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Judicial Ethics Advisory Committees *by Cynthia Gray*

Every case in which a judge presides requires a judge to consider whether disqualification is necessary, and every off-the-bench action requires a judge to consider whether there is a conflict with judicial obligations. A judge needs to evaluate, not only if conduct would violate a specific provision in the code of judicial conduct, but also whether it would create an appearance of impropriety. When faced with these ethical issues, judges benefit from the objective view of experienced colleagues.

To provide that guidance, 43 states, the District of Columbia, and the U.S. Judicial Conference have established judicial ethics advisory committees to which judges can submit inquiries regarding the propriety of contemplated future action under the code of judicial conduct. In ten states, advisory opinions are issued by the judicial discipline commission (Alabama, Alaska, Georgia, Hawaii,

Indiana, Minnesota, Missouri, North Carolina, Ohio, and West Virginia). In most states, the two roles are separate, and the advisory committee is usually created by the state supreme court with members who are judges or retired judges.

In 2008, the Connecticut and California supreme courts created the newest advisory committees for judges. So far, the Connecticut Committee on Judicial Ethics has issued one formal opinion (on serving on the board of a legal aid agency) and almost 40 informal opinions.

The California Supreme Court Committee on Judicial Ethics Opinions will begin developing formal opinions in July 2009. Requests for oral advice will be referred to the California Judges Association's Judicial Ethics Committee,

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Speaking to the Appropriate Audience *by Cynthia Gray*

In general, judicial ethics committees have encouraged judges to participate in a wide variety of educational programs. For example, advisory committees have stated that judges:

- may speak about on-line predators to community groups, including parent/teacher organizations (*Florida Advisory Opinion 2006-30*);
- may teach a trial skills course at a dependency court improvement summit sponsored by the Department of Children and Families that is open to all attorneys (*Florida Advisory Opinion 2008-21*);
- may attend a "brown bag" lunch series with members of a local bar association to discuss general issues of law and appellate practice (*New York Advisory Opinion 06-126*);
- may be a panelist at a meeting, sponsored by a non-

profit group and open to the public, about changes to a statute involving termination of parental rights (*New York Advisory Opinion 06-53*);

- may act as the judge in a mock jury trial presented by the county bar association as continuing legal education (*New York Advisory Opinion 09-26*);
- may speak to students and teachers at a public elementary school about good character (*Pennsylvania Informal Advisory Opinion 1/20a/04*); and
- may participate on a panel designed to train foster parents (*Utah Informal Advisory Opinion 06-4*).

The advisory committees do qualify that permission to ensure that the judge's teaching activities do not give rise to the perception that the judge is biased or has a predisposi-

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Recent Judicial Ethics Advisory Opinions: Bar and Judges' Associations

 A judge may participate in a short informational video about a bar association's volunteer lawyers program. *Alabama Opinion 07-874.*

 A judge may belong to a judges' organization that is sponsored in part by contributions from a vendor/legal publisher provided active judges do not solicit the contribution and, if the sponsor has a contractual or business relationship with a court upon which the organization's members sit, the contributions are insignificant and would not convey the impression that the sponsor is in a special position to influence the members. A judge may attend a conference or social event at a conference that is sponsored, in part, by a law firm that practices in the judge's court, a vendor that may contract to provide a product or service to the judge's court, or an entity likely to have cases in the judge's court provided the contributions are insignificant, the solicitations were not made by sitting judges, and the contributors are not publicly acknowledged in a way that creates the impression that the judge is lending the prestige of office to advance the private interests of the contributor. A judge whose court is currently negotiating with the vendor for a contract should not attend an event if the judge is aware that the vendor is a significant contributor to the event. *Washington Opinion 08-7; Washington Opinion 08-8.*

 Judges may attend the annual luncheon of the judicial section of a bar association when another section of the bar association subsidizes the cost and may invite a speaker to address the judges who attend about financial planning and retirement, but may not permit the speaker to promote retirement seminars or refer the judges to vendors of financial products who will be in the corridor outside the luncheon location. *New York Opinion 08-188.*

 A judge may attend a local bar association's judicial reception as a complimentary guest even though others attending must pay and the event is underwritten by one or more entities. *New York Opinion 09-66.*

 A judges' association may not use a friends committee to solicit wine or other goods or money to buy door prizes or other items at the association's meeting. Although a famous entertainer may perform at the meeting for free or at a substantially reduced fee, the presi-

dent of the association may not write to the entertainer, who is not known to the president, asking the entertainer to do so. *New York Opinion 06-67.*

 A magistrates' association may hire a public relations firm, but the association and particularly its officers are responsible for and should review and approve in advance any comments made or actions taken by the firm on the association's behalf. *New York Opinion 06-50.*

 A judge may be a member of the Colorado District Judges' Association even though dues are used to hire a lobbyist to advance the members' interests and may solicit membership dues from other judges over whom the judge does not have supervisory or appellate authority. *Colorado Opinion 2008-6.*

