

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 13th day of May 2021.

On March 18, 2021, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 21-1 pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee Opinion 21-1

A judge may serve as a member of the judiciary board of a church.

ISSUE:

May a judge serve as a member of the judiciary board of a church?

Answer: Yes. Serving as a member of the judiciary board of a church does not, in and of itself, violate the Canons of Judicial Conduct for the Commonwealth of Virginia (the "Canons") under the facts presented. The judge's service is subject to restrictions imposed by the Canons, and the judge should be mindful of any changes in fact or circumstances, however unlikely, which may create a conflict or necessitate the judge's disqualification.

FACTS:

The judge is a lifetime member of a church, which is international, and has congregations in 112 countries. The church's structure includes a general assembly, which is the supreme legislative and judicial authority of the church, acts as its governing body, and the only tribunal to express the doctrines and creeds of the church. The church also has a general board, which is elected by the general assembly and serves as the apostles of the church and acts as the executive branch of the church.

The judiciary board of the church serves as its judicial branch and is the body that interprets polity and practice. It is an independent branch of church government and serves as the ultimate authority on matters of church constitutional and ecclesiastical interpretation. As that final authority, the judiciary board maintains a balance between the legislative and executive functions of the other two branches and is the final appellate forum of the church for disputes. Judiciary board decisions are final and not subject to review.

The judiciary board consists of a total of nine members serving in one of three categories: three members from the episcopal category, which are jurisdictional bishops; three members from the ministerial category, which are clergy; and three members from the general category, which are from the church at large, or lay members. There is no requirement that any member of the judiciary board possess any legal knowledge, training, or expertise, although the current

board happens to include four members who are involved in the legal profession. Membership of the judiciary board is not limited to citizens of the Commonwealth, nor are cases which are decided by the judiciary board only those arising from within the Commonwealth.

Prior to election to serve as a judge in the Commonwealth of Virginia, the requesting judge applied to the national headquarters of the church to become a member of the judiciary board, as a lay member. The church general assembly elects judiciary board members from names submitted by a nominating committee; the persons receiving the highest number of votes are elected to the judiciary board. After the judge applied, the election process and the church's general assembly session were delayed due to the COVID-19 pandemic. In the interim, the judge was elected. Upon notification that the judge's name was submitted by the nominating committee to the church's general assembly as a qualified candidate for the judiciary board, the judge requested this advisory opinion, prior to the church's election process, to determine whether service as a member of the judiciary board is prohibited by the Canons.

While decisions of the judiciary board are rarely published outside of the church, at the Committee's request, the requesting judge provided examples of the types of cases which the judiciary board may hear and decide. Those examples include reviewing decisions made by lower tribunals concerning 1) requests to move a church from one ecclesiastical jurisdiction to another; 2) whether a bishop has served his time of probation from church activities; 3) whether a pastor was properly appointed in accordance with the church constitution; and 4) whether a decision regarding discipline was in accordance with the church constitution. The matters for consideration by the judicial board are ecclesiastical, subject only to the ecclesiastical rules and the constitution of the church. While the requesting judge was unable to readily envision a scenario where the matters being heard by the judiciary board would overlap with matters that come before a sitting judge, the judge expressed an understanding of the need to be vigilant regarding matters which may require disqualification.

Membership on the judiciary board does not require fundraising or membership solicitation. Membership requires no legal background and advocacy on the part of its members or other church members is not permitted. The judiciary board is purely a body that reviews decisions of other church decision-making bodies. The requesting judge is unaware whether judiciary board members receive compensation or honorariums, although expenses are reimbursed. The requesting judge has expressed an understanding that if an honorarium is given, it is to be reported as required by Virginia Code § 2.2-3114.

DISCUSSION:

Judges need not separate themselves from being active in, and contributing to, the communities in which they live and serve:

It is frequently said that impartial judges should be neutral and detached, but this does not mean that judges have to isolate themselves, devoid of contact with the community at large. There are boundaries that must be respected, but judges should be free to lead normal lives. Upon assuming office, judges should not be expected to give up all of their outside activities. Judges, after all, are human beings entitled to a life of their own. Moreover,

to place judges in a monastery or an ivory tower would diminish their judicial ability. Judges need to keep in touch with the outside world. Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions. As Justice Holmes once said: "[T]he life of the law has not been logic: it has been experience."

CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02 at 1-3 (5th ed. 2013).

The Canons also acknowledge this reality. In matters involving judges' extra judicial activities, the Canons recognize that "[c]omplete separation of a judge from extra judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." Canon 4A, Commentary. "Judges are encouraged to be involved in community activities so long as the judge does not participate in the solicitation of funds and the prestige of the office is not used for fund raising." Canon 4D(3)(b), Commentary.

1. Applicable Canons

Canon 2 mandates that a judge avoid impropriety and the appearance of impropriety in all activities, both personal and professional. Canon 2A explains that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." According to the Commentary to Canon 2A, "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity and impartiality is impaired."

