Judicial Ethics Committee
State of Vermont

Opinion Number: 2728-15

Date: December 16, 2013

To:

The matter which you presented to the Judicial Ethics Committee has been researched and reviewed. The following is the Opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

Question Presented

May an elected judge serve on the board of a nonprofit educational and advocacy organization established to improve prison programming and reduce the number of incarcerated persons, if the judge does not participate in fundraising?

Short Answer

Yes, the judge may serve on the board if it does not interfere with the performance of judicial duties and the judge is careful not to personally participate in fundraising or solicitation activities prohibited by the Code, and precautions are taken to ensure that the organization does not use the judge's occupational affiliation to advance its interests.

Facts

An elected judge, not involved in hearing criminal matters, has been asked to serve on the board of a non-profit education and advocacy organization established to improve prison programming and reduce the number of Vermonters in prison. To this end, the organization supports efforts to re-allocate spending from prisons to job training and education, end the "War on Drugs," expand alternatives to incarceration, end the state's use of private and out-of-state prisons, reduce the collateral consequences of conviction, and support successful re-integration for those leaving prison. The executive director of the organization is an elected state legislator. Board members are expected to participate in fundraising, but the judge would be excused from this requirement if the judge serves on the board. There is no indication that board members are compensated for their service.

Relevant Canons of the Vermont Code of Judicial Conduct

CANONS 2:(B), 3:(A), 4:(A)(3), (B), (C)(1), (C)(3)(i)-(iv), (H)(1)-(2), Reporter's Notes.

Analysis

Generally, a judge may serve on the governing board of a nonprofit organization, subject to the Code's requirements. Canon 4(B). This Committee has previously recognized that the Code encourages such participation "within ethical bounds." See Vt. Judicial Ethics Comm. Advisory Op. No. 2728-13, at *93 (2008), available at https://www.vermontjudiciary.org/JC/Shared%20Documents/Opinion%202728-13.pdf. Indeed, as the comments to the ABA Model Code of Judicial Conduct explain:

> Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. . . . Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

ABA Annotated Model Code of Judicial Conduct, Canon 3, Rule 3.1, cmts. [1]-[2].

Canon 4 of the Code specifically permits a judge to serve as a board member of an organization "devoted to the improvement of the law, the legal system or the administration of justice," subject to the limitations of the Code. Canon 4(C)(3). The Committee believes that the organization, as currently constituted, is an organization devoted to the improvement of the law, the legal system or the administration of justice, and that it is permissible for the judge to serve on its board. See Mass. Comm. on Judicial Ethics Op. No. 95-1 (1995), available at http://www.mass.gov/courts/sjc/cje/95-1h.html (finding that Massachusetts Code of Judicial Conduct permits judge to serve on board of directors of nonprofit organization that develops programs in, among other things, vocational training of offenders, community-based sanctions, prison over-crowding and truth in sentencing).

There is no indication that serving as a board member would interfere with the judge's professional obligations, although caution should be taken pursuant to Canons 3(A) and 4(A)(3) to ensure that judicial duties take precedence over and are not interfered with by extra-judicial activities. Similarly, there is no indication that service on the board would demean the judicial office or cast doubt upon the judge's capacity to act impartially, particularly since the judge is not directly involved in hearing criminal matters. Should the nature of the organization's activities change, or the work of the organization become highly controversial, the judge should consider whether further service on the board is compatible with judicial service. See N.Y. Comm. on Judicial Ethics Op. 11-05 (2011), available at http://www.nycourts.gov/ip/judicialethics/opinions/11-05.htm (judge should not serve as member of legislatively-created board tasked with providing suggestions regarding jail conditions to legislature and executive where lawsuits are reasonably anticipated relating to conditions in local jails and jail conditions have been matter of substantial local controversy).

The Committee believes that the judge's service on the board would not constitute impermissible consultation with a legislative official within the meaning of Canon 4(C)(1). Although the executive director of the organization is an elected state legislator, the judge's contact would

involve "matters concerning the law, the legal system or the administration of justice." Such matters are specifically exempted from the prohibition contained in Canon 4(C)(1). Further, it does not appear that the organization is likely to engage in proceedings that would ordinarily come before the judge, or to frequently engage in adversary proceedings in the court of which the judge is a member. Cf. N.Y. Comm. on Judicial Ethics Op. 88-130 (1988), available at http://www.nycourts.gov/ip/judicialethics/opinions/88-130.htm (judge is prohibited from serving as a director of a legal services bureau which represents clients in his court).

The judge should be careful to avoid personal participation in fundraising. The Code generally prohibits personal participation by a judge in the solicitation of funds or other fundraising activities. Canon 4(C)(3)(b)(i). This is because of "the danger that the person solicited will feel obligated to respond favorably." Canon 4, Reporter's Notes. The Committee notes, however, that the Code does permit a judge to assist an organization of which it is a board member to plan fundraising, to participate in the management and investment of the organization's funds, and to solicit funds from other judges over whom the judge does not exercise authority. Canon 4(C)(3)(b)(i). In addition, "[a] judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code." Canon 4, Reporter's Notes.

The Code also prohibits personal participation in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fundraising mechanism. Canon 4(C)(3)(b)(iii). This has been interpreted to mean that the judge may conduct personal membership solicitation "only if the persons solicited or their associates are unlikely ever to appear before the court on which the board serves." Canon 4, Reporter's Notes. The judge should monitor the activities of the organization to ensure that the judge's association remains appropriate and that the judge's title is not being used for fundraising or solicitation purposes. See Canon 4(C)(3)(b)(iv) (the judge "shall not use or permit the use of the prestige of the judicial office for fund-raising or membership solicitation.").

The Committee presumes that the judge will be listed as a member of the board. There is no indication that the organization intends to use the judge's name or likeness as part of an image campaign, or selectively emphasize the judge's name and title in order to pressure others to donate to the organization. Thus, there does not appear to be any question about lending the prestige of the judicial office to advance private interests. Canon 2(B); see also Mass. Comm. on Judicial Ethics Op. 2004-8, available at http://www.mass.gov/courts/sjc/cje/2004-8n.html (judge serving on board of nonprofit organization should not be listed as major donor on website or in literature distributed for fundraising purposes as it could put pressure on lawyers to make donations to organization in order to raise their status in the eyes of the judge).

Finally, there is no indication that the judge would be compensated for serving on the board. The Committee notes that the Code permits a judge to receive reasonable compensation and reimbursement of expenses, subject to the provisions of Canon 4(H)(1). Any compensation must be reported pursuant to Canon 4(H)(2).

Summary

Based on the facts presented, the judge may serve on the board. Service must not interfere with the performance of judicial duties or cast doubt on the impartiality of the judge. The judge should take precautions to ensure that the organization does not use the judge's title to advance its interests. The judge must not personally participate in fundraising or solicitation except as provided in Canon 4(C). Finally, should the organization wish to compensate the judge for serving on the board, the compensation must be reasonable and the judge must report it pursuant to Canon 4(H)(2).

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