

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2010-4

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SYLLABUS: A judge, who has sentenced an offender for a felony or a misdemeanor offense, should not grant the offender's request to fulfill a community control sanction of community service by making a financial contribution to a charitable organization. First, unless authorized by law, a judge's granting of an offender's request to replace a community control sanction with a financial contribution to a charitable organization is not ethically proper under Jud. Cond. Rules 1.1 and 2.2, which require a judge to uphold the law. Second, unless authorized by law, a judge's permission to an offender to make a financial contribution to a charity, instead of serving a community control sanction as sentenced, does not promote public confidence in the independence, integrity and impartiality of the judiciary as required by Jud. Cond. Rule 1.2 for it allows offenders with money to assert influence over their sentencing sanctions. Third, unless authorized by law, a judge's use of judicial power to allow an offender to make a financial contribution to a charity, in lieu of serving a community control sanction as sentenced, conveys the impression that money and outside influence impacts sentencing and thereby contravenes Jud. Cond. Rules 1.3 and 2.4(C), which prohibit external influence on judicial conduct.

OPINION: This opinion addresses a question regarding a judge granting an offender's request to make a charitable contribution in lieu of serving the community control sanction of community service.

Is it proper for a judge who has sentenced an offender for a felony or a misdemeanor offense to grant the offender's request to replace a community control sanction of community service with a financial contribution to a charitable organization?

Introduction

Under the proposed facts, a court is considering implementing a program allowing charitable financial contribution from offenders to replace community service requirement in limited situations. The court would consider a request to make a charitable contribution in lieu of completing a community control sanction from a

defendant who is having great difficulty in performing community service because of work restrictions or other valid reasons. The court would review each request to assure that the offender had a unique situation or a hardship. The court would review whether the proposed charity was recognized as a charity by the Internal Revenue Service. The court would never order an offender to participate; the offender would have to request the option of charitable contribution in lieu of serving the community control sanction.

A judge's sentencing of a felony or misdemeanor offender is a somber responsibility. The overriding purposes of felony and misdemeanor sentencing are "to protect the public from future crime by the offender and others and to punish the offender." Ohio Rev. Code Ann. §§ 2921.11(A), 2929.21 (West 2006).

When sentencing an offender, a judge's conduct must be ethical and the sentence must comply with the law. The Ohio legislature has enacted sentencing guidelines and sanctions. As to felony offenses, see, e.g., factors to consider in sentencing (R.C. 2929.12); sentencing guidelines (R.C. 2929.13); prison terms (R.C. 2929.14); community control sanctions (R.C. 2929.15); community residential sanctions (R.C. 2929.16); nonresidential sanctions (R.C. 2929.17); financial sanctions (R.C. 2929.18); sentencing hearing (R.C. 2929.19). As to misdemeanor offenses, see, e.g., sentencing considerations (R.C. 2929.21); imposing sentence (R.C. 2929.22); jail terms (R.C. 2929.24); community control sanctions (R.C. 2929.25); community residential sanctions (R.C. 2929.26); nonresidential sanctions (R.C. 2929.27); financial sanctions (R.C. 2929.28).

Under Ohio law, community service is a community control sanction that a judge has discretion to order pursuant to R.C. 2929.15 and 2929.17(C) in the sentencing of certain felony offenses and pursuant to R.C. 2929.22 and 2929.27(A)(3) in the sentencing of certain misdemeanor offenses.

The Board of Commissioners on Grievances and Discipline does not have authority to interpret laws governing sentencing or to render advice as to the application of the sentencing laws. Thus, the Board cannot advise as to whether Ohio law provides for a judge to allow an offender to substitute a charitable contribution in place of serving a community control sanction of community service as sentenced.

The Board of Commissioners on Grievances and Discipline may render advice as to whether conduct is ethical. See Gov. Bar R. V(2)(C). In addition to the ethical requirement of upholding the law, several other ethical requirements are implicated by a judge allowing a defendant to substitute making a charitable financial contribution for serving a community control sanction as sentenced. The ethical requirements are addressed below.