Canon 3 also requires a judge to perform his or her duties impartially and diligently. If a judge's impartiality might reasonably be questioned, the judge is required to disqualify himself or herself. Canon 3E(1) and Canon 3E(1), Commentary.

Canon 4 governs a judge's extra judicial activities. Canon 4A provides that:

A judge shall conduct all of the judge's extra judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

Canon 4D addresses governmental, civic or charitable activities. Relevant to this case:

A judge may serve as an officer, director, trustee or non legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, *religious*, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

Canon 4D(3) (Emphasis added). Some of the limitations listed for such service include the mandate that:

(a) A judge shall not serve as an officer, director, trustee or non legal advisor of a governmental, civic, or charitable organization if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Canon 4D(3)(a). In serving as an officer, director, trustee or non legal advisor, or participating as a member of a governmental, civic or charitable organization, other rules exist regarding fund raising and membership solicitation, in which a judge should be aware. *See* Canon 4D(3)(b), and Canon 4D(3)(b), Commentary.

Finally, Canon 4G prohibits a judge from acting as an arbitrator or mediator, “or otherwise perform[ing] judicial functions in a private capacity.”

2. Analysis

The Committee has previously opined on the propriety of various extra judicial activities, but it has not had the occasion to consider activities within a religious organization which have some striking similarities to a judge’s judicial duties and responsibilities.

In Va. JEAC Op. 00-3 (2000), the Committee opined that a judge may not serve as a member of the board of trustees of a juvenile group home that accepts referrals from courts. The Committee opined that a conflict existed and that “the judge’s service on the board could create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.” *Id.*

In Va. JEAC Op. 00-9 (2000), the Committee opined that a judge may serve as an officer and/or director of a common interest community related to the judge’s address. The Committee cautioned that such service was permissible as long as it did not interfere with the judge’s judicial duties, that the association would not likely be engaged in litigation that would come before the judge’s court, and that the judge not act as the association’s legal advisor nor personally participate in the solicitation of funds. *Id.*

More recently, in Va. JEAC Op. 17-1 (2017), the Committee opined that a judge may serve in an honorary capacity during a local festival and related events sponsored by a community-based non-profit organization, subject to restrictions imposed by the Canons. In particular, the judge was cautioned to evaluate each activity or event to determine whether they would be permissible under the Canons, particularly in regards to appearances in the judge’s court by parties or witnesses affiliated with the organization at issue, the festival, or sponsors, and as to prohibitions against fundraising or solicitation of funds. *Id.*

Advisory opinions from other jurisdictions tend to opine that participation in religious activities or events is ethically permissible, with cautions against appearance of impropriety, as noted in Virginia’s Canon 2. Those opinions usually also caution against service within a

religious organization if the organization is likely to be engaged in proceedings which would come before the judge, or if the proposed service requires fundraising, similar to the cautions and provisions contained in Virginia's Canon 4D. Other advisory opinions which address judges serving in leadership roles in religious organizations provide the same cautionary instructions.¹

The Committee is unaware of an advisory opinion that has considered the exact form of service proposed in this case – that of serving on a church's judiciary board, reviewing cases from lower tribunals and providing church constitutional and ecclesiastical interpretation.² The tasks described in the judge's request appear similar to judicial duties and responsibilities, but the judiciary board operates within the church setting, grounded in application and interpretation of ecclesiastical rules and church constitution, rather than Virginia law and procedure.

Based on the facts presented to the Committee, under Canons 2 and 2A, serving on the church's judiciary board, in and of itself, would not be improper under the Canons. Nor does such service seem to create an appearance of impropriety in terms of creating in reasonable minds the perception that such board membership would impair the judge's ability to carry out judicial responsibilities with integrity and impartiality. *See* Canon 2A, Commentary.

Similarly, with respect to Canon 4A, serving on the church's judiciary board does not appear to cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office or interfere with the judge's performance of his or her judicial duties. Unlike that noted in Va. JEAC Op. 00-9, where the Committee addressed whether and where the property owners association properly "fit" within Canon 4, Canon 4D(3) specifically authorizes a judge to serve as an officer, director, trustee or non legal advisor of a religious organization, "subject to the following limitations and the other requirements of this Code." The limitations include a judge not serving in such a capacity if it is likely the organization will be engaged in proceedings that would ordinarily come before the judge, the court in which the judge is a member, or any court subject to the appellate jurisdiction of the court of which the judge is a member. Canon 4D(3)(a).

Based on the facts presented, there is not an expectation that the church would be involved in adversarial proceedings before the judge or the court in which the judge is a member, nor would the issues or subjects of the cases to be heard by the judiciary board be likely to overlap with the judge's judicial duties. Unlike the facts in Va. JEAC Op. 00-3, there is not a relationship between the church and the judge or the judge's court to constitute an apparent conflict. As for other limitations in Canon 4, the judge has advised that service on the judiciary board does not require fundraising or membership solicitation, nor would that service constitute the practice of law.

