

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Judges Soliciting Contributions for “Therapeutic” or “Problem-solving” Courts

A judge who participates in fundraising activities on behalf of a court, including a “therapeutic” or “problem-solving” court, must limit the participation to activities permitted by Model Code of Judicial Conduct Rule 3.7(A). The judge also must ensure that her conduct does not violate Judicial Code Rules 3.1, 1.2, or 1.3.

This opinion addresses the propriety, under the Model Code of Judicial Conduct,¹ of judges in “therapeutic” or “problem-solving” courts, including executive branch or statutorily created judges,² becoming involved in raising such private funds or private in-kind donations as may be needed to operate such courts.³

“Therapeutic” or “problem-solving” courts include the specialized courts created in recent years to respond to the special problems of drug, mental health, and domestic violence-related charges.⁴ Some such courts have been created by state judicial branch initiatives. Although the staffing and physical space for the court typically are supported by regular governmental funding, government funds may not support the varied alternative remedies that these courts employ. Such remedies depend upon availability of resources such as the services of mental-health professionals, drug-testing laboratories, and social workers, as well as incentives sometimes awarded to successful participants in the programs. Judges assigned to those courts and judges with administrative responsibility for their operation find themselves being urged to engage in efforts to raise private funding, through applications for grants or through solicitation of funds or other donations from private individuals or organizations. In some locales, proponents of therapeutic courts have formed not-for-profit entities to raise private funding and funnel it to the courts.

The Model Code does not specifically address a judge’s involvement in raising funds for a court. Nevertheless, Model Code Rule 3.7,⁵ setting out permissible and prohibited types of conduct in which a

¹ This opinion is based on the Model Code of Judicial Conduct as adopted by the ABA House of Delegates in February 2007. The laws, court rules, regulations, rules of judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

² Executive branch or statutorily created judges ordinarily are designated as administrative law judges. *See* the Application Section of the Judicial Code, n.1.

³ This opinion does not address judicial requests for public funds or for an allocation to a judge’s court of a portion of funds that have been officially appropriated and that appear reasonably related to the function of the court. *See, e.g.,* Oklahoma Jud. Eth. Op. 2002-2 (Jan. 24, 2002), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=364900> (last visited October 7, 2008) (judge with drug court responsibilities may participate as an applicant, or authorize an entity to apply for grant funding for administrative support of state drug courts established through state department of mental health and substance abuse services; grant request is analogous to the mandated budget request for the operation of a district court from funds appropriated in general for all such courts, and is not a “fundraising activity”).

⁴ *See generally* Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Model and Trends* (Nat’l Center for State Courts 2003), available at http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf (last visited October 7, 2008). In addition to handling drug, mental health, and family violence matters, problem-solving or therapeutic courts also handle other specific types of situations, including alcohol-related offenses and teen/juvenile issues. *See* “Resources on Specific Types of Courts,” http://www.ncsconline.org/D_Research/ProblemSolvingCourts/Resources.html (last visited October 7, 2008).

⁵ Model Code Rule 3.7 provides,

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of

judge may participate in association with or on behalf of various types of “organizations or entities,” is sufficiently analogous for the present inquiry to serve as the applicable standard to determine the appropriate limits on judges seeking contributions for such courts. Model Code Rules 3.1,⁶ 1.2,⁷ and 1.3⁸ also are relevant.

Although most of Model Code Rule 3.7 addresses conduct that could at most be described as “indirect” involvement in fundraising, Rule 3.7(A)(2) addresses judges making direct solicitations for contributions to an organization or governmental entity concerned with the law, which would include a therapeutic court or a not-for-profit entity that has been created in order to fund the activities of such a court. Rule 3.7(A)(2) permits such solicitation only when the persons being solicited are members of the judge’s family or other judges over whom the judge has no supervisory authority. Model Code Rule 3.7(A)(5) permits the practice whereby a judge makes a grant application to a private, not-for-profit organization in support of the operation of her court, providing that a judge may “make recommendations to ... a public or private fund-granting organization or entity in connection with its programs and activities,

justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization’s or entity’s funds;

(2) soliciting contributions for such an organization or entity, but only from members of the judge’s family, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

⁶ Model Code Rule 3.1 provides:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

⁷ Model Code Rule 1.2 states, “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

⁸ Model Code Rule 1.3 states, “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”

but only if the organization or entity is concerned with the law, the legal system, or the administration of justice.”

Model Code Rule 3.7(A)(6) specifically authorizes a judge to be a director of certain not-for-profit organizations. Inherent in being a director of a not-for-profit organization is the permissibility of a judge allowing her name to appear on the letterhead of the organization. The prohibition against soliciting contributions contained in Rule 3.7(A)(2), however, would preclude the judge from being a signatory on a solicitation letter.

All of Model Code Rule 3.7 (relating to both direct and indirect fundraising activities) is conditioned upon the conduct in question not being a violation of the provisions of the more general, but no less important, Model Code Rule 3.1. In addition, Model Code Rule 1.2, which requires a judge to, at all times, act in a manner that promotes public confidence in the independence, impartiality, and integrity of the judiciary, and prohibits a judge from engaging in conduct that creates an appearance of impropriety, and Model Code Rule 1.3, which prohibits a judge from abusing the prestige of judicial office, apply. All these concerns potentially can render a judge’s involvement in fundraising activities impermissible.

