

To: NAWJ Members

From: Judge Lisa Walsh

Re: Florida Judicial Ethics Advisory Opinion on “Resolution Regarding Future NAWJ Conferences in Jurisdictions Where LGBTQ Protections Are Repealed or Where Discriminatory LGBTQ Laws are Enacted.”

Date: 8/26/21

Attached, please find a recent opinion by the Florida Judicial Ethics Advisory Commission (“JEAC”), which may be relevant to the membership. It should be noted that there are conflicting ethics opinions from other states which reach contrary conclusions to those reached by the JEAC in Florida. In Florida, a judge may solicit an opinion from the JEAC interpreting the judicial canons on a particular issue. The JEAC has issued such an opinion. The JEAC reviewed a modified resolution offered by the NAWJ Resolutions Committee in April 2021. The JEAC describes the resolution as follows:

The proposed resolution is entitled “Resolution Regarding Future NAWJ Conferences in Jurisdictions Where LGBTQ Protections Are Repealed or Where Discriminatory LGBTQ Laws are Enacted.” The resolution recounts NAWJ’s mission, decries the enactment of “laws that void or repeal state or local protections against discrimination on the basis of sexual orientation, gender identity or gender expression, or have enacted laws that authorize or mandate, authorize or condone discrimination on the basis of sexual orientation, gender identity or gender expression, including laws that create exemptions from anti-discrimination laws in order to permit discrimination on the basis of sexual orientation, gender identity or gender expression,” and would resolve that the NAWJ not select “any future site for an annual or midyear meeting without first taking into careful consideration” whether the site is located in a jurisdiction that has enacted the aforementioned laws. The language of the resolution does not specify any particular laws that would fall within its description but does provide a list of twelve states that have apparently enacted them (whatever they are). This list, as it presently stands, includes: Alabama, Idaho, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas. The inquiring judge informs us that Florida will likely soon be added to the list.

The JEAC interprets this proposed resolution to be a political statement which is a proposed boycott of in the listed states. The JEAC opines that NAWJ Florida members may participate in debate and vote on the proposed resolution. However, with respect to whether the resolution's passage would present any ethical issues for Florida judges who are NAWJ members, the opinion identifies the following concerns. First, the opinion concludes that the resolution constitutes a political statement which may cast doubt on the impartiality of a sitting judge who is a NAWJ member:

NAWJ is somewhat unique in one respect, though. Although it is obviously not a political organization (that would be subject to Canon 7's strictures), NAWJ is a group organized for *judges*.³ Thus, unlike civic groups, bar associations, and other law-related groups, when NAWJ publishes a statement, anyone who hears or reads it will associate the statement with a group of judges. We have not had an occasion to address the implications of a judicial organization espousing political statements on current laws. But we would have to believe that NAWJ's statements about legislation on political topics would likely enjoy a special platform of public consideration. The inquiring judge would have to carefully monitor the extent to which NAWJ's resolution, should it pass, becomes a feature of public discussion or awareness, and whether the judge's membership could

be construed as evidence of partiality on topics to which that resolution pertains.

Moreover, if the unidentified laws that are the subject of the proposed resolution were ever challenged in a court proceeding, any judge who is a member of a judicial group that has actively advocated against such laws would seem to be in a position where the State may legitimately question the appearance of that judge's impartiality. In such an instance, the member judge would have to consider Canon 3E(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .").

It should be noted that the resolution analyzed by the JEAC is a modified version of the original resolution proposed by the JGBTQ+ Committee in April. I am a Florida NAWJ member. I interpret this opinion to mean that if an issue arises which touches on the issues addressed in the resolution, I may be required to disclose NAWJ's resolution and disqualify myself on a proper motion.

Further, the JEAC advised that Florida judges must be cautious and continue to re-examine their relationships with existing organizations' activities to determine whether they may continue their affiliation:

In conclusion, we would repeat our cautionary advice in Florida Judicial Ethics Advisory Committee Opinion 98-31: "the 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 affiliation."

The full text of the JEAC opinion is attached.

Thank you,

A handwritten signature in blue ink, appearing to read "Lisa Walsh", is positioned above the printed name.

