to compliance by certain judicial officers. The Subcommittee reviewed these exceptions and examined whether the exceptions are justified.

The ABA Model Code of Judicial Conduct includes a provision similar to Canon 6, but it is titled "Application of the Code of Judicial Conduct" rather than "Canon 6."

After the Subcommittee's review, the Subcommittee makes the following suggestions and comments.

Item 1: Associate Judges.

Canon 6 lists the persons who must comply with the Code of Judicial Conduct. Since the Code was adopted, the Legislature has changed the designation of many judges from "Master" to "Associate Judge." Canon 6 does not refer to Associate Judges.

Subcommittee Suggestion 1:

The subcommittee suggests that Canon 6A(2) be amended to read as follows:

(2) A full-time commissioner, associate judge, master, magistrate, or referee of a court listed in (1) above.

This change should also be made to Canon 6D, regarding part-time associate judges. Canon 6D should begin:

D. A Part-time commissioner, associate judge, master, magistrate, or referee of a court....

Item 2: Canon 6C – ex parte communication by certain staff.

Canon 6 provides certain exceptions to the Canons. Canon 6C excepts Justices of the Peace (JP's) and Municipal Judges (MJ's) from Canon 3B(8), pertaining to *ex parte* communications. Instead, Canon 6C(2) is a special *ex parte* communications rule for JP's and MJ's, but unlike Canon 3B(8), Canon 6C(2) does not require JP's and MJ's to "require compliance with this section by court personnel subject to the judge's direction and control."

Judge Weiner pointed out that Texas Justice of the Peace courts are the small claims courts and the "people's court." In those courts, the staff must discuss the procedural aspects of a case in order to assist the public and help them complete pleadings. Few attorneys are involved so more discretion should be given the staff. Justice of the Peace staff do not give legal advice but have extensive contact with the public.

Subcommittee Suggestion 2:

The subcommittee's voted to suggest that no changes be made to this Canon.

Item 3: Canon 6C – JP and MJ comments on “impending matters”.

Canon 6C provides that Justices of the Peace (JP's) and Municipal Judges (MJ's) are not subject to Canon 3B(8), pertaining to *ex parte* communications (...concerning the merits of a pending or impending judicial proceeding...). Instead Canon 6C(2) contains an *ex parte* communication rule for JP's and MJ's. Canon 6C(2) does not prohibit JP's and MJ's from commenting on “impending judicial proceedings.” The Committee knows of no reason for that exception and suggests that Canon 6C(2) be amended.

Subcommittee Suggestion 3:

The first sentence of Canon 6C(2) should be amended to read as follows:

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* or other communications concerning the merits of a pending or impending judicial proceeding.

Item 4: Exceptions for County Judges, JP's and MJ's Re Financial Matters.

Under Canon 6B a County Judge (the Constitutional County Court Judge, see Canon 8B.16) is not required to comply with Canon 4D(2) (holding and managing investments), Canon 4D(3) (managing investments so as to minimize the number of cases in which the judge is disqualified) or 4H (extra-judicial appointments).

Under Canon 6C(1)(b) JP's and MJ's are not required to comply with Canons 4D(2) (Holding and managing investments), 4D(3) (managing investments so as to minimize the number of cases in which the judge is disqualified), 4E (Fiduciary Activities), or 4H (Extra Judicial Appointments).

The ABA Model Code provides for similar exceptions.

First, the Committee discussed whether these exceptions were justified. The principal reasons given for the exceptions are financial and limited jurisdiction. These judicial positions are compensated so modestly by the government that strictly prohibiting these outside activities would discourage too many qualified persons from serving in these positions. Also, jurisdiction of these courts is limited thereby decreasing the likelihood that these judges would encounter in their courts issues or parties that conflict with or would affect the judge's business, investments or other extra-judicial activities. The Committee also assumes that if a case before a JP or MJ conflicted with the judge's other financial interests the Judge would recuse himself.

Ms. Willing also reported that few if any complaints or inquiries arose from these exceptions. The Justice of the Peace and Municipal Judges Associations contacted by the Committee requested no changes to these exceptions. Justice Quinn also noted that Justices of the Peace are also subject to discipline under the Texas Constitution. See Article 5, Section 24 of the Texas Constitution.

On the other hand, the Texas Code suffers from an ambiguity. For example, Canon 4D(2) says “Subject to the requirements of subsection (1), a judge may hold and manage investments...including the operation of a business.” Canon 4D(1)'s requirements include that judges are to refrain from business dealings that “reflect adversely on the judge's impartiality....” Canon 6 however says the J P's, and MJ's do not need to comply with 4D(2). Read literally does the exception in Canon 6 mean that because JP's are exempt from Canon 4D(2) they cannot operate a business? Or, does it mean that JP's can operate a business without regard to Canon 4D(1) and therefore can operate a business that tends to reflect adversely on the judge's impartiality?

