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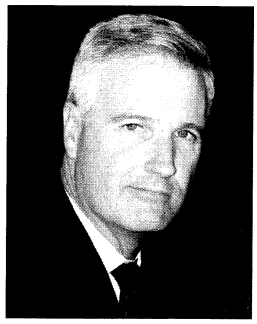
PETER KIEFER

A Question of Ethics

FRANK MAIOCCO AND PETER KIEFER

Going Once, Going Twice . . . Sold!

With the economy continuing to adversely affect public, private, and not-for-profit organizations, it is no wonder that more and more fundraising opportunities are cropping up. Whether beset by churches, schools, civic clubs, or long-established charitable organizations, many of us are individually facing a proliferation of opportunities to "give," "give back," or sustain those institutions that tend to embody our individual sets of values. And, with the general notion that public notoriety effectively expands the various "networks of giving," many organizations have turned to local celebrities, sports heroes, and government leaders to promote causes and raise funds. The apparent goal, of course, being those who lead in any field should also be followed in their giving practices.

With this in mind, a colleague of ours was recently contacted by the local chapter of a national medical research organization and invited, as "a recognized community leader," to participate in the organization's annual fundraising efforts. Acknowledging that his participation in civic activities was at a stark minimum, (**except**, of course, for his position as the local court administrator), and that the judicial canons expressly forbade his participation in certain fundraising activities that might be linked to his profession, our colleague immediately expressed his discomfort with the caller's invitation and politely declined participation. Ultimately, our colleague expressed both regret and surprise at how incensed the caller became.

It is sometimes difficult to articulate to the general public why ethical constraints prohibit us, because of our positions with the court, from certain activities. In fact, it is oftentimes difficult for us, without extensive self-introspection and consultation with each other, to understand the constraints ourselves, particularly where we find our professional obligations in direct conflict with our individual choices. Fundraising activities, when framed between individual choice and our fidelity to the code of judicial ethics, provide a unique illustration of this dynamic.

Respondents

We are pleased that Thu B. Nguyen, assistant court executive officer for the Superior Court in San Luis Obispo, California; Beani Martinez, trial court executive for the 2nd District Juvenile Court, Utah; and, Andrew M. Graubard, director of emergency management and court continuity for the 11th Judicial Circuit of Florida in Miami, accepted our invitation to respond to this month's column.

The Scenario

Court Administrator Bob receives an invitation to field a court team at the annual YMCA bowling tournament. YMCA leadership specifically targets private and public community leaders in an effort to entice broader public support and participation, and Bob's invitation is sent in conjunction with invitations sent to all local government leaders. The bowling tournament is clearly intended to be a fundraising event to support the continuation of YMCA programs.

With a potential opportunity for team-building in mind, Bob registers for the event and solicits the participation of key leadership judges and members of his management team. However, one of the judges discretely reminds Bob that the state's judicial canons prohibit judges from directly soliciting contributions for educational, religious, charitable, fraternal, or civic organizations to avoid lending the prestige of their offices. To support her point, the judge forwards a recent ethics advisory opinion, which concludes that judges are prohibited from speaking at fundraising events even though the judges will not specifically solicit funds.

When Bob suggests that he will limit the team to non-judicial managers, the judge insists that he must adhere to the same ethical constraints that his judges do. Specifically, the judge points to a state ethical canon, modeled after the American Bar Association (ABA) model judicial ethics, which reads:

> Rule 2.12. Supervisory Duties
> (A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this code.
>
> *ABA Model Code of Judicial Conduct, February 2007*

Disappointed, and hoping to avoid an embarrassing internal ethical debate with his judges, Bob dismisses the idea of participating in the event and withdraws his registration.

The experience, however, compels Bob to reflect on his own extracurricular memberships and activities. As a member of his church finance council, Bob recently made an oral appeal to members of his congregation, soliciting participation and financial support for the upcoming church renovation plan. Further, in June and July, Bob took his turn in a local fireworks stand, selling fireworks to raise funds for his daughter's high school lacrosse team. Finally, Bob has been asked by his county manager to consider co-chairing his county's annual United Way appeal.

The Questions

1. Do you agree with the position that the court may not send a representative team to participate in the YMCA fundraising event? Why or why not?

Andrew agreed with the proposition that the court could not send a representative team to participate in the fundraising event based on the possibility that the YMCA could potentially be involved in an unanticipated lawsuit before the court at a later date. He suggested that the court's participation in this or other fundraising activities could be later construed as bias toward the YMCA.

Thu disagreed with the judge's, and Andrew's, interpretation of the fundraising canon and felt Bob should not have withdrawn his registration. She responded that participation in a bowling tournament as part of a team to benefit a non-profit organization is poles apart from "directly soliciting contributions," and that fielding a bowling team does not fundamentally constitute fundraising, per se. Thu opined, "... the Judicial Code of Conduct prohibits solicitations because they may appear coercive. In this instance, no reasonable person will perceive solicitations resulting from the Judge being part of a bowling team as coercive." Thu concluded that judges should not be isolated from the communities in which they serve and live. She suggested that this extrajudicial activity would not cast doubt on judicial impartiality or undermine the judicial office. Rather, it would improve the community's perception of the judiciary.