Lisa Walsh

**FLORIDA SUPREME COURT
JUDICIAL ETHICS ADVISORY COMMITTEE**

Opinion Number: 2021-11

Date of Issue: August 5, 2021

ISSUES

1. Whether a judge who is a member of the National Association of Women Judges may express an opinion among the association's membership as the association deliberates a proposed resolution calling for what appears to be a boycott against States whose laws, according to the resolution, have "voided or repealed protections against discrimination on the basis of sexual orientation, gender identity or gender expression, or have enacted laws that authorize or mandate [such] discrimination."

ANSWER: Yes

2. Whether a judge's continued membership in an organization that issues a resolution calling for a boycott based upon state legislation poses ethical problems under the Florida Judicial Canons.

ANSWER: Depending on the language of the resolution and its publication, possibly yes.

FACTS

The inquiring judge is a longtime member of the National Association of Women Judges ("NAWJ"). According to its website, NAWJ's mission "is to promote the judicial role of protecting the rights of individuals under the rule of law through strong, committed, diverse judicial leadership; fairness and equality in the courts; and equal access to justice." See www.nawj.org. NAWJ provides various programs for its members throughout the United States, including judicial education, mentorship, public and community service, and networking.

NAWJ has numerous committees, including an Annual Conference Planning Committee, Domestic Violence Committee, Human Trafficking Committee, Rural Courts Committee, Strategic Planning Committee, and several others. One that was recently created, the LGBTQ+ Committee,¹ has proposed a resolution to be deliberated and potentially adopted by the membership of NAWJ at an upcoming general membership meeting, conference, or vote.

The proposed resolution is entitled “Resolution Regarding Future NAWJ Conferences in Jurisdictions Where LGBTQ Protections Are Repealed or Where Discriminatory LGBTQ Laws are Enacted.” The resolution recounts NAWJ’s mission, decries the enactment of “laws that void or repeal state or local protections against discrimination on the basis of sexual orientation, gender identity or gender expression, or have enacted laws that authorize or mandate, authorize or condone discrimination on the basis of sexual orientation, gender identity or gender expression, including laws that create exemptions from anti-discrimination laws in order to permit discrimination on the basis of sexual orientation, gender identity or gender expression,” and would resolve that the NAWJ not select “any future site for an annual or midyear meeting without first taking into careful consideration” whether the site is located in a jurisdiction that has enacted the aforementioned laws. The language of the resolution does not specify any particular laws that would fall within its description but does provide a list of twelve states that have apparently enacted them (whatever they are). This list, as it presently stands, includes: Alabama, Idaho, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas. The inquiring judge informs us that Florida will likely soon be added to the list.

¹ The initials, “LGBTQ,” have become a popular shorthand reference to lesbian, gay, bisexual, transgender or transsexual, and “queer” or “questioning.” Some iterations of this abbreviation also include an “I” for “intersex,” an “A” for “asexual” or “ally,” and a “+” symbol that connotes various other concepts of gender and sexuality not encompassed within the other letters.

The inquiring judge poses two questions: can the inquiring judge participate in NAWJ's deliberations and express an opinion on this proposed resolution; and, assuming the resolution is adopted, would that pose any ethical issues for the inquiring judge.

DISCUSSION

Judges are encouraged to be active in civic, bar, and law-related organizations “devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice,” *see* Fla. Code Jud. Conduct, Canon 4D, and NAWJ clearly constitutes such a group. Such associations do important work to help advance the rule of law, public confidence in the judicial system, and judicial engagement with the communities judges serve. At times, however, these same groups may assume political positions or advocate for substantive changes in the law. *See, e.g.*, Fla. JEAC Op. 21-01 (advising that a judge should not maintain membership in a voluntary bar association that endorses a candidate for appointment as a U.S. Attorney); Fla. JEAC Op. 01-15 (“Judicial membership in a voluntary bar association that endorses judicial candidates violates Canons 4A(1) and 5(A)(1). Membership would cast reasonable doubt upon the judge’s capacity to act impartially as a judge.”); Fla. JEAC Op. 98-31 (advising that a judge may maintain membership in the Florida Association of Women Lawyers as it supported a proposed constitutional amendment); Fla. JEAC Op. 84-13 (advising that a judge could serve as chairman of the Family Law Section of The Florida Bar, even though the section actively filed amicus briefs in Florida appellate courts, but cautioned that the judge “avoid direct involvement in any activities of the Family Law Section which could reflect adversely on your impartiality as a judge”).

