

MINNESOTA BOARD ON JUDICIAL STANDARDS

Advisory Opinion 2015-1

Off-Bench Activities of Retired Judges Appointed to Serve as Senior Judges

Issue. Which activities are permissible or impermissible for a retired judge who has been appointed ~~by the Chief Justice of the Supreme Court~~ to serve as a “senior judge”?

Summary.

1. “Senior judge” ~~is used here as shorthand for~~ means “Retired Judge Subject to Recall,” under Application II, Code of Judicial Conduct (“Code”).

2. A senior judge may not practice law.

- 2.3. With two narrow exceptions, involving ~~ADR private judicial functions~~ services and fiduciary positions, a senior judge must comply with all Code provisions. These general provisions apply even when the senior judge is not on judicial assignment and is not hearing cases.

~~A senior judge may not practice law.~~

4. The Code allows, but also places some limitations on, the advertising ~~and performance of ADR of private judicial functions~~ work by senior judges.

Issues Not Addressed. This opinion does not address restrictions on the activities of other categories of part-time judges, i.e., continuing part-time judges, periodic part-time judges, ~~or~~ and pro tempore part-time judges. See Applications III, IV, and V, Code of Judicial Conduct (“Code”). This opinion also does not address issues related to the activities of retired or former judges who have not sought or have not been approved for senior judge status. This opinion does not address residence issues.¹

Authorities. ~~The principal authority for this opinion is Application II, Code, and the related comment. Other relevant authorities include: Application I, cmt. 1; Rules 3.8, 3.9 and 3.10 and related comments; Minn. Stat. § 2.724, subd. 3(b); Minnesota Supreme Court cases; and prior Board opinions.~~

~~References to Rules and Comments are to those in the Code. “Board” refers to the Board on Judicial Standards. “Board Rules” refers to the Rules of the Board on Judicial Standards.~~

¹ A district court judge must reside in the district of appointment. Minn. Const. Art. VI, Sec. 4. However, senior judges are not appointed to a particular district and are not required to reside in a particular district. ~~Senior judges may, therefore, reside anywhere in Minnesota.~~

—The Comments serve two functions: (1) to provide “guidance regarding the purpose, meaning, and proper application of the Rules,” and (2) to identify “aspirational goals for judges.” Code, Scope. “The Canons state overarching principles of judicial ethics . . . [and] provide important guidance in interpreting the Rules.” *Id.*

Where the Rules or Comments use a permissive term such as “may” or “should,” the rule or comment is not mandatory. Rather, “the conduct being addressed is committed to the personal and professional discretion of the judge.” *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011), (quoting Code, Scope).

Nonetheless, Board advisory opinions often advise judges of what they should do, as well as what they must do or not do.

Authority to Issue Advisory Opinions. “The board may issue advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct. . . . The advisory opinion shall not be binding on the hearing panel or the Supreme Court in the exercise of their judicial-discipline responsibilities.” [Board Rule 2\(a\)\(2\), Rules of the Board on Judicial Standards \(“Board Rules”\).](#)

Terminology, Definitions, and Shorthand References. [The Application section of the Code defines several categories of part-time judges and identifies which rules apply to each category. A retired judge who has been appointed under Minn. Stat. § 2.724, subd. 3\(b\) to act as a “senior judge” is categorized as a “retired judge subject to recall, who by law is not permitted to practice law.” App. II, Code; Board Rules, Definitions, “Senior Judge.” A senior judge does not fall under any of the other categories of part-time judges because those categories apply to part-time judges who may practice law.² The Code refers to a retired judge who is authorized to perform judicial functions after retirement as a “retired judge subject to recall.” App. II. The Code’s Terminology section does not define this term, nor does the Code define “senior judge.” However, when the Chief Justice approves a retired judge’s application for Temporary Judicial Assignment, the Order specifies that the retired judge is “appointed and assigned to serve as a senior judge.” The term “senior judge” will be used in this opinion as equivalent to “retired judge subject to recall.”](#)

—This opinion uses certain terms as they are defined in the Terminology section of the Code. For example, “impartiality” means the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge.” “Fiduciary” includes “relationships such as executor, administrator, trustee, or guardian.”

