Judicial Ethics Committee
State of Vermont

Opinion Number: 2728-18

Date: April 15, 2016

To: [Name Redacted]

The matters that you presented to the Judicial Ethics Committee have been researched and reviewed. The following is the Opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

*Questions Presented*

1. May a newly appointed judge receive fees he personally earned from client accounts, to be collected during the winding-up of his interest in his former law firm and after he takes office?

2. May a newly appointed judge retain an interest in real estate co-owned with his former law partners and occupied by his former law firm?

*Short Answer*

As to Question 1, a newly appointed judge may receive fees he personally earned from client accounts collected after taking office; however, the Code of Judicial Conduct and ethics opinions from other jurisdictions limit how such fees may be collected and distributed.

As to Question 2, a newly appointed judge typically should not retain an interest in real estate co-owned with his former law partners and occupied by his former law firm. Certain circumstances in this case mitigate ethical concerns to some extent. However, the Committee recommends that the judge dispose of his interest as soon as he reasonably can do so without serious financial detriment.

*Facts*

A newly appointed judge has asked the Committee to evaluate the appropriateness of certain aspects of his separation agreement with his former firm. The Committee was provided with part of the agreement, consisting of a page ending in an incomplete paragraph (which was partially copied on to a second page). The excerpted portions of the agreement provided to the Committee call for certain fees from clients to be split between the judge and the firm, which the judge personally earned while working as an attorney at the firm. The fees are to be distributed during the winding-up period of the judge's interest in the firm. The firm will act as his agent in collecting the funds from the clients. The firm will indemnify the judge for its accrued debts. The Committee could not read

the second page of excerpts as submitted, but it appears to address accounts still unpaid at the end of the winding-up period, as well as some outstanding salary due to the judge. Because those provisions are not complete, the Committee expresses no opinion on those subjects.

The judge also has an ownership interest in a corporation that owns a portion of the building that the law firm occupies. The other owners of the corporation are the judge's former law partners at the firm. The building is for sale, but it is unknown whether or when it may sell. It is unknown whether the corporation collects rent from the law firm or whether the judge otherwise receives any income from the law firm's occupancy.

The judge anticipates that he will recuse himself from any cases involving his former law partners indefinitely due to their longstanding relationships regardless of any other bases for disqualification.

*Relevant Canons of Judicial Conduct*

Canon 3E(1)(a)-(c), 4D(1)(b), 4D(4), 4H(1), 4G

*Analysis, Generally*

As a general matter, Canon 3E(1)(a), (b), and (c) of the Vermont Code of Judicial Conduct (Administrative Order No. 10) call for a judge to recuse himself where "the judge's impartiality might reasonably be questioned," including some situations where the judge has a prior relationship with the attorneys, parties, or matter pending before him. Canon 3E is broad and generally implicated by the issues raised by the judge. In this Opinion, the Committee focuses more specifically on the economic issues presented.

*Question 1: May a newly appointed judge receive fees he personally earned from client accounts, to be collected during the winding-up of his interest in his former law firm and after he takes office?*

The Code of Judicial Conduct limits the extent to which a judge may engage in extrajudicial economic activities. Canon 4D requires judges to refrain from economic activities that will bring them into close contact with persons or entities who may frequently come before the court. Given the compactness of Vermont's legal community, a financial arrangement in which a judge is compensated by his former firm after he has taken office involves the Code, even if the members of that firm are unlikely to appear before that specific judge due to disqualification, geography, practice area, or other circumstances.

However, in the case of a newly appointed judge, it is generally understood and accepted that there will be some degree of financial interrelationship during the winding up of the judge's former law practice. See generally Cynthia Gray, Ethical Issues for New Judges, State Justice Institute, American Judicature Society 7 (2003). Arrangements, such as the one at issue here, in which a judge will be compensated by his former firm for client work personally done while a member of the firm

generally comport with ethical guidelines as long as some safeguards are in place. See NY Jud. Adv. Op. 95-12, 1995 WL 924525 (IA] judge may collect fees owed to him or her in connection with legal services performed prior to his or her assumption of judicial office . . . and may otherwise supervise the winding up of the affairs of the prior law practice.").

