

JEAC 1999-1
April 22, 1999

You have requested an advisory opinion from the Judicial Ethics Advisory Committee ("the Committee") on whether you may serve as Chairperson of the "Ethics Review Committee" for the Brandywine School District (the "School District"). This Ethics Review Committee is apparently being formed by the Board of Education of the School District to review the School District's ethics policies and procedures.

The Committee understands that there have been allegations made in recent months of unauthorized spending and purchases by certain persons associated with the School District.¹ The Committee has been advised that the State Auditor has investigated these allegations and has forwarded his findings to the State Department of Justice for further possible investigation by that entity. The Committee understands that the allegations referred to above are controversial and have recently generated considerable media attention.

Your letter of April 20, 1999 to the Committee advises that your "role" [as Chairperson] would not have anything to do with reviewing any alleged violations, past or present. [The Ethics Review Committee's] task would simply be to review the District's conflict of interest/ethics policies." Your letter further states that you are a parent of present and former children in the School District, that you have previously served on at least one committee of the School District, and that you have otherwise volunteered your time for the School District.

The Committee's Advice

The Committee believes that your willingness to participate in extra-judicial public service is commendable, but nevertheless advises that, under the circumstances and given the public controversy attendant to the alleged violations of improper spending and purchases by certain individuals in the School District, that you should decline appointment to the Ethics Review Committee either as Chairperson or as a member.

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.

¹ The Committee expresses no view on the merits of such allegations.

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.

* * *

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.

Applicability of Prior Opinions of the Committee

The Committee and its predecessor, the Judicial Proprieties Committee, has previously expressed its views regarding proposed service by judges on extra-judicial committees involving public

education. The Judicial Proprieties Committee has advised a judge that that judge could serve "as a parent and citizen," with no violation of Canons 4 and 5.B., as a member of the "Delaware 2000 Forum," a body of approximately 50 people from all three counties who would meet periodically to "share information about educational reform efforts in the various school districts of the State."² The Judicial Proprieties Committee did not analyze this query under Canon 5.G.³ The Committee's opinion noted:

We further understand from you that the Forum is not intended to be either a steering or an oversight committee. It will have no decision-making authority or responsibility. Nor will it have any implementation responsibilities. You do not anticipate that the Forum will advocate positions or recommend policies. It will not have any authoritative role in the area of policy-making. Furthermore, it is not anticipated that the Forum as a whole will make recommendations to the Executive or Legislative branches of government. Finally, the Forum as a group is not intended to take public positions on issues or endorse particular policy initiatives.⁴

The Committee, however, noted that it "observe[d] from its own experience that matters associated with public education can become extremely controversial... [and that] if the mission of the Delaware 2000] Forum should change from one of oversight and comment to one of active political formulation, [the judge's] immediate resignation from the Forum would be appropriate."⁵

Here, the Committee understands that the alleged spending and purchase violations have already become controversial. Although you have advised that the Ethics Review Committee will not have "anything to do with reviewing any alleged violations, past or present[]," the Committee believes that the work of the Ethics Review Committee may well spawn continuing or new controversy about ethics policies and procedures in the School District. It may be difficult for members of the public, especially interested citizens in the School District, to understand this distinction.

The Judicial Proprieties Committee has previously advised a judge that service on a Dover Charter Review Committee by that judge was inadvisable.⁶ That committee had been created by the City of Dover to submit recommendations for proposed changes to the Dover City Charter. The Judicial Proprieties Committee noted that the subject of amendments to the Dover City Charter had

² JPC Opinion 1992-1 at 1.

³ The opinion does not indicate that the Delaware 2000 Forum was a "governmental" commission within the meaning of Canon 5.G. The absence of any 5.G. analysis, however, does not lessen that opinion's applicability to the present inquiry. Canon 4, upon which the opinion relies, is analogous to Canon 5.G., in that both Canons permit a judge to serve on governmental and non-governmental committees, the purpose of which are to "improve[]... the law, the legal system, or the administration of justice."

⁴ *Id.* at 1-2.

⁵ *Id.* at 2.

⁶ JPC Opinion 1985-1.

"generated considerable publicity and controversy" and that it was "evident" to the Judicial Proprieties Committee that the Dover Charter Review Committee would "deeply involve it in issues which are both significant and highly controversial."⁷ That committee concluded that service by the inquiring judge on the Dover City Review Committee would violate Canon 5.G. which provides that "[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."

