

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

The Hon. Joseph R. Slight, III, Chair
The Hon. Mardi F. Pyott, Vice Chair
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

April 7, 2006

2006-4

400 Court Street
Dover, Delaware 19901

Re: Request for Judicial Ethics Advisory Committee Opinion

Dear Judge _____ :

You have requested an opinion of the Judicial Ethics Advisory Committee (“the JEAC” or “the Committee”) regarding whether you may continue your association with the Boy Scouts of America (“the BSA”) given the organization’s policy of prohibiting membership to homosexual Scout leaders. Currently, you are a volunteer member of the Delmarva Council of the Boy Scouts of America (“the Council”) and, in your capacity as a volunteer, you serve as the Council’s Vice President for Membership Relations. You are also a member of the Council’s

Executive Committee and Executive Board, and a member of the Troop Committee that is associated with your sons' local troop.

The Executive Board is the governing body of the Council and is responsible for carrying out the national policies of the BSA. One of those national policies is the BSA's exclusion of homosexual individuals from membership (hereinafter "the policy").¹ You have advised us that you are not aware of any situation where membership has been denied by the Council because of sexual orientation. You

¹ This policy is articulated on the BSA National Council's legal issues web site at <https://www.bsalegal.org>:

Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

A. No. The Boy Scouts of America is a private membership organization; leadership in Boy Scouting is a privilege and not a right. Boy Scouts believes that homosexual conduct is not compatible with the aims and purposes of Scouting and that a known or avowed homosexual does not present a desirable role model for the youth in the Scouting program. Boy Scouts will continue to select only those who meet Boy Scout standards and qualifications for membership.

have also advised us that you do not advocate in favor of or agree with the policy. Nevertheless, you have confirmed that the Council on which you serve would be required to ensure compliance with the policy should such a need arise. The policy was declared lawful by the United States Supreme Court in *Boy Scouts of America v. Dale*,²

v.

Dale,²

² 530 U.S. 640 (2000).

which held that the BSA can prohibit homosexual membership as an exercise of its First Amendment right of expressive association.

You have asked the Committee to consider whether you should resign any of your current positions with the Council and Troop Committee in light of the BSA's policy towards homosexuals. For the reasons that follow, the Committee has concluded that your resignation is not necessary.

The Applicable Canons of Judicial Conduct

Your request implicates Canons 2 and 5 of the Delaware Judges' Code of Judicial Conduct ("the Code") which state, in pertinent part:

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

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

C. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

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 limitation[]:

(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.

Issues

The Committee has considered the following issues: (1) whether the BSA engages in invidious discrimination as contemplated under Canon 2C; (2) whether it is likely that the Boy Scouts will be engaged in proceedings before your court or other Delaware courts; and (3) whether a judge's involvement with the BSA, in either a leadership position (such as the Vice President, Executive Committee member, or Executive Board member of a local Boy Scouts council), or a less prominent position (such as a member of a local Boy Scouts Troop Committee), will give the appearance of impropriety or reflect adversely upon the judge's impartiality.

Analysis

A. Invidious Discrimination

Although Canon 2C specifically limits a judge's membership in organizations that discriminate on the basis of "race, sex, religion, or national

origin,” the scope of 2C extends further to prohibit “a judge’s membership in an organization that engages in *any* invidiously discriminatory membership practices prohibited by applicable law[.]”³ Whether an organization engages in invidious discrimination “depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.”⁴ Absent such factors, an organization discriminates invidiously if persons who would otherwise be admitted as members are excluded arbitrarily on the basis of race, religion, sex, national origin or any basis prohibited by applicable law.⁵

Under applicable law, the BSA does not engage in invidious discrimination. It is a “private, not-for-profit organization engaged in instilling its system of values in young people.”⁶ Its exclusion of homosexuals is constitutionally permitted under the First Amendment (i.e. the policy is “not ... constitutionally prohibited”)

³ DEL. JUDGES’ CODE OF JUDICIAL CONDUCT CANON 2C cmt. (2006) (emphasis added).

