

# CHARITABLE FUND-RAISING BY JUDGES: THE GIVE AND TAKE OF THE 2007 ABA MODEL CODE OF JUDICIAL CONDUCT

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## INTRODUCTION

Money is no friend to judicial independence.<sup>1</sup> A judge's acceptance of money, gifts, or favors from a person whose interests may come before the judge runs counter to the public's legitimate expectation that partiality and favoritism will have no place in the judicial decision-making process. Initially, the primary concern was actual corruption—a judge receiving something of value in return for an “opinion, judgment or decree.”<sup>2</sup> And although actual corruption unfortunately remains a concern today,<sup>3</sup> public confidence demands not only freedom from partiality, but also freedom from the appearance of partiality.<sup>4</sup> Public suspicion is aroused whenever a

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1. As observed by a delegate to the Sixth Illinois Constitutional Convention, “[y]ou don't want a judge on somebody else's payroll.” 2 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 958 (1970) (remarks of Delegate Peter Tomei in support of an amendment prohibiting judges from holding another “position of profit” during their judicial tenure); see also Scott Gold, *New Rules Sought for Nevada Judges*, L.A. TIMES, Sept. 3, 2006, at A19 (“Judges and money do not mix. . . . The essence of judicial duty is independence. I don't think anyone can argue that it's a good thing for judges to be begging for money—period.”) (quoting Nevada District Judge Brent Adams comment in the context of raising campaign funds).

2. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (1790). The first federal bribery statute applied only to judicial officials. *Id.*; see U.S. vs. Brewster, 408 U.S. 501, 549 n.10 (1972) (Brennan, J., dissenting).

3. See, e.g., Michael Brick, *Former Judge Is Convicted of Bribery in Divorce Court*, N.Y. TIMES, Apr. 20, 2007, at B1 (reporting the conviction of Judge Gerald P. Garson for accepting cash, dinners, and cigars in exchange for special courtroom assignments and other favored treatment); Holbrook Mohr, *Jury Finds Prominent Attorney, Two Ex-Judges Guilty of Bribery*, LAW.COM, Apr. 3, 2007, <http://www.law.com/jsp/article.jsp?id=11755175-38882> (reporting bribery and mail fraud convictions of two former Mississippi state court judges).

4. State v. Garner, 760 S.W.2d 893, 906 (Mo. Ct. App. 1988) (“Acts or conduct which give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct which inexorably bespeak partiality.”); *In re Laatsch*, 727 N.W.2d 488, 491 (Wis. 2007) (“Even the appearance of partiality can erode the public's confidence in the

judge receives a gift, favor, or other benefit that appears to be bestowed for the purpose of influencing the judge in a current or prospective proceeding.<sup>5</sup> Not only gifts of cash, but also loans,<sup>6</sup> reduced legal fees,<sup>7</sup> discounted decorating supplies,<sup>8</sup> free use of rental property,<sup>9</sup> and even gifts of sporting event tickets<sup>10</sup> diminish public confidence in the ability of a judge to preside fairly in a matter involving a donor. Similarly, “educational” judicial retreats held at plush resorts and underwritten by corporations, frequent litigators, or other special interest groups have been criticized by legal scholars and newspaper editors alike as thinly veiled attempts to buy influence.<sup>11</sup>

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integrity of the judiciary.”); *cf.* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) (“Wise observers have long understood that the appearance of justice is as important as its reality.”).

5. See JAMES J. ALFINI, STEVEN LUBET, JEFFERY SHAMAN & CHARLES GARDNER GEYH, *JUDICIAL CONDUCT AND ETHICS* § 7.17, at 7-47 (4th ed. 2007) (“When judges receive gifts from individuals with a present or future interest in matters that may come before the court, it can create the perception, if not the reality, of influence.”).

6. *In re Witt*, 583 N.E.2d 526, 535 (Ill. 1991) (“[R]espondent’s conduct, in soliciting and failing to disclose a loan from an attorney practicing before him, created the potential for partiality, jeopardized the integrity of the judicial system, and created an appearance of impropriety.”); *Office of Disciplinary Counsel v. Cox*, 770 N.E.2d 1007, 1008-09 (Ohio 2002) (finding that a judge undermined public confidence in the judiciary by accepting loans from attorneys who appeared before the judge); *In re Litman*, 272 N.W.2d 264, 266 (Minn. 1978) (“[M]aking a loan to a judge before whom a lawyer practices has the ineluctable appearance of tampering with judicial impartiality.”).

7. Mass. Comm’n on Judicial Ethics, Op. 94-2 (1994), <http://www.mass.gov/courts/sjc/cje/94-2h.html> (advising that “a judge may not accept discounted legal services from an attorney whose interests are likely to come before him”); Max B. Baker, *Discounted Legal Fees Puts Judge on Hot Seat*, FORT WORTH STAR-TELEGRAM, Apr. 1, 2007, at B1.

8. *In re Kral*, 1 Ill. Cts. Comm’n 20 (Dec. 18, 1973) (suspending judge for accepting a discount on wallpaper from a litigant).

9. *Adams v. Comm’n on Judicial Performance*, 897 P.2d 544, 562 (Cal. 1995) (finding judge’s free use of a resort condominium owned by an attorney who appeared before the judge to constitute the improper acceptance of a gift); *In re Murphy*, 2 Ill. Cts. Comm’n 133 (Feb. 9, 1990) (disciplining judge for accepting use of rental cars paid for by a lawyer); *In re Chananau, Determination* (N.Y. Comm’n on Judicial Conduct Sept. 10, 1982) <http://www.scjc.state.ny.us/Determinations/C/Chananau.htm> (admonishing judge for receiving substantial vacation lodging discounts arranged by an individual seeking receivership appointments).

10. *Office of Disciplinary Counsel v. Lisotto*, 761 N.E.2d 1037, 1038 (Ohio 2002) (reprimanding judge for accepting tickets to Pittsburgh Steelers’ football games from an attorney who frequently appeared before the judge); *In re Luzzo*, 756 So. 2d 76, 77-79 (Fla. 2000) (reprimanding judge for accepting tickets to Florida Marlins’ baseball games from a law firm appearing before the judge); *In re Haley*, 720 N.W.2d 246 (Mich. 2006) (censuring judge for accepting two University of Michigan football tickets from an attorney in open court).

11. See Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65 (2004) (documenting that ethics experts, judges, public interest groups, and editorial boards

A suspicion of favoritism likewise exists where a gift does not go directly to a judge, but does inure to the judge's benefit. The most obvious example is the public's distaste for campaign contributions solicited either directly by a judicial candidate or indirectly by the candidate's campaign committee. According to one study, sixty-nine percent of Americans are convinced that raising money for elections either "greatly" or "moderately" affects a judge's courtroom decisions.<sup>12</sup> Another recent study found that seventy-nine percent of the leaders in the business community believe that campaign contributions influence judicial rulings.<sup>13</sup> The fact that a contribution is solicited and accepted by a campaign committee rather than by the judge personally may help sooth the collective conscience of the judicial ethics community but means little to the lay community.<sup>14</sup>

A judge's solicitation on behalf of a charitable organization<sup>15</sup> is problematic for the same reason as the acceptance of a gift by a judge. An individual, especially someone whose interests are likely to come before the

have roundly criticized privately funded judicial trips); Editorial, *Junkets for Judges, They Should End, In Return for Higher Pay*, WASH. POST, Feb. 9, 2008, at A14; Dorothy Samuels, *Tripping Up on Trips: Judges Love Junkets as Much as Tom Delay Does*, N.Y. TIMES, Jan. 20, 2006, at A16.

12. Annenberg Public Policy Center, *Public Understanding of and Support for the Courts: 2007 Annenberg Public Policy Center Judicial Survey Results 3* (2007), available at [http://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf) [hereinafter Annenberg, *Public Understanding*]; see also Greenberg Quinlan Rosner Research, Inc., *Justice at Stake Frequency Questionnaire 4* (2001), available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (reporting that 76% of registered voters believe that judicial campaign contributions have "some" or a "great deal" of influence on a judge's decisions); American Viewpoint Justice at Stake Campaign, *Wisconsin Statewide Survey 9* (2008), available at <http://justiceatstake.org/files/AmViewWisconsingraphics.pdf> (reporting that 78% of likely Wisconsin voters believe that campaign contributions have "some" or a "great deal" of influence on judicial decisions).

13. Zogby International, Christian W. Peck, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 4* (May 2007), available at <http://faircourts.org/files/ced-zogbypoll2007.pdf> (finding that 79% of responding business leaders believe that campaign contributions have an impact on judicial decisions); see generally Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 97 n.11 (2003) ("Poll after poll demonstrates the public's belief that money contributed to candidates for the bench affects judicial decision-making.").

14. See Charles F. Scott, *Reconciling Conflicts in Illinois Judicial Ethics*, 19 LOY. U. CHI. L.J. 1067, 1072 (1987) (observing that while the distinction between contributing to a campaign committee rather than directly to a judge is legally tenable, "the public perception of that distinction is not sympathetic").

15. As used in this Article, the terms "charitable organization," "charitable group," and "charity" denote educational, religious, charitable, fraternal, and civic nonprofit organizations. The terms also include, unless otherwise indicated, organizations and entities concerned with the law, the legal system, or the administration of justice. These are the groups subject to the fund-raising restrictions of Rule 3.7 of the 2007 ABA Model Code of Judicial Conduct. MODEL CODE OF JUDICIAL CONDUCT R. 3.7 (2007).

judge, may accede to a request for a charitable contribution for the identical purpose that an individual would offer a gift to a judge—to curry favor with the judge.<sup>16</sup> But even if a donor has no sinister or ulterior motive in making a donation to the judge’s favorite charity, the public may view the largess as an attempt to gain a courtroom advantage over a less generous attorney or litigant.

The drafters of the original American Bar Association (ABA) Canons of Judicial Ethics<sup>17</sup> (1924 Canons) did not encourage participation in extra-judicial activities<sup>18</sup> and considered judicial assistance in charitable fund-raising to be just as inimical to public confidence in the judiciary as the acceptance of gifts or favors by a judge. As a result, the 1924 Canons included a flat prohibition against a judge’s active participation in civic or charitable fund-raising endeavors.<sup>19</sup>

This prohibition precluded a judge not only from personally soliciting assistance for charities, but also from engaging in any act that could be viewed as lending the prestige of judicial office to a fund-raising effort.<sup>20</sup> The anti-solicitation rule was not relaxed regardless of the relationship between the judge and potential donor,<sup>21</sup> the worthiness of the charitable un-

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16. *See id.* R. 3.1 cmt. 4 (2007) (stating that a person solicited by a judge for charitable purposes might accede to the request in order “to curry favor with the judge”); *In re Cunningham*, 538 A.2d 473, 479 (Pa. 1988) (finding that union officials made cash gifts in order to “curry favor” with judges).

17. The Canons of Judicial Ethics were adopted by the ABA House of Delegates on July 9, 1924. LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 131 (1992).

18. *See infra* note 90 and accompanying text (describing the 1924 Canons’ approval of judicial participation in even bar association activities as “at most lukewarm”).

19. *See infra* Section III.A.

20. *See infra* notes 79-82 and accompanying text.

21. The propriety of a judge accepting a gift has always been determined by the relationship between the judge and potential donor. If the donor’s interests have not come before the judge and are not likely to come before the judge, the judge may accept the gift. *See* CANONS OF JUDICIAL ETHICS Canon 32 (1924); CODE OF JUDICIAL CONDUCT Canon 5C(4)(c) (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 4D(5)(h) (1990); MODEL CODE OF JUDICIAL CONDUCT R. 3.13(C)(3) (2007); *see also* Kan. Judicial Ethics Advisory Panel Op. JE 155 (2007), <http://www.kscourts.org/pdf/ClerkCt/JE155.pdf> (approving judge’s use of lawyer’s condominium because the judge was disqualified from hearing cases in which the lawyer appeared). In marked contrast, a judge’s ability to engage in charitable fund-raising activities is not controlled by the likelihood that the target of the solicitation may come before the judge. *See* CANONS OF JUDICIAL ETHICS Canon 25 (1924) (barring all solicitations); CODE OF JUDICIAL CONDUCT Canon 5B(2) (1972) (barring all solicitations); MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i) (1990) (barring all solicitations except from other judges over whom the soliciting judge does not exercise supervisory or appellate authority); MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2) (2007) (barring all solicitations except from family members and judges over whom the soliciting judge does not exercise supervisory or appellate authority).

dertaking,<sup>22</sup> the amount of the donation,<sup>23</sup> or the incidental or remote nature of the judge's involvement in the fund-raising activity.<sup>24</sup>

In adopting a strict anti-fund-raising rule, the drafters of the 1924 Canons refused to recognize that philanthropic pursuits are qualitatively different from a judge's acceptance of gifts and favors.<sup>25</sup> While receiving items of value from litigants and attorneys damages public trust in the judiciary, a judge's participation in civic, educational, religious, fraternal, and other charitable activities can enhance that trust in many ways.

First, judges, just as other respected professionals, "are expected to be active members of their communities."<sup>26</sup> This expectation is not surprising

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22. See ABA Comm. on Prof'l Ethics, Informal Op. 602 (1962) (barring charitable solicitation "even though the objective may be most worthy"); *In re Crahalla*, 747 A.2d 980, 990 (Pa. Ct. Jud. Disc. 2000) (finding that fund-raising is prohibited regardless of the "worthiness of the cause").

23. Canon 25 of the 1924 Canons made no exception for the solicitation of small or de minimis amounts. CANONS OF JUDICIAL ETHICS Canon 25 (1924); see also Wis. Judicial Conduct Comm'n Op. 98-7 2 (1998), <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content-pdf&seqNo=892> (noting that the Wisconsin Code "does not allow for the solicitation of any specified amount of money").

24. See *infra* notes 82-83 and accompanying text. The fact that a judge's role in a fund-raising activity might be so inconsequential or indirect as to be considered de minimis was not recognized by the ABA until it enacted the 2007 Model Code of Judicial Conduct. See MODEL CODE OF JUDICIAL CONDUCT R. 3.7 cmt. 3 (2007) (explaining that a judge may serve minor roles at fund-raising events such as food preparer and usher). Reporter's Explanation of Changes ("New Comment [3] is designed to provide a safe harbor for certain minor and non-coercive activities undertaken in connection with an organization's or entity's fund-raising efforts.").

25. Precisely why the drafters of the 1924 Code were hesitant to endorse extrajudicial activities is unclear. It may be that the ambivalence toward civic and community involvement was merely an extension of the belief of some at the time that judicial impartiality required "withdraw[ing] from many activities of a political or social nature." Editorial, *Out of Place*, N.Y. TIMES, July 18, 1916, at 8 (cited in Leslie B. Dubek, *Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 588 n.88 (2007)). Or it may be that the drafters merely adopted the view of their chairman, Chief Justice William H. Taft, who stated that "[t]he Chief Justice . . . goes into a monastery and confines himself to his judicial work." ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 287 (1965). Finally, it is possible that the outrage generated by Judge Kenesaw Mountain Landis when he accepted the well-compensated position of Commissioner of Baseball while retaining his federal judgeship resulted in the harsh restrictions on both business and non-business related extrajudicial activities. See Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 915-17 (2007) (crediting the ABA's adverse reaction to Judge Landis' simultaneous public and private employments as the catalyst for the 1924 Canons).

26. ABA ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 255 (2004); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Court*, 87 IOWA L. REV. 1213, 1232-33 (2002) ("[W]e expect judges . . . to participate in bar-related and community activities as active citizens and role models."); Office of the Chief Judge, et al., *Public Trust and Confidence in the Justice System: The Wisconsin Initiative Action Plan-October 2000*, at 50, (2000), available at <http://www.wisbar.org> (in search box enter "Wisconsin Initiative Octo-

considering that each year one-half of all Americans participate in volunteer activities<sup>27</sup> and seventy-five percent of Americans donate money to charitable enterprises.<sup>28</sup> Second, civic and charitable involvement provides judges with both formal and informal opportunities to teach others about the law, the legal system, and the administration of justice.<sup>29</sup> Third, extrajudicial activities help personalize judges as sincere and caring family members, volunteers, and community leaders.<sup>30</sup> Fourth, charitable activities help inte-

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ber 2000” to access article) (stating that Focus Group 5 reported seeing “a good deal of community involvement on the part of the bench and Bar and believe that it is important”); American Bar Association, *Perceptions of the U.S. Justice System* 69 (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf> (finding that 33% of survey respondents either “agreed” or “strongly agreed,” and 26% of respondents either “disagreed” or “strongly disagreed” with the statement that “[m]ost judges do not contribute enough to their communities through donations of time, legal services, or money”); Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/-opinions/jecopinions/2005/2005-02.html> (“We are also aware of how important it is for the judiciary to contribute to the community in which it serves.”).

27. Louise Fenner, *Volunteerism is Integral Part of U.S. Culture* (Feb. 28, 2007), <http://www.america.gov/st/washfileenglish/2007/February/20070226171408xlrennef0.5726892.html> (last visited Jan. 7, 2009); see also BILL CLINTON, GIVING: HOW EACH OF US CAN CHANGE THE WORLD 33 (2007) (stating that approximately 55% of American adults donate some time to volunteer activities each year).

28. Fenner, *supra* note 27; see also CLINTON, *supra* note 27, at 13 (stating that about 70% of American households donate money to charity each year).

29. See MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 2 (2007) (“Participation in both law-related and other extrajudicial activities . . . furthers public understanding of and respect for courts and the judicial system.”); UTAH CODE OF JUDICIAL CONDUCT Canon 4C(4) (2003) (“Judges have a professional responsibility to educate the public about the judicial system and the judicial office . . . .”); J. Thomas Greene, *Views from the Bench: Some Current Causes for Popular Dissatisfaction with the Administration of Justice*, 14 UTAH B.J., May 2001, at 37 (“Judges can do things to improve the perception of the judicial system, such as speaking at service clubs, participating in educational seminars, and conducting moot courts.”); Marna S. Tucker, *The Judge’s Role in Educating the Public About the Law*, 31 CATH. U. L. REV. 201, 205 (1982) (proposing that judges take the lead in educating the public about the legal system by speaking “at colleges, and high schools, the PTA, the Junior League, and the Elks”).

30. See, e.g., *Alaskan Judge Joins Immunization Effort in India*, 93 A.B.A. J., June 2007, at 14 (describing an amazing volunteer effort by a caring judge); WIKIPEDIA, Alan Cedric Page, [http://en.wikipedia.org/wiki/Alan\\_Page](http://en.wikipedia.org/wiki/Alan_Page) (last visited Jan. 7, 2009) (“Far surpassing . . . his impressive achievements on the playing field and in the courtroom are the philanthropic contributions Justice Page has made to those in need. In 1988 Page and his wife . . . founded the Page Education Foundation[ ] . . . provid[ing] much-needed financial and mentoring assistance to minority college students . . . .”). Cf. Tony Mauro, *Is the Supreme Court Ready to Rumble?*, AMERICAN LAWYER MEDIA (May 5, 2006), available at <http://www.law.com/jsp/article.jsp?id=1146733527825> (“By mixing it up with the public in ways that make the justices more human and accessible, and less like oracles, they fill in the many blanks of the public’s perception of the judiciary.”). Failure to participate in community activities can have a detrimental effect on public confidence. As one judge lamented, “it not only is embarrassing not to participate, but . . . diminishes the image of the judiciary for a judge-parent to stand idly by while all other parents are pitching in.” N.Y. Advisory Comm.

grate judges into the community,<sup>31</sup> thereby preventing isolation and fostering better judicial decision-making.<sup>32</sup> Finally, volunteer activities contribute to an improved judicial demeanor by helping a judge reduce stress, build self-esteem, and experience an overall sense of physical well-being.<sup>33</sup>

Slowly, successive versions of the ABA Model Code of Judicial Conduct began to acknowledge the value of a judge's community involvement.<sup>34</sup> Eventually judges were permitted, and indeed encouraged, to join in activities of nonprofit groups and play a major role in the management and operation of civic, educational, religious, fraternal, professional, and charitable organizations by serving as officers, directors, and trustees.<sup>35</sup> With the approval of an expanded role for judges in philanthropic pursuits, the issue of judicial assistance in fund-raising became more acute. The simple fact that, by necessity, a profit margin is built into most charitable activities<sup>36</sup> could

on Judicial Ethics Op. 89-53 (1989), <http://www.nycourts.gov/ip/judicialethics/opinions/89-53.htm>.

31. MODEL CODE OF JUDICIAL CONDUCT R.3.1 cmt 2 (2007) ("Participation in both law-related and other extra-judicial activities helps integrate judges into their communities . . ."); Patricia Manson, *Judicial Code Revamp 'Reflects Changing World,'* CHI. DAILY L. BULL., Dec. 27, 2005, at 1 ("It is also important to encourage judges to participate in society in ways that assure they understand the circumstances of litigants who appear before them.") (quoting Mark Harrison, Chair of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct).

32. See ALFINI ET AL., *supra* note 5, § 1.02, at 1-3 ("Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions.").

33. See DEBRORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 58 (2005) (citing studies finding that "[c]ompared with the population generally, people who regularly assist others beside family and friends live longer, experience less pain, stress, and depression, and have greater self-esteem").

34. The 1972 ABA Code of Judicial Conduct was the first Code to promote a more active role for judges by "encouraging" judges to become involved in "a bar association, judicial conference, or other organization dedicated to the improvement of the law." CODE OF JUDICIAL CONDUCT Canon 4 cmt. (1972); *accord* MODEL CODE OF JUDICIAL CONDUCT Canon 4B cmt. (1990). The 2007 ABA Model Code of Judicial Conduct finally acknowledged the benefits of judicial participation in any type of nonprofit, non-partisan community activity. MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 1 (2007) ("In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities, not conducted for profit, even when the activities do not involve the law.").

35. *E.g.*, CODE OF JUDICIAL CONDUCT Canon 5B (1972) ("A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members . . ."); MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3) (1990) (permitting a judge to serve as an officer, director, trustee or non-legal advisor of a law-related organization or any other educational, religious, charitable, fraternal, or civic organization not conducted for profit).

36. See *Judges: Judicial Code Panel Holds Last Hearing, Gets More Feedback on Two Vexing Issues*, 22 ABA/BNA LAW. MAN. PROF. CONDUCT 87 (2006) (reporting that early in its revision of the 1990 ABA Model Code, the Joint Commission to Evaluate the

no longer be ignored or dealt with summarily with the vague admonition not to solicit money or lend judicial prestige to a fund-raising effort.

But the 1972 ABA Code of Judicial Conduct (1972 Code) and the 1990 ABA Model Code of Judicial Conduct (1990 Code) were only marginally successful in refining and redefining the ethical limits of judicial participation in fund-raising activities. As will be seen, in some instances the two Codes created more confusion than guidance.<sup>37</sup> The 2007 ABA Model Code of Judicial Conduct (2007 Code) brings new hope to the multitude of judges who are actively engaged in charitable work<sup>38</sup> and who, because of the failure of previous codes, routinely need to seek the advice of judicial ethics advisory bodies<sup>39</sup> concerning what they can and cannot do for their religious congregations, social clubs, alma maters, bar associations, and other charitable groups.<sup>40</sup> The importance of the new Code lies in the fact that just like all previous ABA Model Codes, it “comes with a presumption of authority, and state and federal courts are likely to adopt it.”<sup>41</sup>

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Model Code of Judicial Conduct realized that “fund-raising is inevitably a component of most events sponsored by most [educational, religious, charitable, fraternal, and civic] organizations”).

37. See *infra* Sections III.B-C.

38. ALFINI ET AL., *supra* note 5, § 9.04A, at 9-17 (“[I]t is apparent that judges as a group are widely involved in charitable religious, educational, and similar activities.”); Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROB. 10, 24 (1970) (observing that “[m]any judges serve as officers, directors, and trustees of not-for-profit organizations”); Chief Justice Laura Denvir Stith, State of the Missouri Judiciary Address (Feb 5, 2008), available at <http://www.courts.mo.gov/page.asp?id=8401> (claiming pride in the civic and community contributions of the “vast majority” of Missouri judges “work[ing] to make a difference in their communities”).

39. Many jurisdictions have established judicial ethics advisory committees for the purpose of issuing opinions regarding the ethical propriety of a judge’s contemplated conduct. *Judicial Ethics Advisory Committees: Guide and Model Rules*, app. A (Am. Judicature Soc’y 1996). In only a few jurisdictions are the opinions binding on the disciplinary authority and some advisory committees have no official standing at all. See ALFINI ET AL., *supra* note 5, § 1.12, at 1-31. Most of the advisory opinions cited in this Article are accessible through the American Judicature Society’s website, <http://www.ajs.org>.

40. See Okla. Judicial Ethics Advisory Panel Op. 2001-7 (2001), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?Citeid=276441> (also reported at 73 P.3d 273) (“Among ethics panels across the United States the most commonly asked questions are those concerning a judge’s involvement with charitable, educational or civic organizations.”); ALFINI ET AL., *supra* note 5, § 9.04A, at 9-17 (“The subject of charitable solicitation has also generated a voluminous literature of advisory opinions . . .”).

41. Ronald D. Rotunda, *Judicial Ethics, The Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1359 (2006); see also *Report and Recommendation of the Committee to Evaluate Hawaii’s Revised Code of Judicial Conduct* (Apr. 10, 2008), <http://www.state.hi.us/jud/ctrules/CommRptJudConduct.pdf> (“The Committee operated on the presumption that the ABA Model Code 2007 should be adopted as a revised Hawai’i Code.”).

Indeed, many states are now in the process of evaluating their judicial codes in light of the revisions suggested by the 2007 Code.<sup>42</sup>

This Article reviews and evaluates the charitable fund-raising provisions of the new Code. As a necessary starting point, Part I examines the rationale supporting the state's right to limit a judge's personal, off-bench endeavors with an emphasis on the justification for restricting participation in fund-raising activities. Part II traces the evolution of the regulations governing charitable solicitation, beginning with the 1924 Canons and continuing through the successor Model Codes of 1972, 1990, and 2007. Part III explores the meaning of two critical terms left undefined by the 2007 Code: (1) "organizations and entities concerning the law, the legal system, or the administration of justice" and (2) "fund-raising purpose." To a large extent, the construction placed on these terms will dictate whether a judge's role in a revenue generating activity is authorized. The significance of the first term, "organizations and entities concerning the law, the legal system, or the administration of justice," lies in the fact that judges are granted far greater leeway in assisting a group in raising money if it fits within the "law-related"<sup>43</sup> category. The second term, "fund-raising purpose," is important for the obvious reason that the fund-raising limitations of the 2007 Code are only applicable to events and activities with a "fund-raising purpose." Building on this background, Part IV opines whether the fund-raising restrictions imposed by the 2007 Code are justified by the policy considerations underlying the rules. This Part provides suggestions on the proper interpretation and application of the new rules in the context of the common, everyday charitable, civic, fraternal, professional, religious, and educational activities of judges. Finally, the Article concludes with some observations on the difficulty inherent in determining at what point a judge's participation in fund-raising activities actually harms public confidence in the judiciary.