 A judge may serve on the membership committee of the National Council of Juvenile and Family Court Judges. *Delaware Opinion 2007-4.*

 A judges' association may respond by letter to the "Statement by the New York State Commission on Judicial Conduct Regarding Judicial Compensation" as long as the response does not comment on any pending or impending matter. *New York Opinion 08-114.*

 A judges' association should not co-sponsor with advocacy organizations a public forum to educate the community about a recent court of appeals decision and to encourage members of the community to advocate for the appointment of judges who are of the same persuasion as the association's members. *New York Opinion 06-122.*

 A judge may serve on a Colorado Bar Association task forces that will consider whether the association should take positions on the Judicial Performance Commission and the death penalty. *Colorado Opinion 07-8.*

 A judge should not seek office in a contested election to the Vermont Bar Association's Board of Managers. *Vermont Opinion 2728-13 (2008).*

 A judge may serve on the board of trustees of the Kansas Bar Foundation. *Kansas Opinion JE-154 (2007).*

The Center for Judicial Ethics has links to the web-sites of judicial ethics advisory committees at <http://www.ajs.org/ethics/>.

Attending a Hearing with a Family Member

Whether a judge may accompany a family member to a court hearing requires a balancing of two concerns. On the one hand, “understandably,” a judge wants “to lend support to a family member in an emotionally trying situation.”

On the other hand, . . . members of the public . . . may see in [the judge’s] attendance an attempt, at the very least, to signal to the presiding judge [the judge’s] relationship to a litigant in the matter pending before him or her in the hope that that relationship may play a positive role in the litigation’s outcome.

Massachusetts Advisory Opinion 2008-4.

The Massachusetts judicial ethics committee addressed an inquiry from a judge about attending “as a witness and/or a party” a hearing before a clerk-magistrate regarding complaints from a neighbor about the family dog. The judge’s wife was the dog’s registered owner, but the judge was a witness to the dog’s behavior. *Massachusetts Advisory Opinion 2006-3.*

The committee noted that most citizens are not familiar with the division of responsibility and supervisory authority between clerk-magistrates and judges and, therefore, would view a clerk-magistrate as the judge’s subordinate, which “has the potential to make it appear that [the judge was] seeking, by [his] very presence, to communicate [his] interest in the matter and thereby influence the proceeding’s outcome.” On the other hand, the committee stated, the judge “should not be handicapped” by his judicial status from presenting “accurate,

factual testimony.”

The committee concluded that the judge could attend the hearing if it were reasonably likely that he “would be called on to offer factual testimony about an incident or incidents relative to the subject matter of the hearing.” The committee noted that, under those circumstances, because there was “legitimate and proper basis for [the judge’s] presence,” observers would not conclude that he was there “chiefly to send outcome-influencing signals to the presiding clerk-magistrate.” The committee also advised, however, that, if the judge was not likely to be called to testify or if his information could “be offered equally as well by others, . . . [the judge’s] presence would reasonably produce the appearance of impropriety and therefore [he] should not attend.”

In a subsequent opinion, the committee stated that, when a close family member

is involved in emotionally-charged litigation, the judge may testify at the trial if she has relevant factual information but may not voluntarily testify as a character witness. *Massachusetts Advisory Opinion 2008-4.* Even if the judge was not going to testify, the committee advised that the judge could attend the proceeding to lend moral support if the judge takes every reasonable precaution to prevent the appearance that she is seeking to influence the outcome. The committee stated that if, given the emotionally-charged nature of the proceedings, “reasonable people would likely expect to find close family members in attendance,” they would understand that the judge was attend-

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The judge should not interact with others in the courthouse in a way that reasonably conveys that she has the status of an “insider.”

Donations to Charitable Auctions

Judicial ethics opinions advise that a judge may donate items to be auctioned at a charitable fund-raiser unless the judge is identified as the donor or the item involves the personal participation of the judge. See, e.g., *Florida Advisory Opinion 01-9*; *Washington Advisory Opinion 93-10*; *Washington Advisory Opinion 06-1*. For example, a judge:

- may not agree to have lunch with a successful bidder at an auction for a charity (*Arizona Advisory Opinion 94-4*);
- may not allow a not-for-profit organization to auction

off dinner and drinks for 12 in the judge’s home (*Florida Advisory Opinion 01-9*);

- may not provide artwork or crafts made by the judge to a voluntary bar association’s fund-raising event (*Florida Advisory Opinion 03-16*);

- may not provide knives readily identifiable as made by the judge, who is moderately well known in custom knife-making and collecting circles, for sale at an auction to raise

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Judicial Ethics Advisory Committees *(continued from page 4)*

which has issued opinions and run an ethics hotline for judges for many years.

