

January 14, 2004

ABA Joint Commission to
Evaluate the Model Code
of Judicial Conduct
c/o George Kuhlman, Ethics Counsel
541 N. Fairbanks Court
Chicago, Illinois 60611

RE: **Comments on Canon 4(C)(3)(b)**

Dear Chairman and Members of the Joint Commission:

As an associate justice of the Maine Supreme Judicial Court, I serve as the liaison member of the court with the Maine Judicial Ethics Committee. Maine's Code of Judicial Conduct is primarily based on the 1990 ABA Model Code. The Maine committee has asked the Supreme Judicial Court to amend Canon 4(C)(3)(b). Because the proposed amendment might be pertinent to your review of the Model Code, I am bringing it to your attention along with the reasons for it. As background, you should know that Maine is a rural state with a relatively small judiciary. With the exception of the elected part-time probate judges, Maine's judges are appointed.

Canon 4(C)(3)(b)(i) and (ii) of the Maine Code of Judicial Conduct are identical to the same numbered provisions in the Model Code. Maine did not adopt Canon 4(C)(3)(b)(iii) of the Model Code, the membership solicitation provision, but did adopt the prohibition against using the prestige of the judge's office, Canon 4(C)(3)(b)(iv) of the Model Code. In addition, Maine adopted, as part of its Canon 4(C)(3)(b)(iii) the last paragraph of the commentary to Canon 4(c)(3)(b) of the Model Code, which prohibits a judge from being a speaker or guest of honor at a fund-raising event. I have attached a side-by-side comparison of the Maine Code with the Model Code.

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Examples of the impact of these provisions, taken from the Maine ethics opinions, include the situation of a judge who asked the ethics committee if she could participate in an annual charity used book sale, held to benefit the library of her small town. For years previously, she had acted as the cashier at the event. The ethics opinion, written in response to her question, advised the judge that she could not participate. The Maine Judicial Ethics Committee has interpreted Canon 4(C)(3)(b)(i) to mean that a judge cannot participate in fund-raising activities with the sole exception of asking another judge for funds. (I have attached Advisory Opinion No. 97-3.) This opinion caught several judges unawares, and they had to curtail their charitable activities at events such as a church's pancake breakfast and an organization's booth at the county fair. This has been a troublesome provision particularly for judges who reside in small towns.

Another example concerns a judge whose family was very involved with the local hospital, as the judge had been prior to his appointment to the bench. The judge's father had been a well-known and admired physician at the hospital, and, when he died in the 1970s, a fund was established in his name for the cardiac unit that he had established. The hospital planned to renovate the ICU unit and asked the judge to serve in an honorary capacity on its development committee. The judge asked the ethics committee if he could serve, and the committee opined that he could not. (I have attached Advisory Opinion No. 02-2.)

A third example concerns a provision in the Maine Code, Canon 4(c)(3)(b)(iii), which prohibits speaking at fund-raising events. This provision only appears in the commentary to the Model Code, but I suggest that because it is in the commentary, it is almost the same as being in the Model Code. Our Chief Justice, who is in great demand as a speaker both because of her position and the fact that she is a very entertaining and able speaker, asked the committee whether she could speak at a luncheon, whose purpose was, in part, to raise funds. Although the opinion does not state this fact, she was being honored by the organization as a woman with an important leadership role. The ethics committee determined she could not speak. Because a number of the requests she receives are

for events that have a fund-raising component, she speaks less frequently than she would if there were no prohibition against speaking at a fund-raising event. (I have attached Advisory Opinion No. 02-4.)

Although the reasons behind the Model Code fund-raising provisions are substantial and laudatory, they have the unintended consequence of further isolating judges who are already too isolated. The above examples have given the ethics committee concern about whether the benefits to be gained from judges being a vital part of their communities is outweighed by the dangers of fundraising.

The committee's proposed amendments to the Maine Code are in response to requests from judges who find that the fund-raising requirements have hampered their abilities to be fully involved with organizations that bear a direct relationship to the judge's role in the courtroom. The committee was prompted to propose the amendments after receiving letters from two judges. (I have attached copies of the letters from the two judges with their permission.) One of the judges presides over juvenile cases and was dismayed with the lack of alternatives for juveniles in the community. He and others developed an organization called "Youth Promise." There is only so much an organization can do without funds, and that judge would like to have some role in fund-raising for the organization short of actual solicitation of funds. He has described the role that he would like to have as a sort of "cheerleader" for the fund-raising efforts.

