

Opinion 09-01
March 27, 2009

TOPIC: Judge's ability to participate in video used by religious school to recruit students.

DIGEST: A judge may help a religious school recruit students by participating in a videotaped interview which does not mention that one of the interviewees is a judge.

REFERENCES: Illinois Supreme Court Rules 62B, 63C(1)(a), 64C, 65B, 65B(1), and 65B(2); Illinois Judicial Ethics Committee Opinion Nos. 94-7, 95-2, 96-7, 97-5, and 97-13; Canon 5B of the 1970 ABA Model Code of Judicial Conduct; J. Shaman, S. Lubet & J. Alfini, *Judicial Conduct and Ethics*, § 9.06 at 262 n.44 (1990); Florida Comm. on Standards of Conduct Governing Judges, Informal Op. 76-8; Florida Sup. Ct. Jud'l Ethics Adv. Comm. Opn. No. 97-28; Florida Sup. Ct. Jud'l Ethics Adv. Comm. Opn. No. 2007-07; Mass. Comm. Jud'l Ethics Opn. No. 98-1; Mass. Comm. Jud'l Ethics Opn. No. 2000-6; NY Adv. Comm. on Jud'l Ethics Letter Opn. No. 96-75; NY Adv. Comm. on Jud'l Ethics Formal Opn. No. 02-21; S.C. Adv. Comm. on Jud'l Conduct Opn. No. 04-2002; Utah Jud'l Ethics Adv. Comm. Informal Opn. No. 01-3; Washington Jud'l Ethics Adv. Comm. Opn. No. 02-01; Wisconsin Jud'l Conduct Adv. Comm. Opn. No. 05-1.

FACTS

A judge has been asked by a private religious school to tape an interview, along with the judge's spouse, explaining why they decided to send their child to that school. The videotape would be shown to prospective students and their families as a part of the school's effort to recruit new students. The judge would be identified by name on the videotape, but would not wear a judicial robe or be identified as a judge. However, some of the people who would be shown the videotape would know who the judge was and would know the judge's occupation.

QUESTION PRESENTED

Is a judge permitted to participate in making a videotape used by a religious school to recruit new students?

ANALYSIS

This inquiry turns on the interpretation of Supreme Court Rule 65B. The first paragraph to that rule states:

"A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:"

The threshold question is whether assisting a religious school's recruiting efforts constitutes "civic or charitable activities" within the meaning of Rule 65B. The Committee believes that it does. The second sentence in Rule 65B refers explicitly to a judge's ability to serve in various leadership positions in "*an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members...*" (Emphasis added.) See Illinois Judicial Ethics Committee ("IJEC") Opinion No. 96-7 (Rule 65B permits judge to serve on a parish school board). If serving in a leadership position of an educational or religious organization constitutes a form of civic or charitable activities within the meaning of Rule 65B, then providing other assistance to those kind of organizations, such as recruiting prospective students, likewise constitutes a form of civic or charitable activities.

The Committee believes that the judge's participation in membership recruitment comports with the first sentence to Rule 65B because preparation of the videotape would "not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties." Concerns about a judge's impartiality usually relate to a judge's relationship with a party or a party's lawyer, or to a judge's public expression of views on the subject of a case. See, e.g., IJEC Opinion No. 95-2 (judge's duty to disqualify when lawyer for a party currently represents judge in matrimonial case); IJEC Opinion No. 94-7 (judge may not accept award contingent upon

judge's endorsement of organization's legislative platform). No such concerns are present here.

The primary issue regarding the judge's ability to participate in creation of the videotape relates to Supreme Court Rule 65B(2). The first sentence in that provision states:

"A judge should not solicit or permit his or her name to be used in any manner to solicit funds or other assistance for any such organization."

It is necessary to consider whether this prohibition applies to a judge assisting a religious school's recruitment activities and, if so, whether participating in a videotaped interview would violate that prohibition. The applicability of this prohibition initially turns on whether subparagraphs (1) and (2) of Rule 65B apply to the first two sentences in Rule 65B or are limited to the second sentence in that Rule. Read literally, because only the second sentence in Rule 65B is expressly made "subject to the following limitations [in subparagraphs (1) and (2)]," the limitations in those subparagraphs appear to apply only to the second sentence to Rule 65B, *i.e.*, to a judge's ability to serve in various leadership positions in civic and charitable organizations. If that interpretation is correct, then subparagraph (2) does not constrain a judge's ability to otherwise participate in civic and charitable activities, including through preparation of the videotape.¹