The states without committees are Idaho, Iowa, Michigan, Mississippi, Montana, South Dakota, and Wyoming. In addition, the advisory committees in several states appear to be dormant and have not issued a formal advisory opinion in several years. (South Dakota does have a Special Committee on Judicial Election Campaign Intervention, which issues advisory opinions to judicial candidates as well as reviews complaints about campaign conduct.)

In addition to allowing judges to ask questions, some committees invite inquiries from judicial candidates (Arkansas, Arizona, California, Florida, Nebraska, Nevada, Oklahoma, Utah, Vermont, and Wisconsin) and judicial employees (Arizona and Utah). Some may issue opinions on their own initiative (Indiana, Nebraska, Oklahoma, Virginia, and Vermont).

Types of inquiries

There are a few limits on what questions an advisory committee may answer.

An advisory committee cannot retroactively approve a judge's conduct. For example, the rules for the Virginia Judicial Ethics Advisory Committee provide: "The committee shall only issue opinions that address contemplated or proposed future conduct and shall not issue opinions addressing past or current conduct unless the past or current conduct relates to future conduct or is continuing." Other common caveats are illustrated by the rule for the Massachusetts Committee on Judicial Ethics that prohibits "opinions on hypothetical questions or on issues pending before a court, agency, or commission, including the Judicial Conduct Commission."

Moreover, the committees do not usually answer questions about substantive law other than the code of judicial conduct. For example, the New York Judicial Ethics Advisory Committee stated that it could not respond to an inquiry about whether a judge may give effect to a new policy of the district attorney authorizing any police officer to prosecute traffic tickets even if the officer who appears to prosecute the ticket did not write the ticket (*New York Advisory Opinion 09-22*) and an inquiry about whether a

judge is required to assign counsel for unlawful possession of marijuana cases where the defendant cannot afford counsel (*New York Advisory Opinion 09-24*).

The effect

In most states, opinions from judicial ethics committee are advisory only and are not binding on the conduct commission or supreme court in discipline proceedings.

However, a conduct commission or court may consider compliance with an advisory opinion as evidence of good faith or even be required to do so, at least for the judge who made the inquiry. For example, in South Carolina, "in the discretion of the Commission on Judicial Conduct, an opinion of the [Advisory Committee on Standards of Judicial Conduct] may be considered as evidence of a good faith effort to comply with the Code of Judicial Conduct." The rules in Utah provide that "compliance

A conduct commission or court may consider compliance with an advisory opinion as evidence of good faith or even be required to do so at least for the judge who made the inquiry.

with an informal opinion shall be considered evidence of good faith compliance with the Code of Judicial Conduct." In Wisconsin, "if a judge or candidate for judicial office has requested and received a formal advisory opinion, compliance of the judge or the candidate for judicial office with that opinion shall constitute evidence of a good faith effort to comply with the code of judicial conduct in a judicial disciplinary proceeding based, in whole or in part, on the conduct for which the opinion was requested."

In Alaska and Hawaii, where advisory opinions are issued by the discipline commission, reliance on an advisory opinion by the judge who requested it is an absolute defense to a charge of misconduct concerning the identical facts addressed by the opinion. (In Alaska, only reliance on a formal advisory opinion is a complete defense; informal opinions, which are given verbally, have "no legal effect and, if in error, provide no recognized defense to a later disciplinary charge.")

In addition, in two states where the advisory committee is separate from the discipline commission, a judge who requests an advisory opinion and acts in compliance with it "is protected from a charge of violation of that ethics provision" (Maryland) and "shall not be subject to discipline" (Massachusetts). A formal advisory opinion by the Utah Judicial Council is a "binding interpretation of the Code of Judicial Conduct."

In Delaware, a judge who has requested and relied upon an opinion of the Judicial Ethics Advisory Committee “shall be entitled to introduce that opinion as evidence that conduct conforming to the opinion is prima facie permissible pursuant to the Delaware Judges’ Code of Judicial Conduct.”

Application

Some judicial ethics advisory committees include disclaimers in their opinions describing the effect and limits of the opinions. The Florida Judicial Ethics Advisory Committee’s is the most comprehensive:

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 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 by the Committee. . . . 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. . . .

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

Formal opinions

Some advisory committees provide for issuance of both informal and formal advisory opinions. For example, if the Ethics Committee of the Kentucky Judiciary finds a question “of limited significance, it shall provide an informal opinion to the questioner. If, however, it finds the question of sufficient general interest and importance, it shall render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form.” In Arizona, the chair of the Judicial Ethics Advisory Committee determines whether a request for an opinion should be resolved

formally with a written, published opinion by a majority vote of the advisory committee or informally by a letter or other communication from a member of the committee or its staff.

Some states provide for reconsideration of advisory opinions. For example, “a formal opinion may be reconsidered or withdrawn by the [North Carolina Judicial Standards Commission] in the same manner in which it was issued.”

