

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

The Hon. Joseph R. Slight, III, Chair
The Hon. Mardi F. Pyott, Vice Chair
The Hon. Kenneth S. Clark, Jr., Secretary
The Hon. Mary M. Johnston
The Hon. Sheila G. Blakely
The Hon. Donald F. Parsons, Jr.
The Hon. Richard B. Coonin

November 28, 2006

JEAC 2006-7

The Honorable [redacted]
[redacted]Court of the State of Delaware
500 N. King Street
Wilmington, DE 19801

Re: Request for Judicial Ethics Advisory Committee Opinion

Dear Judge [redacted]:

You have requested that the Delaware Judicial Ethics Advisory Committee (the "Committee") provide an opinion concerning whether you should accept appointment as Chair of the Governor's Consortium on Hispanic Affairs ("Consortium"). You graciously have provided the Committee with a detailed summary of your analysis, including relevant Committee precedent and materials from the American Judicature Society's State Justice Institute.

Applicable Canons of the Delaware Judges' Code of Judicial Conduct

Canon 5(G) of the Delaware Judges' Code of Judicial Conduct provides:

Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

The rationale underlying Canon 5(G) is set forth in the Comment:

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

Canon 4 mandates that the law-related activities must not "cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge."

If participation as Chair of the Consortium is determined to be a position *not* concerned with improvement of the law, the legal system or administration of justice, and if the Consortium is deemed *not* to be a governmental committee or commission, Canon 5(B) may apply:

Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of

an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

The Governor's Consortium on Hispanic Issues

The Consortium was established to perform the following "duties and functions:"

- (a) To support, enhance and supplement the work performed by the Governor's Council on Hispanic Affairs;
- (b) To review and study issues affecting the Hispanic community in Delaware;
- (c) To prioritize the issues that face the Hispanic community in Delaware;
- (d) To suggest and promote projects confronting the Hispanic community in Delaware;

- (e) To seek funding from the Arsht-Cannon Fund at the Delaware Community Foundation, and other foundations and governmental entities for the purpose of addressing the identified issues; and
- (f) To perform such other functions and duties as assigned to it by the Governor.

Additional Considerations

You have stated that it would be reasonable to expect that part of the positive impact of the Consortium's activities will include the diversion of the Hispanic population from the criminal justice system and the obviation of the need for members of that community to come into the [redacted] Court system, since poverty and substance abuse issues typically play a large role in criminal, juvenile and dependency/neglect cases. To the extent that the Consortium's work will address these issues, you feel that the Consortium will be concerned with the improvement of the law, the legal system, the administration of justice and the impact on the Hispanic community.

In addressing the concerns identified in the Comment, you have stated:

I understand that my caseload will remain the same. Moreover, as a Judge in the [redacted] Court, I decide cases among individuals. The Consortium is intended to identify needs and provide resources already available at the Arsht-Cannon Fund, to address policywide issues, of which health care and immigration are listed as two examples. Issues such as these typically do not come before me in my role as [redacted] Court Judge. The Comment to Canon 5(G), as applied to this situation, would suggest that this proposed appointment

would be permissible even if the Committee finds that this Consortium in fact does not deal with the improvement of the law, the legal system, or the administration of justice.

You have represented that this appointment would not reflect adversely on your impartiality or interfere with any judicial duties. Your caseload would remain the same and there is no reason that the Consortium would come before the [redacted] Court.

Finally, the Governor's office understands that you will not be involved in fundraising. All fundraising would be delegated to a subcommittee composed of other Consortium members.