Although the conclusion that subparagraph (2) does not apply to the first sentence of Rule 65B may appear consistent with the language of the rule, it leads to illogical results. For example, why should a judge who is a parent of a child attending a private school have greater latitude to solicit funds for the school than a judge who is a member of the

¹ The Committee addressed the flip side of this issue in IJEC Opinion No. 97-13. There, the Committee considered whether the prohibition in the first sentence of Rule 65B against engaging in civic or charitable activities that interfere with the judge's ability to perform his or her judicial functions, extends to a judge's ability to serve in leadership positions on behalf of civic or charitable organizations, as addressed by the remainder of that rule. In dicta, the Committee opined that "the limitations contained in the first sentence to Rule 65B are so fundamental that they must have been intended to apply to service on behalf of civic organizations." The Committee's analysis appears to have assumed, without expressly stating, that the provisions in the second sentence of Rule 65B and subparagraphs (1) and (2) governing a judge's service in a leadership position for civic and charitable organizations do not apply to a judge's other civic and charitable activities.

school's board of directors? This anomaly, which stems from Canon 5B of the 1970 ABA Model Code of Judicial Conduct, was recognized by the authors of the leading treatise on judicial ethics:

"As a consequence of the placement of the punctuation in Canon 5B, it may appear that subpart (2), which prohibits solicitation, is intended to modify only the provision permitting service as an officer or director. Following this construction, there would be no ethical bar to solicitation of funds by one who is merely a member, as opposed to an officer, of the organization. There is no conceivable rationale for such a distinction, and the better view is to read subpart (2) as applying to the whole of the canon."
J. Shaman, S. Lubet & J. Alfani, *Judicial Conduct and Ethics*, § 9.06 at 262 n.44 (1990).

Under these circumstances, the Committee believes that subparagraph (2) of Rule 65B applies to all participation by a judge in civic and charitable activities. The question then becomes whether participating in the recruiting video constitutes "solicit[ing] funds or other assistance" for such organizations under subparagraph (2).²

The Committee believes that the judge's participation in the video does not constitute solicitation of funds or other assistance within the meaning of Rule 65B(2). It is questionable whether the judge is soliciting anything in the interview, much less funds or other assistance. In the video, the judge does not directly urge viewers to send their children to the school. However, because the judge knows that the videotape will be used to recruit students—and, indeed, intends it to be used for that purpose—the Committee is reluctant to rely on the fact that the solicitation to enroll students at the school is not made directly by the judge.

² Rule 65B(2) also prevents a judge from permitting use of his or her name to solicit funds or other assistance. This provision generally applies to direct appeals for money or assistance made in the name of the judge. See, e.g., IJEC Opinion No. 97-15 (judge's name may not appear on stationery used by charity for fundraising). Here, the judge's name is not disclosed on the videotape.

The Committee does believe it significant, however, that the videotape is not used to solicit *donations*. The solicitation of funds generally involves requests for money with little or no *quid pro quo*. Cf. Florida Sup. Ct.. Jud'l Ethics Adv. Comm. Opn. No. 97-28 (use of photograph of judge as part of college advertising series profiling successful alumni did not violate prohibition against use of prestige of office for fund-raising); Mass. Comm. Jud'l Ethics Opn. No. 98-1 (law school's use of photograph and biography of alumnus judge in booklet designed to recruit law school students does not constitute impermissible fundraising). Here, on the other hand, even if one considers the recruiting activity to involve the solicitation of tuition and fees charged by the school, there is no reason to believe that those payments are greater than the value of the education received in return.

Similarly, the Committee believes that the solicitation of "assistance," within the meaning of Rule 65B(2), generally entails requests for non-financial help that is greater in value than anything received in return. This provision is inapplicable because money for tuition and fees, rather than non-financial help, is being requested, and in any event the value of what is sought is presumably equal to the value of what is provided in return.