#### I. THE STATE'S INTEREST IN REGULATING OFF-THE-BENCH ACTIVITIES

If the only objective in regulating judicial conduct was to ensure fair and impartial decisions, there would be no reason to restrict off-the-bench conduct of judges. A decision that is fair and impartial in fact is not made less so by the discriminatory nature of an organization to which the judge

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42. See ABA Center for Professional Responsibility, *Status of State Review of ABA Model Code of Judicial Conduct (2007)*, [http://www.abanet.org/cpr/jclr/jud\\_status\\_chart.pdf](http://www.abanet.org/cpr/jclr/jud_status_chart.pdf) (listing the jurisdictions that have committees reviewing their codes of judicial conduct).

43. The term "law-related" is used in this Article as shorthand to denote activities, organizations, and entities that are "concerned with the law, the legal system, or the administration of justice." MODEL CODE OF JUDICIAL CONDUCT R. 3.7 (2007). The 2007 Code uses the same shorthand phrase. *Id.* R. 3.7 cmt. 1-2.

belongs, the gifts accepted by the judge, or the truth or falsity of statements made by the judge during a political campaign. Unfortunately, however, the survival of our system of justice is not based upon the actual fairness of a court ruling or the actual impartiality of a judge, but rests upon the public's perception of that fairness and impartiality. While some commentators decry the elevation of appearance over reality,<sup>44</sup> appearances continue to dictate the level of trust placed in the courts simply because members of the public have no direct way to evaluate the factual or legal legitimacy of a judicial decision or the purity or impurity of a judge's reasoning process.<sup>45</sup> Therefore, litigants and others must rely on external cues in assessing the degree of faith and confidence that they will put in the judiciary.<sup>46</sup> These external cues, whether related to in court or out of court behavior, often have little to do with reality and everything to do with appearances.<sup>47</sup>

Off-bench activities may adversely impact public perception of judicial integrity and independence in several ways. First, an activity may give the appearance of partiality or favoritism.<sup>48</sup> Second, a judge's outside activities may take too much time and energy away from the performance of the judicial function.<sup>49</sup> Third, a non-judicial endeavor may, as Professor

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44. See Richard C. Reuben, *West-Financed Judicial Award Under Fire: Legal Publishing Giant Defends Integrity of Devitt Selection Process*, 81 A.B.A. J. 36, 37 (1995) (quoting Professor Geoffrey Hazard, Jr., as stating "[w]e're living in a world in which ethical standards are being set by what some Joe Six-Pack would think is not right, a world in which virtual reality is more important than reality itself"); Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 4 (2007) ("The overall aim of rules governing judicial ethics and practice should be actual justice, not the appearance of justice."); Rotunda, *supra* note 41, at 1347 (criticizing the appearance of impropriety standard because of its "vagueness, unpredictability, and unfairness").

45. See Howard T. Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373, 385 (1984) ("Few of the public understand the judicial process or are capable of distinguishing the good judge from the poor solely on the quality of his or her judging. For much of the public, appearances are all it has to go by.").

46. See *In re Brown*, 691 N.E.2d 573, 576 (Mass. 1998) ("Precisely because the public cannot witness, but instead must trust, what happens when a judge retires to the privacy of his chambers, the judiciary must behave with circumspection when in the public eye.").

47. Although, "[i]n matters of ethics appearance and reality often converge as one." *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring).

48. *In re Niemi*, 820 P.2d 41, 43 (Wash. 1991) (citing JEFFREY SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS, § 10.02, at 274 (3d ed. 1990)).

49. Russell R. Wheeler, *Judging What Judges Do Off the Bench*, 1990 J. SUP. CT. HIST. 59, 59-60 ("[E]xtrajudicial activity . . . may, by example, deprive judges of the time and energy they need to decide cases fairly and explain their decisions clearly."); STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 7 (Am. Judicature Soc'y 1984) [hereinafter LUBET, BEYOND REPROACH]; Hazel Beh, *Why Justices Should Stop Appointing Bishop Estate Trustees*, 21 U. HAW. L. REV. 659, 666 (1999) ("[A] judge must not allow personal endeavors to distract from his or her judicial activities.").

Lubet puts it, constitute a “collateral misuse of the judicial office.”<sup>50</sup> The most common form of collateral misuse involves trading upon the dignity, power, and prestige of the judicial office to gain a personal advantage for the judge or another.<sup>51</sup> This misuse violates the covenant between the judge and the people that the power and prestige bestowed upon the judicial office may be invoked by the temporary holder of that office only to advance the legitimate interests of the judicial branch of government.<sup>52</sup> Judicial prestige cannot be employed as leverage to influence a third party to provide the judge or the judge’s alter ego with a private benefit. Obtaining a favor or other benefit by misusing the judicial office not only creates the impression that the favor may be returned by the judge, but also causes the public to “lose confidence in the character of a judge who seeks, or appears, to take any advantage of his or her office.”<sup>53</sup> These three traditionally recognized reasons for limiting non-judicial activities are incorporated into the 2007 Code.<sup>54</sup>

Participation in fund-raising has the potential of implicating all three justifications for limiting extrajudicial endeavors.<sup>55</sup> For example, soliciting on behalf of a group seeking to legalize marijuana or on behalf of a bar association consisting only of plaintiffs’ lawyers may call into question a

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50. LUBET, BEYOND REPROACH, *supra* note 49, at 6.

51. *Id.* at 6-7.

52. Chief Justice Earl Warren suggested the appropriate use of judicial prestige when he “publically called for each federal judge to bring the full prestige of his judicial office to bear ‘at every stage of litigation in order to insure promptness and efficiency.’” Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation*, 29 F.R.D. 207, 216 (1961) (quoting Chief Justice Warren).

53. LUBET, BEYOND REPROACH, *supra* note 49, at 7; John Ritchie, *The Propriety of the Participation by a Judge in Non-Judicial Money-Making Activities*, 51 CHI. BAR REC. 70, 74 (1970) (“[A] judge should refrain from engaging in any non-judicial activity that might impair the dignity, prestige, and esteem in which the office of judge should be held by the public.”).

54. MODEL CODE OF JUDICIAL CONDUCT R. 3.1(A) (2007) (prohibiting extrajudicial activity that interferes with the proper performance of judicial duties); *id.* R.3.1(C) (prohibiting extrajudicial activity that appears to undermine the judge’s independence, integrity, or impartiality); *id.* R. 3.1 cmt. 4 (observing that solicitations by judges create the danger that the person solicited “would feel obligated to respond favorabl[y], or would do so to curry favor with the judge.”); *see also id.* R. 1.3 (“A judge shall not use the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”).

55. The fund-raising restrictions examined in this Article are purportedly justified by the state’s interest in preventing the collateral misuse of the dignity, power, and prestige of the judicial office to promote a private charitable interest. As a result, the remaining two rationales for limiting extrajudicial activities—to prevent the appearance of partiality and to insure full time devotion to judicial duties—while important, only have limited relevance to the present discussion. These two state interests, however, are addressed to the extent necessary to fully explore the issues presented.

judge's independence and impartiality.<sup>56</sup> Private charitable activities are likewise properly limited if they interfere with the performance of judicial duties by causing undue absences from court<sup>57</sup> or creating the need for frequent disqualification.<sup>58</sup> Without question, however, the primary justification for restricting a judge's charitable fund-raising involvement rests with the goal of preventing the collateral misuse of the power and prestige that attaches to the judicial office.<sup>59</sup> This fact is clearly reflected in Professor Lubet's often cited statement of the rationale supporting fund-raising restrictions: "[t]he purpose of this [anti-solicitation] prohibition is to avoid misuse of the judicial office. 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."<sup>60</sup>

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56. See *infra* note 207 (describing relevant factors in determining whether affiliation with a particular organization detracts from judicial independence, integrity, or impartiality).

57. Judges have been disciplined for excessive absence from court but the cause of the absence usually is a personal engagement other than a fund-raising activity. See, e.g., *In re Daley*, 2 Ill. Cts. Comm'n 38 (1983) (suspending judge for leaving the courthouse in mid-afternoon in order to arrive at his secondary employment in time for the 3:00 p.m. shift); *In re DiBlasi*, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001), <http://www.scjc.state.ny.us/Determinations/D/DiBlasi.htm> (censuring judge in part for attending a college broadcasting class held weekdays from 9:15 a.m. until 1:00 p.m.). However, on rare occasion a judge may become so involved in a fund-raising event that the official responsibilities of the judge and court staff suffer. See, e.g., *In re Hyde*, Order of Public Censure (Cal. Comm'n on Judicial Performance May 14, 1996), [http://cjp.ca.gov/userfiles/file/Censures/Hyde\\_05-14-96.pdf](http://cjp.ca.gov/userfiles/file/Censures/Hyde_05-14-96.pdf) (disciplining judge in part for interfering with his secretary's duties by requiring her to prepare fund-raising lists and mailings during working hours).

58. A close affiliation with a not-for-profit entity may result in a judge's frequent disqualification if the organization regularly appears before the judge. But again, disciplinary commissions and advisory committees are seldom required to address the frequent disqualification issue in the context of a judge's charitable fund-raising activities. Most often the issue arises because a judge is serving on the board of an organization which routinely appears in the judge's court. See, e.g., *In re Anderson*, 814 P. 2d 773 (Ariz. 1991) (censuring judge for failing to disqualify from cases involving a hospital on whose board the judge served); Va. Judicial Ethics Advisory Comm. Op. 00-3 (2000), <http://www.courts.state.va.us/jirc/opinions/2000/00-3.html> (advising judge not to serve on the board of an agency that receives court referrals).

59. ABA Comm. Prof'l Ethics, Informal Op. C-327 (1960) ("[T]he basic object of the Canon [Canon 25 of the 1924 Canons] is to eliminate the use of power and prestige of the judicial office to persuade others to contribute. . . ."); Ohio Board of Commissioners on Grievances & Discipline, Op. 87-003 (1987), [http://www.sconet.state.oh.us/BOC/Advisory\\_Opinions/1987/op%2087-003.doc](http://www.sconet.state.oh.us/BOC/Advisory_Opinions/1987/op%2087-003.doc) ("The basic object behind prohibiting judges from soliciting funds for organizations is to eliminate the use or appearance of the use of the power and prestige of judicial office to persuade others to contribute funds."); see also the authorities cited *infra* note 60.

60. LUBET, BEYOND REPROACH, *supra* note 49, at 29. The vast majority of states considering the issue have adopted this statement of the justification for restricting a judge's ability to participate in charitable fund-raising efforts. See, e.g., *In re Davis*, 946 P. 2d 1033,

The intimidation referred to by Professor Lubet includes not only truly coercive or fear-producing conduct, but also the more subtle misuse of judicial prestige to persuade or influence a person to donate.<sup>61</sup> Similarly, the concern that a donor might expect a return judicial favor includes the related fear that a failure to donate might displease a judge.<sup>62</sup>

A restriction on a judge's fund-raising participation is justified only if it bears a relationship to one of the three policy considerations underlying the need to regulate non-judicial pursuits. In other words, the only legitimate function of a code of judicial conduct's set of constraints on extrajudicial activity, including fund-raising, is to

[D]raw the line between those non-judicial activities that enrich, or at least are harmless to, the judiciary and those that actually detract from or interfere with the business of judging. This line should not be drawn so as to eliminate all perceivable evils and temptations. Rather, the delineation should give the members of the judiciary every reasonable degree of latitude, barring activities only where they do measurable damage to the Court's dignity, available time and energy, or appearance of impartiality.<sup>63</sup>

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1045 (Nev. 1997); *In re Hartman*, 873 A.2d 867, 871-72 (Pa. Ct. Jud. Disc. 2005); Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf); Ind. Comm'n on Judicial Qualifications, Op. 1-96 (1996), <http://www.kscourts.org/pdf/ClerkCt/JE87.pdf>; Kan. Judicial Ethics Advisory Panel, Op. JE 87 (1999); Ill. Judicial Ethics Comm., Op. 98-11 (1998), <http://www.ija.org/ethicsop/opinions/98-11.htm>; Mich. St. Bar Comm. on Prof'l and Judicial Ethics, Op. JI-73 (1993), [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ji073.htm?CFID=4088721&CF\\_TOKEN=36272128](http://www.michbar.org/opinions/ethics/numbered_opinions/ji073.htm?CFID=4088721&CF_TOKEN=36272128); Me. Judicial Ethics Comm., Op. 02-2 (2001), *reprinted in* 17 ME. B.J. 254-55 (2002); Neb. Judicial Ethics Comm., Op. 02-3 (2002); Nev. Standing Comm. on Judicial Ethics and Election Practices Op. JE 99-002 (1999), <http://www.judicial.state.nv.us/je990023new.htm>; *see also* MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 4 (2007) (observing that solicitations by judges create the danger that the person solicited "would feel obligated to respond favorably, or would do so to curry favor with the judge"); ABA ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 280 (2004) ("These [fund-raising] limitations address two concerns: that the person solicited will feel obligated to respond favorably because of the judge's position of influence or control or will expect future favors for their donations.").

61. *See* ALFINI ET AL., *supra* note 5, § 9.04A, at 9-15 (stating that one reason for the anti-solicitation rule is to prevent trading on the prestige of judicial office to raise funds even if the judge's conduct does not rise to the level of "intimidation"); ABA Comm. on Prof'l Ethics, Informal Op. 603 (1962) (explaining that the basic objective of Canon 25 of the 1924 Canons was to eliminate the use of judicial power and prestige to *persuade* others to contribute (emphasis added)); ABA Comm. on Prof'l Ethics, Informal Op. 1105 (1969) (noting that a judge may not use the prestige of office to *influence* dinner attendees to contribute funds (emphasis added)).

62. *In re Hartman*, 873 A.2d 867, 871 n.3 (Pa. Ct. Jud. Disc. 2005) (noting that the intimidation emanating from a judge's solicitation may include the fear that "declination of the request will produce the judge's displeasure"); *accord* Ill. Judicial Ethics Comm., Op. 98-11 (1998), <http://www.ija.org/ethicsop/opinions/98-11.htm>.

63. ALFINI ET AL., *supra* note 5, § 10.03D, at 10-9, 10-10; *see also* Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 19 (1970)

Too often drafters of ethical standards fail to scrutinize a proposed restriction on a judge's off-bench activities against the specific rationale supporting the government's right to interfere with the political, social, charitable and other personal undertakings of a judge. Instead, a "gut-feeling" as to the propriety or impropriety, prudence or imprudence, of a particular extrajudicial act is substituted for a "restriction vs. rationale" analysis.<sup>64</sup> It is especially important to conduct this analysis before concluding that a judge's civic or charitable involvement does "measurable damage" to the judiciary because, unlike purely personal pursuits, philanthropic activities benefit the judiciary, the legal profession, and the community at large.<sup>65</sup> In Part IV of this Article the fund-raising restrictions imposed by the 2007 Code are evaluated against the justification offered in support of those limitations, namely the prevention of the collateral misuse of the power and prestige of judicial office to promote a charitable fund-raising effort.

However, before judging the legitimacy of the fund-raising restrictions of the new Code, it is necessary to trace the evolution of the rules governing charitable solicitations through the four versions of the ABA Model Code. This review will provide needed insight into the development and proper interpretation of the current rules.

## II. EVOLUTION OF THE CHARITABLE FUND-RAISING RESTRICTIONS OF THE ABA MODEL CODES

All four versions of the ABA Model Code of Judicial Conduct feature limitations on a judge's off-bench pursuits including limits on fund-raising activities. The refinement of the rules, from one Code to the next, did not proceed smoothly, logically, or in a consistent manner. Moreover, Code provisions governing charitable involvement generally demonstrated a lack of concern for the objectives underpinning the restrictions on private behavior. The 2007 Code's attempt to remedy the shortcomings of previous ABA efforts is best understood in the context of the development of the Model Codes of 1924, 1972, and 1990.

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(stating that non-judicial activities should be prohibited only if there is a "substantial likelihood" that a particular activity will "1. interfere with the performance of official duty; 2. interfere, or seem to interfere, with the impartiality of the participating judge; or 3. impair the dignity and prestige of the judicial office").

64. See James D. Nosedá, Comment, *Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence*, 36 DEPAUL L. REV. 519, 545 (1987) (identifying the "we know it when we see it" approach to defining judicial misconduct).

65. See *supra* notes 26-33 and accompanying text.

## A. Canons of Judicial Ethics (1924): The First Model Code

The 1924 Canons were intended to provide “a proper guide and reminder for judges, . . . indicating what the people have a right to expect from them.”<sup>66</sup> One legitimate expectation, according to the ABA, was that judges should not use, or appear to use, the authority of judicial office to secure financial or other support for charitable ventures.<sup>67</sup> Canon 25 of the 1924 Canons, entitled “Business Promotions and Solicitations for Charity,” provided that a judge “should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute[ ] . . . to charitable enterprises.”<sup>68</sup> In addition to this general warning, Canon 25 continued with the specific direction that a judge “should not solicit for charities.”<sup>69</sup> Reading these two provisions together, it is clear that the drafters of Canon 25 believed that any type of solicitation by a judge, regardless of its nature or size, inescapably gives rise to a reasonable suspicion that the judge is misusing the power or prestige of office.<sup>70</sup>

The anti-fund-raising rule of Canon 25 was given a very broad application. A “charity” included any type of charitable,<sup>71</sup> philanthropic,<sup>72</sup> civic,<sup>73</sup> ecclesiastical,<sup>74</sup> educational,<sup>75</sup> or fraternal<sup>76</sup> group. Because no exception was made for law-related organizations, judicial solicitation on behalf of a bar association was also prohibited.<sup>77</sup> According to the ABA Committee on Professional Ethics it was “best for a judge simply to refrain from any personal solicitations for contributions, no matter how laudable the purpose.”<sup>78</sup>

The rule under the 1924 Canons not only prohibited a judge from personally requesting funds, but also forbade the use of the judge’s name to

66. CANONS OF JUDICIAL ETHICS Preamble (1924).

67. *Id.* Canon 25.

68. *Id.*

69. *Id.*

70. ABA Comm. on Prof’l Ethics, Informal Op. 603 (1962) (explaining that Canon 25 “infer[s] . . . that it is ordinarily not possible to solicit for charities without giving ground for reasonable suspicion that he [the judge] is utilizing the power and prestige of his office to persuade or coerce others to contribute”).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. ABA Comm. on Prof’l Ethics, Informal Op. C-327 (1960) (applying Canon 25 to prohibit judicial solicitations for an art museum or any educational purpose).

76. ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 238 (1942).

77. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1211 (1972) (“We consider this [anti-solicitation] rule to be well established, and to apply to bar associations as well as other types of organizations.”).

78. ABA Comm. on Prof’l Ethics, Informal Op. 390 (1960) (finding that Canon 25 prohibited a judge from requesting contributions to establish a fine arts building).

directly or indirectly aid in solicitation efforts. Thus, a judge's name could not appear in "pamphlets, booklets, newspapers, or magazines"<sup>79</sup> for the purpose of soliciting contributions for charitable purposes. Because, in the eyes of the members of the ABA Committee on Ethics and Professional Responsibility, increasing an organization's membership was just another method of increasing revenue, a judge was prohibited from authoring a letter asking attorneys to join the ABA.<sup>80</sup>

Nor was it permissible for a judge to be a speaker at a charitable fund-raising dinner, because playing such a featured role "[a]t the very least . . . gives rise to the suspicion that the judge endorses the fund raising effort."<sup>81</sup> In an equally strict application of the anti-solicitation rule, it was determined that a judge would improperly use the prestige of office if he agreed to serve as an honorary member of a national lawyers committee formed to raise money for a long-overdue memorial to John Marshall.<sup>82</sup> The judge's participation was prohibited even though the relatively anonymous and indirect nature of the judge's role in the mail solicitation campaign would have prevented any danger of coercion, fear of retribution, or hope of a return favor.<sup>83</sup>

Near the end of the reign of the 1924 Canons, a minor crack appeared in the otherwise impenetrable armor surrounding the rule against judicial participation in fund-raising. Six months before the ABA House of Delegates adopted the 1972 Code,<sup>84</sup> ABA Informal Advisory Opinion 1211 was issued. Opinion 1211 interpreted the 1924 Canons to permit a judge to be listed as an officer or committee member on bar association stationery "no matter what the use to which the letterhead may be put."<sup>85</sup> This interpretation removed any impediment to including a judge's name, together with the names of other officers or committee members, on stationery used by a

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79. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 238 (1942).

80. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1211 (1972).

81. ABA Comm. on Prof'l Ethics, Informal Op. 1105 (1969). Presumably, a judge was permitted to purchase a ticket and attend a fund-raiser, but the matter was not free from doubt. In Informal Opinion 1105 the ABA Committee on Professional Ethics made the all too general statement that a judge's conduct should not give rise to the "suspicion that the judge endorses the fund raising effort." Taken literally that would arguably prevent a judge from attending an income-generating event because purchasing a ticket and attending might, to some, indicate an endorsement. The ambiguity was removed by the 1972 Code which specifically advised that mere attendance at a fund-raising function did not misuse judicial prestige. CODE OF JUDICIAL CONDUCT Canon 5B(2) (1972).

82. ABA Comm. on Prof'l Ethics, Informal Op. 866 (1966).

83. See ALFINI ET AL., *supra* note 5, § 9.04A, at 9-17.

84. The 1972 Code was adopted by the ABA House of Delegates on August 16, 1972. MILORD, *supra* note 17, at 109.

85. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1211 (1972). Informal Opinion 1211 was issued on February 9, 1972. *Id.* It also permitted judges to "encourage" other judges to join law-related organizations. *Id.*

bar association for solicitation purposes. The impetus for this late-arriving concern with a judge's bar activities was no doubt due to the fact that the authors of Opinion 1211 saw the handwriting on the wall. They knew that the proposed 1972 ABA Code expressly permitted judges to hold office in bar associations, encouraged judges to participate in law-related groups, and allowed a judge to be publically listed as an officer, director, or trustee of a civic or charitable organization.

The 1924 Canons' strict prohibition against virtually any extrajudicial activity that could even remotely be perceived as placing the prestige of judicial office behind a fund-raising effort was to serve as the foundation for each successor ABA Model Code.

#### B. Code of Judicial Conduct (1972): The Modern and Mandatory Code

In 1969, an ABA committee was formed for the purpose of modernizing the old Canons,<sup>86</sup> establishing mandatory rather than aspirational standards of judicial conduct,<sup>87</sup> and addressing a problem inherent in all judicial codes—vagueness.<sup>88</sup> California Supreme Court Chief Justice Roger Traynor, Chair of the Committee, believed that the finished product met “head-on the crucial issues” of the day and avoided the unhelpful “rhetorical, hortatory, [and] pious expressions” found in the 1924 Canons.<sup>89</sup>

Justice Traynor's committee was successful in modernizing the Code's approach to judicial participation in bar association and other law-related activities. The drafters of the 1972 Code believed that the “luke-warm” approval of bar association involvement contained in the 1924 Can-

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86. ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, *About the Commission: Background Paper*, <http://www.abanet.org/judiciaethics/about/background.html> (“In 1969, the ABA again began a comprehensive process to review, evaluate and update the [1924] judicial ethics canons.”).

87. *Id.* (“The most significant difference between the 1924 Canons and the 1972 and 1990 Model Codes is that the later versions were designed specifically to be enforceable and incorporated the use of mandatory language.”); CODE OF JUDICIAL CONDUCT Preface (1972) (“The canons and text establish mandatory standards unless otherwise indicated.”).

88. See Christopher Rapp, Note, *The Will of the People, The Independence of the Judiciary, and Free Speech in Judicial Elections after Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 112 (2005) (“In response to criticism that the [1924] Canons were anachronistic and too vague to be readily applied in real-world situations, the ABA replaced them in 1972 with the Model Code of Judicial Conduct.”); Leslie W. Abramson, *The Judge's Relative is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 HOFSTRA L. REV. 1181, 1182 (2004) (“In 1972, an ABA Special Committee on Standards of Judicial Conduct . . . persuaded the ABA House of Delegates to adopt higher and more explicit standards of judicial conduct.”).

89. *New Rules for Judges*, TIME, June 19, 1972, at 69 (quoting Justice Roger Traynor).

ons<sup>90</sup> did not sufficiently acknowledge the personal benefit to individual judges, or the benefit to the judicial system as a whole, that accompanies judicial assistance in law reform or improvement efforts.<sup>91</sup> As a result, the new Code encouraged judges to contribute to the betterment of the legal system through active participation with “a bar association, judicial conference, or other organization dedicated to the improvement of the law.”<sup>92</sup> Because of the importance of law-related activities, Canon 4 was created to deal exclusively with a judge’s “quasi-judicial” activities, and included relatively liberal rules governing a judge’s participation in organizations “devoted to the improvement of the law, the legal system, or the administration of justice.”<sup>93</sup> Less important “extra-judicial” endeavors, which included activities on behalf of non-law-related charitable, educational, religious, fraternal, and civic organizations, were governed by the more restrictive provisions of Canon 5.<sup>94</sup>

In addition, the 1972 Code was at least partially successful in correcting the failure of the 1924 Canons to “provide adequate guidance to a judge concerning participation in civic, charitable, and similar organizations.”<sup>95</sup> Canon 5 of the 1972 Code, governing non-law-related activities, unambiguously provided that a judge should not (1) solicit funds for any educational, religious, charitable, fraternal, or civic organization;<sup>96</sup> (2) be a speaker or guest of honor at fund-raising events sponsored by these entities;<sup>97</sup> or (3) give investment advice to such organizations.<sup>98</sup> In contrast to the prohibition against participation as a solicitor, featured guest, or investment advisor, Canon 5 expressly permitted a judge to be listed as an officer, director, or trustee on stationery used by a charitable group for any purpose including fund-raising.<sup>99</sup>

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90. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 76 (1973) (“Although old Canon 33 does not discourage the judge’s continued participation in bar activities, its approval is at most lukewarm[ ] . . .”).

91. *Id.* (describing participation in law-related organizations as a “means of keeping the judge in contact with the world around him and as a way of making his expertise available in the ever-continuing effort to improve the law”).

92. CODE OF JUDICIAL CONDUCT Canon 4 cmt. (1972).

93. *Id.* Canon 4.

94. *Id.* Canon 5. The difference in the approach the drafting committee took toward law-related “quasi-judicial” activities and other “extra-judicial” activities is apparent from the titles of Canons 4 and 5. Canon 4 has a welcoming title: “A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.” *Id.* Canon 4. Canon 5 has a less inviting title: “A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.” *Id.* Canon 5.

95. THODE, *supra* note 90, at 78.

96. CODE OF JUDICIAL CONDUCT Canon 5B(2) (1972).

97. *Id.*

98. *Id.* Canon 5B(3).

99. *Id.* Canon 5B(2); THODE, *supra* note 90, at 80.

