STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: October 11, 2017 ADVISORY OPINION: JE17-002

A Fixed Payout Amount From The Vested Equity Units Accrued by a Former partner in A Law Firm Who Was Appointed to Fill a Vacancy in a district Court Would Not Violate The Revised Nevada Code of Judicial Conduct

Issue

WHETHER A RECENTLY APPOINTED JUDGE VIOLATES THE REVISED NEVADA CODE OF JUDICIAL CONDUCT IF, AFTER BEING SWORN AS A JUDGE, ABIDES BY THE TERMS OF THE FORMER LAW FIRM'S PARTNERSHIP AGREEMENT AND ACCEPTS PAYMENTS FOR VESTED EQUITY UNITS IN THE PARTNERSHIP OVER A FOUR YEAR INSTALLMENT PAYOUT?

Answer

No. The fact pattern as described by the District Court Judge and presented to the Standing Committee on Judicial Ethics, would not violate the Revised Nevada Code of Judicial Conduct. However, it will require the judge to recuse herself/himself from considering any matters concerning the former law firm in the court in which the judge sits during the four-year buyout period described in the opinion request.

FACTS

A District Court Judge who was appointed to fill a vacancy has requested the Standing Committee to evaluate the propriety of accepting a four-year payout term for vested equity units which were accrued over a period of eight years prior to appointment to the bench. The requesting Judge has not accepted any payments pending receipt of the Standing Committee's opinion. The value of the former partner's equity units, including hourly, contingent, and any other earned fees, has already been determined according to the terms of the partnership agreement. The partnership agreement does not permit a lump sum payout for any departing partner's interest. The specific request from the District Court Judge is to ascertain whether the acceptance of a fixed value for their vested equity units, which was calculated according to the terms of a partnership agreement, which must be paid over a four year period under the terms of the partnership agreement, would potentially violate any provisions of the Revised Nevada Code of Judicial Conduct?

Discussion

The Committee is authorized to render advisory opinions evaluating the scope of the Revised Nevada Code of Judicial Conduct [RNCJC], *Rule 5 Governing the Standing Committee on Judicial Ethics.* Accordingly, this opinion is limited by the authority granted in Rule 5.

Canon 1 of the RNCJC requires all judicial officers to avoid the appearance of impropriety: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Rule 1.3 to Canon 1 explains: "Avoiding Abuse of the Prestige of Judicial Office. A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." Comment [1] to Rule 1.3 sets out generalized expectations: "It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business."

This long established baseline of ethical expectations for judicial officers is the cornerstone of all judicial canons in the RNCJC. It expresses the notion that the citizens of any community have a right to expect their judicial officials will use the power, respect, and confidence entrusted to the judiciary to decide matters fairly, objectively, and in accordance with established statutory and decisional law, not to advance the personal interests of the judiciary or others, nor permit others to take advantage of the prestige associated with judicial office.

Canon 3 requires that a judge "conduct personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."

Rule 3.11(c) (1), (2), (3) Financial, Business, or Remunerative Activities, prohibits financial interaction with lawyers or others who may come before the court:

> "(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:
>
> (1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves."

These qualifying exclusions are apropos for application to the facts as provided by the Judge in this opinion request.

Comment [2] to Rule 3.11 explains: "As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule."

Then Rule 3.13 (A) Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value, cautions judges to be vigilant about receipt of "things of value" which may create a perception that any such benefit was intended to influence the judge's impartiality:

> "(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

Comment [1] to Rule 3.13 provides clarification of the basis upon which receipt of "things of value" may be acceptable, but the context means everything: "Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, "according to the magnitude of the risk."

