



# Ohio Board of Professional Conduct

## OPINION 2017-06

Issued August 4, 2017

### **Specialized Docket Courts and Nonprofit Organizations**

**SYLLABUS:** Under Ohio Ethics Law, a court may not employ a person who is simultaneously employed by a nonprofit drug treatment center that has contracted with the court to provide services for its specialized drug court docket. Unless a statutory exception applies, this type of dual employment arrangement constitutes the receipt by a public official of an improper pecuniary or financial benefit from a third party that has a contract with his or her court.

Under the Code of Judicial Conduct, the dual employment of a court employee with the treatment center may impact the independence, integrity and impartiality of the judge and create an appearance of impropriety that necessitates the disqualification of the judge. In addition, a judge may neither solicit funds on behalf of a nonprofit drug treatment center, nor allow employees of the court to engage in the solicitation of funds for the treatment center.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**QUESTIONS PRESENTED:** 1) Whether a common pleas court may employ an employee of a nonprofit drug treatment center, currently under contract with the court, as a full-time or part-time court employee to serve as the coordinator of the court's specialized drug court docket.

2) Whether the court's drug court coordinator and other employees of the court may engage in fundraising activities on behalf of the nonprofit drug treatment center.

**APPLICABLE RULES AND LAW:** Jud.Cond.R. 1.2, 1.3, 2.12, 3.7; R.C. §§102.01, 102.03, 2921.01, 2921.42, and 2921.43.

**OPINION:** In the opinion request, a common pleas court operates a specialized drug court docket that is certified pursuant to Sup.R. 36.20. The drug court is operated, in part, through a contract with the county's largest local drug treatment center. The treatment agency is a nonprofit §501(C)(3) agency. All programming, counseling, and group meetings in the drug court are operated out of the court's adult probation department. Currently, employees of the treatment agency, the court, and employees who work for both the court and the agency, operate and coordinate the various programs in support of the specialized drug court.

The common pleas court seeks to hire a new coordinator on a full- or part-time basis to operate the drug court. The coordinator will work with court employees and the treatment center to provide services necessary to carry out the functions of the drug court. The coordinator may split his or her duties as an employee of the treatment center and the court. One of the primary duties of the coordinator will be to assist in fundraising for the operation of the treatment center so that the center can become self-sufficient and not dependent upon government funding. In addition, the court desires to enlist other employees of the court to assist in fundraising activities for the treatment center.

### **Question 1**

#### *Application of the Ohio Ethics Law to Court Employees*

The Ohio Ethics Law is set forth in R.C. §§ 102 et.seq., 2921.42 and 2921.43. The Board of Professional Conduct is authorized by statute under the Ohio Ethics Law to render advisory opinions for judicial officers and employees Ohio courts. R.C. §§ 102.01(F)(2), 102.08. O.E.C. Adv. Op. 81-008 (1981).

Judges and court employees are considered “public officials” subject to the Ohio Ethics Law. R.C. §§102.01 (B), (C); 2921.01 (A), (B). The term “public official” is defined as any elected or appointed officer, employee, or agent of any political subdivision of the state. R.C. §2921.01(A). Consequently, the court’s proposed drug court coordinator and other court employees would be or are public officials subject to the Ohio Ethics Law.

### *Profiting from a Public Contract*

In order to prohibit those dealings in which there is a risk that private considerations may detract from serving public interests, the Ohio Ethics law prohibits a public official from having any definite and direct financial interest in the public contracts of his or her agency:

No public official shall knowingly do any of the following: Have an interest in the profits or benefits of a public contract entered into by or for the use of the \* \* \* agency \* \* \* with which the public official is connected.

R.C. §2921.42(A)(4), O.E.C. 2016. *See* Committee Cmt., Am. H.B. 511, 109<sup>th</sup> Ohio General Assembly.

