

**ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS**

**ADVISORY OPINION NO. 3
[June 25, 1992]**

WHEN SENIOR JUDGES MAY ACT AS ARBITRATORS

The Advisory Committee on Judicial Conduct has received a request from an Associate Judge of the Superior Court for a formal opinion with respect to whether and under what circumstances a judge who has been appointed as a senior judge pursuant to D.C. Code § 11-504 (1989) and who performs judicial duties may act as a paid arbitrator hired through a private arbitration organization. The judge has also inquired whether the propriety of a senior judge acting as an arbitrator would be affected (1) by whether the arbitration work is done in the District or in another city; (2) by whether the arbitration cases involve matters which might eventually come before Superior Court; (3) by whether the senior judge has judicial matters under advisement at the time he or she acts as an arbitrator or vice-versa; and (4) by whether a senior judge has sat as a judge during the same week or month that he or she acts as a private arbitrator. The Advisory Committee has concluded that a senior judge may act as an arbitrator so long as he or she does not do so at the same time as performing

judicial duties, as discussed below, and so long as the judge acts in accordance with the Canons of Judicial Ethics applicable to retired judges.

Canon 5E of the 1972 American Bar Association Code of Judicial Conduct (hereafter the "1972 Code"),¹ which with minor modifications is currently in effect in the District of Columbia, prohibits a judge from acting as an arbitrator.² While no decision in this jurisdiction has addressed the issue of judges acting as arbitrators, judicial ethics decisions from other jurisdictions articulate the following reasons for this prohibition: (1) to ensure that a judge does not divert time from judicial work to potentially better-paid arbitration work; (2) to eliminate the possibility that judges would be placed in a position of ruling on the correctness of their own decisions; (3) to prevent the exploitation of the judicial

¹ All Canons cited herein shall refer to Canons in the 1972 Code unless specifically noted otherwise.

² The exact language reads, "A judge should not act as an arbitrator or mediator." A footnote to this provision, reflecting an amendment adopted by the D.C. Joint Committee on Judicial Administration on February 16, 1973, provides, "The prohibition against arbitration and mediation in Canon 5E shall not be applicable to proceedings authorized by law in the Small Claims and Conciliation Branch of the Superior Court." The prohibition against full-time judges acting as arbitrators or mediators is also found in Canon 4F of the 1990 American Bar Association Model Code of Judicial Conduct (hereafter the "1990 Code"), which is currently being studied by this Committee and has not yet been adopted in the District of Columbia.

office in support of an award made by an arbitrator; and (4) to avoid embroiling a judge in social or political controversies. See Arizona Supreme Court Judicial Ethics Advisory Committee (Opinion No. 88-4, May 11, 1988); Supreme Court of Delaware Judicial Proprieties Committee (Letter, September 30, 1985).

The 1972 Code takes the position that part-time judges and certain retired judges should be exempted from the flat prohibition against acting as arbitrators. The language providing the exemption is found following Canon 7, in a section entitled "Compliance with the Code of Judicial Conduct" (hereafter the "Compliance Section"). Its approach is to exempt all part-time judges from the prohibition and then to categorize certain retired judges as part-time judges.

Specifically, Subsection A of the Compliance Section reads in relevant part: "A part-time judge: (1) is not required to comply with Canon 5 ... E [which prohibits judges from acting as arbitrators]." It defines a part-time judge as "a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge."

Subsection C of the Compliance Section distinguishes between retired judges who receive the same salary as a full-time judge and are not permitted to act as arbitrators, and retired judges who receive only a part of the salary of a full-time judge and are permitted to be arbitrators. Specifically, it provides:

A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G,^[3] but, he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G.^[4]

All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

Thus, both the provisions for part-time judges and the provisions for retired judges recognize that the role of a neutral arbitrator is a legitimate and appropriate way for

³ Canon 5G provides that a judge should not accept extra-judicial appointments "to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."

