

JEAC 1999-3
November 29, 1999

You have requested an advisory opinion from the Judicial Ethics Advisory Committee (“the Committee”) on whether, consistent with the Delaware Code of Judicial Conduct, you may serve on the Charitable Gaming Task Force created by House Resolution No. 39 of the Delaware General Assembly. The synopsis of that resolution states that the task force is “to study and make recommendations on Delaware’s Charitable Gaming and Regulations and the reasons for declining charitable revenues.” The resolution states that the task force is to “study Delaware’s charitable gaming laws and regulations and the reasons for declining revenues, if any, and to make recommendations thereon including the permitted use of video lottery machines in charitable and fraternal organization non-profit facilities under the supervision of the Delaware lottery,” with written findings to be submitted to the General Assembly on or before January 15, 2000.

In your letter of November 9, 1999, you point out the worthy activities engaged in by numerous charitable and fraternal non-profit organizations in the State of Delaware and you question whether you do not have the duty to contribute to the improvement of the law as both a judge and citizen of Delaware, if it does not interfere with your own judicial duties. You mention that your appointment to the task force would be as “Mrs. [name of judge].”

The Committee’s Advice

The Committee believes that, while your willingness to participate in extra-judicial public service is commendable as is your desire to assist the worthy activities engaged in by the numerous charitable and fraternal non-profit organizations in the State of Delaware, nevertheless, considering the assigned responsibilities of the task force, we advise that you should decline appointment to the Charitable Gaming Task Force.

Applicable Canons of Judicial Conduct

The following Canons of the *Delaware Judges’ Code of Judicial Conduct* are potentially implicated by this request for an advisory opinion:

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 4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.

A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge:

* * *

C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice.

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

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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.

* * *

G. 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....

The Committee believes that Canon 5.G has particular applicability to the issues raised by your inquiry.

Prior Opinions of the Committee

The Committee and its predecessor, the Judicial Properties Committee, have previously expressed their views regarding proposed service by judges on extra-judicial committees and have advised against judges serving on governmental committees whose purpose did not relate directly to the administration of justice, improvement of the legal system or the judicial branch of government. On April 17, 1985, the Judicial Properties Committee found that service of a judge on the Delaware Charter Review Committee appointed by the Dover City Counsel and Mayor would be inconsistent with the sole purpose and intent of Canons 5.B and 5.G.¹ On October 7, 1991, the Judicial Properties Committee, citing Canons 4 and 5, concluded that service of a judge as chairman of the Mental Health Code Revision Committee, established to revise certain portions of the Delaware Code dealing with mental health, was not within the area of activity permitted by the Code of Conduct.² More recently, on April 22, 1999, the Judicial Ethics Advisory Committee concluded that service by a judge on a school district's ethics review committee was not advisable.³ These three decisions were based, in part, on an interpretation of the language in Canon 5.G that limits a judge's participation on a government committee to only those bodies directly involved with the administration of justice and the improvement of the legal system⁴ and those matters arising in and directly affecting the judicial branch.⁵

¹ JPC Opinion 1999-1.

² JPC Opinion 1991-1.

³ JEAC Opinion 1999-1.

⁴ See JPC Opinion 1985-1 at p.2.

⁵ See JPC Opinion 1991-1 at p. 2.

While the Judicial Properties Committee did conclude on January 9, 1992, as you point out in your letter, that a judge could serve on a Special Committee on State Personnel Reclassification established by the House Labor and Human Resources Committee of the General Assembly,⁶ one of the purposes of that committee was to examine personnel reclassifications in the judicial branch and the adverse impact of certain personnel reclassifications upon the judicial system. Such matters fall within the narrow exception permitted by Canon 5.G. Another decision of the Judicial Properties Committee issued on January 9, 1992,⁷ permitted a judge to serve as a member of the Delaware 2000 Forum. That decision was based, however, on the Committee's understanding that the Forum's only mission was to share information, that the Forum would not advocate positions or recommend policies, that no recommendations would be made to the executive or legislative branch of government, and that the Forum would not take public positions on issues or particular policy initiatives. The Judicial Properties Committee noted that if the Forum's mission changed from oversight and comment to active political formulation, the judge should resign from the Forum immediately. In your case, House Resolution No. 39 makes clear that the purpose of the Charitable Gaming Task Force is to make recommendations regarding Delaware's charitable gaming laws and regulations and recommendations on the permitted use of video lottery machines in charitable and fraternal organization facilities. Furthermore, unlike the Delaware 2000 Forum, the Charitable Gaming Task Force is to submit written findings to the General Assembly.

Since the matters to be addressed by the Charitable Gaming Task Force fall outside the narrow scope involving the administration of justice, the improvement of the legal system or matters directly affecting the judicial branch, it would appear that Canon 5.G as interpreted by this Committee in the past, prohibits your participation on the task force.

Furthermore, this Committee and its predecessor have been especially concerned about judges becoming involved in subjects, not related to the administration of justice, that might generate considerable publicity and controversy. This concern generates from the comment to Canon 5.G which states in part: "Valuable services have been rendered in the past to the states in 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." The controversial nature of a committee's assignment has been the basis for other decisions

⁶ JPC Opinion 1992-3.

⁷ JPC Opinion 1992-1.

advising against participation of a judge in a committee's work.⁸ This Committee assumes that the use of video lottery machines in charitable and fraternal organization non-profit facilities has the potential to generate considerable controversy. Thus, for that reason, the Committee also believes that service by you on the Charitable Gaming Task Force would not be advisable.

Lastly, although you indicate that you would be identified on the task force as "Mrs. [name of judge]" and not as "Judge [name of judge]", such identification does not negate the fact you are a member of the judiciary and thus bound by the Delaware Code of Judicial Conduct, regardless of how you are identified.

Conclusion

Because the Committee does not believe that the matters to be addressed by the Charitable Gaming Task Force fall within the parameters permitted by Canon 5.G and because the matters to be addressed by the task force have the potential of becoming controversial, the Committee concludes that your service on the Charitable Gaming Task Force would not be advisable. While the Committee appreciates your interest in contributing to the well-being of the community, it recommends against your service on the Charitable Gaming Task Force.

For the Committee:

Barbara D. Crowell, Associate Judge
Judicial Ethics Advisory Committee

BDC:kn

cc: The Honorable Randy J. Holland
Members of the Judicial Ethics Advisory Committee
The Honorable Richard R. Cooch, Chair
The Honorable Myron W. Steele
The Honorable Alex J. Smalls
The Honorable Alfred Fraczkowski
The Honorable Alison W. Tumas
The Honorable Patricia W. Griffin

⁸ See JEAC Opinion 1999-1 (Ethics Review Committee of the Brandywine School District; JPC Opinion 1991-1 (Mental Health Code Revision Committee); and JPC Opinion 1985-1 (Dover Charter Review Committee).