

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-27

Issued December 6, 1991

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]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's active involvement in advising, planning, and organizing a proposed joint venture to assist foreigners to establish business relationships with American companies, would fall within the Code of Judicial Conduct Canon 5C(2) prohibition that a judge should not serve as an officer, director, manager, advisor, or employee of any business, even though such activity takes place prior to capitalization of the joint venture. Further, since the purpose of the proposed enterprise is to assist foreigners in establishing business relationships with American companies, a judge's introduction of potential clients to businesses and businesses to potential clients suggests an active involvement in a proposed enterprise which could violate Canon 5C(2), regardless of whether it was done before or after capitalization of the proposed enterprise, and regardless of whether the judge was compensated for such activity. However, with regard to advising foreigners, prior to capitalization and without compensation, on how to make contacts with business and governmental entities in the United States and informing them on how business transactions are conducted or organized in the United States, it is possible that such activity is permissible if in compliance with Canons 5A and 5B.

OPINION: This opinion responds to questions regarding a judge's participation in a proposed joint venture to assist foreign business enterprises establish business relationships with American companies. The proposed joint venture would establish trade representatives in both Volzhskiy, Russia and Cleveland, Ohio. In the proposed joint venture, Americans would raise capital for the venture through stock subscriptions and the Russians would raise capital from sources in their country. Employees of the joint venture would, in both Russia and America, seek customers for the foreign enterprise and would charge a fee for such services. The joint venture would assist in business negotiations and provide other services. The judge would not serve on the board of directors or as an officer, manager, or employee of the proposed joint venture. The judge would subscribe to stock in the company, but his stock ownership would not exceed 5% of the total funds raised. The judge would not receive compensation for his services. The judge specifically asks whether any of the activities set forth below would violate the Code of Judicial Conduct.

1. May a judge serve as an advisor, planner and organizer of the proposed joint venture prior to its being capitalized but not engage in the raising of any funds or allow his or her name to be used when funds are raised, or thereafter serve as an officer, director, manager, or employee?
2. May a judge, before capitalization of the joint, venture, advise the foreigners without compensation, on how to make contacts with business and governmental entities in the United States and on how business transactions are conducted or organized in the United States?
3. May a judge, before capitalization, advise the foreigners and introduce them without compensation to Americans who may be interested in doing business in the foreign city?
4. May a judge, after capitalization, introduce, the foreigners, without compensation, to American businesses which may be interested in doing business with the foreigners, and introduce Americans, without compensation, to foreigners who are interested in doing business with Americans?

The financial activities of judges are regulated by Canon 5C of the Code of Judicial Conduct. Canon 5C(1), (2) and (3) are set forth below and are used as a framework for analysis of the questions presented.

1. A judge should refrain from financial and business dealings that tend to reflect adversely on his [her] impartiality, interfere with the proper performance of his [her] judicial duties, exploit his [her] judicial position, or involve him [her] in frequent transactions with lawyers or persons likely to come before the court on which he [she] 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.
3. A judge should manage his [her] investments and other financial interests to minimize the number of cases in which he [she] is disqualified. As soon as he [she] can do so without serious financial detriment, he [she] should divest himself [herself] of investments and other financial interests that might require frequent disqualification.

Canon 5C(1) provides the general standards governing financial activities. "The aim is to prevent the appearance to litigants, lawyers, and the public that patronizing the business in which a judge is actively involved will work to the advantage of the litigant, or that failure to patronize the business will work to his disadvantage. E. Thode, Reporter's Notes to Code of Judicial Conduct 81 (1973). Canon 5C(2) is a more specific provision and is both permissive and restrictive. It permits judges to make investments and engage in other remunerative activity subject to the requirements of 5C(1). But, it prohibits a judge from serving as an officer, director, manager, advisor, or employee of any business.

Canon 5C (3) requires judges to manage investments and other financial interests to minimize cases in which he or she is disqualified and to divest of investments and other financial interests that might require frequent disqualification. Canon 3C(1)(c) is the provision that requires disqualification for substantial financial interest in a subject matter in controversy or in a party to a proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

As to permitting investments, the rationale is that "[s]hort of keeping one's savings entirely in cash, to be stored in a safe-deposit box or under the mattress, some form of investment is an absolute necessity and cannot be prohibited to judges." S. Lubet, Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges 13 (1984). Also, since investment activities can take place outside of normal business hours they are unlikely to interfere with full-time judging. Id. at 14. Furthermore, the passive and private nature of most investments are out of the public eye and present little likelihood of impairing dignity of the judicial office. Id. However, the passive and private nature of investments can also create potential for conflict of interest or appearances of partiality. Id. For this reason Canon 5C (1) makes investments subject to the restrictions that they do not tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit judicial position, or involve a judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

As to the Canon 5C(2) restriction on serving as an officer, director, manager, advisor, or employee of any business, "[t]his 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.* at 17. In keeping, this Board has previously advised that participation by a judge in a partnership for profit for purposes of providing continuing legal education courses is proscribed by Canon 5C(2), Canon 5C(1) and possibly Canon 2. Ohio Sup.Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 91-10 (1991). The Board has also advised that it would be improper for a judge to be a partner or co-shareholder in a corporation formed for the purpose of acting as consultants to persons running for elective office, Ohio Sup.Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 88-7 (1988).

In answering the questions requested, the Board begins by acknowledging that subscribing to stock in the proposed enterprise would be an investment permitted by the Canons 5C(1), (C)(2), and (C)(3), so long as it would not adversely reflect on impartiality, interfere with the performance of judicial duties, exploit the judicial position, or require frequent disqualification. However, in answer to Question One, the Board's opinion is that a judge's active involvement in advising, planning, and organizing a proposed joint venture to assist foreigners establish business relationships with American companies, would fall within the Canon 5C(2) prohibition that a judge should not serve as an officer, director, manager, advisor, or employee of any business, even if the activity took place prior to capitalization.

In answer to Question Two, regarding advising foreigners, prior to capitalization and without compensation, on how to make contacts with business and governmental entities in the United States and informing them on how business transactions are conducted or organized in the United States, it is possible that such activity is permissible if in compliance with Canon 5A and 5B. Under Canon 5A "[a] judge may write, lecture, teach and speak on non-legal subjects . . . if such avocational activities do not detract from the dignity of his [her] office or interfere with the performance of his [her] judicial duties." Under Canon 5B and subject to limitations found within Canons 5B(1) through (4), "[a] judge may participate in civic and charitable activities that do not reflect adversely upon his [her] impartiality or interfere with the performance of his [her] 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."

In answer to Questions Three through Four, especially since the purpose of the proposed enterprise is to assist foreigners to establish business relationships with American companies, the introduction of potential clients to businesses and businesses to potential clients suggests an active involvement in the proposed enterprise which could violate Canon 5C(2), regardless of whether it was done before or after capitalization of the proposed enterprise, and regardless of whether the judge was compensated for such activity.

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.