

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 97-8

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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: It is improper for a retired judge who is eligible for recall to judicial service to serve as a legislative agent for the Common Pleas Judges' Association and the Association of Domestic Relations Judges.

OPINION: This opinion addresses whether a retired judge who sits by assignment may also be employed as a legislative agent.

Is it proper for a retired judge who is eligible for recall to judicial service to serve as a legislative agent for the Common Pleas Judges' Association and the Association of Domestic Relations Judges when not sitting by assignment?

In Ohio, retired judges who are eligible for recall to judicial service are governed by the Ohio Code of Judicial Conduct. Through the Compliance Section of the Code, the canons of judicial ethics that bind incumbent judges are made applicable to retired judges who sit by assignment, with a few exceptions not pertinent to this opinion.

Like incumbent judges, retired judges who sit by assignment must uphold the integrity and independence of the judiciary.

Canon 1

A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and personally shall observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Like incumbent judges, retired judges who sit by assignment may engage in activities to improve the law, but must act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2

A Judge Shall Respect and Comply With the Law and Shall Act at all Times in a Manner That Promotes Public Confidence in the Integrity and Impartiality of the Judiciary

(A) Activities to Improve the Law. A judge may engage in activities to improve the law, the legal system, and the administration of justice, provided those activities do not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties.

Like incumbent judges, retired judges who sit by assignment are prohibited from practicing law, except for pro se representation and the giving of legal advice or the drafting of documents for family members.

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.

As illustrated below by the Commentary to Canon 4(F), acts of advocacy or negotiations for others are not permitted. In matters involving appearances or dealings with legislative and other governmental bodies, a judge may act for himself or herself only.

Commentary to Canon 4(F). This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. *See* Canon 4(A).

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

There is little authority addressing whether a judge should serve as a legislative agent. A New York ethics opinion addresses whether it is proper for a part-time town justice to

serve as a political lobbyist for a law firm on behalf of its clients. That conduct was found improper since it did not involve the administration of justice and it required attendance at political fund raisers which was an ethical problem since the justice was permitted to attend political gatherings only when campaigning as a candidate. *See* New York, Advisory Committee on Judicial Ethics, Op. 88-154 (1989).

In Ohio, a legislative agent is an individual “who is engaged during at least a portion of his [her] time to actively advocate as one of his [her] main purposes.” Ohio Rev. Code Ann. § 101.70(F) (Baldwin 1994). The word “engaged” refers to any arrangement “whereby, an individual is employed or retained for compensation to act for or on behalf of an employer to actively advocate.” Ohio Rev. Code Ann. § 101.70(H) (Baldwin 1994).

Each legislative agent and his or her employer are required to file with the joint legislative ethics committee a registration statement identifying the legislative agent, the employer, and the real party in interest on whose behalf the legislative agent is “actively advocating.” Ohio Rev. Code Ann. §§ 101.71(A), 101.72 (Baldwin 1994). There is no requirement that a legislative agent be an attorney.

The acts of “active advocacy” are described by statute.

R.C. § 101.70(E) “Actively advocate” means to promote, advocate, or oppose the passage, modification, defeat, or executive approval or veto of any legislation by direct communication with any member of the general assembly, any member of the controlling board, the governor, the director of any department listed in section 121.02 of the Revised Code, or any member of the staff of any public officer or employee listed in this division. “Actively advocate” does not include the action of any person not engaged by an employer who has a direct interest in legislation if the person, acting under Section 3 of Article I, Ohio Constitution, assembles together with other persons to consult for their common good, instructs a public officer or employee who is listed in this division, or petitions that public officer or employee for the redress of grievances.

It is the Board’s view that this type of paid advocacy activity is not appropriate for an incumbent judge or for a judge who sits by assignment. When a judge acts as an advocate for an employer before the legislature, the independence of the judiciary is not preserved as required under Canon 1. Public confidence in the integrity and impartiality of the judiciary is not promoted as required under Canon 2. Further, by serving as a legislative agent, a judge would be engaging in a representative activity prohibited under Canon 4(F) as that rule is construed in a manner consistent with Canon 1.

In expressing this view, the Board is well aware that Canons 2(A)(2) and 4(C)(1) of the Code permit a judge to appear at public hearings before the legislature in matters concerning the law, the legal system, or the administration of justice.

Canon 2(A)(2) Subject to the restrictions of Canon 4(C)(1), a judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and otherwise may consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

Canon 4(C)(1) A judge shall not appear at a public hearing before or otherwise consult with an executive or legislative body or official except on matters concerning the law, the legal system, or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

The conduct permitted under Canon 2(A)(2) and 4(C)(1) does not change the Board's views as to the facts presented. Permission to appear at a public hearing before the legislature is limited to just that, a public appearance on one's own behalf. It is not permission for a judge to be privately hired to represent an employer before the legislature. The activities of a legislative agent extend beyond public appearances and testimony. When a judge serves as an "active advocate" paid to promote, advocate, or oppose the passage, modification, defeat, or executive approval or veto of any legislation on behalf of another, there is doubt cast upon the fairness and impartiality of the judiciary.

Even though the proposed employers are the Common Pleas Judges' Association and the Association of Domestic Relations Judges and the matters would be related to the law, the legal system, or the administration of justice, such advocacy is improper. In serving as a legislative agent, a retired judge is engaging in advocacy activities on behalf of another before the legislature. This does not preserve the independence of the judiciary and does not promote public confidence in the integrity and impartiality of the judiciary.

In conclusion, the Board advises it is improper for a retired judge who is eligible for recall to judicial service to serve as a legislative agent for the Common Pleas Judges' Association and the Association of Domestic Relations Judges.

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.

