

STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

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OPINION NO.: JE11-005

PROPRIETY OF A DISTRICT JUDGE BECOMING A CANDIDATE FOR RE-ELECTION OR ELECTION TO THE BOARD OF GOVERNORS OF THE STATE BAR OF NEVADA AND SERVING IN SUCH POSITION IF ELECTED.

he or she may seek re-election at the expiration of his or her term. Another district judge has asked whether he or she may become a candidate for election to the Board, and if elected, serve in that position.

ISSUE

May a district judge be a candidate for election or re-election to the Board of Governors of the State Bar of Nevada, and if elected may the judge serve on such Board?

The Committee is aware that on a number of occasions former district judges have completed their terms as attorney members of the Board following appointment or election to state judicial office and that in at least one instance, one such individual sought and won reelection to the Board.

DISCUSSION

ANSWER

A district judge may not be a candidate for election to the Board of Governors of the State Bar of Nevada. A district judge who, prior to election as a judicial officer, was a duly elected and serving attorney member of the Board of Governors of the State Bar of Nevada may complete his or her term of office consistent with the jurist's obligation to avoid situations that would cause doubt about the judge's capacity to act impartially or that interfere with the proper performance of judicial duties.

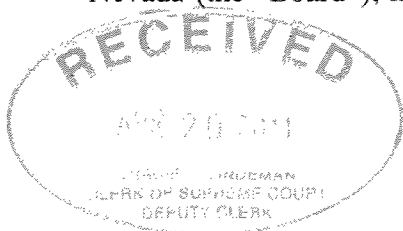
The Committee's opinion evaluates the question presented only as relates to compliance with the requirements of the Nevada Code of Judicial Conduct. Rule 5 Governing Standing Committee On Judicial Ethics & Election Practices. Accordingly, this opinion is limited by the authority granted by Rule 5.

FACTS

A district judge who, prior to election as a judicial officer, was a duly elected and serving attorney member of the Board of Governors of the State Bar of Nevada (the "Board"), has inquired whether

The Committee views the issue presented here as arising under Canon 3, which states, "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." Nevada Code of Judicial Conduct, Canon 3. NCJC Rule 3.7 states:

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned



with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

....

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity;

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Nevada Code of Judicial Conduct, Canon 3, Rule 3.7(A)(6).

The Board is a public corporation concerned with the law and the administration of justice. *See Nev. Sup. Ct. R. 76, 85 & 86.* In the initial analysis, therefore, Rule 3.7(A)(6) would permit a district judge to serve as a member of the Board unless the Board would ordinarily engage in proceedings before the judge or frequently be involved in litigation before the court of which the judge is a member. *Id.* 3.7(A)(6)(a)-(b). Unlike the Supreme Court of Nevada, which directly supervises the Board and reviews its administrative processes such as attorney discipline, *see Nev. Sup. Ct. R. 76 & 99-117*, the Committee would expect the Board to be neither a frequent district court litigant nor

as to the Board's actions routinely the subject matter of district court proceedings.

The Committee observes that the Rules of the Supreme Court of Nevada governing eligibility for election and service to the Board do not contain a disability for district judges. *See Nev. Sup. Ct. R. 80-84.* We conclude from NCJC Rule 3.7 and S.C.R. 80-84, that there is nothing inherently inconsistent with a district court judge serving on the Board. Rule 3.7, however, requires that we must also evaluate the requirements of NCJC Rule 3.1.

That rule provides:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not;

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

(D) engage in conduct that would appear to a reasonable person to be coercive, or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Nevada Code of Judicial Conduct, Canon 3, Rule 3.1. The Supreme Court of Nevada has explained in connection with Rule 3.1 that:

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.

See Nevada Code of Judicial Conduct, Canon 3, Rule 3.1, *Comment [1]* to Rule 3.1.

The Committee previously opined under former NCJC Canon 5A, 5B and 5C that a candidate for judicial office may during an election campaign continue to serve as an officer of a bar association. We reserved there any opinion on the question of whether the attorney bar association officer could continue in such office if elected a judge. *See* Advisory Opinion, No. JE08-003 (March 8, 2008).