A few states allow for review by the state supreme court. In New Jersey, “within 30 days after a judge is notified in writing of the response to the inquiry, or, if a formal opinion has been rendered, within 20 days after its publication, the judge, if aggrieved thereby, may seek review thereof by filing a notice of petition for review with the Clerk of the Supreme Court.”

The topics that give rise to the most inquiries are disqualification and community activities.

Topics

In 2008, judicial ethics advisory committees issued more than 450 written advisory opinions. The topics that give rise to the most

inquiries are disqualification and community activities. Other frequent areas for advice are acting as a reference or witness; court staff issues; family conflicts; financial activities; the conduct of senior, retired, or part-time judges; gifts; teaching, writing, and speaking; political activity; and campaign conduct.

Many advisory opinions are very topical. For example, in early 2008, during the presidential nomination season, three advisory committees answered inquiries about the propriety of judges participating in party precincts and primaries. Other opinions reflect trends in judicial administration. For example, recently, there have been several opinions addressing the concerns of judges presiding in problem-solving courts.

Most committees post their opinions online, and these sites may be searchable and have topic indices. The Center for Judicial Ethics has a link to advisory committee web-sites at http://www.ajs.org/ethics/eth_advis_comm_links.asp. There is a table with state-by-state information about judicial ethics advisory committees at <http://www.ajs.org/ethics/pdfs/Advisorycommitteetable.pdf>.

Judicial ethics advisory committees provide a great service to judges who want to adhere to the highest possible ethical standards while balancing the competing interests that define their role as judges. The value of the advice extends to the entire judiciary.

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Speaking to the Appropriate Audience *(continued from page 1)*

tion to decide matters in a particular way. Thus, at education programs, judges:

- should not discuss any pending or impending cases (*Colorado Advisory Opinion 2008-3; Connecticut Informal Advisory Opinion 2008-23; Florida Advisory Opinion 2006-30; Illinois Advisory Opinion 08-1; New York Advisory Opinion 06-126; Utah Informal Advisory Opinion 99-6*);
- should not make remarks that could result in disqualification (*Florida Advisory Opinion 2005-11*);
- should not commit to a particular legal position in a court proceeding (*Arizona Advisory Opinion 2003-8*);
- should not give legal advice (*Colorado Advisory Opinion 2008-3; Connecticut Informal Advisory Opinion 2008-23; Utah Informal Advisory Opinion 99-6*);
- should not answer hypothetical questions (*Florida Advisory Opinion 2006-30*);
- should not accept questions from those attending the program (*Connecticut Informal Advisory Opinion 2008-23*);
- should not suggest a particular interpretation of a disputed legal issue (*Connecticut Informal Advisory Opinion 2008-23; U.S. Advisory Opinion 108 (2008)*); and
- should not provide direct assistance in a particular case (*Connecticut Informal Advisory Opinion 2008-23*).

Law enforcement audiences

Further, concerns about maintaining a judge's impartiality may limit the type of audience appropriate for a judge's education efforts.

Although there is no absolute prohibition on a judge taking part in training for law enforcement officers, there are strict limits on the appropriate subject and content of the judge's presentation. On the one hand, advisory committees have stated that a judge *may not*:

- participate in a program to train law enforcement officers on how to prepare valid search warrants (*Arizona Advisory Opinion 03-8*);
- give a seminar on the elements necessary to successfully prosecute traffic cases for which police officers act as prosecutors (*New York Advisory Opinion 95-121*); or
- participate in programs to teach law enforcement officers how to be more effective witnesses in court (*Nevada Advisory Opinion JE08-11; Utah Advisory Opinion 88-5; U.S. Advisory Opinion 108 (2008)*).

Committees have advised that a judge *may*:

- teach constitutional law, including search and seizure, Florida statutes, the criminal justice system, and court procedures in the police academy at the local community col-

lege (*Florida Advisory Opinion 05-11*);

- train reserve police officers on appropriate courtroom attire and procedures (*Nevada Advisory Opinion JE08-11*);
- participate in a panel discussion to explain court procedures and operations as part of a sheriff's department training program (*New York Advisory Opinion 96-44*);
- teach a state fire police training course on the organization, duties, and responsibilities of fire police squads, safety, and laws pertaining to the position (*New York Advisory Opinion 06-15*);
- teach a vehicle and traffic law class to aspiring police officers as part of a local community college program (*New York Advisory Opinion 98-73*);
- lecture at a police training academy about what is expected from officers in the courtroom (*Virginia Advisory Opinion 01-4*); and
- teach police officers about recent developments in the law (*Virginia Advisory Opinion 01-4*).

The concerns that arise when a judge participates in training for law enforcement officers were described by the Arizona judicial ethics committee when it answered an inquiry from a judge (and former prosecutor) who had been invited by the Drug Enforcement Administration to teach law enforcement officers about the content of and legal requirements for a proper search warrant application. *Arizona Advisory Opinion 03-8*. One of the reasons the inquiring judge wanted to participate was "to prevent mistakes in the preparation of warrants, thus reducing the chance that a legally defective warrant might be approved by a judge who is awakened in the middle of the night to review it."