One would expect Canon 4, which governed the more favored bar associations and other law-related organizations, to be just as explicit in guiding judges through the maze of proper and improper fund-raising activities. This expectation is certainly warranted because the drafters of the 1972 Code were acutely aware that raising money for law-oriented groups presented difficult and unique issues.<sup>100</sup> It was for this reason that different and presumably less restrictive rules were established for judges assisting Canon 4 organizations.<sup>101</sup> However, instead of presenting specific rules, Canon 4C speaks of fund-raising for law-related organizations in hopelessly vague generalities: “[the judge] may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fundraising activities.”<sup>102</sup>

According to this provision, a judge may assist law-related organizations in raising funds so long as the assistance does not include personal participation in a public fund-raising activity. The precise point at which “assisting” ends and “personal participation” begins has never been adequately defined. For example, does a judge who is a speaker or guest of honor at a bar association or law school dinner “assist” in raising funds as permitted by Canon 4C, or “personally participate in public fund-raising activities” in violation of the Canon? At first blush, it would seem that speaking or receiving an award at an event constitutes prohibited personal participation. But if the drafters of Canon 4C intended to prohibit judges from such featured roles at law-related events, why not just say so as they did for non-law-related events in Canon 5B(2)?<sup>103</sup> Moreover, as a general proposition, when two rules address the same or similar subject matter and one contains a provision that is omitted from the other, the omission is interpreted as intentional and the provision will not be implied where excluded.<sup>104</sup> Employing this construction aid in interpreting Canons 4 and 5

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100. Professor Thode characterized the issue of fund-raising for law-related entities as “[o]ne of the difficult issues faced by the Committee.” He further explained that there was a sufficient difference between law-related and other groups to justify different rules depending on the type of entity involved. THODE, *supra* note 90, at 76.

101. *Id.*

102. CODE OF JUDICIAL CONDUCT Canon 4C (1972).

103. See Jeffrey M. Shaman, *The Illinois Code of Judicial Conduct and the Appearance of Impropriety*, 22 LOY. U. CHI. L.J. 581, 593 (1991) (noting that Canon 4 of the 1972 Code, unlike Canon 5 of the Code, contained no express prohibition against a judge speaking or being a guest of honor at a law-related fund-raising event).

104. *Gen. Elec. Co. v. S. Constr. Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967) (“Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed.”); *Commonwealth v. Berryman*, 649 A.2d 961, 965 (Pa. Super. Ct. 1994) (“Where a legislature includes specific language in one section of a statute and excludes it from another, that language should not be implied where excluded.”); *Drum v. Superior Court*, 139 Cal. App. 4th 845,

arguably leads to the conclusion that the rule against speaking or being honored at a non-law-related fund-raiser does not apply to events sponsored by bar associations and other law groups.

Another ambiguity arose from the fact that, while Canon 5 permitted a judge to be listed on the stationery of a non-law-related organization even if it was used for solicitation purposes,<sup>105</sup> Canon 4 was silent on the issue. Again, there is no explanation for why judges were not told in Canon 4 whether their names could appear on the letterhead of law-related organizations.<sup>105</sup>

Canon 4C of the 1972 Code clouded the permissible scope of judicial fund-raising in yet another way. Rather than simply stating that a judge is prohibited from personally participating in fund-raising activities, the Canon prohibited a judge from personal participation in “*public* fund-raising activities.”<sup>106</sup> Adding the word “public” to modify “fund-raising activities” implied that private solicitations were permitted. In fact, some advisory committees relied on the “public” qualifier to approve a judge’s private, but direct, request for funds.<sup>107</sup> Notwithstanding the unfortunate use of the word “public,” the drafters of Canon 4 never intended to remove the bar against a judge directly soliciting funds regardless of the public or private nature of the act.<sup>108</sup>

In sum, Justice Traynor’s committee fathered the concept that a judge should be given a wider birth when engaging in activities, including fund-raising activities, sponsored by bar associations and other law-related entities. The Committee was wholly unsuccessful, however, in implementing the concept. Canon 4 of the 1972 Code simply did not advise judges what

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851 (2006) (“[W]hen a statute contains a particular provision, the omission of that provision from similar statutes on the same or a related subject reveals a different intent.”).

105. CODE OF JUDICIAL CONDUCT Canon 5B(2) (1972). Professor Thode states in his commentary to Canon 5B(2) that the drafting committee “decided that, as a matter of fairness and honesty, potential donors are entitled to be told the names of officers and directors of the organization to which they are contributing.” THODE, *supra* note 90, at 80. Although this observation was made in the context of non-law-related charitable groups, the same rationale is applicable to organizations devoted to the law, the legal system, and the administration of justice.

106. CODE OF JUDICIAL CONDUCT Canon 4C (1972) (emphasis added).

107. *See, e.g.*, Ariz. Judicial Ethics Advisory Comm., Op. 91-02 (1991), [http://www.supreme.state.az.us/ethics\\_opinions/91-02.pdf](http://www.supreme.state.az.us/ethics_opinions/91-02.pdf) (permitting the judge, in capacity as bar association president, to sign a letter urging attorneys to join the bar association and purchase tickets to events because “[t]he sole limit on fund raising is that the judge may not participate in public fund raising activities[ ] . . . [and t]he correspondence with lawyers will be private”); Tex. Comm. on Judicial Ethics, Op. 58 (1982), <http://www.courts.state.tx.us/-judethics/51-60.htm> (permitting judge to solicit foundations on behalf of the Texas Center for the Judiciary because prohibited “‘public fund-raising activities’ are those activities aimed at the general public or a large segment thereof”).

108. *See* THODE, *supra* note 90, at 77 (“[The Committee] was not willing to authorize judges personally to solicit funds for any organization.”).

they could do for law-related organizations, which the judges were prohibited from doing for other types of charitable enterprises. Although Justice Traynor's distinction between law-related and other charitable groups was abandoned in the 1990 Code, it would be reborn in the 2007 Code.

### C. Model Code of Judicial Conduct (1990): The "Real-World" Code

In a significant shift in philosophy, the 1990 Code eliminated the division between law-related and all other charitable organizations that was created by the 1972 Code.<sup>109</sup> The drafters of the 1990 Code did not believe that the distinction was "accurate or necessary" and therefore created one set of overarching rules applicable to a judge's involvement in any type of extrajudicial activity.<sup>110</sup> To accomplish the consolidation, the provisions of Canons 4, 5, and 6 of the old Code were condensed into Canon 4 of the 1990 Code.<sup>111</sup>

Creating one set of rules to govern both law-related and non-law-related groups did have the salutary effect of rendering moot many of the fund-raising issues persisting under the 1972 Code. Chief among these unanswered questions was how permissible fund-raising activities on behalf of law groups differed from permissible activities on behalf of other entities. Under the new Code it was clear that all organizations were to be treated the same.<sup>112</sup> Thus, when the 1990 Code adopted the rule found in Canon 5, but not in Canon 4 of the 1972 Code, providing that "[a] judge must not be a speaker or guest of honor at an organization's fund-raising event," it was unmistakable that the prohibition applied to all organizations whether or not law-related.<sup>113</sup> Similarly, the commentary to Canon 4 of the 1990 Code, allowing a judge's name to appear on an organization's letterhead, clearly applied to bar and heart associations alike.<sup>114</sup>

The 1990 Code clarified other troublesome rules. First, the 1972 Code's provision authorizing a judge to "assist" law-related organizations in "raising funds" was changed to permit assistance only in "planning fund-raising" activities.<sup>115</sup> Second, the word "public" was removed from Canon

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109. Don J. DeBenedictis, *House Approves Judicial Code*, 76 A.B.A. J., Oct. 1990, at 130 (quoting Judge John P. Corderman, an ABA House Delegate, as describing the 1990 Code as a "real-world code").

110. MILORD, *supra* note 17, at 30.

111. The consolidation did not go uncriticized. See Mark Scott Bagula & Robert C. Gates, *Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617 (1994).

112. Cynthia Gray, *Revising the 1990 American Bar Association Model Code of Judicial Conduct*, 87 JUDICATURE 119, 124 (2003).

113. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990).

114. *Id.*

115. *Id.* Canon 4C(3)(b)(i).

4 so that it was settled that a judge could not personally participate in public or private income-generating activities.<sup>116</sup>

In addition to removing ambiguities created by the old Code, Canon 4C(3)(b) of the 1990 Code included new fund-raising provisions. For the first time an exception was made to the strict anti-solicitation rule. Under the 1990 Code, a judge was permitted to solicit funds and memberships for charitable organizations from other judges over whom the soliciting judge did not exercise supervisory or appellate authority.<sup>117</sup> The revised Code also allowed a judge to solicit non-judges for membership in charitable groups provided (1) the manner of solicitation was not coercive; (2) the membership fee was not “essentially a fund-raising mechanism”; and (3) neither the individuals solicited, nor their affiliates, were likely to appear before the court on which the judge served.<sup>118</sup> Further, the 1990 Code permitted a judge to sign a general membership recruitment letter for a charitable group.<sup>119</sup> Finally, new Canon 4C(3)(b) reaffirmed the caution found in the 1972 Code against the use of the prestige of judicial office in any solicitation.<sup>120</sup>

Unlike previous versions of the Model Code, the 1990 Code attempted to limit the rules restricting fund-raising activities to situations that furthered the primary purpose of the rules—preventing collateral misuse of judicial power and prestige. The 1972 Code did create exceptions to the broad prohibition against fund-raising, but based those exceptions on considerations of expediency and equity wholly unrelated to the rationale sup-

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116. *Id.*; see also MILORD, *supra* note 17, at 36.

117. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i) (1990).

118. *Id.* Canon 4C(3)(b)(iii) & cmt. This provision, permitting judges to solicit memberships, was an implicit rejection of the conclusion of the ABA Committee on Ethics and Professional Responsibility that most membership solicitations are just another method of raising funds. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1211 (1972). The drafting committee of the 1990 Code believed “that there are instances of membership solicitation that involve no fund-raising or that involve incidental fund-raising in amounts so small as to be negligible.” MILORD, *supra* note 17, at 36. Judge Vivi L. Dilweg interpreted the 1990 Code to allow judges to solicit membership in the ABA Judicial Administrative Division because the primary purpose of the Administrative Division “is not to raise funds but to improve all the nation’s courts and the legal system by setting standards and policy and by educating judges and lawyers.” Vivi L. Dilweg, *New Rules to Live By*, 30 JUDGES’ J. 8, 43 (1991).

119. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990).

120. *Id.* Canon 4C(3)(b)(iv) (“A judge as an officer, director, trustee or non-legal advisor, or as a member [of a charitable organization] or otherwise: . . . shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.”). This provision merely served to reinforce the requirement of Canon 2B that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” *Id.* Canon 2B.

porting strict limitations on fund-raising assistance.<sup>121</sup> For instance, the 1972 Code provision, allowing a judge's name to appear on stationery used for soliciting funds, was not supported by any finding that such indirect participation in fund-raising is not coercive or a misuse of judicial prestige. Rather, the exception was justified under the theory that a potential donor has a right to know who is running an organization seeking funds.<sup>122</sup> Similarly, the section of Canon 4C of the 1972 Code, which authorized a judge to recommend law-related projects to funding agencies, was not based upon any determination that it would be unlikely for a grant review committee to feel coerced or expect a return judicial favor. This provision was instead enacted simply because "many organizations seek the advice of judges about funding law-related projects and . . . responses to such requests should not be precluded."<sup>123</sup>

Unlike its predecessor, the 1990 Code did create exceptions to the anti-fund-raising rule, because the policy behind the rule did not support a particular restriction. Thus, the 1990 Code permitted a judge to solicit other judges where the danger that the targeted judge would feel pressured by the soliciting judge's status was trivial or non-existent.<sup>124</sup> Membership recruitment of persons not likely to appear before the soliciting judge was likewise permitted on the basis that such individuals have no reason to please, or fear displeasing, the judge.<sup>125</sup>

The 1990 Code is properly credited with at least beginning the task of critically analyzing the need to prohibit a judge's participation in fund-raising activities. This process was continued by the 2007 Code, resulting in the further lifting of certain prohibitions. Overall, however, the new Code persists in retaining fund-raising restrictions that do not advance the state's interest in preventing the collateral misuse of judicial power and prestige.

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121. See *infra* Part II (discussing the governmental interests used to justify restricting a judge's non-judicial activities).

122. THODE, *supra* note 90, at 80 ("[T]he Committee decided that, as a matter of fairness and honesty, potential donors are entitled to be told the names of the officers and directors of the organization to which they are contributing.").

123. *Id.* at 77.

124. See MILORD, *supra* note 17, at 36 (reporting that the drafters of the 1990 Code believed that permitting judges to solicit other judges created no danger of improper influence).

125. See Fla. Judicial Ethics Advisory Comm., Op. 2007-18 (2007), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2007/2007-18.html>.

D. Model Code of Judicial Conduct (2007): A Code for the 21st Century<sup>126</sup>

Impetus for review of the 1990 Code was supplied by the Report of the ABA Commission on the 21st Century Judiciary issued in July 2003. The report, entitled *Justice in Jeopardy*,<sup>127</sup> suggested that a comprehensive review of the ABA Model Code was needed for three reasons. First, the 1990 Code's provisions governing campaign speech required re-examination in light of *Republican Party of Minnesota v. White*.<sup>128</sup> Second, the proliferation of problem-solving courts and the accompanying transformation of the role of judges from disinterested referees to engaged problem-solvers necessitated some adjustment in the rules governing a judge's in court and out of court conduct.<sup>129</sup> Third, the Commission on the 21st Century Judiciary thought it was essential for the Code to address the "heightened level of interest in and concern over issues of judicial independence and accountability around the country."<sup>130</sup>

The recommendation of the Commission on the 21st Century Judiciary was accepted and the ABA created the Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission).<sup>131</sup> The Joint Commission set out to address not only the three issues raised in *Justice in Jeopardy* but also many other concerns—including the extent to which a judge's involvement with charitable groups should be permitted.<sup>132</sup> Reminiscent of the 1972 Code, one of the goals of the drafters of the 2007 Code was "to expand opportunities for judges to participate in law-related civic or

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126. Siobhan Morrissey, *Revising the Rules: Update of Judicial Conduct Code Will Address the Changing Justice System*, 90 A.B.A. J., Feb. 2004, at 62 (quoting Mark Harrison, Chairman of the Joint Commission, as stating "[w]e'll look at the existing code to see whether it is still serviceable, to determine whether there are changes that can be made in the existing code that would be helpful and address life in the judiciary as it is in the 21st century").

127. ABA, *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY* (2003), <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> [hereinafter *JUSTICE IN JEOPARDY*].

128. 536 U.S. 765 (2002); *JUSTICE IN JEOPARDY*, *supra* note 127, at 57.

129. *JUSTICE IN JEOPARDY*, *supra* note 127, at 58. The fact that the "team approach" of specialty courts, including drug courts, impacted all five Canons of the 1990 Code was recognized at the time that *Justice in Jeopardy* was drafted. See NAT. DRUG CT. INSTITUTE, *ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURT* (2001) (instructing judges how to remain effective drug court team members while adhering to the requirements of the 1990 Code).

130. *JUSTICE IN JEOPARDY*, *supra* note 127, at 58. Here, the Commission was concerned primarily with the politicization of the courts. *Id.* at 13-39.

131. ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, *OVERVIEW OF MODEL CODE OF JUDICIAL CONDUCT AS ADOPTED FEBRUARY 12, 2007*, [http://www.abanet.org/judicialethics/Overview\\_GAK\\_030707.pdf](http://www.abanet.org/judicialethics/Overview_GAK_030707.pdf).

132. Morrissey, *supra* note 126, at 62.

charitable organizations.”<sup>133</sup> Unlike the drafting committee of the 1972 Code, however, the Joint Commission was successful in its endeavor, especially in dramatically enlarging the permissible scope of a judge’s role in fund-raising activities sponsored by law-related groups.

Rule 3.7 of the 2007 Code incorporates many of the non-controversial provisions of the 1990 Code. For one, a judge’s ability to assist in the planning of fund-raising events and to participate in the management and investment of funds was reaffirmed.<sup>134</sup> Likewise, the 2007 Code continues a judge’s ability to seek charitable contributions from judges over whom the soliciting judge does not exercise supervisory or appellate authority.<sup>135</sup> The rule allowing a judge’s name and title to appear on letterhead used for solicitation purposes remains the same.<sup>136</sup> Following the lead of the prior Codes, Rule 3.7 authorizes recommendations to funding agencies in support of projects and programs concerned with the law, the legal system, or the administration of justice.<sup>137</sup>

However, the 2007 Code changes the rules regarding a judge’s ability to recruit members for charitable organizations. As previously discussed, the 1990 Code permitted a judge to solicit non-judges to join law-related and non-law-related groups so long as the solicitation was not coercive, not primarily a fund-raising mechanism, and the person solicited was not likely to appear before the judge.<sup>138</sup> The 2007 Code is much more restrictive in that it only authorizes a judge to solicit membership in law-related organizations.<sup>139</sup> The new Code disallows membership recruitment for all other groups regardless of the amount of the dues and regardless of the remoteness or impossibility of the potential member appearing before the judge.<sup>140</sup> The Joint Commission based this change on the unproven premise that judicial pursuit of members for law-related groups is perceived “as more natural or more appropriate than soliciting membership in a fine arts society or the American Red Cross.”<sup>141</sup>

In addition, the 2007 Code creates two new exceptions to the anti-solicitation rule. Rule 3.7(A)(2) permits a judge to solicit “[m]ember[s] of

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133. Mark Hansen, *Unintended Consequences: Speakers Say Proposed Rule Might Limit Involvement by Judges in Legal Groups*, 92 A.B.A. J., Apr. 2006, at 63.

134. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(1) (2007).

135. *Id.* R. 3.7(A)(2).

136. *Id.* R. 3.7 cmt. 4.

137. *Id.* R. 3.7(A)(5).

138. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990); *see supra* notes 117-118 and accompanying text.

139. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(3) (2007).

140. *Id.*

141. *Id.* Reporter’s Explanation of Changes; *see infra* notes 284-87 and accompanying text (criticizing the “more natural or appropriate” standard in the context of judicial participation in fund-raising activities).

the judge's family" for charitable purposes.<sup>142</sup> Family members include a "spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship."<sup>143</sup>

The second new exception is much more significant. Breaking with what arguably had been the ABA's position for 83 years,<sup>144</sup> a judge is now given wide latitude to personally and actively participate in fund-raising activities concerning the law, the legal system, or the administration of justice.<sup>145</sup> Speaking or receiving an award at a money-making event sponsored by a law-related organization, which was specifically and categorically forbidden under the 1990 Code as a misuse of the prestige of office,<sup>146</sup> is now expressly permitted by Rule 3.7(A)(4).<sup>147</sup> As a necessary corollary of this ability to play a major public role in law-related fund-raisers, Rule 3.7(A) also permits a judge to be featured on an event program and allows the judge's name and title to be used in publicizing an event.<sup>148</sup>

The 2007 Code is certainly superior in many respects to previous ABA efforts. The length, breath, and transparency of the drafting process substantially benefited the final product. The new format of the Code, by utilizing black letter rules accompanied by expanded explanatory and hortatory comments, will assist judges in distinguishing mandatory from suggested judicial conduct. The vagueness of Code provisions governing fund-raising was reduced. Remaining, however, are many unanswered questions regarding the meaning and application of fund-raising provisions to everyday situations that judges face in their charitable undertakings. The next section will address two of these questions.

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142. *Id.* R. 3.7(A)(2).

143. *Id.* Terminology (2007).

144. The 1924 Canons strictly prohibited active, featured roles at fund-raising events. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1105 (1969). The commentary to Canon 4C(3)(b) of the 1990 Code specifically disallowed judicial participation as a speaker or honoree at any fund-raising event. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990). As previously noted, there is some question as to whether the 1972 Code prohibited a judge from serving as a speaker or guest of honor at a law-related fund-raiser. *See supra* notes 101-102 and accompanying text. But the most reasonable interpretation of Canon 4C of the 1972 Code is that such prominent roles were included in the prohibition against a judge's "personal participation in public fund-raising events." If so, the 2007 Code broke with eighty-three years of tradition by enacting Rule 3.7(A)(4).

145. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

146. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990) ("A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible . . .").

147. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

148. *Id.*

## IV. DEFINING ESSENTIAL TERMS

The construction placed on two undefined terms found in the 2007 Code will prove central to the ultimate interpretation and implementation of the rules restricting the fund-raising activities of judges. First, which organizations and entities should be graced with the favored status of “concerned with the law, the legal system, or the administration of justice”?<sup>149</sup> This is an important classification because judges are permitted a much greater level of participation in fund-raising activities sponsored by these law-related groups. Second, which events and activities are considered to have a “fund-raising purpose”?<sup>150</sup> If an event can avoid this label, the Code’s fund-raising limitations do not apply.

## A. Identifying Organizations and Entities “Concerned with the Law, the Legal System, or the Administration of Justice”

Under the 2007 Code, a judge’s ability to participate in a fund-raising activity depends to a large extent on whether the organization or entity sponsoring the event “is concerned with the law, the legal system, or the administration of justice.”<sup>151</sup> For organizations and entities falling within this category, a judge may solicit memberships,<sup>152</sup> be a speaker or award recipient at a fund-raising event,<sup>153</sup> permit his or her name and title to be

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149. *Id.* R. 3.7(A)(5).

150. *Id.* R. 3.7(A)(4).

151. *Id.* R. 3.7(A)(5) (2007).

152. *Id.* R. 3.7(A)(3).

153. *Id.* R. 3.7(A)(4). There appears to be a misstatement in subparagraph (4) of Rule 3.7(A). The subparagraph states that a judge may accept a featured role in a fund-raising event “only if the *event* concerns the law, the legal system, or the administration of justice.” *Id.* (emphasis added). There is no explicit requirement that the organization sponsoring the event be law-related. As a result, under a literal reading of Rule 3.7(A)(4) a judge, for example, could play a featured role in a high school’s fund-raising reenactment of a famous trial. However, the Reporter’s Explanation of Changes to Rule 3.7 clearly states that a judge is permitted to be a featured speaker or participant in an event that has a fund-raising purpose, “*but only if the organization or entity [sponsoring the event] is a law-related one.*” *Id.* R. 3.7(A)(4) Reporters Explanation of Changes, app. B, at 124. Under the Reporter’s Explanation the nature of the organization, not the nature of the event controls. The Reporter is correct. The last phrase of subparagraph (4) of Rule 3.7 should read “but if the event serves a fund-raising purpose, the judge may participate only if [the organization or entity sponsoring] the event [is] concern[ed with] the law, the legal system, or the administration of justice.” *Id.* R. 3.7(A)(4); see ALFINI ET AL., *supra* note 5, § 9.04D, at 9-23 (“Rule 3.7(A)(4) of the 2007 Code makes an explicit exception to the prohibition against judicial participation in fund-raising events, allowing judges to be featured as a speaker or honoree, as long as the organization or entity sponsoring the event ‘concerns the law, the legal system, or the administration of justice.’”). *But see In re Amendments to the Code of Judicial Conduct—Limitations on Judges’ Participation in Fundraising Activities*, 983 So. 2d 550, 552 (Fla. 2008) (explaining that amended Canon 4D(2) of the Florida Code allows a judge to be fea-

used in connection with a fund-raising function,<sup>154</sup> and make recommendations to public and private fund-granting agencies.<sup>155</sup> A judge is prohibited from engaging in these same activities on behalf of any non-law-related charitable, educational, religious, fraternal, or civic group.<sup>156</sup> Obviously, if the phrase “concerned with the law, the legal system, or the administration of justice” is defined broadly, the number and nature of organizations benefiting from the judge’s ability to assist in fund-raising will expand.<sup>157</sup> If defined narrowly, fewer organizations will gain judicial assistance in generating revenue.

There are several indications that the phrase “concerned with the law, the legal system, or the administration of justice”<sup>158</sup> is intended to have an inclusive and flexible interpretation. First, the phrase itself encompasses a lot of ground. “Law,” as defined in the Terminology section of the 2007 Code, is not used in the limited sense of an act of a legislative body, but denotes all “court rules as well as statutes, constitutional provisions, and decisional law.”<sup>159</sup> “Legal system” and “administration of justice” are not defined by the Code, but their common and everyday meaning is certainly comprehensive. A legal system consists of an operating set of institutions and procedures whereby laws are enacted and administered and disputes adjudicated.<sup>160</sup> The administration of justice undertakes the task of developing and managing the means and methods by which the rights, duties, and obligations established by a legal system are interpreted and adjudicated.<sup>161</sup>

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tured at a fund-raising event only if the event is sponsored by a law-related organization, the event itself is related to the law, and the monetary proceeds will be used for a law-related purpose).

154. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

155. *Id.* R. 3.7(A)(5).

156. *Id.* R. 3.7(A)(3)-(5).

157. *Id.* R. 3.7(A)(5).

158. *Id.*

159. *Id.* Terminology, at 6 (2007). The Code’s definition is consistent with the concept that laws are the “rules of action or conduct duly prescribed by controlling authority, and having binding legal force.” *U.S. Fidelity and Guaranty Co. v. Guenther*, 281 U.S. 34, 37 (1930).

160. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 681-82 (2000) (observing that a legal system “refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction”); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (defining a legal system as including the “erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.”).

161. *Keller v. State Bar*, 226 Cal. Rptr. 448, 466 n.13 (Ct. App. 1986). *Black’s Law Dictionary* provides an all-encompassing definition of the term, “administration of justice.” BLACK’S LAW DICTIONARY 47 (8th ed. 2004) (“The maintenance of right within a political community by means of the physical force of the state; the state’s application of the sanction of force to the rule of right.”).

Even defined narrowly, the administration of justice includes the “organization, personnel and operation of the courts, the bar and their allied agencies and institutions.”<sup>162</sup>

Second, an inclusive, flexible definition of “the law, the legal system, or the administration of justice” recognizes, to borrow from Justice Cardozo, that the canons of judicial conduct, “like the traveler, must be ready for the morrow.”<sup>163</sup> Indeed, one of the hallmarks of the American legal system is its elasticity, capacity for growth, and “adaptability to changing circumstances.”<sup>164</sup> Recognizing the benefits of adaptability, Professor Thode explained that as used in the 1972 Code, the operative phrase was intended to include “a broad range of organizations and projects . . . corresponding to the range of concerns that present themselves in the law under modern conditions.”<sup>165</sup>

Consistent with the observation of Professor Thode, numerous organizations, agencies, and committees have been found to be related to the law, the legal system, or the administration of justice. These entities include general membership bar associations,<sup>166</sup> specialty bar associations,<sup>167</sup> bar

162. *Keller v. State Bar*, 767 P.2d 1020, 1046 n.12 (Cal. 1989) (Kaufman, J., dissenting in part) (quoting Glenn R. Winters, *Bar Association Organization and Activities* 171 (Am. Judicature Soc’y 1954)); Ala. Judicial Inquiry Comm’n, Op. 95-570 (1995), <http://www.alalinc.net/jic/opinions/ao95-570.htm> (“[T]he administration of justice’ includes the functions of the legal system by which and through which cases may be brought before a court, tried, determined, and disposed of and judgments enforced . . . .”) (citation omitted); *Rosner v. United States*, 10 F.2d 675, 676 (2d Cir. 1926) (“[T]he administration of justice ‘includes everything connected with the determination of rights of persons and property, every agency provided by law for the accomplishment of that purpose, and every step in the proceeding . . . according to the established law of the land.’”) (emphasis omitted)).

163. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 20 (Yale Univ. Press 1924) (“The law, like the traveler, must be ready for the morrow. It must have the principle of growth.”).

164. *O’Callaghan v. Waller & Beckwith Realty Co.*, 155 N.E.2d 545, 551 (Ill. 1959) (“A . . . reason for the success of our legal system is its adaptability to changing circumstances.”) (omission in original) (quoting C.J. Earl Warren, *The Law of the Future*, *FORTUNE MAG.*, Nov. 1955, at 107).

165. THODE, *supra* note 90, at 77.

166. *See, e.g.*, Ariz. Judicial Ethics Advisory Comm., Op. 91-02 (1991), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/91-02.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/91-02.pdf) (“A bar association is clearly an organization devoted to the improvement of the law and the legal system . . . .”); Fla. Judicial Ethics Advisory Comm., Op. 98-31 (1998), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet8/98-31.html> (reaffirming that the ABA and Florida Bar Association are devoted to the improvement of the law, the legal system, and the administration of justice); MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(3) (2007) Reporter’s Explanation of Changes (describing bar associations as law-related organizations).

167. Specialty bar associations “bring[] together lawyers who practice in a particular area of [the] law; who share a personal attribute; who have an interest in specific interdisciplinary subjects; who share a culture or ethnic origin or gender[;] or who wish to promote an interest in ‘public’ issues.” Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in*

association charitable foundations,<sup>168</sup> judges' organizations,<sup>169</sup> court historical societies,<sup>170</sup> law schools,<sup>171</sup> moot court societies,<sup>172</sup> organizations that train guardians ad litem,<sup>173</sup> domestic violence task forces,<sup>174</sup> child advocacy

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*the Socialization Process*, 33 GONZ. L. REV. 501, 507-08 (1997-1998) (citations omitted). Various specialty bar associations have been found to be devoted to the law, the legal system, or the administration of justice. See, e.g., *In re Wiley*, 671 A.2d 308, 309 (R.I. 1996) (Rhode Island Trial Lawyers Association); Ark. Judicial Ethics Advisory Comm., Op. 91-05 (1991), [http://www.arkansas.gov/jec/opinions/91\\_05.html](http://www.arkansas.gov/jec/opinions/91_05.html) (Arkansas Association of Women Lawyers); Mass. Comm. on Judicial Ethics, Op. 2002-1 (2002), <http://www.mass.gov/courts/sjc/cje/2002-1h.html> (American Academy of Matrimonial Lawyers); N.Y. Advisory Comm. on Judicial Ethics, Op. 98-38 (1998), [http://www.nycourts.gov/ip/judicial-ethics/opinions/98-38\\_htm](http://www.nycourts.gov/ip/judicial-ethics/opinions/98-38_htm) (Lesbian and Gay Law Association); N.Y. Advisory Comm. on Judicial Ethics, Op. 98-50 (1998), [http://www.nycourts.gov/ip/judicialethics/opinions/98-50\\_htm](http://www.nycourts.gov/ip/judicialethics/opinions/98-50_htm) (Judges and Lawyers Breast Cancer Alert); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 21-2003 (2003), <http://www.judicial.state.sc.us/advisoryOpinions/-displayadvopin.cfm?advOpinNo=21-2003> (Association of Trial Lawyers of America). The Association of Trial Lawyers of America has been renamed the "American Association for Justice." See American Association for Justice, <http://www.justice.org>. (last visited Jan. 7, 2009) (noting the organization change in the website banner).

168. Ill. Judicial Ethics Comm., Op. 95-22 (1995), <http://www.ija.org/ethicsop/opinions/95-22.htm> (Fellows of the Illinois State Bar Association); Mass. Comm. on Judicial Ethics, Op. 2004-8 (2004) (Massachusetts Bar Foundation); Wash. Ethics Advisory Comm., Op. 02-01 (2002), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=0201](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0201) (county bar foundation).

169. Del. Judicial Ethics Advisory Comm., Op. JEAC 2007-4 (2007), <http://courts.state.de.us/jec/opns/JEAC2007-4.pdf> (National Council of Juvenile and Family Court Judges); Ill. Judicial Ethics Comm., Op. 94-9 (1994); Tex. Comm. on Judicial Ethics, Op. 58 (1982), <http://www.courts.state.tx.us/judethics/51-60.htm> (Texas Center for the Judiciary, Inc.); Tex. Comm. on Judicial Ethics, Op.10 (1976), <http://www.courts.state.tx.us/judethics/1-10.htm> (National Conference of Metropolitan Judges).

170. Mass. Comm. on Judicial Ethics, Op. 99-6 (1999), <http://www.mass.gov/courts/sjc/cje/99-6h.html> (Supreme Judicial Court Historical Society); N.Y. Advisory Comm. on Judicial Ethics, Op. 06-117 (2006), <http://www.nycourts.gov/ip/judicialethics/opinions/06-117.htm> (Historical Society of the Courts of the State of New York).

171. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A) cmt. 1 at 125 (2007) (stating that public and private law schools "are obviously law-related").

172. *Id.* R. 3.7(A)(3) Reporters Explanation of Changes (approving the solicitation of members for a "law-related organization . . . such as a . . . moot court society").

173. Ill. Judicial Ethics Comm., Op. 95-11 (1995), <http://www.ija.org/ethicsop/opinions/95-11.htm> ("Training persons to serve as GAL's will improve the administration of justice."); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 2-1989 (1989), <http://www.judicial.state.sc.us/advisoryOpinions/-displayadvopin.cfm?advOpinNo=02-1989> (classifying a guardian ad litem advisory board as an organization devoted to the improvement of the law); *accord* Tex. Comm. on Judicial Ethics, Op. 252 (1999), <http://www.courts.state.tx.us/judethics/251-260.htm>; *accord* Wash. Ethics Advisory Comm., Op. 94-06 (1994), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9406](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9406).

174. Ark. Judicial Ethics Advisory Comm., Op. 2003-02 (2003), [http://www.arkansas.gov/jec/opinions/advisory\\_2003\\_02.pdf](http://www.arkansas.gov/jec/opinions/advisory_2003_02.pdf) (finding a state commission on child abuse, rape, and domestic violence to be concerned with the administration of justice and the legal system); Ga. Judicial Qualifications Comm'n, Op. 201 (1995),

centers,<sup>175</sup> juvenile delinquency prevention agencies,<sup>176</sup> courthouse renovation and restoration committees,<sup>177</sup> Court Appointed Special Advocates programs,<sup>178</sup> associations of drug court professionals,<sup>179</sup> substance abuse prevention organizations,<sup>180</sup> committees to “establish restorative justice initiatives,”<sup>181</sup> supervised visitation centers for children of divorced parents,<sup>182</sup>

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<http://www.georgiacourts.org/agencies/jqc/Opinions/201.htm> (revised opinion) (approving membership on the Georgia Family Violence Commission).

175. Alaska Comm’n on Judicial Conduct, Op. 2000-01 (2000), <http://www.ajc.state.ak.us/conduct.htm#Advisory%20Opinions> (“[A] child advocacy center can be construed as being related to the administration of justice, as can an increasingly large number of various social service organizations.”).

176. N.Y. Comm. on Judicial Ethics, Op. 99-21 (1999), [http://www.nycourts.gov/ip/judicialethics/opinions/99-21\\_.htm](http://www.nycourts.gov/ip/judicialethics/opinions/99-21_.htm) (“Clearly, the prevention of juvenile delinquency is an issue regarding the improvement of the law, the legal system and the administration of justice . . . .”); Fla. Comm. on Standards of Conduct Governing Judges, Op. 96-9 (1996), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet6/9609.html> (finding that an organization dedicated to reducing juvenile recidivism is law-related).

177. Tex. Comm. on Judicial Ethics, Op. 131 (1989), <http://www.courts.state.tx.us/judethics/131-140.htm> (“As proper facilities for courts are essential to the legal system and the proper administration of justice . . . this courthouse dome project is within the provisions of Canon 4C . . . .”); W.Va. Judicial Investigation Comm’n, Op. 2/11/99 (1999) (finding committee formed to study courthouse renovation was law-related); Wash. Ethics Advisory Comm., Op. 93-32 (1993), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9332](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9332) (finding that a committee supporting a bond issue for the construction of a courthouse was related to the administration of justice).

178. Kan. Judicial Ethics Advisory Panel, Op. JE-52 (1994), <http://www.kscourts.org/pdf/ClerkCt/JE52.pdf>.

179. Ill. Judicial Ethics Comm., Op. 01-10 (2001), <http://www.ija.org/ethicsop/opinions/01-10.htm>.

180. Fla. Comm. on Standards of Conduct Governing Judges, Op. 93-23 (1993), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet3/9323.html> (DUI countermeasures school); Ill. Judicial Ethics Comm., Op. 99-4 (1999), <http://www.ija.org/ethicsop/opinions/99-04.htm> (Illinois Drug Education Alliance); Mo. Comm’n on Retirement, Removal and Discipline, Op. 166 (1996) (committee on drugs and violence in schools); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 23-2006 (2006), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=23-2006> (“[DUI advisory] task force will contribute to the improvement of the law, the legal system and the administration of justice with regard to criminal DUI cases.”); Wash. Ethics Advisory Comm., Op. 92-14 (1992), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9214](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9214) (finding that a substance abuse treatment center relates to the administration of justice).

181. Wis. Judicial Conduct Advisory Comm., Op. 01-1 (2002), <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=874>.

182. See Fla. Comm. on Standards of Conduct Governing Judges, Op. 97-11 (1997), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet7/97-11.html> (“Although it is impossible to say with any certainty that the [visitation] program is an organization devoted to the improvement of the law, the legal system[,] or the administration of justice, prior opinions of this Committee suggest that the visitation program would probably be viewed in this light.”).

state commissions to evaluate child support guidelines,<sup>183</sup> sex offender management study groups,<sup>184</sup> offender registration working groups,<sup>185</sup> victim impact panels,<sup>186</sup> victims' rights task forces,<sup>187</sup> law enforcement block grant advisory boards,<sup>188</sup> taxation and budget reform commissions,<sup>189</sup> alternative dispute resolution centers,<sup>190</sup> organizations advocating judicial selection reform,<sup>191</sup> teen and youth courts,<sup>192</sup> legal aid societies,<sup>193</sup> domestic violence

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183. Colo. Judicial Ethics Advisory Bd., Op. 2007-11 (2007), [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Judicial\\_Ethics\\_Advisory\\_Board/opinion2007-11\\_1.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Judicial_Ethics_Advisory_Board/opinion2007-11_1.pdf) (finding a direct nexus between the work of the state Child Support Commission and the improvement of the law, the legal system, and the administration of justice).

184. W.Va. Judicial Investigation Comm'n, Op. 2/6/04 (2004) (committee designed to establish comprehensive approaches to sex offender management); N.Y. Advisory Comm. on Judicial Ethics, Op. 06-72 (2006), <http://www.nycourts.gov/ip/judicialethics/opinions/06-72.htm> (committee to assess court practices in managing sex offenders).

185. Kan. Ethics Advisory Panel, Op. JE 157 (2007), <http://www.kscourts.org/pdf/ClerkCt/JE157.pdf>.

186. Ill. Judicial Ethics Comm., Op. 94-20 (1994), <http://www.ija.org/ethicsopinions/94-20.htm> (finding a Victim Impact Panel is devoted to the improvement of the law, the legal system, and the administration of justice); *accord* Wash. Ethics Advisory Comm., Op. 02-05 (2002), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=0205](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0205).

187. Ala. Judicial Inquiry Comm'n, Op. 87-294 (1987), <http://www.alalinc.net/jic/opinions/ao87-294.htm> (finding that a Task Force on Victims' Rights "falls well within those activities" designed to improve the legal system); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 22-1995 (1995), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=22-1995> (permitting judicial participation on a committee formed to revise a victims' bill of rights).

188. Ala. Judicial Inquiry Comm'n, Op. 00-765 (2000), <http://www.alalinc.net/jic/opinions/ao00-765.htm>.

189. Fla. Judicial Ethics Advisory Comm., Op. 2007-03 (2007), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2007/2007-03.html>.

190. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 5-1993 (1993), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=05-1993> (finding that the "South Carolina Council for Mediation and Dispute Resolution is an organization designed to facilitate the resolution of lawsuits and the administration of justice within the legal system"); Wash. Ethics Advisory Comm., Op. 95-11 (1995), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9511](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9511) (finding a regional dispute resolution center to be devoted to the improvement of the administration of justice).

191. Kan. Judicial Ethics Advisory Panel, Op. JE 5 (1984), <http://www.kscourts.org/pdf/ClerkCt/JE5.pdf> (approving service on a citizen's committee supporting a ballot initiative relating to judicial selection procedures because "[t]he method of judicial selection directly impacts upon the administration of justice"); *accord* Kan. Judicial Ethics Advisory Panel, Op. JE 132 (2005), <http://www.kscourts.org/pdf/ClerkCt/JE132.pdf>.

192. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 11-2005 (2005), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=11-2005>; N.Y. Advisory Comm. on Judicial Ethics, Op. 93-102 (1993), [http://www.nycourts.gov/ip/judicialethics/opinions/93-102\\_.pdf](http://www.nycourts.gov/ip/judicialethics/opinions/93-102_.pdf).

fatality review committees,<sup>194</sup> organizations urging adoption of a constitutional amendment creating an intermediate appellate court,<sup>195</sup> law revision commissions,<sup>196</sup> independent legal institutions such as the American Law Institute,<sup>197</sup> the National Conference of Commissioners on Uniform State Laws,<sup>198</sup> the National Judicial College,<sup>199</sup> the State Justice Institute,<sup>200</sup> and the National Center for State Courts.<sup>201</sup>

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193. Utah Judicial Ethics Advisory Comm., Informal Op. 00-1 (2000), [http://www.utcourts.gov/resources/ethadv/ethics\\_opinions/2000/00-1.htm](http://www.utcourts.gov/resources/ethadv/ethics_opinions/2000/00-1.htm) (“[S]ervice to a civic organization such as Utah Legal Services helps to improve the administration of justice in the legal system.”); Wash. Ethics Advisory Comm., Op. 92-01 (1992), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9201](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9201) (“Because the purpose of the legal aid fund is to raise private funds in order to provide poor people with access to the justice system, therefore, is consistent with improving the legal system and the administration of justice, a judicial officer may serve on the legal aid fund board.”); Nev. Standing Comm. on Judicial Ethics & Election Practices, Op. JE 00-004 (2000), <http://www.judicial.state.nv.us/je000043new.htm> (finding an organization providing pro bono legal services is law-related); *contra* Fla. Comm. on Standards of Conduct Governing Judges, Op. 97-6 (1997), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet7/97-06.html> (“[A] majority of the Committee would find that legal aid is not an organization devoted to the improvement of the law, the legal system, or the administration of justice.”).

194. Nev. Standing Comm. on Judicial Ethics & Election Practices, Op. JE 00-005 (2000), <http://www.judicial.state.nv.us/je000053new.htm> (“Participation . . . in the Domestic Fatality Review Program appears to be consistent with . . . [permitting] judges to participate in governmental and non-governmental organizations devoted to the improvement of the law, the legal system, or the administration of justice.”); N. M. Advisory Comm. on the Code of Judicial Conduct, Op. 06-02 (2006), [http://jec.unm.edu/resources/advisoryopinions/-No06\\_02.pdf](http://jec.unm.edu/resources/advisoryopinions/-No06_02.pdf) (classifying the state’s Intimate Partner Violence Death Review Team as law-related).

195. Neb. Judicial Ethics Comm., Op. 90-3 (1990), <http://supremecourt.ne.gov/commissions/jecintro.shtml?sub16#Opinions>.

196. State Bar of Mich. Ethics, Judicial & Prof’l Comm., Informal Op. JI-067 (1993), [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ji-067.htm?CFID=960507&CFTOKEN=58765896](http://www.michbar.org/opinions/ethics/numbered_opinions/ji-067.htm?CFID=960507&CFTOKEN=58765896) (describing a law revision commission charged with examining “the common law and statutes of this state and court judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms,” as related to the law, the legal system, or the administration of justice); *cf.* MODEL CODE OF JUDICIAL CONDUCT Canon 4B cmt. (1990) (encouraging judges to participate in the “revision of substantive and procedural law”).

197. U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93 (1997, revised 1998), <http://www.uscourts.gov/guide/vol2/93.html>.

198. *Id.*

199. Va. Judicial Ethics Advisory Comm., Op. 99-3 (1999), <http://www.courts.state.va.us/jirc/opinions/1999/99-3.html>.

200. Ga. Judicial Qualifications Comm’n, Op. 176 (1992), <http://www.georgiacourts.org/agencies/jqc/Pages/opinions.html>.

201. Tex. Comm. on Judicial Ethics, Op. 196 (1996), <http://www.courts.state.tx.us/judethics/191-200.htm> (permitting membership on the board of the National Center for State Courts because the Center “serv[es] the needs of justice”).

Some judicial ethics advisory committees have not embraced an inclusive, flexible view of the phrase “the law, the legal system, or the administration of justice.”<sup>202</sup> These committees give an unwarranted, narrow construction to the phrase as an artificial means of limiting the type of organization in which a judge may participate. For example, the U.S. Judicial Conference Committee on Codes of Conduct determined that, to qualify as a law-related group, the purpose of the group must be “to benefit the law and legal system itself rather than to benefit any particular cause or group.”<sup>203</sup> While the Committee admits that whether a group or activity benefits a specific constituency or the legal system as a whole “will sometimes be a close question,”<sup>204</sup> it is more accurate to characterize the question as impossible and irrelevant. It is impossible in the sense that virtually every law-related activity or organization benefits a particular group. More importantly, the question is irrelevant. Whether an organization promotes a partisan or special interest has nothing to do with classifying the group as law-related or non-law-related. Although a bar association consisting of only plaintiff or defense attorneys seeks to benefit a particular cause or group, it is undeniable that the bar association is concerned with the law, the legal system, or administration of justice.<sup>205</sup> Similarly, an organization working to legalize marijuana is concerned with the law, even though its activities are clearly partisan and conducted to benefit a particular segment of the population.

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202. See, e.g., U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93 (1997, revised 1998), <http://www.uscourts.gov/guide/vol2/93.html> (“We traditionally have defined activities to improve the law, the legal system and the administration of justice narrowly.”); Mass Comm. on Judicial Ethics, Op. 98-13 (1998), <http://www.mass.gov/courts/sjc/cje/9813h.html> (“To come within the . . . [law, the legal system, or administration of justice] there must be a direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities—in other words, how the courts go about their business.”); accord Colo. Judicial Ethics Advisory Bd., Op. 2005-04 (2005), [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Judicial\\_Ethics\\_Advisory\\_Board/opinion2005-04\\_1.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Judicial_Ethics_Advisory_Board/opinion2005-04_1.pdf). It should be noted that most advisory committees defining law-related organizations narrowly do so in the context of the propriety of a judge serving on a governmental commission. It may be that part of the motivation for imposing a narrow construction in these situations is the controversies that have arisen from extrajudicial service on commissions appointed by the executive branch. See generally Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122-42 (1994).

203. U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93 (1997, revised 1998), <http://www.uscourts.gov/guide/vol2/93.html>.

204. *Id.*

205. See Fla. Comm. on Standards of Judicial Conduct Governing Judges, Op. 95-21 (1995), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet5/95-21.html> (finding a “plaintiffs” bar association devoted to the improvement of the law but disallowing judicial membership because of the association’s partisan nature); accord S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 21-2003 (2003), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=21-2003>.

Advisory committees which unduly restrict the law-related classification do so in order to prevent judges from joining groups that are partisan, discriminatory, or otherwise adversely impact upon the judge's perceived fairness. But a strained definition of "the law, the legal system, or the administration of justice"<sup>206</sup> is not necessary to accomplish that goal. Rule 3.1(C) of the 2007 Code specifically prohibits participation in any extrajudicial activity that appears to undermine the judge's independence, integrity, or impartiality,<sup>207</sup> and Rule 3.6 disallows affiliation with any organization that practices invidious discrimination.<sup>208</sup> Whether an entity is concerned with the law, the legal system, or the administration of justice is a separate question from whether a judge is prohibited from serving an organization because its activities or goals will adversely affect the public's view of the judge's impartiality or independence.<sup>209</sup>

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206. U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93, *supra* note 203.

207. MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C) (2007). In deciding whether an affiliation with a particular organization detracts from judicial independence, integrity, or impartiality, the 2007 Code directs a judge to consider (1) the membership make-up of the organization; (2) the mission, goals, and purpose of the group; and (3) the precise nature of the activity in which the judge will engage on behalf of the organization. *Id.* R.3.7 cmt. 2. These factors are not new. For example, in *State v. Knowlton*, 854 P.2d 259 (Idaho 1993), disqualification of a judge was sought in a case involving allegations of child abuse because the judge was a member of the Governor's Task Force for Children at Risk. The court held that the judge's impartiality was not compromised by service on the Task Force because the mission of the Task Force was not advocacy oriented and its membership was diverse including prosecutors, public defenders, parents, a pediatrician, and others. *Knowlton*, 854 P.2d at 263. *See also* Ill. Judicial Ethics Comm., Op. 98-1 (1998), <http://www.ija.org/ethicsop/opinions/98-01.htm> (finding that judicial impartiality was not adversely impacted by a judge's service on a Family Violence Coordinating Council where the Council did not advocate for victims and its membership was "broad-based"); N.Y. Advisory Comm. on Judicial Ethics, Op. 06-108 (2006), <http://www.nycourts.gov/ip/judiciaethics/opinions/06-108.htm> (finding judge's impartiality was eroded by service on a domestic violence task force with the goal to "increase victim safety and offender accountability," especially since no defense bar representative participated). If a judge is precluded from serving as member of a group because of its partisan or advocacy nature, a judge, generally speaking, is also prohibited from assisting the group in raising funds. *See* Me. Judicial Ethics Advisory Comm., Op. 02-04, *reprinted in* 17 ME. B.J. 252, 256 (2002) ("When a judge speaks at an event intended to [be a fund-raiser] 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.").

208. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2007) (prohibiting judges from holding membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation).

209. *See* Steven Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 JUDICATURE 199 (1986) (treating separately the question of whether victim assistance programs are law-related and the issue of whether impartiality concerns preclude a judge's service as an officer of such groups); ALFINI ET AL., *supra* note 5, § 9.03A, at 9-9 (suggesting that participation in an organization that "arguably fall[s] within the broad scope of 'the law, the legal system, or the administration of justice'" should only be barred if participation would violate another Code limitation such as interfering with judicial duties or adversely affecting impartiality).

Notwithstanding the few states that unjustifiably limit the organizations that qualify as law-related,<sup>210</sup> it seems reasonably certain that the number and nature of groups falling within that classification will continue to grow. As courts are increasingly expected to be part of community problem-solving teams, nonprofit entities designed to address drug, unemployment, gang, and other social problems can claim a “law-related” status. A judge presiding over a therapeutic court, for example, is expected to build continuing relationships with service providers, governmental agencies, civic groups, and community organizations and “to encourage them to become involved participants in the justice system.”<sup>211</sup> But the movement to engage judges in resolving social, economic, and political issues is much broader than the creation and expansion of therapeutic courts. The breadth of the movement is better demonstrated by the World Justice Forum held in July 2008, which joined judges and lawyers with “leaders in such disciplines as architecture, arts, business, education, engineering, environment, faith, human rights, labor, law, law enforcement, media, military, public health and public safety” in order to “incubate new, multidisciplinary rule of law projects.”<sup>212</sup> As the judicial role expands, so will the number of groups that can rightfully claim that they are concerned with the law, the legal system, or the administration of justice.

#### B. When Does an Event Have a “Fund-Raising Purpose?”

The 2007 Code prohibits judges from playing a prominent role in, or lending their name or title to, a non-law-related event that has a “fund-raising purpose.” The practical effect of this rule on the charitable activities of judges will be dictated by the manner in which the term “fund-raising purpose” is defined. Does any incidentally financial benefit derived from an event render it a fund-raiser, or does the term require an event to have a primary goal or objective of producing a profit?

“Fund-raising purpose” is not defined in the 2007 Code nor is it necessarily a self-defining term. Some help identifying the term’s meaning can be obtained from ethics advisory committee opinions construing a similar provision found in the 1972 and 1990 Codes. Both of these Codes prohib-

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210. See *supra* note 202.

211. JUSTICE IN JEOPARDY, *supra* note 127, at 48 (describing as an essential element of problem-solving courts the ability to “reach out to, not only professional service providers, but also to community leaders, community groups and to citizens to encourage them to become involved participants in the justice system”) (quoting testimony of Greg Berman, Director, Center for Court Innovation).

212. William H. Neukom, President’s Message, *A Foundation for Healthy Communities*, 94 A.B.A. J., June 2008, at 9 (describing the participants and purpose of the World Justice Forum). The Forum was conducted by the World Justice Project. See World Justice Project, <http://www.worldjusticeproject.org> (last visited Jan. 7, 2009).

ited a judge from speaking or being honored at any organization's "fund-raising event."<sup>213</sup>

Some states have interpreted "fund-raising event" under the 1972 and 1990 Codes in a very strict manner, cautioning judges that an event is considered a fund-raiser "even though the amount of money raised may be minimal and barely above expenses"<sup>214</sup> and incidental to the main purpose of the gathering.<sup>215</sup> Other more charitable jurisdictions spare events from the prohibitory classification as long as the primary purpose of the function is something other than raising money, and the profit is modest and merely incidental to the announced and principle purpose of the activity. For example, the Maryland Judicial Ethics Committee determined that a judge could be honored at an annual dinner meeting of a civic group created to foster better relationships among the races because the essential purpose of the dinner was not to generate revenue, but to honor persons who have helped improve race relations.<sup>216</sup> The Committee noted that the disclaimer on the tickets indicating that any profit would be donated to charity did not transform the dinner into a fund-raiser because "[t]he disposition of surplus funds appears to be merely a contingent, incidental aspect of the matter."<sup>217</sup>

The Maryland approach, excepting activities with incidental or de minimis fund-raising aspects from the definition of "fund-raising event," is the more generally accepted view.<sup>218</sup> This interpretation has prevailed in part

213. CODE OF JUDICIAL CONDUCT Canon 5B(2) (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990).

214. Ark. Judicial Ethics Advisory Comm., Op. 2005-07 (2005), [http://www.arkansas.gov/jeac/opinions/advisory\\_2005-07.pdf](http://www.arkansas.gov/jeac/opinions/advisory_2005-07.pdf).

