

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

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

August 14, 2006
JEAC 2006-6

Dear Judge _____,

You have requested an advisory opinion from the Judicial Ethics Advisory Committee (the "Committee") on whether accepting an appointment to the Nominating Committee for the National Rifle Association (the "NRA") is consistent with Canons of the Delaware Judges Code of Judicial Conduct.

You have informed the Committee, in letters dated March 3, 2006 and March 10, 2006, that the NRA is a fraternal Sec. 501c(4) organization and operates as a New York not-for profit corporation. You were kind enough to include Article II of the NRA's By-laws, which lay out the organization's purposes and objectives as follows:

1. "To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;"
2. "To promote public safety, law and order, and the national defense;"
3. "To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;"
4. "To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national, and international levels;"
5. "To promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth, and conservation,

and wise use of our renewable wildlife resources.”

You also informed the Committee that if you serve as a member of the Nominating Committee for the NRA, your term would be for one year beginning May of 2006. You also explained that the nominating committee consists of nine members of whom no more than six may be members of the NRA Board of Directors or Executive Council. Three of the committee’s members are non board members of the NRA and you would qualify for one of the three non board members. Your duties would include nominating individuals for the Board of Directors, the three Board Officers (President, Vice-President, Second Vice-President), and the Executive Vice-President, Treasurer, and Secretary of the organization.

You indicated that as a member of the committee, you would be reimbursed for the actual expenses incurred during the course of attending the two meetings required during your service. You would not receive any form of remuneration.

You explained that there is a separate corporation affiliated with the NRA called the National Rifle Association Institute for Legislative Action (ILA). According to your letter of March 3, 2006 “[a]s explained by Article X of the NRA’s Bylaws, ILA has sole responsibility to administer legislative, legal, informational and fund raising activities of the NRA relating to the defense or furtherance of the right to keep and bear arms, in accordance with the objectives and policies established by the NRA’s Board of Directors.” Annually, “the Executive Director for the ILA needs to prepare and submit to the NRA Board of Directors for approval a detailed plan of action in the following areas:

- a) Federal legislative activity
- b) Legislative action organization, development and operation in the political subdivisions of the United States
- c) Legal action
- d) Legislative information gathering and dissemination
- e) Such other legislative activity as may be advisable
- f) Fund raising for the above activities.”

The ILA hires and employs lobbyists and has a political action committee (“PAC”) known as the Political Victory Fund. The PAC solicits contributions from NRA members from which it makes political contributions. The PAC, as required by law, operates separate and apart from the NRA. You explained that as a member of the Nominating Committee, you would have no responsibility dealing directly with ILA.

Your letter mentioned that like any major corporation the NRA is involved in lawsuits. To your knowledge, there are no lawsuits involving the NRA pending in the State of Delaware.

The Committee Advice

The Committee believes that your service as a member of the Nominating Committee for the National Rifle Association, as you propose, would violate the Delaware Judge’s Code of Judicial Conduct. The committee believes that the general public perceives the ILA as the same entity as the NRA, and your proposed service as a member of the nominating committee for the NRA will breach your duty under Canon 2 and Canon 5G of the Delaware Judge’s Code of

Judicial Conduct to avoid the appearance of impropriety in all activities. We believe that membership on the nominating committee also potentially violates Canons 5B and 7A(1).

The Applicable Canons of Judicial Conduct

Canon 1. A judge should uphold the integrity and independence of the judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and Independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective.

Canon 2. A judge should avoid impropriety and the appearance of impropriety in all activities.

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 5. A Judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.

B. 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.

G. Extra-judicial appointments. A Judge should not accept appointment to a governmental committee, 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.

Canon 6. A judge should regularly file reports of compensation received for law related and extra judicial activities.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

Canon 7. A judge should refrain from political activity inappropriate to the judge's judicial office.

A. A judge should not:

(1) Act as a leader or hold any office in a political organization;

Analysis

The Committee has previously examined the propriety of extrajudicial activities and written several opinions. From examining the Committee's prior opinions, the Committee is confronted with two potentially conflicting positions. The committee has previously determined that a judge may serve on the Continuing Education Advisory Council for a university.¹ In reaching this determination, the Committee concluded that it was not likely that the Council would regularly engage in proceedings before the judge and that the Council did not operate for the economic or political advantage of its members.

The Committee has also determined that a judge could not serve on the Board of Directors of the Police Athletic League (PAL) of Delaware.² The Committee found that PAL of Delaware was closely identified with the police in the public perception and that perception was grounded in fact. Given the public perception, fueled by the organization's origins, philosophy, and operation, a judge's service on the PAL of Delaware Board prompted concerns over the erosion of judicial independence and impartiality. This violates the directive in Canon 2 that a judge is to promote public confidence in the independence and impartiality of the judiciary.

