

MINNESOTA BOARD ON JUDICIAL STANDARDS

Advisory Opinion 2015-1

Activities of Retired Judges Appointed to Serve as Senior Judge

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 “Retired Judge Subject to Recall,” under Application II, Code of Judicial Conduct.
2. With two narrow exceptions, involving ADR 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.
3. A senior judge may not practice law.
4. The Code allows, but also places some limitations on, the advertising and performance of ADR work by senior judges.

Issues Not Addressed. This opinion does not address restrictions on the activities of continuing part-time judges, periodic part-time judges, or pro tempore part-time judges. *See* Application 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. 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. Senior judges may, therefore, reside anywhere in Minnesota.

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.

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).

Terminology, Definitions, and Shorthand References. 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.”

ADVISORY OPINION

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 senior judges. 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 “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. *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 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.

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 a senior judge against serving in an “of counsel” capacity for 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 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 both instances, the proposed activity appeared to involve the practice of law. In the second case, there was 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.

3. First Exception to the Requirement that Senior Judges Comply with the Code – Providing ADR Services. 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).

Rule 3.9 provides in part:

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.

(a.) *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 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.” 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 assigned 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.

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. On those days, because the senior judge is “serving as a judge,” the senior judge cannot serve as 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.

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

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.) Discussion of Rules 3.9(B) and (C).

The limitation in Rule 3.9(B) is 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.” 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.

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.” 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.

4. 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, Rules 3.8(B) and (C) restrict senior judges 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, 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, 2015