

JUDICIAL FUNDRAISING IN CANADA

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The extent to which judges should be involved in fundraising for civic and charitable causes is an important issue of judicial ethics. The default principle adopted by judicial councils in Canada precludes judges from fundraising subject to only minor exceptions. Yet anecdotal evidence indicates that some Canadian judges do engage in fundraising. This raises the question of whether there should be a change to the principle so as to allow judges greater scope for fundraising activities. The aim of this article is to review the ethical principles for judicial fundraising and evaluate whether they require modifications for the modern Canadian judiciary. The authors consider several hypothetical fundraising scenarios and propose recommendations to the Canadian Judicial Council's Ethical Principles for Judges.

La mesure dans laquelle les juges devraient s'investir dans les activités de financement pour les causes civiques et caritatives est importante pour la déontologie judiciaire. Le principe implicite adopté par les conseils de la magistrature du Canada veut que les juges soient exclus de ces activités sous réserve de quelques petites exceptions. Pourtant, il existe des cas isolés où des juges canadiens participent effectivement à des activités de financement. Cela soulève la question à savoir s'il faut modifier le principe de manière à donner aux juges plus de latitude dans les activités de financement. Le but de cet article consiste à revoir les principes de la déontologie en matière de financement judiciaire et d'évaluer s'il est nécessaire de les modifier dans le contexte de la magistrature canadienne moderne. L'auteur examine plusieurs scénarios hypothétiques de financement et propose des recommandations aux principes de la déontologie judiciaire du Conseil canadien de la magistrature relativement aux juges.

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I. INTRODUCTION

The extent to which judges should be involved in fundraising for civic and charitable causes is an important issue of judicial ethics. The default principle adopted by judicial councils in Canada precludes judges from fundraising subject to only minor exceptions. Yet anecdotal evidence indicates that some Canadian judges do engage in fundraising. This raises the question of whether there should be a change to the principle so as to allow judges greater scope for fundraising activities. The aim of this article is to review the ethical principles for judicial fundraising and evaluate whether they require modifications for the modern Canadian judiciary.

Judicial involvement in fundraising can take several forms. One form is the direct soliciting of funds for a specific cause from possible donors. Another form is indirect solicitation, for example in cases where a judge is part of a larger group or team. Yet another is a judge's participation in a fundraising event, for example by giving a speech, performing services at the event, or otherwise supporting it. A fourth form is involvement in the planning or organizing of fundraising activities. This article will consider each of these forms of fundraising.

II. THE REGULATION OF JUDICIAL FUNDRAISING IN CANADA

A. THE CANADIAN JUDICIAL COUNCIL

The conduct of federally appointed judges in Canada is subject to review by the Canadian Judicial Council (CJC). The CJC is a federal body established in 1971 under the *Judges Act*.¹ It consists of 39 members, including the Chief Justice of Canada, the provincial and territorial Chief Justices and Associate Chief Justices, and some senior judges from federal and provincial superior courts across Canada.² The CJC aims to ensure "that judges and the public alike are aware of the principles by which judges should be guided in their personal

¹ RSC 1985, c J-1, s 59(1).

² *Ibid.*

and professional lives.”³ Currently, the CJC exercises authority over more than 1,100 federally appointed judges.⁴

After its creation, the CJC sought ways of developing an ethical framework to assist judges with deciding how best to handle ethical dilemmas.⁵ Initially it did so by sponsoring and publishing two books in 1980: *A Book for Judges* and *Le livre du magistrat*.⁶ It should be noted that the books were not official directives from the CJC but rather the views of their independent authors.⁷ Nevertheless, they offered guidance concerning judicial fundraising by stating that regardless of how worthy the cause, judges should not solicit funds.⁸ The rationale provided was that judges who solicit donations for organizations ask for and receive gifts, favours, or benefits on their behalf, acceptance of which could cast doubt on their impartiality.⁹ Both books also urged judges to avoid associating with organizations and people who are likely to be involved in litigation or controversies.¹⁰ Such guidance was provided in order to minimize the risk of a judge not appearing to be impartial.

In an effort to expand upon and update its earlier work, in 1991 the CJC released *Commentaries on Judicial Conduct*.¹¹ This text provided additional reasons why judges should refrain from fundraising. Some of the concerns raised were that fundraising “alters the expectations of all who are subjected to the campaign whether they contribute or not; that it is a temptation to counsel to ‘try to gain an edge’ in contributing; and that it ... publicly identifies the judge with the political and social views of the organization.”¹²

In 1998 the CJC published *Ethical Principles for Judges*. This work incorporated the views of the Canadian judiciary and the legal and academic community on the expected standards of judicial conduct.¹³ Building on its earlier work, *Ethical Principles* is considered the most comprehensive treatment of judicial ethics in Canada, as it updates the thinking about some of the issues raised in the earlier publications.¹⁴ It states that “[j]udges are free to participate in civic, charitable and religious activities.”¹⁵ However, judges are advised to “avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.”¹⁶ The principles further provide that “[j]udges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes)

³ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at iii [*Ethical Principles*].

⁴ Canadian Judicial Council, “Mandate and Powers,” online: Canadian Judicial Council <www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_mandate_en.asp>.

⁵ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canada Communications Group, 1995) at 143.

⁶ The Honourable JO Wilson, *A Book for Judges* (Ottawa: Canadian Judicial Council, 1980); Le très honorable Gérard Fauteux, *Le livre du magistrat* (Ministre des Approvisionnement et Services Canada, 1980).

⁷ Friedland, *supra* note 5 at 143.

⁸ Wilson, *supra* note 6 at 9; Fauteux, *supra* note 6 at 25.

⁹ *Ibid.*

¹⁰ Wilson, *ibid* at 9; Fauteux, *ibid* at 25-26.

¹¹ Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville: Les Éditions Yvon Blais, 1991).

¹² *Ibid* at 18-19.

¹³ The Honourable Georgina R Jackson, “The Mystery of Judicial Ethics: Deciphering the Code” (2005) 68:1 Sask L Rev 1 at 5.

¹⁴ *Ethical Principles*, *supra* note 3, ch 1, commentary C1.

¹⁵ *Ibid*, ch 6, principle C1(a).

¹⁶ *Ibid.*

or lend the prestige of judicial office to such solicitations.”¹⁷ Commentary clarifies that “appropriate judicial purposes” refers to the solicitation of funds from the government which are necessary for the proper administration of justice.¹⁸

In addition, like the earlier publications, *Ethical Principles* urges judges to refrain from involvement in causes or organizations which are likely to be engaged in litigation.¹⁹ This is due to a concern that it may become awkward for a judge if the organization with which he or she is involved becomes engaged in litigation.²⁰ It is also meant to reduce the risk of judicial impartiality being called into question.²¹ The commentary to the principles acknowledges the benefits of having judges participate in the community but cautions that such involvement can carry certain risks that should be avoided.²² The central concern is with situations that could call into question judicial impartiality and lead to disqualification due to conflict of interest or prejudice.²³ As a result, the CJC has made it clear that judges should “not allow the prestige of judicial office to be used in aid of fund raising for particular causes, however worthy.”²⁴ The commentary also explicitly mentions that “(apart from requests to judicial colleagues), [judges] should not personally solicit funds or lend their names to financial campaigns.”²⁵

It should be noted that *Ethical Principles* is deliberately styled as containing principles rather than rules. They “are advisory in nature.... They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.”²⁶ This is true for all of the direction in *Ethical Principles*, not just that dealing with fundraising. The non-binding nature of these principles gives rise to two points. First, any suggestion in this article that certain conduct violates the principles should not be understood as an allegation of judicial misconduct. The focus of the article is not on being critical of particular judges or practices but rather on how the principles themselves might evolve to reflect better our shared aspirations. Second, the broader question, important though it is, of whether these principles should have a more binding effect on judges must be left for another day. It suffices here to observe that, as with all of the principles, the question of effective enforcement remains even once agreement is reached on what the principles should provide on the issue of fundraising.

B. PROVINCIAL JUDICIAL COUNCILS

Each province and territory has the power to create standards of conduct to regulate judges it appoints. Although most have created judicial councils to ensure judges conduct themselves in accordance with the expected high standards of behaviour, only Ontario, Quebec, British Columbia, and Newfoundland and Labrador have established either a code

¹⁷ *Ibid.*, ch 6, principle C1(b).

