

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-10

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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

[Not Current- subsequent rule amendments to Canons 1 through 6, Ohio Code of Judicial Conduct, eff. May 1, 1997]

SYLLABUS: A judge is prohibited from participating as a partner in a partnership for profit to provide continuing legal education. Code of Judicial Conduct Canon 5 C (1), (2). A judge is permitted to participate in the preparation and presentation of legal and non-legal educational materials to lawyers and nonlawyers for compensation. Code of Judicial Conduct Canon 4 A, Canon 5 A, Canon 2 and Canon 6.

OPINION: We have before us a request for an advisory opinion on whether three active judges, one former judge, one retired judge, and two private individuals may enter a partnership for profit to provide educational seminars for individuals who preside at and administer Mayors' Courts in Ohio. We address the following questions:

1. Whether a judge is permitted to participate as a partner in a partnership for profit to provide continuing legal education;
2. Whether a judge is permitted to participate in the preparation and presentation of educational materials to lawyers and non-lawyers (mayors, clerks of mayors' courts, and personnel of mayors' courts) for compensation;
3. If the answers to the above questions are no, then under what circumstances may a judge participate in such activities;
4. Whether with respect to the above questions a retired judge or a former judge would have a different status than a sitting judge?

Question 1

Both the Code of Judicial Conduct (Judicial Code) and the Supreme Court Rules for the Government of the Judiciary of Ohio (Judiciary Rules) clearly provide authority for judges to participate in educational activities. For example, the Judiciary Rules set forth that "[j]udges who teach a continuing legal education course shall be credited, for each hour taught, with three hours of classroom attendance." Gov.Jud. R. IV (E). Authority for judges to provide continuing legal education is also found within the broad mandate of Canon 4 of the Judicial Code that "[a] judge may engage in activities to improve the law, the legal system, and the administration of justice." Under Canon 4 A, a judge, subject to the proper performance of his judicial duties, may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him.

Authority for judges to participate in non-legal educational activities is found under Canon 5 A which states that a judge may write, lecture, teach and speak on non-legal subjects, if such activities do not detract from the dignity of his office or interfere with the performance of his judicial duties. Finally, Canon 6 of the Judicial Code indirectly acknowledges that a judge may participate in such nonjudicial activities by explicitly allowing a judge, subject to certain restrictions, to receive compensation and reimbursement of expenses for quasi-judicial and extra-judicial activities permitted by the Judicial Code.

In the past, this Board has expressed several opinions acknowledging that judges may participate in educational activities. A judge of a Common Pleas Court is not prohibited by either Ohio Const. Art. IV, § 6 (B) or the Judicial Code from holding the position of visiting lecturer of a state university and receiving reimbursement so long as the activities do not interfere with his duties as a judge. Ohio SupCt, Op. 86-2 (1987). Under the Judicial Code, a judge is permitted to write, without remuneration, a foreword to a book on the bicentennial of the United States Constitution. Ohio SupCt, Op. 87-8 (1987). A judge is permitted, under Canon 4 A of the Judicial Code, to write articles for publication on legal topics and to receive compensation under Canon 6. Ohio SupCt, Op. 89-21 (1989). A judge is permitted under Canon 4 A of the Judicial Code to teach courses at colleges and universities on the law, the legal system, and the administration of justice and to receive compensation under Canon 6. Ohio SupCt, Op. 89-28 (1989).

This Board has not directly addressed the issue of whether a judge can participate in a partnership for profit to provide continuing legal education. In a related opinion, this Board considered whether it is ethical for a judge to enter a partnership or become a co-shareholder in a corporation formed for the purpose of providing consultation. Ohio Sup.Ct., Op. 88-7 (1988). The Board opined that a consulting business for political candidates is not the type of extra-judicial activity a judge should undertake. *Id.* The Board's opinion was based upon Canon 5 C (2) of the Judicial Code that a judge should not serve as an officer, director, manager, advisor, or employee of any business; Canon 2 that a judge should not engage in activity that creates an appearance of impartiality; Canon 5 C (1) that candidates for political office would be likely to appear before the judge; and Canon 7 A (4) that a judge should not engage in political activity. *Id.*

The issue of whether judges may participate in partnerships to provide continuing legal education is governed by Canon 5. The broad mandate of Canon 5 is that "[a] judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties." Canon 5 C governs financial activities of judges and provides guidelines for determining what activities a judge must avoid in financial dealings.

- (1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
- (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

Code of Judicial Conduct Canon 5 C (1) (2).