That question and the question of whether a judge may serve as an officer of a bar association has been addressed by other state judicial ethics advisory panels in the same and similar contexts. While many of these opinions were rendered under the former Judicial Canons, we note that the relevant provisions have not materially changed in the current NCJC or comparable codes of the other states. *Compare* NCJC Rule 3.7 *with* [Former] Nevada Code of Judicial Conduct, Canon 4C; *see generally*, American Bar Ass'n, Model Code of Judicial Conduct 124 (2007 ed.).

The Washington State Ethics Advisory Committee concluded that under former Canon 4C a judge could serve on the

board of trustees of a voluntary local county bar association. *See* Wash. Ethics Advisory Comm., Opinion No. 86-03 (April 4, 1986). Likewise, in a predicate statement in a 1991 opinion, the Arizona Judicial Ethics Advisory Committee stated “Canon 4C permits a judge to serve as president of a [voluntary] bar association.” Ariz. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. No. 91-02 (April 29, 1991).

Illinois’ Judicial Ethics Committee has stated “Judges are encouraged to participate in the activities of the organized bar. They themselves are frequently candidates for bar association office.” Ill. Jud. Ethics Comm., Op. No. 93-8 (September 21, 1998). Thus, it was determined that a judge was not lending the prestige of his office when he or she joined a committee to support the election of a particular lawyer to bar association office. *Id.*

The New York Advisory Committee on Judicial Ethics has repeatedly endorsed the view that judges may serve on the board of directors of bar associations, and that committee has expansively viewed the term bar association as any legal organization comprising bar members formed to promote and improve the legal system. *See, e.g.* N.Y. Advisory Comm on Jud. Ethics, Op. 08-156 (October 23, 2008). The New York committee, however, has moderated its own views, indicated that judge’s may not recruit non-judge membership or funds or participate in bar surveys that rank jurists, because these activities may be viewed as a coercive use of judicial office or raise an appearance of impropriety. *See id.*; N.Y. Advisory Comm on Jud. Ethics, Op. No. 10-68 (April 22, 2010); N.Y. Advisory Comm on Jud. Ethics, Op. No. 88-100 (September 19, 1988).

There is not, however, unanimity on these questions among state judicial ethics advisory panels. Both the Florida Supreme Court's Judicial Ethics Advisory Committee and the Massachusetts Supreme Judicial Court Committee on Judicial Ethics have determined that jurist membership on the governing boards of bar associations is inconsistent with the Canons.

The Massachusetts committee repeatedly found that a judge's "membership on the Council of the Boston Bar Association . . . would not be consistent with the requirements of Canons 2 and 4 of the Code of Judicial Conduct." Mass. Sup. Jud. Ct. Comm on Jud. Ethics, Op. No. 2003-12 (September 19, 2003). The central tenet of this opinion was that although Bar Associations are organizations devoted to improvement of the law within the intendment of Rule 3.7(A), state and local bar organizations modernly take positions on controversial issues and administer programs and services with broad legal, political and social implications. Consequently, a judge who takes a leadership role in the association places himself or herself in a position more frequently at odds with the restrictions on jurist's conduct under the Canons. The committee explained that as with many other extrajudicial activities, a bar association leadership position could be no less inconsistent with judicial office; that the association was a law-related organization was not, therefore, dispositive. *See id.*

A 2004 opinion of Florida's Advisory Committee touched on the same issue as had the Massachusetts panel the preceding year. The Florida opinion, however, addressed the very facts with which we are now presented. There, the committee was asked by a judge-elect who was a current attorney member of the Board

of Governors of the Florida State Bar whether he or she could complete their term and if so then run for re-election. Like Nevada, the Florida Bar Association is a mandatory bar association, a fact ultimately found irrelevant given the conclusion of the opinion. The Florida Committee opined that the judge-elect could after becoming a judicial officer complete his or her term on the Board of Governors "so long as participation on the board does not cast reasonable doubt on the judge's capacity to act impartially or interfere with the proper performance of judicial duties." *See Fla. Sup. Ct. Jud. Ethics Advisory Comm., Op. No. 2004-34 (September 24, 2004).* The Opinion concluded though that the judge could not seek reelection to the Board of Governors. The committee there stated:

Although the foregoing Canons encourage bar activity . . . there is a distinction between continued service on the board until the expiration of the term and the judge seeking re-election for another term . . . This committee has addressed this issue in a number of opinions. In [1979], the Committee unanimously held that a judge could not run for president of a bar association stating "that a judge places himself in a position where he must ask for votes or support from lawyers. The question will inevitably be raised whether the judge is exerting pressures on lawyers who must litigate before him. This gives the appearance of impropriety." In [1994], the Committee unanimously opined that "in any bar election, especially against a lawyer opponent, the question would be raised whether the judge was exerting "subtle pressure" on lawyers who must litigate before him or her.