Ethics committees in other states have addressed similar issues regarding a judge's ability to promote enrollment at a school or university. Although the facts and applicable ethics rules vary, the weight of authority supports this Committee's conclusion that a judge who is not identified as such may participate in a recruiting videotape. Some authorities even permit the judge's title to be used. For example, the Massachusetts Committee on Judicial Ethics concluded that a judge who was an alumnus of a law school could permit the school to use the judge's photograph and biography in a booklet intended to recruit law students. Mass. Comm. Jud'l Ethics Opn. No. 98-1. See also Florida Sup. Ct.. Jud'l Ethics Adv. Comm. 97-28 (photograph of judge may be used as part of college advertising series profiling successful alumni); NY Adv. Comm. on Jud'l Ethics Letter Opn. No. 96-75 (photograph of alumnus judge taken in courtroom may be used by law school for advertising purposes); NY Adv. Comm. on Jud'l Ethics Formal Opn. No. 02-21 (advertising campaign by university that includes judge's picture in judicial robes and mentions judge's occupation does not violate prohibition on use of prestige of judicial office to advance private interest of others); S.C. Adv. Comm. on Jud'l Conduct Opn. No. 04-2002 (billboard

featuring photograph of judge used to promote girl scouts involves "image campaign" that does not violate prohibition against lending prestige of judicial office to advance private interests of others); Utah Jud'l Ethics Adv. Comm. Informal Opn. No. 01-3 (use of judge's photograph and title in advertising campaign for American Indian College Fund is permissible); Washington Jud'l Ethics Adv. Comm. Opn. No. 02-01 (judge may appear in informational video, filmed in judge's chambers, speaking on behalf of bar foundation's programs; prohibition against judge personally soliciting contributions for law-related organizations is not violated because the judge will not ask for contributions or otherwise personally solicit funds).

The Committee notes, however, that some ethics opinions conclude that a judge impermissibly lends the prestige of judicial office by appearing in advertising on behalf of a school or organization. See, e.g., Florida Comm. on Standards of Conduct Governing Judges, Informal Op. 76-8 (judge may not give a videotaped interview on behalf of a local boys club to be shown on a telethon); Florida Sup. Ct. Jud'l Ethics Adv. Comm. Opn. No. 2007-07 (billboards and other materials used in public relations campaign by library that contain photograph of judge wearing judicial robe and that identify judge's occupation violate prohibition against lending prestige of judicial office to advance the private interests of others); Mass. Comm. Jud'l Ethics Opn. No. 2000-6 (advertisement by university featuring photograph of alumnus judge and mentioning his judicial position contains judge's endorsement of university and thereby violates prohibition against lending prestige of judicial office to advance university's private interests). Some opinions disapproving a judge's assistance of a school are based on ethical prohibitions unique to that state. See, e.g., Wisconsin Jud'l Conduct Adv. Comm. Opn. No. 05-1 (use of judge's image, name, and title on billboards as part of university's advertising campaign would violate Wisconsin rule prohibiting a "judge's name to be used in connection with any ... commercial advertising that indicates the judge's title or affiliation with the judiciary...").

In light of the language of the Illinois rule and under these facts, the Committee believes, on balance, that the judge may participate in the recruiting video. This conclusion is supported by the fact that this situation does not implicate any of the concerns underlying the Code of Judicial Conduct. In particular, the judge would not be lending the prestige of judicial office to the school's recruiting activities because the judge would not be identified as such. See Supreme Court

Rule 62B (prohibition against "lend[ing] the prestige of judicial office to advance the private interests of others"). In addition, there would be no risk of coercion involved with the use of the videotape. Viewers of the videotape would not feel any pressure as a result of the judge's judicial status if they were unaware of that status. Even if they recognized one of the interviewees to be a judge, the fact that the judge would not know who was viewing the videotape would decrease any risk that viewers would feel any pressure due to the interviewee's judicial status. Cf. Supreme Court Rule 64C (judge may not "engage in direct, personal solicitation of funds" on behalf of a law-related organization); Utah Jud'l Ethics Adv. Comm. Informal Opn. No. 01-3 (emphasizing that judge whose photograph and title are used on behalf of American Indian College Fund will not have direct contact with or information about potential donors). Similarly, the judge's unawareness of who would view the videotape eliminates any reason to fear any impact on the judge's impartiality even if any viewers of the videotape happened to be parties to or counsel in a case before the judge. Cf. Supreme Court Rule 63C(1)(a) (requiring disqualification of judge who is biased in favor of or against a party or a party's lawyer).

Although the Committee believes the judge may participate in the school's recruiting video, the Committee recommends that the judge instruct school officials to ensure that the judge's title not be mentioned when the video is shown to prospective students and their parents. This precaution will reduce any risk that viewers will be influenced by the interviewee's judicial status.

CONCLUSION

The judge's participation in the recruiting videotape is consistent with both the letter and the spirit of the Code of Judicial Conduct. In particular, the activity does not entail the improper solicitation of funds or other assistance in violation of Supreme Court Rule 65B(2).