⁴ *Id.*

⁵ *Id.*

⁶ *Dale*, 530 U.S. at 640.

and, therefore, the policy is not “prohibited by applicable law.”⁷ Accordingly, Canon 2C does not prohibit your membership in or affiliation with the BSA.⁸

B. BSA As A Litigant In Your Court

The Committee’s search of legal databases has not revealed a single case in Delaware where the BSA was a named litigant. While the BSA is a prominent national organization that may at any time be involved in litigation anywhere throughout the country, there is no basis to believe that it is “likely” the BSA will be engaged in proceedings before you or any other court within Delaware.⁹ Therefore, your involvement with the BSA is not subject to the “limitation” under Canon 5B(1).¹⁰

C. The Appearance of Impropriety and Impartiality

Judges must ensure that their extra-judicial or “off-bench” activities do not

⁷ *See Id.*

⁸ *See* Arizona Supreme Court, Judicial Ethics Advisory Committee, Advisory Opinion 00-05 (2000) (holding that the BSA does not engage in invidious discrimination).

⁹ *See* DEL. JUDGES’ CODE OF JUDICIAL CONDUCT CANON 5B(1) (To track the language of this Canon further, it does not appear that the BSA would “ordinarily” come before you or would “regularly” be engaged in court proceedings in Delaware.).

¹⁰ *See e.g.* Massachusetts Committee on Judicial Ethics, Opinion No. 2001-1 (2001) (Stating that while the BSA has a policy of excluding homosexuals, it “does not engage in advocacy litigation directed toward that end” and, therefore, such issues were not likely to be presented in Massachusetts courts.).

Parts (2) and (3) of Canon 5B are not implicated here because the facts as we understand them do not indicate that you are soliciting funds on behalf of the BSA, soliciting potential BSA members, or are engaged in providing investment advice to the BSA.

create an appearance of impropriety or cause an objective observer to doubt their impartiality.¹¹ Simply put, activities that would cause a reasonable person to believe that the judge is biased or prejudiced must be avoided.¹² The mere “appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements.”¹³ Consequently, “judicial membership in a restrictive organization [such as the BSA] presents the problem of balancing a judge’s associational rights against public confidence in an impartial judiciary.”¹⁴

While there is little or “no case law which defines the sort of civic or charitable activity which might reflect adversely on a judge’s impartiality[,]”¹⁵ judges generally “should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse, or are dedicated to, a particular legal philosophy or position.”¹⁶ Similarly, when an organization’s “advocacy activities or public positions would cause a reasonable person to question the

¹¹ CTR. FOR PROF’L RESPONSIBILITY, JUDICIAL DIV., AM. BAR ASS’N, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 29, 256 (2004).

¹² *Id.* at 256

¹³ *Id.* at 30 (quoting *In Interest of McFall*, 617 A.2d 707 (Pa. 1992)).

¹⁴ *Id.* at 78

¹⁵ JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 301 (3d ed. 2000).

¹⁶ *Id.* at 302.

judge's impartiality[,]" a judge should cease his/her affiliation with that organization.¹⁷ It is of no consequence that the judge does not share the views of the organization. The mere "fact of the judge's membership in a discriminatory organization can lead to the public perception of the judge's support of the discriminatory policies."¹⁸

The responses from the few jurisdictions that have addressed the issue of whether a judge can be affiliated with the BSA have been mixed. Some have permitted judges to participate in the BSA at every level without qualification, whether it be a leadership position or not, reasoning that the United States Supreme Court's decision in *Dale* supports the conclusion that a judge is not ethically barred from volunteering for the BSA.¹⁹ Other jurisdictions take the opposite approach by advising judges that they should "steer clear" of any involvement with the BSA "because of the importance of eliminating the appearance of bias."²⁰ Still others have found a middle ground between the two extremes by concluding that the determination of whether a judge may participate in the BSA depends upon his

¹⁷ ANNOTATED MODEL CODE OF JUDICIAL CONDUCT at 257.

¹⁸ *Id.* at 77.

¹⁹ Arizona Judicial Ethics Advisory Opinion 00-05.