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² The Minnesota Chief Justice may appoint a retired judge to serve as a temporary or part-time judge even if the judge does not participate in the senior judge program. Minn. Stat. § 2.724, subd. 3(a). “The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.” App. I, cmt. 2, Code.

1. Code and Statutory Provisions. ~~The Code principles that are most important to this opinion are, in order of importance, Application II, Rules 3.8, 3.9 and 3.10, Application I, and the Comments to Parts I and II.~~

~~The Application section of the Code “establishes when the various Rules apply to a judge or judicial candidate.” Application Part I applies to all judges and Part II applies specifically to senior judges.~~

For senior judges, there are two basic rules. First, a senior judge cannot practice law. Minn. Stat. §§ 2.724, subd. 3(b) and 484.06, App. II-, and Rule 3.10.

Second – with two partial exceptions – a senior judge must comply with *all* of the provisions of the Code. App. II. The exceptions are that the restrictions ~~on doing ADR work found in Rule 3.9 and~~ on most fiduciary appointments in Rule 3.8 do not apply to a senior judges, and the prohibition on providing private judicial functions in Rule 3.9 does not apply to a senior judge when not contemporaneously serving as a judge. App. II.

2. Prohibition Against the Practice of Law. “A judge who has been elected to office and who has retired as a judge in good standing and *is not practicing law* may be appointed to serve as a judge of any court except the Supreme Court.” Minn. Stat. § 2.724, subd. 3(b) (emphasis added). Another statute provides, “No judge of the district court shall practice as an attorney” Minn. Stat. § 484.06. Most senior judge appointments are to the district court. These prohibitions are incorporated into Application II (“A retired judge subject to recall for service, who by law is not permitted to practice law”); *see also* Rule 3.10 (“A judge shall not practice law.”). A retired judge who applies to serve as a senior judge must verify in the Application for Temporary Judicial Assignment that he/she is the judge is -“not engaged in the practice of law.”

Although the Code does not define “the practice of law,” that term is defined by Minnesota statute, case law and commentary. Under some circumstances, the term can include preparation of legal documents and some forms of assistance to practicing attorneys. *See, e.g.,* Minn. Stat. § 481.02; *In re Jorissen*, 391 N.W.2d 822, 825 (Minn. 1986); *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 868 (Minn. 1988); and Betty M. Shaw, *How to Avoid Issues of Unauthorized Practice*, Minn. Law., Jan. 11, 1999, at 2.

The prohibition against the practice of law applies even when the senior judge is not actually on active assignment and not actually hearing cases. See Code App. II, cmt. 1 (“[A]s long as a retired judge is subject to being recalled . . . the judge is considered to ‘perform judicial functions.’”). Because the Order that appoints a senior judge is effective for the remaining duration of the then-current biennium, the prohibition against the practice of law also applies for the remainder of the biennium, not just when the retired judge is actually hearing cases. The prohibition follows from Minn. Stat. § 2.724, subd. 3(b), Rule 3.10, and Minn. Stat. § 484.06, which provides that “[n]o judge of the district court shall practice as an attorney”

There is one exception to the prohibition on practicing law: any judge, including a senior judge, “may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, a person with whom the judge has an intimate

relationship, or a member of the judge's household, but is prohibited from serving as the lawyer for any such person in any forum." Rule 3.10.