⁴ Canon 5G permits judges to represent their "country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities. "

a judge who does not receive a full salary to supplement his or her income.⁵

⁵ The 1990 Code provides that a retired judge "who by law is not permitted to practice law" is not required to comply with Canon 4F, prohibiting a judge from acting as an arbitrator or mediator, "except while serving as a judge." See 1990 Code, Application Section, Subsection B(1) (Retired Judge Subject to Recall). Retired judges who are permitted to practice law have no restrictions on their freedom to act as arbitrators. See 1990 Code, Application Section C(1)(b) (Continuing Part-time Judge). See also 1990 Code, Terminology: Continuing part-time judges" and "Periodic part-time judges." Thus, under the 1990 Code, whether our senior judges can act as arbitrators turns on whether they are permitted to practice law.

This Committee can find no law, regulation, or provision in our current Code of Judicial Conduct which prohibits our senior judges from practicing law. Indeed, the 1972 Code in its Compliance Section partially exempts retired judges who do not receive compensation equal to a full-time judge from Canon 5F's prohibition against judges practicing law. Instead, it provides that a retired judge who is deemed a part-time judge

should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

Thus, so long as they do not practice in the Superior Court and the D.C. Court of Appeals, it would appear that our senior judges are permitted to practice law under the Code. See also Alabama Judicial Inquiry Commission (Opinion No. 89-354, February 28, 1989); South Carolina Advisory Committee on Standards of Judicial Conduct (Opinion No. 6-1985, August 14, 1985) (both concluding, based on state codes of judicial conduct modeled on the 1972 Code, that retired judges subject to recall may lawfully practice law); and Georgia Judicial Qualifications Commission (Opinion No. 107, February 8, 1988); Indiana Commission on Judicial Qualifications (Letter, December 8, 1983); and Louisiana Supreme Court Committee on Judicial Ethics (Opinion No. 26, February 3, 1976) (all concluding, based on state codes of judicial conduct modeled on the 1972 Code, that part-time judges may lawfully practice law).

While our senior judges would appear to fall into the category of retired judges who are authorized to practice law and therefore have no restrictions on their ability to act as arbitrators under the 1990 Code, the confusing series of categories in the 1990 Code for part-time judges and retired judges leaves this open to question. Moreover, the existence of this confusion raises the possibility that this language should not be adopted here in the District of Columbia. In any event, it is not clear that any important distinction exists in this

Judges of the District of Columbia Courts do not retire at full pay. A judge who retires at the earliest possible time -- when he or she has served for ten years and has reached the age of fifty-five -- receives only twenty-eight and one-third percent of the salary he or she was paid immediately prior to the date of retirement. See D.C. Code §§ 11-1562(a), 1562(b)(2), 1564(a)(1989). The maximum retirement salary of a District of Columbia judge is eighty-percent of that salary. See D.C. Code § 11-1564 (a). Since by law senior judges in the District of Columbia do not receive the same compensation as full-time judges, they fall within the 1972 Code provisions governing part-time judges.⁶ Accordingly; the prohibition against acting as an arbitrator does not apply to senior judges of

jurisdiction between being able to act as an arbitrator at any time and being able to act as an arbitrator except while serving as a judge. See discussion, infra at 10-11.

⁶ There could, conceivably, be an argument that a senior judge whose judicial work, when combined with retirement income from the court, provided compensation sufficient to bring his or her total income up to that of an active judge is not a part-time judge. Such a construction of the provision would be nearly impossible to administer, since the senior judge might well not know how often he or she would sit until a fiscal year concluded. Moreover, the exemptions from the various Canons for part-time judges include more than just Canon 5E relating to arbitration and mediation. They also apply to Canon 5C(2) on financial and business dealings, 5D on fiduciary activities, 5F on the practice of law, 5G on extra-judicial appointments, and Canon 6C on public reports. It would be extremely unwieldy to have these different rules applying to senior judges depending upon the amount of extra-judicial compensation they had made thus far in a year or were projected to make a year.

the District of Columbia Courts.⁷

In response to the further questions raised by our inquiring colleague, however, the Committee has considered whether the Canons impose other restrictions on a senior judge's freedom to act as an arbitrator. In examining that issue, the Committee has recognized that the role of a neutral arbitrator is similar to the role of a judge.⁸ It has also recognized that budgetary limitations in District of Columbia may mean that from time to time funds will not be available for senior judges to supplement their retirement salaries by part-time judicial work. Finally, and perhaps most significantly, it has recognized the invaluable functions performed by senior judges of the Superior Court and the Court of Appeals in assisting with the smooth and efficient operations of those courts and, accordingly, the importance of not unnecessarily deterring

