

JUDICIAL ETHICS COMMITTEE  
ADVISORY OPINION NO. 96-1  
Issued: February 7, 1996

ISSUE: Does the Maine Code of Judicial Conduct or 4 M.R.S.A. sec 312 forbid a probate judge from serving as an elected member of a directing board of a charitable institution, a bank or other such private entity?

ANSWER AND DISCUSSION: This inquiry raises two distinct issues: whether the Code of Judicial Conduct forecloses a judge from serving in an elected capacity on a board as a director, and whether the Code permits extra-judicial activity (whether or not it is predicated on an election) of that type.

A. Canon 5 applies generally only to political activities of a judge. A specific provision of Canon 5A(3) requires a judge to resign from judicial office "upon becoming a candidate for any elective office...." While the resignation requirement is not expressly limited in that section to candidates for political elective office, the title to Canon 5 and the specific nomination to Canon 5A provide clear evidence that these restrictions were intended to apply only to candidates for political office.

Additional evidence of this limited construction is found in the Canon's definition of "candidate" (to whom the resignation requirement of Canon 5A(3) applies). "Candidate" is defined in the Code as "a person seeking appointment, reappointment, election or reelection to public office." Thus, a person seeking election to a private board is not a "candidate" within the meaning of Canon 5.

This construction is confirmed by the Advisory Committee's Note to Canon 5. Further, the ABA Model Code of Judicial Conduct, to which the textual note of Maine Canon 5A(3) refers, limits applicability of the resignation requirement to candidates in "a primary or in a general election...." Neither of those situations exists here.

Accordingly, because the restrictions and requirements set out in Canon 5A(3) apply only to political activities, this provision does not prohibit a candidacy for a position with a private entity. Title 4 M.R.S.A. sec 312, which authorizes judges of probate to engage in "political activities," is therefore not implicated here.

B. Even though the present inquiry does not directly raise it, the more significant issue here is whether the Code prohibits a judge from serving generally as a director or trustee of an organization. The specific inquiry here relates to different types of organizations and entities (that is, whether it is proper for a judge to work with a

bank and with a charitable institution). Because the relevant provisions of the Code distinguish among different types of organizations in which a judge may or may not participate, they do not permit a uniform answer to the present question. Further, while a review of the germane portions of the Code may allow some general observations, the precise effect of the Code will be determined by application of specific facts that are not provided by this general inquiry.

Canon 4C(3) specifically permits a sitting judge to "serve as an officer, director, trustee or non-legal advisor, or be a member of an organization." The types of organizations within the scope of this sanctioned affiliation are those that are "devoted to the improvement of the law, the legal system or the administration of justice" or ones that are "educational, religious, charitable, fraternal or civic...not conducted for profit...." Canon 4C(3)(a) then identifies circumstances under which a judge may not participate in those organizations. As a general matter, these exclusions arise if it is likely either that the organization will be engaged in proceedings over which the judge would "ordinarily" preside or that the organization "frequently" will be a litigant in the court in which the judge sits. Canon 4C(3)(b) identifies the types of work that the judge may perform for those organizations in cases where the Code permits participation in the first place.

The inquiry posed here arose from an invitation for the judge to join the board of trustees of a private, non-profit museum. The Committee is satisfied that such an entity is the type of civic organization in which a judge may participate under Canon 4C(3), because a museum is in essence an educational facility and because it is a civic institution that (in this case) is not conducted for profit. In other jurisdictions, such sanctioned organizations have included a church, American Bar Association Informal Ethics Opinion 1070 (July 21, 1969); a charitable, quasi-public hospital, American Bar Association Informal Ethics Opinion C-706 (December 6, 1963); a non-profit corporation that provides health maintenance services, Michigan Standing Committee on Professional and Judicial Ethics Opinion JI-72 (July 29, 1993); a census count committee formed to promote census awareness, Michigan Standing Committee on Professional and Judicial Ethics Opinion JI-18 (March 27, 1990); non-profit corporation formed by a public university, *id.*; and a not-for-profit corporation that teaches the retarded, Illinois Judicial Ethics Committee Opinion 93-5 (September 21, 1993). The Maine Canons establish a distinction between "business" pursuits (addressed in Canon 4D) and other pursuits (which are described and addressed in Canon 4C). A private, non-profit museum falls on the latter side of this demarcation and, further, is qualitatively similar to those types of organizations where judges of other jurisdictions have been permitted to sit on a directing board.

Such participation, however, is permitted only if the organization does not fall within the scope of the exclusion set out

in Canon 4C(3)(a). Further, the nature of the judge's participation is limited by the terms of Canon 4C(3)(b). These limitations are of particular concern with those types of organizations that engage in fund-raising efforts. The Code imposes express restrictions on the judge's ability to participate in those efforts. These restrictions will require the judge and the organization to cooperate in ensuring that the judge is not otherwise involved in the solicitation of funds. Canon 4C(3)(b)(i) precludes the judge from "personally" participating in the solicitation of funds or in other fund-raising activities. A similar provision in Michigan has been construed not to prevent the organization from issuing fund-raising letters on letterhead that includes the judge's name, provided that the judge is not the signatory. Michigan Ethics Opinion JI-18, *supra*. The prohibition in the Maine canon against personal participation in fund-raising is consistent with this view. See also Canon 2B ("A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others;...").

The present inquiry also raises the question of whether the Code permits a judge to sit as a trustee or director of a bank or other corporation. As is noted above, the Code permits a judge to participate in civic and charitable organizations, subject to certain exceptions and limitations. The Code addresses other types of organizations through an opposing approach: a judge may not participate in a business (in a position of management or otherwise) unless certain narrowly drawn circumstances are present. See Canon 4D(3). Thus, unless those circumstances are demonstrated, participation in a business is foreclosed. See American Bar Association Informal Ethics Opinion 1385 (February 17, 1977) (under provisions similar to Canon 4D, judge may not become an "honorary director" of a bank). An analysis of whether a particular judge may participate in a particular business is quite fact-specific. Because the present inquiry does not provide any of the factual data necessary for an evaluation under the provisions of Canon 4D, no further discussion is possible here.

As a final observation under the Code, it must be noted that even if participation in a civic or charitable organization or in a business is permitted under Canon 4C or Canon 4D, that participation is still rendered subject to the general considerations set out in Canon 4A: extra-judicial activities are not permitted if they generate "reasonable doubt" on the judge's capacity to sit impartially, if they demean the judge's office, or if they interfere with the judge's performance of the duties of the office. These general principles, however, are to be construed in a way that judges are encouraged to engage in appropriate extra-judicial activity and not to isolate the judge from his or her community. Advisory Committee's Note to Canon 4.