Canon 4G specifically prohibits a judge from acting as an arbitrator, mediator, "or otherwise perform[ing] judicial functions in a private capacity." As previously noted, the types of cases heard by the judiciary board involve application and interpretation of ecclesiastical rules and church constitution, not Virginia law or procedure. The differences in the types of cases and governing authorities render the judiciary board service sufficiently different from judicial duties that the Committee believes such service does not constitute "judicial functions" as contemplated by Canon 4G.³

In considering the responsibilities of the judiciary board, the types of matters usually reviewed by the judiciary board, and understanding the board's role as providing constitutional and ecclesiastical interpretation for the church, neither the judge nor the Committee could readily envision a scenario where the judge's judicial duties and judiciary board duties would overlap. However, the judge expressed an understanding of the need to be vigilant regarding any judiciary board matters which could come before him or her as a judge, and the requirement of disqualification pursuant to Canon 3E(1) should the occasion arise in which the judge's impartiality might reasonably be questioned. The Committee cautions the judge to remain attentive to any potential conflicts.

Finally, the Committee is aware that activities involving a religious organization may have constitutional implications, particularly with respect to the First Amendment. Such constitutional questions are outside the scope of this Committee's authority to address. *See* Order of the Supreme Court of Virginia re-establishing Judicial Ethics Advisory Committee, Paragraph 19 (April 18, 2019) ("The Committee may not issue an advisory opinion that interprets any constitutional provision, statute, rule or regulation that does not relate to judicial ethics.").

CONCLUSION:

The Committee finds that under the facts presented, the judge may serve as a member of the judiciary board of a church without violating the Canons. Such service provides a unique opportunity for the judge to serve the community, allowing a church to benefit from the judge's legal training, experience, and skills, but in a venue different enough that it is unlikely to result in an overlap of duties and with little to no risk of conflict or required disqualification.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 2, Canon 2A, Canon 3, Canon 3E(1), Canon 4, Canon 4A, Canon 4D, Canon 4D(3), Canon 4G.

Va. Code § 2.2-3114.

CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02 at 1-3 (5th ed. 2013).

Va. JEAC Op. 00-3 (2000).

Va. JEAC Op. 00-9 (2000).

Va. JEAC Op. 17-1 (2017).

NY Jud. Adv. Op. 98-140 (1999).

SC Adv. Comm. Std. Jud. Cond. Op. 15-1996 (1996).

NY Jud. Adv. Op. 13-159 (2014).

Fla. JEAC Op. 2019-31 (2019).

Md. Jud. Eth. Comm. Op. 1986-08 (1987).

Order of the Supreme Court of Virginia re-establishing Judicial Ethics Advisory Committee (April 18, 2019).

A Copy,

Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk

FOOTNOTES:

¹ See, e.g., NY Jud. Adv. Op. 98-140 (1999) (opining that a judge may serve as a director of a religious organization, subject to the limitations of the rules prohibiting such service if the organization is likely to be engaged in adversarial proceedings in courts and with the understanding that the judge would not participate in fundraising activities), and SC Adv. Comm. Std. Jud. Cond. Op. 15-1996 (1996) (opining that a judge may serve on a state-wide ministry council where his responsibilities would include ministry planning and evaluation but not fundraising).

² However, two advisory opinions from other jurisdictions concern similar involvement with church leadership positions by judges. In NY Jud. Adv. Op. 13-159 (2014), the New York Advisory Committee on Judicial Ethics opined that a judge may “serve on a committee that ‘reviews, interprets, and advises on Church matters and doctrines.’” No other description of the committee’s duties was provided in the opinion, but service was found permissible, “unless service necessitates that you engage in impermissible activities, such as, inter alia, fundraising. . . .” In a recent opinion, the Florida Judicial Ethics Advisory Committee, (“Florida Committee”), considered whether a judge may serve as a member of the House of Deputies, one of the houses of the governing body of the Episcopal Church. Fla. JEAC Op. 2019-31 (2019). Unlike this case, the Florida judge sought to serve in a different branch of church government, and the judge’s duties would entail discussion and consideration of proposed legislation, which potentially could entail discussion of controversial issues, both religious and secular. *Id.* A majority of the Florida Committee opined that the judge could serve, but there was disagreement as to whether the judge could fully and freely participate, or whether certain limitations as reflected in the judicial canons relating to issues such as independence, integrity, or impartiality,

should temper the judge's participation. *Id.* One member dissented and opined that the judge's service was not permitted by the canons. *Id.*

³ *See, e.g.*, Md. Jud. Eth. Comm. Op. 1986-08 (1987), wherein the Maryland Judicial Ethics Committee opined that a retired judge subject to recall could participate in ecclesiastical proceedings involving requests for annulment of marriages under canon law, explaining that "[t]he crucial point is that the ecclesiastical proceeding is totally independent of the civil proceeding. Ecclesiastical annulments have no legal significance in the civil law, whether rendered prior to, or subsequent to, civil divorce."

AUTHORITY:

The [Judicial Ethics Advisory] Committee is . . . established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same.

Order of the Supreme Court of Virginia entered April 18, 2019.