

MEMORANDUM

To: Judicial Ethics Committee

Da: October 28, 1997

Re: Request by Judge

This is a memorandum in response to Judge _____ request for an opinion regarding the propriety of financial contributions made to Vermont Legal Aid. Based upon the limited amount of legal authority on the subject, I believe that such contributions would not violate Vermont's Code of Judicial Conduct unless they objectively create an appearance of impartiality.

I.

Vermont's "Code of Judicial Conduct is intended to establish standards for ethical conduct of judges." A.O. 10, Preamble [2]. The specific Canons relevant to the present situation are as follows:

CANON 3

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

...
(c) the judge knows that the judge.. **.has** an economic interest' in the subject matter in controversy or in a party to the proceeding or has any other more than

.. .¹ An "economic interest" is defined as an "ownership of a more than de **minimis legal** or equitable interest, or a relationship as officer, director, advisor or other active participant **in** the affairs of a party...." A.O. 10, Terminology [6].

de **minimis** interest that could be substantially affected by the proceeding:

CANON 4

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

D. Financial Activities.

(1) A judge **shall** not engage in financial and business dealings that:

...
(b) involve the judge in frequent transactions or continuing business relationships **with** those lawyers or other persons likely to come before the court on which the judge serves.
...

II.

Vermont's Code of Judicial Conduct is based on the **ABA's Model Code of Judicial Conduct**. **A.O. 10**, Reporter's Notes. As such, decisions and commentary from other jurisdictions which have adopted the Model Code "are authoritative sources of interpretation for the Vermont Code." Id.

The only relevant case I could find was United States v. Arena, 918 F. Supp. 561 (N.D.N.Y. 1996). In Arena, two individuals were charged and convicted of engaging in various chemical attacks on Planned Parenthood. Id. at 565. In a post-trial motion, defendants argued that the trial judge erred in not **recusing** himself from the case because his wife had made charitable contributions to Planned Parenthood. Id. at 578. In denying the post-trial motion, the court stated that the contributions did not qualify as a financial interest' "since the donation does

² Vermont's Code uses the phrase "economic interest" and is defined in Part I of **this** memorandum.

not bestow any ownership interest, legal or equitable, in the entity.” *Id.* The court also noted that since Planned Parenthood was not a party to the action, “[we do] not fathom how [our] impartiality might reasonably be questioned.” *Id.*

A donation to Vermont Legal Aid does not create an ownership interest in the entity. Also, even though attorneys for Vermont Legal Aid will most likely represent litigants before Judge _____, Vermont Legal Aid would not be a party to those actions. Under the holding in *Arena*, therefore, the contributions are permissible.

However, certain jurisdictions have held that membership on the board of directors of a legal aid society or a plaintiff- or defendant-oriented bar association may create the appearance of impartiality. J. Shaman et al., *Judicial Conduct and Ethics* § 9.11, at 296-97 (2d ed. 1995) (citing Fla. Comm. on Standards of Judicial Conduct, Op. 74-17 (Dec. 11, 1974); N.Y. Office of Court Admin., Op. No. 17 (April 8, 1975); La. Sup. Ct. *Comm. on Judicial Ethics*, Op. 91 (March 18, 1991)). These cases do not **deal** with financial contributions made to such institutions.

Also, under the broad language in Canons **3E(1)** and **4A(1)**, the contributions may be suspect. See also ABA Model Code of Judicial Conduct Commentary on Canon 4D (promulgated “to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. ”). The test as to whether a judge’s impartiality may reasonably be questioned is “whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial.” J. Shaman et al., *Judicial Conduct and Ethics* § 4.25, at 143 (2d ed. 1995) (citing *Pepsico, Inc. v. McMillan*, 764

³ Disqualification of federal judges is governed by 28 U.S.C. § 455. The **definition of** “financial interest” in the federal statute is virtually identical to the definition of “economic interest” in the Vermont Code. Compare 28 U.S.C. § 455(d)(4) **with** A.O. 10, Terminology [6].

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Although there appears to be little legal authority on the subject, there is no specific provision in the Vermont Code which would prohibit a contribution by Judge :0
Vermont Legal Aid. As discussed, similar contributions were not grounds for **recusal** in the Arena decision. However, under an objective standard of scrutiny, the contributions may create the appearance of **impartiality** in violation’ of Canons **3E(1)** and **4A(1)**.

• If you have any questions or concerns, please **feel** free to contact me at the District Court at