¹⁸ *Ibid.*, ch 6, commentary C8.

¹⁹ *Ibid.*, ch 6, principle C1(c).

²⁰ *Ibid.*, ch 6, commentary C8.

²¹ *Ibid.*

²² *Ibid.*, ch 6, commentary C1.

²³ *Ibid.*, ch 6, commentary C3.

²⁴ *Ibid.*, ch 6, commentary C6.

²⁵ *Ibid.*

²⁶ *Ibid.*, ch 1, principle 2.

or principles of judicial conduct. Of these four, only Ontario and British Columbia have addressed the issue of judicial fundraising.

Ontario's *Principles of Judicial Office for Judges* encourages judges to be involved in community activities provided that such activities are not incompatible with the judicial office.²⁷ Similarly to *Ethical Principles*, it states that "judges should not lend the prestige of their office to fund-raising activities."²⁸ The *Code of Judicial Ethics* applicable to provincially appointed judges in British Columbia directs judges to "devote themselves entirely to the exercise of their judicial function."²⁹ The code makes it clear that although judges are permitted to participate in civic and charitable activities, "judges should not participate in fund-raising activities."³⁰ These directives both go further than *Ethical Principles* as they create an absolute prohibition against judicial fundraising, forbidding judges from soliciting even from judicial colleagues or for appropriate judicial purposes.

III. JUDICIAL FUNDRAISING IN CANADA

Notwithstanding these reasonably direct limitations on judicial involvement in soliciting money for civic and charitable causes, the reality is that some judges are engaging in fundraising activities.³¹ Although in most cases this is not widely publicized, many judges are aware of what their colleagues are doing. There are also some prominent examples that do reach the broader public. For example in 2011 as part of the "Movember" campaign to raise money for prostate cancer research almost half of the male judges of the Nova Scotia judiciary participated as a team which raised \$18,463.³² It was only in 2012 that it was publicly reported that "judges can't participate in the [Movember] fundraising contest."³³ Justice Saunders of the Nova Scotia Court of Appeal, who spearheaded the Movember campaign, noted at the time of this change that "judges are not permitted to solicit donations for any cause."³⁴ In previous years judges from Nova Scotia had also participated in the annual Glube Cup Charity Hockey Tournament for Feed Nova Scotia which collected admission donations of food or money.³⁵

²⁷ "Principles of Judicial Office," ch 3, principle 3.4, online: Ontario Courts <www.ontariocourts.ca/ojc/ojc/principles-of-judicial-office/>.

²⁸ *Ibid*, ch 3, principle 3.4, commentary 1.

²⁹ Provincial Court of British Columbia, *Code of Judicial Ethics*, revised ed (1994) r 2.00, online: <www.provincialcourt.bc.ca/judicial-council/>.

³⁰ *Ibid*, r 2.04(b).

³¹ See e.g. The Honourable Shelagh Creagh, "Alberta judges and their communities" *Vox Judicia* (July 2013), online: The Canadian Bar Association <www.cba.org/CBA/judges_forum/newsletters2013/alberta.aspx> (providing three examples of Alberta judges publicly engaging in fundraising activities for charity).

³² Gail J Cohen, "Nova Scotia judges, lawyers raise over \$90K for Movember" (1 December 2011) *Legal Feeds* (blog), online: <[www.canadianlawyermag.com/legalfeeds/582/Nova-Scotia-judges-lawyers-raise-over-\\$90K-for-Movember.html](http://www.canadianlawyermag.com/legalfeeds/582/Nova-Scotia-judges-lawyers-raise-over-$90K-for-Movember.html)>.

³³ "Justice moustache contest is on," *CBC News* (31 October 2012), online: CBC News Nova Scotia <www.cbc.ca/news/canada/nova-scotia/story/2012/10/31/ns-judges-moustaches.html>.

³⁴ The Honourable Jamie WS Saunders, "Mo'vember and the Nova Scotia Judiciary" *Vox Judicia* (July 2013), online: The Canadian Bar Association <www.cba.org/CBA/judges_forum/newsletters2013/movember.aspx>.

³⁵ Nova Scotia, "Glube Cup Charity Hockey Tournament," online: Nova Scotia <novascotia.ca/news/release/?id=20070420013>.

Another recent event that attracted attention was *The Trial of David Suzuki*, a “live theatre and public engagement project” held at the Royal Ontario Museum in November 2013.³⁶ The trial was presided over by Justice Ducharme of the Ontario Superior Court of Justice. His involvement led to a complaint to the CJC by advocacy group Ethical Oil.³⁷ It is not clear whether this event amounted to a fundraiser for a specific cause or organization. At a minimum, tickets were sold by the museum for either the performance alone or the performance and a reception.³⁸

It is apparent that some judicial fundraising is occurring in Canada despite ethical principles and codes of conduct which do not condone this behaviour. This is a clear indication that judicial councils need to revisit this issue to determine whether the current statement of judicial ethics in Canada is adequate or if it requires changes. This in turn demands that the advantages, disadvantages, and effects, if any, that judicial fundraising has on the quality of the judiciary and the justice system be carefully weighed and considered. It is also important to consider the comparative law on this issue, looking at how fundraising is treated in judicial ethics codes in other countries.

IV. THE REGULATION OF JUDICIAL FUNDRAISING IN OTHER JURISDICTIONS

A. THE UNITED STATES

The American Bar Association’s (ABA) *Model Code of Judicial Conduct* establishes ethical standards for judicial conduct.³⁹ The *Model Code* is not in itself binding but it has been adopted, in whole or in significant measure, by most American states such that its provisions are binding on their judges. Under its provisions judges can engage in extrajudicial activities as long as they do not detract from their duties, lead to frequent disqualifications, or cast doubt on a judge’s impartiality, integrity, or independence.⁴⁰ However, unlike in Canada the *Model Code* has over time relaxed its anti-solicitation rules. It has done so by adding new exceptions which allow judges to participate in more general fundraising activities.⁴¹ There is now a “distinction between actual solicitations of funds which with narrow exceptions continues to be barred and participating in more general fundraising activities which is now permitted.”⁴²

In Canada, *Ethical Principles* permits judges to solicit funds from judicial colleagues. The *Model Code* does too, but it also goes one step further by allowing judges to solicit contributions “from members of the judge’s family.”⁴³ In addition, American judges, unlike

³⁶ Royal Ontario Museum, “The Trial of David Suzuki — Reception & Performance,” online: <www.rom.on.ca/en/activities-programs/events-calendar/the-trial-of-david-suzuki-reception-performance>.

³⁷ Jen Gerson, “After mock trial of David Suzuki, judge faces formal complaint from pro-oilsands group,” *National Post* (17 December 2013), online: <news.nationalpost.com/2013/12/17/judge-in-mock-trial-of-david-suzuki-faces-formal-complaint-from-pro-oilsands-group/>.

³⁸ Royal Ontario Museum, *supra* note 36.

³⁹ American Bar Association, *Model Code of Judicial Conduct*, 2011 edition (American Bar Association, 2010) [*Model Code*]. For federal judges see United States Courts, *Code of Conduct for United States Judges*, online: <www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> [*Federal Code*].

⁴⁰ *Ibid.*, Canon 3, rr 3.1(A)-(D).

⁴¹ James J Alfini et al, *Judicial Conduct and Ethics*, 4th ed (San Francisco: Matthew Bender, 2007) at 371.