Additionally, conflicts may arise between the interests and demands of the bar and the judiciary that may present difficulties for a judge purporting to act in an elected, representative capacity for members of the bar. Because Canon 4 encourages judges to engage in activities to "improve the law, the legal system and the administration of justice," the Committee believes that a judge may ethically serve as an appointed chair of a local bar association committee. However, a host of potential ethical dilemmas may arise when judges run for office in local bar associations." Although the instant inquiry deals with The Florida Bar, rather than a local bar association, the committee finds no relevant distinction between the two.

See id.

In evaluating the question presented here, the Committee's assessment is that the opinions of the other state judicial ethics advisory panels concluding a judge may serve in bar association office, and thus by implication seek election to that office, did not complete the analysis required by the NCJC. Rule 3.7(A) begins with the admonition, "[s]ubject to the requirements of Rule 3.1" and in so citing Rule 3.1 requires more than a recital that a bar association is a organization "concerned with the law, the legal system, or the administration of justice." When examining Subsections (A) through (D) of NCJC Rule 3.1, the Committee finds persuasive the concerns raised by the Massachusetts and Florida advisory panels. In particular, the 2004 Florida opinion exhibited the sensitivities we believe appropriate under NCJC Rule 3.1(A), 3.1(C) and 3.1(D).

We are also mindful that Nevada judges have served on the Board and Nevada's state court judiciary is elected. The former fact indicates that perhaps these sensitivities are unwarranted despite the requirements of the Rule and the latter presents a circumstance where the same concerns between bench and bar under Rules 3.1 and 3.7 might be said to exist. The Committee concludes that notwithstanding these considerations, the better reasoned interpretation of NCJC Rule 3.7 is that reached in the 2004 Florida opinion which we choose here to follow. If our Supreme Court disagrees, amending the rules to allow judges to seek election or reelection to Board is fully within the Court's purview.

CONCLUSION


A district judge who is a duly elected and serving attorney member of the Board of Governors of the State Bar of Nevada may complete his or her term of office consistent with the jurist's obligation to avoid situations that would reasonably create doubt as to the judge's capacity to act impartially or that interfere with the proper performance of judicial duties. A district judge may not be a candidate for election or re-election to the Board of Governors of the State Bar of Nevada.

REFERENCES

Rule 5 Governing Standing Comm. On Judicial Ethics & Elect. Prac.; Rule 5 Governing Standing Committee On Judicial Ethics & Election Practices; Nevada Code of Judicial Conduct, Canon 3, NCJC Rule 3.1; NCJC Rule 3.7; NCJC *Comment [1]* to Rule 3.1; Nev. Sup. Ct. R. 76, 85-86 & 99-117; Advisory Opinion: JE08-003 (March 8, 2008); [Former] Nevada Code of Judicial Conduct, Canon 4C; American Bar Ass'n,

Model Code of Judicial Conduct 124 (2007 ed.); Ariz. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. No. 91-02 (April 29, 1991); Fla. Sup. Ct. Jud. Ethics Advisory Comm., Op. No. 2004-34 (September 24, 2004); Ill. Jud. Ethics Comm., Op. No. 93-8 (September 21, 1998); Mass. Sup. Jud. Ct. Comm on Jud. Ethics, Op. No. 2003-12 (September 19, 2003); N.Y. Advisory Comm on Jud. Ethics, Op. No. 10-68 (April 22, 2010); N.Y. Advisory Comm on Jud. Ethics, Op. 08-156 (October 23, 2008); N.Y. Advisory Comm on Jud. Ethics, Op. No. 88-100 (September 19, 1988); Wash. Ethics Advisory Comm., Opinion No. 86-03 (April 4, 1986);

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