

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

The Hon. Kenneth M. Milman, Chair
The Hon. Richard F. Stokes, Vice Chair
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The Hon. Jan R. Jurden
The Hon. Michael K. Newell
The Hon. Charles W. Welch, III
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JEAC 2012-3

September 21, 2012

**Re: May A Judge Accept An Appointment To
The Child Placement Review Board?**

Dear

You asked the Judicial Ethics Advisory Committee (the “Committee”) whether the Code of Judicial Conduct (the “Code”) permits a judge to accept an appointment to the Child Placement Review Board (the “Review Board”). While recognizing the admirable mission of the Review Board, the Committee has concluded that Rules 3.4 and 3.7 of the Code prohibit a judge from accepting the appointment because (i) the Review Board has a broad public policy mandate insufficiently dedicated to improving the legal system, (ii) service would create a risk of controversy, and (iii) the Review Board engages in fact-finding and litigation before the Delaware courts.

I. BACKGROUND

The Review Board was established by the Delaware Child Placement Review Act, 31 *Del. C.* §§ 3801-24 (the “Act”). The purpose of the Act is

to provide a citizen-based independent monitoring of Delaware children in the care and custody of a placement agency to ensure that they receive continuing efforts to obtain permanent homes; adequate provision for their stability, health, and safety; and ongoing care addressing their physical, mental, and emotional needs; and to advocate as necessary for the paramount concerns of best interest and safety for the children.

Id. § 3801. The Review Board consists of “no fewer than 56 members” whom the Governor appoints and may remove for cause. *Id.* § 3803(c). For administrative purposes, the Review Board functions within the Administrative Office of the Delaware courts. *Id.* § 3803(a).

The Review Board is charged with conducting an administrative review of any child who is (i) in the custody or care of the Division of Family Services or (ii) in the custody or care of the Division of Youth Rehabilitative Services but in an alternative placement or in out-of-home care and who is not in a detention or incarceration facility. *Id.* §§ 3802(2), 3803(b). The administrative review “must be conducted no less frequently than once during the first 12 months after a child's initial custody or care placement, and no less frequently than annually thereafter until the child exits custody or care placement.” *Id.* § 3803(b). For the purpose of conducting administrative reviews, the Review Board may divide itself into Review Committees of not less than three members. *Id.*

The purposes of an administrative review are as follows:

- (1) To determine if a plan has been developed for a child which adheres to the appropriate policy, maintains the child's safety and best interest as paramount concerns, has been appropriately implemented and complied with, and specifies a projected date for when the child can be safely returned home or maintained in an alternate permanent home;
- (2) To assess the efforts of the placement agency and/or contract agency to achieve permanence for the child. The assessment must include, but is not limited to, an assessment of the child's safety, best interest, stability of placement, and other special needs;
- (3) To assess if the current placement of a child is appropriate and in the child's best interest;
- (4) To encourage and advocate for permanency for a child through reunification with his or her parents or parents or guardian or guardians through the initiation of termination of parental rights proceedings and adoption, as appropriate, or through placement in another planned permanent living arrangement;
- (5) To encourage and advocate for stability in a child's life through quality placements and fewer changes in placement;
- (6) To collect information from the placement agency, contract agency and other individuals or organizations involved with a child for the purpose of data collection and advocacy on behalf of the child;
- (7) To submit a written findings and recommendations report regarding the plan and status of a child to the placement and/or contract agency, Family Court, parents, legal guardians, guardian ad litem or Court Appointed Special Advocate (CASA) that will assist in the decision-making processes regarding the child and carry out the purposes of paragraphs (1) through (5) of this section;
- (8) To distribute the recommendations portion of the findings and recommendations report as determined by the Executive

Committee. The Executive Committee may consult with the placement agency in this determination.

Id. § 3810.