215. Ark. Judicial Ethics Advisory Comm., Op. 92-02 (1992), [http://www.arkansas.gov/jeac/opinions/92\\_02.html](http://www.arkansas.gov/jeac/opinions/92_02.html); Neb. Judicial Ethics Comm., Op. 07-1 (2007) ("Fundraising activities include all charitable and other events from which an organization derives direct financial benefits, through the sale of tickets or otherwise, even if the financial benefit is incidental to the main purpose of the event, or the funds raised are to be donated to another organization, charity, or cause.") (quoting N.J. ADVISORY COMM. ON EXTRAJUDICIAL ACTIVITIES, GUIDELINES FOR EXTRAJUDICIAL ACTIVITIES ANNOTATED § V, at ¶ C (May 2004), available at [http://njlegallib.rutgers.edu/misc/EJ\\_guide\\_anno\\_2004\\_May.html#V](http://njlegallib.rutgers.edu/misc/EJ_guide_anno_2004_May.html#V)).

216. Md. Judicial Ethics Comm., Op. 1979-06 (1980), <http://mdcourts.gov/ethics/pdfs/1979-06.pdf>.

217. *Id.*

218. *E.g.*, Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/200502.html> ("[M]erely because the sponsor makes an incidental profit does not result in the event being a fund-raiser, unless the purpose of the event was to raise funds."); Ill. Judicial Ethics Comm., Op. 01-04 (2001), <http://www.ija.org/ethicsop/opinions/01-04.htm> (distinguishing between events, the primary purpose of which is to urge people to contribute, and events where fund-raising is merely incidental to the event); N.Y. Advisory Comm. on Judicial Ethics, Op. 95-161 (1996) ("The stated intent of the organization, when undiminished by the factual pattern surrounding the activity presented, is the governing factor to be considered in determining whether the activity is or is not a fundraiser. Here, although some small profits were made in connection with [the] previous breakfasts, the cost of the ticket cannot be said

because barring judicial speakers from an event that makes any profit or solicitation would eliminate judges from a role they have long enjoyed—speaking at the weekly business meetings of fraternal and civic groups like Rotary International. Fund-raising activities of these groups vary in form but are invariably a regular component of each meeting.<sup>219</sup>

For example, some fraternal organizations “fine” members for real or imagined “offenses,”<sup>220</sup> or conduct a “50-50” raffle, or sell tickets for a chance to win a cash prize by pulling the winning card from a deck of playing cards.<sup>221</sup> Other groups charge members a fee to announce personal, family, or business accomplishments.<sup>222</sup> At virtually every meeting, clubs like the Kiwanis, Lions, and Rotary urge members to purchase or sell fund-raising tickets for their home club, attend fund-raisers for sister clubs, or solicit items for auctions and other charitable purposes.<sup>223</sup> These are the means by which nonprofit groups survive and benefit the community. To outlaw judges from speaking or receiving an award at a meeting because of its incidental fund-raising aspects would not further the state’s interest in preventing the misuse of the dignity and power of the judicial office. Judicial prestige is just not involved in these situations.<sup>224</sup> The judge makes no

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to be so exorbitant as to controvert the stated intent of the function, which is to honor the judge, not to raise funds.”); Pa. Conference of State Trial Judges Judicial Ethics Comm., Informal Op. 9/29b/00 (2000) (finding a silent auction “incidental” to the main purpose of a bar association conference).

219. See *infra* notes 220-223.

220. Lions International clubs use this method of fund-raising. See *The Tail Twister: Functions and Duties*, <http://www.lionsclubs.org/EN/content/pdfs/cc5tailtwister.pdf>.

221. See, e.g., ROTARY CLUB OF OCONEE COUNTY NEWSLETTER (Rotary Club of Oconee County, Oconee County, Ga.), Feb. 26, 2008, at 2, [http://www.oconeecountyrotary.org/parameters/oconeecountyrotary/uploads/dl/Club\\_Bulletins/CB022608.pdf](http://www.oconeecountyrotary.org/parameters/oconeecountyrotary/uploads/dl/Club_Bulletins/CB022608.pdf) (describing “50 Buck Drawing”); THE SCRIBE (Rotary Club of Strongsville, Strongsville, Ohio), Jan. 26, 2007, at 7, <http://www.strongsvillerotary.org/images/scribe/2007-0126Scribe.pdf> (announcing that “[t]he pot was \$43 and the queen was worth \$441.00”); JANESVILLE KIWANIS CLUB NEWSLETTER (Kiwanis International, Janesville, Wis.), Nov. 9, 2006, at 1, [http://janesvillekiwanis.org/news\\_files/20061109KiwanisNewsletter.pdf](http://janesvillekiwanis.org/news_files/20061109KiwanisNewsletter.pdf) (describing the “Ace of Hearts Drawing”).

222. THE SCRIBE, *supra* note 221, at 6 (announcing “Happy Bucks” News); JANESVILLE KIWANIS CLUB NEWSLETTER 1 (Kiwanis International, Janesville, Wis.), Aug. 23, 2007, [http://janesvillekiwanis.org/news\\_files/20070823KiwanisNewsletter.pdf](http://janesvillekiwanis.org/news_files/20070823KiwanisNewsletter.pdf) (listing “Happy Dollars” contributors).

223. See, e.g., THE SCRIBE, *supra* note 221 (reporting that solicitations were made at a business meeting for a fund-raising dance, a clothing drive, and golf-outing sponsorships); JANESVILLE KIWANIS CLUB NEWSLETTER (Kiwanis International, Janesville, Wis.), Jan. 18, 2007, at 1, [http://janesvillekiwanis.org/news\\_files/20070118KiwanisNewsletter.pdf](http://janesvillekiwanis.org/news_files/20070118KiwanisNewsletter.pdf) (reporting that a club member was selling raffle tickets for another Kiwanis Club during the meeting).

224. See Fla. Comm. on Standards of Judicial Conduct Governing Judges, Op. 95-28 (1995), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet5/95-28.html> (quoting a committee member as stating “[m]y understanding is that a speech to a

personal appeal for contributions, and the solicitation takes place whether or not the judge attends the meeting.<sup>225</sup> Any pressure a member feels to donate is not related to the judge's role as speaker or honoree, but arises from the fact that donations are a duty of membership. In addition, interpreting ethics codes to prohibit appearances at clubs that conduct minor "in-house" solicitations would eliminate many opportunities to educate business, political, and community leaders about the law and the administration of justice.<sup>226</sup> There is simply nothing to be gained by foregoing this effective, inexpensive method of building public confidence in the judicial system.

For this and other reasons, the 2007 Code appears to have adopted the interpretation of "fund-raising event," which excludes incidental or ancillary profits. This conclusion is supported by the subtle but telling way that the new Code changes the language of Canon 4C(3)(b) of the 1990 Code. While the 1990 Code prohibited a featured judicial role in an organization's "fund-raising event,"<sup>227</sup> the 2007 Code precludes such participation when a non-law-related event serves a "fund-raising purpose."<sup>228</sup> The new provision declares that the event's purpose is the controlling factor. Presumably, if the goal, aim, or object<sup>229</sup> of a non-law-related organization's event is to

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civic group, such as Kiwanis or Rotary, is, by its nature, non-coercive, and I find it unlikely that the judge's mere appearance at the podium of such group would be a misuse of the prestige of judicial office").

225. Cf. Wis. Judicial Conduct Advisory Comm., Op. 98-12 (1998), <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=886> (justifying rule permitting a judge to pass the collection plate at church in part on the basis that a religious service "is a voluntary assembly at which the collection of funds is to be expected by those who choose to attend").

226. See *The Legal, Political, & Social Implications of the Death Penalty*, Rotary Club of Charleston (South Carolina) Mar. 1, 2007, at 1 (on file with author), available at [http://www.charleston-rotary.org/blogarchive/2007\\_03\\_01\\_archive.htm](http://www.charleston-rotary.org/blogarchive/2007_03_01_archive.htm) (summarizing what appears to be a very informative speech concerning the death penalty given by a judge); *Weakley County Juvenile Judge Jim Bradberry*, Union City Rotary Club Weekly Bulletin and News (Tennessee) June 8, 2007, at 1 (on file with author), available at <http://www.unioncityrotary.org/weeklybulletinnews/details.asp?articleID=117> (welcoming a juvenile court judge speaking on the topic of "Families in Crisis"); *Justice Alan Greiman, Illinois Appellate Court*, Rotary Club of Chicago Gyrator (Illinois) Jan. 8, 2008, at 1 (on file with author), available at [http://rotary1.clubexpress.com/content.aspx?page\\_id+70&club\\_id+501199&item\\_id=2324+cat\\_id+1](http://rotary1.clubexpress.com/content.aspx?page_id+70&club_id+501199&item_id=2324+cat_id+1) (announcing Justice Allan Greiman as a future business meeting speaker); *Featured Speaker*, Rotary Club of the Valley of the Moon (California) Apr. 4, 2008, at 2 (on file with author), available at [http://www.valleyofthemoon-rotary.org/080404\\_Rotary\\_bulletin\\_final.doc](http://www.valleyofthemoon-rotary.org/080404_Rotary_bulletin_final.doc) (summarizing a judge's presentation at the Club's business meeting); see also MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 6 (2007) ("A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.").

227. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990).

228. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

229. "Purpose" is defined as "[a]n objective, goal, or end." BLACK'S LAW DICTIONARY 1271 (8th ed. 2004).

raise money, a judge may not attend as a speaker, guest of honor, or other featured participant. However, if the event's main purpose is something other than fund-raising, an incidental resulting profit will not preclude the judge's participation.

Thus, the difficult task in applying Rule 3.7(A)(4) will be to determine the purpose of an event, because charitable activities can have more than one objective.<sup>230</sup> Of course, advertising a gathering as a fund-raiser,<sup>231</sup> or building a contribution into the price of a ticket,<sup>232</sup> or realizing a large profit<sup>233</sup> usually reveals a profit-seeking motive. Other indicia of a fund-raising purpose are less definitive. Soliciting contributions at an event,<sup>234</sup> distributing pledge cards,<sup>235</sup> conducting an auction<sup>236</sup> or raffle,<sup>237</sup> or producing an ad book<sup>238</sup> usually indicate an intent to generate revenue. There are exceptions,

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230. For example, the Utah Judicial Ethics Committee found a national advertising campaign conducted by the American Indian College Fund to have three purposes: (1) address stereotypes about Native Americans, (2) provide role models for young Native Americans, and (3) raise funds. Utah Judicial Ethics Comm., Informal Op. 01-3 (2001), [http://www.utcourts.gov/resources/ethadv/ethics\\_opinions/2001/01-3.htm](http://www.utcourts.gov/resources/ethadv/ethics_opinions/2001/01-3.htm).

231. See Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/200502.html> (“[A] judge may not be a featured speaker at a designated fundraiser.”).

232. Mass. Comm. on Judicial Ethics, Op. 99-17 (1999), <http://www.mass.gov/courts/sjc/cje/99-17h.html> (“Generally . . . a charitable function is considered a fund-raiser if . . . the tickets are priced to exceed the cost of the function.”); Ill. Judicial Ethics Comm., Op. 01-04 (2001), <http://www.ija.org/ethicsop/opinions/01-04.htm> (finding a fund-raising purpose if the ticket includes a contribution); see also Neb. Judicial Ethics Comm., Op. 07-01 (2007), <http://www.supremecourt.ne.gov/professional-ethics/lawyers/ethicspdfs/2000s/07-01.pdf>.

233. See Md. Judicial Ethics Comm., Op. 1979-06 (1980), <http://www.courts.state.md.us/ethics/pdfs/1979-06.pdf> (describing the amount of financial gain as an important consideration in determining fund-raising intent).

234. Mass. Comm. on Judicial Ethics, Op. 99-17 (1999), <http://www.mass.gov/courts/sjc/cje/99-17h.html>.

235. Ill. Judicial Ethics Comm., Op. 01-04 (2001), <http://www.ija.org/ethicsop/opinions/01-04.htm> (finding that distributing pledge cards requesting attendees to commit to a financial contribution indicates a profit motive).

236. Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/2005-02.html> (observing that auctions indicate a fund-raising purpose); Del. Judicial Ethics Advisory Comm., Op. JEAC 2007-1 (2007), <http://courts.delaware.gov/jeac/opns/07-1.pdf> (advising a judge not to serve as auctioneer at a little league auction); see also Kan. Judicial Ethics Advisory Panel, Op. JE-151 (2007), <http://search.kscourts.org/pdf/ClerkCt/JE151.pdf>.

237. Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/2005-02.html> (observing that raffles indicate a fund-raising purpose).

238. *Id.* (selling advertisements in an event program is an indication of a fund-raising event); Md. Judicial Ethics Comm., Op. 1975-01 (1975), <http://www.courts.state.md.us/ethics/pdfs/1975-01.pdf> (concluding that an income-producing souvenir program containing messages of congratulations to the organization sponsoring the event, the guest speaker, and award recipient, rendered an event a fund-raiser).

however. A religious service is not transformed into a fund-raiser merely because a collection plate is circulated.<sup>239</sup> Nor do surplus funds result where ad sales in a souvenir journal merely offset the cost of holding a function.<sup>240</sup> Additionally, as previously seen, an incidental or ancillary raffle or other form of solicitation conducted as part of a fraternal or civic organization's business meeting does not automatically convert the meeting into an event with a "fund-raising purpose." In the last analysis, the aim or objective of an event will depend upon the intent and expressed goals of the sponsoring agency, the type of activities planned prior to and during the event, and the anticipated net financial outcome of the event.<sup>241</sup> The advisory opinions interpreting the 1972 and 1990 Codes to permit participation in an event producing an incidental profit will be of great assistance in making this evaluation.<sup>242</sup>

V. MEASURING FUND-RAISING RESTRICTIONS AGAINST THE  
GOVERNMENT'S INTEREST IN PREVENTING THE COLLATERAL MISUSE OF  
THE JUDICIAL OFFICE

This Part of the Article evaluates the extent to which the fund-raising rules of the 2007 Code are justified by the state's interest in preventing the misuse of judicial power and prestige to bolster a charity's solicitation efforts. A "preferred" construction is suggested for some Code provisions in order to ensure that restrictions on a judge's charitable activities are no greater than necessary to accomplish the purpose served by the restriction. Sections A, B, and C discuss the direct solicitation of funds by a judge and the use of judges in "featured" and "supporting" roles at fund-raising events. Next, in Sections D, E, and F, the propriety of other common forms of judicial fund-raising are explored including (1) a judge's recommendation of a law-related project or program to a funding source; (2) solicitations by judges for religious purposes; (3) a judge's acceptance of an unannounced and unpublicized award at a non-law-related group's fund-raiser;

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239. Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.state.va.us/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/jirc/opinions/2008/08_1.html) (holding that a religious service is not transformed into a fund-raising event "merely because the service traditionally includes the collection of small donations as relatively minor part of the service"); *cf.* *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (stating that the passing of a collection plate in church does not make a worship service a commercial enterprise).

240. N.Y. Advisory Comm. on Judicial Ethics, Op. 89-39 (1989), [http://www.courts.state.ny.us/ip/judicialethics/opinions/89-39\\_.pdf](http://www.courts.state.ny.us/ip/judicialethics/opinions/89-39_.pdf) (concluding that a judge may be honored at a dinner-dance if the proceeds from ticket sales and journal ad sales are used solely to defray the cost of the event).

241. *See* Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2005/2005-02.html>.

242. *See supra* notes 216, 218.

and (4) the use of ad books at events featuring a judge as a speaker or honoree.

#### A. Direct Solicitation of Funds by Judges

In the context of fund-raising, the greatest damage to public confidence occurs when a judge directly and personally solicits funds—especially where the target of the judge’s request has, or is likely to have, business before the court. Asking a lawyer, litigant, or court employee to purchase a ticket or make a donation necessarily creates the impression that judicial prestige is being employed to coerce or at least influence a favorable response. A direct solicitation also maximizes the likelihood that a return favor will be expected. The pressure on a potential donor is even greater when the request is made in the courthouse. This “most egregious”<sup>243</sup> form of solicitation is demonstrated by the well-intentioned fund-raising efforts of Judge Marion McNulty.<sup>244</sup>

Judge McNulty was a member of a charitable organization that raised money for the benefit of women and families.<sup>245</sup> The judge assisted the group by distributing flyers that promoted fund-raising events to attorneys and court employees. She posted invitations on her chamber’s door and at the family court employees’ entrance.<sup>246</sup> The judge also, while in the courthouse, discussed funding opportunities with attorneys and personally accepted contribution checks. From these checks, Judge McNulty selected a “winner” who received a free event ticket.<sup>247</sup> The New York State Commission on Judicial Conduct admonished Judge McNulty, stating that she “should have recognized that her highly visible participation in the fund-raising activities as well as her direct approaches to court employees and attorneys who appeared before her could have a considerable coercive effect.”<sup>248</sup>

Clinging to the standard set by the 1924 Canons, “less egregious” forms of direct solicitation are also routinely forbidden. A direct request for funds by a judge is prohibited even where the circumstances surrounding

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243. ALFINI ET AL., *supra* note 5, § 9.04A, at 9-16 (describing face-to-face solicitation of practicing lawyers on courthouse premises as “[a] most egregious case of charitable fund-raising abuse”).

244. *In re McNulty*, Determination (N.Y. State Comm’n on Judicial Conduct Mar. 16, 2007), <http://www.scjc.state.ny.us/Determinations/M/McNulty.htm>; *see also In re Quall*, Public Admonishment (Cal. Comm’n on Judicial Performance June 2, 2008), [http://cjp.ca.gov/userfiles/file/Public\\_Admon/Quall\\_DO\\_06-02-08.pdf](http://cjp.ca.gov/userfiles/file/Public_Admon/Quall_DO_06-02-08.pdf) (disciplining judge in part for soliciting items for a charity auction from an attorney during court proceedings).

245. *In re McNulty*, at 2.

246. *Id.*

247. *Id.*

248. *Id.*

the solicitation foreclose any possible appearance of coercion or hope for a return favor. Thus, a judge was advised not to seek pledges from fellow Kiwanis members who were not attorneys and lived outside the soliciting judge's state.<sup>249</sup> Another judge was warned not to sign a solicitation letter on behalf of the National Center for State Courts seeking funds from attorneys who were not licensed in the judge's jurisdiction.<sup>250</sup> Similarly, personal solicitations have been disallowed notwithstanding the fact that the target of the fund-raising effort is unaware of the solicitor's judicial status. Application of this rule has prevented a judge who was fully "disguised in a holiday character costume"<sup>251</sup> from attending a Salvation Army collection kettle and has prevented a judge from serving as a caller during a charity phone-a-thon.<sup>252</sup> Nothing in the 2007 Code indicates a relaxation of the strict prohibition against these less offensive forms of direct solicitation.

Subject to the narrowly drawn exceptions discussed below, direct, person-to-person solicitation is uniformly barred<sup>253</sup> as the chief evil to be pre-

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249. Ark. Judicial Ethics Comm., Op. 2004-03 (2004), [http://www.arkansas.gov/jec/opinions/advisory\\_2004\\_03.pdf](http://www.arkansas.gov/jec/opinions/advisory_2004_03.pdf).

250. Tex. Comm. on Judicial Ethics, Op. 196 (1996), <http://www.courts.state.tx.us/judethics/191-200.htm>. New Hampshire permits a judge to solicit funds from out-of-state sources on behalf of a judges' organization "for the purposes of judicial education and the improvement of the judicial system." NEW HAMPSHIRE CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(v) (2007), <http://www.courts.state.nh.us/rules/scr/scr-38.htm>.

251. Fla. Judicial Ethics Advisory Comm., Op. 2004-36 (2004), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2004/2004\36.html>.

252. N.M. Advisory Comm. on the Code of Judicial Conduct, Op. 99-03 (1999), [http://jec.unm.edu/resources/advisoryopinions/No99\\_03\\_1.pdf](http://jec.unm.edu/resources/advisoryopinions/No99_03_1.pdf). *But see* Ariz. Judicial Ethics Advisory Comm., Op. 00-6 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf) (permitting judge to receive calls and record pledges because no solicitation was involved).

253. *See* Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf) (finding that obtaining pledges for a walk-a-thon constitutes a direct solicitation of funds); Mich. St. Bar Comm. on Prof'l and Judicial Ethics, Op. JI-125 (2001), [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ji125.html?CFID=1529030&CFTOKEN=57786660](http://www.michbar.org/opinions/ethics/numbered_opinions/ji125.html?CFID=1529030&CFTOKEN=57786660) (finding that where a judge's job at a "jail and bail" fund-raiser is to determine the amount of bail, such involvement constitutes a direct solicitation); *In re Coffey*, Public Reprimand (Neb. Comm'n on Judicial Qualifications Sept. 29, 2006), <http://www.supremecourt.ne.gov/professional-ethics/judges/s-35-060003.pdf> (finding that a judge personally participated in soliciting funds by asking a friend to agree to be honored at a charitable event knowing that the honoree would be required to make a financial contribution to the charity); *In re Hartman*, 873 A.2d 867 (Pa. Ct. Jud. Disc. 2005) (finding that a judge used his office and courtroom for the solicitation and collection of funds for charitable purposes); *In re Arrigan*, 678 A.2d 446 (R.I. 1996) (censuring judge for personally soliciting funds from lawyers practicing before the judge); *Minnesota Chief Justice Cited for Fundraising*, CHI. TRIB., Aug. 26, 1987, at A3, available at <http://pqasb.pqarchiver.com/chicagotribune/advancedsearch.html> (reporting that the Minnesota Chief Justice was reprimanded for soliciting a \$5,000 contribution for the Minnesota Bicentennial Commission from a private corporate donor); *In re Brown*, 662 N.W.2d 733 (Mich. 2003) (disciplining judge in part for permitting charitable golf-outing invitations to

vented by the rule against the collateral misuse of judicial prestige to promote fund-raising activities.

### 1. *Soliciting Other Judges*

The first exception to the strict anti-solicitation rule was created by the 1990 Code<sup>254</sup> and reaffirmed in the 2007 Code.<sup>255</sup> Under this exception, a judge may directly solicit funds from other judges over whom the soliciting judge does not exercise supervisory or appellate authority.<sup>256</sup> The drafting committees of the two most recent Model Codes agreed that the exception was warranted because judge-to-judge solicitation, at least where supervisory or appellate authority is not present, does not implicate the public interest that fund-raising restrictions seek to protect.<sup>257</sup> A judge, unlike a non-judge, simply is not influenced by a soliciting judge's official status and is also unlikely to expect a return favor from a judge of equal or lower rank.<sup>258</sup>

It is plausible that a judge might feel pressured when solicited by a supervising judge who controls the assignment and other daily aspects of the potential donor's professional life.<sup>259</sup> It is also possible that a donating judge might expect or hope for a favorable response when making a future request of his or her supervisor. As a result, the bar against a judge seeking contributions from individuals supervised by the soliciting judge has some legitimacy. The proscription against a judge with appellate authority seeking contributions from a judge whose decisions the appellate judge may review stands on much weaker ground. The unexpressed rationale behind

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state that the judge "sponsored" the event); *Charitable Fund-Raising*, JUDICIAL CONDUCT REP., Fall 2003, at 3 (stating that the personal solicitation of funds for any organization was prohibited by the 1972 and 1990 Codes); ALFINI ET AL., *supra* note 5, at § 9.04B, 9-18 (noting that personal solicitation is prohibited under the 2007 Code).

254. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i) (1990).

255. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2) (2007).

256. *Id.*; MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i) (1990).

257. The Reporter's Explanation of Changes to Rule 3.7(A)(2) of the 2007 Code explains:

Judges were already permitted by the 1990 Code to solicit contributions for charities from judges over whom they did not exercise supervisory or appellate authority, because the element of coercion is largely missing, and there is little likelihood that the judge making the contribution would be perceived as attempting to influence the judge making the solicitation.

MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2) Reporter's Explanation of Changes (2007).

258. *Id.*

259. See Ariz. Judicial Ethics Advisory Comm., Op. 95-20 (1995), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/95-20.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/95-20.pdf) (stating that peer solicitations may be coercive where the soliciting judge is a "senior member of the bench, a judge having assignment authority, or perhaps an aggressive judge"); cf. *In re Danikolas*, 838 N.E.2d 422 (Ind. 2005) (suspending a judge for firing a magistrate in retaliation for unfavorable testimony the magistrate provided against the judge during a disciplinary hearing).

this limitation is that lower court judges could reasonably believe that affirmation or reversal of a decision might not rest upon the merits of a case, but upon their level of generosity. Until there is some evidence to support this unwarranted and demeaning view of the appellate decision-making process, the restriction on solicitations by reviewing court judges should be removed.<sup>260</sup>

## 2. *Soliciting Family Members*

Rule 3.7(A)(2) of the 2007 Code creates a second exception to the anti-solicitation rule by permitting judges to solicit family members for charitable purposes.<sup>261</sup> Not surprisingly, some states recognized this exception long before the adoption of the new Code, and for good reason.<sup>262</sup> A judge's son-in-law, for example, might feel coerced into sponsoring the judge in a charity bowl-a-thon. However, the pressure would not arise from a fear of adverse consequences when appearing on the other side of the judge's courtroom bench,<sup>263</sup> rather, the pressure would result from the likelihood that the son-in-law will face the judge from the other side of the dining-room table.<sup>264</sup> The Massachusetts Judicial Ethics Advisory Committee set forth the rationale for the family solicitation exception:

The relationship of spouse, parent, child, brother or sister is so basic that it renders irrelevant the judge's official status. To think that such close family members would feel pressured . . . [by a family member's judicial status] does not comport with a realistic view of the dynamics of family life. Indeed, the very concept of "solicitation" implies a more formal endeavor that seems at odds with family activities. Moreover, a judge's official actions could never be called into question by

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260. Utah permits judges to solicit other judges regardless of the supervisory or appellate duties of the soliciting judge. UTAH CODE OF JUDICIAL CONDUCT Canon 4(C)(3)(b)(i) (2008). California judges may request charitable donations from all judges except "court commissioners, referees, retired judges, and temporary judges." CAL. CODE OF JUDICIAL ETHICS Canon 4C(3)(d)(i) (2007).

261. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2) (2007).

262. *E.g.*, Mass. Comm. on Judicial Ethics, Op. 2004-2 (2004), <http://www.mass.gov/courts/sjc/cje/2004-2n.html> (permitting judge to solicit charitable contributions from a spouse, parent, child, brother, and sister); Mich. St. Bar Comm. on Prof'l and Judicial Ethics, Op. CI-641 (1981), [http://michbar.org/opinions/ethics/numbered\\_opinions/ci641.html?CFID855954&CFTOKEN=73360565](http://michbar.org/opinions/ethics/numbered_opinions/ci641.html?CFID855954&CFTOKEN=73360565) (permitting judge to solicit for Muscular Dystrophy from "immediate family"); Wis. Judicial Conduct Advisory Comm., Op. 98-7 (1998), <http://www.wicourts.gov/sc/judcond/DisplayDocument.html?content=html&seqNo=892> (permitting judge to ask spouse and other family members for donations).

