

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: April 16, 2020

ADVISORY OPINION 20-946

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### FINANCIAL ACTIVITIES: PURCHASE OF PROPERTY FROM ATTORNEY WHO PRACTICES IN JUDGE'S COURT

#### ISSUE

May a judge pursue negotiations to purchase a residence from an attorney where that attorney and the attorney's firm routinely have cases before the judge, including currently; the attorney is aware the judge is interested in purchasing the residence; and the judge intends to offer significantly less than the listing price? **Answer:** No.

#### FACTS

A judge and spouse are considering making an offer on a house for as much as 25 percent below the listing price. They contacted the seller's agent and viewed the house. The seller is an attorney who, along with his/her firm, regularly practice and have cases currently pending before the judge. The seller is aware the judge is interested in purchasing the residence. Since the initial showing, the judge's agent has been talking with the seller's agent.

#### DISCUSSION

As with all his/her activities, a judge's financial activities are subject to restrictions not required of ordinary citizens. These restrictions are necessary to preserve the independence and impartiality of the judge and the entire judiciary. The following provisions apply to a judge's financial activities, specifically real-estate dealings:

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| Canon 2     | A judge should avoid impropriety and the appearance of impropriety in all his activities.   |
| Canon 2A    | A judge . . . should conduct himself . . . in a manner that promotes public confidence in the integrity and impartiality of the judiciary.  |
| Canon 5     | A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.  |
| Canon 5C(1) | A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, or exploit his judicial position. |
| Canon 5C(2) | Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate . . . .   |

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- Canon 5C(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified.
- Canon 5C(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone if it reflects expectation of judicial favor.

See also Canon 2C prohibiting the lending of the prestige of office for private benefit and Canon 2C's Commentary:

*A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must, therefore, accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.*

In summary, a judge's financial dealings must—to the objective observer—neither present an appearance of impropriety, cast doubt on the judge's impartiality, conflict with his/her judicial duties, exploit his/her judicial position, nor give the appearance of receiving a gift or favor that reflects expectation of judicial favor.

Under the facts presented by the inquiring judge, the judge may not go forward in negotiations to purchase the residence. The following conditions, which cannot be met under the circumstances here, are necessary to avoid the ethical concerns where the other party to a judge's financial transaction is an attorney who practices in the judge's court:

- a. The transaction is conducted at arm's length, i.e., the parties have no relationship with each other or any other special circumstances relating to the bargaining positions.
- b. The negotiations are solely by the parties' respective agents.
- c. The property is available on the open market, i.e., not a private sale.
- d. The property is not or has not been involved in any litigation assigned to the judge.
- e. The purchase price is for the fair market price of the property, i.e., the amount for which the property would sell on the open market by a willing seller to a willing buyer, independent of each other.
- f. Financing is through a commercial institution and/or an appropriate third party, i.e., no financing by the attorney-seller or any person or entity associated with the seller in any way.
- g. The transaction cannot include special terms that favor the judge or lead to concerns that a special relationship between the judge and the attorney exists.

Optimally, a judge could avoid the ethical concerns presented here by having his/her real-estate agent negotiate the sale without disclosure of the identity and judicial status of the judge as the potential purchaser. However, where the judge and the attorney are aware of each other's respective status, the judge is in a position of superior bargaining power. This unequal

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bargaining position increases the perception of coercion on the attorney-seller, i.e., the attorney would likely feel obligated to respond favorably because the judge is in a position of influence and control over the cases of the attorney and his/her firm. It could also increase the likelihood of the attorney's perception of an opportunity to curry the judge's favor, even to the extent of developing a special relationship with the judge.<sup>1</sup>

In addition, any further negotiation could trigger an appearance the judge is seeking or the attorney is offering a gift or favor that reflects expectation of judicial favor, Canon 5C(4). See Advisory Opinion 00-748 (knowingly accepting favors or benefits having a substantial monetary value from the attorney whose cases or his/her firm's cases are presently pending before the judge is "inherently corruptive, suggesting improper use of the prestige of office") (quoting Adams v. Commission on Judicial Performance, 882 P.2d 358, 379 (Cal. 1994)). See, e.g., Advisory Opinions 00-748 (a gift of a college-football-game ticket from an attorney who presently has a case pending before the judge creates an appearance of impropriety, whether or not the attorney actually has an expectation of judicial favor in return for the gift); 94-514 (a gift of a smoked turkey from an attorney with a case pending before the judge may very well have the appearance of an attempted bribe or an attempt to curry the judge's favor). See also Advisory Opinion 00-748 (any gift that has the appearance of currying influence with a judge or that casts doubt upon a judge's integrity under Canon 1 or a judge's independence under Canon 2 is inappropriate for a judge to accept). As in the instant inquiry, the size of the purchase and the flexibility of price render the transaction questionable from the perspective of an objective observer. Adams v. Commission on Judicial Performance, 10 Cal. 4th 866, 888 (Cal. 1995).

A violation of the pertinent canons by further negotiations cannot be excused by disqualifying from the cases of the attorney and his/her firm. Disqualification does not cure past conduct that gives the appearance of impropriety, of exploitation of his/her judicial position, or of receipt of a gift or favor that reflects expectation of judicial favor or a "repayment" to the judge for his/her past decisions favorable to the attorney and/or his/her firm. See also Canon 5C(3), which provides, "A judge should manage his . . . financial interests to minimize the number of cases in which he is disqualified."

In summary, a judge's financial dealings must—to the objective observer—neither present an appearance of impropriety, cast doubt on the judge's impartiality, conflict with his/her judicial duties, exploit his/her judicial position, nor give the appearance of receiving a gift or favor that reflects expectation of judicial favor.

Accordingly, the inquiring judge may not pursue negotiations under the facts presented.

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<sup>1</sup> Conduct that creates such perceptions of coercion and opportunity are condemned even in the context of a judge's mere requests regarding fundraising for civic and charitable organizations. See, e.g., Advisory Opinion 00-747.

**REFERENCES**

Alabama Canons of Judicial Ethics, Canons 1, 2, 2A, 2C, 5, 5C(1), 5C(2), 5C(3), and 5C(4)

Alabama Canons of Judicial Ethics, Canon 2C Commentary

Alabama Advisory Opinions 00-748, 00-747, 94-514

Adams v. Commission on Judicial Performance, 10 Cal. 4th 866, 888 (Cal. 1995)

Adams v. Commission on Judicial Performance, 882 P.2d 358, 379 (Cal. 1994)

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This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043.