⁴² *Ibid.*

⁴³ *Model Code*, *supra* note 39, Canon 3, r 3.7(A)(2). See also *Federal Code*, *supra* note 39, Canon 4(C).

their Canadian counterparts, are expressly permitted to assist organizations in “planning related to fund-raising, and participating in the management and investment of the organization’s or entity’s funds.”⁴⁴ They can also solicit membership dues or fees for non-profit organizations even if the funds are used to support the organization’s objectives, “but only if the organization or entity is concerned with the law, the legal system, or the administration of justice.”⁴⁵ In contrast, although *Ethical Principles* does not take a position on membership solicitation it appears that judges should refrain from such conduct if it may be “perceived as coercive or is essentially a fund-raising mechanism.”⁴⁶

Moreover, the *Model Code* provides that it is acceptable for judges to attend, speak at, receive an award at, or be featured in connection with a fundraising event hosted by an organization provided that it relates to the law, legal system, or the administration of justice.⁴⁷ In addition, it is expressly stated that the mere attendance by a judge at an event organized for the purpose of fundraising, regardless of whether it is law-related, does not violate any of the *Model Code* rules.⁴⁸ A judge is also permitted to “serve as an usher or a food server or preparer, or to perform similar functions at fund-raising events sponsored by ... organizations.”⁴⁹

Beyond the *Model Code*, decisions of American judicial ethics committees and panels are a rich source of information on this issue, as they have released advisory opinions to help judges identify the permissible boundaries of judicial fundraising. There is no similar public source of information in Canada, as any advisory opinions provided to judges by the CJC are not made public. American advisory opinions unequivocally state that judges are not permitted to solicit funds beyond the exceptions set out in the applicable code of conduct. Consequently, a judge participating as an auctioneer at a country club’s fundraising tournament would be in violation of this rule.⁵⁰ Similarly, it would be forbidden for a judge to solicit donations from lawyers to help pay for a brochure about the perception of fairness in courts as this is considered a personal solicitation by a judge.⁵¹ Likewise, a judge would be in breach of the rule by participating in the solicitation of funds for a church.⁵²

Furthermore, apart from solicitations from judicial colleagues or family members, advisory opinions clarify that no exceptions are made as to the people that can be solicited by a judge. As a result, in one instance it was concluded that a judge that chaired the finance

⁴⁴ *Model Code, ibid*, Canon 3, r 3.7(A)(1); *Federal Code, ibid*, Canon 4(C) (expressly allows planning but does not mention the management of funds).

⁴⁵ *Model Code, ibid*, Canon 3, r 3.7(A)(3).

⁴⁶ *Supra* note 3, ch 6, commentary C4(2). See *Federal Code, supra* note 39, Canon 4(C) providing that a judge “should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.”

⁴⁷ *Supra* note 39, Canon 3, r 3.7(A)(4); cf *Federal Code, ibid*, Canon 4(C), commentary, providing that a judge “may not be a speaker, a guest of honor, or featured on the program” of fundraising events of law-related and other organizations.

⁴⁸ *Ibid*, Canon 3, r 3.7, commentary 3. See also *Federal Code, ibid*, Canon 4(C), commentary.

⁴⁹ *Model Code, ibid*.

⁵⁰ Judicial Ethics Opinion (17 May 2007), JE 151 at 1, online: Judicial Ethics Advisory Panel, Supreme Court of Kansas <www.kscourts.org/pdf/ClerkCt/JE151.pdf>.

⁵¹ Opinion (31 January 2012), 2012-04 at 2, online: Judicial Ethics Advisory Committee, Florida Supreme Court <www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2012/2012-04.html>.

⁵² United States Courts, Guide to Judicial Conduct, vol 2, pt B at 42-1 (“Advisory Opinion No. 42: Participation in Fund Raising for a Religious Organization”), online: <www.uscourts.gov/uscourts/rulesandpolicies/conduct/vol02b-ch02.pdf>.

committee for the Boy Scouts of America was prohibited from soliciting financial support from other board members.⁵³ Despite the judge confining solicitation requests to a small group of individuals, this behaviour was nevertheless prohibited as it was regarded a solicitation of funds which did not fall within the allowable exceptions.⁵⁴

Advisory opinions also address the indirect participation by judges in fundraising activities. In general, judges are advised to refrain from participating even indirectly in non-law related fundraising situations where donors may feel coerced to contribute or where it may appear that judicial prestige is misused. For example, the Judicial Ethics Committee of Maine decided that it would be improper for a judge to serve on a campaign committee to raise funds for the renovation of a local hospital.⁵⁵ Since the judge's name would appear on fundraising letters there was a concern that donors could feel compelled to contribute.⁵⁶ Potential donors might also expect future favours in return for their generosity.⁵⁷ In addition, there was a fear that people solicited could include parties with interests before the judge.⁵⁸ This could undermine public confidence in judges by creating an appearance of a conflict of interest. In another case, a judge was not permitted to participate as a celebrity judge for a charity fundraising event.⁵⁹ Even though the judge was not requesting donations on behalf of the charity, it was determined that by participating the judge would be lending the prestige of the judicial office to be used by others to fundraise.

Hence, judges are advised to refrain from participating in fundraising events which might create the risk that people solicited could feel a sense of obligation to respond favourably because of the judge's involvement. They are also instructed to avoid circumstances where the prestige of the judicial office could be seen to be used by others for fundraising purposes. Accordingly, an approach sanctioned by several advisory opinions which reduces such concerns has been simply to omit the judge's name from any advertisements related to fundraising.⁶⁰ By so doing, a judge could avoid the risk of misusing the judicial office as his or her name and position would not be known to people attending the fundraising event. As a result, provided that a judge's involvement remains anonymous, a judge is allowed to participate indirectly in fundraising activities.

There is also a shared understanding among advisory opinions as to the permissible participation by judges in activities that involve the law, legal system, or the administration of justice. For example, the Florida Supreme Court permitted a judge to assist in a legally-

⁵³ *Ibid* at 32-1 (“Advisory Opinion No. 32: Limited Solicitation of Funds for the Boy Scouts of America”), online: <www.uscourts.gov/uscourts/rulesandpolicies/conduct/vol02b-ch02.pdf>.

⁵⁴ *Ibid*.

⁵⁵ Advisory Opinion (16 July 2002), 02-2 at 2, online: Judicial Responsibility and Disability Committee, State of Maine <www.jrd.maine.gov/pdfs/Opinions/Opinion%2002-2.pdf>.

⁵⁶ *Ibid* at 1.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at 2.

⁵⁹ Opinion (2 February 2011), 1-2011 at 1, online: Advisory Committee on Standards of Judicial Conduct, South Carolina Judicial Department <www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=01-201>. See also Opinion (19 February 1998), 98-1 at 3-4, online: Judicial Conduct Advisory Committee, Supreme Court of Wisconsin <www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=89>, in which a judge was not permitted to participate as a celebrity judge in a fundraising event for a charitable organization. Such involvement was found to constitute personal participation in a fundraising activity and was seen as a misuse of the judicial office.

⁶⁰ See Cynthia Gray, “A Judicial Survival Guide to Balancing Social Commitments with the Code of Judicial Conduct” (1996) 35:4 *Judges J* 18 at 25-26 [Gray, “Survival Guide”].

related program during which the judge selected the winner of a “best skit” contest that received a monetary prize given to his or her charity of choice.⁶¹ This conduct was acceptable because the judge was not directly involved in fundraising. Instead, the judge was only responsible for designating a recipient of the award from funds already set aside by an organization devoted to the improvement of the law. Similarly, the Colorado Supreme Court allowed a judge to be interviewed for a video relating to a diversion program for teen offenders intended for informational and fundraising purposes.⁶² The Court reasoned that such involvement was akin to speaking at a law-related fundraising event which is expressly permitted under the *Model Code*.⁶³ However, the acceptability was subject to the condition that the judge did not personally solicit funds for the organization.⁶⁴ It is therefore apparent that as long as judges refrain from actively soliciting funds from potential donors, judges can assist with law-related fundraising events. Such conduct is generally encouraged as it is believed that a judge that is able to keep abreast of current issues and ideas in the profession will be more effective in the performance of his or her judicial function.⁶⁵

American advisory opinions also allow judges to assist in the planning of fundraising events. Permissible planning activities include the internal brainstorming of fundraising ideas.⁶⁶ In one instance, a judge was allowed to serve as president of a non-profit sports organization and assist it with fundraising planning to help achieve the goal of promoting athletics in local schools.⁶⁷ However, this was subject to the condition that the judge did not misuse the judicial office in support of fundraising.⁶⁸ The judge was also advised to avoid permitting his or her name to appear on fundraising letters which could cause people to believe that he or she was fundraising.⁶⁹ In comparable circumstances, a judge serving as the director of an organization which offered educational services to students was permitted to assist in planning fundraising events on its behalf.⁷⁰ This was conditional on the judge refraining from fundraising, largely to avoid creating situations where donors could feel obligated to respond favourably to the judge’s solicitation requests.⁷¹

Thus, advisory opinions clarify that American judges can participate in planning fundraising activities as long as they do not fundraise or cause the public to assume that they

⁶¹ Opinion (23 September 2010), 2010-32 at 1, online: Judicial Ethics Advisory Committee, Florida Supreme Court <www.jud6.org/LegalCommunity/LegalPractice/opinions/jecapinions/2010/2010-32.html>.

