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STANDING COMMITTEE ON JUDICIAL
ETHICS AND ELECTION PRACTICES

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PROPRIETY OF A JUDGE ALLOWING
CHARITABLE CONTRIBUTIONS AS
PART OF A PLEA BARGAIN/SENTENCE

Issue

1. May a judge order a convicted defendant as part of a criminal sentence to make a charitable contribution?

2. May a judge approve a plea bargain agreement between the prosecutor and the defendant which includes an agreement by the defendant to make a charitable contribution, so long as the judge does not select the charity or the amount of the contribution?

3. May a judge, as part of civil contempt or sanction, order/require a party or an attorney to make a charitable contribution?

Answer: The Committee answers no to all three of the foregoing issues.

Facts

This advisory opinion concerns the authority of judges to order parties or attorneys to make charitable contributions. The opinion addresses three basic hypothetical scenarios:

1. As part of a sentence of a defendant convicted of a crime, the judge orders the defendant to make a charitable contribution in an amount and to a charity selected by the judge.

2. Prior to trial, the defendant the prosecutor enter into an agreement whereby in

exchange for a reduction or dismissal of the criminal charges, the defendant agrees to make a charitable contribution in an amount and to a charity selected by the prosecutor. Alternatively, the defendant is allowed to select the charity. In either case, the plea agreement is submitted to the presiding judge for approval.

3. A judge finds a party and/or the party's attorney in contempt or in violation of NRCPC Rule 11, NRCPC 37 or another rule that authorizes the court to impose sanctions. As a sanction, the judge orders the party or attorney to make a charitable contribution in lieu of paying a fine.

Discussion

The Nevada Code of Judicial Conduct sets forth the applicable standards from which our judges are provided guidance for ethical conduct.

Canon 4C(3) of the Nevada Code of Judicial Conduct states as follows:

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

"(i) may assist such an [charitable] organization in planning fund-raising and may participate in the management and investment of the organization's funds, **but shall not personally participate in the solicitation of funds, or**

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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." (Emphasis added)

In addition, Canon 2A states that a judge has the duty to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 2B states that a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment and the judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. These Canons are also relevant to the issues raised in this request for advisory opinion.

In *Matter of Davis*, 113 Nev. 1204, 946 P.2d 1033 (1997), the Nevada Supreme Court affirmed a decision of the Nevada Commission on Judicial Discipline removing a municipal court judge from office for numerous violations of the Nevada Code of Judicial Conduct (NCJC). One of the charges against the judge was that he directed or suggested to persons appearing before his court, and having been found guilty by the court, to contribute to certain charities in lieu of paying fines to the city thereby diverting money from the city treasury. The Commission found that the judge was motivated partially by the purpose of enhancing his electability.

The judge argued that there was no evidence that he directed or encouraged charitable contributions to enhance his electability. He further claimed that he did not violate Canon 4C(3) "because the defendants had a choice as to whether to contribute and which charity would receive

the contribution." 113 Nev. at 1223.

In affirming the Commission's decision, the Supreme Court stated:

"We conclude that appellant's conduct violated NCJC 4C(3). 'The rule addresses the dual fears that potential donors either may be intimidated into making contributions when solicited by a judge, or that they may expect future favors in return for their largesse.' Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* Sec. 9.06 at 289 (2d ed. 1995). This treatise also directs our attention to unreported decisions wherein judges were disciplined for conduct similar to that presently under scrutiny. In one case, the judge disposed of cases by requiring defendants to contribute stated amounts to charities named by the judge. In another, the judge allowed the defendants to make voluntary contributions to law enforcement services in exchange for dismissal of traffic infractions. *Id.* at 290 nn. 40-41. Accordingly, we conclude that appellant violated NCJC Canon 4C(3). Further this conduct violated other canons identified by the Commission." *Matter of Davis, supra*, 113, Nev. at 1223.

There are no provisions in the Nevada criminal statutes authorizing judges to order a convicted defendant to make a charitable

contribution. The prescribed punishment for misdemeanors in Nevada is imprisonment in the county jail for not more than 6 months, a fine of not more than \$1,000, or both. *See* NRS 193.150. The prescribed sentences for felony crimes involve sentences of one or more years in prison and/or a fine. No statute authorizes the court to substitute a charitable contribution for either the fine or imprisonment penalty.

Under NRS 4.373, a justice of the peace may suspend the sentence of a person convicted of a misdemeanor and may order the defendant to pay restitution to his victim, participate in a work program for the benefit of the community, participate in professional counseling, abstain from the use of alcohol or drugs, refrain from engaging in any criminal activity or to engage or refrain from engaging in any other conduct deemed appropriate by the justice of the peace. Again, there is no statutory provision that authorizes the judge to order a defendant to make a charitable contribution as part of a suspended sentence.