²⁰ ANNOTATED MODEL CODE OF JUDICIAL CONDUCT at 82 (citing JEFF BLEICH, FAIRNESS REQUIRED ON AND OFF BENCH, CALIFORNIA BAR JOURNAL (Mar. 2003)).

level

of involvement in the organization and the judge's thoughtful exercise of his judicial discretion.²¹

The Committee finds the middle ground to be the most appropriate platform from which to address this issue because it offers the flexibility to consider each individual case and all relevant facts and circumstances. This case-by-case approach would not be possible under an inflexible rule that a judge can or cannot participate in the BSA. The approach adopted here gives deference to the discretion of the judge who is confronting the issue. When exercising this discretion, the judge must be mindful that “[t]he changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to re-examine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the judge’s relationship with it.”²²

Based upon the facts as presented, the Committee concludes that your

²¹ See Massachusetts Committee on Judicial Ethics, Opinion No. 2001-1 (“The foregoing is not to say that there are no conceivable circumstances under which you might be required to terminate your membership in the Boy Scouts or to recuse yourself from cases because of your Boy Scout membership.”); State of Washington Ethics Advisory Committee Opinion 04-01 (2004) (Prohibiting a judicial officer from participating in the BSA “in a leadership role as that participation may reflect adversely on the judge’s impartiality[,]” but giving judicial officers “who participate in Boy Scouts as a troop leader or other similar position” the discretion to determine whether they should disqualify themselves under Canons 2 and 5.).

²² DEL. JUDGES’ CODE OF JUDICIAL CONDUCT CANON 5B cmt.

current participation with the Council does not convey the appearance of impropriety or reflect adversely upon your impartiality. The Committee believes your involvement as a member of the Troop Committee that is associated with your sons' local Boy Scout troop is appropriate given that, in this non-leadership position, you will have no direct involvement with the BSA's policy of prohibiting membership to homosexuals. Although potentially problematic in the future should circumstances change, the Committee believes that your current leadership positions with the Council are also appropriate because, as you have stated, you are not aware of any situation where membership has been denied by the Council because of sexual orientation. It also appears unlikely that the Council will be asked to enforce the policy in the future given the clear holding in *Dale*. Should the situation arise where you are called upon to be involved directly or indirectly with enforcing the BSA's policy of prohibiting homosexual membership, the Committee suggests that you consider either resigning your leadership positions at that time or, at the very least, recusing yourself from any discussion or involvement regarding the BSA policy.

Finally, the Committee has considered the question of whether your association with the BSA would reflect adversely upon your impartiality from the perspective of homosexual litigants who may appear in your court in matters

unrelated to the BSA. Specifically, we have considered whether your affiliation with the BSA would cause

a reasonable person in that litigant's position to question your impartiality. The Committee does not believe it would, but recommends that you remain sensitive to that possibility and reevaluate the situation, if experience proves otherwise. Although the BSA has a policy of excluding homosexuals, "that is not the stated purpose of the organization."²³ The mission of the BSA "is to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law."²⁴ It is not the BSA's purpose actively to promote discrimination against homosexuals. The BSA is, therefore, distinguishable from other "issue-oriented" organizations that clearly have a biased agenda.²⁵ "[T]he Ku Klux Klan, for example, are devoted to the promulgation of bias. A judge who is charged with dispensing justice to all citizens could not appear impartial if he or she belonged to such a group."²⁶ Such concerns generally are not implicated by a judge's affiliation with the BSA or, for that matter, most other religious, ethnic, civic or charitable

²³ Massachusetts Committee on Judicial Ethics, Opinion No. 2001-1.

²⁴ <http://www.scouting.org>.

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See Massachusetts Committee on Judicial Ethics, Opinion No. 2001-1.

²⁶ JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS at 302.

organizations.²⁷ The Committee therefore concludes that your participation in the BSA to the degree and in the manner you have described would not reflect adversely on your impartiality to a potential homosexual litigant.

For the Committee:

Joseph R. Slights, III
Chair, Judicial Ethics Advisory Committee

cc: Liaison Justice
Members of the JEAC

²⁷ See FLORIDA CODE OF JUDICIAL CONDUCT CANON 2 cmt. (“This Canon is *not* intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as *Boy Scouts*, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross.”) (emphasis added); Massachusetts Committee on Judicial Ethics, Opinion No. 2001-1 (Stating that Canons 2 and 5 are not always implicated by a judge’s involvement with the BSA by drawing a distinction between an “issue-oriented” organization whose “issues were likely to be presented in the courts of the Commonwealth” and an organization like the BSA which, although it has a “policy of excluding gays and lesbians from membership, that is not the stated purpose of the organization and it apparently does not engage in advocacy litigation directed toward that end.”).