Beani suggested that the question was not as much about whether the court fields a bowling team, but rather who comprises it. In her analysis, Beani questions whether the court can comfortably participate with a representative team if a judge is not included. She agrees with Andrew, in part, that judicial representation on the team renders it ethically impermissible, but agrees with Thu, in part, that a representative court team may participate if the team is comprised entirely of non-judicial members. Beani cautions, however, that non-judicial court employees may participate only as long as they do not compromise the integrity of the court by using government-owned property in support of outside interests or interfering with the employee's court duties.

2. Is there anything Bob can do to minimize the ethical dilemma and permit the court's participation in this event?

Andrew suggested that Bob could permit non-judicial court employees to participate in the bowling tournament as private citizens, as long as there is no direct or indirect link to their positions or employment with the court. In this regard, Andrew suggested that Bob could field a team as an individual, and that he would need to ensure that his or another individual's name, rather than the court's, appears on any published list of fundraisers.

Beani noted that there is very little Bob can do if his judge insists that such participation falls under Rule 2.12 regarding supervisory duties and if his judge requires court staff to adhere to her interpretation regarding judicial direction and control. However, in her analysis, Beani disagrees with the notion that the judge should have any supervisory role with non-judicial staff. Seemingly, she argues that Bob and his non-judicial staff should adhere to a code of conduct that is distinct from the more stringent canons set out for judges. In support, Beani offers the Encarta Encyclopedia's definition of a judge — a "government official who administers the law in a court of justice by supervising trial, instructing juries and pronouncing judgments and sentences." Beani reasons that Bob's role is different from a judge and that he should retain the authority to field a team if he is exercising reasonable diligence to avoid a conflict of interest or the appearance of a conflict.

Thu would encourage Bob to seek further guidance from his supervising judge and/or the State Ethics Advisory Committee to assist in determining how this rule should be interpreted and applied to non-judicial court managers. Thu recommended highlighting the following points in any conversation to persuade active court participation:

- the fundamental difference between fielding a bowling team in the tournament versus direct solicitation of funds;
- a survey of judicial codes of conduct in other states and the ABA's model code that permit judges to assist organizations in planning related to fundraising, soliciting membership for organizations, and other permissible extrajudicial activities that do not demean the judicial office; and
- the court's, and the county's, history and tradition of participating in other fundraising drives, such as the United Way or the Susan G. Komen walk.

Thu also urged the development of a formal, established process wherein adequate judicial oversight could govern the selection of organizations and fundraising events with which the court can actively participate.

3. In your view, to what extent must Bob adhere to the judicial canons? Is there a point at which he can comfortably participate in fundraising activities without jeopardizing his fidelity to the judicial canons? Where would you draw this line?

Andrew reiterated that Bob should be able to participate in fundraising activities as an individual citizen and never as a representative of the court. Thu agreed that Bob was free to participate in fundraising as a private citizen, though she articulated some conditional parameters. "As a private citizen, Bob can comfortably participate in fundraising activities when they are appropriate, do not create the appearance of impropriety, nor cast doubt on his abilities to perform his job as court administrator, nor impugn the dignity of the court." Thu also conditioned Bob's adherence to the judicial canons

only when they are consistent with the rules of conduct of court professionals, perhaps drawing a distinction between restrictive levels as they apply to judicial versus non-judicial court leaders. Thu reminded that, at all times, Bob needs to be mindful that his individual fundraising efforts are not coercive (e.g., soliciting from his staff).

By contrast, Thu and Beani disagreed with Andrew's absolute prohibition of Bob's fundraising activities as a representative of the court. Rather, each argued that Bob could legitimately represent the court in fundraising activities as long as such activities are expressly authorized by Bob's judges.[1] Beani was quick to note that this judicial discretion and direction worked both ways, however. "As long as Bob is bound by the judge's requirements per Rule 2.12, he must adhere completely if the judge(s) direct..."

4. Commentary following Rule 2.12 in the *ABA Model Code of Judicial Conduct* suggests that a judge is responsible for the conduct of others only when those persons are acting at the judge's direction or control — constructively, while actually "working" for the judge. How does this reconcile with a court leader's 24/7, at-will, and/or FLSA-exempt relationship with the court?

Andrew made a clear distinction between actual work time and private time, notwithstanding the notion of the "24/7" court administrator. "Being at-will 24/7 means to me that we always govern ourselves in a way that professionally represents the court system; however, it should not prohibit us from pursuing our beliefs as long as they are moral, legal, and not a conflict of interest with the court." In this regard, Andrew argued that "off-the-clock" Bob had considerable discretion to participate in fundraising activities as long as they met his prescribed criteria — moral, legal, and not a conflict of interest to the mission of the court.

Thu encouraged court leaders to adhere to the Code of Conduct for Court Professionals, which is consistent with the ABA Model Code of Judicial Conduct. She, too, felt the code sufficiently distinguishes between private time and those times when court employees are performing under the direction and control of their supervising judges. Under either code, the issue of whether court leaders are under the direction of their judge 24/7 is moot.