The other judge has been involved with efforts to provide pre-trial diversion alternatives for juveniles and the establishment of a mentoring group for young adults. He helped form a group called "Home to Home" which provides a safe and supervised location where estranged parents can hand over children for visitation with the other parent.

I enclose the proposed amendments to Canon 4 of the Maine Code. They would have the effect of allowing organizations, who have a judge as an officer and the judge's name on the letterhead, to send fund-raising letters without

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changing the letterhead—as long as the judge is not identified as a judge. They would allow a judge to be a speaker or guest of honor at a fund-raising event and to participate at the church’s fundraising pancake breakfast. They would also allow the judge to have more of a “cheerleader” role for a charitable organization’s fund-raising efforts.

Although the proposed amendments have not been acted on by the Maine Supreme Judicial Court, the concern and thought behind them are worthy of your consideration.

Sincerely,

Susan Calkins
Associate Justice

SC:beh

Encls.

JUDICIAL ETHICS COMMITTEE
Advisory Opinion 02-2
Issued July 16, 2002

Issue: Whether a judge may serve on a “mini-capital campaign” committee to raise funds for the renovation of a local hospital.

Discussion: The Maine Code of Judicial Conduct provides guidelines with respect to charitable fundraising by judges. Canon 2 states “a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” Canon 4(C)(3)(b) further clarifies a judge’s permissible role in charitable organizations:

A judge as an officer, director, trustee or non-legal advisor [of a charitable organization], or as a member or otherwise ... may assist such an organization in planning fundraising .. but shall not personally participate in the solicitation of funds or other fund-raising activities.... [A judge] shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Two principal concerns exist when considering the propriety of a judge’s involvement in fundraising activity. The first is that potential donors may feel compelled to contribute or that donors may expect special consideration in the future in return for their gift. Second, financial solicitation compromises the public confidence in judges by creating the appearance of conflicts of interest. See Jeffrey Shaman, et al. Judicial Conduct and Ethics (3rd Ed. 2000) §9.06 at 294-295.

In this case, we believe such concerns are prevalent despite the laudatory nature of the organization for which funds are to be solicited.

The Judicial Ethics Committee previously addressed a similar question in Advisory Opinion No. 97-3, finding that Canon 4(C)(3)(b)(i) precluded a judge from acting as a cashier at a used book sale held to benefit a charitable organization. In that opinion, we found that “the judge’s visible participation at a fund-raising event may make lawyers or litigants feel obligated [to donate].” Me. Jud. Adv. Op. 97-3. As a committee member whose name would appear on fundraising letters, the judge’s involvement in the hospital’s capital campaign will be apparent to persons from whom funds are solicited. Those persons may include current or future parties with interests before the judge. Furthermore, the overwhelming weight of authority from other jurisdictions with similar judicial conduct provisions supports a strict interpretation of the rules on fundraising.¹ Thus, we find the rationale underpinning Opinion No. 97-3 persuasive and believe that the participation of a judge on a fundraising committee would violate Canons 2(B) and 4(C)(3)(b)(i).

¹ See, e.g., Ark. Jud. Adv. Op. 94-09 (finding service on an ad hoc fund-raising committee for the local Boys/Girls Club to be a “clear violation” of Canon 4(C)(3)); Del. Jud. Adv. Op. 1998-2 (citing Canon 2(B) in advising a judge not to serve on a church committee responsible for collecting tuition owed to a church-operated school); Wash. Jud. Adv. Op. 91-9 (improper for a judicial officer to chair a fundraising event for a civic organization, even where the judicial officer would not be responsible for individual solicitations); Ill. Jud. Adv. Op. 99-1 (prohibiting a judge from volunteering as a “celebrity bagger” in a United Way fundraiser at a local supermarket); Neb. Jud. Adv. Op. 00-1 (advising judge not to participate in charity auction to benefit a local non-profit organization); and Neb. Jud. Adv. Op. 02-3 (prohibiting a judge from authoring a letter on behalf of the Nebraska State Bar Association’s charitable campaign). See also *In re Benjamin Crahalla*, 46 Pa. D. & C. 4th 38 (2000) (reprimanding a judge for sending a letter on behalf of the Boy Scouts that included a request for contributions).

