

California Judges Association

OPINION NO. 38

(Originally issued: June 11, 1988)

**RETIRED JUDGES:
JUDICIAL ASSIGNMENT WHILE ACTIVE MEMBERS OF STATE BAR**

AUTHORITATIVE: Canons 2A, 4D(2), 4E(1), 4F, 4G, 4C(2), California Constitution, Article 6, Sections 17 and 18, Business & Professions Code Sections 6002, 6003, 6004, 6005, 6006, 6125 and Government Code Section 68082

I. Background

The Executive Board of the California Judges Association has requested that the Judicial Ethics Committee review whether Section Canon 6A of the California Code of Judicial Ethics precludes a retired judge from serving on assignment by order of the chairperson of the Judicial Council if that judge is also an active member of the State Bar of California.

II. Question

Is a retired judge who is an active member of the State Bar precluded from serving on judicial assignment, provided that the judge is in fact not practicing law during the assignment, and provided further, that there is no appearance of impropriety.

III. Answer

No.

IV. Discussion

Canon 6A., Judges provides in pertinent part, as follows:

[a]nyone who is an officer of the state judicial system and who performs judicial functions...is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

...

Canon 6B., Retired Judge Serving in the Assigned Judges Program provides:

A retired judge, who has filed an application to serve on assignment, meets the eligibility requirements set by the Chief Justice for service and has received an acknowledgment of participation in the assigned judges program, shall comply with all provisions of this Code except for the following:

4C(2) Appointment to governmental positions

4D(2) Participation in business entities and managing investments

4E Fiduciary¹ activities

Canon 6C., Retired Judge as Arbitrator or Mediator provides:

A retired judge serving in the assigned judges program is not required to comply with Canon 4F of this Code relating to serving as an arbitrator or mediator, or performing judicial functions in a private capacity, except as otherwise provided in the Standards and Guidelines for Judges Serving on Assignment promulgated by the Chief Justice.

Those provisions with which retired judges need not comply deal with financial activities (4D(2)), fiduciary activities (4E), arbitration/mediation functions (6C), and extra judicial appointments (4C(2)). By omitting reference to it in the compliance section, retired judges are required to comply with Canon 4G. That Canon reads as follows:

G. Practice of Law.

A judge shall not practice law.

Thus, there is no question that retired judges who sit on assignment may not practice law upon recall to judicial service, during such service, or prior to such service if they consider themselves available for such service.² The central issue addressed in this opinion is whether being an active member of the State Bar is the equivalent of practicing law. We conclude that maintaining an active membership in the State Bar is not per se tantamount to practicing law and that if there is no violation of Canon 2A, a retired judge may serve on assignment even if the judge is an active member of the State Bar.

Although the Judicial Ethics Committee does not render legal opinions, it is necessary to discuss the various applicable constitutional and statutory provision in order to put the issues in proper perspective. Further, the proscriptions of the law are materially relevant in view of Canon 2A, which requires that judges shall respect and comply with the law.

Cal. Const. Article 6, Section 17 provides that: “a judge of a court of record may not practice law....” Government Code Section 68082 provides that:

...during his continuance in office, a...judge of a court of record...shall not practice law in any court of this state or act as attorney...before any department of the state or general government or courts of the United States.

It may logically be argued that the reference in the statutory prohibition against practicing law during a judge’s “continuance in office” would not apply to a retired judge, since the term of a judge who has retired ends with the commencement of the judge’s retirement, and the retired judge who practices would not be doing so during his “continuance in office.” But even if the statute were so construed, the **constitutional** prohibition would remain. First, Article 6, Section 17 does not contain the limiting phrase “during his continuance in office.” Second, its predecessor, Section 18 which was repealed upon the enactment of Section 17 in 1966, **did** read, in part:

¹ Fiduciary includes such relationships as executor, administrator, trustee, and guardian. See Canons 4E, 6B, and 6F (Commentary).

² Sitting “on assignment” is to be distinguished from being appointed as a judge pro tempore, whether the appointee is a retired judge or not, and nothing in this opinion is intended to apply to such appointees. Canon 6D of the Compliance Provisions is addressed to those who serve as judges pro tempore.

...[N]o...judge of a court of record shall practice law in or out of court **during his continuance** in office

The deletion of the limiting language in 1966 certainly suggests an intent to broaden the prohibition against the practice of law to all judges, not only those whose elected or gubernatorially initiated term has ended. Unlike a temporary judge, who may not hear a cause without the stipulation of the parties litigant, who receives no statutory compensation, and whose authority is limited (*Sarracino v. Superior Court of Los Angeles County* (1974) 13 Cal3d 1), a retired judge who sits on assignment of the chairperson of the Judicial Council exercises judicial powers as broad as a regularly sitting, non-retired judge (*Fay v. District Court of Appeal* (1927) 200 Cal 522), and is entitled to receive the same compensation of a judge of the court to which he or she is assigned. It is unreasonable to believe that the existing constitutional provision was not intended to apply to retired judges sitting on assignment.

Therefore, even assuming that Government Code Section 68082 might be construed not to apply to retired judges, the constitutional provision does, and Canon 2A commands compliance with that provision.

Returning to the central issue, i.e., whether being an active member of the State Bar is the equivalent of practicing law, it would be helpful to outline the portions of the State Bar Act (Business & Professions Code Section 6002 et seq.) that apply to one's status with the bar.

