OPINION 2006-06

SYNOPSIS

(1) An assistant judge may practice law with a law firm and may include his name in the firm's name and on its stationary so long as the assistant judge is regularly and actively practicing law with the firm. (2) An assistant judge may remain a member of an elected municipal school board to which the assistant judge was elected before becoming an assistant judge but may not run for re-election once his current school board term expires.

FACTS

Requesting attorney has been elected as an assistant judge. At the time of his election, requesting attorney had retired from the practice of law, but his former law firm has retained his name as a part of the firm's name. Requesting attorney would like the firm to be able to continue using his name as a part of the firm name and asks if this can continue under the Vermont Code of Judicial Conduct if he remains retired. In the alternative, he asks whether the firm can continue to use his name if he rejoins the firm or practices with the firm in an "of counsel" capacity.

Requesting attorney is also an elected member of a municipal school board and asks whether he can remain on the school board until his current term expires and whether he can run for reelection when his term is up.

ANALYSIS:

As a threshold matter, we must determine whether it is within our mandate to issue an opinion on an inquiry that involves the interpretation and application of the Vermont Code of Judicial Conduct. For the reasons set forth below, we believe that the Rules of Professional

Conduct and the precedents of this section support the issuance of an opinion in this instance. The following two Rules of Professional Conduct make compliance with the Judicial Conduct Code a part of the responsibilities of a lawyer, when applicable.

Rule 8.2   JUDICIAL AND LEGAL OFFICIALS

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct

Rule 8.4   MISCONDUCT

It is professional misconduct for a lawyer to...

(c) engage in conduct that is prejudicial to the administration of justice;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

Rule 8.3 (b) requires a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct to inform the appropriate authority. This rule requires referral of Judicial Conduct Code violations to the Judicial Conduct Board, but Rule 8.3 does not appear to preclude the issuance of an advisory opinion by this committee when requested to do so by a member of our association in regard to prospective conduct, even where the analysis may require application of the Judicial Code. This committee has issued opinions in the past that involved application of provisions of the Judicial Code. See Opinions 92-10 and 88-20. Under the circumstances presented here, we conclude that it is appropriate to address the merits of the requesting attorney's inquiry.

    1.   **May the requesting attorney permit his name to be used as a part of his former firm's name?**

We turn first to the Code of Judicial Conduct (the "Judicial Code") to answer the unstated threshold question of whether an assistant judge is permitted to practice law. The Judicial Code

contains special provisions for assistant judges and probate judges who are, by definition, "Continuing part-time judge[s]. AO 10 Terminology [3]. The Judicial Code permits an assistant judge to practice law while holding the position of an assistant judge subject to the restrictions of APPLICATION B of A.O. 10. Application B prohibits a continuing part-time judge from practicing law in any court where the judge serves or in any court which is subject to the appellate jurisdiction of the court on which the judge serves. The Judicial Code does not restrict a continuing part-time judge to a solo practice; therefore, impliedly, though not stated expressly, an assistant judge may practice law as a member of a firm or in an "of counsel" capacity.

The Judicial Code does not specifically address the issue of firm name and letterhead, but Rule 7.5 of the Vermont Rules of Professional Conduct does address this issue. The Rule states in pertinent part:

Rule 7.5   FIRM NAMES AND LETTERHEADS

(c)   The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

The rule applies to all public offices including an assistant judgeship. Under this Rule, the requesting attorney/assistant judge must be "actively and regularly practicing with the firm" if the firm wishes to retain his name as part of the firm name and on its letterhead.

There remains a question as to whether any other provision of the Judicial Code may supersede the Rules of Professional Conduct in regard to the use of a part-time judge's name as part of a law firm name. Canon 2 B states in pertinent part:

... A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impressions that they are in special position to influence the judge....

Vermont part-time judges have historically maintained a separate practice of law and doing so under their own names and we do not construe Canon 2 B as limiting the right of a continuing part-time judge to use his name in the firm name and on the firm stationery as long as the part-time judge is regularly and actively practicing law with his firm.

2. May requesting attorney retain his school board membership after becoming an assistant judge?

Two Canons, Canon 4 C (3) and Canon 5 A (3) appear to be relevant to answering this question. Canon 4.C.(3) states in pertinent part:

> A judge may serve as an officer, director, trustee ... of an educational ...
> organization not conducted for profit, subject to the following limitations and the
> other requirements of this Code.

A municipal school board appears to fit within the intended scope of this Canon. There is precedent for judges sitting on the Boards of Trustees of some of our nation's colleges and universities. Serving on a town school board also appears to be permissible under this Canon.

Canon 5.A.(3) states in pertinent part:

> A judge shall resign from judicial office upon becoming a candidate for any
> elective office, except that a judge of probate or an assistant judge may be a
> candidate for reelection or may serve as town meeting moderator, provided that
> the judge complies with the provisions of Section 5.C.

Given the broad language of the Canon which extends the resignation mandate to a candidate for "any elective office," and further given the sole specified exception for the annually elected post of town meeting moderator, it appears clear that all other public elective offices were intended to be covered. This provision would, thus, extend to the office of a municipal school board.

Still to be addressed is the issue of whether the newly elected assistant judge can continue in the post of school board member until the judge's current term on the board expires. The

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language of the Canon 5.A.(3) requires a judge to resign the judicial position "upon becoming a candidate for any elective office..." The Canon does not specify resignation from an elective position already held. Canon 5 A is entitled "POLITICAL CONDUCT OF INCUMBENT JUDGES." It appears directed at campaign activity and candidates. The limitations applied to campaigns and candidates do not appear apt to persons already holding an elective office. We conclude that the resignation requirement of Canon 5 does not extend to persons already holding public office.

CONCLUSION

Requesting attorney may allow his name to be used by his former firm only if he rejoins the firm and actively and regularly practices with the firm.

Requesting attorney may continue as a member of the local school board before taking the oath of office as an assistant judge but may not run for re-election.