⁶² Advisory Opinion (10 July 2012), 2012-03 at 1, online: Colorado Judicial Ethics Advisory Board, Colorado Supreme Court <www.courts.state.co.us/userfiles/file/2012-03.pdf>.

⁶³ *Ibid* at 3.

⁶⁴ *Ibid* at 1.

⁶⁵ *Re Petition of Alton W Wiley*, 671 A (2d) 308 at 310 (RI Sup Ct 1996) [Wiley].

⁶⁶ United States Courts, Guide to Judicial Conduct, vol 2, pt B at 35-1 (“Advisory Opinion No. 35: Solicitation of Funds for Nonprofit Organizations, Including Listing of Judges on Solicitation Materials”), online: <www.uscourts.gov/uscourts/rulesandpolicies/conduct/vol02b-ch02.pdf>.

⁶⁷ Opinion (26 January 2012), 12-14 at 1, online: Advisory Committee on Judicial Ethics, New York State Unified Court System <www.nycourts.gov/ip/judicialethics/opinions/12-14.htm>.

⁶⁸ *Ibid* at 2.

⁶⁹ *Ibid*.

⁷⁰ Opinion (2009), 10-2009 at 1, online: Advisory Committee on Standards of Judicial Conduct, South Carolina Judicial Department <www.judicial.state.sc.us/advisoryOpinions/HTML/10-2009.htm>. See also Opinion (3 May 2011), 2011-06 at 1, online: Judicial Ethics Advisory Committee, Florida Supreme Court <www.jud6.org/LegalCommunity/LegalPractice/opinions/jecapinions/2011/2011-06.html>, in which a judge was allowed to assist in planning fundraising activities for a supervised childcare program organized by the YWCA to help pay for the supervision of children whose parents attended court-related matters.

⁷¹ *Ibid*.

are fundraising. This contrasts with the position in Canada, where although it is acceptable for judges to be members or directors of civic or charitable organizations, nowhere is it stated that judges can help plan fundraising events.⁷²

Furthermore, advisory opinions explain that the degree to which a judge is able to engage in fundraising activities is primarily determined by the nature of the judge's participation. Judges are not forbidden from engaging in every type of fundraising activity.⁷³ The permissibility of a judge's involvement in a fundraising event is determined by taking into account the overall event and the extent of the judge's engagement to decide if there are any elements of coercion present.⁷⁴ With this in mind, advisory opinions have generally prohibited judges from playing central roles in fundraising events.⁷⁵ In one case, although not engaged in soliciting funds, a judge was nevertheless advised to decline serving as the president of a civic organization if his involvement required direct participation in fundraising activities.⁷⁶ This was largely due to the possibility that as a result of the judge's highly visible role the public may perceive the judge as playing more than an indirect role in soliciting money.⁷⁷ This in turn could cause donors to feel a sense of obligation to contribute money to the fundraising event.

On the other hand, minor involvement in fundraising activities has not been viewed by advisory opinions as violating the rules prohibiting judges from soliciting funds.⁷⁸ In a New York advisory opinion, a judge was able to assist with behind-the-scenes activities like helping to set up, prepare food, cook, and clean up during a fire department's annual fundraiser.⁷⁹ In that case, the judge was not doing things designed to raise money. The judge was also not playing a major role in the event, making it unlikely that people would think that the judge was engaged in fundraising. In light of this, collectively advisory opinions prohibit judges from taking on central roles in fundraising events. Meanwhile, they allow judges to engage in minor fundraising activities so long as such involvement is not perceived as a solicitation of funds or causes the judicial office to be misused.

If American advisory opinions were used as guide for modifying *Ethical Principles*, Canada's anti-solicitation restrictions would be somewhat loosened. The key changes would include allowing judges to participate in planning fundraising events. They would also permit judges to engage in minor fundraising activities so long as it could not be perceived that they are involved in soliciting money. Judges would also be able to engage in law-related fundraising activities if they themselves did not make appeals for funds. In addition, it would

⁷² *Ethical Principles*, *supra* note 3, ch 6, commentary C6.

⁷³ Gray, "Survival Guide," *supra* note 60 at 25.

⁷⁴ Cynthia Gray, "The 2007 ABA model code: taking judicial ethics standards to the next level" (2007) 90:6 *Judicature* 284 at 290.

⁷⁵ Advisory Committee on Judicial Ethics (13 September 2012), Advisory Opinion, 12-142 at 1, online: NY ACJE <www.nycourts.gov/ip/judicialethics/opinions/12-142.htm> (in which a judge that was president of a not-for-profit religious organization was permitted to attend and be involved in behind-the-scenes activities which included planning the organization's casino themed fundraising. This was subject to the condition that the judge did not speak or participate in any prominent way during the fundraising event).

⁷⁶ Maryland Judicial Ethics Committee (4 April 2011), Advisory Opinion, 2011-04 at 2, online: Md Judicial Ethics Committee <www.courts.state.md.us/ethics/pdfs/2011-04.pdf>.

⁷⁷ *Ibid.*

⁷⁸ Gray, "Survival Guide," *supra* note 60 at 25.

⁷⁹ Opinion (11 March 2010), 10-22 at 1, online: Advisory Committee on Judicial Ethics, New York State Unified Court System <www.nycourts.gov/ip/judicialethics/opinions/10-22.htm>.

be acceptable for judges to participate in fundraising activities indirectly if the judicial office was not misused and if potential donors did not feel coerced in such circumstances.

B. AUSTRALIA

The *Guide to Judicial Conduct* gives practical guidance to all members of the Australian judiciary by indicating how particular ethical situations may be best handled.⁸⁰ The first edition stated that “[a] judge should not personally solicit funds from a legal practitioner or any other prospective donor.”⁸¹ This created an absolute ban against judicial fundraising similar to that currently endorsed in *Ethical Principles*. However in 2007 absolute prohibitions against judicial fundraising were replaced with more permissive statements. *Judicial Conduct* now provides that “[a] judge should avoid any involvement in fundraising such as might create a perception that use is being made, or advantage taken, of the judicial office.”⁸² A judge should also be “especially careful to avoid creating such a perception in the minds of actual or potential litigants or witnesses before the judge’s court.”⁸³ *Judicial Conduct* no longer categorically prohibits fundraising. Accordingly, Australian judges are not limited to soliciting funds only from judicial colleagues or for appropriate judicial purposes. They are also not precluded from personally participating in fundraising. Instead, the *Judicial Conduct* grants judges a degree of latitude to engage in fundraising if their involvement does not create the appearance that the judicial office is being misused.

C. ENGLAND

The judiciary in England has adopted a position similar to Australia concerning judicial fundraising. Indeed, *Judicial Conduct* was used as a model in drafting the guide used in England.⁸⁴ All full-time and part-time judges in England are subject to the *Guide to Judicial Conduct, March 2013* which offers assistance by providing guidance for proper judicial behaviour. The guide recognizes the public benefit that judicial community involvement may bring but warns that “care should be taken that it does not compromise judicial independence or put at risk the status or integrity of judicial office.”⁸⁵ It goes on to mention that judges may be involved in managing educational, charitable, and religious organizations but urges that “care should be taken in considering whether, and if so to what extent, a judge’s name and title should be associated with an appeal for funds, even for a charitable organisation.”⁸⁶ It explains that failure to take such precautions could amount to the inappropriate use of judicial prestige in support of an organization.⁸⁷ It could also be seen as creating a sense of obligation to donors.⁸⁸ In comparison to *Ethical Principles*, the *Guide* takes a more flexible approach to judicial fundraising. It does not bar judges from making personal appeals for

⁸⁰ Council of Chief Justices of Australia, *Guide to Judicial Conduct*, 2nd ed (Melbourne: Australasian Institute of Judicial Administration Incorporated, 2007), ch 1, r 1.1 [*Judicial Conduct*].

⁸¹ Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Carlton, Australia: Australasian Institute of Judicial Administration Incorporated, 2002), ch 6, r 6.5.

⁸² *Judicial Conduct*, *supra* note 80, ch 6, r 6.6.

⁸³ *Ibid.*

⁸⁴ Judiciary of England and Wales, *Guide to Judicial Conduct, March 2013* at 4 [*Guide*], online: <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf>.

⁸⁵ *Ibid.*, ch 8, r 8.4.1.