Section 6002

The members of the State Bar are all persons admitted and licensed to practice law in this State except justices and judges of courts of record during their continuance in office.

Section 6003

Members of the State Bar are divided into two classes:

- (a) Active members
- (b) Inactive members

Section 6004

Every member of the State Bar is an active member until...at his request, he is enrolled as an inactive member.

Section 6005

Inactive members are those members who have requested that they be enrolled as inactive members

Section 6006

Active members who retire from practice shall be enrolled as inactive members at their request. Inactive members are not entitled to ... practice law

Section 6125

No person shall practice law in this State unless he is an active member of the State Bar.

Considering those portions of the State Bar Act, it may be difficult, on the surface, to envision why a retired judge would want to retain active membership in the State Bar if the judge in fact is not practicing law. If no such reason could possibly exist, it could reasonably be argued that such membership is tantamount to practicing, for active membership is precisely what entitled a person to maintain a practice (*State Bar of California v. Superior Court* (1929) 207 Cal at 336).

There are situations where retaining an active membership is based on reason and is legitimate. For example, a judge who retires on December 11, initiates active membership in order to practice, obtains malpractice insurance because of the active status and the practice, and who is asked to sit on assignment for two weeks in July to help out during the court's vacation personnel shortage, could legitimately accept the assignment without transferring to inactive status, provided that the judge is not, during the assignment period, practicing law. Assuming the foregoing facts, requesting inactive status with the State Bar would be a formalistic ritual with no useful purpose.

As noted in the foregoing example, and because of Canon 4G and the constitutional prohibition, the assigned retired judge would be required to suspend practicing law while on judicial assignment. However, depending on the type of practice involved, the extent of the judge/lawyer's involvement in litigation, and the relationship with partners, associates, or employees, it may not be easy, and it may be impossible, for the judge to suspend practicing during that period. "Practicing Law" has a definite meaning (*People v. Merchant's Protective Corp.* (1922) 189 Cal 131, 535), and using the rendition contained in the opinion in that case, as modified by Government Code Section 68082 (*supra*), we would define it as follows:

Under Canon 4G, the practice of law consists of providing another with services in a state or federal court or department, furnishing legal advice or counsel, preparing legal instruments which affect legal rights, or being in a partnership or sharing fees, expenses, or commissions with one acting as an attorney.

The assigned judge in the above example would be able to retain an active membership in the Bar but, in addition to suspending all overt practice, would have to terminate any law partnership, could not share in fees, expenses, or commissions, could not have employees acting as his/her agent in the practice of law, and would have to remove his/her name from all pleadings.

Even though the practice of law may be suspended, an example at the other end of the spectrum may demonstrate how an appearance of impropriety in violation of Canon 2A may arise. A retired judge who actively practices for nine months each year, and who sits on assignment for three months each year, alternating back and forth on a regular, or at least a frequent basis, may appear to many observers to be acting improperly. A potential client, knowing of the judge's activities, may feel that the judge has such a close relationship to the regularly sitting judges that the judge would be a more effective advocate than a competing attorney who does not have the advantage of sitting on assignment. Although a retired judge may be expected to have a good relationship with the judge's former colleagues simply by having been on the local bench, that association is all the closer—at least it would seem so to the outsider—because of the frequent assignments. Without question, the judge/lawyer would be advancing the interests of the client and, perhaps the judge's own pecuniary interests by using the prestige of the judicial office in violation of Canon 2B(2).

The situation in the preceding paragraph would be exacerbated in a small county where virtually everyone may know that the retired judge is now a practicing lawyer. Were that judge to sit on assignment on a frequent basis, the judge would all the more be advancing private interests, since almost everyone in the county would be aware of the dual status and continual close-working relationship with the sitting judge.

Further, a retired judge who frequently sits on assignment but who actively practices law at other times and who presides over cases in which attorneys who are adversaries in the practice appear before the judge would produce a chilling effect upon the advocacy of those attorneys; this would lessen public confidence in the impartiality of the judiciary in violation of Canon 2A.

Although it would be preferable to lay down clear rules and guidelines as to what types of practice, or as to what frequency of reverting back and forth between practice and assignment would be

proper or improper under Canon 2A and 2B(2), the diversity of any lawyer's practice and the uniqueness of each locality, the situation, and the different relationships among lawyers, judges, and litigants make it impossible to place each potential situation in a mold. The broad wording of Canon 2A and the individual conscience of each retired judge will have to serve as the compass.

CONCLUSION

In summary, Canon 4G requires that the retired judge who sits on assignment need not surrender his or her active membership in the State Bar, so long as the judge does not, in fact, practice law during judicial service or prior to such service if the judge is available for assignment and provided that there is no appearance of impropriety.³

This opinion is advisory only. This Committee acts on specific questions submitted, and its opinion is based on fact as set forth in the question submitted.

COMMITTEE ON JUDICIAL ETHICS

June 11, 1988

³ The Administrative Office of the Courts has taken the position that a retired judge will not be given an assignment unless the judge transfers to inactive status with the State Bar. The AOC is not bound by this opinion, of course, but since its position is based upon its interpretation of Canon 4G, this opinion may offer some guidance in reconsidering its position.