Subcommittee Suggestion 4:

The committee concluded that the exceptions are justified and should not be repealed.

Item 5: Practice of Law by Certain Judges.

Canon 4G generally prohibits judges from practicing law, however, certain judges are exempt from 4G. In lieu of 4G, Canon 6 provides limited restrictions to the practice of law by certain judges. See Canon 6B(3) (County Judges); Canon 6C(d) (JP's and MJ's); Canon 6D(2) (certain part-time judges); and Canon 6E (2) (Judge Pro Tempore). A sample of the limited permission to practice is Canon 6B(3):

A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1)...

(2)...

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

The ABA Model Code contains similar provisions, including the following provision relating to Continuing Part-time Judges:

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

The Ethics Committee has written often on this subject and these opinions are instructive. The opinions serve to remind judges of the limited exceptions to the general rule and to remind judges that although a judge may practice law, the judge must comply with other provisions of the Code. In explaining the purpose of the prohibition, the Ethics Committee has said:

Public officials should act with the utmost caution at all times to avoid any suspicion on the part of the public that there is some influence operating on the court in the handling of matters before it and they should not conduct themselves in such a way as to impair the confidence which the community has in the administration of justice.

Opinion 173, March 1958.

The earlier Ethics opinions relied on that standard to measure a judge's ethical responsibility. In Ethics Opinion 195, June 1960, the committee states, "if there is enough probability of such an arrangement impairing the confidence of the community in the administration of justice, it should probably be labeled as unethical."

The Committee reviewed these Canons and Opinions and asked, "Should a Judge practice law under any circumstances? If we answer "No" then we discourage very capable and ethical people from serving as a judge. Lawyers are uniquely qualified to serve in these positions and should be encouraged to accept them. A complete ban would certainly not encourage more lawyers to serve. Also, the Canons permit some judges to continue to own and manage business and continue their occupations. Some of these

business and occupations may conflict in some situations with their service as a judge. For example, a JP has jurisdiction in landlord-tenant disputes and some JP's may act as apartment managers or own rental property. Yet, these Canons do not require that JP to refrain from the JP's occupation.

If we answer "Yes, certain judges may practice law" then the practice must be done in a way that does not impair the confidence which the community has in the administration of justice. Does this Canon adequately protect that standard? Certainly not standing alone. Judges must be aware that although permitted to practice law, the Judge must comply with other provisions of the Code as illustrated by many Ethics Committee Opinions.

The Committee does suggest one change to the Canon. Canon 6D refers to Part-time commissioners, masters, etc. and provides in part (2) that those judges "should not practice law in the Court which he or she serves..." In at least one instance, all masters of a particular jurisdiction were retained in a case and this resulted in the recusal of all of the judges in that jurisdiction from the case. Because of that abuse, the Committee recommends that Canon 6D(2) be amended by changing "should not" to "shall not".

Subcommittee Suggestion 5.

Although this is a complex subject and although the ABA Model Code is written more clearly, the Committee recommends only one change as noted in the immediately preceding paragraph.

The Committee however is concerned about the conduct of judges who are permitted to practice law. The Committee recommend no changes only after the Committee recognized that Judges practicing law are subject to other Canons, the Constitution, Statutes and other standards. A few examples of these other standards include: a judge is prohibited from lending the prestige of the office to advance the private interests of the judge or others; consequently, the judge is prohibited from using the judicial office to enhance a private law practice. (Canon 2B); It would be unethical for a County Judge to accept employment in any case, criminal or civil, where they are acting adversely to the County or State. (Ethics Opinion 183, 1958); A practicing attorney who is also a part-time associate city judge should not represent a person accused of a crime where the police in that city are or may be potential witnesses. (Ethics Opinion 429, 1985); A judge is disqualified in a case if the judge has been counsel in that case. (Texas Constitution Article 5 Section 11). In addition, the parties in a case can file a Motion for Recusal.

Item 6: Miscellaneous Items:

Canon 6 G(3) provides that lawyers who are candidates for judicial office and who violate the Code are subject to disciplinary action by the State Bar of Texas. The Committee is concerned that two separate disciplinary bodies have jurisdiction over a controversy. Would the State Bar enforce sanctions more or less severely than the Judicial Conduct Commission? Or, would the State Bar interpret the Canons differently than the Judicial Conduct Commission? Either event could result in inequitable results. Any change to address this problem would require a Constitutional Amendment to give the Judicial Conduct Commission broader authority, therefore the Committee makes no recommendation.