263. A judge is disqualified from presiding over a matter in which the judge's son-in-law is involved. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2) (2007).

264. *See id.* R. 3.7(A)(2) Reporter's Explanation of Changes (explaining that there is little chance of judicial coercion or hope for a judicial favor when the potential donor is related to the soliciting judge).

such a solicitation since a judge would never have occasion to sit on matters involving these family members.<sup>265</sup>

The family member exception of the 2007 Code automatically permits a judge to solicit his or her spouse, domestic partner, child, grandchild, parent, and grandparent.<sup>266</sup> Other relatives, a judge's siblings for example, may be solicited only if the judge "maintains a close familial relationship" with the relative.<sup>267</sup> At the same time, however, Rule 2.11 of the Code provides that a judge is disqualified from any proceeding involving the "judge's spouse or domestic partner or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such person."<sup>268</sup> It seems much more consistent with the purpose behind fund-raising restrictions to expand the family solicitation exemption to the same class of family members that triggers a judge's disqualification under Rule 2.11. There simply cannot be judicial coercion or the expectation of a return judicial favor where, by law, the judge is prohibited from hearing matters in which the potential donor is involved.

With the two exceptions just discussed, the 2007 Code bars direct solicitation of funds or other assistance by judges.<sup>269</sup> This restriction is not controversial or subject to a divergence of opinion.<sup>270</sup> That distinction has been reserved for the question regarding the propriety of a judge serving in a highly visible but non-solicitation role, such as a speaker or honoree, at a fund-raising event. Until the adoption of the new Code, serving in such a capacity was considered the functional equivalent of direct solicitation.<sup>271</sup> That changed in 2007.

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265. Mass. Comm. on Judicial Ethics, Op. 2000-4 (2000), <http://www.mass.gov/courts/sjc/cje/00-4h.html>.

266. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2) & Terminology (2007).

267. *Id.*

268. *Id.* R. 2.11(A)(2). The "[t]hird degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece." *Id.* Terminology.

269. *Id.* R. 3.7(A)(2).

270. Prohibitions against a judge personally and directly soliciting funds for another purpose—a campaign for judicial office—have drawn more interest. Some courts have held such restrictions invalid. *See, e.g., Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (invalidating Canon 7(B)(2) of the Georgia Code of Judicial Conduct, which prohibited a judicial candidate from personally soliciting campaign funds because it was an unconstitutional restriction of a candidate's freedom of political speech); *Republican Party v. White*, 416 F.3d 738 (8th Cir. 2005) (declaring that the solicitation clause of Canon 5 of the Minnesota Code of Judicial Conduct impermissibly barred judicial candidates from personally soliciting individuals or groups).

271. ALASKA CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i) (2007) ("[B]eing the speaker or guest of honor at an organization's fund-raising event is the functional equivalent of solicitation.").

## B. Featured Roles at Fund-Raising Events

From both a theoretical and practical standpoint, the new Code's greatest impact on fund-raising is its retreat from the rule absolutely forbidding judicial participation as a speaker or honored guest at a fund-raising event. For the first time, the 2007 Code carves out a specific type of organization for which a judge is permitted to engage in a variety of prominent, advertised fund-raising roles.<sup>272</sup> Of course, the organizations that the Model Code drafters deemed worthy of fund-raising assistance were not groups committed to curing disease, feeding the hungry, or sheltering the homeless, but bar associations, law schools, and other groups concerned with the law, the legal system, or the administration of justice.<sup>273</sup> This new exception is significant, because under previous Model Codes it was well accepted that a judge's speaking or award-recipient role at a fund-raising event "present[ed] a very real danger of *de facto* coercion, which, even if unintended, amounts to a misuse of the judicial office."<sup>274</sup>

So what was the drafters' rationale for allowing judges to actively and publicly participate in fund-raising events sponsored by law-related organizations while retaining the old rule prohibiting similar activities on behalf of equally benevolent non-law-related charities? Surprisingly, the official comments to Rule 3.7 of the 2007 Code do not explain the basis for the change from previous Model Codes.<sup>275</sup> One has to look to the unofficial Reporter's Explanation of Changes<sup>276</sup> that accompanies Rule 3.7 to find any discussion of the reasons for relaxing the bar against judicial speakers and honorees at law-related fund-raisers.<sup>277</sup> The explanation provided by the Reporter is not very satisfactory.

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272. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

273. *Id.*

274. JEFFREY SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS § 9.09 (3d ed. 2000). The authors of the fourth edition of *Judicial Conduct and Ethics* soften their position on this issue by stating that serving as a speaker or honoree at a fund-raising event "arguably presents a danger of *de facto* coercion, which even if unintended, would amount to a misuse of the judicial office." ALFINI ET AL., *supra* note 5, § 9.04D.

275. MODEL CODE OF JUDICIAL CONDUCT R. 3.7 cmts. 1-5 (2007). This is surprising because less significant changes in fund-raising rules are explained in the Comments. For example, Comment 3 advises judges that Rule 3.7 allows them to act as food servers and preparers at fund-raisers because such activities do not constitute solicitations, present a danger of coercion, or misuse judicial prestige.

276. The Reporter's Explanation of Changes was prepared in order to inform the ABA House of Delegates of the nature of the proposed amendments to the Model Code. MODEL CODE OF JUDICIAL CONDUCT (2007) Reporter's Explanation of Changes, Introductory Statement. The Reporter's Explanation of Changes was not approved by the Joint Commission or adopted as part of the 2007 Code. *Id.* It does, however, serve as a valuable aid in interpreting the new Code.

277. *Id.* R. 3.7(A)(4) Reporter's Explanation of Changes.

The Reporter's Explanation begins by stating that the provision of Rule 3.7(A)(4) permitting a judge to play a featured role only at a law-related organization's fund-raiser is patterned after Canon 4C of the Code of Conduct for United States Judges.<sup>278</sup> According to the Reporter, Canon 4 of the Federal Code of Conduct implicitly permits federal judges to be speakers and honorees at law-related fund-raising functions.<sup>279</sup> The Reporter's Explanation of Changes states:

The Code of Conduct for United States Judges provides that as a general matter, judges may *not* participate in the fund-raising activities of charitable and other civic organizations other than by attending, which is similar to Commentary in the 1990 Code. In context, however, the federal provision appears to be limited to non-law-related organizations and activities. The [Joint] Commission adopted the same general stance in Rule 3.7(A)(4), but made the implicit exception explicit: a judge *is* permitted to be a featured speaker or participant at an event that has a fund-raising purpose, *but only if the organization or entity is a law-related one.*<sup>280</sup>

Unfortunately, the Reporter cites no authority for the proposition that the code of conduct for federal judges permits speaking or honoree roles at law-related fund-raising events. In fact, the commentary to Canon 4C of the federal code explicitly and unequivocally directs that "[a] judge may attend fund-raising activities of law-related organizations although the judge *may not* be a speaker, guest of honor, or featured on the program of such an event."<sup>281</sup> The federal commentary is based upon a comment to Canon 4C(3)(b) of the 1990 Code that likewise mandates that "[a] judge must not be a speaker or guest of honor at a fund-raising event . . . conducted by either a law-related or other type of charitable agency or organization."<sup>282</sup>

Also left unexplained by the Reporter is the fact that the Code of Conduct for United States Judges and the 1990 Code have been consistently interpreted to preclude featured judicial roles at fund-raising events that are sponsored by organizations devoted to the law, the legal system, or the administration of justice.<sup>283</sup>

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278. *Id.*

279. *Id.*

280. *Id.*

281. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4C cmt. (2007) (emphasis added). The federal code also prohibits a judge from being featured on an event program of, or speaking or receiving an award at, a non-law related fund-raiser. *Id.* Canon 5(B)(2) cmt.

282. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (1990). Canon 4 of the 1990 Code governed a judge's participation in the activities of both law-related and non-law-related charitable organizations. *Id.* The Code of Conduct for United States Judges sets forth the rules governing judicial participation in law-related organizations in Canon 4 and the rules governing other types of charitable entities in Canon 5. CODE OF CONDUCT FOR U.S. JUDGES Canons 4 & 5 (2007).

283. See U.S. Judicial Conference Comm. on Codes of Conduct, Op. 89 (1994, revised 1998), <http://www.uscourts.gov/guide/vol2/89.html> (recognizing that "Canon 4 [of the Code of Conduct for U.S. Judges] permits a judge slightly greater latitude to participate in

A second justification offered by the Reporter for permitting prominent roles only in a law-related organization's fund-raising event is that such participation "would be perceived as more natural or more appropriate" than similar activities on behalf of a charitable organization, which has no connection to the law, the legal system, or the administration of justice.<sup>284</sup> This assumption is questionable at best. Does the ordinary reasonable person perceive it to be more natural for a judge to speak at a bar association fund-raiser than at a similar function conducted by the Juvenile Diabetes Association, especially if the judge's child suffers from the disease? The answer is that there is no empirical or anecdotal evidence to support the conclusion that the general public has greater confidence in a judge who helps lawyers raise money as opposed to a judge who assists other worthwhile, and maybe less well-funded, charities raise money.

But even more fundamentally, the propriety of a judge's participation in a fund-raising activity has never been determined by the application of a "natural or appropriate" test;<sup>285</sup> nor should it be. As noted by Professor Wendy Williams in another context, many "rules seem natural and appropriate, but upon close examination, the rules are often only tenuously related

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fund-raising for good causes related to the law," but reaffirming the provision in the commentary to Canon 4 that a "judge may not be a speaker, guest of honor or featured on the program of such an event"); Cynthia Gray, *A Judicial Survival Guide to Balancing Social Commitments with the Code of Judicial Conduct*, 35 JUDGES' J., Fall 1996, at 18, 24 (stating that the 1990 Code provision prohibiting a judge from being a speaker or guest of honor at an organization's fund-raising event "applies both to charitable organizations in general and to organizations devoted to the improvement of the law, the legal system, and the administration of justice"); *Judges: Judicial Code Panel Holds Last Hearing, Gets More Feedback on Two Vexing Issues*, 22 ABA/BNA LAW. MAN. ON PROF. CONDUCT 87 (2006) (stating that the 1990 Code provision barring judicial participation as a speaker or honoree at a fund-raising event, "includes organizations dedicated to 'the improvement of the law, the legal system, or the administration of justice' as well as nonprofit 'educational, religious, charitable, fraternal or civic' organizations generally"); Alaska Comm'n on Judicial Conduct, Op. 2004-01 (2004), <http://www.ajc.state.ak.us/conduct.htm#advisoryopinions> (interpreting an Alaska Code provision patterned after the Commentary to Canon 4C(3)(b) of the 1990 Code as prohibiting a judge from being a speaker or honoree at a fund-raising event conducted by a law-related organization); accord Fla. Judicial Ethics Advisory Comm., Op. 99-27 (1999), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet9/9927.html>; accord Wash. Ethics Advisory Comm., Op. 95-21 (1995), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9521](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9521).

284. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(3) (2007) Reporter's Explanation of Changes.

285. Many activities that an ordinary, reasonable observer would consider natural or appropriate for a judge are barred by judicial codes of conduct. For example, a judge may not publicly support a spouse or child who runs for political office. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 5 (2007) ("[T]here is no 'family exception' to the prohibition . . . against a judge . . . publicly endorsing candidates for public office.").

to their purposes.”<sup>286</sup> Such is the case here. The “natural and appropriate” standard is unrelated to the policy considerations that, for the last nine decades, have served to justify restrictions on fund-raising. As discussed previously, the primary rationale for limiting a judge’s participation in fund-raising activities is to (1) eliminate the potential for a judge to misuse the power and prestige of office to persuade, coerce, or intimidate others to contribute to a charity; and (2) avoid the possibility that a donor will expect favorable treatment from the judge in return for a donation.<sup>287</sup>

It is against these state interests that the legitimacy of a fund-raising restriction must be examined. If prohibiting speaking or other featured roles at an event sponsored by a particular type of organization advances a stated goal, the limitation is justified. If the restriction does not further the goal, the prohibition is unwarranted regardless of what may be perceived as natural or appropriate. In other words, do policy considerations justify permitting a judge’s featured role in a law-related fund-raising event while prohibiting such roles in fund-raisers sponsored by other educational, religious, charitable, fraternal, or civic groups?

The first task in assessing the legitimacy of the distinction between law-related and all other types of charitable fund-raisers is to determine in which type of event it is more likely that a judge could—in actuality or in perception—misuse the prestige of judicial office, to intimidate, coerce, or influence a potential donor. Is it a bar association or other law-related gathering where the targeted donors are often almost exclusively attorneys, many of whom have appeared or may appear before the judge? Or is it the event of an organization like a church, college, or cause-driven charity where few potential ticket purchasers are lawyers and most contributors have very little likelihood of coming before the judge? Of course, the greatest pressure is on attorneys whose livelihood may depend on their success in court.<sup>288</sup>

The second task in this assessment is to decide in which category of fund-raising event the donor will expect, or be perceived to expect, favorable treatment from the judge in return for a contribution? Again, the an-

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286. Professor Williams was commenting on work-place rules regarding pregnancy. Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 358 (1985).

287. See *supra* notes 60-62 and accompanying text.

288. See ALFINI ET AL., *supra* note 5, § 9.04A, at 9-16 (“While it is certainly accurate to say that lawyers or court personnel can be intimidated into contribution by the solicitation of sitting judges, it seems less likely that average citizens would feel equally compelled[ . . . .]”); Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1128 (2004) (agreeing with the proposition that a non-lawyer is less likely to feel pressured by a judge’s solicitation); Utah Judicial Ethics Informal Advisory Op. 89-1 (1989), [http://www.utcourts.gov/resources/ethadv/ethics\\_opinions/1989/89-1.htm](http://www.utcourts.gov/resources/ethadv/ethics_opinions/1989/89-1.htm) (stating that lawyers are “particularly susceptible” to the coercive effect of a judge’s solicitation).

swer appears obvious: the attorneys filling the seats of law-related functions are more likely to be perceived to donate in order to curry favor with a judge. The vast majority of attendees at other types of fund-raisers simply have no occasion to be concerned with pleasing a judge before whom they will never appear.

In sum, whatever the Joint Commission's basis for distinguishing between law-related and all other organizations in Rule 3.7A(4), the fact remains that the policy considerations underlying fund-raising rules do not support the distinction.<sup>289</sup> Some states have recognized and accepted the fact that there is no justification for treating bar associations differently than heart associations when it comes to allowing judicial speakers and honorees at income-producing events. For example, Illinois provides that a judge may speak or be honored at a fund-raiser whether it is sponsored by a law-related or other type of civic or charitable group.<sup>290</sup> Texas treats all entities the same in allowing judges to serve as a speaker or guest of honor at fund-raising events.<sup>291</sup> Similarly, California permits a judge to "be a speaker, guest of honor, or recipient of an award for a public or charitable service."<sup>292</sup>

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289. For a contrary view see *Final Report and Recommendations of the Texas Supreme Court Task Force on the Code of Judicial Conduct* (2005), reprinted in 68 TEX. B.J. 514 (2005). In 2005 the Texas Task Force on the Code of Judicial Conduct proposed a change to the Texas Code similar Rule 3.7A(4). The Task Force recommended that judges only be permitted to speak or receive an honor at the fund-raising event of a law-related organization because other groups had a history of choosing to honor judges for the purpose of inducing attorneys to support the event. *Id.* at 517. Assuming the accuracy of this observation, and further assuming that lawyers did feel coerced into attending, the very same criticism could be leveled against law-related groups. If a judge should be prevented from receiving an honor at a non-law-related event because the judge is selected primarily for the purpose of increasing attendance, then the prohibition should apply to law-related organizations harboring the same improper motive. The Texas Supreme Court declined to adopt the Task Force's recommendation and continues to authorize judicial speaking and award receiving at law-related and other charitable fund-raising events. TEX. CODE OF JUDICIAL CONDUCT Canon 4C(2) (2005).

290. ILL. CODE OF JUDICIAL CONDUCT Canon 4C (2006) (providing that a judge "may appear at, participate in, and allow his or her title to be used in connection with a fund-raising event for the [law-related] organization"); *id.* Canon 5B(2) ("A judge may be a speaker or the guest of honor at a [non-law-related] organization's fund-raising events.").

291. TEX. CODE OF JUDICIAL CONDUCT Canon 4C(2) (2005).

292. CAL. CODE OF JUDICIAL ETHICS Canon 4C(3)(d)(iv) (2007); *see also* IND. CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (effective Jan. 1, 2009), available at [http://www.in.gov/judiciary/rules/jud\\_conduct/jud\\_conduct09.pdf](http://www.in.gov/judiciary/rules/jud_conduct/jud_conduct09.pdf) (declining to follow the 2007 Model Code by prohibiting judges from speaking or receiving an award at both law-related and non-law related fund-raising events); OHIO CODE OF JUDICIAL CONDUCT R. 3.7(A)(5) (effective Mar 1, 2009) (declining to follow the lead of the 2007 Model Code by permitting a judge to play a featured role at a fund-raising event sponsored by a law-related group or any other educational, religious, charitable, fraternal, or civic nonprofit organization).

### C. Supporting Roles at Fund-Raising Events

While judges are frequently invited to appear as speakers and honored guests at money-raising soirees, much more often they are asked to work along side other parents, club members, or volunteers in less glamorous roles at pancake breakfasts, car washes, book sales, and similar events. These non-featured roles certainly create no cause for concern when performed at law-related events where even featured roles are permitted. Additionally, the 2007 Code clarifies that as a general rule, “supporting” roles do not misuse judicial prestige when performed at non-law-related charitable events. Comment 3 to Rule 3.7 provides:

It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse of the prestige of judicial office.<sup>293</sup>

#### 1. *Behind-the-Scenes Supporting Roles*

Behind-the-scenes assistance such as cleaning after an event,<sup>294</sup> setting-up for a walk-a-thon,<sup>295</sup> decorating a hall,<sup>296</sup> working in the kitchen,<sup>297</sup> and writing a fund-raising skit<sup>298</sup> has been approved under state judicial codes as presenting no danger of coercion or the expectation of a return favor. The result will be the same under Rule 3.7 of the 2007 Code. A judge’s service in these non-visible jobs simply is not known to the potential donors and therefore cannot form the catalyst for a contribution.

#### 2. *Visible Supporting Roles*

Participation in visible supporting roles at non-law related fund-raising events is likewise permitted so long as the judge is not used to draw atten-

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293. MODEL CODE OF JUDICIAL CONDUCT R. 3.7 cmt. 3 (2007).

294. N.Y. Advisory Comm. on Judicial Ethics, Op. 89-18 (1989), [http://www.courts.state.ny.us/ip/judicialethics/opinions/89-18\\_.pdf](http://www.courts.state.ny.us/ip/judicialethics/opinions/89-18_.pdf) (permitting judge to clear tables after a fund-raising supper).

295. N.Y. Advisory Comm. on Judicial Ethics, Op. 07-17 (2007), <http://www.courts.state.ny.us/ip/judicialethics/opinions/07-17.htm> (permitting judge to erect signs for a walk-a-thon).

296. Ind. Judicial Qualifications Comm’n, Op. 1-96 (1996), <http://www.in.gov/judiciary/jud-qual/docs/adops/1-96.pdf>.

297. Cal. Judges Assoc. Comm. on Judicial Ethics Op. 41 (1989); R.I. CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (2008) (authorizing judge to cook pancakes at a neighborhood center’s fund-raising event).

298. Wis. Judicial Conduct Advisory Comm., Op. 98-3 (1998), <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=896>.

dees or increase donations and the judge is not identified by title. Accordingly, judges are free to wash cars,<sup>299</sup> serve food and beverages,<sup>300</sup> show people to their seats,<sup>301</sup> park cars,<sup>302</sup> give directions at a walk-a-thon,<sup>303</sup> work at a concession stand<sup>304</sup> or carnival,<sup>305</sup> and hold a sideline marker during a charity football game.<sup>306</sup>

A closer question arises where the judge's role is more than that of an ordinary worker and approaches the status of a featured or special participant in activities such as sporting events, theatrical productions, and fashion shows. State advisory committee opinions are not uniform in this gray area. For example, the Florida Judicial Ethics Advisory Committee has determined that a judge may not serve as a team member in a fund-raising basketball game.<sup>307</sup> However, Arizona<sup>308</sup> and New York<sup>309</sup> judges are permitted to play on sports teams for charitable purposes. New York, taking a less favorable view of the theatre, has prohibited judges from serving as cast

299. Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf); see also ALASKA CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (2007).

300. Ala. Judicial Inquiry Comm'n, Op. 91-435 (1991), <http://www.alalinc.net/jic/opinions/ao91-435.htm> (permitting judge to serve food and beverages); accord Cal. Judges Assoc. Comm. on Judicial Ethics Op. 41 (1989); accord N.Y. Advisory Comm. on Judicial Ethics, Op. 99-89 (1999), [http://www.courts.state.ny.us/ip/judiciaethics/opinions/99-89\\_.htm](http://www.courts.state.ny.us/ip/judiciaethics/opinions/99-89_.htm).

301. N.Y. Advisory Comm. on Judicial Ethics, Op. 90-175 (1990), [http://www.courts.state.ny.us/ip/judiciaethics/opinions/90-175\\_.pdf](http://www.courts.state.ny.us/ip/judiciaethics/opinions/90-175_.pdf).

302. *Id.*

303. N.Y. Advisory Comm. on Judicial Ethics, Op. 07-17 (2007), <http://www.courts.state.ny.us/ip/judiciaethics/opinions/07-17.htm>.

304. Fla. Judicial Ethics Advisory Comm., Op. 2005-07 (2005), [http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005\\_2005-07.html](http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005_2005-07.html); Kan. Judicial Ethics Advisory Panel, Op. JE-134 (2005), <http://www.kscourts.org/pdf/ClerkCt/JE134.pdf>; W.Va. Judicial Investigations Comm'n Op. 10/7/94 (1994), <http://www.state.wv.us/wvsca/JIC/advop.htm#Judicial%20duties>.

305. ALASKA CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (2007) (“[J]udges may participate as workers at fundraising events such as car washes and carnivals[ . . . ]”).

306. Fla. Judicial Ethics Advisory Comm., Op. 89-19 (1989), [http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eight\\_y9/89-19.html](http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eight_y9/89-19.html) (permitting judge to attend sideline marker and check press credentials at a charitable football game).

307. Fla. Judicial Ethics Advisory Comm., Op. 88-5 (1988), [http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eight\\_y8/88-05.html](http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eight_y8/88-05.html) (prohibiting participation in a basketball game with the Miami Dolphins even though the judge was not identified by title).

308. Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf) (approving judge's participation as softball team member).

309. N.Y. Advisory Comm. on Judicial Ethics, Op. 90-97 (1990), [http://www.courts.state.ny.us/ip/judiciaethics/opinions/90-97\\_.htm](http://www.courts.state.ny.us/ip/judiciaethics/opinions/90-97_.htm) (permitting participation as a player or umpire in a fund-raising softball game).

members of a fund-raising play,<sup>310</sup> while Illinois judges may serve as thespians at profit-producing productions.<sup>311</sup> In Michigan, judges may walk down the runway at a charity fashion show,<sup>312</sup> but in Florida they may not.<sup>313</sup>

The better approach, and the approach that should be adopted in interpreting Comment 3 to Rule 3.7, is to permit a judge to serve as a sport's team member, an actor, or in similar participatory roles provided that the judge is not singled out for special attention, the judge's title is not used, and the judge's involvement is not distinguishable from other participants.<sup>314</sup> Serving as one of several singers, dancers, actors, musicians, performers, or team-members does not, without more, constitute a solicitation.<sup>315</sup> Nor is participating as a member of a group likely to intimidate or pressure others to buy a ticket or otherwise support the entity sponsoring the event.<sup>316</sup> Furthermore, it is unlikely that a ticket purchaser for a charity baseball game, for example, would reasonably expect a return judicial favor from the catcher who happens to be a judge any more than the spectator would expect a better plea negotiation from the pitcher who is also the state attorney. A different result is required, at least at non-law related events, where the judge is assigned a special status like "star"<sup>317</sup> of the opera or "celebrity" umpire.<sup>318</sup> In these situations the public might perceive an abuse of the judicial office.

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310. N.Y. Advisory Comm. on Judicial Ethics, Op. 92-79 (1992), [http://www.courts.state.ny.us/ip/judicialethics/opinions/92-79\\_.pdf](http://www.courts.state.ny.us/ip/judicialethics/opinions/92-79_.pdf) (advising judge not to make a "cameo" appearance in a fund-raising play); *see also* Tex. Comm. on Judicial Ethics, Op. 41 (1979), <http://www.courts.state.tx.us/judethics/41-50.htm> (prohibiting judge from performing as an operatic singer at a fund-raiser).

311. Ill. Judicial Ethics Comm., Op. 95-23 (1995), <http://www.ija.org/ethicsop/opinions/95-23.htm>. (approving judge's role in a stage play provided the judge is not advertised as "star of the play").

312. Mich. State Bar Standing Comm. on Judicial Ethics, Op. JI-71 (1993), [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ji071.htm?CFID=4262652&CF\\_TOKEN=97956505](http://www.michbar.org/opinions/ethics/numbered_opinions/ji071.htm?CFID=4262652&CF_TOKEN=97956505).

313. Fla. Judicial Ethics Advisory Comm., Op. 88-31 (1988), [http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eight\\_y8/88-31.html](http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eight_y8/88-31.html); *accord* Wash. Ethics Advisory Comm., Op. 93-5 (1993), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=9305](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9305) (performing as a model at a fund-raising fashion show is prohibited).

314. This is the test applied by the Arizona Judicial Ethics Advisory Committee in Opinion 00-06. The opinion discusses a multitude of common fund-raising questions facing the judiciary. Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf).

315. *Id.*

316. *Id.*

317. Ill. Judicial Ethics Comm., Op. 95-23 (1995), <http://www.ija.org/ethicsop/opinions/95-23.htm> (approving judge's role in a stage play provided the judge is not advertised as "star of the play").