According to one commentator, the standards within 5 C (1) proscribing all conduct adversely reflecting on impartiality, interfering with performance of judicial duties, exploiting judicial position, or requiring frequent disqualification provide a framework for determining the acceptability of any sort of financial activity. S. Lubet, Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges 16-17 (1984). The commentator suggests that if one or more of the standards are violated, the financial activity is improper. *Id.*

The commentator further points out that Canon 5 C (2) flatly prohibits judges from acting as officers, directors, managers, advisors, or employees of any business. *Id.* at 17. "This bar is absolute; it applies to all businesses, without regard to the nature of the enterprise, the form of its organization, or even its possible location well beyond the jurisdiction of the judge's court." *Id.*

The drafters of the 1972 ABA Code of Judicial Conduct acknowledged that Canon 5 C could cause hardship in jurisdictions where judicial salaries are inadequate. E. Thode, Reporter's Notes to Code of Judicial Conduct, 82-83(1973). The drafters therefore included an alternate 5 C (2) permitting judges to operate businesses subject to the restrictions of Canon 5 C (1). *Id.* However, Ohio did not adopt the alternate 5 C (2) provision but chose instead to adopt the absolute prohibition against judges serving as officers, directors, managers, advisors, or employees of any business. Canon 4 D (3) of the 1990 ABA Model Code of Judicial Conduct specifically prohibits a judge from being a general partner of a business.

The Board could find no ethics opinions directly addressing this issue. Nevertheless, the Board considers the proposed partnership, even though formed to provide continuing legal education, to be primarily a business and that a partner of such a business would be considered an officer, director, manager, advisor, or employee of the business within the meaning of Canon 5 C (2). Therefore, this Board is of the opinion that participation by a judge as a partner in a partnership for profit for purposes of providing continuing legal education courses is proscribed by Canon 5 C (2) of the Judicial Code.

The Board is also of the opinion that the proposed partnership would be proscribed by the language of Canon 5 C (1) that judges should refrain from financial and business dealings tending to reflect adversely on impartiality, interfere with proper performance of judicial duties, exploit judicial position or involve the judge with lawyers or persons likely to come before the court on which the judge serves. A partnership for profit to provide continuing legal education is a business activity that inherently exploits a judge's judicial position. This is particularly true in instances such as those described by this request where educational requirements have been mandated by statute for mayors and support personnel who in essence become a captive audience for the business activity. The prestige and stature of a judge providing continuing legal education would most certainly influence the success of such a business activity. For these reasons, it is also possible that a judge's involvement in such a business activity would create the appearance of impropriety in violation of Canon 2.

The Board is well aware that as judicial officers and persons specially learned in the law, judges are uniquely able to contribute to improving the law, the legal system, and the administration of justice and should be encouraged to do so. Code of Judicial Conduct Canon 4 commentary. The Board further acknowledges that judges should not be isolated from society. Code of Judicial Conduct Canon 5 commentary. However, these considerations cannot outweigh the clear prohibition of Canon 5 C (1) and (2), in situations where the goal of legal education is driven by a profit motive.

The Board recognizes that under Canon 4 C, a judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. However, the Board believes that a primarily for profit business, even though providing continuing legal education is not an organization contemplated by Canon 4 C. Canon 5 does not make exceptions for participation in business activities that relate to activities to improve the legal system, nor does Canon 4 C authorize participation in businesses formed for those purposes.

Question 2

It is the Board's opinion that a judge is permitted by the language of Canon 4 A, Canon 5 A, and Canon 6 to participate in the preparation and presentation of legal and non-legal educational materials to lawyers and nonlawyers for compensation. Previous opinions of the Board on this issue are summarized in Question 1.

Question 3

Since Question 3 is overly broad, the Board declines to offer guidance beyond that provided in response to Questions 1 and 2.

Question 4

Under the Compliance Section of the Judicial Code, a retired judge who is eligible for recall to judicial service should comply with all the provisions of the Judicial Code except Canon 5 C (2), D, E, G, and Canon 6 C. Therefore, a retired judge would not be prohibited under Canon 5 C (2) from entering a partnership for profit to provide continuing legal education; but theoretically could be prohibited under Canon 5 C (1) if those standards were violated. A former judge (not re-elected or appointed) is obviously not an active, part-time, or pro tempore judge and would not be governed by the Judicial Code.

This is an informal, non-binding advisory opinion, based upon the facts presented and limited to questions arising under the Code of Judicial Conduct, the Supreme Court Rules for the Government of the Judiciary of Ohio, and the Code of Professional Responsibility.