

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2009-1

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SYLLABUS: Rule 3.11(B) of the Ohio Code of Judicial Conduct prohibits a full-time magistrate from serving as an independent contractor for any business entity, unless allowed by one of the exceptions within the rule. Because none of the exceptions apply, it is improper under Rule 3.11(B) of the Ohio Code of Judicial Conduct for a full-time magistrate to engage in outside employment performing legal research projects as an independent contractor for a legal publishing company. If a full-time magistrate has undertaken such employment, he or she should relinquish the employment as soon as practicable pursuant to Rule 3.11(D). This opinion does not prohibit a full-time magistrate from writing or teaching. Under the exception provided in Rule 3.11(B)(3), a full-time magistrate is permitted to write or teach, provided the conditions of Rule 3.11(C) and Rule 3.1 are met, and subject to applicable restrictions in Ohio Ethics Law. The advice offered in this opinion also applies to a full-time judge.

OPINION: References within this opinion to the Ohio Code of Judicial Conduct are to the Ohio Code of Judicial Conduct, as amended effective March 1, 2009, which supersedes the former Ohio Code of Judicial Conduct in effect through February 28, 2009.

This opinion addresses a question regarding outside employment by a full-time magistrate.

Is it proper for a full-time magistrate to engage in outside employment as an independent contractor performing legal research projects for a legal publishing company?

A full time magistrate would like to accept outside employment with a legal publishing company. The legal publishing company is a business entity. The magistrate would be hired as an independent contractor to perform legal research projects, such as legal research and document preparation for the legal publisher's state surveys database project. According to the requester, the legal publisher does not appear as a party before the magistrate or the court and does not contract with the court on which the magistrate serves. The legal publisher requires that the individual contractor is a licensed attorney. The majority of the

independent contractors become involved by word-of-mouth among the independent contractors or through inquiries from the publisher's employees. The outside employment does not arise because of the magistrate's position.

The question presented implicates both the Ohio Code of Judicial Conduct and Ohio Ethics Law. Pursuant to Gov.Bar R. V(2)(C), the board is the appropriate advisory body for judges and magistrates as to the application of the Ohio Code of Judicial Conduct. Pursuant to R.C. 102.01(F)(2) and R.C. 102.08, the board is the appropriate advisory body for judges and magistrates as to the application of Ohio Ethics Law. Ohio Rev. Code Ann. §§ 102.01(F)(2) (West Supp. 2008), 102.08 (West 2002).

Application of Ohio Ethics Law

A judge's or magistrate's opportunities to engage in outside employment with a business entity are restricted by Ohio Ethics Law.

Pursuant to R.C. 102.01(B) and (C), a judicial officer or judicial employee is considered a "public official or employee" and a court is considered a "public agency." Ohio Rev. Code Ann. § 102.01(B), (C) (West Supp. 2008). R.C. 102.03(D) and (E) prohibits a public official or an employee (such as a judge or magistrate) from: 1) using or authorizing the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties; or 2) soliciting or accepting anything of value, that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. A corollary provision, R.C. 102.03(F) prohibits a person from promising or giving to a public official or employee anything of value that is such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. Ohio Rev. Code Ann. § 102.03(D), (E), (F) (West Supp. 2008).

A promise of employment is considered "anything of value." Ohio Rev. Code Ann. §§ 1.03 (West 2004), 102.01(G) (West Supp. 2008). A thing of value that is more than nominal or de minimis is a "substantial influence." A thing of value from a person interested in matters before, regulated by, or doing or seeking to do business with a public agency is considered an "improper influence." See, e.g., Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 2006-7 (2006). Employment from a person interested in matters, before, regulated by, or seeking to do business with a court (public agency) is considered to be a "substantial and improper influence" upon a judge or magistrate (public official or employee) with respect to that person's duties. Thus, R.C. 102.03(D) and (E) would prohibit a judge or magistrate from outside employment with a person who is interested in matters before, regulated by, or doing or seeking to do business with the court.

Under the facts presented the legal publishing company is not interested in matters before, regulated by, or doing or seeking to do business with the court. Therefore, R.C. 102.03(D) and (E) are not implicated.

Pursuant to R.C. 2921.42 a magistrate is prohibited from having an unlawful interest in a public contract. Ohio Rev. Code Ann. § 2921.42 (West 2006). Under the facts presented, the outside employment does not involve a public contract and therefore, R.C. 2921.42 is not implicated.

Application of Ohio Code of Judicial Conduct

A judge's or magistrate's opportunities to engage in outside employment with a business entity is greatly limited by Rule 3.11 of the Ohio Code of Judicial Conduct.

A full-time judge or a full-time magistrate is subject to Rule 3.11 in its entirety. A part-time judge or a part-time magistrate is subject to Rule 3.11(C), but not to (A) or (B). See Application Section (I)(A), (B), (III)(A) of the Ohio Code of Judicial Conduct.

RULE 3.11 Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and *members of the judge's family*.

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of or independent contractor for any business entity except that a judge may do any of the following:

(1) Manage or participate in a business closely held by the judge or *members of the judge's family*;

(2) Manage or participate in a business entity primarily engaged in investment of the financial resources of the judge or *members of the judge's family*;

(3) Write or teach.

(C) A judge shall not engage in financial activities permitted under divisions (A) and (B) of this rule if they will do any of the following:

(1) Interfere with the proper performance of judicial duties;

(2) Lead to frequent disqualification of the judge;

(3) Involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves;

(4) Result in violation of other provisions of this code.

(D) As soon as practicable without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this rule.

Outside employment of a judge or magistrate is also subject to Rule 3.1 which governs extrajudicial activities in general.

