

**JPC 1985-2**  
September 30, 1985

The Judicial Proprieties Committee has considered your request of May 3, 1985 for an advisory opinion respecting the provisions of Canon 5E of the Delaware Judges' Code of Judicial Conduct.

You have indicated that for the past several years you have served as a part-time law teacher or professor at the Delaware Law School. None of this has interfered with your service on the Court. This year you will be teaching classes in labor law, an important segment of which involves arbitration. Many law professors act as arbitrators as an adjunct to their teaching activity, and we agree that it would be helpful to you in connection with your teaching work to serve as an arbitrator.

However, as a member of the Judiciary you are faced with the prohibition of Canon 5E which states that a judge should not act as an arbitrator or mediator. As you have noted, this flat prohibition is not accompanied by any Commentary, nor do there appear to be any helpful decisions on the subject.

Accordingly, the Committee has consulted the Reporter's Notes to the Code of Judicial Conduct, published in 1973 by the American Bar Association. That document contains a helpful discussion of the factors that led to the prohibition in Canon 5E. It notes that under the former Canons of Judicial Ethics judges were authorized to act as arbitrators for compensation provided such work did not "interfere with the due performance of . . . judicial duties, and is not forbidden by some positive provision of law".

The Committee charged with drafting the present Code examined various statistics on the use of judges as arbitrators and mediators. It also received information from other sources about potential conflicts inhering in a judge's acting as an arbitrator. These included the possibility that the arbitration proceeding could come before the Court on which the judge sits; the Court could be drawn into social and political controversies in which a judge acted as an arbitrator; the judicial office could be exploited in an effort to secure its dignity and prestige in support of an award; and judicial time could be diverted in a case in which a judge's fees would be thousands of dollars. As a result the drafting committee decided that the potential dangers outweighed the service and income supplementation values cited in support of arbitration activities by judges, and flatly prohibited the same. The Reporter's Notes also indicate that the same reasoning process led to the prohibition of a judge acting as a mediator.

While we are sympathetic to your interest in serving as an arbitrator, we believe there is no alternative, considering the plain language of the Code, and the reasoning outlined in the Reporter's Notes, but to advise you that in our opinion it would be a violation of the Code of Judicial Conduct for you to act as an arbitrator.

Andrew G. T. Moore, II, Justice  
Vincent A. Bifferato, Judge  
Robert W. Wakefield, Judge  
Paul E. Ellis, Judge