Applicable rules in the Ohio Code of Judicial Conduct

A judge is required by the ethical rules to comply with the law.

Jud. Cond. Rule 1.1

A judge shall comply with the *law*.

Jud. Cond. Rule 2.2

A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*.

As defined, “[l]aw’ encompasses court rules, including this code [Ohio Code of Judicial Conduct] and the Ohio Rules of Professional Conduct, statutes, constitutional provisions, and decisional law.” Terminology, Ohio Code of Judicial Conduct. As already stated, the Ohio legislature has enacted laws regarding sentencing guidelines and sanctions that judges must uphold.

The requester of this opinion has not brought to the Board’s attention, nor is the Board aware of, any express provision in the law that would permit a community control sanction of community service imposed by sentence to be fulfilled by a defendant’s financial charitable contribution. The Board is aware of a case in which a judge’s requirement of a financial charitable donation as a requirement of a pre-trial diversion program did not comport with the law. In *Lane v. Phillabaum*, 182 Ohio App.3d 145, 150, 2008-Ohio-2502, the court of appeals for the twelfth appellate district, noted, inter alia, that it is improper under R.C. 2949.11 for a trial court, to require, as a condition of a pre-trial diversion program, that students charged with alcohol-related criminal offenses make donations to a particular charity or nonprofit organization. R.C. 2949.11 requires that unless otherwise required by law, fines be paid into the treasury of the county in which the fine is assessed.

A judge must promote confidence in the judiciary and avoid abuse of the prestige of judicial office.

Jud. Cond. Rule 1.2 Promoting Confidence in the Judiciary

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*.

Jud. Cond. Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office

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.

Jud. Cond. Rule 2.4 External Influences on Judicial Conduct

(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.

Jud. Cond. Rule 3.7 is also pertinent. That rule prohibits a judge from soliciting contributions for charitable organizations, unless permitted by one of the narrow exceptions in the rule. None of the narrow exceptions applies here.

By permitting an offender to substitute money instead of serving a community control sanction as sentenced, a judge erodes public confidence in the independence, integrity and impartiality of the judiciary. The result is that offenders with money gain influence over their sentencing sanctions. This does not promote confidence in the administration of justice as required by Jud. Cond. Rule 1.2.

By allowing an offender to make a financial contribution to a charity in lieu of completing a community control sanction as sentenced, a judge conveys the impression that the financial interests of a charitable organization are inappropriately influential to the judge's conduct in making sentencing decisions that protect the public and punish an offender. Further, it may appear to the public that the judge is using the judicial office to advance the interests of charitable organizations or to solicit funds for charitable organizations.

Judicial power, especially in sentencing criminal defendants, should not be used to influence financial contributions to charities. Regardless of whether the offender chooses the charity or the judge directs the financial contribution to a charity, the ethical concerns are present because the judge has the power over whether money can be used as a substitute for a community control sanction. Unless there is authorization by law, a judge's conduct in allowing an offender to make a financial contribution to a charity in lieu of serving a community control sanction conveys the impression that money and outside influence impact sentencing and thereby contravenes Jud. Cond. Rule 1.3 and Jud. Cond. Rule 2.4(C).

Other views regarding charitable contributions as part of sentence

The issue of charitable contributions as part of sentences has been the subject of advisory opinions and judicial conduct cases in other states. For an overview see Cynthia Gray, *Charitable Contribution as Part of a Sentence*, Judicial Conduct Reporter (American Judicature Society) Winter 2000 at 1, 4-6. Since that article, more advisory opinions have been written on various aspects of charitable contributions and sentences. See, e.g., Kansas SupCt, Judicial Ethics Advisory Panel, JE 108 (2001) responding to the question of whether a judge may permit a defendant, convicted of a misdemeanor, to make a contribution to a charity of the defendant's choice in lieu of imposing the usual fine. The Kansas committee stated that "[a] judge may not authorize an alternative to a fine unless authorized by statute to do so. Further, if the judge imposes the suggested alternative and makes an order to that effect, the judge is advancing the private interest of whatever charity defendant selects." Nevada, Comm'n on Judicial Discipline, Op. JE 00-003 (2000) advises that "in the absence of any statute, rule, or canon that authorizes judges to order or approve charitable contributions as part of the resolution of a criminal or civil