The content of the proposed resolution before NAWJ appears to be another potential instance of a law-related group assuming a political position. The resolution denounces substantive, enacted laws that it deems “discriminatory” towards certain individuals and goes so far as to identify states that apparently have enacted such “discriminatory” laws—it is a political statement concerning an issue of political debate. The resolution’s directive to “first tak[e] into

careful consideration” whether to schedule future conferences at any of the purportedly offending states appears to be a call for a boycott—which is a widely recognized method of expressing a political view or effectuating a political change. In short, we construe this proposed resolution as what it plainly is: a political statement on a current political issue.²

The inquiring judge may discuss and debate the proposed resolution within the confines of NAWJ’s membership. There is no ethical prohibition to that kind of activity. Because the inquiring judge assures us that the deliberations and discussion on the resolution’s vote will remain within NAWJ and not be disseminated to the public, the judge is free to voice the judge’s views and opinions among NAWJ’s membership.

The second issue poses a more difficult question. At this time, NAWJ has not actually passed a resolution on this topic, and even if it does in the future, the final resolution may be worded very differently than the one which has been presented to us. Moreover, while we suspect from the tone of the proposed resolution that its proponents intend to publicly disseminate the resolution’s passage (assuming it garners sufficient support), that may not be the case. It may be that if the

² We recognize that another state’s judicial ethics advisory body has reasoned that NAWJ’s potential advocacy on this point is simply “intended to improve the law, the legal system or the administration of justice” See New York Advisory Committee on Judicial Ethics Op. 21-81. That premise, however, rests on the tacit assumptions that: (a) the laws in question (whatever their content) are pejorative and discriminatory in their operation and intent; and that, therefore; (b) advocating against such laws would necessarily constitute an improvement in the law or legal system. Framing NAWJ’s potential advocacy in that manner seems a tad stilted and, we fear, could lead an advisory committee such as ours into political waters on political questions (where laws with which the committee may happen to disagree are deemed “ethical” to advocate against, while other laws with which the committee agrees become “unethical” for a judicial officer to publicize any disagreement with).

resolution is adopted, it is not publicly promoted but made available to the public (such as NAWJ's bylaws, which are publicized on its website). However, assuming passage and some kind of publicity of or public access to the proposed resolution, and in the interest of providing the most comprehensive response possible, we would offer these observations to the inquiring judge about whether such potential actions by NAWJ could potentially pose issues for a member judge in Florida.

Pertinent to this part of the inquiry are the following canons: Canon 5A ("A judge shall conduct all of the judge's extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality . . ."); Canon 4A ("A judge shall conduct all of the judge's quasi-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality . . ."), and Canon 2A ("A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

We have construed these judicial canons to advise judicial officers that they may maintain membership in nonpolitical, nonpartisan organizations that occasionally espouse political viewpoints. For example, a divided Committee opined in Florida Judicial Ethics Advisory Committee Opinion 95-46 that a judge could maintain membership in the American Board of Trial Advocates (ABOTA), a nonpartisan, nonpolitical organization whose membership is equally split between civil plaintiff and defense attorneys, even though ABOTA has, on occasion, lobbied state and federal legislatures regarding legislation. Judges may be members of the National Association for the Advancement of Colored People (which we deemed was a nonpolitical organization), see Fla. JEAC Op. 20-22, as well as the National Rifle Association, see Fla. JEAC Op. 09-13. Indeed, we have advised that a judge may continue to be a member of the American Israel Public Affairs Committee, even though we assumed the organization was "primarily a lobbying group." See Fla. JEAC Op. 01-13.