⁸⁶ *Ibid.*, ch 8, r 8.4.2.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

funds. Instead, it urges judges to exercise caution and to use their judgment when determining whether to associate themselves, and to what extent, with fundraising endeavours. Such discretion gives judges the freedom to decide whether to become involved in certain civic and charitable fundraising activities.

V. POLICY ARGUMENTS ABOUT JUDICIAL FUNDRAISING

Judges play an indispensable role in the administration of justice. Their position requires that they be “held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust.”⁸⁹ To ensure that the public does not lose confidence in the judicial system, a delicate balance is required to maintain a degree of judicial insulation from society so that judges remain impartial arbiters while at the same time allowing them to be active members of the community. Too restrictive measures on extrajudicial activities carry the risk that judges will “lose contact with the world outside the court, which in turn will result in judicial shortsightedness and unresponsiveness to the ever-changing needs of society.”⁹⁰ On the other hand, permitting judges to engage in extrajudicial activities freely introduces the danger of weakening public confidence in the courts.⁹¹ It also risks individuals believing that justice can be purchased.⁹² The issue of whether to allow judges to raise funds for civic and charitable organizations requires resolution of the tension between these positions.

At the outset it should be noted that fundraising is not simply one of several forms of possible community involvement. Fundraising for a cause shows a much stronger degree of support for that cause than indications of personal agreement, volunteering of time and activity, and even personal financial contributions. It moves beyond one’s own individual support to the active seeking out of expressions of support from others. It encompasses an advocacy function, championing the cause and seeking to rally others to it. Moreover, unlike other involvement it entails a specific and identifiable response by others, who must either agree to donate or not.

There are many arguments in favour of a ban on judicial fundraising. It has been long recognized that “ethical system[s] must be so framed as to prevent judges from being activists, mavericks, [and] publicity-seekers.”⁹³ In view of this, judicial fundraising presents ethical problems as it can directly or indirectly result in a judge being publicly associated with an organization as its advocate. This in turn may have significant negative repercussions as it could undermine the perceived impartiality of the judge and reduce the public’s trust in the justice system.

⁸⁹ Jeffrey M Shaman, Steven Lubet & James J Alfani, *Judicial Conduct and Ethics*, 2nd (Charlottesville: Michie, 1995) at 1.

⁹⁰ Shimon Shetreet, “Standards of Conduct of International Judges: Outside Activities” (2003) 2:1 *Law & Prac Intl Courts & Trib* 127 at 161. See also John Sopinka, “Must a Judge Be a Monk — Revisited” (1996) 45 *UNBLJ* 167.

⁹¹ Steven Lubet, “Judicial Ethics and Private Lives” (1985) 79:5&6 *Nw UL Rev* 983 at 1007.

⁹² *Re Amendments to the Code of Judicial Conduct — Limitations on Judges’ Participation in Fundraising Activities*, 983 So (2d) 550 at 566 (Fla Sup Ct 2008).

⁹³ The Honourable Mr Justice Thomas, *Judicial Ethics in Australia* (Sydney: The Law Book Company Limited, 1988) at 42.

A. EROSION OF PUBLIC CONFIDENCE IN THE IMPARTIALITY OF JUDGES

Judges are expected to be impartial, which “connotes absence of bias, actual or perceived.”⁹⁴ Impartiality is so important that it is a constitutional right of all Canadians that they are entitled “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”⁹⁵ Judicial fundraising can place that impartiality in jeopardy. Every time judges solicit funds for any cause there is always the risk that those that appear before the court may suspect that the judge may be affected by the resulting financial support.⁹⁶ A “system of justice based on how much money you gave or raised for the judge before whom you are appearing cannot sustain public trust, and inevitably the public will believe about the judiciary what they believe about politics: money is what determines results.”⁹⁷ If individuals cannot be assured that judges are impartial, this could erode public confidence in adjudication and could result in people becoming reluctant to seek the aid of the judiciary to help resolve disputes.⁹⁸

A common concern regarding judicial fundraising is that donors (which may include lawyers and potential litigants appearing before a judge) may contribute with the expectation that they will receive future favours from the soliciting judge in return for their generosity.⁹⁹ Some have likened this to an acceptance of a gift by a judge, since a potential donor may contribute expecting a favour in return. Even if donors do not have an ulterior motive in contributing, the “public may view the largess as an attempt to gain a courtroom advantage over a less generous attorney or litigant.”¹⁰⁰ As a result, the fears remain that judges who raise money may either appear beholden to those from whom funds were solicited or that they may not appear to be impartial if donors end up becoming litigants before them.¹⁰¹ Since judicial impartiality is vital for inspiring public confidence in the justice system and ensuring just verdicts, any judicial fundraising which has the potential to undermine impartiality should be avoided.

B. IDENTIFICATION OF THE JUDGE WITH THE OBJECTIVES OF AN ORGANIZATION

When judges raise money for charitable or civic causes it publicly identifies them with the objectives of the organization for whom the solicitations were made.¹⁰² When a judge identifies himself or herself either voluntarily or as a consequence of involvement with a cause or issue this heightens the risk that the public could question the judge’s neutrality.¹⁰³

⁹⁴ *Valente v The Queen*, [1985] 2 SCR 673 at 685.

⁹⁵ *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁹⁶ Michael Mone, “An Impartial and Independent Judiciary” (2002) 20:4 *Adv Society J* 15 at 17.

⁹⁷ *Ibid.*

⁹⁸ Shetreet, *supra* note 90 at 161.

⁹⁹ Justice Ian Binnie, “Judicial Independence in Canada” (Paper delivered at the World Conference on Constitutional Justice, Rio de Janeiro, 16-18 January 2011) at 25, online: Council of Europe Venice Commission <www.venice.coe.int/wccj/rio/papers/can_binnie_e.pdf>. See Alfini et al, *supra* note 41 at 368-69.

¹⁰⁰ Raymond J McKoski, “Charitable Fund-raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct” [2008] *MSU L Rev* 769 at 772-73.

¹⁰¹ Jackson, *supra* note 13 at 10.

¹⁰² Binnie, *supra* note 99 at 25.

¹⁰³ Thomas, *supra* note 93 at 39-40.

For instance, the public may view a judge that is involved with fundraising efforts for Mothers Against Drunk Driving Canada as having a predisposition on the issue of impaired driving, an issue which may come before the judge in a variety of cases.¹⁰⁴ While the cause may be worthy, it is undesirable that the public perceive a judge as having a particular attitude or opinion about an issue as a result of his or her fundraising efforts or affiliation with an organization.

C. INCREASE IN THE NUMBER OF RECUSALS

It has been argued that judicial fundraising has the undesired potential of contributing to an excessive number of recusals.¹⁰⁵ This is problematic since regular disqualifications impose a cost on both the justice system and the public.¹⁰⁶ This is because such involvement “will often necessitate the disqualification of a judge in a matter in which he or she has been involved or with which he or she is familiar due to his or her extra-judicial activity.”¹⁰⁷ Justice Thomas has strengthened this argument by considering the inherent incompatibility between judicial and non-judicial functions.¹⁰⁸ At its core, the argument states that judges should be hesitant when engaging with organizations, as the nature of charitable and civic groups has changed because they are now more frequent litigants than in the past.¹⁰⁹ Simply, judges should refrain from engaging with charities that could be involved in legal disputes or could cause controversy. This has become a more salient issue over time as organizations are now more likely to be involved in “political disputes over funding, the role of labour unions, abortion and other matters.”¹¹⁰ There is some evidence that judges have taken notice of these changes, as for instance they have reduced their involvement in organizations like the Canadian Red Cross and the Canadian National Institute for the Blind as compared to their more active involvement in the past.¹¹¹

D. DETRACTING FROM THE PERFORMANCE OF THE JUDICIAL FUNCTION

Another concern is that fundraising may detract from the time and energy that judges spend performing their judicial functions.¹¹² The fear is that when judges become involved in extrajudicial activities their efficiency suffers.¹¹³ Judges should devote themselves entirely to judging, which demands that they refrain from pursuing other goals regardless of how worthy or beneficial they may be.¹¹⁴ If judges were allowed to engage in fundraising activities this would reduce the amount of time judges spent adjudicating disputes.¹¹⁵ This in turn could result in a backlog of cases and a reduction in the speed at which disputes are

¹⁰⁴ *Ibid.*

¹⁰⁵ Binnie, *supra* note 99 at 25.

