Narrow but Navigable: An Ethical Approach to Postretirement Private ADR Employment

Retirement from the bench is a momentous time in the career of a judicial officer. For some, retirement heralds a season of much deserved rest and relaxation. For others, stepping away from the bench ushers in the next stage of professional endeavors. Among the many possibilities available, an enduringly popular option is employment with a private alternative dispute resolution (ADR) firm. One need only open the *Daily Journal* to see the growing list of announcements that a retired judge or justice has joined a private ADR firm. With all the change and excitement that retirement brings, what better moment to recall that preretirement conduct to secure prospective employment is still judicial conduct that requires the same degree of prudence as any other era of service on the bench.

The *California Judicial Conduct Handbook* section on "proper preretirement activities" is brief but illuminating. (Rothman et al., *California Judicial Conduct Handbook*, 4th ed. (2017), § 9:14, p. 600 (the Handbook).) Although the Handbook describes a judge's preretirement activities as "limited," it also recognizes that, "[p]rovided the activity does not place the judge in a position which would require disqualification, a judge may make non-public arrangements to set up a private [ADR] business or legal practice or make an agreement with a provider or law firm."[1] (*Ibid.*; see canon 4D(4) [judges must manage their personal investments and financial activities to minimize the necessity for disqualification].) Specifically, the Handbook advises that a judge may sign a contract to join a law firm as "of counsel"; rent space; buy equipment; and prepare advertising and mailings related to their upcoming postbench employment. (Rothman, *supra*, § 9:14, p. 600 [citing California Judges Association, *Judicial Ethics Update* (November 2010), p. 11 (judge may sign a contract to join a law firm as "of

[1] The Handbook generally refers to "judges" in the sections regarding preretirement conduct, but the specific conduct at issue may implicate canons that pertain to justices as well. One example arises from the disqualification requirements that may attach to a judicial officer's preretirement search for postretirement employment, which is addressed in more detail below.

counsel" before retirement)].)[2] For the judicial officer eager to pursue employment with a private ADR firm after retirement, this guidance offers good news: The canons can countenance a sitting judge securing that prospective role without compromising their ethical obligations. Charting that path successfully, however, requires a careful approach.

A few examples may be illustrative. In the process of setting up private postretirement employment, sitting judges must not use court resources (computers, telephones, judicial assistants, etc.) in support of their new venture. (Rothman, *supra*, § 9:12, p. 596; see canon 1 [judges must personally observe high standards of conduct to preserve the integrity and independence of the judiciary] and canon 2A [judges must act at all times in a manner that avoids impropriety and promotes public confidence in the integrity and impartiality of the judiciary]; see also Commission on Judicial Performance, *Public Admonishment of Judge Watson* (2006), p. 2 [judge improperly used court staff, court resources, and court facilities for his personal real estate business].) Relatedly, judges who have secured a private postretirement position must not publicly promote their future business (by mailings, advertisements, press interviews, or other announcements) until after they retire. (Rothman, *supra*, § 9:12, pp. 597–598 [citing, for example, California Judges Association, *Judicial Ethics Update* (2016), p. 10 (judge may not send out announcements that he or she is commencing a private dispute resolution service prior to judge's retirement date)]; see canon 2B(2) [judges must not lend the prestige of judicial office to advance pecuniary or personal interests, including through the use of their title] and canon 4D(2) [judges must not participate in, connected their name with, or lend the power or prestige of their judicial office to business ventures or commercial advertising].)

