



## Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair  
~~XXXXXXXXXXXX~~  
Hon. Kevin L. Fitzwater  
Paul L. Biderman, Esq.  
Prof. Robert L. Schwartz

May 19, 2008

[REDACTED]

**Re: Judicial Advisory Opinion No. 08-04**

Dear [REDACTED]

You have asked the Advisory Committee if the Code of Judicial Conduct permits you to make various donations that include your personal participation to charitable organizations that then auction the donations for the benefit of the charitable organizations. One organization you have identified is committed to the provision of legal services to people who cannot otherwise afford lawyers and will be conducting an auction at the State Bar Convention. To the extent that the donations require your participation, you would provide those services completely outside your activities on the bench and outside of normal court hours. Examples of donations that you noted include race car driving lessons and band performances. Both involve activities for which you are particularly well known throughout the legal community.

Your inquiry raises the issue of whether this extra-judicial activity would conflict with the requirements of Rule 21-500(C)(3)(b)(i) NMRA, which provides that a judge "shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority." In addition, Rule 21-500(C)(3)(b)(iv) provides that a judge "shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation." This second part of Rule 21-500 supports the general principle that appears in Rule 21-200(B) NMRA:

“A judge shall not lend the prestige of judicial office to advance the private interest of . . . others.”

There are two concerns that stand behind these rules, as they apply to your inquiry. First, attorneys and current or prospective litigants may feel obliged to support, or more interested in supporting, a charity when a solicitation is made, directly or indirectly, by a judge who may hear a case involving that attorney or member of the public. Some people may feel that they could earn your respect and favor by lodging a high bid for your services. This problem is underscored by your involvement in fulfilling the donation by participating with the successful bidder. Indeed, your participation itself, along with the prestige of your judicial office, is the subject of the donation, and the bidders may well be competing to develop a special relationship with you because of your judicial position. Second, the charitable organizations you select for your largesse may be viewed as favored organizations with favored viewpoints if you become closely identified with them in your capacity as a judge.

The most important factor in determining whether these types of gifts would breach these principles is whether you are identifiable, and identifiable as a judge, in making these charitable donations. To the extent that it is clear to those who bid on these items that they are buying your services, and clear to you who has purchased these services, they implicate the concerns of the Code. To the extent that your donations are truly anonymous, of course, there is no concern that people will bid in order to impress you or that you are lending the prestige of the judiciary to these selected organizations.

In the facts of your inquiry, you are closely associated with the activities that you would make available for auction, and your work in these areas is well known, particularly among those likely to be bidding at an auction at the State Bar Convention conducted by a charitable organization committed to providing legal services to those who need them. There are not many others who can offer race car driving lessons, and, of course, you would have to be present to provide the lessons. Similarly, your band is well known, and you would have to appear in person to play with the band for the auction winner.

Under similar circumstances, last year the Delaware Judicial Ethics Advisory Committee determined that a newly appointed judge who had acted as an auctioneer

for a Little League at an annual charitable auction for years before his appointment could no longer do so. Delaware Advisory Opinion 2007-1. Similarly, the Florida Supreme Court Judicial Ethics Advisory Committee determined that a judge could not participate in a voluntary bar association's fundraiser by providing his own artwork for sale or auction, although that judge could donate items for the auction as long as there was no specification that the items were submitted by a judge. Florida Advisory Opinion 2003-16. The Arkansas Judicial Ethics Committee has determined that a judge could play in a band at a fundraiser for public radio, in part because "no person being solicited would even know that the judge is performing." Arkansas Advisory Opinion 93-06.

Therefore, to the extent that in making donations of services to a charitable organization your judicial position is identifiable, either directly or indirectly, and you are required to participate with the successful bidder, the Committee believes that the donations create the very problems that gave rise to the relevant sections of the Code.

Very truly yours,



James J. Wechsler  
Chair

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cc: Hon. Kevin Fitzwater  
Paul Biderman, IPL Director  
Professor Robert L. Schwartz