¹⁰⁶ E Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* (Chicago: ABA, 1973) at 79.

¹⁰⁷ Shetreet, *supra* note 90 at 160-61.

¹⁰⁸ The Honourable Justice Thomas, *Judicial Ethics in Australia*, 2nd ed (Sydney: LBC Information Services, 1997) at v.

¹⁰⁹ *Ibid.*

¹¹⁰ Celeste McGovern, “Unelected and Unmuzzled: New Ethical Guidelines Allow Judges to Enter the Political Arena,” *Alberta Report* (21 December 1998) 26:1 (Academic Search Elite).

¹¹¹ Jackson, *supra* note 13 at 9.

¹¹² McKoski, *supra* note 100 at 779-81.

¹¹³ Shetreet, *supra* note 90 at 160.

¹¹⁴ Lubet, *supra* note 91 at 988.

¹¹⁵ Shetreet, *supra* note 90 at 160.

resolved.¹¹⁶ There is also the danger that if a fundraising activity becomes too time-consuming, the public may mistakenly believe that the judge is “not ... a full-time judge, or to take the view ... that the office of the judge is not a full-time occupation.”¹¹⁷

E. IMPROPER USE OF THE PRESTIGE OF THE JUDICIAL OFFICE

A more general concern regarding judicial fundraising is that it is incompatible with the exercise of judicial power. Arguably when judges use their position to solicit contributions they misuse the judicial office and may cause people to feel intimidated or coerced into donating.¹¹⁸ Judges might take advantage of the prestige of their office to solicit money for an organization, and this may occur even in circumstances where such conduct cannot be described as involving intimidation.¹¹⁹ The prestige of the judicial office is not intended to be used as a vehicle to advance economic, financial, social, political, or other interests including a charity’s interests.¹²⁰ The motivation behind this concern is the “fear [that] not only [will] a future decision be tainted, but also that the public will lose confidence in the character of a judge who seeks, takes or appears to take any advantage of his or her office.”¹²¹ Some have suggested that the best way to guard against such dangers is to preclude fundraising entirely. This would prevent judges from any enticement to lend the prestige of the judicial office to benefit other interests.¹²² It would also have the beneficial effect of preventing the appearance of judicial impropriety.¹²³

F. BENEFITS OF JUDICIAL INVOLVEMENT IN THE COMMUNITY

There are fewer arguments favouring judicial fundraising. Some of them relate more generally to judicial involvement in civic and charitable activities without specifically addressing the issue of judicial fundraising. The thrust of this line of reasoning is that there is an expectation that judges, like other professionals, should be involved in the community as this has the effect of enhancing public trust.¹²⁴ Engagement in charitable and civic activities also allows judges to become better integrated within the community and forges bonds of trust by “help[ing] personalize judges as sincere and caring family members, volunteers, and community leaders.”¹²⁵ It provides judges with opportunities to educate the public about the administration of justice, the legal system, and the law.¹²⁶ Not only is such engagement beneficial to the public by inspiring confidence in the justice system, it also benefits individual judges by improving their demeanour, reducing their stress levels, and enhancing their self-esteem.¹²⁷

¹¹⁶ *Ibid.*

¹¹⁷ Thomas, *supra* note 93 at 37-38.

¹¹⁸ Alfini et al, *supra* note 41 at 368-69; Candice Goldstein, “Fundraising by judges: ethical restrictions on assisting civic, charitable and other organizations” (1986) 70:1 *Judicature* 27 at 30.

¹¹⁹ Alfini et al, *ibid*; Goldstein, *ibid*.

¹²⁰ Pierre Noreau & Chantal Roberge, *Applied Judicial Ethics*, 2nd ed (Montreal: Wilson & Lafleur, 2008) at 186; Lubet, *supra* note 91 at 986; Goldstein, *supra* note 118 at 30.

¹²¹ Lubet, *ibid* at 987.

¹²² Goldstein, *supra* note 118 at 30.

¹²³ *Ibid.*

¹²⁴ McKoski, *supra* note 100 at 774.

¹²⁵ *Ibid* at 775.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* at 776.

As noted, a difficulty with these arguments is that they sidestep the issue of judicial fundraising. Those that come close to taking a stand on the issue do so tentatively by suggesting that judicial fundraising may be acceptable in certain limited circumstances. For instance, such arguments compare the relatively lesser harm that solicitations by a judge may have on making an average citizen feel intimidated into contributing as compared to lawyers or court staff.¹²⁸ Despite the existence of such arguments, collectively they fail to make a strong case in favour of allowing judges to fundraise. Canadian judges are already provided with significant opportunities to participate in community matters and reap the benefits derived from such extrajudicial activities. For instance, *Ethical Principles* allows judges to be involved in community activities.¹²⁹ Hence, given the qualitative difference between fundraising and other forms of involvement, arguments that address the general benefits of judicial community involvement are not particularly persuasive when used in support of judicial fundraising activities.

G. NO NEED FOR BLANKET PROHIBITIONS AGAINST JUDICIAL FUNDRAISING

There are those who assert that imposing a blanket rule against judicial fundraising is too harsh.¹³⁰ Civil law judges who participated in the formation of the *Bangalore Principles of Judicial Conduct*, which are now used as an international model for judicial conduct, endorsed this view when they objected to total prohibitions against judicial fundraising as an internationally accepted norm.¹³¹ Advocates of this position suggest that there are situations where the concerns against judicial fundraising are overblown. For instance, it is not apparent why a judge lending his or her name in support of an overseas disaster relief campaign would trigger the concerns relevant to judicial fundraising.¹³² Similarly, general forms of fundraising like serving as an usher or food server at a fundraising event generally lack the elements of coercion or abuse of the prestige of the judicial office.¹³³ The ability to coerce potential donors is also non-existent in circumstances that involve judges soliciting funds from other judges.¹³⁴ Likewise, solicitation requests by judges from family members are also not seen as being problematic since they do not trigger the more general concerns. In these international principles exceptions are therefore made to allow certain forms of judicial fundraising to ensure that activities which do not actually cause harm to the justice system are not unduly prohibited. Hence, a general ban against judicial fundraising is resisted by recognizing that in certain situations the dangers cautioned against are not present.

This line of thinking likely underpins decisions in jurisdictions such as Australia and England to endorse a less absolute approach. For instance, Australia allows judges to engage in fundraising as long as it is not perceived that advantage is being taken of the judicial

¹²⁸ Roger J Miner, "Judicial Ethics in the Twenty-first Century: Tracing the Trends" (2004) 32:4 Hofstra L Rev 1107 at 1128.

¹²⁹ *Ethical Principles*, *supra* note 3, ch 6, principle C1.

¹³⁰ David Wood, *Judicial Ethics: A Discussion Paper* (The Australian Institute of Judicial Administration Incorporated) at 27.

¹³¹ United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) at 16.

¹³² Wood, *supra* note 130 at 27.

¹³³ Alfini et al, *supra* note 41 at 371.

¹³⁴ Goldstein, *supra* note 118 at 28.

office.¹³⁵ In England and Scotland, judges are urged to be cautious when using their names and the title of a judge in appeals for funds, but they are not barred from fundraising entirely.¹³⁶ Tanzania expressly allows judges to raise funds for organizations devoted to the improvement of the law and the legal system.¹³⁷ Tanzanian judges can also raise funds for civic and charitable organizations if their involvement does not adversely reflect upon their impartiality or impair the performance of judicial duties.¹³⁸ It is clear that some countries have not found arguments in favour of absolute bans against judicial fundraising to be persuasive. Instead, these countries think that in certain circumstances fundraising is an appropriate activity for judges.

H. JUDICIAL FUNDRAISING PROBLEMS EXAGGERATED

A more extreme view is sceptical about whether there should be any concerns at all with judges soliciting funds.¹³⁹ There is a lack of empirical data on how the public views charitable judicial fundraising.¹⁴⁰ There is also a difficulty in determining at which point, if any, such behaviour actually harms the public's confidence in the judiciary.¹⁴¹ Without such information an accurate comparison between the benefits and harms of judicial fundraising cannot be made. This makes it hard to give weight to the arguments against judicial fundraising because its perceived harms may not actually exist. Advocates of this position therefore suggest that empirical data should be collected to distinguish between fundraising participation that is harmless to the judiciary and conduct that has a detrimental impact on the public's confidence in the justice system.¹⁴² It is only by doing so that judicial fundraising restrictions can be properly examined to ensure that they are directly related to the policy considerations used to support such constraints.¹⁴³

VI. ANALYSIS AND RECOMMENDATIONS

It is difficult simply to reject the call for more empirical data. It would be useful to know, for example, what percentage of Canadian judges, lawyers, and members of the public oppose various forms of judicial fundraising. Perhaps, for example, judicial involvement in the Nova Scotia Movember campaign described above was wildly popular in both the legal and the broader community. However, we do not have such data nor are we likely to have them in the near future. It would not be appropriate to delay consideration of these issues until more data are available. The data may be inconclusive. Moreover, concerns about actual and perceived impartiality and the administration of justice are not generally susceptible to resolution solely or even largely through an aggregation of public opinion.