⁷ *See also* Alabama Judicial Inquiry Commission (Opinion No. 90-392, April 3, 1990); Texas Judicial Ethics Committee (Opinion No. 124, September 19, 1988); Texas Judicial Ethics Committee (Opinion No. 99, July 23, 1987); Alabama Judicial Inquiry Commission (Opinion No. 86-254, March 3, 1986); Florida Committee on Standards of Conduct Governing Judges (Opinion No. 85/3, March 12, 1985) (all concluding, based on state codes of judicial conduct modeled on the 1972 Code, that retired judges may lawfully act as arbitrators).

⁸ There are, of course, certain differences between arbitrators and judges. Arbitrators, while neutral, are paid by the parties and have obligations solely to the parties. Judges, who are also neutral, are paid by the public and have obligations to the public interest and the system of justice which may go beyond the interests of the parties. In the usual case, however, the similarities between judges and arbitrators would appear to outweigh their differences.

senior judges from performing that role. In addition to their pre-scheduled part-time service, which covers vacations of full-time judges, assignments not otherwise staffed, and the handling of overflow cases, they are regularly asked to help on short notice because of illness or family emergencies of full-time judges or during periods when vacancies have not been filled. They sit on the Court of Appeals and in every division of the Superior Court, handling complex, lengthy matters as well as short matters. Indeed, without the services of senior judges, there would be times when active⁹ trial judges would be forced to handle multiple assignments, with resulting delays and backlogs in the court system.

Having reviewed the Canons applicable to senior judges, the Committee has found nothing therein to suggest that senior judges cannot serve both as arbitrators and as judges in the same jurisdiction. Thus, the Committee concludes that the judge making inquiry here need not confine his arbitration work to the other city in which he will live. Nonetheless, there are ethical restraints within the 1972 Code that a senior judge who sits part-time

⁹ As used in this jurisdiction, the term "active" judge denotes a full-time, non-retired judge.

as a judge and part-time as an arbitrator needs to take into account.

Canon 2A, for example, which requires judges to act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,"¹⁰ is fully applicable to all senior judges, as well as to active judges. This ethical principle would preclude a senior judge from ever acting in a judicial capacity to review a matter he or she had ruled on as an arbitrator. It would also preclude a senior judge from conducting an arbitration in the courthouse or from using court employees or expending court resources for arbitration work.

Canon 2B, also applicable to both senior and active judges, cautions against "lend[ing] the prestige of [the judicial] office to advance the private interests of others."¹¹ The Committee has considered whether this would preclude a senior judge from handling any matters as an arbitrator which might eventually come before the Superior Court on a motion to confirm, modify or vacate the arbitration award. See D.C. Code § 16-4310, 4312 (1989). The rationale for precluding a senior judge from handling such arbitration matters would be that the prestige of the

¹⁰ This language is also found in Canon 2A of the 1990 Code.

¹¹ This language is also found in Canon 2B of the 1990 Code.

senior judge might cause his or her award to be given particular weight and advance the private interests of the winning party.

The Committee has concluded, however, that this is too broad a reading of Canon 2B and gives insufficient recognition to the impartiality which judges are routinely called upon to exercise. It is not uncommon for judges to review decisions made by present or former colleagues. The D.C. Code explicitly provides that Superior Court judges may be temporarily assigned to serve on the Court of Appeals and that Court of Appeals judges can be temporarily assigned to serve on the Superior Court. See D.C. Code § 11-707 (1989). Such assignments are likely to entail review by the designated Superior Court judge of decisions made by colleagues and review by the Court of Appeals judges of decisions made by the designated Court of Appeals colleague. These provisions are based on the assumption that the reviewing judges will be capable of impartially reviewing the decisions of their colleagues without giving those decisions undue weight. Judges who were unable to do so because of a close personal relationship or other reason would be obligated to recuse themselves. See Canon 3C(1) (a). Thus, the Committee concludes that Canon 2B's prohibition against "lend[ing] the prestige of [the

judicial) office to advance the private interests of others" does not foreclose a senior judge from handling arbitration matters which would later be reviewed by another judge in Superior Court or the Court of Appeals. Moreover, since the parties to an arbitration have the power to reject potential arbitrators, a party concerned about this issue ordinarily could block the judge from acting as the arbitrator.