The critical qualifiers present in the opinion request under consideration are: [1] The Judge has fully disclosed the existence of the vested partnership interest; [2] The disclosed partnership interest was earned during the eight years previous to appointment; [3] The method of valuation was according to the partnership agreement, not some arbitrary method and it was decided prior to the former partner's departure from the firm; [4] The mandatory four year payout term is according to the terms of the partnership agreement; [5] The fair market value of the equity units was established by reference to the partnership agreement, not some arbitrary manner decided after the departure of the Judge; [6] The value of the vested equity units includes all fees earned by the retiring partner prior to departing, including hourly, contingent, or other fees to which the partner might be entitled; [7] The Judge will recuse herself/himself from any matters emanating from the previous law firm during the four year payout; [8] The equity units are not an unearned gift bestowed by the law firm to garner favorable judicial treatment from a former partner.

The subject equity units were bestowed based on the identical requirements for other law firm partners. Thus, no special consideration was granted to the former partner by the law firm. The decision by the Judge to recuse from any matters which might come before the department to which the Judge was appointed during the four year payout establishes another layer of protection from claims of favoritism or special dispensation to the former law firm. It is important to note that the value of the departing partner's interest was established according to the partnership agreement, not some late-thought formula suggested by the Judge or the remaining members of the partnership. These are all safeguards against the recently appointed Judge from having to constantly review potential conflicts with the former law firm and will limit the potential recusals to those which directly or indirectly involve the law firm from which the Judge resigned during the subsequent four year payout. The stipulation to recuse from matters involving the former law firm during the four year payout term will limit the extent of recusal and eliminate the necessity for opposing law firms to move for disqualification or recusal.

There are two previous opinions of this Committee which bear on the issue presented. JE 13-001, filed March 15, 2013, and JE13-002, also filed March 15, 2013. In JE 13-001, the request concerned a recently elected justice of the peace who posed four issues to the Committee: 1.Whether the private practice previously maintained by the lawyer might be sold to another lawyer, who would take over the office space and purchase the practice? The purchase price of the practice was to be based on the number of clients who remained in the practice after sale and the revenue generated by those clients. No component of the sale was to be paid for clients who elected to seek other counsel. The purchase price of the practice would then be calculated at a percentage of actual billed and collected gross revenue over the next 12 to 18 months. 2. May the justice of the peace assist the purchaser of the former practice in ongoing matters at the time the practice was sold? 3. May the justice of the peace continue to pay employees of the former practice as employees of a professional corporation after assuming the bench? 4. How long does a judicial officer named as a trustee or successor trustee in a client trust document have to remove herself or himself as a fiduciary?

Only those portions of JE 13-001 which are relevant to the opinion request at issue will be discussed. The Committee's opinion was that the proposed sale method would violate the RNCJC. The formula by which compensation would be calculated after sale necessarily required an ongoing, impermissible connection between the justice of the peace and the former practice. The purchase price would continue to link the justice of the peace with the success or failure of the remnants of the practice, which would create the appearance of impropriety.

The Committee opinion observed that RNCJC Rule 3.11 precludes a judge from taking an interest in a business. Comment 2 to Rule 3.11 requires judges to divest themselves "as soon as practicable without serious financial detriment" from any interest which might cause frequent disqualification or otherwise violate Rule 3.11.

However, the Opinion did state that while it was permissible to sell a former practice, including goodwill, "the sale must be for a fixed sum rather than contingent on the future success of the practice... That is not to say, however, that payment may not be made over time provided that payment is on a fixed amount....But even then, such payments should be made over the shortest period of time possible, especially where the financial arrangement might require frequent disqualification." [1]

The factual background supplied by the Judge here reveals these elements which differ from JE 13-001: [1] The Judge was a partner in the former firm for eight years prior to appointment; [2] The equity units accrued by the former partner were entirely vested and not contingent; [3] The partnership agreement requires payment of a departing partner's vested equity units over a period of four years; [4] The value of the equity units is established according to the partnership agreement; [5] The value of equity units is calculated prior to departure of the partner, which includes all fees earned by the retiring partner, including hourly, contingent, or other fees to which the partner might be entitled; [6] The Judge will recuse herself/himself from any matters emanating from the previous law firm during the four year payout; [7] The equity units are not an unearned gift bestowed by the law firm to garner favorable judicial treatment from a former partner; [8] The value of the equity units does not change over the four year payout period; [9] The Judge will not preside over, offer advice regarding, or discuss any case filed in district court on behalf of or involving the former law firm for a period of at least four years; [10] The payout over four years has been fully disclosed and will not create an appearance of impropriety regarding the previous law firm; [11] The payout for the vested equity units is limited to four years, which will minimize the time frame during which the Judge must recuse from any cases emanating from or involving the former law firm.