A judge's responsibility to safeguard against improperly lending the prestige of office to a personal or pecuniary interest (canon 2B(2), *supra*) also extends beyond the

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[2] Although not necessarily related to preparing for a judge's postretirement employment with a private ADR firm, the Handbook also notes that a judge who plans to join a private mediation group after retirement "may participate in a private mediation study group" composed of mixed professionals "to discuss subjects related to mediation, as long as no pending cases are discussed with the group." (Rothman, *supra*, § 9:14, p. 600 [citing California Judges Association, *Judicial Ethics Update* (2016), p. 11].)

judge's own actions. Importantly, judges must ensure that their courts and prospective private employers refrain from advertising (including through a court-issued retirement announcement) their upcoming private employment until after the judge has retired. (Rothman, *supra*, § 9:12, pp. 597–598 [citing California Judges Association, *Judicial Ethics Update* (December 2014), p. 6 (a judge who is about to retire and intends to take up mediation may not permit the mediation firm to advertise the anticipated participation of the judge until the judge is officially retired)]; see canon 2B(1) [judges must not allow their relationships to influence their conduct or judgment, or permit the impression of special influence over the judge]; California Judges Association, *Judicial Ethics Update* (November 2010), p. 11 [judge who has signed a contract to join a law firm as "of counsel" should caution the law firm not to announce the relationship until after judge retires].)

Two additional points of caution reinforce the axiomatic advantages of patience. The first point pertains to whether a sitting judge who has secured postretirement private ADR employment may schedule ADR sessions to occur postretirement. The Handbook frames the scheduling of private ADR sessions by a sitting judge, whether done on court or private time, as "business activity [that] has the appearance of exploiting the judicial office, even where the parties or attorneys in the booked cases do not have any matters pending before the judge." (Rothman, *supra*, § 9:13, p. 599; see also canons 1, 2B(1)–(2), 4D(2), *supra*.) For that reason, the Handbook guides judges to ensure that their prospective private employers also do not schedule them for postretirement services prior to their actual retirement. (*Ibid*.) The second point of caution reminds judges that, even if their time on the bench closes out on vacation hours, all the same guidance regarding preretirement conduct applies during that vacation. (Rothman, *supra*, § 9:12, p. 596; see canon 4F [judges must not act as arbitrators or mediators or otherwise perform judicial functions in a private capacity unless expressly authorized by law]; California Judges Association, *Judicial Ethics Update* (2010), p. 8 [judge who is about to retire may not use accrued vacation time before retirement to engage in private judging activity because the judge is still an active judge until actual date of retirement].)

Thus far, the examples raised have largely addressed the period after a judge has secured postretirement employment with a private ADR firm. What of the days, months, or even years ahead of that point, when a judge is considering or still seeking that kind of postretirement employment? This question leads to one of the narrower points of ethical passage in a judge's journey toward private ADR employment: the potential for disqualification. It is worth recalling that, as a baseline requirement, judges must conduct *any* extrajudicial, financial, or business activity in a manner that does not lead to frequent disqualification. (Canon 4A [judges must conduct extrajudicial activities to avoid reasonable doubt in their impartially, demeaning the judicial office, interfering with their duties, and frequent disqualification]; canon 4D(4) [judges must manage personal investments and financial activities to minimize the need for disqualification]; see also canon 4D(1)(a)–(b) [judges must not engage in financial and business dealings that may be perceived to exploit the judges' position, or involve the judges in frequent transactions or business relationships with persons likely to appear before them in court].)

On to the specifics. Section 170.1(a)(8)(A) of the Code of Civil Procedure[3] addresses when a judge is disqualified from a case because the judge has a current arrangement for prospective employment (or other compensated service)[4] as an ADR neutral; has participated in the last two years, or is presently participating, in discussions regarding that prospective employment; or was previously employed as an ADR neutral.[5] If those circumstances are present, then the addition of any of the following factors requires the judge to be disqualified: (i) the current employment arrangement, or present or previous discussion, is with a party to the proceeding; (ii) the matter before the judge includes issues related to the enforcement of an agreement to submit a dispute to an ADR

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[3] Canon 3E(5)(h) makes these same statutory disqualification requirements applicable to appellate justices. For consistency, this disqualification discussion here continues to reference only "judges" but should be understood to also apply to the justices of the appellate courts.

