

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

The Hon. Stephen P. Lamb, Chair
The Hon. Barbara D. Crowell, Vice Chair
The Hon. Mardi F. Pyott, Secretary
The Hon. James T. Vaughn, Jr.
The Hon. Kenneth S. Clark, Jr.
The Hon. Sheila G. Blakely
The Hon. Joseph R. Slight, III

August 26, 2004

The Honorable

JEAC 2004 -2

***RE: Opinion of the Judicial Ethics Advisory Committee
Whether arrangements with a former law firm for withdrawing from
and severing financial ties are sufficient to meet the requirements of
Canon 5C of the Delaware Judges' Code of Judicial Conduct.***

Dear _____ :

You have requested an opinion from the Judicial Ethics Advisory Committee (the "Committee") on whether your arrangements for withdrawing from and severing your financial ties with your former law firm, _____, are sufficient to meet the requirements of Canon 5C of the Delaware Judges' Code of Judicial Conduct.

You have advised the Committee, in letters dated June 3, 2004 and August 10, 2004, that the financial arrangements you have made or propose to make to conclude your withdrawal as a partner of your former firm are as follows:

1. Return of Capital

Your capital account balance, computed as of October 31, 2003, has been paid to you in full.

2. Payment for Current Work (Excluding Contingent Matters)

During your first year of service on the court, throughout which you are disqualified under Canon 3C(1)(b) from handling any cases in which your former firm is involved, your percentage interest in collected receivables for services performed before the date of your departure has been paid over to you monthly at the same time draws are paid to partners. Your understanding with your former firm is that, at the end of that one-year period of disqualification, you and your former firm will agree to a present value calculation of collectible accounts receivable then remaining outstanding pertaining to such pre-departure services, which will be paid to you as a lump sum by the end of November 2004.

3. Fee Awards for Contingent Fee Cases

When you were appointed, there were two pending contingent fee cases. Based on the work that was performed before your departure, you and your former firm have agreed to estimate the value of your interest in any anticipated proceeds from those matters to the extent they remain unresolved by October 2004. You are to be paid this amount in a lump sum by the end of November 2004.

4. Keogh and 401(k) Accounts

You had interests in certain investments as beneficiary of a Keogh plan trust in the name of your former firm. In accordance with the terms of that plan, you liquidated your interest in the trust and rolled over the proceeds into a separate IRA account administered for your benefit and at your expense by Charles Schwab & Co. You also had an account as part of your former firm's 401(k) plan that has been rolled over into a separate IRA account in your name and is administered at your expense by Charles Schwab & Co.

5. Retirement Payment

Your former firm determined that you were eligible beginning January 2009 to receive retirement income from the firm.¹ Thereafter, in order to avoid any long-term periodic payment obligation, you and the former firm agreed on a present value calculation of the future stream of payments. The present value of that lump sum amount either has been or will be paid to you before the end of November 2004.

¹ The former firm maintains an unfunded retirement plan that ordinarily requires 25 years of service. Before applying for appointment as a judge, you requested advice from the firm as to whether you would be eligible for a retirement benefit if you were appointed, notwithstanding that, based on the anticipated schedule for the appointment, you would be approximately 10 months short of meeting the 25 year requirement. The former firm has, on other occasions, waived the 25 year eligibility requirement for retiring partners and advised you that it would do so in your case.

Thus, you expect that all of your financial ties to your former firm will be severed by the end of November 2004.

The Committee Advice

Based upon the factual representations made in your letters of inquiry, the Committee believes that the financial arrangements you have made with your former firm meet the Canon 5C obligation to organize your financial dealings as to minimize the risk of conflict with your judicial duties. Moreover, once the last payment described above is made, the Committee believes that there will be no further basis for disqualification pursuant to Canon 3C.

The Applicable Canons of Judicial Conduct

Canon 5C reads, as follows:

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 a 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.

Canons 3C(1)(b), 3C(1)(c), and 3C(1)(d)(iii), also implicated by your request, provide, as follows:

C. Disqualification: (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned including but not limited to instances where:

(b) [T]he judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding;

(c) The judge knows that . . . the judge . . . has any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge . . . (iii) has a financial interest that could be substantially affected by the outcome of the proceeding.

Analysis

As your June 3, 2004 letter of inquiry recognizes, Canon 3C(1)(b) provides that you should disqualify yourself in any proceeding involving your former firm during the first year of your service as a judge. That period of general disqualification will often allow enough time for a newly appointed judge to completely sever financial relations with a former firm. In your case, the period of general disqualification will be exceeded by only a short time needed to determine the amount of and arrange payment of any remaining sums due to you.

