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STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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OPINION: JE07-002

PROPRIETY OF A JUDGE, WHO IS ALSO A PARENT AND PRESIDENT OF A CHARITABLE ORGANIZATION WHICH SUPPORTS A PARTICULAR HIGH SCHOOL, PARTICIPATING ON A COMMITTEE TO DEVELOP AND MAKE A RECOMMENDATION TO THE SCHOOL DISTRICT ON A MANDATORY, BUT RANDOM, DRUG-TESTING PROGRAM OF STUDENT ATHLETES AT THE HIGH SCHOOL.

ISSUE

May a judge who is a parent and president of a charitable organization which supports a particular high school serve on a committee to develop and recommend a mandatory, but random, drug testing program for student athletes at the high school?

Answer: No.

FACTS

A judge asks whether it is appropriate for the judge to serve on a school committee which will develop and recommend to the school district a mandatory, but random, drug testing program for student athletes at a particular high school. The judge is acting as a concerned parent and also as the president of a charitable organization which

supports the high school. The school committee consists of coaches and teachers employed by the high school, the assistant principal, athletic director of the high school, the school principal, the judge, and another parent. If they are to be implemented, the school committee's recommendations must be presented to and approved by the school and the school district. If the school committee's findings, conclusions, and recommendations are adopted, the school and the school district will enforce their requirements. Members of the school committee are acting on a voluntary basis. The judge is not an officer of the school committee and will not be acting as a legal advisor to it. The judge also will not be engaged in fund-raising for the committee.

DISCUSSION

The Standing Committee is again confronted with competing objectives of the Nevada Code of Judicial Conduct. On the one hand, the Code in the Commentary to Canon 4(A) states:

Complete 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.

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On the other hand, Canon 2 broadly requires a judge to avoid the "appearance of impropriety in all of the judge's activities." Similarly, Canon 4 directs that "a judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." The Sections within Canons 2 and 4 address these issues in greater and more specific detail. Here we have a judge who is a parent of a student athlete seeking to participate in the development of important policies related to the judge's role as a parent of a student athlete. However, the development and eventual implementation of the policies involve an executive body of government, including administration at the high school, school district administrators, and potentially the school board itself.

Canon 4C includes specific provisions with respect to a judge's governmental, civic, or charitable activities. In connection with this request, the Standing Committee considered Canon 4C(1), Canon 4C(2), and Canon 4C(4).

Canon 4C(2) provides:

G o v e r n m e n t a l
A p p o i n t m e n t s . A j u d g e
s h a l l n o t a c c e p t
a p p o i n t m e n t t o a
g o v e r n m e n t a l c o m m i t t e e o r
c o m m i s s i o n o r o t h e r
g o v e r n m e n t a l p o s i t i o n t h a t
i s c o n c e r n e d w i t h i s s u e s o f
f a c t o r p o l i c y o n m a t t e r s
o t h e r t h a n t h e i m p r o v e m e n t
o f t h e l a w , * t h e l e g a l
s y s t e m o r t h e
a d m i n i s t r a t i o n o f j u s t i c e .
A j u d g e m a y , h o w e v e r ,
r e p r e s e n t a c o u n t r y , s t a t e o r

l o c a l i t y o n c e r e m o n i a l
o c c a s i o n s o r i n c o n n e c t i o n
w i t h h i s t o r i c a l , e d u c a t i o n a l
o r c u l t u r a l a c t i v i t i e s .

There are two requirements which must be satisfied for this Canon to apply. The committee or commission must be "governmental" and the judge's service on it must be by "appointment."

When a committee or commission is established by legislative act or created by an executive officer of government, it is clear that it is a "governmental" committee or commission. See, e.g., Massachusetts, *C.J.E. Opinion No. 2003-14* (September 29, 2003). Even where a committee is not created by statute, it has been considered a "governmental" entity where it will be participating on broad policy issues with government agencies. Id. When participation on a committee is limited to persons designated by a governmental officer, service on it is by "appointment." However, when participation is open to all who wish to participate, service is not considered to be by appointment. See, Massachusetts, *Opinion No. 2002-18* (December 17, 2002).

The Standing Committee concludes that Canon 4C(2) does not directly apply here. Based upon the information provided to the Standing Committee, it appears that the school committee is not one which is created by legislative act or by any action taken by the school administration or the school district itself. In addition, service on this committee does not appear to be by appointment. It appears that service is voluntary on the part of parents and therefore does not involve acceptance of an appointment.

Canon 4C(1) provides:

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. [Emphasis added.]

The Standing Committee concludes that the service by the judge on the school committee is the equivalent of the judge consulting with an executive body, that is, school administration, school district administrators, and the school board. It also concludes that the consultation is not on a matter "concerning the law, the legal system, or the administration of justice," as those terms are used in the Code. The Code states that the term law "denotes court rules as well as statutes, constitutional provisions and decisional law." The judge's role on this committee does not involve consultation on the law as intended by the Canon. Indeed, the Code does not intend that judges act as legal advisors at all. See, e.g., Canon 4C(3) and Canon 4G and related commentary.

The exception to the prohibition on consultation in Canon 4C(1) is a phrase which is used elsewhere in Canon 2 and in Canon 4. It is used in Canon 2D with respect to a judge's support of public agencies or interests or a judge's testimony. It is used in Canon 4B with respect to a judge's avocational activities; it is used in Canon 4C(2) with respect to a judge's acceptance of a governmental position, and it is used in Canon 4C(3)

with regard to a judge's service with a law-related organization.