——— A senior judge should not provide advice or coaching to attorneys for one side of a pending case or be "of counsel" to a law firm even if the judge does not personally represent clients. ~~Two informal opinions provided guidance to senior judges who inquired whether a certain proposed activity would violate the prohibition against the practice of law.~~ In 2005, the Board ~~cautioned~~ advised a senior judge against serving in an "of counsel" capacity ~~for to~~ a family member's law firm in a southern state while the judge lived there during the winter. In 2014, a recently retired senior judge was ~~cautioned~~ advised against providing advice on pending cases to family law and criminal defense practitioners, even though the judge would have no contact with the consulting lawyer's clients. In 2024, a senior judge was advised against accepting compensation from a private firm to participate in a mock oral argument to help attorneys on one side of a case prepare for an appeal. In both instances, the proposed activity appeared to involve the practice of law. In the second case, there was also a concern that advising defense attorneys, but not prosecutors, might raise questions about the senior judge's impartiality if the judge was assigned to hear criminal cases. In contrast, a judge may act as a mock trial judge in an educational setting with students in the roles of attorneys on both sides.

3. First Exception to the Requirement that Senior Judges Comply with the Code – Providing ~~ADR Services~~ Private Judicial Functions.

(a.) Overview.

The first of two exceptions to the rule that senior judges must comply with all Code provisions is that a "retired judge subject to recall for service . . . is not required to comply with Rule 3.9 (Service as Arbitrator or Mediator), except while serving as a judge" Code, App. II(A). At the same time,

——— Rule 3.9 provides ~~in part~~:

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law. A retired judge may act as mediator or arbitrator if:

- (A) The judge does not act as an arbitrator or mediator during the period of any judicial assignment;
- (B) The judge is disqualified from mediation and arbitration in matters in which the judge served as judge, and is disqualified as judge from matters in which the judge acted as mediator or arbitrator, unless all parties to the proceeding consent after consultation with their attorneys; and
- (C) Acting as arbitrator or mediator does not reflect adversely on the judge's impartiality.

The purpose of the rule, as with many rules in the Code, is to prevent potential conflicts between judicial duties and private activities. A potential conflict can arise if a judge receives compensation for performing private judicial functions. For example, if a party or attorney appearing in a case before the judge is also a potential customer in an unrelated private mediation, the judge might be tempted to show favoritism to the party, or the party might be tempted to hire the judge in an effort to gain favorable treatment in the case.³

Nevertheless, in the case of retired judges, the concern about potential conflicts must be balanced against other considerations. A retired judge may have an understandable interest in remaining professionally active and in earning compensation without being limited to part-time service in the Judicial Branch. This interest should be taken into account both because it is legitimate and because senior judges provide valuable services to the judicial branch and should not be discouraged from serving as senior judges without good reason. Rule 3.9 and Application II strike a balance by permitting a senior judge to engage in arbitration and mediation, but only when not contemporaneously serving as a judge.

Interpretation of Rule 3.9 can be problematic for several reasons. First, the rule contains an exception for retired judges to engage in arbitration and mediation under specified conditions, but Application II states that the rule does not even apply to a retired judge when not serving as a judge. Application II and Rule 3.9 may be reconciled by considering the conditions in the exception as additional requirements for arbitration and mediation. These conditions add little to what is already required by other rules.

Second, the first sentence of the rule states that a judge shall not act “as arbitrator or mediator or otherwise perform judicial functions in a private capacity,” but the exception for retired judges refers only to arbitration and mediation and omits other private judicial functions. However, the history of the exception shows that it was not intended to prohibit a senior judge from providing private judicial functions other than arbitration and mediation when not serving as a judge.⁴

³ The ABA committee that drafted the 1972 Model Code “received information . . . about potential conflicts inhering in a judge’s acting as an arbitrator: the arbitration proceeding could come before the court on which he sits; the court could be drawn into social and political controversies in which a judge acted as an arbitrator; the judicial office could be exploited in an effort to secure its dignity and prestige in support of an award; and judicial time could be diverted in a case in which a judge’s fee would thousands of dollars,” E. Wayne Thode, *Reporter’s Notes to the Code of Judicial Conduct* 80 (1973).

