Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)

C.J.E.A.B. ADVISORY OPINION 2008-07
(Finalized and effective December 19, 2008)

ISSUE PRESENTED

The board has been asked whether, consistent with the Code of Judicial Conduct, a judge may approve a donation to a charitable organization in the context of a deferred sentence agreement. The requester notes that there is statutory authority allowing judges to approve such a donation in this context, but is concerned that if judges do so, they may fall afoul of Canons 2 and 5, which prohibit a judge from lending the prestige of his or her office to advance the private interests of others and from permitting the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal, social, or civic organization. She asks whether the statutory authority in section 18-1.3-102(2), C.R.S., permits a judge to approve a deferred sentence agreement in which the defendant agrees to pay a sum certain to a designated charity. She further queries whether the answer would be different if the charitable donation is made to an organization from a list available to the defendant, or to a charity of the defendant's choice. Alternatively, would it be permissible for the court to designate a charity, or to use a list from which it could choose a charity to designate?

CONCLUSION

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.

APPLICABLE CANONS OF THE CODE OF JUDICIAL CONDUCT

Canon 1 sets forth that a judge should uphold the integrity and independence of the judiciary.

Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities. Canon 2B specifies that a judge should not lend the prestige of his or her office to advance the private interests of others, nor should a judge convey or permit others to convey the impression that they are in a special position to influence him or her.

Canon 5(B)(2) states that a judge shall not personally solicit funds for any educational, religious, charitable, fraternal, social, or civic organization, or use or permit the use of the prestige of the judge's office for that purpose.

DISCUSSION

Section 18-1.3-102(2), C.R.S., allows a judge to approve a stipulation entered into by the district attorney and the defendant whereby the defendant pleads guilty, agrees to adhere to certain

conditions and, if he or she complies with those conditions, the guilty plea is withdrawn and the case is dismissed. The statute provides that "the stipulation may require the defendant to perform community or charitable work service projects, or make donations thereto." It does not specify, however, who should decide to which organization the defendant would be required to provide service or donations.

As the requester points out, it would be problematic under Colorado's Code of Judicial Conduct for a judge to select the recipient charity. If a judge were to choose which organization would benefit from the defendant's time or money, then the judge might be seen as using the prestige of his or her office to advance the private interests of others, in violation of Canon 2. The judiciary also might be seen as an advocate or fundraiser for the special interest, in violation of Canon 5. Thus, we conclude that a judge cannot designate a particular charity to which the defendant must contribute. *See* Md. Ad. Ops. 2002-18, 1999-08, 1999-10; Ks. JE 108.

Because a court-maintained list of charities from which a defendant could choose might be seen as bearing the court's imprimatur and would raise similar concerns under Canons 2 and 5, we further conclude that a court should not maintain such a list.

Nevertheless, we do conclude that it is permissible for a judge to 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. By so doing, the court would neither be advancing the private interests of others nor engaging in what amounts to fundraising for the organization. Instead, the court would be advancing the public policies animating section 18-1.3-102(2), C.R.S., regarding rehabilitation of a certain category of defendants, and it would be doing so by merely acquiescing in the choice of either or both the DA and the defendant. *See also* Mich. Ad. Op. JI-64

We note that our conclusion here is limited to the deferred-sentencing context. There 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. There is no statutory authority similar to section 18-1.3-102(2), C.R.S., in the probation context that allows a sentencing court to require a defendant to make a charitable contribution as a condition of probation. In addition, the probation context itself differs from the deferred-sentencing context in ways that may affect the analysis under the Code of Judicial Conduct and that fall outside the scope of this opinion.[1]

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 19th day of December, 2008.

[1] We recognize *People v. Burleigh*'s apparent approval of a judge ordering a charitable donation as part of a sentence to probation. 727 P.2d 873 (Colo App. 1996). *Burleigh*, however, differed from the usual sentencing situation because the court there made specific findings that the donation the defendant was ordered to make was reasonably related to the defendant's rehabilitation. Perhaps more importantly, *Burleigh* is inapposite here because it did not involve analysis under the Code of Judicial Conduct.