In JEAC 2000-1, the Committee considered whether the fact that a judge held a note given by the judge's former firm in payment of the judge's partnership interest would cause the judge's disqualification beyond the one-year period of general disqualification. In its opinion, the Committee stated:

While there is nothing in the Delaware Judges' Code of Judicial Conduct which specifically addresses the issue, it has long been Delaware tradition that members of the Judiciary disqualify themselves from proceedings involving their former law firm until they are paid for their partnership interest in full,

any other financial ties are severed, and any cases pending at the time of their departure from private practice in which they have a financial interest are resolved. This view is in accord with that of many jurisdictions that have considered this issue. [footnote omitted]

The Committee further stated that:

Until you have been paid in full, the financial benefit you derive from your former firm's purchase of your former partnership interest could create the appearance of impropriety if you were to hear any case involving any attorney now associated with the firm. It is evident that you have an interest in the subject matter of any proceeding brought before you by the firm since any fees realized could theoretically be used to pay its debt to you. [footnote omitted]

The Committee cited and relied upon an article mentioned in your inquiry, Cynthia Gray, American Judicature Society, *Ethical Issues for New Judges* 3 (perm. ed., rev. vol. 2003) (hereinafter "*Ethical Issues*"). The article states, as follows:

[T]he majority rule is that a new judge is required to disqualify from cases involving the judge's former partner or firm for as long as the lawyer or firm is obligated to make payments to the judge regardless whether the obligation is a fixed amount or a percentage of contingency fees or accounts receivable.

Ethical Issues at 18.

Based on these authorities, it is the view of the Committee that you should continue to disqualify yourself from matters involving your former firm until all of

the payments described in your letters of inquiry have been made. Once that has happened, there is nothing to suggest that your prior financial ties to your former firm will necessitate any further disqualification on your part. In particular, the arrangements you have described, assuming all payments are made, should not amount to any continuing “financial interest” or other “interest” between you and your former firm within the meaning of Canons 3C(1)(c) and 3C(1)(d)(iii).

It is also the Committee’s view that the arrangements made with your former firm, as described above, are consistent with your duties under Canon 5C. As is discussed generally in *Ethical Issues*, at 8-11, a new judge may be paid for an interest in a law practice although a new judge may not share in profits earned after the judge’s departure. A judge may also “receive payment for work done on contingent fee lawsuits that were pending at the time he stopped practicing law.” *Ethical Issues* at 10. The arrangements you and the former firm have made to pay you for your capital and your interests in accounts receivable or work in progress as of the date of your departure (including contingent fee matters) appear to satisfy these norms. For example, *Arkansas Advisory Opinion 96-09* discusses payment for contingent fee matters and concludes that: “The judge and the firm should evaluate such matters as of the time of departure based on the likelihood of success, the likely recovery, and the amount of work performed to date . *** The

payment to the departing attorney may be in a lump sum or in installment payments that end at the earliest practicable date, ideally within a few months.” *Id.* at 2. As stated in your letter, you and your former firm plan to follow this procedure in placing a value on the contingent fee matters involved.

The arrangement described by you with respect to the Keogh and 401(k) accounts, as well as the unfunded retirement plan appear to fully sever other aspects of your financial relationship with your former firm. Of these, the unfunded retirement plan posed the greatest threat of disqualification under Canon 3C(1)(c) or (d), as the future financial condition of your former firm could bear on its ability to satisfy obligations to retired partners. Assuming, as is implied by your letters, that the present value calculation with respect to the firm’s retirement plan obligations was done at arm’s length using a market rate of interest, the arrangement you describe fully discharges your duty under Canon 5C to avoid the risk of conflict with your judicial duties. Because you were able to roll over both the Keogh and 401(k) account into separate IRAs in your name and for your benefit, those aspects of your arrangements present no further issue. In the Committee’s view, where the terms of a former firm’s retirement plan permit the new judge to withdraw assets held for the judge’s account from the plan, the new judge should do so. As suggested in *Ethical Issues* at 18-19, where the terms of

the plan do not permit the judge to withdraw assets from the plan (as, for example, where a minimum age stipulated for withdrawals has not been met), the nature of the issues that could arise out of a judge's continued participation in a former firm's retirement plan will depend on the nature and terms of the plan.

Finally, it is the Committee's view that, by arranging to sever all financial ties to your former firm within 13 1/2 months of your investiture, you have discharged your duty under Canon 5C to minimize the risk of conflict between your financial interests and the performance of your judicial duties. JEAC 2000-1 did not consider the question whether Canon 5C was also implicated by the fact that the duration of the note there at issue apparently exceeded the one-year period of disqualification found in Canon 3C(1)(b). Perhaps this is because the letter requesting the opinion stated that the former firm only occasionally represented clients in the judge's court. By contrast, your former firm is a frequent litigant in the Court of Chancery and your disqualification from all cases in which it is involved for any substantial period of time beyond the one year period of general disqualification could have substantially interfered with the proper performance of your judicial duties.

Conclusion

The Committee concludes that once the payments described above are made, you should be able to hear cases in which attorneys from your former firm act as counsel, provided there is no reason for your disqualification apart from the financial arrangements discussed in this opinion. Moreover, the Committee is of the view that, if all payments described by you are made on or before November 30, 2004, there is no reason to believe that you have violated Canon 5C in arranging for your withdrawal from your former firm and in severing the financial ties between you and that firm.

For the Committee,

Stephen P. Lamb, Vice Chancellor

Cc: The Honorable Jack B. Jacobs, Liaison to the Committee
Members of the Judicial Ethics Advisory Committee
The Honorable Stephen P. Lamb, Chair
The Honorable Sheila G. Blakely
The Honorable Kenneth S. Clark, Jr.
The Honorable Barbara D. Crowell
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