⁴ In 1994, a Minnesota Supreme Court advisory committee recommended adoption of the 1990 ABA Model Code subject to a number of variations. The Court adopted the Code as recommended by the committee. *Promulgation of Amendments to the Minnesota Code*, No. C4-85-697 (Minn. Nov.1, 1995). In the case of Canon 4.F., the predecessor to current Rule 3.9, the committee, at the Board’s recommendation, proposed the exception for retired judges that is now found in Rule 3.9. At the same time, the advisory committee recommended adoption of 1990 Model Code Application B(1), the predecessor to current Application II, which provided that a retired judge was not subject to Canon 4.F. when not serving as a judge, *Final Report, Advisory Comm. to Review ABA Model Code of Judicial Conduct*, at 7, 34-35, 47, No. C4-85-697 (Minn. June 29, 1994). Thus, the exception was unnecessary. The exception was taken from a Michigan ethics opinion. *State Bar of Mich.*, JI 28 (July 12, 1990). The Michigan judicial code differed from the Minnesota Code in two respects that made importing the language in the Michigan ethics opinion

The Code does not define “judicial functions in a private capacity.” There are many types of private judicial functions, primarily alternative dispute resolution (ADR) processes. *See, e.g.*, § 484.76, subd. 2; Rule 114, Rules of General Practice (listing alternative dispute resolution processes). This opinion focuses on ADR although some private judicial functions are not necessarily ADR. For example, the Board has determined that a senior judge may serve as a special master appointed under Rule 53, Rules of Civil Procedure, without determining whether a special master process is a form of ADR. Issues concerning private judicial functions other than arbitration and mediation have not arisen often, and the Board has not had occasion to address them. In general, private judicial functions that are similar to arbitration and mediation should be treated similarly and therefore subject to the conditions for arbitration and mediation in Rule 3.9.

Some private judicial functions, as well as activities that are not judicial functions and not within the scope of the Rule 3.9, may be prohibited by other rules if they create potential conflicts greater than those created by arbitration and mediation or for other reasons. *See, e.g.*, Rule 3.1 (restrictions on extrajudicial activities). In addition, individual district courts may have policies or practices. Senior judges should also be aware that at least one Judicial District has a policy of not giving judicial assignments to senior judges who engage in certain activities, such as doing who also do ADR work in the District, even though the Code permits the activity even though the Code permits such work to be undertaken.

Third, the rule does not apply to judicial functions that are performed as “assigned judicial duties” rather than “in a private capacity.” Rule 3.9 & cmt. 1. If an activity is an assigned judicial duty, there is no potential for a conflict between a private activity and a judicial duty, and the judge may engage in the activity while contemporaneously serving as a judge. However, it is not always clear whether a judicial function should be categorized as “assigned” or “private.”

An important factor in differentiating assigned and private activities is the source of the judge’s compensation. In general, if a senior judge is paid to perform a judicial function by the Minnesota Judicial Branch, the function would be considered an assigned duty, Rule 3.9 would not apply, and the senior judge would be able to perform the function contemporaneously (*i.e.*, on the same day) with service as a judge. Judicial roles within the definition of “judge” in Application I.B. and Board Rules, Definitions, are paid by the Judicial Branch and are assigned duties. Thus, a senior judge may serve as a judge and as a child support magistrate on the same day. However, if a senior judge performs a judicial function pursuant to a court order but is paid by parties, such as serving as a special master or consensual special magistrate, whether the function is categorized as assigned or private “depends upon the facts of the particular judicial service.” App. I, cmt. 2. If the function is determined to be private, then the senior judge may provide it only when not contemporaneously serving as a judge.

into Minnesota Canon 4.F. problematic. Specifically, the Michigan judicial code did not have an Application section, and Michigan Canon 4.F. did not prohibit other judicial functions. *Id.* The committee report does not show that the committee or the Board considered that the Minnesota Application section exempted retired judges from Canon 4.F. or that private judicial functions are not limited to arbitration and mediation. The Board’s interpretation that a senior judge may provide private judicial functions in addition to arbitration and mediation is in line with the ABA Model Code and the majority of states.