Your position on the nominating committee would be an extra-judicial activity. You represent that to your knowledge, the NRA is not a party to any lawsuit pending before any Delaware court or any federal court in the District of Delaware, and has not been for quite some time, if ever. Accordingly, it is the Committee's view that it is unlikely that the NRA would regularly engage in proceedings before you and would not violate Canon 5B(1).

As noted above, the ILA has a political action committee ("PAC") known as the Political Victory Fund. The PAC solicits contributions from members of the NRA for the purpose of making political contributions. Also as noted above, you represent that as a member of the Nominating Committee, you have no duties directly relating to the ILA and thus, no duties

¹ JEAC Opinion 1998-1 (Jan. 23, 1998)

² JEAC Opinion 2006-2 (Feb. 22, 2006)

directly related to the PAC. Therefore, it is assumed that you will not solicit funds for the organization. Also, you represented that as a member of the Nominating Committee, the Board has knowledge of your background and employment status, but that this information would not be published. Your name and the fact that you are from Dover may appear in the NRA magazine but not your address or phone number. Accordingly, it is also assumed that the prestige of your office will not be used for solicitation purposes. Finally, assuming that you will not give investment advice to the organization, it is the Committee's view that there is no violation of Canon 5B(3).

In regard to expense reimbursement, you represent that consistent with Canon 6B, you will only be reimbursed for the actual expenses incurred by your attendance at the two required meetings. You further represent that you will not be reimbursed for any expenses not directly relating to your service on the Nominating Committee or those expenses incurred by your wife or another family member who chooses to accompany you. Accordingly, it is the Committee's view that the NRA's reimbursement policy does not conflict with Canon 6B.

You represent, through your letters, that the NRA is a fraternal organization and as outlined by its bylaws is not a political organization. You also represent that the ILA is part of the NRA operated as a separate entity within the corporation, and that as a member of the Nominating Committee, you will have no duties directly related to the ILA. As a member of the Nominating Committee, you will be nominating a slate of names for the Board of Directors, not setting policy. However, the bylaws establish that the ILA must act in accordance with policies established by the NRA's Board of Directors, and you will be a member of the committee that nominates members for the Board.

The concern that the committee has is that the ILA is closely identified with the NRA. The general public does not see the distinction or that the two are separate entities. Your service as a member of the nominating committee is to nominate members for the board of directors. The board of directors will then set policies for the NRA and the ILA. The general public can infer that you are influencing a political agenda by the nomination of officers who will set policy for the organization. Although the connection may be indirect, it is an important one. The NRA may not be a political organization, but it has become widely known in recent years as an organization that exerts significant political muscle, in connection with elections at the national, state and local levels.

As a member of the nominating committee, a member must consider not merely a proposed board member's name but his or her policy stance and the public's perception of him or her when deciding whether to nominate that individual for the board. The committee nominates an individual who would best serve the ideals, goals and policy objectives of the organization including whether that individual would continue certain policies or change them. Certain nominees, like Charlton Heston, are likely to be closely linked in the public's mind with the policies of the NRA.

The NRA has sometimes taken divisive and controversial positions on issues. Several Delaware opinions have noted that Canon 5G suggests that appointments to extra-judicial positions "should not be undertaken, so that courts are not involved in matters that may prove to

be controversial”³

Therefore, although the NRA board and ILA are distinct components of the NRA, a judge who served on the nominating committee of the NRA would be perceived as being too closely related to political issues to satisfy comfortably the requirements of Canons 5B and 7A(1).

Conclusion

The Committee concludes that based on the NRA’s bylaws, your representations, and the above analysis of the applicable canons, your service as a member of the Nominating Committee of the NRA would violate Canon 2 that a judge avoid even the appearance of impropriety to insure that persons appearing before a judge can count on the judge’s independence and impartiality. We believe that it would also violate Canon 5G and may violate Canon 5B and 7A(1).

³ JPC 1985-1 (Apr. 17, 1985) (Judge should not serve as a member of the Dover Charter Review Committee because the Committee dealt with issues that had generated considerable publicity and controversy); JEAC 199-3(Nov. 29,1999)(Judge should not serve on the Charitable Gaming Task Force created by the General Assembly, because matters to be addressed by the task force had the *potential* of becoming controversial); JEAC 1999-1 (Apr. 22, 1999) (Although the judge would not have direct involvement in controversial issues related to the Brandywine school district by serving as chairperson of their ethics review committee “[it]may be difficult for members of the public, especially interested citizens in the School District, to understand this distinction.” Therefore, the committee recommended the judge not assume the chairperson position.”.