The committee noted that judicial participation in training or teaching law enforcement officers directly implicated judicial independence, integrity, and impartiality "and therefore must be approached with great caution."

The judge would be training officers on issues relating to search warrants that are routinely attacked by criminal defendants whose charges arise from the execution of the warrant. . . . Clearly, judges will put themselves in danger of being perceived as advocates for law enforcement if they embark upon a mission to train police officers on how to perform their duties. Additionally, were judges to do so, it would raise significant separation of powers issues. . . .

The committee also expressed concern that engaging in this type of training might put a judge in the position of hearing evidence on motions about search warrants from officers he had trained or having to testify that the officers had, or had not, followed the judge's instructions. The committee

acknowledged that better training of officers should lead to fewer mistakes in warrants but noted that most police agencies are connected with a prosecutorial office or have their own in-house counsel to advise them on such issues.

Similarly, the Nevada advisory committee stated that “courtroom training for police officers is primarily, if not totally, the responsibility of the police and prosecutors.” *Nevada Advisory Opinion JE08-11*. The committee noted that police officers may at some point appear before the judge on the prosecution side of a proceeding and are part of a different branch of government than judges. Thus, the committee concluded that a judge may not instruct police officers about appropriate demeanor when appearing as a witness in court, for example, tone of voice, hesitation or readiness in answering, carriage, evidence of surprise, gestures, zeal, expression, use of eyes, self possession or embarrassment, and air of candor or levity, although the committee did advise that a judge may teach about appropriate attire and court procedures.

In contrast, the Virginia advisory committee concluded that a judge could inform police at an educational activity about “propriety in the courtroom, the value of succinct and articulate answers, [and] the need to pay attention to questions and to answer them properly” because the judge could provide the same instruction to a civic club or a group of lawyers. *Virginia Advisory Opinion 01-4*. In general, the Virginia committee advised that a judge may participate in an educational activity to inform police about legal developments or procedures in the courtroom. However, the committee cautioned:

In an educational program for police, to the extent the judge presents himself or herself as an advocate for a particular approach to criminal enforcement or appears to be “coaching” police on how best to get convictions or otherwise causes himself or herself to be too closely identified with the police effort, the judge has crossed the line and placed into jeopardy the appearance of independence of the judiciary. Even if a judge participates in an acceptable educational forum but does so on a repeating or regular basis, he or she might also risk the appearance of being too closely associated with the police (or other sponsoring organization) so that independence could be reasonably challenged.

Because of the inherent dangers, advisory committees apply significant qualifications and urge judges to use caution if they decide to teach law enforcement officers. Thus, the judge:

- must also be willing and available to teach other interested groups on the same subject (*Arizona Advisory Opinion 03-8*; *California Advisory Opinion 58* (2006));
- must not make presentations on a frequent or regular basis (*Arizona Advisory Opinion 03-8*; *Virginia Advisory*

Opinion 01-4);

- may not suggest how the law should be applied or used by law enforcement officers, how they should do their jobs, or how to succeed in the judge’s court (*Arizona Advisory Opinion 03-8*);

- must not coach or otherwise assist police officers to prepare cases for trial or testify as witnesses (*California Advisory Opinion 58* (2006));

- should not advise officers how to obtain convictions (*New York Advisory Opinion 06-15*);

- should make clear that the judge’s statements are not intended as advisory opinions (*Arizona Advisory Opinion 03-8*);

- should not give instruction or advice on “how to” topics such as how to properly prepare a search warrant, how to testify in court, and how to conduct various law enforcement functions (*Arizona Advisory Opinion 03-8*); and

- should not advocate for particular police philosophies or prosecution tactics (*Arizona Advisory Opinion 03-8*).

But see South Carolina Advisory Opinion 22-2006 (judge may teach a class to police officers on driving under the influence, driving with unlawful alcohol concentration, and criminal domestic violence as long as the judge does not offer any personal opinions).

Government agency audiences

At closed government agency trainings, a judge may not provide guidance on the “in-and-outs” of practice before the judge’s court (*Connecticut Informal Advisory Opinion 2008-23*; *U.S. Advisory Opinion 108* (2008)) or give partisan advice on questions of strategy or tactics about how to succeed (*New York Advisory Opinion 06-77*). Answering an inquiry about whether a judge should accept an invitation to speak at an educational conference for county and city attorneys on dependency and neglect cases, the Colorado advisory committee stated that presenting on trial strategy would give the appearance that the judge was promoting the position of the department of social services over the position of respondent/parents or their children. *Colorado Advisory Opinion 2008-3*. *See also New York Advisory Opinion 08-49* (judge should not teach cross-examination techniques to attorneys newly employed by an institutional provider of indigent defense services that regularly appears in the judge’s court). *But see Arizona Advisory Opinion 03-8* (judge may participate in a program designed to teach prosecutors “the care and feeding of a superior court judge”).