The Committee believes that given the distinctions between the ongoing connections with the success or failure of a former practice as described in JE13-001 and those in the factual pattern described by the present Judge, there is no threat of an appearance of impropriety or transgressing the concerns expressed by the Committee in JE13-001.

As to the second issue discussed in JE13-001, the Committee's opinion held that it was impermissible for the judge to continue to provide assistance and guidance to the purchaser concerning ongoing matters after taking the bench. The opinion cited Rule 3.10 of RNCJC, in which judges generally are prohibited from practicing law. Rule 3.11 prohibits judges from engaging in business with lawyers or others likely to come before the court in which the judge serves. Any ongoing involvement with the matters pending in a former practice would implicate the practice of law or involvement in operation of the former practice.

Although the opinion request pending before this Committee has not suggested any ongoing involvement with a former partnership, the opinion in JE 13-001 is instructive regarding how the best interests of former clients might be taken into consideration. JE13-001 provides this guidance: "Still, the Committee is mindful of the potential impacts such a transition could have on the judge's former clients. Accordingly, the Committee believes it is appropriate for the justice of the peace to answer factual inquiries the purchaser of the practice may have about the prior representation that would assist in the transition."

Therefore, in this current opinion request, the Committee cautions the judge that any future questions about pending matters at the former law firm must be confined to factual inquiries only.

In JE13-002, the request was to determine the propriety of a recently appointed district court judge selling a law practice to a lawyer likely to appear before the judge on a regular basis. The sale would be structured as a one-time cash payment at closing. A second component was whether the judge could maintain an interest in a building which leased space to the State of Nevada, but was occupied by the State Public Defender. The building had been leased by the Nevada Department of Administration for use by the State Public Defender for twenty years prior to the judge's appointment. The judge did not receive income directly from any attorneys in the Public Defender's office. All lease payments were from the Department of Administration.

[1] The Committee is bound by the authority granted to it by Rule 5 of the Rules Governing the Standing Committee on Judicial Ethics. Thus, the Committee cautions that this advisory opinion is limited to an evaluation of the transaction and facts as represented by the Judge under the RNCJC. No opinion is expressed or implied regarding any implications or result under any other rules or law, including the Nevada Rules of Professional Conduct.

The Committee's opinion in JE13-002 was that neither of the inquiries would constitute a violation of the RNCJC. The sale of a judge's former law practice under the facts as presented did not establish a continuing business connection between the judge and the lawyer who purchased the practice. No creditor/debtor relationship would exist in a one-time lump-sum payment. Thus, no violation of the prohibitions described in RNCJC 3.11 (B) would be apparent.

As for the ownership of a building in which the Nevada Department of Administration pays to lease space for the State Public Defender, no direct financial relationship existed between the judge and the Public Defenders who might appear before the judge. This absence of a continuing financial interest between the judge and the public defenders who might appear before the judge eliminated the probability of frequent disqualifications or self-imposed recusals. Although the judge was cautioned that disclosure of the landlord relationship might be required in certain circumstances, the Committee did not find any violation of Rule 3.11(C).

Here, the Committee was aware that Section V, RNCJC: "Time for Compliance," states: "A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge."

Comment [1] to Section V instructs that: "If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period, but in no event longer than one year."

