

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: June 19, 2009

ADVISORY OPINION 09-899

## QUASI-JUDICIAL ACTIVITY: CIRCUIT JUDGE'S DONATION OF ITEM FOR STATE BAR SECTION'S SILENT AUCTION TO RAISE FUNDS FOR LAW SCHOOL SCHOLARSHIP

### ISSUE

May a circuit judge, as a quasi-judicial activity under Canon 4C, donate an item, including her signed artwork, for a silent auction sponsored by the Women's Section of the Alabama State Bar Association at the State Bar's annual meeting to raise funds for a scholarship awarded to a female Alabama resident attending an Alabama law school? **Answer:** Yes, if the judge's participation complies with other canons and the judge's title is not used in the promotion of the item or the auction.

### FACTS

The Alabama State Bar Association Women's Section and the State Bar sponsor a silent auction at the State Bar's annual meeting. All proceeds raised by the Women's Section are donated to a scholarship fund for a scholarship awarded to a female Alabama resident attending an Alabama law school. The auction usually presents approximately 120 items for bid; at least 300 people attend; and each bidder is identified only by an assigned number. The judge wishes to donate artwork created by her.

### DISCUSSION

A judge's participation in activities of an organization devoted to the improvement of the law, the legal system, or the administration of justice, i.e., "quasi-judicial" activities, is governed by Canon 4. That canon provides, in part, that a judge "may assist such an organization in raising funds" if (1) such action does not interfere with the proper performance of her judicial duties, and (2) if in doing so, she does not cast doubt on her

capacity to decide impartially any issue that may come before her.

The parameters of "assisting" in fundraising are suggested by the Reporter's Notes for the 1972 Model Code of Judicial Conduct:

[Canon 4C] authorizes a judge to assist in fundraising for Canon 4 organizations but not to the extent of personally participating in public fundraising activities. This distinction is primarily a matter of form, but the Committee felt it sufficiently insulates the judge from the donors and the donors from the judge, thereby reducing the possible appearance of impropriety or lack of impartiality implicit in fundraising by judges.

E. Wayne Thode, *Reporter's Notes to the Code of Judicial Conduct* 77 (1973). Given the canons' directives for a judge to avoid the appearance of impropriety, Canon 2, and to participate in establishing, maintaining, and enforcing high standards of conduct, Canon 1, a judge's participation in fundraising activities should be evaluated by an objective, reasonable person standard.

This Commission's advisory opinions observe the prohibition against a judge's direct and personal solicitation of donations for any quasi-judicial activity. *See* Advisory Opinion 07-878 (direct solicitation of local businesses for start-up supplies to establish a "litter squad" as an alternative punishment to incarceration is prohibited). *See also* Advisory Opinions 00-768 (letter to the local Bar members for support of the local Legal Aid program is prohibited, even if the judge does not use his judicial title or judicial letterhead, for such would create a question as to his impartiality); 97-682 (direct solicitation of donations of computer hardware, software, and training for testing of new technologies for use in the courtroom and case management is prohibited).

In considering this prohibition against direct and personal fundraising, a judge should assess not only her conduct, but the nature of the item she selects to donate for auction. A judge may not donate an “item” that would entail personal interaction between the judge and the winning bidder. *See, e.g.*, New Mexico Advisory Opinion 08-04 (race-car driving lessons and a performance by the judge’s band); New York Advisory Opinion 99-45 (sitting with the judge at the bench during a court session and dining with him); Washington Advisory Opinion 95-06 (dinner in the judge’s home).<sup>1</sup> Such a donation could be reasonably construed as a direct or personal solicitation. *See, e.g.*, Arizona Advisory Opinion 94-04 (lunch); Texas Advisory Opinion 205 (a golf game). *Cf.* Advisory Opinion 96-596 (a judge is discouraged under Canon 5B(2) from hosting a charity fundraising dinner in his home). As a direct solicitation, such service donated for auction would increase the perception of coercion and/or an opportunity to curry the judge’s favor, even to the extent of bidders’ competing to develop a relationship with the judge. *See* New Mexico Advisory Opinion 08-04.

Under the facts presented, the judge proposes to donate a tangible item. Thus, the judge should determine whether donating a tangible item for a State Bar section’s silent auction at the State Bar’s annual meeting would evoke a reasonable, objective appearance of a direct or personal solicitation of a contribution. We conclude that, under the narrow circumstances presented, it would not. Rather, such donation falls within the permissible activity of “assisting” the fundraising efforts of a section of the State Bar. *See, e.g.*, Washington Advisory Opinion 06-01 (donating a

signed print of a photograph taken by the judge for a silent auction).

Here, the circumstances would tend to insulate the judge from the bidders and the bidders from the judge, i.e., the persons solicited by the State Bar section would not feel obligated to bid on the judge’s donated item because of her position of influence or authority, and the bidders would not expect future favors for bidding on the item. *See* Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics* § 9.04A (4<sup>th</sup> ed. 2007). *See also* Advisory Opinion 00-768. Because the donated item would be auctioned silently and the bidders identified only by numbers, the judge would most likely not know the identity of the bidders. Furthermore, the auction attendees would be the State Bar members and their guests at the State Bar’s annual meeting, i.e., most attendees would not ordinarily come before the circuit judge donating the item; the bidders would constitute a large group of prospective donors; the public would not view the judge’s donation as coercive and abusive of the prestige of her office because the prospective-donor class consists of attendees of the State Bar’s annual meeting, and the judge’s participation would not promote attendance to the event. *See* Charles E. Geyh & W. William Hodes, *Reporters’ Notes to the Code of Judicial Conduct* 69-70 (2009) (a judge’s solicitation of membership in law-related organizations, such as a bar association, would be perceived by the public as more natural or more appropriate than solicitation of membership in nonlaw-related organizations, such as an opera society or a charity; only in the latter context does the judge’s solicitation constitute coercion and an abuse of the prestige of office); *id.*, at 58 (judges may have greater latitude to engage in activities that are law-related because it is less likely that extra-judicial activities will adversely impact the judicial system if they are conducted, for example, in connection with a bar association).

