

JEAC 1997-2
September 22, 1997

You request an advisory opinion on whether participating in the American Communications Network, Inc. ("ACN") telecommunications system would constitute a violation of the Judicial Code of Conduct. In response to your original letter of December 31, 1996, the Committee requested in a letter dated January 15, 1997 additional information concerning your potential participation with ACN. Based upon the information provided, the Committee understands that you would function as an independent agent for ACN soliciting customers for LCI International, Inc. (It is the Committee's understanding that ACN is a privately owned multilevel customer acquisition company that acquires long distance customers for LCI International, a New York stock exchange traded company.) As an independent agent for ACN, you would receive a percentage of each long distance bill of each customer you solicited so long as the customer remains with LCI as well as bonuses for signing qualifying agents to work with ACN. You would have no involvement with customers once they have switched to LCI and also no involvement with complaints about service or failure to pay since those complaints would be addressed to the phone company directly. You indicated that you would be soliciting only family members and friends and would not solicit lawyers or others who have frequent interactions with the Justice of the Peace Court or are likely to come before the court where you hear cases. You also indicated that you would not use your judicial title or office in any capacity in this business venture and that the time spent as an independent agent for ACN would be minimal.

The Canons of the Judges' Code of Judicial Conduct which need to be considered include Canon 2(B), Canon 5(C)(1) and (C)(2). The aspect of Canon 2(B) implicated is that a Judge not lend the prestige of his or her judicial office to advance the private interests of the Judge or others. This Canon does not preclude your participation in the ACN telecommunications marketing system so long as you do not use your judicial title or office in any capacity related to this business venture. The Committee notes that you have indicated that you would not use your judicial title or office in any manner associated with this business venture. Further, activities related to this endeavor may not be conducted at the courthouse during business hours.

Canon 5(C)(1) prohibits a Judge from financial and business dealings that "exploit or demean the judicial position, or involve the Judge in frequent transactions with lawyers or other persons likely to come before the court on which the Judge serves." In our view, this Canon provision would not preclude your involvement with the ACN telecommunications marketing system so long as you do not use your judicial title or office in any capacity related to this business venture and you solicit only family members and friends whose appearance in your court would otherwise require your disqualification. "Cold calling" or calling potential customers who are unknown to you personally (but may recognize you as a Judge) is inappropriate. We note that ACN defines their marketing system as a "warm market" but stated that "most independent agents seek to retain at least 25 customers for LCI." The limited number of persons targeted for solicitation supports the conclusion that this endeavor is not general marketing.

General marketing of products in multi-level marketing businesses or other non-law related businesses has been determined to implicate the prohibitions of the Judicial Code of

Conduct in a number of states. *See, e.g.*, South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion No. 11-1996 (precluding a full-time Magistrate from working as a sales representative for a network marketing firm selling fine jewelry and collectibles); South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion No. 3-1996 (prohibiting a part-time probate Judge from participating in a pyramid plan selling long distance telephone services); Maryland Judicial Ethics Handbook, Opinion No. 119 (April 26, 1989) (holding that the Judge may not engage in a multi-level marketing business which involves sales, presentation of marketing concepts, recruitment of sponsors and assisting sponsors to recruit other). *But see* Alabama Ethics Opinion 81-120 (holding that a Judge may own and operate, on a part-time basis, a business that is a direct distributorship of a nationally known product and sponsor other persons who distribute the same product line but finding that the decision of whether ownership or operation of a particular business by a Judge is violative of Canon 5(C) must be determined on a case-by-case basis). Frequent sales calls on the general public involve Judges in frequent transactions with persons likely to come before the Court and exploit the Judge's position. Persons whom you are soliciting may believe that they could curry favor with you by agreeing to sign up with ACN. The Committee understands that the pool of persons allowed to be solicited consists only of your family and close friends whose appearance in your court would otherwise require your disqualification; therefore, they are distinguishable from the cases noted above since those cases involved marketing efforts with the general public.

Canon 5(C)(1) also requires that you not solicit lawyers or other persons who have frequent interactions with the Justice of the Peace Court or are likely to come before the court. The Committee notes that you have already agreed that you, as an independent agent for ACN, would not solicit lawyers or others who have frequent interactions with the Justice of the Peace Court or are likely to come before the court. If someone who you have successfully solicited as a customer for LCI (and for whom you are receiving a percentage of their long distance bill) subsequently appears before you in a Justice of the Peace Court, it is the Committee's view that you should disqualify yourself from hearing the matter involving those customers.

Finally, Canon 5(C)(2) provides that a Judge shall not serve as an "officer, director, partner, manager, advisor or employee of any business other than a business closely held and controlled by members of the Judge's family." Based on the information you have submitted to the Committee, you would serve as an independent contractor and, therefore, not in any position with ACN which would be prohibited pursuant to that Canon provision. The determination of whether an independent contractor or master/servant (employee) type of agency relationship exists must be analyzed on a case-by-case basis. We are satisfied that, based on the information before us and for purposes of this opinion only, your relationship with ACN would be as an independent contractor. *Cf. Fisher v. Townsends, Inc.*, Del. Supr., No.308, 1996, Holland, J. (June 11, 1997).

The Committee has a strong overall concern about Judges' business activities, given the potential for demeaning or exploiting the judicial position. However, as you define this endeavor, it does not, in our view, violate the Judges' Code of Judicial Conduct so long as activities conducted in furtherance of this business venture are limited in the manner described above. Your participation with ACN should cease or you should request further advice if information

about ACN's practices or activities become available to you which indicate that your association with ACN might violate any of the concerns discussed above.

FOR THE COMMITTEE:
Patricia W. Griffin, Member