RULE 3.1 Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by *law*. However, when engaging in extrajudicial activities, a judge shall not do any of the following:

(A) Participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) Participate in activities that will lead to frequent disqualification of the judge;

(C) Participate in activities that would appear to a reasonable person to undermine the judge's *independence, integrity, or impartiality*;

(D) Engage in conduct that would appear to a reasonable person to be coercive;

(E) Make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for extrajudicial activities permitted by *law*.

Rule 3.11 is described as modifying ABA Model Rule 3.11 by the addition of "independent contractor" to the list of prohibited relationships with a business entity and by adding a general exemption for writing and teaching activities. See section entitled Comparison to ABA Model Code of Judicial Conduct which follows Rule 3.11.

Rule 3.11 is described as comparable to former Ohio Canon 2(C)(1) through (4). See section entitled Comparison to Ohio Code of Judicial Conduct which follows

Rule 3.11. However, former Ohio Canon 2(C)(3) did not explicitly include “independent contractor” in the list of prohibited business relationships.

Under Ohio’s Rule 3.11(B), a full-time judge or full-time magistrate is not permitted to participate as an independent contractor for any business entity unless one of the exceptions enumerated in (B)(1) through (3) apply. None of the enumerated exceptions apply to the facts presented.

The (B)(1) exception to Rule 3.11 does not apply because the legal publisher is not a business closely held by the judge [magistrate] or *members of the judge’s [magistrate’s] family*.

The (B)(2) exception to Rule 3.11 does not apply because the legal publisher is not a business entity primarily engaged in investment of the financial resources of the judge [magistrate] or *members of the judge’s [magistrate’s] family*.

The (B)(3) exception to Rule 3.11 does not apply because the proposed legal research activities for the business entity do not constitute writing or teaching for purposes of the rule. Teaching is not involved and any writing would be incidental to the legal research projects being conducted for the business entity.

As explained in Comment [1] to Rule 3.1, “[j]udges [and magistrates] are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system and the administration of justice such as by: speaking, writing, teaching, or participating in scholarly research projects.” Yet, the proposed independent contractor work for a legal publisher performing legal research projects, such as legal research and document preparation for a publisher’s state survey database project, does not rise to a “scholarly research project” that would fit within the “write or teach” exception in Rule 3.11(B)(3). The proposed research project work for the publisher is primarily a business arrangement that would serve the financial interests of the publisher and the independent contractor. It is understandable why full-time magistrates with sound, efficient legal research skills might view the chance to use those skills in their spare time to perform discrete projects of this type as an attractive opportunity to earn remuneration beyond their salaries. It likewise is understandable that publishers whose business is providing the legal community access to their research databases would welcome the opportunity to secure the finely honed research skills of full-time magistrates willing to devote their off-hours to such work in exchange for remuneration. Though the Board appreciates the extent to which such a business arrangement would satisfy the respective pecuniary interests of the publisher and the independent contractor, such interests are not typically the hallmarks of “scholarly research,” words Comment [1] uses to explain the scope of the “write or teach” exception to Rule 3.11’s general prohibition against full-time magistrates and judges entering into any independent contractor relationship with any business entity.

The proposed independent contract work on legal research projects for a business entity is distinct from activities that would fall within the teaching or writing exception of Rule 3.11(B)(3). For example, the types of activities that would fall within the writing or teaching exception of Rule 3.11(B)(3) would include teaching a continuing legal education course, teaching a college course, or writing an article, book, chapter to a book, or foreword to a book. Some of these teaching and writing activities have been addressed in prior board opinions interpreting the former Ohio Code of Judicial Conduct. See Ohio Sup.Ct, Bd of Comm'rs on Grievances & Discipline, Op. 95-9 (1995) (teaching continuing legal education classes or courses permitted); Op. 94-12 (1994), 89-28 (1989) (teaching at state or private colleges or universities on topics related to the law, the legal system, and the administration of justice permitted); Op. 86-2 (1986) (instructing a class as visiting lecturer at a state university permitted); Op. 89-21 (1989) (writing articles for publication on legal topics permitted); Op. 87-8 (1987) (writing a foreword for a book on the bicentennial of the U.S. Constitution permitted). In contrast, see Op. 91-10 (1991) (prohibiting a judge from participating as a partner in a partnership for profit to provide continuing legal education; but permitting a judge to participate in the preparation and presentation of legal and non-legal educational materials to lawyers and nonlawyers).

Since Canon 2 of the former Ohio Code of Judicial Conduct did not include an explicit restriction on serving as an independent contractor of a business entity, there currently might be magistrates or judges who are now serving as independent contractors of business entities. With the adoption of Rule 3.11(B), such employment should be discontinued in accordance with Rule 3.11(D). As addressed in Rule 3.11(D), a judge or magistrate, as soon as practicable without serious financial detriment, is required to divest a financial interest that might violate the rule.

In conclusion, the Board advises as follows. Rule 3.11(B) of the Ohio Code of Judicial Conduct prohibits a full-time magistrate from serving as an independent contractor for any business entity, unless allowed by one of the exceptions within the rule. Because none of the exceptions apply, it is improper under Rule 3.11(B) of the Ohio Code of Judicial Conduct for a full-time magistrate to engage in outside employment performing legal research projects as an independent contractor for a legal publishing company. If a full-time magistrate has undertaken such employment, he or she should relinquish the employment as soon as practicable pursuant to Rule 3.11(D). This opinion does not prohibit a full-time magistrate from writing or teaching, provided the conditions of Rule 3.11(C) are met, and subject to applicable restrictions in Ohio Ethics Law. The advice offered in this opinion also applies to a full-time judge.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court

Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester of the opinion may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.