However, there is a qualifier contained in Comment 2 to Rule 3.11: " **As soon as practicable without serious financial detriment,** the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule." [Emphasis by Committee] Under the facts as disclosed by the Judge, the partnership agreement specifically does not provide for a lump-sum payment. Any buyout of a departing partner must be paid over a four year period. Thus, the provision for an installment payout was neither arbitrary nor created solely to accommodate this departing partner, but in compliance with the terms of an existing partnership agreement. It would constitute a "serious financial detriment" if the judge were not allowed to accept payments over the four year term required by the partnership agreement. Thus, the Committee found that the four year payout term would not transgress RNCJC Section V because the Judge would suffer a "serious financial detriment" if not permitted to comply with the partnership agreement. *See also*, ABA New Model Code, Comment [2] to Rule 3.11. [2]

The ABA House of Delegates adopted the Model Code of Judicial Conduct initially on August 7, 1990, and subsequently amended it on several occasions, the last of which was August 10, 2010. The New Model Code has been used by the Nevada Supreme Court as the basic underlying theme for its versions of the RNCJC. The current version of the RNCJC was adopted by the Nevada Supreme Court effective January 19, 2010. It is similar but not entirely identical to the ABA New Model Code. However, reference to both the ABA Model Code and RNCJC shows the strong influence of the ABA New Model Code and its history on the formulation ultimately adopted by the Nevada Supreme Court in 2009, and made effective on January 19, 2010. The hearings by the ABA and subsequent references to the New Model Code by many jurisdictions gives guidance on how it, and various versions adopted throughout the USA, may be interpreted.

The ABA New Model Code contains provisions which are almost identical to RNCJC. This is true for Canon 1 and Rules 1.2 and 1.3 – as well as the Comment on Rule 1.3. Canon 3 and Rule 3.11 are very similar. Comments [1] and [2] are precisely identical to RNCJC. Thus, the provisions of the ABA New Model Code are supportive of the conclusions reached by the Committee in this opinion.

Judicial Ethics advisory opinions from other jurisdictions are entirely in accordance with the conclusions reached by the Committee. Although it would be duplicitous to list the dozens of authorities which found such circumstances complied with judicial ethical rules, a few are directly on point. One from the federal courts pertained precisely to the fact pattern described by the Judge herein. In U. S. Committee on Codes of Conduct Advisory Opinion No. 24: Financial Settlement and Disqualification on Resignation From Law Firm [2009], the request concerned "...how a newly-appointed federal judge who is withdrawing from private practice at a law firm should address related financial settlement and disqualification issues." The newly appointed judge was departing from an established practice in a partnership. The partnership agreement provides for payment of an agreed amount representing the retiring partner's interest in the firm. Some of the payments are to be paid in the years following the partner's appointment as a judge. The opinion expresses this guidance:

2 Although not raised as an issue by the opinion request, the Committee urges the Judge to be cognizant of the reporting requirements for any outside compensation as set out in RNCJC Rule 3.15.

> A partner who leaves a law firm to become a federal judge should, if possible, agree with the partners on an exact amount that the judge will receive for his or her interest in the firm, whether that sum is to be paid within the year or over a period of years. Such agreed-upon payments may be made to the judge provided (1) it is clear that the judge is not sharing in profits of the firm earned after the judge's departure, as distinguished from sharing in an amount representing the fair value of the judge's interest in the firm, including the fair value of the judge's interest in fees to be collected in the future for work done before leaving the firm, and (2) the judge does not participate in any case in which any attorney in the former firm is counsel until the firm has paid the full amount the judge is entitled to receive under the agreement.

A very similar result was reached in Arkansas Judicial Ethics Advisory Committee, Advisory Opinion #96-09 [February 19, 1997]. This opinion was published to address the "financial issues presented by lawyers leaving firms and assuming full-time judicial duties." Although expressed in more general principles than the opinion request before this Committee, the Arkansas statements have pointed applicability to this request:

> The terms of an agreement may provide for compensation to the attorney regardless of when the work is performed. In our opinion, a distinction must be drawn between work performed in the firm before the judge departs and work performed by members of the firm after departure..... Similarly, judges should not be paid by the firm for work done by other members of the firm after the judge has left the firm. Such an arrangement is not consistent with the prohibition against the appearance of impropriety.... Therefore, prior to the time of departure, the firm and the departing attorney should calculate the value of the share or fee to be paid.... The payment to the departing attorney may be in a lump sum or in installment payments that end at the earliest practicable date, ideally within a few months. While the judge is receiving funds from the firm, the judge is obviously required to recuse in any matters involving the firm.