Presentations on more neutral topics, however, are permitted. Topics approved by advisory committees include:

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- evidentiary issues in general (*Colorado Advisory Opinion 2008-3*);
- direct- and cross- examination (*Connecticut Informal Advisory Opinion 2008-23*);
- bench trial basics (*Utah Informal Advisory Opinion 99-6*);
- adult protective services (*Ohio Advisory Opinion 06-3*);
- a “view from the bench” (*New York Advisory Opinion 07-97*);
- judicial review of agency determinations (*New York Advisory Opinion 07-97*);
- issues of law and practice (*New York Advisory Opinion 07-15*); and
- appellate practice (*New York Advisory Opinion 06-77*).

An additional limitation on a judge speaking at a closed government agency training is that the judge must be willing and available to train attorneys representing the other side. *Colorado Advisory Opinion 2008-3*; *Connecticut Informal Advisory Opinion 2008-23*; *Illinois Advisory Opinion 08-1*; *Utah Informal Advisory Opinion 99-6*; *U.S. Advisory Opinion 108* (2008). Further, the New York advisory committee also cautioned that any attorneys directly and actively involved in a case that is currently in the midst of a trial before the judge should not attend a presentation by the judge. *New York Advisory Opinion 07-15*.

With those qualifications, judges have been permitted to:

- make a presentation at a closed meeting of the state county attorney’s association (*Colorado Advisory Opinion 2008-3*);
- participate on a panel with other judges at a continuing legal education conference limited to members of the attorney general’s office (*Utah Informal Advisory Opinion 99-6*);
- speak at a legal education program open only to prosecuting attorneys (*Illinois Advisory Opinion 08-01*);
- teach a course on adult protective services at a training program for employees of county departments of job and family services (*Ohio Advisory Opinion 06-3*);
- speak at a seminar for lawyers, staff, and interns of a state agency (*New York Advisory Opinion 07-97*);
- give a seminar to the staff attorneys of a public authority (*New York Advisory Opinion 06-77*); and
- appear at “closed” government-sponsored training pro-

grams for attorneys employed by a governmental entity (*U.S. Advisory Opinion 108* (2008)).

Specialty bar association audiences

Similarly, whether a judge may make a presentation to a specialty bar association depends largely on the content of the presentation. The Nebraska advisory committee stated that, based on the totality of the circumstances described in the promotional materials, a judge should not make a presentation on effective motions to suppress in a seminar about defense of driving under the influence cases sponsored by the Nebraska Criminal Defense Attorneys Association. *Nebraska Advisory Opinion 06-4*. The opinion noted that the tenor of the entire seminar was successfully defending DUI prosecutions; the organization had publicized the judge as an expert who, with

[A]dvisory committees apply significant qualifications and urge judges to use caution if they decide to teach law enforcement officers.

national experts, would be presenting his personal perspectives as a judge on what is effective and what is not effective when seeking to suppress evidence; at least some of the judge’s planned presentation could be perceived as providing instructions for challenging field sobriety testing; and there were additional concerns about fund-raising and lending the prestige of the judicial office to the organization.

The New Mexico judicial ethics committee has also advised that a judge may not speak about the domestic violence court over which she presides at a seminar of the state criminal defense lawyers association because prosecutors were not permitted to attend. *New Mexico Advisory Opinion 08-6*. Cf., *Massachusetts Advisory Opinion 02-1* (judge may participate as a speaker or panelist in educational programs sponsored by the Academy of Matrimonial Lawyer where the Academy does not favor any particular category of litigants).

In a joint opinion, the New York advisory committee answered inquiries about whether a judge could participate in a symposium on class actions sponsored by the National Consumer Law Center, which is composed of “consumer lawyers,” and a continuing legal education program sponsored by a legal services group that represents tenants, although there was no bar on who could attend. *New York Joint Advisory Opinion 03-84 and 03-89*. The committee concluded that a judge could participate in education programs sponsored by advocacy organizations involving lawyers who specialize in particular areas of the law on behalf of certain groups of litigants provided that the judge

does not instruct on questions of strategy or tactics. *See also New York Advisory Opinion 03-54* (judge may be a panelist and lecturer on the law of evidence at the annual meeting of the National Association of Criminal Defense Lawyers).

Advocacy group audiences

Not-for-profit groups involved in issues that arise in court proceedings pose similar concerns when judges are asked to take part in an informational program. (Additional issues are raised if the event is a fund-raiser or sponsored by a political organization.) Therefore, prior to agreeing to a speaking engagement, a judge should consider the nature of the organization. The relevant factors include:

- whether the organization advocates positions on disputed issues;
- whether the organization regularly engages in adversarial proceedings in court;
- whether the organization files amicus briefs on disputed issues;
- whether the organization endorses non-judicial political candidates;
- whether the organization subscribes to a particular legal philosophy or position that implies commitment to causes that may come before the court;
- whether the organization is devoted to the improvement of the law, the legal system, or the administration of justice; and
- whether the organization serves primarily a social function.