([ba.](#)) *Discussion of Rule 3.9(A), State v. Pratt, and Interpretations of the Terms “While Serving as a Judge” and “During the Period of Any Judicial Assignment.”*

A comment in *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012), raised questions about the [meaning](#), correct interpretation and practical application of the term “while serving as a judge” in Application II(A) and the term “during the period of any judicial assignment” in Rule 3.9(A). *Id.* at 878.

The Hennepin County Attorney’s Office (HCAO) prosecuted the *Pratt* case. *Id.* at 870. In April 2009, a senior judge was assigned to preside at Pratt’s trial. *Id.* at 872. In December 2008, the judge had contracted with HCAO to serve as an expert witness in an unrelated suit against the Hennepin County Medical Center. *Id.* This contractual relationship was not disclosed until the second to last day of Pratt’s month-long trial. *Id.* Relying on Rule 2.11(A) of the Code, which states that a “judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned,” the Supreme Court reversed Pratt’s conviction, holding that the senior judge should have disqualified himself because of the contractual relationship with HCAO. *Id.* at 873.

Dictum in *Pratt* cited Rule 3.9(A) of the Code, which prohibits a retired judge from providing ADR services; “during the period of any judicial assignment.” *Id.* at 878 (quoting Rule 3.9(A)). The Court, reasoning by analogy, noted that the Code “proscribes a retired judge’s contemporaneous service as an arbitrator or mediator and service as a judge,” and then observed: “If a retired judge may not serve as an arbitrator or mediator in a matter unrelated to any party during a judicial assignment, certainly a judge should not be on retainer to a party appearing before [the judge] in a proceeding during a judicial assignment.” *Id.* at 878.

The State Court Administrator received inquiries from retired judges about the Court’s comment in *Pratt* and asked the Board to clarify the meaning of “during the period of any judicial assignment.” The Board responded [by in](#) a September 28, 2012 opinion letter, [pointing out that a senior judge is not required to comply with Rule 3.9\(A\) “except while serving as a judge stating.”](#) [The letter continued:](#)

The prohibition in Rule 3.9, against acting “as an arbitrator or mediator during the period of any judicial assignment,” applies only “while serving as a judge.” Retired judges who are merely certified to act as retired judges, but are not actually “serving” in particular cases, are not prohibited from acting as arbitrator or mediator. The Board’s opinion is, further, that the prohibition against serving as a judge takes effect only when the arbitration or mediation has actually commenced; the prohibition would not be in place when the retired judge has merely accepted an offer to mediate or arbitrate or simply negotiated his or her fee for this service. The prohibition would be lifted when the judge has completed his or her involvement in the arbitration or mediation.

The letter concluded, “The dictum in *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012), does not affect the Board’s opinion.”

Upon appointment, a senior judge ~~is authorized to hear cases~~ may be assigned cases in district court and the court of appeals by the Chief Judge. See Minn. Stat. § 2.724, subd. 3. The meaning of “period of judicial assignment” in Rule 3.9 cannot be the same as the period of appointment, which encompasses the remainder of the biennium. If these terms were synonymous, a senior judge would never be able to arbitrate or mediate, and the exception allowing senior judges to act as arbitrators and mediators would be meaningless. On the other hand, “period of judicial assignment” cannot be limited to the time when a judge is on the bench or otherwise performing assigned duties, since such a limited restriction would add nothing to the elementary principle that a judge may not receive compensation from two different sources for providing services simultaneously.