The questions remaining are whether the judge may be identified, in any promotion of the item or the auction, as the donor-artist and, if so, may she be identified by her judicial title. The canons encourage judges to participate in quasi-judicial

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<sup>1</sup> Although these advisory opinions address extra-judicial activities, rather than quasi-judicial activities, each respective jurisdiction’s applicable provisions under which the activity is deemed prohibited include a provision prohibiting personal, direct solicitation.

activities or organizations, Commentary to Canon 4. Obviously, the prestige of the judicial office is therefore inherent in a judge's participation in such activities. However, it is more in keeping with the Commission's interpretation and application of the canons that the donating judge not be identified with her title. *But see* Geyh, *supra*, at 70 (use of the judge's title in connection with a fundraising event on behalf of a law-related organization, under Rule 3.7(A)(4) of the 2007 Model Code of Judicial Conduct, rather than being an abuse of the prestige of judicial office, can provide leadership and role-modeling in the legal community). In addition, if the donation is the judge's work of art, that item should not be singled out in any way in the promotion of the auction, e.g., pictured on the cover of the auction catalog.

Of course, as noted above, in determining whether to donate an item, the judge should evaluate whether such action interferes with the proper performance of her judicial duties, and whether it casts doubt on her capacity to decide impartially any issue that may come before her. In regard to this latter consideration, the beneficiary of the fundraising effort is relevant. *See, e.g.*, Advisory Opinion 00-768 (fundraising to benefit the local Legal Aid program would create a question as to the judge's impartiality). In addition, the judge should observe the other requirements of the canons, such as the high standards of conduct prescribed in Canons 1 and 2. Even for law-related organizations and activities, a judge should consider whether the membership and purposes of the organization, or the nature of her participation in or association with the organization would conflict with her duty to refrain from activities that reflect adversely on her independence, integrity, and impartiality. *Id.* Moreover, the donated item should benefit the dignity of the judicial office. *See also* Canon 5A (a judge may engage in the arts if such avocational activity does not detract from the dignity of her office or interfere with the performance of her judicial duties). In addition, the judge's donated item should not give the appearance that she is giving

her professional endorsement of a commercial establishment, e.g., a gift certificate to a restaurant. *Cf.* Advisory Opinion 91-435 (under Canon 5B, in volunteering to be a server at a fundraiser where the food is donated by restaurants, the judge should not allow herself to be placed in a position where it appears to the public that she is giving her professional endorsement to a particular restaurant represented at the fundraiser).

As a cautionary note, the Commission observes that this opinion does not dispense with the judge's duty of addressing the question of disqualification under Canon 3C in the rare, but possible circumstances making it reasonable to question the impartiality of the judge in a case where a party is represented by counsel who had bid on her donated item. For example, such a situation would be presented if counsel for a party had bid an exorbitant amount for artwork created by the judge, and the judge knows of that bid and the identity of the bidder. *Cf.* Advisory Opinion 04-846 (a judge is disqualified to hear a case where one of the parties made large contributions for the funding of a court program over which the judge presides and the judge knows that this entity provided such funding). Of course, if the judge is aware of such facts, she should disclose those facts to the parties and their attorneys and give them an opportunity to supply any additional information they believe exists under which her impartiality might reasonably be questioned.

The Commission further cautions that a live auction before a local bar association would present an entirely different scenario than the one presented here. *Cf.* Geyh, *supra*, at 57 (noting that a judge's coercion—whether by subtle or overt efforts—of others to participate in extra-judicial activities favored by the judge can be a significant problem in communities with only one judge, or a small number of judges, and a small number of lawyers who must maintain good relations with the judiciary). *But see* Washington Advisory Opinion 06-01 (a judge is permitted to donate an item to a local bar association fundraiser). In addition, this advisory opinion does not address the propriety of a state

appellate judge's donation. Finally, the above rationale likewise would not necessarily condone a judge's extra-judicial activity of donating an item for a silent-auction fundraiser for an educational, religious, charitable, fraternal, or civic organization or institution under Canon 5B.

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.

### REFERENCES

Alabama Canons of Judicial Ethics, Canon 1, 2, 3, 4, 4C, 5, 5A, 5B, and 5B(2), and Commentary to Canon 4.

Alabama Advisory Opinions 07-878, 04-846, 00-768, 97-682, 96-596, and 91-435.

2007 Model Code of Judicial Conduct, Rule 3.7(A)(4).

Arizona Advisory Opinion 94-04.

New Mexico Advisory Opinion 08-04.

New York Advisory Opinion 99-45.

Texas Advisory Opinion 205.

Washington Advisory Opinions 06-01 and 95-06.

Charles E. Geyh & W. William Hodes, *Reporters' Notes to the Code of Judicial Conduct* 69-70 (2009).

Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics* § 9.04A (4<sup>th</sup> ed. 2007).

E. Wayne Thode, *Reporter's Notes to the Code of Judicial Conduct* 77 (1973).

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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 19 of the Rules of Procedure of the Judicial