The administrative review must “evaluate all plans for care and other needs of the child.” *Id.* § 3802(1)(a). The review also must advocate “for the needs and safety of the child as identified and determined necessary.” *Id.* § 3802(1)(c). The review must include written findings and recommendations, which must be provided to the “placement agency and/or contract agency, to the child's parents or legal guardians, or to the child's guardian ad litem or CASA.” *Id.* § 3815(a). The findings and recommendations also “must be submitted by the Review Committee to the Family Court and must be made a part of the child's Family Court file. . . .” *Id.* § 3815(e). The Family Court is required by the Act to “review the report and consider the recommendations in it.” *Id.* The report “may be received as evidence and may be considered by a court along with other evidence.” *Id.*

II. ANALYSIS

The Committee has evaluated the propriety of a judge serving on the Review Board under Rules 3.4 and 3.7 of the Code. It is possible that service on the Review Board also could create issues under Rule 1.2 of the Code, Promoting Confidence in the Judiciary. *See generally* Cynthia Gray, *Ethics and Judges' Evolving Roles off the Bench: Serving on Governmental Commissions* (State Justice Institute of the American Judicature Society 2002). Because the Committee regards the more specific requirements of Rules 3.4 and 3.7 as controlling, the Committee has not reached the applicability of Rule 1.2.

A. The Review Board Lacks A Sufficiently Direct Connection To The Improvement Of The Legal System

Rule 3.4 addresses a judge's ability to accept a governmental position. It states, in pertinent part:

- (A) A judge should not accept appointment to a governmental committee, commission, board, agency 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.
- (B) A judge may serve as a member, officer, or director of an organization or governmental agency committee, board, commission or other governmental position devoted to the improvement of the law, the legal system, or the administration of justice.

Del. Judges' Code of Judicial Conduct R. 3.4. The commentary to Rule 3.4(B) notes that, time permitting, a judge is encouraged to further the improvement of the law, the legal system, or the administration of justice "either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law." *Id.*

In determining whether a governmental position falls within Rules 3.4(A) and (B), judicial ethics committees have distinguished between (i) governmental positions carrying a broad public policy mandate in which improving the law, the legal system, or the administration of justice plays a part and (ii) governmental positions dedicated to the improvement of the law, the legal system, and the administration of justice. Membership

in the latter is permissible. Membership in the former is not. *See generally* Gray, *supra*, at 2-3.

The Committee has previously framed the relevant inquiry as whether the governmental position is “directly concerned with improvement of the law, the legal system, or administration of justice.” Del. Judicial Ethics Adv. Comm. Op. 2006-7, at 9. Other judicial ethics committees have used similar formulations. Indiana’s judicial ethics commission has described an appropriate governmental position as “one whose concern with the legal system is direct and exclusive, such as a community corrections board or a committee assigned to consider changes in existing law.” Ind. Comm’n Judicial Qualifications Op. 2-01. By contrast, a “governmental commission with a tangential or partial nexus to the legal system, such as a board concerned with protection and advocacy for particular groups of citizens, or a commission established to study the social status of minorities, for example, likely does not have a sufficient direct and exclusive concern with the legal system.” *Id.* The Massachusetts judicial ethics committee requires that the position have a “direct nexus” to how “the court system meets its statutory and constitutional responsibilities—in other words, how the courts go about their business.” Mass. Comm. on Judicial Ethics Op. 98-13. The advisory committee for federal judges opined that judges may accept positions “directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice,” but should refrain from governmental positions concerned with “utilizing the law or the legal system as a means to achieve an underlying social, political, or civil objective.” U.S. Comm. Codes of Conduct Op. 93 (1998). “A permissible activity . . . serves the interests

generally of those who use the legal system, rather than the interests of any specific constituency, or enhances the prestige, efficiency or function of the legal system itself.”

Id. The Committee acknowledges that some jurisdictions use more lenient formulations. The Florida judicial ethics committee, for example, permits a judge to serve on a governmental panel that is “tangentially related to the courts.” Fl. Sup. Ct. Comm. on Standards of Conduct Governing Judges Op. 97-11.

This Committee previously opined that a judge could not serve as Chair of the Governor’s Consortium on Hispanic Affairs because the position was not “directly concerned with improvement of the law, the legal system, or administration of justice.” Del. Judicial Ethics Adv. Comm. Op. 2006-7, at 9. The Committee expressed this opinion despite assuming that the work of the Consortium would include addressing interactions between members of the Hispanic community and the court system, as well as efforts to divert the Hispanic population from the criminal justice system. The Committee also expressed the view that service on the Consortium would involve matters of fact or policy other than the improvement of law.

Judicial ethics committees in other states have rendered opinions addressing whether judges can serve on governmental commissions concerned with issues facing vulnerable populations, such as children, domestic violence victims, or the elderly. The opinions are fact-specific and turn on the particular responsibilities of the commission on which the judge will serve. The Committee has found the following opinions to be the most persuasive.