In the Board’s view, the meaning of the term “during the period of any judicial assignment” in Rule 3.9 is identical to the meaning of the term “while serving as a judge” in Part II of the Application section. These terms refer to those days on which the judge presides in a case or handles a calendar.⁵ On those days, because the senior judge is “serving as a judge,” the senior judge cannot serve as an arbitrator or mediator. This conclusion is consistent with the observation in *Pratt* that the Code “proscribes a retired judge’s *contemporaneous* service as an arbitrator or mediator and service as a judge.” 813 N.W.2d at 878 (emphasis added). Conversely, when not serving as a judge – that is, when not actually hearing cases – the senior judge may serve as an arbitrator or mediator, subject to the limitations in Rule 3.9(B) and (C) and other Code limitations rules.

Once a senior judge has accepted an assignment, the assignment takes precedence over ADR activities. For example, it would be inappropriate for a senior judge presiding over a multi-day trial to interrupt the trial in order to conduct a mediation session or an arbitration hearing. It would likewise be inappropriate for a senior judge who has accepted an assignment to hear cases all week long in a particular county or district to beg off from judicial service to conduct a mediation session or an arbitration hearing. Once a senior judge has accepted a specific judicial assignment, the assignment takes precedence over opportunities to provide ADR services.

It is generally permissible for a senior judge who has a case under advisement after otherwise completing a specific judicial assignment to engage in ADR activities, so long as the ADR work does not involve the lawyers, law firms or parties of the case under advisement. Similarly, if a senior judge is assigned a case that is not presently active, it is generally permissible

⁵ Under the Board’s 2012 opinion letter, “serving as a judge” in Application II.A. is distinct from “perform[ing] judicial services” in comment 1 to Application II. “Serving as a judge” refers to days on which the judge hears cases. “Perform[ing] judicial functions” within the meaning of the comment refers to the entire period of appointment as a senior judge. Code, App. II, cmt. 1 (“[A]s long as a retired judge is subject to being recalled for service, the judge is considered to ‘perform judicial functions.’”). The phrase “perform judicial functions” refers to the definition of “judge” in Application I.B., *i.e.*, “anyone who is employed by the judicial branch of state government to perform judicial functions”. Thus, a senior judge is classified as a “judge” subject to the Code during the entire period of appointment, whereas the prohibition on arbitration and mediation applies only on days on which the judge is compensated by the Judicial Branch.

for the judge to engage in ADR activities, so long as the ADR work does not involve the lawyers, law firms or parties of the assigned case.

(b.c.) Discussion of Arbitration and Mediation Exception in Rules 3.9(B) and (C).

The limitation conditions on arbitration and mediation in Rule 3.9(B) ~~is~~are straightforward. A senior judge is disqualified and may not serve as mediator or arbitrator “in matters where the judge served as judge,” or serve as judge in matters where “the judge acted as mediator or arbitrator, unless all parties to the proceeding consent after consultation with their attorneys.”⁶ The senior judge must inform the parties and counsel of the judge’s prior service or activity at the earliest practicable time, and then afford the parties the opportunity to consult privately with their attorneys before deciding whether to consent to the judge’s involvement. See Rule 2.11(C).

~~For more guidance on the issue of disqualification, see Advisory Opinions 2013-2 and 2014-1 on the Board’s web site.~~

~~Rule 3.9(C) provides that a retired judge “may act as mediator or arbitrator if [a]cting as arbitrator or mediator does not reflect adversely on the judge’s impartiality.” “Impartiality” means the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge.” Code, Terminology.~~ Rule 3.9(C)’s language is similar to that of Rule 2.11(A), which mandates disqualification “in any proceeding in which the judge’s impartiality might reasonably be questioned.” Thus, under Rule 3.9(C), a senior judge should decline to serve as mediator or arbitrator when the facts and circumstances of a prospective ADR case would raise a question in the mind of a reasonable person about the judge’s ability to be fair and impartial when handling future judicial assignments.

