

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

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

June 16, 2006

JEAC 2006-5

Dear :

You have requested an advisory opinion from the Judicial Ethics Advisory Committee (the “Committee”) regarding whether you may, as a Justice of the Peace holding “Senior Judge” status maintain an active real estate agency’s license working as an assistant to your wife who is currently employed as a full time real estate agent. At the time of the Committee’s opinion to you dated January 26, 2005, you were serving a term as a Justice of the Peace in Kent County. In that opinion, the Committee advised that Canon 5 of the Delaware Judge’s Code of Judicial Conduct prohibited your holding an active real estate agent’s license.¹ Since that date you relocated to Sussex County, resigned your position as a Justice of the Peace, and have been sworn in as a Senior Judge for the Justices of the Peace Courts of the State of Delaware pursuant to *Del. Code Ann.* tit. 10, § 9211. You have now requested the Committee issue an advisory opinion as to whether your status as a “Senior Judge” in the Justice of the Peace Court system permits

¹ See JEAC 2005-1

you to be employed as a real estate agent pursuant to the provisions of *Del. Code Ann.* tit. 10, § 9211(a)(4).

I. THE COMMITTEE'S ADVICE

The Committee believes that at the present time, you may not reactivate your real estate agent's license and resume your affiliation with a real estate brokerage agency, nor actively engage in the real estate business notwithstanding your intent to limit your endeavors in that regard to assisting your wife in her capacity as an agent.

II. THE APPLICABLE CANONS OF JUDICIAL CONDUCT

The Committee in an advisory opinion JEAC 2005-1 held that Canons 5C and 5D of the Delaware Judges' Code of Judicial Conduct precluded your engagement in the profession of real estate agent. These Canons provide:

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, 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.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate and engage in other remunerative activity, but should 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. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship calculated according to the civil law system, any other relatives with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

D. Fiduciary Activities.

A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. "Member of the judge's family" includes a spouse, child,

grandchild, parent, grandparent, or other relative by blood, adoption, or marriage or person with whom the judge maintains a close familial relationship.

III. ANALYSIS

Your authority to continue to serve as a Justice of the Peace is derived from *Del. Code Ann.* tit. 10, § 9211 which provides:

“(a) Any retired justice of the peace may be designated by the Chief Magistrate, with the approval of the Chief Justice of the Supreme Court, to serve temporarily in any Justice of the Peace Court in the State; provided, however, that the retired justice of the peace:

(1) Was serving in good standing as a Justice of the Peace at the time of retirement;

(2) Had been appointed and confirmed for a second term prior to retirement;

(3) Assents to such designation; and

(4) Is not involved or employed in any position which would create a conflict of interest with the position of justice of the peace, including, but not limited to, any position concerned with or growing out of the collection of any judgment rendered by a justice of the peace, the private practice of law, the holding any state office, or employment by the State in any capacity.”

In your request for an opinion from the Committee, you have asserted that subparagraph (a) (4) of § 9211 “clearly indicates that a part time judge can be employed as long as certain rules are followed”. The Committee must disagree with your interpretation of § 9211 (a)(4).

Subsection (a)(4) provides no affirmative authorization to a retired justice of the peace to engage in any other outside vocation. Rather, the statute provides specific conditions under which the retired justice of the peace is specifically precluded from temporarily serving on active duty in the Court. Specifically, this subsection conditions active service by a retired justice of the peace to circumstances where the judge “is not

involved or employed in any position which would create a conflict of interest with the position of justice of the peace...”. The subsection goes on to provide by way of example, circumstances when such a conflict would exist, those being any position concerned with or growing out of the collection of a judgment rendered by your court, the private practice of law, the holding of any state office, or employment by the state in any capacity. The use of the term “including, but not limited to,” inserted after the reference to any position which would create a conflict of interest and before the specified examples demonstrates that the four vocations that would preclude service as an active justice of the peace are not intended to be an exhaustive list, but rather, that the intention of the legislature be that employment in any of these four occupations are to be conclusively presumed to create such a conflict of interest and are therefore expressly prohibited. Vocations falling outside of these four explicitly prohibited categories may or may not be permissible, depending on whether the particular circumstances of the occasion create a conflict of interest.

In order to determine whether the nature of a vocation, not otherwise prohibited under § 9211 (a)(4) of Title 10, nevertheless creates a conflict of interest, one must refer back to Canons 5C and 5D of the Delaware Judges’ Code of Judicial Conduct. This Committee in its prior advisory opinion to you specifically advised against you engaging in the profession of real estate agent.

It should be noted that while the statute authorizing active service by a retired justice of the peace except where such service would create a conflict of interest does not expressly define “conflict of interest”, such omission is neither necessary nor ambiguous. The prohibitions against employment Canon 5C (2), and against engaging in fiduciary

activities, Canon 5D, except as an employee of ones own family business or a fiduciary for a family member have been determined necessary by the Delaware Supreme Court in Canon 5 to minimize the risk of conflict with judicial duties. The Delaware Judges' Code of Judicial Conduct was adopted by the Delaware Supreme Court, *en banc* by order dated December 16, 1993 and became effective January 1, 1994. The authority of the Delaware Supreme Court to enact such rules governing the behavior of judges throughout the Courts of this State is constitutional, arising out of Article IV, Section 13 of the Constitution of 1897. While the Committee's interpretation of *Del. Code Ann.* tit. 10, § 9211 (a) (4) is not inconsistent with the provisions of Canon 5 of the Delaware Judges' Code of Judicial Conduct, to interpret it otherwise, as you have suggested in your request for advisory opinion, would place this legislative enactment in direct conflict with a rule of the Supreme Court adopted for the purpose of regulating the conduct of business of the Courts' pursuant to its constitutional authority. Were there to be any ambiguity in the statute, lending itself to one interpretation consistent with the provisions of the Constitution, and another in derogation of a Constitutional provision, we would be required to interpret such statutory ambiguity in favor of an interpretation creating a statutory and constitutional consistency. Where there are no ambiguities in the statutory provisions and where such provisions are in conflict with terms of the Constitution, such statutory provisions would be rendered unenforceable.

Our opinion in this matter is not meant to preclude any opportunity you might have at some point in the future to engage in the practice of real estate as an assistant in your wife's business. Should the day come when your wife were to obtain a broker's license and open her own agency, you might be permitted to serve as an officer, director,

partner, manager, advisor or employee in such business as permitted under Canon 5C, provided that you did not engage in any activities which could be construed as or causing you to serve in the capacity of a fiduciary for a non-family member, activities prohibited under Canon 5D.

IV. CONCLUSION

The Committee concludes that so long as you remain on active duty designation as a justice of the peace pursuant to *Del. Code. Ann.* tit. 10 § 9211, you are prohibited under the Delaware Judges' Code of Judicial Conduct from activating your real estate agent's license and entering into a professional relationship of real estate agent for a real estate brokerage.

For the Committee,

Robert Burton Coonin,
Judicial Ethics Advisory Committee

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cc: Members of the Judicial Ethics Advisory Committee
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