First, a judge may not practice law, and thus steps must be taken to disassociate from the former firm and its clients even while actively collecting fees. Canon 4G. In most jurisdictions, this extends to aspects of client representation that may be considered clerical or ministerial in nature. *In the Matter of Moynihan*, 604 N.E.2d 136 (N.Y. 1992). Thus, even if the firm pays the judge for work done for a client, it must be made clear to the client that the judge no longer represents them, and the judge can render no services to the client beyond what is reasonably necessary to secure new legal representation for the client. See NY Jud. Adv. Op. 0077, 2000 WL 35936969 ("A newly-appointed full-time judge . . . may write to former clients to inform them of the judge's recent appointment to the bench and to tell them that he/she must discontinue the practice of law during the judicial term of office."); MA Sup. Jud. Ct. Comm. Jud. Eth. Op. 2008-2, 2008 WL8681311 (explaining that judge's name may remain on firm for a limited time only if the firm will dissolve entirely after winding down); NE Jud. Eth. Op. 97-2, 1997 WL 34844060 (citing Shaman, et al., *Judicial Conduct and Ethics*, § 7.23).

Second, payments from the firm to the judge should be limited to fees and shares earned before the judge took office. IL Jud. Eth. Op. 94-12, 1994 WL 808093 ("nothing . . . prevents a judge from receiving legal fees earned as a lawyer."). If reasonably possible, the amount due should be ascertained before the judge takes office and explicitly stated in any separation agreement. See U.S. Adv. Op. 24 (June 2009), available at www.uscourts.gov/file/1903/ download. This applies to both hourly fees and contingent fees, whenever and however collected. See Michigan Advisory Opinion CI-1079 (1985), available at www.michbar.org/ opinions/ethics/ numbered_opinions/OpinionID=111 (setting forth different measures for splitting a contingent fee earned after a judge's departure); Eth. Comm. KY Jud. Op. JE-41 (1982), 1982 WL 961492 ("The judge may share in fees to be collected in the future as long as the work was done before he left the firm."). Generally speaking, a judge cannot retain an interest in his former firm after taking office, and thus should not receive a share of firm profits realized after the judge's departure. See NY Jud. Adv. Op. 97-9, available at www.nycourts.gov/ip/judicialethics/opinions/97-09_.htm.

Third, the fees should be collected and distributed to the judge within a reasonable amount of time. Although this safeguard more typically applies to the sale of an interest in a law firm, and obviously depends on factors beyond the judge's or the firm's control, such as prompt payment, Canon 4D(1)(b) explicitly provides that "[a] judge shall not engage in financial and business dealings that . . . involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." Canon 4D(4) provides that "[a] judge shall manage the judge's ... financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall relinquish investments and other financial interests that might require frequent disqualification." There is no specific rule in Vermont for what amount of time is considered reasonable. With respect to selling an interest in a firm, Massachusetts has advised that

a ten-year payment plan is considered presumptively reasonable, but should be shortened if the financial relationship becomes the only reason for disqualification; however, other jurisdictions have advised on plans of a significantly shorter duration. See MA Sup. Jud. Ct. Comm. Jud. Eth. Op. 00-1, available at www.mass.gov/ courts/case-legal-res/ethics-opinions/cje-opin-2000-1.html; AL Jud. Inq. Comm. Op. 86-248, 1986 WL 1245781 (one year plan). As in all things, the touchstones of reasonableness and good faith apply.

The excerpted portion of the separation agreement provided to the Committee appears to be reasonable. To the extent that fees will be paid to the judge, those fees are for work actually performed by the judge before he took office. Presumably, the fee-splitting called for in the agreement reasonably reflects the judge's proportional work on those accounts, or is otherwise consistent with the share he would have received had he stayed with the firm. The fees are to be distributed within a finite time less than one year from taking office. The legible portion of the excerpts does not address what will happen to fees collected after the end of the winding-up period, nor do they specify the amount to be distributed. If those issues are not addressed elsewhere in the agreement, it would be helpful to clarify those matters now to avoid dealing with any ambiguities or unforeseen conflicts in the future.

So far as it is shown in the excerpts provided, the agreement generally comports with the judge's ethical obligations.

*Question 2: May a newly appointed judge retain an interest in real estate co-owned with his former law partners and occupied by his former law firm?*

Canon 4D(1)(b) provides that "[a] judge shall not engage in financial and business dealings that ... involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." Canon 4D(4) provides that "[a] judge shall manage the judge's . . . financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall relinquish investments and other financial interests that might require frequent disqualification."