Even if disqualification appears unnecessary, disclosure may be appropriate. “A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” Rule 2.11, cmt. 5. For example, disclosure or disqualification is appropriate if the senior judge (a) has recently provided, (b) has agreed to provide, or (c) is in discussions to provide, a private judicial function in a matter involving a party, attorney, or law firm appearing before the senior judge in an assigned proceeding, even if the private matter is unrelated to the assigned proceeding. See Rule 18-103.9, Maryland Code of Judicial Conduct; Rule 3.9, New Hampshire Code of Judicial Conduct. For more guidance on the issue of disqualification, see Board Advisory Opinions 2013-2 and 2014-1.

4. Permissions and Restrictions on ~~a~~ Advertising and Soliciting Dispute Resolution Services.

Subject to certain limitations in the Code, a senior judge may advertise ADR services.

⁶ Similarly, a lawyer may not represent anyone in connection with a matter in which the lawyer participated as a judge, arbitrator, or mediator unless all parties consent. Rule 1.12(a), Minn. R. Prof. Cond.

An advertisement about a senior judge's availability to provide ADR services may include accurate and truthful statements about the judge's prior judicial service. However, ads, business cards, and stationery used for ADR or advertising purposes may not use ~~the words~~ such as "Judge" as a title. Rule 3.11 cmt. 1; *see also* Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discip., Op. 23013-3 at 2, 9 (June 6, 2013) (opining that a retired judge who serves temporarily on a court by designation of the chief justice of the Ohio Supreme Court, when engaged in arbitration, mediation, or other business activities, should not use a judicial title, including but not limited to "Judge X," "Honorable X," "Hon. X," "Former Judge X," "Retired Judge X," and "Judge X (Ret.)." ~~In addition,~~ ADR materials may not refer to the judge as "Senior Judge X" or allude to the judge's current status as a senior judge. *See id.* In addition, a senior judge may not appear in a robe in a photo advertising ADR services. *Id.*; Rule 1.3 cmt. 1.

Senior judges who advertise ADR services often place ads in legal publications. Some senior judges have ADR web sites. Others are listed on a roster of qualified neutrals on the web site of a business that provides ADR services. The periodic nature of legal publications and the "on call" short-notice character of most senior judge courtroom work make it impractical for senior judges to advertise their availability to do ADR work only when they are not on judicial assignment. Therefore, it is the Board's view, subject to limitations and conditions stated herein, that a senior judge, even while on judicial assignment, may advertise availability to provide ADR services.

There are, however, limitations on how the senior judge seeks ADR business while on judicial assignment. For example, a senior judge on assignment should not solicit ADR business from attorneys who come in contact with the judge during the assignment. If an attorney representing a party on a case on which the senior judge is or will be presiding asks the senior judge about availability for ADR work on another matter, the senior judge should defer discussing the particulars of that potential ADR work until after the pending matter has been decided.

~~Senior judges should also be aware that at least one Judicial District has a policy of not giving judicial assignments to senior judges who also do ADR work in the District, even though the Code permits such work to be undertaken.~~

45. Second Exception to the Requirement that Senior Judges Comply with the Code – Appointment to Fiduciary Positions.

The second exception to the general rule that senior judges must comply with all provisions in the Code is that "a retired judge subject to recall for service . . . is not required to comply at any time with Rule 3.8 (Appointments to Fiduciary Positions)." Code, App. II(B). Rule 3.8(A) provides:

A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, a person with whom the judge has an intimate relationship, or a member of

the judge's household and then only if such service will not interfere with the proper performance of judicial duties.

Application II(B) exempts senior judges from compliance with Rule 3.8(A)'s prohibition on serving as a fiduciary in non-familial cases.

~~However, Although Rules 3.8(B) and (C) do not technically apply to a senior judge, a senior judge must comply with them because they repeat what is required under other rules.⁷ from some fiduciary activities.~~ Rule 3.8(B) provides:

A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

For senior judges, the term "court on which the judge serves," usually refers to the judicial district where the senior judge most commonly accepts judicial assignments. Depending on circumstances, a senior judge should also consider declining or terminating an appointment to serve in a matter which could affect a person or entity related to the judge's fiduciary service. *See* Rule 2.11(A)(1).