proceeding, it is the opinion of the Committee that judges may not order or approve charitable contributions to public or private charities as part of a sentence or plea agreement in a criminal case or as a sanction in lieu of a fine in a civil action.” Pennsylvania, Judicial Ethics Comm. of the Pennsylvania Conference of State Trial Judges, Informal Op. 5/6/3 advises: “A judge cannot directly or indirectly suggest to a lawyer that a contribution to a charity may be made in exchange for judicial action or inaction. A lawyer who sua sponte suggests that the lawyer will contribute to a charity to avoid or promote judicial action or inaction would be bribing the judge, which would create the appearance of impropriety and therefore require the judge to recuse.” But see, Colorado SupCt, Judicial Ethics Advisory Bd, Op. 2008-7 (2008) the board noted there is express statutory authority and advised that “[a] judge may approve a deferred–sentence agreement that requires a defendant to make a donation to a specific charity, as long as the charity specified in the agreement is neither chosen nor suggested by the court.” The board noted its conclusion is limited to the deferred-sentencing context and stated “[t]here may be other circumstances in which judicial approval of such a contract term, in the absence of the express statutory authorization found here, might conflict with the Code of Judicial Conduct. This opinion is therefore not intended to extend a court’s authority to set conditions of probation.”

Judicial discipline has been invoked for improperly requiring defendants to pay money to charitable organizations. For example, the Arkansas Supreme Court removed a judge from office, for among other misconduct, failing to respect and comply with the law and failing to promote public confidence in the integrity and impartiality of the judiciary by enforcing the payment of civil fees by defendants with time in jail or with the threat of jail, knowing that the money would go to non-profit corporation to which the judge was affiliated. *Arkansas Judicial Discipline and Disability Comm’n v. Proctor*, 2010 Ark. 38, 2010 WL 271343 (Ark.). The Louisiana Supreme Court publicly censured a judge for, among other misconduct, ordering defendants charged with drug offenses to pay money to private organizations without ascertaining whether the organizations met the criteria required by statute. *In re Johnson*, 1 So.3d 425 (La. 2009). The Nevada Supreme Court affirmed the determination of the Commission on Judicial Discipline to remove a municipal court judge from office, for among other misconduct, suggesting that criminal defendants contribute money to charities on a list the judge prepared, in lieu of paying fines to the city. *In re Davis*, 946 P.2d 1033 (1997).

Conclusion

In conclusion, this Board advises as follows. A judge, who has sentenced an offender for a felony or a misdemeanor offense, should not grant the offender’s request to fulfill a community control sanction of community service by making a financial contribution to a charitable organization. First, unless authorized by law, a judge’s granting of an offender’s request to replace a community control sanction with a financial contribution to a charitable organization is not ethically proper under Jud. Cond. Rules 1.1 and 2.2, which require a judge to uphold the law. Second, unless authorized by law, a judge’s permission to an offender to make a financial contribution to a charity, instead of serving a community control sanction as sentenced, does not promote public confidence in the

independence, integrity and impartiality of the judiciary as required by Jud. Cond. Rule 1.2 for it allows offenders with money to assert influence over their sentencing sanctions. Third, unless authorized by law, a judge's use of judicial power to allow an offender to make a financial contribution to a charity, in lieu of serving a community control sanction as sentenced, conveys the impression that money and outside influence impacts sentencing and thereby contravenes Jud. Cond. Rules 1.3 and 2.4(C), which prohibit external influence on judicial conduct.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.