318. Most judicial ethics advisory committees have determined that attaching the designation of "celebrity" to a judge's role in a fund-raiser improperly invokes judicial pres-

### 3. Supporting Roles that Include Collecting Money

An important issue for judges is the propriety of performing a job at a fund-raiser that includes collecting money. State advisory committees interpreting relevant provisions of prior Model Codes have not provided a uniform response to the question.<sup>319</sup> Maine judges may not serve as cashiers at concession stands or used book sales.<sup>320</sup> Indiana, taking a more generous view, permits judges to sell refreshments, Christmas trees, or crafts for a charitable purpose.<sup>321</sup> The Florida Judicial Ethics Advisory Committee, hedging on the issue, has suggested that while a “judge would do well to aspire to participate in community activities as something other than a cashier, . . . A judge who is flipping hamburgers or putting mustard on hot dogs . . . [may] fill in for a co-volunteer who must step away from the cashier’s duty momentarily.”<sup>322</sup>

The Reporter’s Explanation of Changes to Comment 3 of Rule 3.7 of the 2007 Code suggests that serving as a cashier or ticket taker or in similar capacities may be permissible depending upon the nature of the event and

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tige. See, e.g., N.Y. Advisory Comm. on Judicial Ethics, Op. 02-25 (2002), [http://www.courts.state.ny.us/ip/judiciaethics/opinions/02-25\\_.htm](http://www.courts.state.ny.us/ip/judiciaethics/opinions/02-25_.htm) (“[B]y appearing as a ‘celebrity bartender,’ [at a bar association event] the judge would be lending the prestige of judicial office to advance the private interests of others . . . .”); Ill. Judicial Ethics Comm., Op. 99-1 (1991), <http://www.ija.org/ethicsop/opinions/99-01.htm> (advising that a judge may not serve as a celebrity bagger for the United Way); Fla. Judicial Ethics Advisory Comm., Op. 90-27 (1990), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet/90-27.html> (prohibiting judge from serving as a celebrity bagger); Wis. Judicial Conduct Advisory Comm., Op. 98-1 (1998), <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=898> (prohibiting judge from serving as a celebrity judge in a cooking contest); Tex. Comm. on Judicial Ethics, Op. 16 (1976), <http://www.courts.state.tx.us/judethics/11-20.htm> (finding that acting as a celebrity auctioneer constitutes a solicitation). *But see* Tex. Comm. on Judicial Ethics, Op. 220 (1997), <http://www.courts.state.tx.us/judethics/211-220.htm> (explaining that a judge may be a celebrity server at a charitable fund-raiser because that designation is analogous to the role of speaker or guest of honor which is permitted by the Texas Code of Judicial Conduct).

319. See *infra* notes 320-22.

320. Me. Judicial Ethics Advisory Comm., Op. 97-3 (1997); accord N.Y. Advisory Comm. on Judicial Ethics, Op. 96-59 (1996), <http://www.courts.state.ny.us/ip/judiciaethics/opinions/96-59.htm> (advising that a judge may not serve as a cashier at a library book fair).

321. Ind. Judicial Qualifications Comm’n, Op. 1-96 (1996), <http://www.in.gov/judiciary/jud-qual/docs/adops/1-96.pdf>.

322. Fla. Judicial Ethics Advisory Comm., Op. 2005-7 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/2005-07.html>. An amendment to Canon 5 of the Florida Code of Judicial Conduct, effective May 22, 2008, authorizes a judge “to participate as a . . . cashier for a school hot dog roast or similar activity.” *In re Amendments to the Code of Judicial Conduct*, 983 So.2d 550, 552 (Fla. 2008).

the extent of the judge's participation.<sup>323</sup> The Reporter continues with advice that is unquestionably sound but short on specificity: "As long as there is no coercion—even subtle and unstated coercion—and as long as the judge's position as a judge is not being exploited, the [money-handling] activity is permissible."<sup>324</sup> Factors to be considered in making this determination are not enumerated by the Reporter, but a common sense list is easily assembled.

First, it is important to identify the judge's relationship with the group sponsoring the fund-raising activity. If the judge, or family member of the judge, belongs to the group it is less likely to appear that the judge was chosen as a cashier, for example, to exploit his or her official status.<sup>325</sup> Another significant factor is the sum of money involved. Nominal sums are likely to be considered *de minimis* because they do not implicate concerns of coercion or expected return favors.<sup>326</sup> Third, using the judge's title will almost certainly result in the appearance that judicial prestige is being misused.<sup>327</sup> Fourth, it is important to assess the likelihood that the judge will encounter attorneys or others who have appeared or may appear before the judge in court. A judge selling raffle tickets at a bar association function creates a greater danger of the appearance of coercion than a judge selling raffle tickets at a function sponsored by a Rotary Club or church to which the judge belongs.<sup>328</sup> Finally, consideration should be given to whether the donor is receiving something of value in return for a contribution.<sup>329</sup> An example will assist in illustrating how these five factors can be employed in determining whether collecting money at a fund-raising event violates the new Code.

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323. MODEL CODE OF JUDICIAL CONDUCT R. 3.7 cmt. 3 (2007) Reporter's Explanation of Changes ("Whether such activities [cashier or ticket taker] are appropriate depends upon analysis of the overall event, and the significance of the judge's participation.").

324. *Id.*

325. *See* Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf) (approving judge's participation in a car wash because "the judge's participation is not exceptional, but, rather the same as everyone else involved in the event").

326. *See, e.g.*, R.I. CODE OF JUDICIAL CONDUCT Canon 4 C(3)(b) cmt. (2007) ("Canon 4 should not be read as prohibiting participation in *de minimis* fund-raising activities . . ."); *accord* WIS. CODE OF JUDICIAL CONDUCT SCR 60.05(3)(c)(2)(d) cmt. (2004).

327. *See, e.g.*, LA. CODE OF JUDICIAL CONDUCT Canon 5B(2) (2006) (permitting judges to participate in charitable fund-raising "provided the judge's title or status is not used").

328. *See supra* note 283.

329. *See* Fla. Judicial Ethics Advisory Comm. Op. 2005-07, <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2005/2005-07.html> ("[W]e believe there is an important distinction between selling—at a reasonable price—widely sold items, and soliciting charitable contributions.").

Assume that a judge belongs to a Kiwanis Club. Each year the club receives a donation from the county fair association in return for club members serving as ticket sellers at the entrance to the fair.<sup>330</sup> Applying the five factors previously outlined, it becomes clear that a judge's service as a ticket seller does not constitute a solicitation or misuse of the prestige of office. As a member of the organization, the judge is simply performing a task expected of all members. The amount of money the judge will be handling—the entry fee to the county fair—is minimal. The vast majority of fair attendees are not lawyers or likely to appear in court. There will be no identification of the judge's judicial title, and the ticket price entitles the attendee to something of value—entry to the fair grounds. Lastly, the judge's role of selling tickets cannot be equated with a solicitation. Presumably, attendees arrive at the fair, park their cars, and approach the entry gate intending to purchase a ticket regardless of the identity of the ticket-seller. The concern that an attendee would feel pressure to buy an extra, unneeded ticket in order to please the judge is, at best, trivial.

#### D. Fund-Raising Recommendations by Judges on Behalf of Law-Related Programs

A provision was included in the 1972 Code permitting a judge to “make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.”<sup>331</sup> This exception to the general prohibition against fund-raising assistance is well founded, because it is unlikely that a grant review committee will be coerced or intimidated into awarding funds because a judge supports an application. It is equally unlikely that a funding agency would expect a return favor if the project recommended by the judge is the grant recipient. This provision of Canon 4C of the 1972 Code has not been the subject of criticism and was repeated in the 1990 and 2007 Codes without substantial change.<sup>332</sup>

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330. This hypothetical is based on West Virginia Judicial Investigation Commission Opinion 10/7/94 (1994), <http://www.state.wv.us/wvsca/JIC/advop.htm#Judicial%20duties>.

331. CODE OF JUDICIAL CONDUCT Canon 4C (1972).

332. See MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(ii) (1990) (“A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise . . . may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice.”); MODEL CODE OF JUDICIAL CONDUCT R.3.7(A)(5) (2007) (providing that a judge may make a recommendation to a “public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice”). Rule 3.7 was modified to clarify that the authority to make funding recommendations is not limited to judges who are directly associated with the grant-seeking organization. *Id.* R. 3.7(A)(5) (2007) Reporter’s Explanation of Changes

Precisely how far a judge may go in “recommending” a project to a funding source is the subject of debate. In considering the issue under previous Model Codes, a few jurisdictions have concluded that a judge may directly and expressly solicit grant monies for law-related endeavors.<sup>333</sup> For example, the Washington Ethics Advisory Committee has authorized a judge on behalf of a bar association to (1) make direct contact with a potential funding source to determine whether the interests of the funding agency coincide with a proposed bar association project; (2) make an oral or written application for funding; (3) sign a grant application; and (4) initiate follow-up contacts with the agency to inquire about the status of a grant application.<sup>334</sup> The majority of advisory committees, however, only allow a judge to support funding proposals by supplying information that describes the program and the benefits and importance of the program to the judicial system.<sup>335</sup> Because judicial codes uniformly bar direct solicitation, most jurisdictions prohibit a judge from signing a grant application or otherwise personally requesting funding approval.<sup>336</sup> All jurisdictions agree that a fund-

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(“[T]he authority to make recommendations to fund-granting organizations and entities is not limited to officers, directors, and others directly associated with the organization or entity.”).

333. See, e.g., Wash. Ethics Advisory Comm., Op. 02-10 (2002), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.byyear](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.byyear) (“Canon 4C makes an exception to the prohibition against soliciting funds by permitting a judicial officer to make recommendations to public and private fund granting agencies on projects and programs concerning the law, the legal system and the administration of justice.”); N.H. CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) cmt. (2007), available at <http://www.courts.state.nh.us/rules/scr/scr-38.htm> (“[A] judge may solicit funds from governmental agencies and nonprofit organizations for programs to improve the administration of justice.”).

334. Wash. Ethics Advisory Comm., Op. 02-10 (2002), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.byyear](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.byyear).

335. Ill. Judicial Ethics Comm., Op. 94-9 (1994), <http://www.ija.org/ethicsop/opinions/94-9.htm> (permitting judge to explain to a potential donor the nature and importance of a program devoted to the improvement of justice); Mass. Comm. on Judicial Ethics Op. 2006-5 (2006), <http://www.mass.gov/courts/sjc/cje/2006-5n.html> (limiting judicial participation in the funding process to a description of the activities and benefits provided by a program such as freeing up court personnel, helping preserve judicial neutrality, and assisting pro se litigants); Tex. Comm. on Judicial Ethics, Op. 214 (1997), <http://www.courts.state.tx.us/judethics/211-220.htm> (limiting a letter in support of a grant application to a description of the services provided by the entity seeking funds); W.Va. Judicial Investigation Comm., Op. 1/22/07 (2007), <http://www.state.wv.us/wvsc/JIC/advop.htm> (permitting judge to inform the legislature about the importance of a child visitation center).

336. Ariz. Judicial Ethics Advisory Comm., Op. 97-09 (1997), [http://www.supreme.state.az.us/ethics/Judicial\\_Ethics\\_Advisory\\_Opinions.htm](http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Opinions.htm) (prohibiting judge from signing a grant application or otherwise soliciting funds); accord Haw. Comm’n on Judicial Conduct, Op. 03-48 (1998); Ill. Judicial Ethics Comm., Op. 94-9 (1994), <http://www.ija.org/ethicsop/opinions/94-9.htm> (stating that a judge may not ask for funding); Mass. Comm. on Judicial Ethics, Op. 2006-5 (2006), <http://www.mass.gov/courts/sjc/cje/2006-5n.html> (finding a recommendation letter improper because it requested funding); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 6-2002 (2002), <http://www.judicial.state.sc.us/advisoryOpinions/> (“[T]he Circuit Court Judge can endorse a grant that will provide

ing recommendation must be based on the personal knowledge of the judge.<sup>337</sup> Arizona specifically suggests that a judge should be familiar with the organization, its purposes, and the use to which funding will be put.<sup>338</sup> The requirement that a recommendation contain first-hand information is essential to ensure that the judge's role in the funding process is to provide relevant information to the decision-maker and not merely to lend the judicial title to the grant application.<sup>339</sup> As with any other non-judicial activity, a judge may not make a funding recommendation that appears "to undermine the judge's independence, integrity, or impartiality."<sup>340</sup>

The state's interest in protecting the dignity and prestige of the judiciary is best served by an interpretation of Rule 3.7(A)(5) that prohibits a judge from soliciting approval of a grant application while permitting a

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funds for completion of the restoration of the Dillon's historic county courthouse, but he cannot personally solicit funds for the project."); Tex Comm. on Judicial Ethics, Op. 199 (1996), <http://www.courts.state.tx.us/judethics/191-200.htm> (prohibiting judge from signing a solicitation letter); see also Steven Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 JUDICATURE 199, 200 (1986) (observing that "the qualified nature of the language – 'recommendations' as opposed to 'requests' – makes it clear that something significantly less than actual fundraising is contemplated" by the last sentence of Canon 4C of the 1972 Code).

337. Mass. Comm. on Judicial Ethics, Op. 2006-5 (2006), <http://www.mass.gov/courts/sjc/cje/2006-5n.html> (requiring funding letter to be based upon factual information gained from the judge's personal observations); Neb. Judicial Ethics Comm., Op. 98-4 (1998) (concluding that a "judge may write a letter in support for a funding grant on behalf of a victim assistance or CASA agency based on the judge's personal knowledge"); Tex. Comm. on Judicial Ethics, Op. 214 (1997), <http://www.courts.state.tx.us/judethics/211-220.htm> (finding that a judge may write in support of a grant application if the letter is based on the judge's knowledge of the services provided by the organization); Wash. Ethics Advisory Comm., Op. 01-09 (2001), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.byyear](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.byyear) (advising that a letter in support of a new tribal detention facility should be confined to matters within the judge's personal knowledge).

338. Ariz. Judicial Ethics Advisory Comm., Op. 97-01 (1997), [http://www.supreme.state.az.us/ethics/Judicial\\_Ethics\\_Advisory\\_Opinions.htm](http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Opinions.htm).

339. Cf. Raymond J. McKoski, *Ethical Considerations in the Use of Judicial Stationery for Private Purposes*, 112 PENN. ST. L. REV. 471, 499 (2007) ("The rationale for permitting judicial recommendations [for employment and academic purposes] is that as long as a recommendation letter is based on the judge's first-hand knowledge, the letter transfers that personal knowledge and not the prestige of judicial office.").

340. MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C) (2007) ("[W]hen engaging in extrajudicial activities, a judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."); see Fla. Judicial Ethics Advisory Comm., Op. 2002-09 (2002), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/jeac.html> (finding that a judge's letter encouraging funding of an organization that advocates for victims of domestic violence could cast doubt on the judge's impartiality); W.Va. Judicial Investigation Comm'n, Op. 3/14/06 (2006), <http://www.state.wv.us/wvsca/JIC/advop.htm> (stating that a judge should not speak in favor of a grant supporting a crisis center because of the need to protect the impartiality of the judiciary).

judge to convey pertinent, first-hand information that may be useful to the individuals making the ultimate funding decision.

#### E. Fund-Raising for Religious Purposes

The fund-raising restrictions of all four ABA Model Codes have applied with equal force to both secular and religious activities.<sup>341</sup> As a result, judges are permitted to serve religious congregations in almost every capacity including cantor,<sup>342</sup> lector,<sup>343</sup> speaker,<sup>344</sup> vestryman,<sup>345</sup> president,<sup>346</sup> school board member,<sup>347</sup> teacher,<sup>348</sup> parliamentarian,<sup>349</sup> trustee,<sup>350</sup> usher,<sup>351</sup> and pastor,<sup>352</sup> but only to the extent that the position does not require the direct or

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341. See ABA Comm. on Prof'l Ethics, Informal Op. 603 (1962) (interpreting Canon 25 of the 1924 Canons to prohibit solicitations for "ecclesiastical" purposes); CODE OF JUDICIAL CONDUCT Canon 5B(2) (1972) (grouping, for fund-raising purposes, religious organizations with all other non-law related educational, charitable, fraternal and civic organizations); MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) & cmt. (1990) (imposing same fund-raising rules for all educational, religious, charitable, fraternal, and civic organizations); MODEL CODE OF JUDICIAL CONDUCT R. 3.7 (2007) (imposing same fund-raising rules for all non-law-related educational, religious, charitable, fraternal, and civic organizations).

342. Ariz. Judicial Ethics Advisory Comm., Op. 93-1 (1993), [http://www.supreme.state.az.us/ethics/Judicial\\_Ethics\\_Advisory\\_Opinions.htm](http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Opinions.htm).

343. *Id.*

344. *Id.*

345. *Id.*; Md. Judicial Ethics Comm., Op. 1980-10 (1980), <http://www.courts.state.md.us/ethics/opinions.html>.

346. Ill. Judicial Ethics Comm., Op. 96-4 (1996), <http://www.ija.org/ethicsop/opinions/96-4.htm> ("A judge may accept the presidency of a church, synagogue, or mosque."); N.Y. Advisory Comm. on Judicial Ethics, Op. 03-129 (2003), <http://www.nycourts.gov/ip/judicialethics/opinions/03-129> (permitting judge to serve as synagogue president); Ariz. Judicial Ethics Advisory Comm., Op. 93-1 (1993), [http://www.supreme.state.az.us/ethics/Judicial\\_Ethics\\_Advisory\\_Opinions.htm](http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Opinions.htm) (advising that a judge may serve as an officer of a church).

347. Ill. Judicial Ethics Comm., Op. 96-7 (1996), <http://www.ija.org/ethicsop/opinions/96-7.htm>; Okla. Judicial Ethics Advisory Panel, Op. 2007-4 (2007), <http://oscn.net/applications/oscn/DeliverDocument.asp?CiteID=449053> (permitting judge to sit on the board of directors of a private Christian school).

348. Fla. Comm. on Standards of Conduct Governing Judges, Op. 97-26 (1997), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet7/9726.html>.

349. N.Y. Advisory Comm. on Judicial Ethics, Op. 06-10 (2006), <http://www.nycourts.gov/ip/judicialethics/opinions/06-10.htm>.

350. N.Y. Advisory Comm. on Judicial Ethics, Op. 05-17 (2005), <http://www.nycourts.gov/ip/judicialethics/opinions/05-17.htm>.

351. N.Y. Advisory Comm. on Judicial Ethics, Joint Op. 89-83/89-84 (1989), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/jeac.html>.

352. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 4-2008 (2008), <http://www.judicial.state.sc.us/advisoryOpinions/>. *But see* Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.state.va.us/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/jirc/opinions/2008/08_1.html) ("[A] judge should not act as a pastor or minister at a regular church service.").

indirect solicitation of funds.<sup>353</sup> The rule has been applied to preclude a judge from speaking at a church banquet where a small profit would result from the \$20 ticket price<sup>354</sup> and to preclude a judge who sits on the board of his church's theological seminary from making presentations to religious organizations for the purpose of increasing endowments to the seminary.<sup>355</sup> However, the anti-solicitation rule has been relaxed in one respect. Most states considering the issue under pre-2007 Code provisions allow judges to pass a collection plate during a religious service.<sup>356</sup> While the unspoken motivation for this concession may be the states' hesitancy to become embroiled in what has all the earmarks of a losing First Amendment battle,<sup>357</sup>

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353. Most advisory committees make it a point to stress that permissible activities on behalf of religious organizations do not include active participation in fund-raising. *See, e.g.*, Ill. Judicial Ethics Comm., Op. 96-7 (1996), <http://www.ija.org/ethicsop/opinions/96-7.htm> (advising that a judge serving as a church school board member may not solicit, or allow his or her name to be used to solicit, funds); Ariz. Judicial Ethics Advisory Comm., Op. 93-1 (1993), [http://www.supreme.state.az.us/ethics/Judicial\\_Ethics\\_Advisory\\_Opinions.htm](http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Opinions.htm) ("The sole limitation placed on a judge's activities in the area of religion is a prohibition against soliciting funds for religious organizations."); N.Y. Advisory Comm. on Judicial Ethics, Op. 03-129 (2004), <http://www.nycourts.gov/ip/judicialethics/opinions/03-129.htm> (stating that a judge may serve as an officer of a religious group but may not be active in fund-raising).

354. Ark. Judicial Ethics Advisory Comm., Op. 94-03 (1994), [http://www.state.ar.us/jeac/opinions/94\\_03.html](http://www.state.ar.us/jeac/opinions/94_03.html).

355. Wash. Ethics Advisory Comm., Op. 06-11 (2006), [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=0611](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0611).

356. *See infra* notes 358-60 (listing the states permitting a judge to take part in the offering process). Apparently, Virginia does not allow a judge to pass a collection plate. Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.state.va.us/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/jirc/opinions/2008/08_1.html) ("[A] judge may not request offerings or tithes in any capacity.").

357. Although the constitutionality of restrictions on judicial fund-raising are beyond the scope of this Article, it appears that the First Amendment severely limits any attempt to regulate a judge's religious expression, including expression that solicits funds. First, religious speech, which is doubly protected by the free exercise clause and the free speech clause, is at the "core" of the First Amendment. *DeBoer v. Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001) ("Religious expression holds a place at the core of the type of speech that the First Amendment was designed to protect."); Cedric Merlin Powell, *The Scope of National Power and the Centrality of Religion*, 38 BRANDEIS L.J. 643, 678 (2000) ("Since religious expression is a distinct form of First Amendment 'super speech' (doubly protected as free exercise of religion and free speech), it is, like free speech, at the very core of the First Amendment."). Second, it may be difficult to identify a state interest sufficient to defeat the constitutional right to speak and solicit on behalf of a religious view. *Cf. Charles Gardner Geyh, Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 882 (2007) ("Any state-imposed restriction on the content of a judge's speech is presumably subject to strict scrutiny."). The protection of the prestige of judicial office or the state's interest in protecting individuals from "coercive" solicitations by judges does not appear applicable, much less compelling, especially where a judge, as an adherent to a particular religious faith, solicits people who share the judge's beliefs. A judge who, without expressly or impliedly referring to his or her judicial status requests or even imploring other congregation members to support religious endeavors is simply not exploiting the judicial office.

three express rationales have been offered to justify the exception. First, some states consider the act of passing a collection basket as de minimis and beyond the concern of a code of judicial conduct.<sup>358</sup> Other jurisdictions have concluded that the non-verbal act of collecting contributions is not a solicitation.<sup>359</sup> The third and most compelling rationale is simply that the decision of a congregation member to place a donation in the basket is not influenced by the power or prestige of the usher who happens to be a judge.<sup>360</sup> The donor may be concerned with pleasing or displeasing a higher authority, but that authority is not the judge.

Although the 2007 Code does not weigh in directly on the propriety of a judge passing a collection basket, Comment 3 to Rule 3.7 gives some indication as to the likely resolution of the issue under the new Code.<sup>361</sup> Comment 3 provides that a judge may “serve as an usher . . . at fund-raising

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Third, courts have determined that a state may not prohibit a judge from personally and directly soliciting funds from others, including attorneys, in support of the judge’s campaign for judicial office. *See* cases cited *supra* note 270. If a judge has a constitutionally protected right to solicit contributions for his or her personal political advancement, it is difficult to justify a ban on religious solicitations that are of no direct benefit to the judge. This is especially true because while lawyers who practice before the judge are likely to be the targeted donors in judicial campaigns, they are unlikely to be targets in a religious solicitation. Fourth, courts have recently given judges enormous leeway in expressing religious beliefs even when the expression unequivocally establishes a bias against certain groups. *See, e.g.,* Comm’n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1015 (Miss. 2004), (holding that the state’s interest in judicial impartiality does not outweigh a judge’s right to express his religiously based belief that, “gays and lesbians should be put in some type of mental institute”). Surely, a judge’s faith-based solicitation is less offensive and damaging to public confidence than the religious expression protected in *Wilkerson*.

358. *E.g.,* R.I. CODE OF JUDICIAL CONDUCT Canon 4C3(b) cmt. (2007), <http://www.courts.state.ri.us/supreme/jtd/code.pdf> (“Canon 4 should not be read as proscribing participation in de minimis fund-raising activities so long as a judge is careful to avoid using the prestige of office in the activity. Thus, e.g., a judge may pass the collection plate during services at church[ ] . . . .”); *accord* WIS. CODE OF JUDICIAL CONDUCT SCR 60.05(3)(c)(2)(d) cmt. (2004), <http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=27626>.

359. *E.g.,* N.Y. Advisory Comm. on Judicial Ethics, Joint Op. 89-83/89-84 (1989), <http://www.nycourts.gov/ip/judicialethics/opinions/89-83.pdf>. Recognizing the weakness of its position that passing a “collection” plate among a group of people who are encouraged and expected to donate is not a solicitation, the New York Advisory Committee provided an alternative basis for its holding. The Committee stated that “[w]hile a technical argument could be made that the usher’s function of passing a collection basket or plate during religious services relates to fundraising, . . . [t]he Committee believes that the legal maxim ‘de minimis non lex curat’ — ‘the law does not concern itself with trifles,’ applies here.” *Id.*

360. *See* Ariz. Judicial Ethics Advisory Comm., Op. 96-13 (1996), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/96-13.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/96-13.pdf) (“[T]he risk that a person would feel pressured by the prestige of the judge’s office is minimal under these circumstances even if some members knew the usher was a judge or considered the act of passing the basket as a solicitation.”).

361. MODEL CODE OF JUDICIAL CONDUCT R. 3.7 cmt. 3 (2007).

events sponsored by educational, religious, charitable, fraternal or civic organizations.”<sup>362</sup> The Reporter’s Explanation of Changes further specifies that a judge may handle money at a fund-raising event provided that the circumstances surrounding the event do not exploit the judicial office or create “even subtle [or] unstated coercion.”<sup>363</sup> Ignoring for a moment that a worship service is not a fund-raising event,<sup>364</sup> the assistance ordinarily provided by a congregation member in the offering process does not implicate the concerns identified by the Reporter. Of course, in some sense, coercion might result if a state Supreme Court Justice was invited to be a “guest” or “celebrity” usher. In that case one could reasonably assume that judicial prestige was being asserted.<sup>365</sup> Likewise, if an usher wore judicial robes or announced his or her judicial title during the collection, an exploitation of the judge’s office would be inferred. But without special circumstances, a judge’s solicitation of other members of the same house of worship hardly plays on judicial power or prestige.<sup>366</sup>

#### F. Reoccurring Fund-Raising Issues not Addressed by the 2007 Code

Two situations faced by judges that arguably involve the collateral misuse of office are not mentioned in the new Code. First, what is the ethical responsibility of a judge who is announced as the surprise and unadvertised award recipient while attending a fund-raising event sponsored by a non-law-related organization? Second, is a judge precluded from playing a featured role at an event where the sponsoring agency plans to produce an ad book containing messages honoring the judge?

##### 1. *Unannounced Awards*

Assume that a local Rotary Club conducts a very profitable chicken dinner and live auction each year.<sup>367</sup> After the dinner and before the auction

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362. *Id.*

363. *Id.* Reporter’s Explanation of Changes; *see supra* notes 323-29 and accompanying text.

364. Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.state.va.us/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/jirc/opinions/2008/08_1.html) (“[A] regular religious service should not be considered a ‘fund raising event’ merely because the service traditionally includes the collection of small donations . . .”).

365. *Cf. supra* note 318 (collecting advisory opinions holding that designating a judge as a “celebrity” participant in a secular fund-raising event is a misuse of judicial prestige).

