



# Ohio Board of Professional Conduct

## **OPINION 2021-01**

Issued February 12, 2021

Withdraws Adv. Op. 1991-11

### **Judicial Membership on Nonprofit Corporation Board Providing Services to Court**

**SYLLABUS:** A judge may not serve as a member or officer of the board of directors of a nonprofit corporation that provides services to the court under a contract with the court's funding authority.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**SYLLABUS:** A judge may not serve as a member or officer of the board of directors of a nonprofit corporation that provides services to the court under a contract with the court's funding authority.

#### **QUESTION PRESENTED:**

Whether a municipal judge may serve as a member or officer of the board of directors of a nonprofit corporation that provides services to the municipal court through a grant contract between the corporation and the court's funding authority.

**APPLICABLE RULES:** Jud.Cond.R. 1.2, 3.1, 3.7

**OPINION:** A nonprofit corporation provides services to a municipal court through a community re-entry detention program for defendants charged with misdemeanor violations of the municipal code. The program promotes community service assignments as an alternative to incarceration and provides rehabilitation to participants in an effort to reduce recidivism. The services include in-home detention with monitoring of each participant, community service assignments, drug/alcohol-treatment services, and educational, vocational and job training placement assistance. The nonprofit corporation receives referrals from the municipal court, the workhouse and the probation office, conducts home assessments and advises the court as to the progress of each participant.

The reentry program is funded through a grant contract between the city that is court's statutory funding authority and the nonprofit corporation. The nonprofit corporation would use the funds from the grant to pay program expenses. The costs of the program would be based on per diem rates for a specific number of participants. The city could receive volume fee reductions in the per diem for agreeing to fund more participants.

An analysis of both the Code of Judicial Conduct and the Ohio Ethics Law is necessary in order to answer the question presented.

#### *Ohio Ethics Law*

Public officials, including judges, are subject to the Ohio Ethics Law, including a prohibition against public officials from having an interest in any public contract entered into by, or for the use of, his or her agency. R.C. 2921.01(A), 2921.42(A)(4). R.C. 2921.42(E)(1) defines a "public contract" for purposes of that section to include the purchase or acquisition or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision. Members of a nonprofit corporation board have either a pecuniary or fiduciary "interest" in the contracts of the corporation. Oh. Ethics Comm. Op. 81-008 (1981). Under the facts presented, the municipal court on which the judge serves is a beneficiary of the contract entered between the city and the nonprofit organization. As a member of the nonprofit board under contract with the city, the judge would have a fiduciary interest in the contract, and thus would be precluded from serving on the nonprofit board under R.C. 2921.42(A)(4).

An exception to the prohibition in R.C. 2921.42(A)(4) has been determined by the Ohio Ethics Commission, but is inapplicable under the facts presented. The commission has opined that a public official is permitted to serve on a nonprofit board without violating R.C. 2921.42(A)(4) when 1) the governmental entity creates or is a participant in the non-profit corporation; 2) the elected legislative authority or the appointed governing body formally designates the office or position to represent the governmental entity; 3) the public official or employee is formally instructed to represent the governmental entity and its interests; and 4) there is no other conflict of interest on the part of the designated representative. Ohio Ethics Comm'n, Op. 84-001 (1984). Here, the municipal court did not create the nonprofit organization, the judge has not been officially designated to

represent the court on the nonprofit board, and the judge's service on the board gives rise to an ethical conflict under the Code of Judicial Conduct. Based on the foregoing, a judge's membership as a director or officer on a nonprofit board, that contracts with the city to provide reentry services to the court, gives rise to a fiduciary interest in a contract between the corporation and the city that is precluded under the Ohio Ethics Law.

#### *Code of Judicial Conduct*

A judge is generally permitted to serve as an officer, director, trustee, or non-legal advisor of a non-profit educational, religious, charitable, fraternal, or civic organization. Jud.Cond.R. 3.7. However, a judge cannot serve in these capacities if the organization will be engaged in proceedings before the judge. Jud.Cond.R. 3.7(A)(7)(a). Based on the question presented, the nonprofit organization will be regularly engaged in proceedings of the court through the judge's referral of defendants to the organization. The organization would continue to engage with the court by informing the judge of the program participant's status and his or her completion of program requirements.

Moreover, the judge's participation as a board member may interfere with the judge's obligation to uphold the independence and impartiality of the judiciary. Jud.Cond.R. 1.2. A judge may not participate in an extrajudicial activity when it would appear to a reasonable person to undermine the judicial officer's independence, integrity, or impartiality. Jud.Cond.R. 3.1(C), 1.2. Service on the nonprofit board may raise questions from court participants and prosecutors about the impartiality of the judge. For example, the parties may question whether the judge can rule on matters in an impartial manner when serving on the nonprofit board, especially when the organization depends on a certain number of referrals from the court to realize its income from the city grant. Likewise, reasonable questions concerning judicial independence may also be raised if the judge promotes the use of the reentry program as a preferred alternative over incarceration in order to ensure the financial success of the nonprofit corporation that he serves in a fiduciary role.