¹³⁵ *Judicial Conduct*, *supra* note 80, ch 6, r 6.6.

¹³⁶ *Guide*, *supra* note 84 at ch 8, r 8.4.2; Judicial Office for Scotland, *Statement of Principles of Judicial Ethics for the Scottish Judiciary* (Judicial Office for Scotland, 2010), ch 7, r 7.1.

¹³⁷ *Code of Conduct for Judicial Officers in Tanzania* (1984), r 3C, online: Université de Montréal. <www.deontologie-judiciaire.umontreal.ca/fr/magistrature/documents/Code_TANZANIE.pdf>.

¹³⁸ *Ibid.*, r 4B.

¹³⁹ Wood, *supra* note 130 at 27.

¹⁴⁰ McKoski, *supra* note 100 at 839-40.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* at 841.

¹⁴³ *Ibid.*

The approach in Australia and England, which gives judges the discretion to fundraise in certain circumstances, including for civic and charitable causes, is problematic for several reasons. First, by moving away from a general preclusion, it presupposes that the level of judicial fundraising should be expanded. Yet as noted above the perceived benefits, if any, of allowing judges to participate in fundraising have not been substantiated by empirical evidence. Given both the lengthy pedigree and the current state of the principle in Canada, the onus arguably rests with those who would expand judicial fundraising to make a strong case for that expansion. Second, a discretionary approach is marked by the lack of a clear line providing guidance in advance. An open-ended principle makes it challenging for judges to be certain when they choose to fundraise that they are not putting the public's perception of their independence, impartiality, or integrity in jeopardy. These are serious concerns that go to the root of arguments against judicial fundraising. Leaving decisions to individual judges risks considerable inconsistency, on a case-by-case basis, across the judiciary and even across members of the same court. What some judges will choose to do under the rubric of this discretion, others would consider quite unacceptable. This is an area of judicial ethics where clarity and predictability will best serve to foster the interests involved. It would be unusual indeed, given that chief concerns with the current Canadian principle relate to the lack of clarity and certainty, for us to move to an even more open-ended principle. Third, such an approach would expose judges to considerably more requests for fundraising involvement and would require ongoing decisions in response.

On balance, the discretionary approach to judicial fundraising should be resisted by Canadian judicial councils. Instead, Canadian judicial councils should use the *Model Code* to update their judicial fundraising principles. This would not be unusual since American sources were consulted in the development of *Ethical Principles*.¹⁴⁴ As explained above, the United States has softened its strict anti-solicitation rules by adding exceptions to the *Model Code*. The ABA has taken the position that not all judicial fundraising situations appear to a reasonable person to be coercive or risk the judicial office being misused.¹⁴⁵ Nevertheless the core focus of the *Model Code*'s approach is that apart from narrow exceptions judges continue to be barred from soliciting funds. Making changes along the lines of the American ones would not radically alter the Canadian approach to regulating judicial fundraising. But the changes would provide greater clarity to judges by expressly defining permissible fundraising activities. Guidance of this sort is currently absent in Canada.

The exception which allows judges to solicit funds from other judges should be expanded to include members of the judge's family. Solicitation requests by judges to family members are similar in nature to those to other judges. Members of the judge's family are unlikely to feel pressured or intimidated into donating since the judge does not hold a position of influence over them. They would never be involved in litigation in which the judicial relative was presiding; he or she would already have a basis for disqualification.

In addition, judges should be permitted to participate in the planning of fundraising events. Currently there is no clear guidance as to whether this type of conduct is permitted. Instead,

¹⁴⁴ *Supra* note 3, ch 1, commentary C3.

¹⁴⁵ Alfani et al, *supra* note 41 at 371. See e.g. *Re Amendments to the Code of Judicial Conduct*, 983 So (2d) 550 (Fla Sup Ct 2008) (approving changes to the Florida Code of Judicial Conduct generally in accord with the approach adopted in the *Model Code*, *supra* note 39).

only general direction is provided which urges judges to avoid the improper use of the prestige of the judicial office and to refrain from fundraising.¹⁴⁶ More precise guidance would be valuable. This change would draw on a considerable number of American advisory opinions which state that judges can assist in planning fundraising activities as long as they do not fundraise or cause the public to perceive that the prestige of the judicial office is being used in aid of fundraising. Since it is quite possible for judges to conduct themselves in this manner, there is no reason why such conduct should be disallowed.

American judges can speak at, appear at, and receive either recognition or an award during a fundraising event if it relates to the law, administration of justice, or the legal system.¹⁴⁷ They can also be identified by their title in a program used in connection with such events.¹⁴⁸ This is because when judges participate in these ways they are not soliciting funds. This reduces the risk that individuals attending fundraising events may feel intimidated to donate money or that they might expect future favours in return for their generosity from the judge. Also, if the judge's involvement in the event is minor, then it is unlikely that it will detract from the performance of his or her judicial function.

However, it is imperative to differentiate the permissibility of such conduct at law-related as opposed to non-law-related fundraising events. *Ethical Principles* clearly states that judges are to avoid "involvement in causes or organizations that are likely to be engaged in litigation."¹⁴⁹ This fear is heightened when judges are involved in non-law-related fundraising events, as the host organizations of such events have over time become more involved in legal disputes. In addition, judges are expected to "avoid any activity or association that could reflect adversely on their impartiality."¹⁵⁰ There is an increased danger that the public may question a judge's neutrality if the judge becomes identified with fundraising events that do not involve the law. Since such involvement is not related to the work of a judge, it becomes more likely that the public may perceive a judge involved in such events as holding a particular attitude towards an issue or potential litigant that may come before the court. It is therefore unwise to allow such conduct at non-law-related fundraising events. Ignoring this advice could result in judges engaging in controversial issues and legal disputes which could cast doubt on their impartiality.

Similar concerns are not triggered when a judge becomes identified with law-related events. In fact, there are certain benefits derived from such involvement. Due to the nature of the judge's job it is expected that he or she will be involved in law-related activities. Such involvement allows judges to enhance the administration of justice by educating people about the law. Also, by being able to participate in these ways judges are presented with opportunities to stay informed about current issues affecting the judiciary.¹⁵¹ This in turn can enhance a judge's ability to perform his or her duties. It can also help achieve the CJC's commitment to "improv[ing] the quality of judicial service."¹⁵² Canadian judicial councils should therefore allow judges to speak, appear, and receive either recognition or an award

¹⁴⁶ *Ethical Principles*, *supra* note 3, ch 6, principle C1(b).

¹⁴⁷ *Model Code*, *supra* note 39, Canon 3, r 3.7(A)(4).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ethical Principles*, *supra* note 3, ch 6, principle C1(c).

¹⁵⁰ *Ibid.*, ch 6, principle C1(a).

¹⁵¹ *Wiley*, *supra* note 65 at 310.

¹⁵² *Judges Act*, *supra* note 1, s 60.

at only law-related fundraising events and permit them to be identified by their title in a program used in connection with such events.

Lastly, Canadian judicial councils should expressly state that judges can engage in minor behind-the-scenes fundraising activities. As pointed out by American advisory opinions, no obvious reasons exist that justify disallowing judges from assisting in fundraising activities when they are not doing things designed to raise money or that could amount to misuse of the judicial office. For instance, a judge that helps by cleaning up after a fundraising event would not be in violation of *Ethical Principles*. In such circumstances, the judge would not be soliciting money. It is also unlikely that potential donors at the event would perceive the judge as using the prestige of the office to assist in raising funds. As well, it is not expected that by playing a minor role in the event the judge would call into question his or her impartiality or impair the performance of his or her judicial duties. Since minor behind-the-scenes activities do not invoke the core concerns about judicial fundraising, Canadian judicial councils should therefore allow such conduct.

