

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 87-003**

*[Withdrawn- by Board on Dec. 5, 1997 due to Op 89-29]*

**SYLLABUS:** A judge may serve as a member of the Board of Trustees for an incorporated not-for-profit foundation, PROVIDED such activity does not create a conflict of interest with the judge's official function, does not involve solicitation of funds by the judge or by others using the judge's name, and does not violate the mandatory standards set forth in the Code of Judicial Conduct including avoiding even the appearance of impropriety.

**TO:** Honorable David D. Mattes, Judge Clark County Juvenile Center

**FROM:** The Board of Commissioners on Grievances and Discipline of the Judiciary

**DATE:** May 18, 1987

We have before us your request for our opinion on whether you, as probate-juvenile judge, can serve on the Board of the Clark County Mental Health Foundation (the "Foundation"). It is our understanding that the Foundation's primary goal is fund-raising, with the proceeds going to the various mental health agencies in Clark County. In addition, as indicated in your request letter, as probate-juvenile judge, you hear cases in which agencies to be supported by the Foundation are directly or indirectly involved.

At the outset, before specifically addressing disqualification and conflicts, let us direct you to Canon 2 of the Code of Judicial Conduct as adopted in Ohio. Under Canon 2, a judge must not only avoid impropriety but must also avoid the appearance of impropriety. "It is of vital importance that the litigant should believe that he will have a fair trial." State ex rel v. Marshall, 123 Ohio St. 586, 587 (1931). Similarly, a formal opinion issued by the ABA Committee on Professional Ethics stated: "[a]ll judges of the lowest as well as highest courts must in all their personal business and social intercourse act not only in a manner that is lawful and proper but one which gives the impression and appearance to the public that it is proper." ABA Standing Committee on Professional Ethics, Formal Op. 322 (1969).

Therefore, if being a member of the Foundation's Board in any way lends the appearance of impropriety to your judicial duties then you should not serve on the Board or, in the alternative, step down from the bench. "Because of the position of the courts and because the needs of the citizens to understand that the courts are above reproach, the lives of our judges are far more circumscribed than the rest of us." Id. at 5.

Canon 3C(1)(d)(i) of the Code of Judicial Conduct requires a judge to disqualify himself if he is a party or a trustee of a party to the proceeding. Code of Judicial Conduct, Canon 3C(1)(d)(i) (1973). Thus, if the Clark County Mental Health Foundation were a party in any capacity in your courtroom and you were a trustee of the Foundation then your disqualification as judge would become a necessity.

Canon 5, which is relevant to your particular situation is entitled, "[a] judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties." Canon 5B states:

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

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.
- (2) A judge should disqualify himself in any case in which the decision could affect any organization which he serves as either an officer or member of the board.

(3) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, except he may participate as a member in solicitations limited to members of an educational, religious, charitable, fraternal or civic organization of which he is a member, and he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events. Code of Judicial Conduct, Canon 5B (1982).

Based on the information contained in your request letter, it is unclear whether your particular situation violates Canon 5B. This Canon allows judges to participate in activities, such as the Clark County Mental Health Foundation, provided such activity does not interfere with the judges' proper and expeditious administration of his or her official function. However, if it is likely the Foundation is, or will become involved, or regularly engaged, in proceedings in your courtroom then a conflict would arise. In this regard, it was stated in an ABA ethics opinion that "[i]f conflicting obligations in fact exist and cause interference with the judge's devotion to his judicial duties, then he must choose between the two positions and forego one or the other." ABA Committee on Ethics and Professional Responsibility, Informal Op. C-706 (1963).

In addition, Canon 5B(2) of the Code of Judicial Conduct requires a judge to disqualify himself from any case where his decision could affect any organization which he serves as an officer or board member. Therefore, as Probate-Juvenile Judge and a Foundation board member, you must disqualify yourself from any case which would affect the Foundation. It has been held however, that a judge who is an officer of a non-profit corporation interested in a case is not disqualified to hear the case. In Re Hopkins' Will, 6 Dem. 12, 19 NYSR 528 (1888). But see e.g., Askounes' Liquor License Case, 144 Pa. Super. 293, 19 A.2d 846 (1941).

The greatest difficulty with you becoming a board member of the Foundation relates to its prime objective of fund-raising as noted in the by-laws (Article 11, Section 1). Canon 5B(3) of the Code proscribes solicitation of funds by any judge. The ABA Standing Committee on Professional Ethics has prohibited judges from becoming involved in solicitation of funds for charitable purposes. ABA Standing Committee on Professional Ethics, Formal Op. 322 (1969). Further, the ABA Committee has held that a judge should not permit the use of his name for the purpose of solicitation of funds. ABA Committee on Ethics and Professional Responsibility, Formal Op. 238 (1942).

The basic objective behind prohibiting judges from soliciting funds for organizations is to eliminate the use or appearance of use of the power and prestige of the judicial office to persuade others to contribute funds. ABA Committee on Ethics and Professional Responsibility, Informal Op. 603 (1962). If, as a member of the Foundation's Board of Trustees, one is required to solicit funds or permit use of his or her name in any fund-raising effort then, judges would be prohibited from accepting such a position.

In regard to extra-judicial activity, the ABA Committee has held:

Although there may be no inherent impropriety in any specific act performed by a judge, a person in this position must give serious thought to, the weight of his judicial position and dignity and is cautioned against permitting any person to throw onto the scales of justice the weight of his judicial position. . . . [T]he public must have absolute faith in the competence and integrity of the courts and must have complete belief that the places of justice are wholly untainted and untarnished by scandal or suspicion. ABA Standing Committee on Professional Ethics, Formal Op. No. 322 (1969).

In conclusion, "[a] judge should not undertake any obligation or enter into any relationship of any kind or nature whatsoever which might in any way be inconsistent with his duties and obligations as a judge." *Id.* at 7. Therefore, in light of the considerations discussed herein, it is our opinion, and you are so advised, that membership on the Foundation's Board of Trustees might well create a conflict with your duties as Probate-Juvenile Judge in Clark County.

**This opinion is advisory in nature, is based upon the facts as presented and is limited to questions arising under the Code of Judicial Conduct.**

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