Similarly, the Ethics Review Committee is almost certainly a "governmental" entity within the meaning of Canon 5.G. (as was also, apparently, the Dover Charter Review Committee). It is at least quasi-governmental since the School Board of the Brandywine School District is an elected body, statutorily authorized by the General Assembly. As the official Comment to Canon 5.G. states,

"[t]he appropriateness of conferring [appointments under Canon 5.G.] on judges must be reassessed, however, in light of... 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."⁸

The Committee has also previously advised a judge that the judge could properly serve on the "Continuing Advisory Council" for a Delaware public university.⁹ The Continuing Advisory Council had the following described role:

- (1) to provide advice on the establishment and maintenance of realistic [continuing education] programs that meet the needs of the Delaware 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.¹⁰

The Committee found no violation of Canons 5.A. and 5.B., but there apparently was no suggestion by the inquiring judge or belief by the Judicial Ethics Advisory Committee that the service might be controversial.

The Judicial Proprieties Committee has also advised that it would not be proper for a judge to serve as chair of a state "Mental Health Code Revisions Committee." That Committee was charged (apparently by the General Assembly) with the responsibility of recommending proposed changes to Delaware laws dealing with mental health. The Committee noted that it was "possible" that the

⁷ *Id.* at 1, 2.

⁸ *Delaware Judges' Code of Judicial Conduct* Canon 5 cmt. (1994).

⁹ JEAC Opinion 1998-1.

¹⁰ *Id.* at 1.

Committee's proposed revisions "might be controversial," placing the judge "in the awkward role of an advocate defending the revisions in a political atmosphere."¹¹ The Judicial Proprieties Committee concluded that the judge's proposed service on the Mental Health Code Revisions Committee would be inconsistent with Canons 4.B, 4.C, and 5.G, and recommended against appointment of the judge to that Committee.

Similarly, this Committee believes that, if the work of the Ethics Review Committee should become controversial, you as Chairperson might similarly be placed in an "awkward" role.

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 such as an ethics review committee of a school district will always be determined on a "case-by-case basis."¹² To the extent that the Ethics Review Committee is deemed governmental, or at least quasi-governmental, a judge should not serve on this Ethics Review Committee of the School District because matters of ethics policies and procedures for a school district do not appear related to "the improvement of the law, the legal system, or the administration of justice," a predicate for extra-judicial service otherwise required under Canon 5.G. In this sense, the existence or possibility of "controversy" is not relevant.

The Committee is concerned, however, that the work of the Ethics Review Committee may become controversial, even if that committee tried carefully to exclude from its deliberative process any consideration of the alleged particular spending and purchasing actions that have been the source of much public discussion and publicity. The Committee is also mindful of the fact that it is possible that litigation resulting from the alleged spending and purchasing violations may ensue in the Superior Court. Although you could, of course, recuse yourself from any such cases, the potential option of your future judicial recusal does not justify your service as Chairperson of the Ethics Review Committee for the reasons set forth in this advisory opinion.¹³ Even if the Committee studiously sought to avoid discussion or consideration of the alleged spending and purchasing, the public might not comprehend this distinction.

The Committee does not mean to suggest that a judge could never accept appropriate extra-judicial service in areas that may become, or do become, controversial. "As a judicial officer and

¹¹ JPC Opinion 1991-1 at 1.

¹² See Jeffrey W. Shaman, et al., *Judicial Conduct and Ethics* § 9.04, at 287 (2d ed. 1995).

¹³ Cf. Alabama Judicial Inquiry Commission Opinion 85-230 (1985), cited in American Judicature Society, *The Digest of Judicial Ethics Advisory Opinions* 39 (Deborah L. Solomon ed. 1991) (concluding that "[a] judge may serve as a member of the superintendent's advisory council for a county school system, as long as such service does not conflict with the performance of his/her judicial duties. However, should the council consider matters or issues which would ordinarily come before the judge's court, the judge must resign as a council member. Otherwise, the judge would be required to constantly recuse himself/herself when these matters or issues come before his/her court").

person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice[]..."¹⁴ There may be times when the work of a governmental committee, commission or other position does engender some controversy; a judge performing extra-judicial service for that body would then need to assess the nature and extent of the controversy but might not need to resign so long as that extra-judicial service did not "tend[] to erode the appearance of impartiality which is essential to judging itself."¹⁵ Nevertheless, given the concern discussed above, the facts presented by this inquiry lead the Committee to conclude that service on the School District's Ethics Review Committee is not advisable.

As stated earlier, your desire to contribute to the well-being of the community through service on the Ethics Review Committee is laudable but, on balance, the Committee recommends against your service on the Ethics Review Committee of the Brandywine School District.

For the Committee:
Richard R. Cooch
Chair, Judicial Ethics Advisory Committee

¹⁴ *Delaware Judges' Code of Judicial Conduct* Canon 4 cmt. (1994).

¹⁵ Steven Luber, *Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges* at 28 (1984).