[4] To enhance readability, the phrase "or other compensated service" is excluded from the remainder of the discussion of the Code of Civil Procedure section 170.1(a)(8)(A). The notion should nonetheless be understood to follow each mention of "employment."

[5] To better focus on a sitting judge's preretirement efforts to secure prospective employment, the remainder of the discussion will exclude reference to the disqualification requirements that arise from a judge's prebench employment as a private ADR neutral.

process, or to the enforcement of an award or other final decision reached by an ADR neutral; (iii) the judge has directed the parties to participate in an ADR process and the ADR neutral will be an individual or entity with whom the judge has a current arrangement for employment, or is/has participated in employment discussions; or (iv) the judge will select an individual or entity to conduct an ADR process in the matter before the judge and among those available for selection is an individual or entity with whom the judge has a current employment arrangement, or is/was participating in an employment discussion. (Code Civ. Proc., § 170.1(a)(8)(A)(i)–(iv).) Amid these potentially dizzying requirements, it bears repeating that this subsection does *not* require disqualification simply because a judge has a current arrangement for prospective private ADR employment or because the judge is presently, or has participated in the last two years, in discussions regarding that prospective employment. Instead, it takes a combination of those circumstances *and* the later-described factors in subdivision (a)(8)(A)(i)–(iv) for disqualification under this section to apply.

Among the many possible points of further exploration, an area of longstanding interest is the definition of conduct that constitutes "participating in" or having previously "participated in" discussions regarding prospective private ADR employment. The guidance in section 170.1(a)(8)(B)(i) addresses two broad courses of relevant judicial conduct: (1) a judge has expressed "an interest in accepting or negotiating possible employment" as an ADR neutral, whether by making an inquiry or by responding to a statement or offer with encouragement to provide additional information; or (2) a judge has responded "negatively" to an unsolicited offer or inquiry. (Code Civ. Proc., § 170.1(a)(8)(B)(i).) In the first scenario, a judge is deemed to have "participated in" discussions regarding prospective employment; but in the second scenario, the judge is not. (*Ibid.*; see *Rossco Holdings, Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1359, 1362 [discussing section 170.1(a)(8)(B) of the Code of Civil Procedure following a statutory amendment that clarified a judge must express interest in accepting employment for disqualification under the section to be required].)

Separately, but no less notably, subdivision (a)(8)(A) includes a disqualification requirement for "judges who have had substantial negotiations for employment as [an ADR] neutral, *regardless* of whether the employment negotiations were with a neutral implicated in the case before the judge." (*Rossco Holdings, Inc.*, *supra*, 149 Cal.App.4th at 1362 [italics added]; Code Civ. Proc., § 170.1(a)(8)(A)(ii) [requiring disqualification, where the prerequisite employment arrangement or discussions are present, if the "matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an [ADR] process or an award or other final decision by [an ADR] neutral."].) Observing the scope of this disqualification requirement, the following guidance may come as no surprise: "[I]f a judge has a direct calendar civil assignment involving [ADR] referrals and is considering retirement, he or she may not meet with an ADR representative to gather information about the dispute resolution organization, because any such meeting would indicate interest by the judge in possible employment and would lead to frequent disqualification …." (Rothman, *supra*, § 9:12, p. 597.)

The flexibility to appropriately explore postretirement private ADR employment without prompting frequent disqualification (canons 4A, 4D(4), and 4D(1)(a)–(b), *supra*) may nonetheless be a calendar reassignment away. As the Handbook observes, "facilitating the development of a judge's future private employment in [ADR] or the practice of law must be secondary to, and never at the cost of, the primary obligations of serving as a judge and maintaining the highest level of dignity, respect, and integrity in the judicial institution." (Rothman, *supra*, § 9:11, p. 596.) Close adherence to those principles will pay dividends, from guarding against postretirement disruptions (see California Constitution, article VI, section 18(d) [regarding the Commission on Judicial Performance's jurisdiction over a "former judge"]) to augmenting the intangible value of a judicial officer's resume for whatever ventures the future may hold.