VII. HYPOTHETICAL SCENARIOS

The proposed changes to the judicial ethics principles about fundraising are set out in the Appendix to this article, taking the current *Ethical Principles* as a starting point. The changes can be further explored by considering a series of hypothetical scenarios. Depending on the degree of consensus that can be reached, such scenarios could play a role similar to that played in the United States by public advisory opinions. All of the organizations referred to in these scenarios should be understood to be registered charities.

1. A judge's daughter attends a private school. The judge solicits donations for the school's capital campaign from (i) other judges and (ii) other parents whose children attend the school.
2. A judge solicits donations for Mothers Against Drunk Driving Canada from (i) other judges, (ii) lawyers, and (iii) members of the public.
3. A judge solicits donations for the Faculty of Law, Western University, from (i) other judges, (ii) lawyers, and (iii) members of the public.
4. A judge solicits donations for the Canadian Forum on Civil Justice, a national non-profit organization dedicated to advancing civil justice reform through research and advocacy, from (i) other judges, (ii) lawyers, and (iii) members of the public.
5. A judge solicits pledges, which subsequently become donations, from members of the public for his or her participation in a run in support of breast cancer research.
6. A team of ten runners solicits pledges, which subsequently become donations, from members of the public for their participation in a run in support of breast cancer research. A judge is a member of the team.

Under the current and proposed principles, the only aspect of these appeals for funds that would be permitted is the solicitation of other judges. Under the proposed principles judges would also be able to solicit their family members. Direct fundraising from lawyers or members of the public in support of any of these causes would violate the principles. Even though there is a legal aspect to scenarios 3 and 4, these appeals do not fall within the narrow compass of raising funds in support of the administration of justice (the meaning of “appropriate judicial purposes”). Scenario 6 adds some complexity because the judge is not directly soliciting the funds from the public. However, as a member of the team the judge should be accountable for fundraising efforts by the team as though they were his or her own.

7. A judge gives a speech about (a) the administration of justice or (b) his or her career at a fundraising event for (i) his or her daughter’s private school, (ii) Mothers Against Drunk Driving Canada, (iii) the Canadian Forum on Civil Justice, and (iv) the Faculty of Law, Western University. Promotional materials for the event indicate that he or she will be speaking.
8. A judge gives a speech about (a) the administration of justice or (b) his or her career at a fundraising event for a political party. Promotional materials for the event indicate that he or she will be speaking.

The acceptability of a judge’s conduct changes when a judge participates in a fundraising event without actually soliciting funds. Nevertheless scenario 8 is reasonably clear, since *Ethical Principles* unequivocally provides that “[a]ll partisan political activity must cease upon [judicial] appointment.”¹⁵³ This includes judges refraining from attending “political fund raising events.”¹⁵⁴ Consequently, a judge would be prohibited from giving such a speech as this amounts to participating in a political fundraising event.

The current principles are unclear about the conduct in scenario 7. Is the judge fundraising? Is the judge lending the prestige of judicial office to the fundraising? The better answers to these questions are no and yes respectively. That second answer would preclude these activities. The proposed principles are more nuanced in this area, in that they accept that lending the prestige of judicial office in certain enumerated ways to fundraising activities by organizations concerned with the law, the legal system or the administration of justice is not a significant problem requiring preclusion. So the nature of the organization is quite important. Judges would only be permitted to engage in this sort of conduct for fundraising by law-related organizations. This suggests that the speech for the Canadian Forum on Civil Justice or the Faculty of Law, Western University would be acceptable and the speech for the private school would not. While some of Mothers Against Drunk Driving Canada’s activities relate very directly to law and law reform, the organization as a whole would not seem to be law-related and so that speech would not be allowed. In terms of the different possible topics for the speech, under the principles it would not matter whether the judge spoke about the administration of justice or his or her career.

¹⁵³ *Supra* note 3, ch 6, principle D2.

¹⁵⁴ *Ibid*, ch 6, principle D3(b).

9. A judge waits tables at a fundraising event for (i) his or her daughter's private school, (ii) Mothers Against Drunk Driving Canada, (iii) the Canadian Forum on Civil Justice, and (iv) the Faculty of Law, Western University. Promotional materials for the event indicate that he or she will be waiting tables.
10. A judge's services as a chef are auctioned off at a fundraising event for (i) his or her daughter's private school, (ii) Mothers Against Drunk Driving Canada, (iii) the Canadian Forum on Civil Justice, and (iv) the Faculty of Law, Western University. The judge will cook dinner for the highest bidder at (a) the bidder's home or (b) the judge's home.
11. As part of a fundraising campaign, the Faculty of Law, Western University identifies a judge as one of its graduates. The judge, with his or her consent, is pictured in the campaign brochure and quoted in support of the institution.

The proposed principles are not specific enough to provide an answer to these scenarios, which in part illustrates the utility of having scenarios to supplement the principles. In scenario 9, the act itself of waiting tables at the event would not constitute fundraising and would likely not amount to lending the prestige of judicial office to the fundraising. But if the people solicited are actively made aware of the judge's involvement, as is the case here through the promotional materials, this could be perceived as lending the prestige of the judicial office to the fundraising. The conduct in issue — waiting tables — is not exempted from the more general prohibition under the proposed principles. Therefore, regardless of the type of organization hosting the fundraising event, the judge would not be permitted to participate.

By cooking dinner at either the highest bidder's home or at the judge's home, even if such conduct does not in itself constitute fundraising by a judge, at minimum it amounts to the use of the prestige of the judicial office to assist in fundraising. The judge's name and title would be known to those participating in the auction. This conduct would be precluded for the same reasons as that in scenario 9, regardless of the type of organization that hosts the fundraising auction.

Scenario 11 raises similar concerns. Featuring the judge by name and picture primarily because of his or her position could amount to lending the prestige of judicial office to the Faculty's fundraising campaign. This conduct is not specifically exempted — as giving a speech or receiving an award is — and so would be contrary to the principles.

12. A judge chairs a fundraising event for (i) his or her daughter's private school, (ii) Mothers Against Drunk Driving Canada, (iii) the Canadian Forum on Civil Justice, and (iv) the Faculty of Law, Western University. He or she is involved in planning and implementing the event but does not ask anyone for funds.
13. A judge serves on a fundraising committee for (i) his or her daughter's private school, (ii) Mothers Against Drunk Driving Canada, (iii) the Canadian Forum on Civil Justice, and (iv) the Faculty of Law, Western University. He or she is

involved in strategy for and planning the fundraising campaign but does not ask anyone for funds.

The proposed principles allow judges to assist civic, charitable, or religious organizations with the planning related to a fundraising event. Judges could do so long as they did not raise funds or misuse the prestige of the judicial office. A key aspect of the latter requirement would be restricting the extent to which his or her involvement becomes known to the public or to potential donors. If these conditions are observed, in both scenarios 12 and 13 a judge could either chair or serve on the fundraising planning committee for all of these organizations.

VIII. CONCLUSION

Canada's judicial fundraising principles require modifications to reflect modern circumstances. In light of the considerable policy arguments urging caution in this area, it is difficult to support moving to the approach, adopted in some other jurisdictions, which would allow individual judges to exercise discretion in making decisions about what fundraising activities are or are not improper. The general direction that judges should not fundraise should be affirmed, subject to existing and some additional exceptions for situations that do not trigger the core concerns with judicial fundraising. The principles should also expressly address certain conduct that is related to fundraising activities so as to provide clearer guidance to judges. In addition, including discussion of hypothetical scenarios similar to those presented here would strengthen the understanding and operation of the principles.

APPENDIX:
PROPOSED AMENDMENTS TO THE
ETHICAL PRINCIPLES RELATING TO FUNDRAISING

C. Civic and Charitable Activity

1. Judges are free to participate in civic, charitable and religious activities subject to the following considerations:
 - (a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.
 - (b) Judges should not solicit funds (except from judicial colleagues or family members or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations. However, judges may:
 - (i) assist a civic, charitable or religious organization or an organization concerned with the law, the legal system or the administration of justice in planning relating to fund raising.
 - (ii) appear or speak at or receive an award or other recognition at a fund raising event for an organization concerned with the law, the legal system or the administration of justice, and in connection with that event be featured in its promotion.
 - (c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.
 - (d) Judges should not give legal or investment advice.