Beani offered a slightly different perspective. The Model ABA Code was written to encompass judges who, in many cases, are elected or selected to be 24/7 judges. In the absence of express language to the contrary, Rule 2.12 does not make it clear that the judge can only require those under his/her direction or control during working hours. Thus, Beani would interpret it to mean that staff, particularly at the executive level, is an extension of the judges and, therefore, have the same conduct requirements — particularly if that is the perspective of his/her supervising judge. Beani encouraged clearer language to preclude individualized interpretation of the scope and application of the rule and its associated commentary.

5. In your view, has Bob crossed the line by participating in the other fundraising activities? Why or why not? Which activities seemed more appropriate? Why?

All three panelists agreed that Bob acted appropriately when participating in his church renovation campaign and in support of his daughter's athletic team, although each respondent justified his/her position differently. Andrew felt Bob's participation was appropriate as long

as "... his involvement was as 'Bob' and not as The Court Administrator..."

Thu suggested that a complete separation of Bob's professional life from his community involvement is neither possible nor wise. In fact, she suggested his involvement, given the link, was a healthy way of integrally contributing to the community in a way that brings honor, rather than harm, to the image of the court.

By contrast, Beani justified Bob's church and school fundraising activities because he simply was not aware of the scope or application of the code of conduct. She added that, now that he is aware of it, he should consult with his supervising judge to ensure the appropriateness of similar activities in the future.
Acknowledging that there must never be a connection between what an employee does outside work and his position with the judicial branch, Beani strongly emphasized Bob's need to protect his individual choices and activities. She encouraged Bob to regularly approach fundraising and volunteer opportunities as a private citizen and an individual, rather than defined by his profession. Further, if asked about his profession, he should characterize it more broadly (e.g., "I work for the state," as opposed to "I work for the judicial branch of government") rather than immediately linking himself to his court and greater ethical restrictions. "It is important to be careful not to even create an appearance of a conflict."

Andrew insisted on a much harder line regarding Bob's invitation to serve as a co-chair of the upcoming annual United Way appeal. "I do not think that his involvement as the co-chair of the United Way appeal is appropriate as the court administrator. I do feel, however, that Bob could contribute to the United Way as . . . 'Bob the county worker' and not in the name of the court."

6. Does Bob have an obligation to disclose his participation in potentially prohibitive fundraising activities? To whom?

Andrew suggested that Bob should speak with his general counsel when getting involved with fundraising through his office to avoid any apparent or actual conflicts of interest with the court. However, Andrew was, again, very clear regarding the need to distinguish between Bob's official activities and his personal ones. He did not feel Bob had any obligation to disclose fundraising activity when acting as a private citizen, a school parent, or a member of his religious congregation, provided Bob experiences no doubts regarding the moral and/or legal status of the activity.

Beani advanced Andrew's position one step further and suggested that, absent a very clear mandate in Rule 2.12, Bob is not directly obligated to disclose his participation to anyone. However, she noted that every court employee has an obligation "...to exercise reasonable diligence to become aware of personal conflicts of interest, disclose such conflicts to management, or in Bob's case, his supervising judge, and take appropriate steps to eliminate conflicts when they arise."

Thu concluded that Bob should not participate in any potentially prohibitive fundraising activities. These included activities where the cause is inappropriate; the activities involve political campaigns; and/or direct fundraising solicitations are targeted toward staff or litigants. In keeping with Andrew's and Beani's perspective, Thu encouraged Bob to consult with his supervising judge to discuss any private fundraising plans that cast any doubts.

Again, we wish to thank Thu, Beani, and Andrew for their insights on the topic of fundraising in the context of our professional fidelity to the judicial canons. From their diverse opinions, it is clear that the issue is a challenging, and often forgotten one, worthy of perpetual introspection when approached for participation by local, not-for-profit organizations.

Our panelists implicitly have suggested that court managers exercise continuing vigilance in discerning where potential fundraising activities fit in a personal-to-professional continuum. This begs a fundamental question: Is there a greater ethical obligation, or greater implicit restrictions, on the personal fundraising activities of court managers who live in smaller, rural, or less densely-populated communities where residents are known and, perhaps, defined by their respective occupations? We're curious to hear what you think. If you have a few minutes and find this issue compelling, please drop us a few lines to share your comments at fmaiocco@co.kitsap.wa.us or pkiefer@superiorcourt.maricopa.gov.

ABOUT THE AUTHORS

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NOTES

1. Rule 3.7(A) of the ABA Model Code of Judicial Conduct, in part, sets forth a judge's permissible fundraising activities, as follows:

RULE 3.7 *Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities*

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting* contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;....

If non-judicial court leaders are held accountable to the same standard, which is what Rule 2.12 potentially suggests, then it is reasonable for discernment of, and exceptions to, this standard to be thoroughly discussed with one's judge(s) to ensure clarity of discretion and appropriateness.