

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 9th day of June, 2021.

On April 27, 2021, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 20-3 pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee

Opinion 20-3

A retired judge serving on the recall list may also serve as an administrative hearing officer conducting hearings involving Title IX complaints for a private university.

ISSUE:

May a retired judge currently serving on the recall list also serve as an administrative hearing officer, conducting Title IX complaint hearings for a private university?

Answer: Yes. A *retired* judge, serving as an administrative hearing officer, conducting hearings involving Title IX complaints for a private university, would not, in and of itself, violate the Canons of Judicial Conduct for the Commonwealth of Virginia (the “Canons”) under the facts presented. The judge’s service is subject otherwise to restrictions imposed by the Canons, and the judge must be mindful of any changes in fact or circumstances, however unlikely, which may create a conflict or require disqualification of the judge.

FACTS:

The requesting judge is retired from full-time judicial service, but otherwise serves on the judicial recall list. The judge has been contacted by the Title IX compliance office for a university inviting the judge to consider serving as an administrative hearing officer, conducting hearings for Title IX complaints arising at the institution. The cases involve complaints about university students, faculty and/or other employees. The estimated number of cases heard is 3-4 per year, with a total time estimate of 30-40 hours per case.

The duties of the administrative hearing officer are to preside in a hearing as the fact finder and draft a written opinion to be submitted to the compliance office. The judge would not make recommendations for, or issue, any sanctions or discipline. The judge is not certain but believes attorneys could be involved at the hearing stage. While unlikely that matters or litigants being heard

before an administrative hearing officer would come before the judge when the judge is recalled to judicial service, the judge expressed an understanding of the need to be vigilant in identifying any judicial matters which may require disqualification. The judge assumes that the service is compensated, although specific position details have not yet been discussed with the university.

DISCUSSION:

Judges need not separate themselves from being active in, and contributing to, the communities in which they live and serve, and the Canons acknowledge this reality. In matters involving extra judicial activities, the Canons recognize that “[c]omplete separation of a judge from extra judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.” Canon 4A, Commentary.

1. Applicable Canons

Both the Preamble to the Canons and Canon 6 are clear that the Canons apply to retired judges. Canon 6 does contain exceptions, however. Retired judges are not required to comply with Canons 4D(2), 4E(3), 4F, 4G, 4H, or 4I(2). *See* Canon 6B.

Regarding the specific exceptions: Canon 4D(2) generally prohibits a judge from “accepting appointment to a governmental committee or commission or other governmental position concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice;” Canon 4E(3) generally prohibits a judge from serving “as an officer, director, manager, general partner, advisor or employee of any business entity;” Canon 4F proscribes certain fiduciary activities for judges; Canon 4G prohibits a judge from acting as an arbitrator or mediator, “or otherwise perform[ing] judicial functions in a private capacity;” Canon 4H generally prohibits a judge from practicing law; and Canon 4I(2) requires a judge to “report compensation as required by § 2.2-3114 of the Code of Virginia.”

Canon 2 mandates that a judge avoid impropriety and the appearance of impropriety in all activities, both personal and professional. Canon 2A explains that “[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.” According to the Commentary to Canon 2A, “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity and impartiality is impaired.”

Canon 3 also requires a judge to perform judicial duties impartially and diligently. If a judge’s impartiality might reasonably be questioned, the judge is required to disqualify himself or herself. Canon 3E(1) and Canon 3E(1), Commentary.

Canon 4 governs a judge’s extra judicial activities, and provides that “[a] judge may engage in extra-judicial activities designed to improve the law, the legal system, and the administration of

justice, and shall conduct any such extra-judicial activities in a manner that minimizes the risk of conflict with judicial obligations.”

Canon 4A provides that:

A judge shall conduct all of the judge’s extra judicial activities so that they do not:

- (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

Canon 4I outlines permissible compensation and reimbursement for extra judicial activities. While retired judges are not required to comply with Canon 4I(2), the rest of the Canon applies:

A judge may receive compensation and reimbursement of expenses for the extra judicial activities permitted by these Canons, if the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.

- (a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
- (b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge’s spouse or guest. Any payment in excess of such an amount is compensation.

Canon 4I(1).

2. Analysis

The Committee has on occasion been requested to address the propriety of extra judicial activities.* However, prior opinions involved requests from judges serving in *full-time* judicial service, and therefore subject to greater restrictions and obligations under the Canons. The Committee has only once previously addressed an issue involving retired judges and extra judicial activities, in an opinion which focused on the issue of fund raising. *See* Va. JEAC Op. 99-3 (1999). The Committee has not previously considered the extent and propriety of other employment by a retired judge serving on the judicial recall list under the Canons, particularly where that non-judicial employment consists of duties similar to the judge’s judicial duties.

As noted above, the Canons apply to retired judges serving on the recall list, with certain exceptions. The Canons do not specifically address a retired judge serving on the recall list also serving as an administrative hearing officer. However, Canon 4G prohibits a judge from acting as an arbitrator or mediator, “or otherwise perform[ing] judicial functions in a private capacity.” Based on the description provided by the requesting judge, the duties and responsibilities of the administrative hearing officer may fairly be characterized as “judicial functions” on behalf of a private university.

