

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379

www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2005-8

Issued August 5, 2005

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: In the absence of an express ethical or statutory restriction, a retired judge who engages in the practice of law may also serve as a private judge pursuant to R.C. § 2701.10. To avoid an appearance of impropriety, a retired judge should not practice law in the court in which he or she frequently accepts referrals as a private judge and should not act as a lawyer in any proceeding in which he or she served as a private judge or in any related proceeding.

OPINION: This opinion addresses a question regarding a retired judge's simultaneous pursuit of the practice of law and private judging.

Is it proper for a retired judge who is engaged in the full-time or part-time practice of law to register for referrals as a private judge pursuant to R.C. § 2701.10?

A retired judge has various options for remaining active in the bar and the judiciary. Three options are pertinent to addressing the question raised.

One option is to re-enter the private practice of law.

Another option is to serve as an “*assigned judge*” pursuant to Ohio Const. Article IV § 6(C) and Ohio Revised Code Section 141.16. An “*assigned judge*” is a retired judge who consents to and receive assignments to active duty as a judge by the Chief Justice of the Supreme Court of Ohio. See Ohio Const. Art IV § 6(C) and Ohio Rev. Code Ann. §141.16 (West 2002).

A third option is to serve as a “*private judge*” pursuant to Section 2701.10 of the Ohio Revised Code. A “*private judge*” is a retired judge who registers with the clerk of a court of common pleas, municipal court, or county court to receive referrals for adjudications of civil actions or proceedings and submissions for determination of specific issues or questions of fact or law in any pending civil action or proceeding. See Ohio Rev. Code Ann. §2701.10 (West 1994).

By law, upon entry of an order of referral or submission, a *private judge* “shall have all of the powers, duties, and authority of an active judge of the court in which the action or proceeding is pending.” Ohio Rev. Code Ann. §2701.10 (C)

(West 1994). “Any judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, by a retired judge in accordance with this section shall have the same force and effect as if it had been entered or made by an active judge of the court, and any appeal from the judgment, finding, conclusion, or determination shall be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court.” Ohio Rev. Code Ann. §2701.10 (D) (West 1994).

A *private judge* who receives referrals under R.C. § 2701.10 is distinct from an *assigned judge* who receives assignments from the Chief Justice pursuant to Ohio Const. Article IV § 6(C) and Ohio Revised Code Section 141.16. Unlike an *assigned judge*, a *private judge* is not eligible for recall to judicial service by assignment.

Some of these options for retired judges may be pursued simultaneously and some may not. The pertinent authority is the Ohio Code of Judicial Conduct. Also instructive are the Guidelines for the Assignment of Judges promulgated by the Supreme Court.

Retired judge who serves as an *assigned judge* may not practice law but may serve as a *private judge*

A retired judge who serves as an *assigned judge* may not practice law but may serve as a *private judge*. Why?

An *assigned judge* is subject to Section (D) of Compliance with Code of Judicial Conduct.

Section (D) of Compliance with the Code of Judicial Conduct

A retired judge who is eligible for recall to judicial service shall comply with all the provisions of this Code except Canon 2(C)(3) and Canon 4(C)(2), (D), and (E).

Pursuant to Section D of Compliance, an *assigned judge* must comply with the Canon 4(F) prohibition on the practice of law.

Canon 4(F)

A judge shall not practice law. Notwithstanding this prohibition, a judge may act *pro se* and, without compensation, may give legal advice to and draft or revise documents for a member of the judge’s family.

Pursuant to Section D of Compliance, an *assigned judge* is not required to comply with the Canon 4(E) restriction on the performance of judicial functions in a private capacity.

Canon 4(E)

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

Further, Section 15(b) of the Guidelines for Assignment of Judges states: “A retired judge shall not be assigned while the judge is engaged in the fulltime or parttime practice of law. For this purpose, the practice of law does not include, among other activities, service with or without compensation as an adjudicator for submissions or referrals pursuant to R.C. 2701.10.” (The Guidelines refer to a private judge as an “adjudicator for submissions or referrals pursuant to R.C. 2701.10.”).

Retired judge who practices law may not serve as an *assigned judge* but may serve as a *private judge*

A retired judge who practices law may not serve as an assigned judge but may serve as a private judge. Why?

The reason is not obvious because the Compliance Section does not directly address how, if at all, the Code of Judicial Conduct applies to a *private judge* who receives referrals pursuant to R.C. § 2701.10. Assigned judges are covered by Section D. Part-time judges are covered by Section B. Judges pro tempore are covered by Section C. But, private judges are not mentioned and do not readily fit within any of these sections.

But, because Section D of Compliance prohibits a retired judge who serves as an *assigned judge* from practicing law it is logical that the reverse is a true. A retired judge who engages in the practice of law will be precluded from serving as an *assigned judge* because an *assigned judge* is prohibited from practicing law.

And, because there is no express ethical or statutory restriction, the Board’s view is that is not considered improper for a retired judge, who engages in the practice of law, to accept referrals as a private judge. To avoid an appearance of impropriety, a retired judge should not practice law in the court in which he or she frequently accepts referrals as a private judge and should not act as a lawyer in any proceeding in which he or she served as a private judge or any related proceeding.

Further clarification of how the Ohio Code of Judicial Conduct applies, if at all, to private judges who register for referrals pursuant to R.C. § 2701.10 is needed and should be addressed by rule within the Code.

In conclusion, in the absence of an express ethical or statutory restriction, a retired judge who engages in the practice of law may also serve as a private judge pursuant to R.C. § 2701.10. To avoid an appearance of impropriety, a retired judge should not practice law in the court in which he or she frequently accepts referrals as a private judge and should not act as a lawyer in any proceeding in which he or she served as a private judge or in any related proceeding.

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 Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.