South Carolina's judicial ethics committee considered whether a judge could serve on a task force created by the federal Children's Justice Act. *See* S.C. Adv. Comm. on Standards of Judicial Conduct Op. 8-1996. The judge was invited to join the task force's Court Coordination Sub-Committee, which was specifically charged with improving the "coordination of procedure between the Family Court and the General Sessions Court and the prevention of delay in child protection hearings." *Id.* The South Carolina committee permitted the judge to join the sub-committee because it solely addressed matters related to the administration of justice. The committee noted that membership on a committee with a broad mandate risked involving the judge in policy matters that are "plainly prohibited" and "better left to the legislature." *Id.*¹

Alaska's judicial ethics commission has also considered whether a judge could serve on a task force created by the Children's Justice Act. *See* Alaska Comm'n on Judicial Conduct Op. 2001-01. Citing the South Carolina judicial ethics opinion, the Alaska commission opined that a judge could participate in the work of the task force

¹ In an earlier opinion, the South Carolina judicial ethics committee determined that a judge could not serve on the Family Violence Advisory Committee, a seven member committee charged with "analysis and development of state legislation, programs and policies, surveys and research and, intervention services to reduce family and domestic violence." S.C. Adv. Comm. on Standards of Judicial Conduct Op. 30-1994 (amended). The committee determined that judicial participation on a "committee that develops legislation, policies, and programs leads to the appearance of impropriety because legislation that originated from the committee would impact issues and parties that appear before the [judge]." *Id.*; *see also* S.C. Adv. Comm. on Standards of Judicial Conduct Op. 1-1992 (ruling that service on Joint Legislative Committee on Children would create appearance of impropriety for judge); S.C. Adv. Comm. on Standards of Judicial Conduct Op. 11-1988 (ruling that service on committee designed to develop and implement policies and guidelines for the treatment of crime victims and witnesses would create appearance of impropriety and create impression that judge was not impartial). As noted, although service on the Review Board could create similar concerns under Rule 1.2, the Committee has not reached those issues.

involving coordination among courts, but could not participate in those aspects of the task force's work that concerned the investigation and prosecution of instances of child abuse and neglect.

Arkansas's judicial ethics committee has considered whether a state judge could serve on the Arkansas Commission on Child Abuse, Rape and Domestic Violence, an advisory committee charged with addressing twelve areas enumerated by statute. *See* Ark. Ethics Adv. Comm. Op. 2003-02. The committee opined that the judge could perform certain tasks on the committee to the extent they focused directly on improvements in the law, but the judge could not be involved in coordinating investigations and service delivery to child victims on the grounds that the judge could possibly be dealing with persons who could appear in court. The committee also opined that the judge could not participate in fatality reviews.

Arizona's judicial ethics committee has considered whether a judge could serve on the Tucson-Pima County Domestic Violence Commission, a government body whose agenda included attempts to influence law enforcement, prosecutors, and the judiciary in their handling of domestic violence cases. *See* Ariz. Sup. Ct. Judicial Ethics Adv. Comm. Op. 97-06. While recognizing that "no judge supports criminal activity, including domestic violence," the committee opined that a judge could not participate because a judicial officer cannot appear to favor victims over accused persons or seem to give preference to domestic violence cases over other matters.

Utah's judicial ethics committee has opined that a judicial officer could not serve on the Salt Lake County Child Abuse Coordinating Commission, which was established

to achieve justice for victims and perpetrators of child abuse by coordinating policies and procedures among various government agencies dealing with child abuse cases. *See* Utah Ethics Adv. Comm. Op. 88-2. The Utah committee opined that service on the Commission would be appropriate to the extent the Commission was charged with coordinating the policies and procedures of various agencies dealing with child abuse to enhance the flow of cases through the system. The Utah committee concluded, however, that a judge could not serve on the Commission because its activities extended beyond improving the legal system to encompass taking positions on public policy questions, such as whether certain conduct should constitute a criminal offense. In a subsequent opinion, the Utah committee permitted a judge to serve on the advisory board of the Salt Lake County Children's Justice Center and the State Advisory Board for Children's Justice Centers. *See* Utah Ethics Adv. Comm. Op. 98-4. The Committee was satisfied that the advisory board duties were "limited to children's justice issues," but cautioned that a judicial member of the committee could not participate in any "discussions which focus primarily on prosecutorial tactics which do not benefit the system as a whole, or other discussions which might call into question the judiciary's essential neutrality concerning the administration of the criminal justice system." *Id.*