Prior Opinions of the Committee ¹

JEAC 1998 -1 (January 23, 1998)

The Committee considered the propriety of a judge's service on the Continuing Education Advisory Council for a university. The Council had the following role: (1) to provide advice on the establishment and maintenance of realistic continuing education programs that meet the needs of the Delaware

¹The Delaware Committee opinions are consistent with the weight of the decisions of the United States Judicial Conference's judicial ethics advisory committees. See Cynthia Gray, *Ethics and Judges' Evolving Roles off the Bench: Serving on Governmental Commissions*, State Justice Institute of the American Judicature Society, *Key Issues in Judicial Ethics* series (2002).

citizenry; (2) to act as a communication link to assist in the development of community understanding and support; and (3) to assist in the development of long range goals and plans of the university related to continuing education. The responsibilities of council members included studying all issues related to continuing education presented to them, assisting in developing solutions, and studying and offering advice on continuing education matters.

The Committee concluded that the judge's participation would not violate the Code of Judicial Conduct. The Committee reasoned that the Council would not be regularly engaged in court proceedings and that the Council did not appear to be conducted for the economic or political advantage of its members.

JPC 1992-1 (January 9, 1992)

The Judicial Proprieties Committee responded to a request that a member of the judiciary be permitted to serve as a member of the Delaware 2000 Forum. The Forum was intended to be a body of approximately 50 people from all three counties, who would meet every three or four months to share information about educational reform efforts in the various school districts of the State. Its members included the Lt. Governor, community and civic leaders, representatives of the PTA, DSEA, DPI, State Board of Education, Higher Education Commission, National Science Foundation Commission, State School Board Association, the

Business/Public Education Council, and Department of Labor, as well as teachers, school administrators, and state legislators. The Forum's only mission was to serve as a meeting place for its members to share information about the State's progress and setbacks along the path to achieving the Delaware 2000 education objectives.

The Committee unanimously concluded that the judge could serve as a member of the Forum. The Committee reasoned that the judge would be participating as a parent and citizen in discourse about the state of the educational system and ways to improve it. Further, the Forum was not intended to have any decision-making or implementation authority or responsibility. The Forum was not assembled to advocate positions or recommend policies to the executive or legislative branches of government. Finally, the Forum as a group was not intended to take public positions on issues or endorse particular policy initiatives.

JPC 1985-1 (April 17, 1985)

Re: Dover Charter Review Committee

JPC 1991-1 (October 7, 1991)

Re: Mental Health Code Revision Committee

JEAC 1999-1 (April 22, 1999)

Re: "Ethics Review Committee" for the Brandywine School District

In each of these three opinions, the Committee at the time advised the judge against participation in the extra-judicial appointment. All three extra-judicial groups either had previously generated controversy and media attention, or were

likely to become controversial. Additionally, it was anticipated that the organizations would be making recommendations to executive or legislative bodies for changes in the law or procedures.

Conclusion

Judicial ethics advisory opinions rendered by judicial ethics advisory committees in various jurisdictions both support and reject extra-judicial service of various types. Analysis of a judge's ability to serve on an extra-judicial committee should be determined on a case-by-case basis.²

It appears to the Committee that service as Chair of The Governor's Consortium on Hispanic Issues would not reflect adversely upon your impartiality or interfere with the performance of your judicial duties. Additionally, the Consortium has not been established for the economic or political advantage of its members. The Committee does not foresee that the Consortium will be engaged in proceedings that would ordinarily come before you or will be regularly engaged in adversary proceedings in any court.

Nevertheless, the Consortium is a governmental committee or commission as contemplated by Canon 5(G). Participation as Chair of the Consortium does not

²See Jeffrey W. Shaman, et al., *Judicial Conduct and Ethics* § 9.04, at 287 (2d ed. 1995).

appear to be a position directly concerned with improvement of the law, the legal system or administration of justice. Furthermore, the Consortium is concerned with issues of fact or policy on matters other than improvement of the law, the legal system or the administration of justice, and undoubtedly will involve more than historical, educational, and cultural activities. Therefore, pursuant to Canon 5(G), the Committee must conclude that you should not accept the appointment as Chair of The Governor's Consortium on Hispanic Affairs.

For the Committee:

Mary M. Johnston
Judicial Ethics Advisory Committee

cc: Liaison Justice
Members of the JEAC