Washington Advisory Opinion 93-19.

Advisory committees have suggested that addressing an organization can constitute an identification with that organization's positions and, therefore, is prohibited if such an identification compromises the judge's impartiality. For example:

- A judge should not participate in a panel discussion of offender accountability and court compliance calendars at a domestic violence training program sponsored by a domestic violence advocacy group. *New York Advisory Opinion 08-116*
- A judge may not give an address on how juvenile cases are handled to an advocacy group, but may do so to a group that studies juvenile justice. *West Virginia Advisory Opinion* (December 11, 1997).
- A judge may not deliver a keynote address at the Crime Solvers Annual Banquet and the State Fraternal Order of Police Convention. *West Virginia Advisory Opinion* (February 19, 2002).

In contrast, the Illinois committee concluded that merely addressing an organization is not an implicit endorsement of the organization or its agenda. *Illinois Advisory Opinion 94-17*. Thus, that committee stated that judges are free, as long as they do not say anything that casts doubt on their impartiality, to speak before groups, such as court watchers or Mothers Against Drunk Driving, that advocate new legislation or changes in the enforcement of existing laws.

The Washington advisory committee stated that a judge may not speak at a MADD dinner on "The Role of MADD and the Court System" because to do so would cast doubt on the judge's capacity to impartially decide DUI cases. *Washington Advisory Opinion 96-9*. The committee concluded:

The advisory committees do qualify that permission to ensure that the judge's teaching activities do not give rise to the perception that the judge is biased or has a predisposition to decide matters in a particular way.

Singling out and defining the role of one advocacy group could create the appearance that the judge favors or listens to MADD associates more than other participants. Defining what should be the role of an advocacy group necessarily involves expression of a series of value judgements about the subject that might cast doubt on the judge's capacity to decide

DUI issues impartially.

See also Washington Advisory Opinion 95-8 (judge may not speak at a MADD dinner honoring the law enforcement officers who issued the most driving-under-the-influence citations in the past year).

In contrast, the Florida advisory committee stated that a judge could take part in a panel discussion of under-age drinking sponsored by the local MADD. *Florida Advisory Opinion 06-17*. The committee noted it had been "given no reason to believe that MADD plans to dictate the content of the panel discussion" and that the program's theme ("Start Talking Before They Start Drinking") was educational and its "premise (underage drinking is a problem) hardly seems controversial." The committee also emphasized that the judge could not participate if the judge would "be called upon to proclaim public support for, or be advertised as an endorser of, MADD or any of its legal positions." *See also Nebraska Advisory Opinion 01-1* (judge may welcome law enforcement officers and representatives of victim organizations to training sponsored by MADD if the judge does not say anything that suggests endorsement of the organization's policy objectives or training goals or otherwise cast doubt on the judge's impartiality).

(continued on page 10)

Speaking to the Appropriate Audience *(continued from page 9)*

Law firm audiences

Most advisory opinions that address the issue state that a judge should not participate in closed training programs offered by a law firm. Thus, a judge:

- should not preside over mock trials and give instructions at a national law firm's retreat that is exclusively for the members of that firm (*Florida Advisory Opinion 03-3*);
- should not accept speaking invitations from law firms and others that frequently appear in court (*New Jersey Advisory Opinion 1-89*);
- should not participate in a legal seminar that is conducted solely for the members of the sponsoring law firm (*Pennsylvania Informal Advisory Opinion 9/8/04I*);
- should not speak at a retreat hosted and financed by a law firm that is likely to appear before the judge (*South Carolina Advisory Opinion 36-2001*);
- should not present an overview of a particular type of case handled in the judge's court to an in-house law firm seminar attended by lawyers from the firm, its clients, and prospective clients even if the firm does not currently have a case pending in the judge's court (*Texas Advisory Opinion 262 (2000)*); and
- should not speak at an in-house CLE event sponsored by a law firm even if the firm allows lawyers not affiliated with the firm to attend without charge (*Texas Advisory Opinion*

276 (2001)).

The Texas advisory committee explained:

By presenting a legal overview of a case to an in-house law firm seminar attended by lawyers from the firm, its clients and prospective clients, the judge would not only be lending the prestige of her judicial office to advance the interest of that law firm, the judge would also be indirectly allowing the law firm to convey the impression to its clients and prospective clients that the firm has a special position of influence with the judge. It does not matter whether the law firm currently has a case pending in the judge's court or not.

However, two advisory committees have allowed a judge to participate in in-house law firm training at least if the judge is reasonably available for similar programs for other firms. See *Maryland Advisory Opinion 1988-2* (judge may occasionally speak on civil trial practice in the district court at after-work training session for young associates of a law firm where the only payment would be a dinner prior to the program); *Missouri Advisory Opinion 179 (2001)* (judge may appear at in-house programs of law firms likely to appear before the judge as long as the programs are not publicly advertised). 