Although the Committee recognizes the important purposes and goals of the Review Board, its mission and tasks are not sufficiently dedicated to the improvement of the law, legal system, or administration of justice to provide the direct nexus required by Rules 3.4(A) and (B). The Review Board has a broad policy mandate to "ensure that [children in the state custody] receive continuing efforts to obtain permanent homes;

adequate provision for their stability, health, and safety; and ongoing care addressing their physical, mental, and emotional needs” and “to advocate as necessary for the paramount concerns of best interest and safety for the children.” 31 *Del. C.* § 3801. This mandate extends beyond what is permissible for a judicial officer under Rules 3.4(A) and (B). In addition, although children in state custody certainly deserve advocacy and representation, the Review Board’s concern for this particular constituency is inappropriate for a judge, because it associates the judge with the protection of a particular group of citizens, rather than the improvement of the legal system as a whole. Membership on the Review Board also could suggest that the judge gives priority to certain types of cases and litigants rather than acting as an impartial jurist. Consequently, the Review Board is not sufficiently dedicated to the improvement of the law, legal system, or administration of justice to satisfy the requirements of Rules 3.4(A) and (B).

B. The Review Board May Generate Controversy That Would Make Judicial Participation Inappropriate

Commentary to Rule 3.4(A) states that the propriety of a judicial officer accepting or continuing in a governmental appointment must be assessed or reassessed “in light of . . . the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial” and points out that “[j]udges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.” *Del. Judges’ Code of Judicial Conduct R. 3.4(A) cmt.* Several of this Committee’s opinions conclude that if an appointment would

involve the judge in controversial matters, the judge should not accept the position.² For example, the Committee previously recommended that a judge not serve as chairperson of the ethics review committee for the Brandywine school district because the committee's work "may become controversial." Del. Judicial Ethics Adv. Comm. Op. 1999-1, at 5.

The Review Board is tasked with assessing the well-being of children in the care and custody of a placement agency and reporting its findings to the Family Court. This obligation necessarily involves the Review Board in emotional and controversial topics. This possible controversy also makes the appointment of a judge to the Review Board inappropriate under Rule 3.4.

C. The Review Board Makes Factual Findings And Acts As A Party To Litigation

Rule 3.7(A) provides that a judge should not participate in a civic or charitable activity "if it is likely that the organization . . . will be regularly engaged in adversary proceedings in any court." Del. Judges' Code of Judicial Conduct R. 3.7(A). Under the Act, the Review Committees submit written findings and recommendations to the Family

² See Del. Judicial Ethics Adv. Comm. Op. 2006-6, at 5-6 ("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.") (internal quotation marks omitted), Del. Judicial Ethics Adv. Comm. Op. 1999-3, at 4-5 (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), Del. Judicial Proprieties Comm. Op. 1985-1, at 1-2 (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).

Court which are included in the child's Family Court file, which must be considered by the Family Court, and which may be received as evidence. In addition,

with the approval of the Executive Committee, [the Review Board] has the unconditional right to intervene in any action involving a child in the care or custody of a placement agency. Upon filing a motion to intervene, the Board shall become a party to the action, with all rights and privileges entitled thereto.

31 *Del. C.* § 3819. The Review Board's role in making factual findings and recommendations, submitting evidence, and acting as a party to litigation render the participation of a judicial officer inappropriate under Rule 3.7.

III. CONCLUSION

The Review Board works to improve judicial fact finding and advocate on behalf of at-risk children. This work is commendable but is not sufficiently dedicated to improvement of the judicial system as a whole. It is also potentially controversial. Under its statutory mandate, the Review Board makes evidentiary submissions to and appears in litigation before the Delaware courts. These factors make judicial participation on the Review Board inappropriate.

For the Committee,



J. Travis Laster
Member, Judicial Ethics Advisory Committee



Kenneth M. Millman
Chair, Judicial Ethics Advisory Committee

cc: The Honorable Carolyn Berger, Liaison Justice
Members of the Judicial Ethics Advisory Committee
The Honorable Kenneth M. Millman, Chair
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