

Judicial Ethics Committee Advisory Opinion 21-01

May 10, 2021

Question:

The Judicial Ethics Committee has been asked for an opinion on whether a judge may use, or allow to be used, his or her likeness for the purpose of raising funds for a for profit organization that intends to donate a portion of those funds to legal aid societies and other organizations whose goal is to promote greater access to justice.

Answer:

No. The Code of Judicial Conduct prohibits a judge from aiding a for profit organization in planning related to fundraising and soliciting contributions for such an organization or entity. RJC 3.7(A)(1), (2). Additionally, while the Code of Judicial Conduct encourages judges to engage in educational, religious, charitable, fraternal or civic extrajudicial activities concerning the law, the legal system, the administration of justice, and even non-legal matters, such activity is to be conducted with not-for-profit organizations. RJC 3.1, Comment 1. Finally, “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.” RJC 2.4.

DISCUSSION

The instant question was precipitated by a request from DASH4LAW, Inc. (“DASH”) to use the likeness of certain judges to create a non-fungible token (“NFT”) which would be auctioned off with a portion of the proceeds from the auction to be donated to legal aid groups who promote access to justice. In order to fully analyze the issue and how the Code of Judicial Conduct is implicated, we have highlighted specific portions of the participation agreement submitted by DASH, as well as the explanatory memorandum. The participation agreement proposed by DASH states that:

[the] Judge agrees to provide DASH with a digital image (“Art”) for posting by DASH and for DASH to create an associated a non-fungible token (“NFT”) to www.opensea.io, www.rarible.com or any other NFT online marketplace (“Marketplace”) for sale to the highest bidder. If and

only as allowed by the Marketplace, DASH will provide a description of the Art and incorporate any additional terms or restrictions desired by the Parties. DASH will also create a digital wallet to accept donations (“Donations”) in connection with the Marketplace (“Wallet”). Upon the sale of the NFT to the buyer or any subsequent buyers (collectively, “Buyer”), DASH will deduct from the Donation (i) ten percent (10%) of the Donation as a fee, (ii) any costs to create the Wallet, and (iii) fees (if any) imposed by the applicable Marketplace (collectively, “Fees”) and donate the remainder as directed by the Judge to either or both of the Legal Aid Clinic of East Tennessee and the Knoxville Community Mediation Center (or such other charitable entities mutually agreed upon by the Parties).

The accompanying explanatory memorandum attached to the agreement states that the purpose of the agreement is to create auctionable items with a portion of the proceeds of the auction to be donated to Knoxville Community Mediation Center (KCMC) and Legal Aid of East Tennessee (LAET). The memorandum explains that:

[the] female Tennessee Supreme Court justices will be honored with non-fungible tokens which depict their digital image and the outstanding accomplishments of their careers. These NFT’s will be auctioned and sold to the highest bidders who will then own the only authentically original digital image of the Justices. . . . The TVAJA’s first NFT fundraising exclusively will benefit the Knoxville CMC and LAET. As customary in NFT transactions, DASH4Law, the technology provider, will only charge __% for each transaction. The donors receive a charitable deduction for their donation. The Justices receive no compensation for the gift of their image. Like a charity dinner, the Justices lend their image and reputation to charitable causes expecting nothing in return.

While the idea of helping and supporting legal aid organizations in their efforts to create more access to justice and to make it affordable to everyone is not only noble but also aligns with the goals of the Tennessee Supreme Court, the Administrative Office of the Courts, and the Tennessee judicial system as a whole, the proposed agreement and arrangement carries with it numerous ethical concerns.

As relevant to the agreement in question, the first concern is that DASH is a for profit company. While the Code of Judicial Conduct encourages judges to engage in certain extrajudicial activities, especially those that promote the legal system and access to justice issues and concerns, its rules are clear that such activities should be limited to dealings with not-for-profit organizations. As noted above, Comment 1 to RJC 3.1 states that:

[t]o the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. 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. *See* RJC 3.7.

RJC 3.1, Comment 1 (emphasis added). Moreover, while judges are allowed to participate in such extrajudicial activities, a judge's ability to aid in fundraising and soliciting of contributions is limited both as to the type of organizations they may help and from whom they may solicit funds. Pursuant to RJC 3.7:

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;

RJC 3.7 (emphasis added).

A review of the documents provided, as well as a search of the Secretary of the State's website, makes it clear that DASH is a for profit company. Per the documents, DASH deducts from the donation a 10% fee plus any other costs or fees associated with the creation of the NFT as well as the auction. While the agreement states that the judge will not receive any compensation from the proceeds of the auction, the rule does not make that distinction. Rather, the rule simply states that such activities are allowed when working with a not-for-profit organization. In addition, while the judge is not directly soliciting the funds for DASH and the organizations which DASH's donation will aid, the Code of Judicial Conduct limits from whom a judge may solicit funds, which includes members of the judge's family and judges over whom the judge in question does not have supervisory or appellate authority. Since the auction proposed is not limited as to who may bid on the NFT, it appears that a

judge would, at least indirectly, be soliciting funds beyond the narrowly tailored list of acceptable individuals per the Code of Judicial Conduct.

In addition to the concerns relating to extrajudicial activities with a for profit company, the Code of Judicial Conduct also address external influences on judicial conduct. More specifically, RJC 2.4 states that “[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.” RJC 2.4. While the concern here is perhaps subtle, there is a concern that the general public may perceive that DASH, KCMC and LAET, or the person who purchased the NFT of the judge would have a position of influence with the judge. When viewed in light of the preamble to the Code of Judicial Conduct that “[i]nherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system” and RJC 1.2 which states that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety,” it is clear that participation in the proposed agreement is not permissible as it can bring into question influence over a judge and, therefore, allow for questioning of “the independence, integrity, and impartiality of the judiciary.”

One additional subtle concern is raised by the “Promotion” section of the participation agreement. Per that section,

[A] judge hereby grants to DASH a royalty free, non-exclusive, irrevocable, worldwide, fully-paid up license use, copy, modify, or display the Art and the Judge’s name an appropriate information for the promotion of DASH or any of DAHS’s products or services.


This language appears to be in direct conflict with RJC 1.3 which states that “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” While Comment 4 to this rule directly addresses the publication of a judge’s personal writings, the caution expressed by the comment is directly on point. According to Comment 4, when a judge writes or contributes to a publication for a for profit entity,

[a] judge should not permit anyone associated with the publication of such materials to exploit the judge’s office in a manner that violates this Rule or other applicable law. *In contracts for publication of a judge’s writing, the judge should retain sufficient control over the advertising to avoid such exploitation.*

The granting of a royalty as defined in the participation agreement is clearly in direct conflict with the spirit of RJC 1.3 if not the rule itself.

For these reasons, it is the opinion of the Tennessee Judicial Ethics Committee that no judge¹ should participate in the program as currently comprised.

FOR THE COMMITTEE:



J. ROSS DYER, JUDGE

CONCUR:

Judge Angelita Blackshear Dalton
Judge Tammy Harrington
Judge Deana Hood
Judge Timothy E. Irwin
Judge Betty Thomas Moore
Judge Jerry Stokes

¹ Per Tennessee Supreme Court Rules, Rule 10, "a judge within the meaning of this Code, is anyone who is authorized to perform judicial functions, including but not limited to an officer such as a magistrate, referee, court commissioner, judicial commissioner, special master, or an administrative judge or hearing officer." Additionally, the Code is not only applicable to full-time judges, but also part-time judges, while serving as judges, and senior judges.