Supreme Court of Wisconsin
Judicial Conduct Advisory Committee
Date Issued: November 23, 1998

OPINION 98-12

ISSUE

Is selling fruit door-to-door to raise money for a charitable organization a *de minimis* activity?

ANSWER

No.

FACTS

A judge wishes to participate in a fund-raising campaign of a charitable organization of which the judge is a member. In this campaign, the community in which the judge resides is divided into areas of several square blocks each. Within each area, the assigned member solicits sales of cases of fruit at $10-$12 per case by going door-to-door. Each member typically sells 25-50 cases. The judge also asks the Committee to provide guidelines as to which fund raising activities are *de minimis*.

DISCUSSION

The Committee concludes that the issue presented involves provisions of SCR 60.05(3), 60.01(4), 60.03(1), 60.05(1), and the Preamble to the Code of Judicial Conduct.

A. SCR 60.05(3)

Judges are, with only two exceptions described below, prohibited from being involved in charitable and civic fund-raising, as stated in SCR 60.05(3)(c)2.a:

> 2. A judge, in any capacity:
>
> a. May assist [a nonprofit charitable or civic] organization in planning fund-raising activities ... but may not personally participate in the solicitation of funds or other fund-raising activities....

As stated in the Preamble to the Code of Judicial Conduct, use of the language "may not" creates a "binding obligation" for judicial adherence to the rule. Reasons for this prohibition are described in Wis. Advisory Ops. Numbers 98-1, 98-3, and 98-5 (1998). The Committee finds only two exceptions.

Exception #1. SCR 60.05(3)(c)2.a further states in part:

> [A] judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority.

Exception #2. The Comment to SCR 60.05(3)(c)2.d states in part:

> SCR 60.05 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 the office in the activity.

The question raised by the request for a formal advisory opinion concerns the second exception. Following the reasoning in Section B below, the Committee finds that the proposed activity does not constitute a *de minimis* fund-raising activity as defined by the Code of Judicial Conduct, and is thus not permitted.

B. SCR 60.01(4), 60.03(1), 60.05(1), and 60.05(3)

What activities in civic or charitable fund-raising activity may be considered *de minimis* under the Code of Judicial Conduct? Charitable organizations and individual situations vary widely, making it difficult to list universally-applicable guidelines. The Code of Judicial Conduct does not contain such a list. In each situation a balance must be struck between two opposing justifications for action. On one hand, judges have a constitutionally-protected right to free speech and association, and in any case isolation of a judge from the community is neither possible nor desirable. *See* Comment to SCR 60.05(1); JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 10.07, at 307-09 (2d ed. 1995). On the other hand, restrictions on judicial behavior protect the impartiality of the judge, maintain public confidence in the judiciary, and prevent a judge from being distracted by extraneous activities. *See* Comment to SCR 60.03(1); SHAMAN ET AL., *supra* §§ 10.02-.06, at 303-07.

The following analysis of relevant sections of the Code of Judicial Conduct takes the need for such a balance into consideration, and derives from the Code some principles which must be used by persons subject to it.

The term *de minimis* is defined in SCR 60.01(4):

> "De minimis" means an insignificant interest that does not raise reasonable question as to a judge's impartiality or use of the prestige of the office.

This definition contains three criteria by which a fund-raising activity must be evaluated to determine whether it is *de minimis*. Any interest involved must be "insignificant"; if insignificant, two other standards must next be applied: the activity must not threaten the impartiality of the judge, and the judge's prestige must not be used as a way of raising funds. We analyze these criteria in order.

First, it must be determined if the interest in a particular case is indeed "insignificant." The extended Comment to 60.05(3)(c)2.d states in relevant part:

> Solicitation of funds for an organization ... involve[s] the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control.

This passage reminds us that the solicitation of funds involving direct personal interaction between solicitor and potential contributor creates a reciprocal obligation between the two parties. Contributors are asked to give up something of value which they would not otherwise relinquish. However, it is difficult to state a given dollar amount at which a contribution becomes significant, because what may be "insignificant" in the eyes of the solicitor may be of some significance to a potential donor. This possibility certainly exists when a judge solicits a contribution from a stranger, since the judge cannot know with assurance how the stranger will interpret the significance of the request. Thus the proposed sale of fruit fails to meet the "insignificance" standard of *de minimis* activity.

Even if the activity were held to "involve an insignificant interest," it must pass two additional tests to be considered *de minimis*. The issue of judicial impartiality is not of primary relevance to the present case, but the issue of the use of prestige of office is clearly involved. If the identity of the judge is known to the potential contributor, there is a reasonable possibility that the prestige of judicial office will influence the decision to contribute, regardless of the intent of the judge in soliciting the funds. A judge soliciting a stranger cannot be assured that his or her identity as a judge will be unknown, particularly in a small jurisdiction. Therefore, it is a reasonable possibility that the proposed sale of fruit will involve use of the prestige of office to encourage charitable contributions, and cannot

be considered *de minimis* under SCR 60.01(4).

The Comment to 60.05(3)(c)2.d further states:

> SCR 60.05 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 the office in the activity. Thus, e.g. , a judge may pass the collection basket during services at church, may ask friends and neighbors to buy tickets to a pancake breakfast for a local neighborhood center and may cook the pancakes at the event but may not personally ask attorneys and others who are likely to appear before the judge to buy tickets to it.

In light of the previous analysis, how should we interpret these apparent exceptions to the prohibition on solicitation of charitable and civic contributions? The three examples contained in this Comment suggest that the situation, as well as the relationship between the solicitor and the person solicited, must be considered in determining whether a fund-raising activity would be *de minimis*. In the first example, a church service is a voluntary assembly at which the collection of funds is to be expected by those who choose to attend. A judge passing a basket is one among many doing so. The judge's identity may or may not be known to the persons being solicited, nor does the judge ask for or know if any specific amount has been contributed. The amount contributed is usually determined by the contributor, not by the person soliciting a donation. Thus, the contribution may be considered "insignificant" and the prestige of judicial office appears unlikely to influence it.

In the second example from the Comment, a judge may ask a "friend" or "neighbor" (who is not a stranger) for a small ("insignificant") contribution, only if the prestige of judicial office does not influence the decision to contribute. In contrast, in the third example from the Comment the professional relationship between judge and attorneys precludes such a request: the judge's prestige will certainly be involved, and a reasonable possibility exists that the judge's ability to remain impartial will be threatened by knowing the response of the attorneys to his or her solicitation.

The Committee believes that even situations which are *de minimis* must still be examined on a case-by-case basis, since particular circumstances (e.g., the nature of the organization for which the contribution is being solicited) may cause a conflict with other sections of the Code of Judicial Conduct. The Comment to SCR 60.05(1) states that "a judge should not become isolated from the community in which the judge lives." However, the prohibition on judicial participation in fund-raising does not isolate a judge from the community. There are many ways permitted under the Code of Judicial Conduct in which a

judge may be involved in charitable and civic organizations. Examples can be found in the Code of Judicial Conduct, as well as in prior opinions of this Committee (Wis. Advisory Ops. 98-3, 98-4, and 98-7).

CONCLUSION

The Committee concludes that a judge may not sell fruit door-to-door for a charitable organization, because it is not a *de minimis* activity as defined in the Code of Judicial Conduct. *De minimis* exceptions to the prohibition on judicial involvement in solicitation of charitable contributions are very limited; judges are prohibited by the Code of Judicial Conduct from virtually all personal participation in soliciting charitable and civic contributions.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60--Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 98-12 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 23rd day of November, 1998.

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Thomas H. Barland
Chair