

Informal Opinion 21-2

May 25, 2021

Question:

A judge has asked whether the judge may serve on the board of trustees for a city's arts council.

Answer:

The judge may not serve on the board.

Discussion:

The judge who requested the advisory opinion has provided the committee with the city ordinance establishing the arts council and the board of trustees. The ordinance authorizes the city to create a "separate non-profit corporation" that is the arts council. According to the judge, the city has established the arts council as a 501(c)(3) corporation. Although the arts council is a separate non-profit corporation, the arts council is supported by funds appropriated by the city and the mayor assigns staff to the council. The members of the arts council are appointed by the mayor and the city council. Most of the board members are appointed by the mayor and the chairman of the city council. The board also selects two members.

There are two rules in the Utah Code of Judicial Conduct that apply to this request. Rule 3.4 of the Utah Code of Judicial Conduct states that "[a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice." Rule 3.7 similarly allows a judge to participate, subject to the requirements in rule 3.1, in "activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice." Rule 3.7 also permits a judge to participate in activities sponsored by "civic organizations not conducted for profit," with certain restrictions, such as a prohibition on most kinds of fundraising.

In Informal Opinion 06-3, the Ethics Advisory Committee answered the question of whether a justice court judge could serve on a county ad hoc citizen's advisory committee. The committee determined the judge could not serve because the committee was a government body that did not "have a direct connection to the regular judicial or administrative duties of a judge."

In Informal Opinion 95-3, the committee determined that a judge could not be a member of the Board of Regents because the Board of Regents is concerned with policy issues on higher education, and not on the legal system or the administration of justice.

Similar to the organizations discussed in the above opinions, the city's arts council and the board of trustees clearly do not have a direct connection to the law, the legal system, or the administration of justice. The question under rule 3.4 is therefore whether appointment to the board of trustees would be considered appointment to a governmental committee, board, commission, or other governmental position even if the arts council exists as a separate 501(c)(3) corporation. The committee determines that appointment to the board of trustees would be considered appointment to a governmental position.

Although the arts council exists as a 501(c)(3) corporation, there are many factors supporting the conclusion that appointment to the board constitutes appointment to a governmental position. The council depends on a city ordinance for its existence. The council is funded by city funds and staff is appointed by the mayor. Most of the board of trustees members are appointed by the mayor and the city council. The city thus controls the arts council in the same way it would if the council were established as a government council and not a 501(c)(3) corporation.

Even if appointment to the board of trustees was not considered appointment to a governmental position under rule 3.4, service would be prohibited under rule 3.7. Although rule 3.7 permits a judge to serve on the boards of private, non-profit entities in certain circumstances, a judge is not permitted to participate in activities "sponsored" by a governmental entity unless the entity is concerned with the law, the legal system, or the administration of justice. At the very least, the arts council and the board of trustees are sponsored by a governmental entity and the entity is not directly concerned with the law, the legal system or the administration of justice. See Informal Opinion 98-11 ("[T]he work of a governmental commission or committee must have a direct and primary connection to the legal system It is not enough that the committee be concerned with justice in the broader sense.").

In Informal Opinion 95-3, the committee stated that the code "envisions two broad categories: private organizations and government agencies." The committee recognized that "[i]f an entity's focus is on law, then a judge may serve whether the agency is a governmental agency or a private organization." But, the committee stated, "absent such a legal nexus, a judge may not serve in other branches of government." The members of the committee stated that they "are divided on the question of whether a judge ought to be able to serve the citizens of this State in nonjudicial government capacities such as by serving on the Board of Regents." The majority agreed, however, "that the Code of Judicial Conduct, as it has been promulgated by the Utah Supreme Court does not permit such extra-judicial governmental service unless the particular agency's mission is focused on the law."

In conclusion, although the city's arts council is established as a separate 501(c)(3) corporation, appointment to serve on the board of trustees is considered appointment to a governmental position or is considered participation in an activity sponsored by a governmental

entity. The arts council does not have a connection to the law, the legal system, or the administration of justice, and therefore the judge may not serve on the board of trustees.