Other state courts and judicial conduct commissions have sanctioned judges for ordering or authorizing charitable contributions as part of a criminal sentence or "diversionary program" or as a contempt or civil sanction. *In the Matter of Storie*, 574 S.W.2d 269 (Mo. 1978), for example, a judge was suspended for approving plea bargains that included an agreement that in consideration for a reduced charge, dismissal or nolle prosequi, a contribution would be made by the defendant to a fund maintained by the judge to improve court facilities.

A number of judicial ethics decisions from other jurisdictions have also advised that a judge may not require a defendant to contribute to a charity, including both governmental and private charitable

organizations, either directly as part of a sentence, as part of a plea bargain agreement, in exchange for withholding adjudication, as a condition of probation, as part of probation before judgment, or as an alternative in lieu of performing community service work. *See* "Charitable Contributions as Part of a Sentence" *Judicial Conduct Reporter*, Vol. 21, No. 4 (Winter 2000).

Ordering attorneys to make charitable contributions as a sanction of violation of court rules has also been disapproved, although the decisions are not uniform. *In the Matter of Merritt*, 432 N.W.2d 170 (Mich. 1988), a judge was censured for maintaining a fund to assist indigent drug and alcohol abusers where contributions from attorneys were required as sanctions for late filing or pre-trial statements, tardiness or failure to appear. In contrast to *Merritt*, however, a Washington state advisory opinion stated that a judge may give attorneys the option of paying fines levied for violations of civil scheduling orders directly to a local county bar association pro bono or volunteer lawyer program or a charity so long as the judge does not select the organization and the attorney is admonished not to make the contribution to an organization with a political agenda. *See* "Charitable Contributions as Part of a Sentence" *Judicial Conduct Reporter*, Vol. 21, No. 4 (Winter 2000).

A number of reasons have been advanced for prohibiting judges from requiring or proposing that defendants, civil parties or attorneys make charitable contributions in lieu of a fine or sanction. These reasons include the concern that judicial power should not be used to force litigants to provide gifts or services to specified charities and judges should not be choosing among competing charities.

Secondly, charitable contributions in lieu of sentencing are not authorized by statute and judges, no matter how well intentioned, may not impose penalties or dispose of cases in a manner not prescribed by statute or case law. This also distinguishes charitable contributions from community service work which is provided for by statute.

Third, charitable contributions in lieu of a fine divert money from the treasury which the governmental entity would otherwise receive. Fourth, ordering or approving charitable contributions may create the appearance that the judge is improperly using his judicial authority to enhance his, or her, popularity and chances for being re-elected.

Although imposing restrictions on the types of charities to which contributions may be ordered may arguably lessen the appearance of partiality, in the absence of any clearly established rule and standards, the ability to distinguish acceptable court ordered or approved charitable donations from unacceptable ones is doubtful. What may appear to one jurist as an apolitical charitable organization may appear to others as having a political agenda to which they do not wish to subscribe and which is not subject to the rules and regulations governing the disposition of public monies.

Conclusion

The Committee recognizes that the intentions of judges in ordering or approving plea bargain agreements, sentencing alternatives, or sanction orders requiring that a party or attorney make a charitable contribution may be well intentioned and that worthy causes and programs may obtain funding through such methods that they might not otherwise receive. Strongly weighing against these well-intentioned goals, however,

is the concern for an impartial judicial system and the basic instruction provided by Canon 4C(3) that judges may not personally participate in the solicitation of funds, or other fund-raising activities.

Therefore, in the absence of any statute, rule, or canon that authorizes judges to order or approve charitable contributions as part of the resolution of a criminal or civil proceeding, it is the opinion of the Committee that judges may not order or approve charitable contributions to public or private charities as part of a sentence or plea agreement in a criminal case or as a sanction in lieu of a fine in a civil action.

References

Nevada Code of Judicial Conduct; Canons 2, and 4; NRCP 11; NRCP 37; *Matter of Davis*, 113 Nev. 1204, 946 P.2d 1033 (1997); NRS 193.150; NRS 4.373; *In the Matter of Storie*, 574 S.W.2d 269 (Mo. 1978); *In the Matter of Merritt*, 432 N.W. 2d 170 (Mich. 1988); and *Judicial Conduct Reporter, Vol 21, No. 4 (Winter 2000)*.

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the Court, the State of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada Judiciary, or any person or entity which requested the opinion.


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