

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 92-02
(January 30, 1992)

**Imposition of Sentencing Alternatives That Generate Funds
for Private, Non-governmental Organizations**

Issues

1. May a judge ethically sentence a person to participate in an educational program sponsored by a private, non-governmental organization as a result of a plea negotiation with the prosecutor in which the defendant agrees to the condition?

Answer: Yes.

2. Does it make a difference if the judge has cause to believe that the majority of funds that the defendant is required to pay for the program will be used for purposes other than sponsoring the program?

Answer: No, depending on the circumstances.

3. Does it make a difference if the organization designated by the prosecutor has suffered no economic loss caused by the defendant being sentenced and the monetary amount is designated either a charitable contribution, a reimbursement for educational program expenses, or a contribution to a lobbying effort against drunk driving?

Answer: Yes, depending on the circumstances.

Facts

Mothers Against Drunk Drivers (MADD) is a national organization involved in decreasing the incidence of drunk driving within our society through public education and political action. MADD has developed a victim impact panel in which victims of drunk drivers, or survivors of persons killed by drunk drivers, share with the convicted persons how drunk drivers have negatively impacted their lives. It may have a positive impact on persons convicted of DUI and could be a viable sentencing option in addition to other mandatory DUI penalties.

The city prosecutor's office routinely compels all persons entering plea agreements on DUI charges to participate on a victim impact panel as a condition of probation. MADD charges \$10.00 for each convicted person attending the panel. The program cost is unverified, but it appears that very little money is actually spent on the individual panels because facilities are provided without cost and participants are not compensated. The fee goes into the organization's general fund from which monies can be drawn for any purpose, including the promotion of legislation that may not be supported by the persons paying the fees. Conceivably, the fee could be designated a charitable contribution or a reimbursement for program expenses, and a restricted fund could be set up to handle the fees.

Discussion

Issue 1

Generally speaking, we believe that a judge may sentence a person to participate in an educational program sponsored by a private, non-governmental organization as a result of a plea negotiation with the prosecutor in which the defendant agrees to the condition. A number of educational and treatment programs in this state are, in fact, authorized by statute. *See, e.g.,* A.R.S. §28-692, *et seq.*, which requires a judge to order a person to attend alcohol abuse classes and treatment programs. We note, however, that this committee has no authority to give an opinion on the legality of creative sentencing alternatives or pre-trial diversion programs available to courts and law enforcement agencies. The committee's sole concern here is whether the use of such programs creates ethical problems for judges under the Code of Judicial Conduct. Indeed, there are several pitfalls that judges should be advised to avoid.

Judges must always be concerned about the appearance of impropriety and its effect on public perceptions. Canon 2A requires a judge to "conduct himself at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary." When a judge sentences an offender to pay for a program conducted by a private organization under the conditions described in the statement of facts, there is a possibility that the defendant and the public at large might conclude that the sentencing judge endorses not only the organization's programs but its goals as well. While a judge may be privately sympathetic and supportive of the organization, the judge must be impartial in the courtroom and not allow his private feelings to color his or her judgment concerning the defendant's conduct. In the absence of legislative authorization for a particular sentencing option or the safeguards suggested below, a judge should act cautiously before endorsing or appearing to endorse such programs.

Another sensitive area involves fund raising by the judiciary. Canon 2B states that a judge "should not lend the prestige of his office to advance the private interests of others." This prohibition is reinforced by Canon 5B(1) that prohibits a judge from soliciting funds for any educational or civic organization or from using the prestige of his or her office for that purpose. Under these provisions of the Code, we believe that a sentencing judge could not ethically require a defendant to make a donation to a private charitable organization. The question here, however, is different. The fee that is assessed a participant in a victim impact panel is not a charitable contribution; it is a charge to cover the costs of the program. Assuming that the program itself is an appropriate sentencing alternative, the approval of a nominal fee to reimburse the sponsor for the costs of the program does not raise any particular ethical issue.

If a judge is concerned about the public's perception of plea agreements that require the payment of fees to a specific organization, there are steps that can be taken to distance the court from such agreements. For example, the court could require the agreement to contain a statement that the fee or contribution is not the result of any suggestion or promises by the court and is entirely the result of negotiations between the prosecutor and the defendant. *Cf.* Fla. Op. 87-6 (May 29, 1987).

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Issue 2

The \$10.00 fee described here is a nominal amount that cannot reasonably be viewed as a supporting donation to the organization in the absence of more specific information about the manner in which the organization uses its funds. We do not believe, however, that a judge must inquire into the financial affairs of the organization in order to sustain a plea agreement predicated on a defendant's participation in the program. When considering fees that are only a small fraction of the overall fine or costs involved in a case of this nature, a judge can assume that there is an inherent support cost in sustaining any organization. Thus, staff salaries, supplies, postage, telephone, legal and accounting fees and other incidental costs are almost certainly involved in sustaining the existence of the organization and are more than sufficient to justify a nominal fee.

It would make a difference if the judge knew that the funds derived from the fee were directly routed to lobbying activities. But while the organization in this case may conduct such activities, there is no indication that substantial funds are being diverted for this purpose. Although the assessment of a nominal fee does not require an assurance to the judge that the funds are being used for anything other than incidental or program costs, a higher fee might require the judge to obtain information about the costs of the program or the disposition of the funds. If a large or substantial fee is required to participate in an educational program that is only provided by a single organization, and the court has cause to believe that the fee is being used to generate funds for political action or legislative programs, then it would not be ethical for a judge to direct the payment of such a fee. If the fee were restricted to a fund to be used exclusively for the payment of costs associated with the program, there would be no ethical problem.

Issue 3

It follows from this analysis, that if a fee is designated as a charitable contribution or a contribution to a legislative lobbying effort against drunk driving, then a judge cannot ethically sentence individuals to contribute either time or money to the program. To do otherwise would suggest that a judge is engaged in fund raising for a private organization contrary to Canon 5B(1), and perhaps even contrary to law. *See, e.g., U.S. v. Wright Contracting Co.*, 728 F.2d 648 (4th Cir. 1984); *U.S. v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984); *U.S. v. Blue Mountain Bottling Co. of Walla Walla*, 929 F.2d (9th Cir. 1991). However, where there is a recognized agency or institution in the community providing remedial services, a judge should have the discretion to use that agency as a sentencing option. If a judge does not have confidence in a particular agency and does not want to sentence a defendant to that agency by virtue of a plea agreement, then the judge can refuse to accept the plea agreement. There is no compulsion on the part of the judge to accept all of the terms of a plea agreement.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2A, 2B and 5B(1) (1985).

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Other References

Arizona Revised Statutes § 28-692, *et seq.*

U.S. v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984).

U.S. v. Missouri Valley Construction Co., 741 F.2d 1542 (8th Cir. 1984).

U.S. v. Blue Mountain Bottling Co. of Walla Walla, 929 F.2d (9th Cir. 1991).

Florida Committee of Standards of Conduct Governing Judges Opinion 87-6 (May 29, 1987).