Ethics advisory committees in other jurisdictions have concluded that the exception must be narrowly construed. They have done so because facets of almost every social problem today in some way involve law and the courts, and without a narrow interpretation of the exceptions, the prohibition portion of the rule would disappear. To fit within the exception, there must be a direct nexus between the subject of the consultation, or the activities of the government committee and how the court system and judges meet their statutory and constitutional responsibilities. In other words, how the courts go about their business. If the nexus is indirect, incidental, or tangential, or if the permitted subjects are just one of a broader mission focus, the judge may not consult or serve on the committee. See, e.g., Colorado, *C.J.E.A.B. Advisory Opinion No. 2005-04* (October 27, 2005); Massachusetts, *C.J.E. Opinion No. 2003-13* (September 25, 2003); Massachusetts, *C.J.E. Opinion No. 2001-4* (March 22, 2001); Massachusetts, *C.J.E. Opinion No. 2002-18* (December 17, 2002); Massachusetts, *C.J.E. Opinion No. 98-13* (August 27, 1998); and Massachusetts, *C.J.E. Opinion No. 96-4* (October 8, 1996); *Fed. Adv. Op. No. 93* (October 27, 1998); Virginia, *Opinion No. 00-6* (July 17, 2000).

The Federal Committee has explained that, in its view, the exception contemplates that the judge may be involved if the matter is of a kind that a judge, by reason of judicial experience, is uniquely qualified to address. If the judge's involvement is for some other than his or her judicial expertise, the activity is less likely to meet the exception. For example, the Federal Committee has

advised that "legislative appearances by a judge are permissible only where the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual." *Federal Adv. Op. No. 93* (October 27, 1998).

When advisory ethics committees have concluded that Canon 4C(2) applies and that the judge could not serve on a governmental committee, they have also considered the extent to which the judge might nonetheless consult with the committee, recognizing that judicial knowledge and experience might provide valuable insight. Those opinions, too, have concluded, that the consultation must be limited to discrete issues which have a direct bearing on the business of the courts. See, e.g., Massachusetts, *C.J.E. Opinion No. 2003-14* (September 29, 2003); Massachusetts, *C.J.E. Opinion No. 2003-13* (September 25, 2003). Moreover, those opinions have admonished a judge, who is allowed to consult on a limited basis, to "take care to insure that any mention of [the judge's] name in . . . publication is accompanied by a note revealing [the judge's] limited, consulting role and announcing that the [judge] takes no position on the . . . overall recommendations." Id.; Colorado, *C.J.E.A.B., Advisory Opinion No. 2005-04* (October 27, 2005).

That cautionary note stems in part from the provisions of Canon 2B and Canon 2D which are specifically referenced in the commentary to Canon 4C(1). Canon 2B provides that a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. Canon 2D allows a judge to actively support public agencies or interests or testify on public matters

concerning the law, the legal system, the provision of legal services, and the administration of justice. The Commentary to Canon 2D cautions that "a judge must still be careful when lending the prestige of the judge's office for such purposes so as to avoid coercive conduct or undue influence prohibited by other Sections of the Code."

The Standing Committee also considered Canon 4C(4) which provides:

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 profit, subject to the following limitations and the other requirements of the Code.

Arguably, this school committee might be considered a civic organization. However, the Commentary to that Canon refers to the Commentary to Canon 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." The Commentary to Canon 4B says:

In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that use of permissive language in various Sections of Code does not relieve a judge from the other requirements

of the Code that apply to the specific conduct.

It is the conclusion of the Standing Committee that, although Canon 4C(4) might suggest that the judge's service as a non-legal advisor to this civic-related committee is permissible, the "subject to the other requirements of the Code," provisions require consideration of Canon 4C(1), Canon 4C(2), Canon 2B and Canon 2D, which are discussed above.

The Standing Committee recognizes the importance of the issues being considered by this school committee, not only to society in general, but also to all parents, including parents who happen to be judges. However, the work of this school committee does not have the close or direct nexus to matters concerning the law, the legal system, or the administration of justice as required by the Canons. It does not involve the business of how courts meet their statutory or constitutional duties. The judge is not involved because of judicial experience which the judge, as a judge, is uniquely qualified to address. Although the Standing Committee does not conclude that the judge's participation here is in any way intended to lend the prestige of judicial office to the effort, much of the Code is concerned with appearances and there is the potential, at least, that the judge's participation would give the appearance that the prestige of the judicial office was being used to advance the interests of the school committee.

CONCLUSION

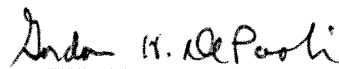
A judge, who is also a parent and president of a charitable organization which supports a particular high school,

may not serve on a school committee to develop findings and conclusions and to make recommendations to the school and the school district concerning a mandatory, but random, drug testing program for student athletes.

REFERENCES

Nevada Code of Judicial Conduct, Commentary to Canon 4(A); Canon 2; Canon 2B; Canon 2D; Canon 4, Canon 4B; Canon 4C; Canon 4G; Colorado, *C.J.E.A.B. Advisory Opinion No. 2005-04* (October 27, 2005); Massachusetts, *C.J.E. Opinion No. 96-4* (October 8, 1996); Massachusetts, *C.J.E. Opinion No. 98-13* (August 27, 1998); Massachusetts, *C.J.E. Opinion No. 2001-4* (March 22, 2001); Massachusetts, *C.J.E. Opinion No. 2002-18* (December 17, 2002); Massachusetts, *C.J.E. Opinion No. 2003-13* (September 25, 2003); Massachusetts, *C.J.E. Opinion No. 2003-14* (September 29, 2003); Virginia, *Opinion No. 00-6* (July 17, 2000); *Fed. Adv. Op. No. 93* (October 27, 1998).

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