Rule 3.8(C) provides that "a judge acting in a fiduciary capacity" is "subject to the same restrictions on engaging in financial activities that apply to a judge personally." Those restrictions are set forth in Rule 3.11. Under Rule 3.11(C), a judge may not engage in financial activities, otherwise permitted under Rules 3.11(A) and (B) that would "interfere with the proper performance of judicial duties, lead to frequent disqualification," or violate another Code provision. Rule 3.11(C)(1)-(4). ~~An example of such a violation would be using a judicial title or robe in business advertising. Rule 3.11 cmt. 1.~~

~~5. Permissions and Restrictions on a Senior Judge Advertising ADR.~~

~~Subject to certain limitations in the Code, a senior judge may advertise ADR services.~~

~~An advertisement about a senior judge's availability to provide ADR services may include accurate and truthful statements about the judge's prior judicial service. However, ads, business cards and stationery used for ADR or advertising purposes may not use the word "Judge" as a title. Rule 3.11 cmt. 1; see also Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discip., Op. 3013 at 2,~~

⁷ The ABA Model Code provides that a retired judge subject to Application II is not required to comply with "Rule 3.8(A)," which means that such a judge is required to comply with Rule 3.8(B) and (C). In contrast, Minnesota Application II refers to "Rule 3.8." The omission of the "A" in Minnesota Application II appears due to oversight or typographical error. The missing "A" originated in a 2007 review committee report. The report set forth recommended deviations from the Model Code in strike-through format. In the report, there is no strike-through in ABA Model Code Application II. This shows that the committee did not intentionally reference Rule 3.8 rather than 3.8(A) in its recommended Application II. Report, Ad Hoc Advisory Comm. to Review the Minn. Code of Judicial Conduct, recommended Code at 6, No. C4-85-697 (Minn. Oct. 31, 2007). The Court adopted the committee's recommended Application II. Order Promulgating Revised Minn. Code of Judicial Conduct, at 6, No. ADM08-8004 (formerly C4-85-697) (Minn. Dec. 18, 2008).

~~9 (June 6, 2013) (opining that a retired judge who serves temporarily on a court by designation of the chief justice of the Ohio Supreme Court, when engaged in arbitration, mediation, or other business activities, should not use a judicial title, including but not limited to “Judge X,” “Honorable X,” “Hon. X,” “Former Judge X,” “Retired Judge X,” and “Judge X (Ret.).” In addition, ADR materials may not refer or allude to the judge’s current status as a senior judge. *Id.* In addition, a senior judge may not appear in a robe in a photo advertising ADR services. *Id.*; Rule 1.3 cmt. 1.~~

~~———— Senior judges who advertise ADR services often place ads in legal publications. Some senior judges have ADR web sites. Others are listed on a roster of qualified neutrals on the web site of a business that provides ADR services. The periodic nature of legal publications and the “on call” short notice character of most senior judge courtroom work make it impractical for senior judges to advertise their availability to do ADR work only when they are not on judicial assignment. Therefore, it is the Board’s view, subject to limitations and conditions stated herein, that a senior judge, even while on judicial assignment, may advertise availability to provide ADR services.~~

~~———— There are, however, limitations on how the senior judge seeks ADR business while on judicial assignment. For example, a senior judge on assignment should not solicit ADR business from attorneys who come in contact with the judge during the assignment. If an attorney representing a party on a case on which the senior judge is or will be presiding asks the senior judge about availability for ADR work on another matter, the senior judge should defer discussing the particulars of that potential ADR work until after the pending matter has been decided.~~

~~———— Senior judges should also be aware that at least one Judicial District has a policy of not giving judicial assignments to senior judges who also do ADR work in the District, even though the Code permits such work to be undertaken.~~

The Board hopes that this opinion provides helpful general guidance to senior judges.

Adopted January 27, 2014
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