Any activity that would interfere substantially with the judge’s performance of judicial duties would constitute a violation of Model Code Rule 3.1(A).⁹ Although we presume that fundraising to permit operation of a “problem-solving” court would not in itself interfere with the judge’s duties on that court, the issue must be considered. Rule 3.1(B) similarly proscribes activities “that will lead to frequent disqualification;” whether fundraising directed at specific funding sources might do so will be a fact question in every case. Similarly pertinent are whether any particular activity the judge might undertake would appear reasonably to undermine the judge’s “independence, integrity, or impartiality” (Rule 3.1(C)) or “appear to a reasonable person to be coercive” (Rule 3.1(D)).

In situations in which a judge learns that either parties or lawyers who come before the judge have made contributions in response to the judge’s solicitations, the judge would need to determine, according to the test for the appearance of impropriety in Model Code Rule 1.2, whether she is able to continue to hear the matter in question. Comment [5] posits as the test for an “appearance” problem whether the conduct in question – here, presiding over the matter -- would “create in reasonable minds a perception that the judge violated [the] Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.” Although in most instances, contributions of the sort considered in this opinion would be unlikely to constitute so significant a personal benefit to the judge as to raise the question of an appearance of partiality, a judge would be well-advised to take into account both the size and the importance of contributions known by the judge to have been made by lawyers or parties who come before her.

Model Rule 1.3 protects against abuse of judicial prestige to advance “personal or economic interests of the judge or others.” (Emphasis added.) Neither the Rule nor the Comments specifically address the kind of fundraising considered here. Interpreting Arizona’s counterpart to Model Code Rule 1.3, the Arizona Supreme Court Judicial Ethics Advisory Committee addressed a court’s support or endorsement of its own grant applications to government agencies or private foundations for court-related projects, concluding that, because they would not generally advance the private interests of a judge or others, judges or court administrators may write such letters.¹⁰ We concur with the opinion, and with its admonitions that the endorsement of funding for such organizations is appropriate only when it is clear that no political or business profit-making interest is involved (so as not to trade on the prestige of judicial office), and that a judge must consider whether circumstances might suggest that individuals involved in the projects would

⁹ Cf. Utah Jud. Eth. Inf. Op. 89-11 (Aug. 10, 1989), available at http://www.utcourts.gov/resources/ethadv/ethics_opinions/1989/89-11.htm (last visited October 7, 2008) (judge’s volunteer work with Special Olympics requiring weekly absence from the bench interfered impermissibly with judge’s discharge of her duties).

¹⁰ Arizona Supreme Court Jud. Eth. Adv. Committee Op. 97-01 (Feb. 7, 1997) (Endorsing or Writing Letters of Support for Court-related Projects), available at http://www.supreme.state.az.us/ethics/ethics_opinions/97-01.pdf (last visited October 7, 2008).

obtain special influence before the judge (causing both the appearance of impropriety and the possibility of frequent disqualification).¹¹

Additional concerns arise when solicitations are directed at lawyers, as opposed to businesspersons or the general public. The Florida Supreme Court Judicial Ethics Advisory Committee opined that, notwithstanding the "laudable purpose," a judge who presided over a drug court was prohibited from soliciting or receiving "incentive gifts" from lawyers or law firms for use as rewards to drug court programs.¹² In reaching this conclusion, the court relied not only on the judicial code provisions on acting in a manner that promotes public confidence in the integrity and impartiality of the judiciary and on lending the prestige of judicial office, but also on additional concerns that the involvement of lawyers who might come before the judge would raise questions either of partiality toward lawyers who had complied with the judge's request¹³ or, in the alternative, of potentially burdensome disqualification that could be required when donating lawyers came before the judge.¹⁴

A judge's adherence to the Code of Judicial Conduct provisions cited in this opinion ensures that fundraising efforts on behalf of special courts benefit the operation of those courts without raising concerns about the impartiality, independence, and integrity that must underlie all of the judge's activities.

¹¹ See also Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Opinion 2004-13 (Dec. 3, 2004) (under Ohio Code of Judicial Conduct Canons 1 (integrity and independence), 2 (public confidence in judiciary), and 3(C)(1) (discharging administrative duties diligently and without bias), municipal judge should not send letter requesting local businesses to donate items for use as program rewards and incentives for defendants in the mental health court and should not direct a court employee to solicit such donations).

¹² Florida Supreme Court Judicial Ethics Advisory Committee Opinion 2007-05 (Mar. 20, 2007), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2007/2007-05.html> (last visited October 7, 2008).

¹³ See Model Code of Judicial Conduct Rule 3.1(B).

¹⁴ See Model Code of Judicial Conduct Rule 2.11(A), which states, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned...." See also Model Code of Judicial Conduct Rule 3.1(A).

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321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312)988-5300

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