Donations to Charitable Auctions *(continued from page 3)*

funds for community organizations (*Florida Advisory Opinion 07-4*);

- may not make a donation to a charity's fund-raising auction that requires the judge's personal participation, such as race car driving lessons or band performances (*New Mexico Advisory Opinion 08-4*);
- may not participate in a school's fund-raising auction by permitting the winner to sit with the judge during a court session and be the judge's guest at dinner (*New York Advisory Opinion 99-45*); and
- may not offer a dinner at the judge's home as an auction item for a bar association silent auction to raise funds for the pro bono program (*Washington Advisory Opinion Amended 95-6*).

The New Mexico advisory committee explained that to the extent the judge's donations are "truly anonymous . . . there is no concern that people will bid in order to impress" the judge or that the judge is lending the prestige of office to selected organizations. *New Mexico Advisory Opinion 08-4*. In contrast, the committee stated, when the judge is involved in fulfilling the donation by participating with the

successful bidder, people may feel that they could earn the judge's "respect and favor by lodging a high bid" for the judge's services, and "bidders may well be competing to develop a special relationship" with the judge. 

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Attending a Hearing with a Family Member *(continued from page 3)*

ing in her personal capacity.

Distinguishing the situation from the hearing regarding the dog addressed in *Massachusetts Advisory Opinion 2006-3*, the committee noted the trial was before a judge in a different department than the inquiring judge, rather than a clerk-magistrate, reducing “substantially the likelihood that a spectator . . . would reasonably view [the judge’s] attendance, without more, as an attempt to influence the outcome.” However, the committee cautioned that “the risk remains that trial dynamics may produce sudden and unexpected situations in which it is impossible to avoid an appearance that [the judge is] seeking to influence, even subtly, the outcome.”

The committee emphasized that the line between “permissible attendance” and impermissible if inadvertent use of the prestige of office to advance the family member’s interests “remains a very fine one and [the judge’s] attendance would not be without substantial risks.” In both advisory opinions, the committee identified steps the judge should take to reduce those risks:

- The judge should not refer to himself or permit others to refer to him as “judge” while in the courthouse.
- The judge should not interact with others in the courthouse in a way that reasonably conveys that she has the status of an “insider.”
- The judge should avoid any actions that a reasonable person might interpret as attempting to convey to the fact-finder his relationship to the family member involved in the litigation.
- Any testimony by the judge should be limited “to direct and succinct factual observations, without veering off into statements that commingle factual observations with legal conclusions.”

The New York State Commission on Judicial Conduct censured a judge for, in addition to other misconduct, sitting near her relatives in court during a felony hearing for her relative. *In the Matter of Thwaits*, Determination (New York State Commission on Judicial Conduct December 30, 2002) (www.scjc.state.ny.us). The brother of the judge’s daughter’s husband was charged with felony criminal contempt and stalking his estranged wife. Although the judge had disqualified herself because of her relationship with the defendant and his family, she attended the felony hearing in the court where the matter was transferred and sat in the small courtroom near members of the defendant’s family. Finding that it was improper for the judge to sit near her relatives during a felony hearing for her relative, the Commission stated that “her

presence, in a small courtroom with other family members who were present to show support for the defendant, could reasonably convey the appearance of lending her judicial prestige to support the defendant and his family.”

Observing

The New York advisory committee has issued a series of opinions answering questions about the permissibility of a judge’s attendance at court proceedings involving the judge’s child. For example, in *New York Advisory Opinion 99-24*, the committee advised that a judge could accompany her daughter to a small claims proceeding in which the daughter was a party and observe as a member of the audience but only if the proceeding was being held in another county and the judge was likely to remain an unknown observer. Other New York opinions state that a judge:

- may accompany her minor child to family court when the child testifies as the complainant in a juvenile delinquency case even if the presiding judge is likely to recognize the judge (*New York Advisory Opinion 07-178*);
- may attend and observe court proceedings involving his 21-year-old son “in the obvious role of parent” (*New York Advisory Opinion 07-205*); and
- may accompany and act as parental representative for a minor son at a hearing of the transit adjudication bureau on a summons he received for allegedly violating a statute regarding occupying subway seats (*New York Advisory Opinion 06-101*).

The committee also addressed whether a judge may observe when the judge’s child is appearing as an attorney in a courtroom. *New York Advisory Opinion 90-26* states that a judge may sit inconspicuously in the observers’ area of the courtroom with other observers to watch her daughter, a litigation attorney, but only in a county other than where the judge sits and only as long as the judge is unlikely to be recognized by the sitting judge. Similarly, the committee advised that a judge may discreetly sit as an ordinary spectator in the courtroom to observe his attorney/child arguing before a multi-judge appellate court. *New York Advisory Opinion 04-126*. 

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