

JPC 1996-1
March 25, 1996

You request an advisory opinion on whether justices of the peace should disqualify themselves when a lawyer representing a party before them is a member of the Magistrates Screening Committee ("Committee"). The issue arises because criminal defense lawyers in Sussex County have asked justices of the peace to disqualify themselves on the ground that the deputy attorney general prosecuting the case is a member of the Committee.

The Governor established the Committee by executive order to assist in the merit selection of justices of the peace. The Committee's purpose is "to recruit potential candidates, assess their qualifications and supply the Governor with the names of those candidates who are most qualified to serve."

The Committee is composed of nine members, no more than five of whom are lawyers or registered members of the same political party. The Committee's members reflect the broad diversity of the citizenry of Delaware. All records and deliberations with respect to persons under consideration are confidential and protected by executive privilege. Cf. Guv v. Judicial Nominating Commission, Del. Super., C.A. No. 94M-06-053, Ridgely, P.J. (April 7, 1995), appeal dismissed, Del. Supr., No. 170, 1995, Walsh, J. (Sept. 18, 1995)(ORDER).

The Constitution provides that the Governor, with the consent of a majority of the Senate, shall have the power to appoint judges. Del. Const. Art. III, § 9. The Committee merely screens candidates for the appointing authority. Although similar bodies are an important part of the merit selection process throughout the country, no precedent is reported in the Digest of Judicial Ethics Advisory Opinions published by the American Judicature Society. It may well be that no one has questioned a judge's impartiality on this ground.

The participation of lawyers is an essential element of the process. As officers of the legal system, lawyers have a special responsibility for the quality of justice. See The Delaware Lawyers' Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities. As professionals, lawyers are expected to base their evaluation on the judicial qualities demonstrated in a variety of situations rather than on the result of a particular case. A rule requiring recusal of a judge when a lawyer who serves on a merit selection body appears in a case would inevitably mean that any lawyer who practices before the courts could not serve in that capacity. Such a rule would deprive merit selection bodies of the informed professional perspective that only experienced litigators are able to provide.

An independent and honorable judiciary is indispensable to justice in our society. See The Delaware Judges' Code of Judicial Conduct, Canon 1. Because the tenure of qualified judges should be secure, the merit selection process affords particular protection to sitting judges. There are sometimes special voting requirements before a sitting judge may be found unqualified. For example, the executive order establishing the Judicial Nominating Commission ("Commission"), which screens candidates for the higher courts, provides as follows:

Sitting judges who are willing to be reappointed shall not be denied recommendation by the Commission except upon the affirmative vote of at least two-thirds of the members.

Merit selection bodies recommend against reappointment only when there is compelling cause for that result. Since sitting judges will have been deemed qualified when first appointed, the focus is likely to be on whether the actual performance of a candidate for reappointment has demonstrated the demeanor and diligence expected of a judge. See F. Michael Parkowski, "King Making and King Breaking," In Re, Feb. 1996, at 4 (describes operation of Delaware State Bar Association's Judicial Appointments Committee).

The existence of a formal process itself furthers fairness. Judges will inevitably be evaluated when they seek reappointment. In a formal process they are evaluated by persons whom the appointing authority considers competent to perform that function. Since merit selection bodies conduct an investigation to obtain a fair sample of opinion, complaints by litigants who have a grievance arising from a particular case can be considered in the perspective of a judge's overall performance. Persons who comment on a candidate's qualifications are expected to disclose how they know the candidate and the basis for their opinion. If the view of anyone, including members of the merit selection body, seems unduly determined by some contact with the candidate, other members can consider that in coming to their own independent conclusion.

Persons who participate in the merit selection process are expected to act ethically in the performance of this public service. See Robert A. Stein, "For the Benefit of the Nation," ABA Journal, March 1996, at 104 (describes American Bar Association's program of evaluating candidates for appointment to federal courts). The American Judicature Society's Handbook for Judicial Nominating Commissioners includes a sample ethical rule from Florida, which provides, in part, as follows:

In the performance of their duties, judicial nominating commissioners should be ever mindful that they hold positions of public trust. No commissioner should conduct himself in a manner which reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of nominees. Accordingly, a commissioner should not become an advocate for any prospect. Consideration of nominees should be made impartially, discreetly, and objectively. A commissioner should disclose to other commissioners all personal and business relationships with a prospective nominee that may indirectly influence his decision. If a substantial conflict of interest is apparent, the commissioner should disqualify himself from voting on further consideration of any affected prospect....

The Governor's Executive Order establishing the Magistrates Screening Committee provides as follows:

If any member of the Committee currently is an attorney for, client of, employer or employee of, or relative of any candidate, then such member shall disclose the

relationship to the Committee and shall not participate in the deliberations of the Committee concerning that candidate.

We are informed by lawyers who have served on the Committee or the Commission that even in the absence of a written rule, members disqualify themselves when their participation is perceived to be unfair.

Judges have a duty to hear and decide matters assigned, unless disqualified. Canon 3A(2). A judge should disqualify himself or herself in a proceeding when the judge's impartiality might reasonably be questioned. Canon 3C(1). A lawyer's membership on the Committee is not normally ground to reasonably question a justice of the peace's impartiality. On the other hand, there may be circumstances when recusal would be proper. For example, a justice of the peace whose reappointment is pending may recuse himself or herself when a lawyer who represents a party in a case involving strong emotions is unwilling to disqualify himself or herself from the Committee's deliberations.

In sum, justices of the peace should not recuse themselves from a case in which one of the lawyers is a member of the Magistrates Screening Committee, unless there are special circumstances in which the judge's impartiality might reasonably be questioned. Of course, a judge should disqualify himself or herself, whether or not requested to do so, whenever the judge doubts his or her ability to be impartial.

FOR THE COMMITTEE:
BERNARD BALICK, Chair