A “public contract” is defined as a “\* \* \* contract for the purchase or acquisition, of property or services by or for the use” of a public agency. R.C. §2921.42(G). An “interest” in a public contract may be deemed either pecuniary or fiduciary; however, “profit” has been interpreted by the Ohio Ethics Commission to mean a pecuniary or financial gain or benefit. O.E.C. Adv. Op. 92-013. *See also* O.E.C. Adv. Op. 81-005 (the officers of a nonprofit corporation have an interest in the contracts of the corporation).

An arrangement where a public official is simultaneously employed by a for-profit or nonprofit corporation that is under contract with that public official’s public agency implicates R.C. §2921.42(A)(4). O.E.C. Adv. Op. 2016-1. Such an arrangement constitutes the receipt of an improper pecuniary or financial benefit by the public official in a contract with a third party and the official’s public agency. O.E.C. Adv. Op. 2016-1. *See also* Adv. Op. 91-11 (municipal court judge is prohibited by R.C. §2921.42(A)(4) from serving on the

board of a nonprofit corporation that has a contract with the court.<sup>0</sup> Consequently, unless the statutory exception discussed below applies, a court's drug court coordinator and current court employees are prohibited from simultaneously engaging in employment with a drug treatment center under a contract with the court. R.C. §2921.42(A).

*Statutory Exception to R.C. §2921.42(A)(4)*

A statutory exception exists to the prohibition in R.C. §2921.42(A) and permits the dual employment of court employees if each of four requirements is met: 1) the public contract provides necessary supplies or services for the political subdivision; 2) the supplies or services are unobtainable elsewhere for the same or lower cost, are furnished as part of a continuing course of dealing prior to the hiring of the public official; 3) the treatment accorded the public agency is preferential to, or the same as other customers; and 4) the transaction is conducted at arm's length, with full knowledge by the agency of the interest of the public official in the services provider. R.C. §2921.42(C).

In order for the exception to apply, the public official who simultaneously is employed by a corporation and the court has the burden to demonstrate that the four prongs of the exception are satisfied. O.E.C. 2016-1. The advisory opinion request does not demonstrate facts that the exception would apply in this instance.

However, even if the exception in R.C. §2921.42(C) were to apply, the Board advises that any public official employed by a for-profit or nonprofit corporation that contracts with his or her public agency is prohibited from participating in matters, or authorizing or using the authority or influence of his or her position, to secure authorization of the public contract with the corporation. R.C. §§102.03(D), 2921.42(A)(1).

*Code of Judicial Conduct Considerations*

Notwithstanding the application of the Ohio Ethics Law, the Board has previously considered the intersection of courts and nonprofit organizations that contractually provide services to courts, including specialized dockets. Prior opinions reviewed only the conduct of judges serving as directors or board members, but similar concerns may

exist when court staff are employed by nonprofit organizations under contract with a court.

In Adv. Op. 2006-7, the Board opined that the former Code prohibited a municipal judge from serving on the board of trustees of a nonprofit corporation that was under contract with the court to provide mental health and chemical dependency treatment services for the court's specialized docket. Citing former Canon 1 (a judge shall uphold the independence and integrity of the judiciary)<sup>1</sup>, the Board reasoned that "the integrity and independence of the judiciary was not maintained if a judge serves on the board of a non-profit corporation that provides defendants of the court with services needed to fulfill court ordered conditions of probation." *Id.* In Adv. Op. 1991-11, the Board considered a judge's participation on a board that provided services to the court to assist it in its community reentry detention program. The court's involvement with the community reentry program required the judge to decide whether the defendant would be incarcerated or permitted to participate in the reentry program. The Board concluded under former Canon 5(B)(1) (service as an officer, director, trustee of an organization)<sup>2</sup> that the judge was prohibited from serving as a member of the nonprofit because the organization frequently would be engaged in proceedings before the judge.

Although the Code does not directly apply to court staff, the court should carefully consider how the dual employment of the judge's staff with the drug treatment center may similarly impact the judge's independence, integrity, and impartiality or raise possible disqualification issues. *See* Jud.Cond.R. 1.2. For example, drug treatment center employees may frequently appear before the court in order to fulfill contractual duties related to the specialized docket. The appearance in a case by a treatment center staff member, who simultaneously participates or has a role in the case as a court employee, creates an appearance of impropriety that necessitates the disqualification of the judge.