JUDICIAL ETHICS COMMITTEE

Advisory Opinion 02-4

Issued: 08/27/2002

Issue

Whether a judge may speak at a luncheon held as a fundraising event.

Statement of Facts

A judge accepted an invitation to speak at a luncheon in October. The judge received a letter of confirmation which read: "Please accept our heartfelt thanks for agreeing to speak at the luncheon, the proceeds of which will benefit [a charitable organization]." The judge's letter of inquiry expressed the understanding that the luncheon was to foster collegiality and support for women in leadership, as well as to raise funds. A phone call to the organizer of the luncheon revealed that the luncheon is, in fact, a fundraising event.

Discussion

The Maine Code of Judicial Conduct Canon 4C reads in pertinent part:

(3) A judge may serve as an officer, director, trustee or non-legal advisor, or be a member of an organization . . . subject to the following limitations and the other requirements of this Code.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(iii) shall not use or permit the use of the prestige of judicial office for

fund-raising or membership selection. A judge should not be a speaker or guest of honor at an event of the organization held primarily for fund-raising. . .

An initial point of inquiry is whether this provision of Canon 4C applies to situations in which the judge is not an officer, director, trustee or non-legal advisor, or a member of an organization. The addition of the words “or otherwise” to supplement the existing characterizations of a judge’s relationship with the organization suggests that the existing characterizations were felt to be insufficient. The addition of “or otherwise” suggests that the drafters intended the prohibition to apply even when the judge’s relationship with the organization does not fall into any of the categories laid out in Canon 4C(3).

There is no reason to conclude that the phrase “or otherwise” is not meant to have independent meaning from the preceding terms. However, even were “or otherwise” to mean having only relationships of a similar nature to those specifically stated, the prohibition would apply. When a judge speaks at an event intended to fundraise for an organization, the relationship of the judge to the organization is significantly more similar to that of a member than that of a mere attendee of the event.

An additional consideration is the Maine Judicial Ethics Committee's history of conservatively interpreting the Code. Because this provision arguably applies to this situation, the conservative approach is to apply it.

It is also necessary to determine whether the applicable language is binding upon the judge. The Preamble to the Code states that “[t]he use of . . . “should not” is intended as an hortatory statement of what is appropriate or inappropriate conduct but not as a binding rule under which discipline may be imposed.” However, there are three reasons the language stating that a judge “should not” be a speaker or guest of honor at an event held primarily for fundraising should be considered binding upon the judge.

First, the words “should” and “should not” are indicative of the propriety or impropriety of particular conduct, and a judge is required by Canon 2 to avoid impropriety. Therefore, if the Code states that a judge should not conduct herself in a particular manner, she is on notice that such behavior will generally be considered improper, and is required by Canon 2 to avoid it.

Second, implicit in the phrasing of Canon 4C(3)(b)(iii) is that speaking at an event held primarily for fund-raising may be using the prestige of judicial office for fundraising, which is prohibited, and for which discipline can be imposed.

Third, a judge is prohibited from participating personally in the solicitation of funds or other fund-raising activities. Canon 4C(3)(b)(i).

Although there is no Maine authority on this subject, a few other states have dealt with this issue in their judicial ethics organizations. The Florida Judicial Ethics Committee prohibited a former National Football League player who had become a judge from attending a dinner to accept his recognition for his induction into the International Jewish Sports Hall of Fame. The proceeds from the dinner were to fund children's visits to Israel, and the judge's title would not be used. Florida Judicial Ethics Advisory Committee (Op. 96-3). The Washington Ethics Advisory Committee prohibited a judge from speaking at a breakfast which had a fundraising component. The fundraising was to happen after the judge had departed, and the judge would not personally take part in the fundraising. Washington Ethics Advisory Committee (Op. JI-87).

Here, a judge was invited to speak at a fund-raising event. The judge is expressly prohibited from doing so if it involves using the prestige of judicial office for fundraising or participating personally in fund-raising activities. The facts indicate that the judge would be using the prestige of the office and personally participating in fund-raising by speaking at the fundraising luncheon. The judge is also impliedly prohibited from speaking due to the connection between Canons 4 and 2 which suggests the potential for impropriety or appearance of impropriety in speaking at a fundraising event.

Conclusion

A judge may not speak at the luncheon. The luncheon is a fundraising event, and the Maine Code of Judicial Conduct prohibits a judge from being a speaker or guest of honor at an event held primarily for fund-raising.