On the other hand, in Florida Judicial Ethics Advisory Committee Opinion 95-21 we advised that membership in the Academy of Florida Trial Lawyers, an organization “devoted to the improvement of the law, the legal system, and the administration of justice,” was prohibited under Canon 4A, notwithstanding the generalized aspirational goals of the organization. We concluded that it was ethically impermissible because the Academy required certification that less than 40% of a member’s practice was devoted to defense work. As one of our members commented, such membership could have attorneys “saying, ‘Hey, She’s a Plaintiff’s judge’ or ‘He belongs to the Academy.’” *Id.*

What can be synthesized from all these prior opinions is that maintaining the appearance of impartiality is a paramount concern when we examine these membership inquiries. So mere membership in a nonpolitical organization that sometimes professes a political viewpoint will ordinarily not run afoul of the judicial canons—if that membership, in and of itself, would not give rise to an appearance of partiality.

NAWJ is somewhat unique in one respect, though. Although it is obviously not a political organization (that would be subject to Canon 7’s strictures), NAWJ is a group organized for *judges*.³ Thus, unlike civic groups, bar associations, and other law-related groups, when NAWJ publishes a statement, anyone who hears or reads it will associate the statement with a group of judges. We have not had an occasion to address the implications of a judicial organization espousing political statements on current laws. But we would have to believe that NAWJ’s statements about legislation on political topics would likely enjoy a special platform of public consideration. The inquiring judge would have to carefully monitor the extent to which NAWJ’s resolution, should it pass, becomes a feature of public discussion or awareness, and whether the judge’s membership could

³ According to NAWJ’s website, membership is open to “federal, state, tribal, military and administrative law judges, as well as judicial clerks, attorneys and law students,” and includes both men and women. As its name implies, however, NAWJ’s focus is clearly on the judiciary.

be construed as evidence of partiality on topics to which that resolution pertains.

Moreover, if the unidentified laws that are the subject of the proposed resolution were ever challenged in a court proceeding, any judge who is a member of a judicial group that has actively advocated against such laws would seem to be in a position where the State may legitimately question the appearance of that judge's impartiality. In such an instance, the member judge would have to consider Canon 3E(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .").

In conclusion, we would repeat our cautionary advice in Florida Judicial Ethics Advisory Committee Opinion 98-31: "the 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 affiliation."

REFERENCES

Fla. Code Jud. Conduct, Canons 2A; 3E(1); 4A; 4D; 5A
Fla. JEAC Ops. 84-13; 95-21; 95-46; 98-31; 01-13; 01-15; 09-13;
20-22; 21-01
New York Advisory Committee on Judicial Ethics Op. 21-81

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate.

Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission, and to the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is

not bound by the interpretive opinions of the Committee. See *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So. 2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with a Committee opinion as evidence of good faith. See *id.*

The Committee expresses no view on whether any proposed conduct of an inquiring judge is consistent with substantive law which governs any proceeding over which the inquiring judge may preside. The Committee only has authority to interpret the Code of Judicial Conduct, and therefore its opinions deal only with whether the proposed conduct violates a provision of that Code.

Members: Judge Michael Andrews, Judge Roberto Arias, Judge Nina Ashenafi-Richardson, Judge W. Joel Boles, Judge Miguel de la O, Judge James A. Edwards, Judge David Green, Mark Herron, Esquire, Judge Jeffrey T. Kuntz, Judge Matthew C. Lucas, Judge Michael Raiden, and Charles Reynolds, Esquire.

For further information, contact **Judge Nina Ashenafi-Richardson, Chair of the Judicial Ethics Advisory Committee**, 301 S. Monroe Street, Room 265-B, Tallahassee, FL 32301 or JEAC@flcourts.org.

All Judicial Ethics Advisory Committee opinions, subject matter indices, and a search engine are available on the Sixth Circuit's website at **www.jud6.org** under *Opinions*. Committee opinions and related finding tools are also accessible on the Florida Supreme Court's website at **www.floridasupremecourt.org** as a secondary posting under *Opinions*.

Copies furnished to:

Inquiring Judge (name deleted)
Chief Justice Charles T. Canady, Justice Liaison

John A. Tomasino, Supreme Court Clerk
All Committee Members
Alexander J. Williams, General Counsel of the JQC.
Melissa Hamilton, Staff Counsel