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<sup>1</sup> Current Canon 1 and Jud. Cond. R. 1.2.

<sup>2</sup> Current Jud. Cond. R. 3.7(A)(7).

## Question 2

### *Fundraising prohibitions*

Judges are prohibited from directly soliciting contributions on behalf of an “organization or entity,” and by extension, cannot directly or indirectly permit staff to assist in fundraising activities on behalf of the judge or the court. Jud.Cond.R. 3.7(A)(2). A judge is directed by Jud.Cond.R. 2.12 to “require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under [the] code.” Jud.Cond.R. 2.12. Consequently, a judge may not require or permit court personnel to engage in any conduct, including soliciting funds for a third party, when such conduct would violate the code if undertaken by the judge. *See* Jud.Cond.R. 2.12, cmt [1].

Other rules of the Code of Judicial Conduct also are implicated if court staff engage in prohibited solicitation of funds for the treatment center. For example, a judge is required to act at all times in a manner that promotes the public confidence in the independence, impartiality, and integrity of the judiciary, and from engaging in conduct that creates the appearance of impropriety. Jud.Cond.R. 1.2. Directing or permitting employees to assist in solicitation efforts for an organization that provides core services to a specialized docket court by, gives the appearance that the court, through its employees, is improperly soliciting funds on behalf of the organization. This conduct, when performed by court employees, whether during or after regular work hours, undermines the independence and integrity of the court. Lastly, the solicitation of funds by the court’s employees also may implicate the Code if the prestige of judicial office is used to advance the economic interests of third parties. Jud.Cond.R. 1.3. *See* Adv. Op. 2004-13 (using judicial office and employees to solicit donations improper because it interferes with integrity and independence of the court and public confidence in the judiciary); ABA Formal Op. 08-0452 (judicial support or endorsement of funding for organizations with business with the court may create the appearance of impropriety and raise the potential for disqualification.)

Although the goal of assisting a nonprofit treatment center in becoming financially self-sufficient is laudable and will ultimately assist the court in carrying out the functions

of its specialized drug court docket, the court by and through its employees cannot engage in solicitation on behalf of the organization. Solicitation by employees on behalf of the treatment center, coupled with the possible dual employment of court employees discussed earlier, may give the impression that the nonprofit treatment center and the court are indistinct, thereby undermining the independence of the court and creating the appearance of impropriety. In addition, persons or entities with business before the court may feel compelled to contribute to the treatment center, if an employee of the court solicits contributions from the local community or lawyers practicing before the court.

In order to ensure proper separation between the court and the nonprofit treatment center, avoid the appearance of impropriety, and ensure compliance with the Code of Judicial Conduct, the treatment center should conduct its own solicitation activities without the assistance of court employees. In the event the proposed drug court coordinator is simultaneously employed by the court and the treatment center under the exception available in R.C. §2921.42(C), the Board advises that the coordinator should not be involved in solicitation activities for the treatment center in either employment capacity.

**CONCLUSION:** Under R.C. §2921.42(A), a court operating a specialized docket may not hire persons who are employed by a drug treatment center under contract with the court unless the exception in R.C. §2921.42(C) applies. Furthermore, court employees simultaneously employed with the drug treatment center may impact the independence, integrity, and impartiality of the judge and create an appearance of impropriety that necessitates the disqualification of the judge. Jud.Cond.R. 1.2. Additionally, a judge is prohibited from engaging in the solicitation of funds for organizations and entities and cannot permit or require employees under his or her direction or control from engaging in the same prohibited conduct. Jud.Cond.R. 3.7, and 2.12. The solicitation of funds by court employees interferes with the independence and integrity of the court, creates the appearance of impropriety, and may improperly advance the economic interests of private entities.