

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 12-912

QUASI-JUDICIAL ACTIVITY: RECOMMENDATION TO FUND-GRANTING AGENCY OF ORGANIZATION'S SERVICES PROVIDED TO THE COURT

ISSUE

May a domestic-relations circuit judge write a letter, on behalf of the local, non-profit family center to a public or private fund-granting entity, to recommend the child-visitation services the center provides the court pursuant to court referrals? **Answer:** Yes, under certain conditions.

FACTS

The local family center's mission is to strengthen families and prevent child abuse and neglect by providing free education, training, and support to parents and caregivers. It receives referrals from the circuit court for supervised visitation for non-custodial parents and monitored exchange of children for visitation. The center receives private foundation grants and government grants, including those from the Administrative Office of Courts. There is no indication the center provides any court-advocate services.

DISCUSSION

A judge's participation in activities of an organization to improve the law, the legal system, and the administration of justice, i.e., quasi-judicial activities, is governed by Canon 4. The judge's first determination is whether the center's visitation services are quasi-judicial activities under Canon 4 or extra-judicial activities under Canon 5. It appears here the visitation programs are likely quasi-judicial activities because such programs assist family court judges in making visitation decisions in difficult cases. See Florida Advisory Opinion 97-11 (supervised visitation program is closely interrelated with the administration of justice and the family court). See also Advisory Opinion 97-678 (rehabilitation opportunities not otherwise available for juvenile offenders are quasi-judicial activities); New York Advisory Opinion 88-94 (programs

providing services directly and on a regular basis to the court concern the administration of justice whereas a program only tangentially or indirectly involved with court operations cannot realistically be characterized as concerned with the administration of justice).

Canon 4C provides that a judge, subject to the proper performance of her judicial duties, may engage in the following if, in doing so, she does not cast doubt on her capacity to decide impartially any issue that may come before her:

- Serve as a member, officer, or director of an organization or governmental agency devoted to the law, the legal system, and the administration of justice.
- Assist such organization in raising funds and participate in their management and investment.
- Make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

The judge's "assistance" is limited to an entity devoted to the law, the legal system, and the administration of justice whereas the judge's "recommendations" may encompass projects and programs concerning the law, the legal system, and the administration of justice even though the entity implementing those projects and services may also provide non-Canon 4 activities or services. The "recommendations" provision recognizes that many organizations seek the advice of judges about funding law-related projects and that responses to such requests should not be precluded. E. Wayne Thode, *Reporter's Notes to the [1972] Code of Judicial Conduct* 77 (1973).

In general, participation in fundraising presents two dangers: (1) the prestige of the judicial office will be used for the solicitation of funds,

and (2) the person solicited will feel obligated to respond favorably if the judge is in a position of influence or control. Advisory Opinion 04-891. *See also* Canon 2C (a judge should not lend the prestige of her office to advance the private interests of others, nor should she convey or permit others to convey the impression they are in a special position to influence her). Thus, a judge may be prohibited from direct and personal solicitation of donations for a quasi-judicial activity. *Compare* 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); 97-682 (direct solicitation of donations of computer hardware, software, and training for technological needs in the courtroom and case management is prohibited) *with* Advisory Opinion 09-899 (under certain conditions, a judge may donate an item for the State Bar’s silent auction to raise funds for a law school scholarship).

The qualified nature of Canon 4C’s language—“assisting” and “recommendations” rather than “requests”—clearly indicates something significantly less than actual fundraising is contemplated by Canon 4. Steve Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 *Judicature* 199, 200 (1986). These limitations of not personally participating in public fundraising activities sufficiently insulate 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. Thode, *supra*, at 77. It is not likely a grant-review committee will be coerced or intimidated into awarding funds because a judge supports an

application, and it is equally unlikely a funding entity would expect a return favor if the project recommended by the judge is the grant recipient. *See* Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 *Mich. St. L. Rev.* 769, 826 (2008).

Even if the judge’s involvement constitutes only “assistance” or a “recommendation,” Canon 4C activities are not without limitation. Canon 4C explicitly provides two requirements: (1) the judge’s involvement must not interfere with the proper performance of her judicial duties, and (2) it must not cast doubt on her capacity to decide impartially any issue that may come before her. *See also* Canon 2A (a judge should conduct herself at all times in a manner that promotes public confidence in the impartiality of the judiciary). In this regard, the recipient of the judge’s recommendation, i.e., the potential donor, is relevant because the judge should not make a recommendation to lawyers or litigants who are likely to appear before the judge. *See* Canon 2C Commentary (a judge should not write a letter of recommendation to a recipient who is either engaged in litigation before the judge or likely to be engaged in proceedings that would ordinarily come before the judge). An exception to this prohibition is where the potential donor will not be identified as having donated. *See* Advisory Opinion 04-847 (a judge may write letters to the local Bar encouraging participation in the State Bar’s Volunteer Lawyers Program where an attorney participating in the program is not identified as having undertaken a particular case). The judge should also not provide a recommendation to a potential donor that is a controversial entity or one connected with disputed social or legal issues.

The beneficiary of the grant request and the use to which any funding will be made are also relevant. *See* Advisory Opinion 09-899. 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.* Thus, the judge should not support an organization that has commercial or business profit-making interests involved. Canon 2C. Neither should the judge provide a recommendation for an organization that provides court-advocate services. *See* Advisory Opinions 12-909 (a judge may not participate in a fundraiser for a child-advocacy center because the center's mission and activities are advocacy-based and thereby present a reasonable question of the judge's impartiality in cases before him); 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). *See, e.g.,* Florida Advisory Opinion 2002-09 (a judge may not write a letter to a grant provider for funding of a non-profit organization that provides advocates to domestic violence victims; the judge would be indirectly assisting litigants or witnesses who would appear in court, and that could affect the perception of impartiality). *But see* New York Advisory Opinion 08-112 (the president of the judges' association may write a letter on the association's behalf, in support of a grant application by the American Probation and Parole Association (APPA) for funds to provide services that would benefit only crime victims, provided the district attorney and public defender also do so, and provided the association's letter sets forth only the personal knowledge and experience of

association members with the APPA and is limited to objective facts). Another factor impacting the appearance of impartiality is whether the organization is the only entity providing services not otherwise available in the service area. The judge should not give the appearance she is giving her professional endorsement to a particular competing entity or organization over another.

Finally, assuming the judge's letter of recommendation is otherwise appropriate, it must meet certain requirements:

- The letter should be addressed to a specific potential donor because the judge should access the circumstances for each specific funding request to determine if her involvement complies with the canons. In addition, the letter should not be used for any purpose other than to support the grant request.
- The recommendation must supply only information that describes the program and the benefits and importance of the program to the judicial system. *McKoski, supra*, at 827 (such limitation is recognized by the majority of advisory committees).
- The recommendation must be based on the judge's personal knowledge. Such requirement insures the judge's role is to provide relevant information and not to lend the judicial title to the grant application. *Id.* at 828.
- The letter should not have any language that might convey the appearance the organization is in the judge's special favor or in any position to exert influence on the judge. *See* Canon 2C.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2A, 2C, 4, 4C, and 5.

Commentary, Canon 2C.

Alabama Advisory Opinions 12-909, 09-899, 07-878, 04-891, 04-847, 00-768, 97-682, and 97-678.

Florida Advisory Opinions 2002-09 and 97-11.

New York Advisory Opinions 08-112 and 88-94.

Steve Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 *Judicature* 199, 200 (1986).

Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 *Mich. St. L. Rev.* 769, 826 (2008).

E. Wayne Thode, *Reporter's Notes to the [1972] Code of Judicial Conduct* 77 (1973).

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.