While such activities would normally be prohibited by Canon 4G, retired judges are specifically exempt from having to comply with the prohibitions established in that Canon. *See* Canon 6B.

The Committee's inquiry does not end there, for even though the requesting judge is retired, service as an administrative hearing officer would nevertheless be considered an extra judicial activity permissible only to the extent the judge may do so without violating other Canons.

Based on the facts presented to the Committee, under Canons 2 and 2A, serving as an administrative hearing officer as a retired judge would not, by itself, be improper under the Canons. Nor does such service seem to create an appearance of impropriety by creating in reasonable minds the perception that such service to the university impairs the judge's ability to carry out judicial responsibilities with integrity and impartiality. *See* Canon 2A, Commentary.

Similarly, with respect to Canon 4A, such service would not appear to cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office or interfere with the judge's performance of judicial duties.

Based on the facts presented, there is little likelihood that parties appearing before the judge as an administrative hearing officer would be involved in adversarial proceedings before the judge or the court in which the judge may happen to be sitting while in recall status. It is also unlikely that the subject of the matter the judge would hear in the capacity of an administrative hearing officer would overlap with the judge's judicial duties while on judicial recall status.

If an overlap in duties arises, the judge has expressed an understanding of the need to be vigilant to identify and address circumstances in which the judge's impartiality might reasonably be questioned, and the requirement for the judge for disqualification pursuant to Canon 3E(1). The Committee cautions the judge to remain attentive to potential conflicts and to be mindful of the Canons which may be implicated.

CONCLUSION:

The Committee finds that under the facts presented, the retired judge serving on the judicial recall list may also serve as an administrative hearing officer, conducting hearings involving Title IX complaints for a private university. Such service is subject to other restrictions imposed by the Canons and is permissible so long as the judge maintains impartiality, and remains vigilant regarding any facts or circumstances which may create a conflict or require disqualification of the judge. The judge must take extra care to ensure compliance with Canons 2A and 3E(1), remaining mindful of and attentive to avoiding an appearance of impropriety that may create a perception that the judge's integrity and impartiality are impaired.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Preamble, Canon 2, Canon 2A, Canon 3, Canon 3E(1), Canon 4, Canon 4A, Canon 4D, Canon 4D(3), Canon 4G, Canon 4I, Canon 6, Canon 6B.

Va. JEAC Op. 00-3 (2000).

Va. JEAC Op. 00-9 (2000).

Va. JEAC Op. 17-1 (2017).

Va. JEAC Op. 99-3 (1999).

A Copy,

Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk

FOOTNOTE:

* *See, e.g.*, Va. JEAC Op. 00-3 (2000) (opining that a judge may not serve as a member of the board of trustees of a juvenile group home that accepts referrals from courts); Va. JEAC Op. 00-9 (2000) (opining that a judge may serve as an officer and/or director of a Property Owners Association related to the judge’s address); Va. JEAC Op. 17-1 (2017) (opining that a judge may serve in an honorary capacity during a local festival and related events sponsored by a community-based non-profit organization, subject to restrictions imposed by the Canons).

MINORITY OPINION:

Although the Canons encourage judges to be active in their communities, they also make it clear that judges should avoid activities that create actual or perceived conflicts of interest. The public's perception of such conflicts is obviously very important in the language of the Canons.

In the present case, the retired judge is not taking a position in a civic club or some other non-paid position. He or she is taking a paid position with a large university making factual

determinations in Title IX cases. Determinations of “facts” can be vital to the interest of the university even though the retired judge does not make the final decision.

The Committee does not know what the judge will be paid, by the way of salary, or what other benefits will be furnished, but the Committee should assume that compensation for the job will be substantial.

If the retired judge is called to the bench, he or she must be wary of conflicts created because of the university connection. Naturally, the judge should recuse himself or herself if someone appears before him or her with university connections, either on his or her own motion or the motion of a party. Given the size of the university, this could be disruptive of the court's case flow.

The university in question is huge, with a student body of about 100,000. It has a large staff with many employees and contractual relationships. When compared to the population of the city in which it is located, it is extremely large. The size of the university creates opportunities for both actual and perceived conflicts for the retired judge.

Although the judge may try to be honest and objective, as the Canons require, and recuse himself or herself in obvious cases of conflict, I am most concerned about those cases where the judge does not know that he or she has a university person before him or her and decides the case in that person's favor. Will the public think the judge is doing a favor for the other employer (the university)? Perhaps so, and if that is a possible conclusion, why expose our judicial system to that criticism? The judge will have two employers, (or “Masters,” as the Bible says), and if that creates conflicts that casts a shadow on the integrity of our judicial system, the JEAC ought not sanction the requested relationship between the retired judge and the university.

AUTHORITY:

The [Judicial Ethics Advisory] Committee is . . . established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same.

Order of the Supreme Court of Virginia entered April 18, 2019.