The Canon 2B prohibition against judges lending the prestige of their office to advance the private interests of others would suggest that senior judges should monitor the types of advertising done by the private arbitration organization to make certain that such advertising does not inappropriately exploit their judicial background. This would not, of course, require that the organization refrain from mentioning as a basic biographical fact a senior judge's prior judicial experience, so long as basic biographical information is given about other non-judicial arbitrators on the organization's roster.

Canon 3A(5), also applicable to both senior and active judges, provides that "[a] judge should dispose promptly of the business of the court."¹² The Commentary stresses the need for judges to devote adequate time to their judicial

duties. Thus, a senior judge who performs at different times both the roles of arbitrator and of judge should take particular care to ensure that his or her arbitration duties do not interfere with the ability to dispose promptly of matters which are before the judge in a judicial capacity.

The Committee has considered whether senior judges are ethically precluded from handling arbitration matters while they have judicial matters under advisement. The Committee has concluded that the answer is no. Canon 3A(5)'s general requirement that judges promptly dispose of the business of the court is adequate to prevent arbitration cases from receiving undue priority over outstanding judicial matters. In reaching this conclusion, the Committee notes that judicial matters remain under advisement for a variety of reasons totally beyond the control of a judge. A trial judge, for example, may have completed a trial but be awaiting the submission of proposed findings of fact, legal memoranda, the preparation of a transcript, or a supplement to the record. An appellate judge may have circulated a draft opinion and be waiting for his or her colleagues to provide their input.

¹² Similar language is found in Canon 3B of the 1990 Code.

A rigid policy precluding work as an arbitrator when a matter is under advisement could result in the under utilization of the talents of senior judges, who would be motivated to handle only the most ministerial matters if willing to sit at all. Further, it could upset the balance between the prompt disposition of matters and the careful disposition of matters by closing off the opportunity to act as an arbitrator so long as any matter remained under advisement. Nothing in the 1972 Code requires imposition of such a rule.

Canons 2A, 2B and 3A(5), however, require that senior judges put some degree of separation between their judicial duties and their arbitration work. Senior judges are paid for their services on a per diem basis. During normal work hours, when a senior judge is being paid to perform judicial duties, a senior judge should not work on arbitration matters. To do so would be improper because of the conflict resulting from giving time to privately paid arbitration work while being paid for public judicial work. It could also conflict with the requirement of promptly disposing of the business of the court.

The Committee has considered whether there should be a hiatus of some days or weeks between working as a judge and working as an arbitrator. Were a specified time period

required between performance of judicial duties and working as an arbitrator, however, a judge could find himself or herself unable to assist the court on short notice because of recent arbitration work. Alternatively, a date long-scheduled for arbitration might need to be moved because a trial lasted longer than predicted. Such a requirement would be difficult to administer and would result in senior judges who wished to supplement their incomes as arbitrators being hesitant to sit as senior judges. The Committee concludes that the provisions of the 1972 Code do not require such a hiatus.

Nonetheless, the Committee notes that there could come a point where it would be difficult to maintain either the public perception or the private reality of arbitration work and judicial work being handled separately. Where, for example, the two different roles were consistently alternated on a daily basis, questions would arise concerning whether the judge was devoting time to arbitration matters on days he or she was paid for judicial service and whether the time spent on arbitration matters interfered with the judge's conscientious performance of his or her judicial duties. While the Committee does not suggest that a rigid rule is necessary, it may often be appropriate for the judge to carve out blocks of time

during which he or she would perform only judicial functions or only arbitration work.¹³

In sum, the Committee has concluded that senior judges may act as arbitrators. They must not do so, however, at the same time they are being paid to sit as judges; they must not do so on court property or by using court personnel or expending court resources; and, of course, they must not review their own decisions.

¹³ *See also* Alabama Judicial Inquiry Commission (Opinion No. 90-392, April 3, 1990), concluding that a retired judge who sits full-time should be subject to the same ethical restrictions as a full-time non-retired judge, including the prohibition against acting as an arbitrator.