These cited authorities are entirely consistent with what is apparently the prevailing opinion in the United States on both a federal and state level. *See, e.g., Connecticut Informal Advisory Opinion 2008-19A* (a judge may accept payment from a former law firm for a case initiated on behalf of a client that the judge had brought to the firm as a "rainmaker" in lieu of any payments for his interest in the practice when the sole remaining case is settled approximately four years later than the firm and judicial official had contemplated); *Florida Advisory Opinion 1976-1* (a new judge may accept a fixed amount for his interest in his former law firm and the proportionate share of the fees earned before his elevation to the bench); *Florida Advisory Opinion 1974-4* (a new judge may receive annual installment payments for his interest in a firm computed on a predetermined formula pursuant to a standard contract for all shareholders); *Massachusetts Advisory Opinion 2000-1* (a new judge's former firm may pay him a fixed amount at a reasonable rate of interest in installments over 10 years); *Minnesota Advisory Opinion 2014-1* (a lump sum payment for a judge's interest in his former law firm is preferable, but, if immediate liquidation would cause serious financial detriment, an installment sale is permissible); *Pennsylvania Informal Advisory Opinion 10/29/2010* (a judge may receive installments for the agreed upon value of his interest in the law practice, including fees earned before he took the oath of office; the firm may sign a promissory note for the deferred payments); *West Virginia Advisory Opinion* (January 16, 2001) (a new judge may receive intermittent payments from his former law firm for an extended period).

Based on a thorough review of the factual background provided by the Judge; an examination of the RNCJC and previous opinions of this Committee; the opinions of federal and state advisory entities; and discussion among the participating Committee members, it was the unanimous vote that the inquiry by the Judge does not potentially violate any provision of the RNCJC. However, this opinion is confined to the facts as provided by the Judge, the stipulations as to conditions of fair market valuation for the vested equity units, payment terms, and appropriate recusal during the payout of at least four years.

CONCLUSION

A recently appointed Judge does not violate the Revised Nevada Code of Judicial Conduct if, after being sworn as a Judge, abides by the terms of an existing partnership agreement at the former law firm and accepts payments for fully vested equity units over a four year term if the established value of those units is determined according to the partnership agreement before the Judge is sworn as a Judge. The Judge must recuse from any matters emanating from or involving the former law firm during the four year payout term in order to avoid the appearance of impropriety and frequent requests for disqualification.

REFERENCES

Rule 5 Governing the Standing Committee On Judicial Ethics; Nevada Code of Judicial Conduct Section V; Comment [1] to Section V; Canon 1; Rule 1.3 to Canon 1; Comment 1 to Rule 1.3; Canon 3; Rule 3.10; Comment [1] to Rule 3.10; Rule 3.11(B) and (C); Comment [2] to Rule 3.11; Rule 3.13 (A); Comment [1] to Rule 3.13 (A); JE 13-001; JE 13-002; U.S. Committee on Code of Conduct Advisory Opinion No. 24 [2009]; American Bar Association, *New Model Code of Judicial Conduct*, Canons 1 and 2; Rules 1.2, 1.3; Comment to Rule 1.3; Rule 3.11; Comments [1] and [2] to Rule 3.11 (August 10, 2010);

Arkansas Judicial Ethics Advisory Committee, Advisory Op. #96-09 [February 19, 1997]; Connecticut Informal Advisory Opinion 2008-19A; Florida Advisory Opinion 1976-1; Florida Advisory Opinion 1974-4; Massachusetts Advisory Opinion 2000-1; Minnesota Advisory Opinion 2014-1; Pennsylvania Informal Advisory Opinion 10/29/2010; West Virginia Advisory Opinion (January 16, 2001).

This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.

Bill C. Hammer, *Chairman*