Absent additional circumstances, Canon 4D(1)(b) and Canon 4D(4) generally do not prohibit a judge from acting as a landlord or otherwise jointly owning property. See generally Gray, "The Judge as Landlord," 23 Vt. B.J. & L. Dig. 19 (1997); State v. St. Francis, 151 Vt. 384, 391-92 (1989) (trial judge's ownership of land in alleged "Indian country" did not require disqualification). In this situation, however, there are two circumstances that are not typically present in the ordinary landlord—tenant or joint ownership situation. The other co-owners of the corporation that owns the condominium at issue are the judge's former law partners, and the sole occupant of the condominium is the judge's former law firm.

Advisory opinions from other jurisdictions addressing roughly analogous circumstances are mixed. Some jurisdictions place an absolute bar on such relationships while others allow it during the winding-up of a new judge's law firm interest; still others allow a judge to lease property to a

lawyer appearing before him, with or without disqualification. Compare SC Adv. Comm. Std. Jud. Cond. Op. 12-1991, 1991 WL 11760298 ("It is not proper for the judge to continue in this real estate partnership. He should divest himself of this investment as soon as he can do so without serious financial detriment.") with WI Sup. Ct. Jud. Cond. Adv. Comm. Op. 97-4, 1997 WL 34844127 (newly elected judge may lease office space to a lawyer as part of an agreement to purchase the firm but "not for more than one year after taking office"); but see MD Jud. Eth. Comm. Op. 2007-10, 2007 WL 7602908 (mere landlord—tenant relationship with lawyer is not an ethical violation, but the relationship must be disclosed and could be grounds for disqualification). As the Maryland Judicial Ethics Committee stated in the 2007 Opinion cited above, "more recent opinions of other jurisdictions that have addressed this issue . . . conclude that a failure to recuse or disclose the existence of a landlord-tenant relationship between a judge and an attorney appearing before the judge could result in an appearance of impropriety and/or be violative of the prohibition against financial dealings with lawyers that come before the judge." MD Jud. Eth. Comm. Op. 2007-10, 2007 WL 7602908 (citing SC Adv. Comm. Std. Jud. Cond. Op. 6-2006 (judge should not lease residence to state trooper who appears regularly in front of the judge); WI Sup. Ct. Jud. Cond. Adv. Comm. Op. 02-2 (a judge may not lease space to a lawyer who is likely to appear before the judge); WA Adv. Op. 93-08 (permitting judicial officer to lease real estate to a lawyer without disqualification, although noting that disclosure may be appropriate in certain circumstances).

In this matter, the judge has disclosed that he will likely be indefinitely disqualified from any cases involving his former law partners due to their longstanding prior relationships alone. The Committee is without information on whether the law firm pays rent to the corporation, or whether disputes are likely to arise from this tenancy. The request also does not identify the other corporate shareholders or the likelihood they might appear before the judge. The judge also has indicated that the building is for sale, and thus any potential issue may soon disappear altogether, and in any case likely falls into the relinquish-as-soon-as-financially-practicable safe harbor of Canon 4D(4).

The Committee recommends, that the judge take all reasonable steps to dispose of his interest in the corporation and/or the building as soon as practicable. Even if the judge is indefinitely disqualified from cases involving his former law partners, such disqualification may not necessarily extend to associates or new hires at the former firm. To the extent these other lawyers may appear before the judge, Canon 3E's caution against situations where the judge's impartiality may reasonably be questioned and Canon 4D's duty to avoid disqualification may be implicated. Further, as noted under the *Generally* header above, economic relationships involving frequent and continuous contacts with law firms may raise issues as to the impartiality of the judiciary as perceived by the public, even if the judge is disqualified from every case. To avoid ethical concerns in the future, it would be prudent for the judge to relinquish his interest sooner rather than later.

*Conclusion*

The Code of Judicial Conduct imposes limits on a judge's extrajudicial economic activity to avoid bias, the appearance of bias, and the risk of frequent disqualification. The Code of Judicial Conduct permits a newly appointed judge to maintain a reasonable financial relationship with his former law firm during the winding-up of his interest therein. The Committee recommends that the

judge continue to take reasonable steps to dispose of his interest in the building and/or the corporation in a timely manner and without serious financial detriment.

Members of the Judicial Ethics Committee

Douglas C. Pierson, Esq., Chair

Hon. Lawrence H. Bruce

Hon. Theresa S. DiMauro

Hon. Brian J. Grearson

Eileen Blackwood, Esq.

*Application*

The Judicial Ethics Committee cautions that this opinion is based only on the facts provided to the Committee by the judge. This opinion is advisory, and should not be considered to be binding on the Supreme Court or the Judicial Conduct Board. Further, the passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If you engage in a continuing course of conduct, you should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.