366. This fact has been recognized by Louisiana. LA. CODE OF JUDICIAL CONDUCT Canon 5B(2) (2006), *available at* <http://www.lasc.org/rules/supreme/cjc> (“However, it shall not be a violation of this Canon for a judge to privately solicit funds for the judge’s local church from a local church member.”).

367. This hypothetical event is loosely based on a “pork-chop dinner and auction” sponsored by the Antioch, Illinois, Rotary Club which the author has attended.

begins, the club presents an award to a non-member who has worked to enhance the success of young people in the community. The identity of the recipient is revealed for the first time during the award presentation. Neither the fact that an award will be given nor the name of the recipient is included in materials promoting the event.

A judge and her husband attend the dinner one year, as they have for the past fifteen years, and to the surprise of all (except the judge's husband) the judge is announced as the honoree. The judge's selection is based on the fact that she has spoken at more than 100 schools, created a Law Day program for high school students, and presides over mock trials at elementary and secondary schools. The announcement of the judge's name, along with a description of her contribution to children, is followed by a thunderous round of applause. All eyes turn to the judge, expecting the judge to leave her seat at the dinner table and approach the podium to accept the award. The judge is surprised by the turn of events and knows that her state's judicial code (patterned after the 2007 Code) prohibits a judge from "receiving an award or other recognition"<sup>368</sup> at a fund-raising event of a non-law-related organization, like the Rotary. As the applause starts to subside, the judge has three possible courses of action.

First, the judge could proceed to the podium and graciously accept the award on behalf of all judges who devote their time to educate children about the legal system and conclude by promising to display the award proudly in her chambers.

Second, the judge could decline to accept the honor,<sup>369</sup> explaining to the audience that the code of judicial conduct prevents a judge from receiving awards at fund-raisers. The judge could then return to her seat or, in the interest of reducing the embarrassment to the event's organizers and attendees, just leave.

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368. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

369. This advice was given to a judge in New York. N.Y. Advisory Comm. on Judicial Ethics, Op. 88-09 (1988), [http://www.nycourts.gov/ip/judicialethics/opinions/88-09\\_.pdf](http://www.nycourts.gov/ip/judicialethics/opinions/88-09_.pdf) (advising judge to decline a plaque presented at a civic association's fund-raising dinner even though neither the award nor the recipient was announced prior to the dinner and even though the Committee acknowledged that its opinion "represents an extreme application on the [anti-solicitation] rule"). Opinion 88-09 was abrogated by N.Y. Comp. Codes R. & Regs. tit. 22, § 100.4 (c)(3)(ii) (2008) (permitting a judge to accept an unadvertised award ancillary to a civic or charitable fund-raising event); *see also* Ariz. Judicial Ethics Advisory Comm., Op. 00-06 (2000), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/00-06.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/00-06.pdf) (suggesting that if the announcement of the judge's attendance at a fund-raising event "is significant and calls special attention to the judge, the judge probably should ask the announcer or host to make a public disclaimer of the judge's involvement in the event, as awkward as that might be").

Third, the judge could hope Hagrid would arrive quickly with Harry Potter's invisibility cloak.<sup>370</sup>

Which response is most likely to enhance public confidence in the judiciary? Someone unschooled in the fine points of judicial ethics (the disinterested, objective, reasonable observer)<sup>371</sup> would most likely conclude that the best course of action is for the judge to humbly accept the award and bask in the complimentary, trust-building information imparted by the presenter. Those schooled in judicial ethics should reach the same conclusion, because the rationale supporting a ban on judicial involvement in fund-raising simply does not apply in the context of an unannounced award. In the hypothetical situation presented, the judge's name was not used to draw people to the event or to increase bidding. There is certainly no danger that a bidder will expect a judicial favor in return for purchasing an auction item. Nor has the judge directly or indirectly solicited anything. This simply is not a situation in which the judicial office has played any role in the audience's decision to attend or bid. Because surprise or unannounced awards do not in any way exploit the judicial office,<sup>372</sup> some states permit a judge to accept these awards.<sup>373</sup> The 2007 Code apparently does not.<sup>374</sup> This is un-

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370. See J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 201 (1997) (describing Harry's receipt of an "invisibility cloak" as a Christmas gift). Other options for the judge include leaving without explanation, and attempting to halt the presentation as soon as it is apparent the judge is the honoree. These alternatives not only damage public confidence in the judiciary, but are just plain rude.

371. The propriety of judicial behavior is determined by how it appears to the reasonable, disinterested, objective observer, that is, the "average person encountered in society." *In re Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991); *Miller v. Blackden*, 913 A.2d 742, 744 (N.H. 2006) (stating that judicial impartiality is to be judged by the fully informed, objective, disinterested observer).

372. See Mass. Comm. on Judicial Ethics, Op. 99-17 (1999), <http://www.mass.gov/courts/sjc/cje/99-17h.html> (admitting that excluding the judge's name from all event advertising "alleviates possible concerns about . . . lending the prestige of . . . office to the fund-raising project").

373. See, e.g., N.Y. CODE OF JUDICIAL CONDUCT, N.Y. COMP. CODES R. & REGS. tit. 22, § 100.4 (C)(3)(b)(ii) (2008) (permitting judge to accept an unadvertised award ancillary to a civic or charitable fund-raising event); N.Y. Advisory Comm. on Judicial Ethics, Op. 04-57 (2004), [http://www.nycourts.gov/ip/judicialethics/opinions/04-57\\_.htm](http://www.nycourts.gov/ip/judicialethics/opinions/04-57_.htm) (advising that a judge may accept an award at a church's anniversary fund-raising celebration but "the judge's name cannot appear on the event tickets or on any advertisement associated with the event (i.e. flyers, journals, newspapers)"); Pa. Conference of State Trial Judges Judicial Ethics Comm., Informal Op. 4/24b/3 (2003) (permitting acceptance of an award presented at a nonprofit organization's fund-raising event provided "[t]he "publicity, promotions, and invitations for the event do not mention the award or the judge's name"); see also WIS. CODE OF JUDICIAL CONDUCT SCR 60.05(3)(c)(2)(d) cmt. (2007) ("A judge may be a speaker or guest of honor at an organization's fund-raising event provided there is no advertising of the judge as a speaker or guest of honor . . . and provided that any contributions at the event are made prior to the judge's speech or presentation as guest of honor."); *Storms v. Action Wisconsin, Inc.*, 754 N.W.2d 480, 488 (Wis. 2008) (citing Wis. SCR 60.05(3)(c)(2)(d) in support

fortunate because community awards build, rather than erode, public confidence in the judiciary.<sup>375</sup>

## 2. Fund-Raising Journals

Fund-raising journals are often produced in conjunction with annual dinners and award ceremonies because they offer a low-cost means of raising money.<sup>376</sup> Sometimes referred to as “souvenir” journals or programs,<sup>377</sup> or program books,<sup>378</sup> fund-raising journals vary in format but usually contain information about the sponsoring entity and the purpose of the event.<sup>379</sup> The journals always include space purchased by businesses, organizations, or individuals offering support or congratulations to the group that sponsors the event or a person honored or otherwise featured at the function.<sup>380</sup>

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of its finding that a judge’s unadvertised speech at a fund-raiser held by a civil rights organization did not constitute a misuse of judicial prestige).

374. MODEL CODE OF JUDICIAL CONDUCT R. 3.7A(4) (2007) (creating no exception to the rule prohibiting acceptance of an award at a fund-raising event not concerning the law, the legal system or the administration of justice).

375. See U.S. Judicial Conference Comm. on Codes of Conduct, Op. 46 (1975, revised 1998), <http://www.uscourts.gov/guide/vol2/46.html> (“[T]he entire judiciary benefits from public praise of one of its members.”); Miriam A. Cherry & Robert L. Rodgers, *Tire-sias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141, 1186 (2006) (“Awards, honors, and praise from the public as well as legal commentators and practitioners all strengthen a Justice’s good reputation.”).

376. JOAN FLANIGAN, *THE GRASS ROOTS FUNDRAISING BOOK* 243 (1992) (estimating the profit from a fund-raising journal to be about 90%); HARRY A. FREEDMAN & KAREN FELDMAN, *BLACK TIE OPTIONAL: A COMPLETE SPECIAL EVENTS RESOURCE FOR NONPROFIT ORGANIZATIONS* 137 (2007) (“These [ad books] can be hugely profitable.”).

377. See, e.g., N.Y. Advisory Comm. on Judicial Ethics, Op. 94-48 (1994), <http://www.nycourts.gov/ip/judicialethics/opinions/94-48.pdf> (noting that an attorneys’ association raised money by soliciting ads in a “souvenir journal”); Md. Judicial Ethics Comm., Op. 1975-01 (1975), <http://www.courts.state.md.us/ethics/pdfs/1975-01.pdf> (describing a “souvenir program” containing congratulatory messages to the sponsoring agency, guest speaker, and honoree).

378. Mass. Comm. on Judicial Ethics, Op. 92-4 (1992), <http://www.mass.gov/courts/sjc/cje/92-4h.html> (describing a synagogue’s fund-raising “program book”).

379. KIM KLEIN, *FUNDRAISING FOR SOCIAL CHANGE* 133 (5th ed. 2007) (describing the standard format of a souvenir program).

380. *Id.*; e.g., Fla. Judicial Ethics Advisory Comm., Op. 99-09 (1999), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet9/9909.html> (noting that “the public may purchase ads in a souvenir journal congratulating the nominee(s) or inductee(s), promoting an organization, a cause, or an individual”); Md. Judicial Ethics Comm., Op. 1975-01 (1975), <http://mdcourts.gov/ethics/opinions/1970s/1975-01.pdf> (“[F]unds . . . are derived from the publication of a souvenir program which contains messages of congratulations to [X organization], the guest speaker, and the recipient of the award.” (last alteration in original)).

A quality souvenir program is produced each year by the ABA Commission on Women in the Profession as part of its Margaret Brent Awards Luncheon.<sup>381</sup> The 2007 Margaret Brent Program Book includes a welcome from the Commission Chair and other ABA and local dignitaries; a description of the purpose of the event; award criteria; a list of past recipients; an agenda; a biography of the five 2007 Margaret Brent award winners, including two judges; and an acknowledgement of the luncheon sponsors.<sup>382</sup> The remainder of the Program Book consists of “tributes” to the honorees.<sup>383</sup> The tributes for the 2007 Program Book were purchased by bar associations, lawyers, businesses, and others at a cost of \$250 for a quarter-page ad, \$500 for a half-page ad, and \$1,000 for a full-page ad.<sup>384</sup>

Does the 2007 Code prohibit a judge from playing a featured role at a law-related fund-raiser where ads, such as those appearing in the Margaret Brent Program Book,<sup>385</sup> are sold honoring or recognizing the judge? The answer to this question is controlled by another question: Is the selling of ads or tributes, using the judge’s name, a misuse of judicial prestige to promote a private fund-raising effort? The manner in which the state of New York dealt with the issue is instructive.

Under Canon 4C(3)(b)(i) of the 1990 Code, a judge was prohibited from speaking or receiving an award at any fund-raising event including an event in which the profit was achieved through the sale of ads in a souvenir journal.<sup>386</sup> Most states adopted this model rule and so never had reason to

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381. *E.g.*, ABA Commission on Women in the Profession, *17th Annual Margaret Brent Awards Luncheon Program Book* (2007), available at <http://www.abanet.org/women/margaretbrent/07/BrentTributeProgram2007.pdf>; see also ABA Commission on Women in the Profession, *18th Annual Margaret Brent Awards Luncheon Program Book* (2008) (copy on file with author).

382. *17th Annual Margaret Brent Awards Luncheon*, *supra* note 381 at 3-20.

383. *Id.* at 21-55 (displaying tributes to the honorees).

384. ABA Commission on Women in the Profession, Program Book Tribute Pages and Reservation Form-2007 Margaret Brent Awards Luncheon, Ad Specification/Cost, available at <http://www.abanet.org/women/margretbrent/07/BrentInvitation2007.pdf> (last visited Jan. 7, 2009). The ad rates remained the same for the 2008 Margaret Brent Program Book. See ABA Commission on Women in the Profession, Program Book Tribute Pages and Reservation Form-2008 Margaret Brent Awards Luncheon, Ad Specification/Cost, available at <http://www.abanet.org/women/margaretbrent/tributebook.html> (last visited Jan. 7, 2009).

385. No opinion is expressed concerning whether the Margaret Brent Awards Luncheon in general, or the Margaret Brent Program Book in specific, has a “fund-raising purpose” as that term is used in Rule 3.7 of the 2007 Code.

386. See Fla. Judicial Ethics Advisory Comm., Op. 99-09 (1999), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet9/9909.html> (concluding that a judge may not receive an award and be inducted into a Women’s Hall of Fame where program advertisements are sold to raise funds); see also Md. Judicial Ethics Comm., Op. 1975-01 (1975), <http://mdcourts.gov/ethics/opinions/1970s/1975-01.pdf> (interpreting the 1924 Canons to preclude a judge from being honored as “Woman of the Year” because funds would be derived from sales of ads in a souvenir program). If the profit obtained from the journal merely offsets the cost of the function, the journal is not considered a fund-raising

decide whether ad books that included tributes to a judge misused judicial prestige. In these jurisdictions, as soon as it was apparent that a profit-producing journal was involved, the event was off-limits regardless of whether ads were sold in the judge's name or not. However, a few states departed from the 1990 Code and permitted a judge to speak or be honored at a fund-raising function if it was sponsored by certain categories of law-related organizations.<sup>387</sup> One of these states, New York, allows a judge to serve as a speaker or honoree at a bar association, law school, or court employee organization's fund-raiser.<sup>388</sup>

The New York Advisory Committee interpreted the rule authorizing judges to serve as an honoree or speaker at a bar, law school, or court employee event to also permit the publication of an event journal in which lawyers and others purchase space to congratulate the featured judicial guest.<sup>389</sup> The Committee reasoned that, so long as the judge does not personally solicit ads, "it is not unethical to permit the use of the judge's name in a fund-raising journal . . . [because] the use of the judge's name in the journal [does] not constitute active fund-raising."<sup>390</sup>

The 2007 Code does not specifically address the propriety of producing fund-raising journals in connection with law-related events. However, Rule 3.7(A)(4) of the new Code appears inclusive enough to permit the use of journals that contain paid tributes to a judge.<sup>391</sup> The Rule itself provides that a judge may "be[ ] featured on the program of, and permit[ ] his or her title to be used in connection with an event" having a fund-raising purpose provided the event is sponsored by a law-related organization.<sup>392</sup> Further, it is safe to assume that the drafters of the 2007 Code were aware of the Mar-

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mechanism and a judge is permitted to participate in the event. N.Y. Advisory Comm. on Judicial Ethics, Op. 89-39 (1989), [http://www.nycourts.gov/ip/judicialethics/opinions/89-39\\_.pdf](http://www.nycourts.gov/ip/judicialethics/opinions/89-39_.pdf) (concluding that a judge may be honored at a dinner-dance if the proceeds from ticket sales and journal ads are used only to defray the cost of the event); *accord* Mass. Comm. on Judicial Ethics, Op. 2003-1 (2003), <http://www.mass.gov/courts/sjc/cje/2003-1n.html>.

387. *See, e.g.*, ALASKA CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i) (2007) ("[A] judge may be the speaker or guest of honor for public service organizations that seek improvement in the administration of justice, benefit indigent representation, or assist access to justice"); ARIZ. CODE OF JUDICIAL CONDUCT Canon 4C(3) (2007) ("[A] judge may be an announced speaker at a fund-raising event benefiting indigent representation or public institutions of legal education.").

388. N.Y. CODE OF JUDICIAL CONDUCT 100.4(C)(3)(b)(ii) (2008).

389. N.Y. Advisory Comm. on Judicial Ethics, Op. 94-48 (1994), [http://www.nycourts.gov/ip/judicialethics/opinions/94-48\\_.pdf](http://www.nycourts.gov/ip/judicialethics/opinions/94-48_.pdf) (advising that a judge may accept an award at the dinner of an association of attorneys which raises money by soliciting advertisements in a souvenir journal).

390. N.Y. Advisory Comm. on Judicial Ethics, Op. 00-23 (2000), [http://www.nycourts.gov/ip/judicialethics/opinions/00-23\\_.htm](http://www.nycourts.gov/ip/judicialethics/opinions/00-23_.htm).

391. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(4) (2007).

392. *Id.*; *see also id.* cmts. 1-5.

garet Brent Program Book<sup>393</sup> and the relevant advisory opinions from New York.<sup>394</sup> These facts support the conclusion that Rule 3.7 was intended to permit souvenir journals containing congratulatory messages paid for by lawyers, businesses, and others, so long as the judge does not solicit the advertisements.<sup>395</sup>

But clearing the misuse of prestige hurdle does not end the inquiry. An advertisement is also prohibited if the nature, tone, or content of the ad leads the ordinary observer to question the honoree-judge's independence, integrity, or impartiality.<sup>396</sup> For example, a congratulatory message must not imply that the honored judge engages in demeaning or discriminatory conduct toward litigants.<sup>397</sup> Similarly, it is impermissible to convey the impression that the tribute's sponsor is in a special position to influence the judge.<sup>398</sup> Merely referring to a judge as a "friend" or "colleague" of the person purchasing the ad is probably insufficient to create an appearance of favoritism or partiality. However, including a photograph of a judge in an ad purchased by a law firm that appears before the judge,<sup>399</sup> or otherwise

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393. Loretta C. Argrett was a member of the Joint Commission. ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Commission Roster, <http://abanet.org/judicialethics/roster.html> (last visited Jan. 7, 2009). She also received the Margaret Brent Award in 2005. *15th Annual Margaret Brent Awards Luncheon* at 14, available at <http://abanet.org/women/mb/15/body.pdf> (last visited Jan. 7, 2009) (on file with author).

394. Opinions issued by the New York Advisory Committee on Judicial Ethics are available on-line at <http://www.nycourts.gov/ip/acje/whatis.shtml>. The New York opinions concerning the use of fund-raising journals were discussed in leading articles on judicial ethics prior to the creation of the Joint Commission. See, e.g., Cynthia Gray, *A Judicial Survival Guide to Balancing Social Commitments with the Code of Judicial Conduct*, 35 JUDGES' J. 18, 24-25 (1996); CYNTHIA GRAY, A JUDGES ATTENDANCE AT SOCIAL EVENTS, BAR ASSOCIATION FUNCTIONS, CIVIC AND CHARITABLE FUNCTIONS, AND POLITICAL GATHERINGS 8 (Am. Judicature Soc'y 1996).

395. See *In re Kaplan*, Determination (N.Y. State Comm'n on Judicial Conduct May 17, 1983), [http://www.scjc.state.ny.us/Determination/K/Kaplan,\\_louis\\_\(2\).htm](http://www.scjc.state.ny.us/Determination/K/Kaplan,_louis_(2).htm) (admonishing judge in part for assisting his wife in soliciting ads for a souvenir journal).

396. See MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C) (2007) ("[W]hen engaging in extrajudicial activities, a judge shall not participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity or impartiality.").

397. See *id.* R. 3.1 & cmt. 3 (2007) ("Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality.").

398. See *id.* R. 2.4(C) ("A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."); MODEL CODE OF JUDICIAL CONDUCT Canon 2B (1990) ("[N]or shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.").

399. See N.Y. Advisory Comm. on Judicial Ethics, Op. 04-30 (2004), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/92-12.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/92-12.pdf) ("[I]ncorporating the judge's image into the firm's web site . . . create[s] an appearance that the judge maintains a relationship with that firm . . . which might lead individuals to question the judge's impartiality or convey to them the impression that the law firm is in a special position to influence the

implying a special relationship between the firm and the judge, must be avoided.<sup>400</sup>

A difficult situation arises when a litigant or a potential litigant purchases a tribute to a judge. Will the appearance of the ad imply that the litigant enjoys a favored status with the judge, thereby leading to the perception that the judge's independence, integrity, or impartiality has been compromised? If that conclusion can be reasonably drawn from the circumstances, and the judge has advance notice of the proposed ad, the judge has a duty to object to its placement in the journal.<sup>401</sup> In the event that the ad appears over the judge's objection, it may arguably result in the judge's disqualification from matters involving the sponsor of the tribute.<sup>402</sup> However, a party or future party's purchase of an ad should not routinely call the judge's impartiality into question. This is because a judge receives no tangible benefit from the posting of an ad and usually has no control over the submissions that an independent entity accepts for publication. Needless to say, unusual circumstances could arise whereby a litigant's purchase of ad space might indicate an attempt to influence a judge. For example, if a litigant or law firm "honored" a judge by purchasing ten pages of a twenty page souvenir journal at a cost of \$1,000 a page, a reasonable suspicion would arise. But even in this illustration, disqualification of the judge should be exercised with caution so as not to supply a litigant or lawyer with an expensive, but otherwise painless, means to remove a judge from a case.

#### CONCLUSION

Restricting a judge's participation in fund-raising activities is justified to the extent that it is necessary to avoid the appearance that the power and prestige of the judiciary is being employed to persuade another to make a charitable contribution. Whether a particular act will be perceived to trade upon the judicial office for a private advantage is judged by that arbiter of

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judge . . . ."); Ariz. Judicial Ethics Advisory Comm., Op. 92-12 (1992), <http://www.mass.gov/courts/sjc/cje/90-1h.html> (finding that use of a judge's photograph in the brochure of a computer manufacturer impermissibly promotes a private business interest).

400. See Mass. Comm. on Judicial Ethics, Op. 90-1 (1990) (finding that including a judge's name in the judge's former law firm's brochure might give the impression "that the firm is influential because of its special . . . association with a high-ranking member of the Commonwealth's judiciary").

401. See *id.* (advising a judge to object to his former firm's use of the judge's name and title in a brochure the firm was producing for clients and prospective clients).

402. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[ ] . . .").

all things—the ordinary, reasonable, disinterested observer.<sup>403</sup> Jane Q. and John Q. Public are deemed to be the appropriate authority to evaluate the likely impact of a judge’s extrajudicial endeavors because it is the public’s confidence in the judiciary that keeps our justice system viable. So what are Ms. and Mr. Public’s opinions concerning the coercive effect of a judge speaking at a bar association fund-raising dinner, or serving as a “celebrity” bagger at the homeless shelter’s canned goods drive? The answer is simple—we have no idea. There is virtually no empirical data on how the public views any type of extrajudicial conduct, much less a judge’s participation in charitable fund-raising.<sup>404</sup> This means that judges are left to divine, through intuitive means, the general public’s reaction to off-bench activities. The virtual impossibility of this task, together with the fact that ethical codes carry a strong presumption against fund-raising involvement, leads most advisory and disciplinary bodies to assume a detrimental effect on public confidence where none has been shown. Worse yet, on the theory that any relaxation of the rules will open “Pandora’s Box,”<sup>405</sup> advisory committees have prohibited activities while admitting that the activity in no way implicates the interests supporting fund-raising restrictions.<sup>406</sup> So what can be done to facilitate the accurate assessment of the impact that a particular charitable activity is likely to have on confidence in the judiciary?

One possibility is to begin gathering empirical data concerning how the reasonable, disinterested observer views various levels of judicial participation in fund-raising activities. Public opinion polls or focus groups could be employed, although it is doubtful that judicial conduct, on or off the bench, should be dictated by polling results. If we accept Dean Hazel Bey’s position that judges must yield to public opinion in their extrajudicial roles,<sup>407</sup> then we also must be ready to deal with the possibility that public opinion, in many particulars, may run counter to the beliefs and traditions of the bench and bar. Recall that one study has shown that sixty-four percent

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403. See *supra* note 371.

404. Dubeck, *supra* note 25, at 580 n.51 (“There is little to no empirical data on public opinion regarding extrajudicial conduct.” (citing Steven Lubet, *Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment*, 2 GEO. J. LEGAL ETHICS 665, 668 (1989))); Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U. L. REV. 781, 785 (2008) (employing a “novel” empirical model to test the intuitive assumption that the perception of judicial impartiality is negatively impacted by less restrictive rules of judicial conduct).

405. Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/2005-02.html> (“[O]pening the Pandora’s Box of fund-raising only a crack can lead to abuse. For this reason, the box must remain closed.”).

406. See *supra* note 372.

407. Beh, *supra* note 49, at 665 n.23 (“While the justices must never yield to public opinion in their judicial role, they must yield in their extra-judicial role because they are the guardians of public confidence in the independence and integrity of the system.”).

of Americans apparently have more confidence in an elected, rather than appointed judiciary.<sup>408</sup> A judicial code reflecting what actually builds public confidence may look quite different from a code based upon what judges and lawyers think enhances public confidence.

Of course there are other means to secure information regarding how the public perceives judicial involvement in activities that raise funds. The drafting committee of the next ABA Model Code could appoint an advisory committee of non-attorneys for the purpose of providing insight on the perceived effect of specific charitable activities on public trust. In addition, states that have loosened the restrictions on fund-raising could be surveyed to determine if “Pandora’s Box” has indeed opened, or if there has been a noticeable increase in the number of complaints filed against judges, or unfavorable media coverage, or other indicia of the waning of public confidence.

Another, more radical approach might be to replace the ordinary, reasonable, *disinterested* observer with the ordinary, reasonable, but *interested* observer. Under this test, a judge’s activity in support of a money-raising effort would be judged directly thorough the eyes of the target of the solicitation. The controlling question would become: Is the ordinary, reasonable member of the targeted group likely to feel judicial pressure to contribute or entitlement to a return courtroom favor because of the judge’s role in the fund-raising activity? There would no longer be a need to consult the mystery middle-man (the disinterested observer) to see how he or she perceives the degree of pressure on the potential donor. But even assuming a benefit to this modified test, there is little possibility that it will be adopted. The disinterested observer is much too ingrained in the law of judicial conduct and ethics.<sup>409</sup>

Until a better method is devised to distinguish between fund-raising participation that is harmless to, or actually increases confidence in the judiciary, and conduct that is detrimental to the public’s faith in the system, we at least have the duty to carefully examine each proposed restriction on a judge’s community life to ensure that it has a direct relation to the policy considerations supporting the restriction.

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408. Annenberg, *Public Understanding*, *supra* note 12 (reporting that 64% of survey respondents favored the direct election of judges); *see also* American Justice Partnership Foundation, *Voter Opinion on the Election or Appointment of State Supreme Court Justices* (July 2008) at 1, available at [http://www.legalreforminthenews.com/2008PDFS/State\\_Supreme\\_Court\\_Elected\\_vs.\\_Appointed\\_7-8-08.pdf](http://www.legalreforminthenews.com/2008PDFS/State_Supreme_Court_Elected_vs._Appointed_7-8-08.pdf) (last visited Jan. 7, 2009) (finding that 75% of survey respondents favored the election rather than the appointment of state supreme court judges).

409. For a discussion comparing the interested, or “litigant-based” reasonable person and the disinterested, or “community based” reasonable person in the context of contract interpretation, see Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293 (1997).