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JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Vol 24, No 1 Spring 2002

Ethics and Judges' Evolving Roles Off the Bench: Service on Governmental Commissions by Cynthia Gray

The tension between the impetus for judges to become more involved off the bench and the ethical rules designed to ensure impartiality on the bench has led judges to seek advice from judicial ethics committees about their participation on governmental commissions that address such issues as domestic violence, juvenile justice, protection of children, substance abuse, victim services, and anti-crime initiatives. Dozens of opinions from many states address the propriety of a judge's involvement in such reform efforts.

The American Judicature Society, under a grant from the State Justice Institute, has published an essay that

analyzes those judicial ethics advisory opinions. The essay concludes that judicial involvement on issue-related governmental commissions is neither absolutely prohibited nor unconditionally permitted but depends on a wide variety of factors including the composition, agenda, and responsibilities of the particular commission. The essay considers the types of commissions for which judicial involvement is proscribed and the types for which it is permitted, and describes the limits of permitted judicial involvement. The essay emphasizes that judges should take affirmative steps to learn sufficient information to thoroughly analyze

whether participation would violate the code of judicial conduct. To offer guidance that judges, courts, and others can use to determine whether and to what extent a judge may become involved with a particular commission, the essay lists factors that make judicial participation more likely to be appropriate and those that make it less likely to be appropriate.

Following is an excerpt from the essay. Information about ordering the essay is available on page 11 or at www.ajs.org.

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Law Clerks' Acceptance of Perks from Future Employers

Judicial clerkships are generally short-term opportunities with the end date known before the clerkship starts. Clerks look for and accept other employment usually before the clerkship ends and sometimes even before the clerkship begins. That "practical reality" (*Arizona Advisory Opinion 00-3*) presents judges and clerks with questions about whether a clerk may

accept bonuses and other usual employment perks from a law firm that is the clerk's future employer.

Under the code of conduct for judicial employees in Arizona, an appellate court clerk's mandatory bar dues may not be paid by the law firm for which the clerk will work when the clerkship is completed if the firm appears in the court in which the clerk is

employed. *Arizona Advisory Opinion 00-3*. Canon 2B of that code provides: "Judicial employees shall not solicit or accept gifts or favors from attorneys, litigants or other persons known to do business with the court and shall not request or accept any payment in addition to their regular compensation

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Statements of Clarification and Correction: Exceptions to Confidentiality

by Cynthia Gray

Investigations of judicial discipline complaints are confidential in all states. In addition, in most states, dismissal of a complaint and other dispositions that do not result in the filing of formal charges (for example, a cautionary letter or private reprimand) are not made public. Approximately 25 states, however, have adopted an exception to confidentiality that allows the judicial conduct commission to release a statement of clarification and correction if a complaint against a judge has become public despite the confidentiality provisions. Those states include **Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, North Carolina, North Dakota, Pennsylvania, Vermont, Washington, West Virginia,** and **Wisconsin**. The precise circumstances in which the exception applies differ from state to state.

Generally, the exception may be used when an investigation or the subject of a complaint becomes public. Other triggers include when a judge is “publicly associated” with “violating a rule of judicial conduct or with having an incapacity” (**Washington**), “with having engaged in serious reprehensible conduct” (**Missouri, North Dakota**), or with having committed “a major offense” (**Missouri**) or violation of the code of judicial conduct (**North Dakota**). Some state rules expressly indicate that the investigation must have become public through sources independent from the commis-

sion, **Minnesota, Montana, North Carolina, Pennsylvania, Texas**), by the complainant, judge, third persons, or the law (**Idaho, Indiana, North Carolina**), or by the judge’s waiver of confidentiality (**Hawaii, Massachusetts, Minnesota, Montana**).

The rules in **Alabama, Colorado, Iowa,** and **Missouri** apply when there is broad public interest in the subject of the investigation (phrased “the sub-

Commission’s “determination by a majority vote that it is in the public interest to do so.”

In all states, the release of a statement is discretionary. In **Georgia** and **North Carolina**, the commission may release a statement at the request of the judge involved or on its own motion. In **California, Missouri, North Dakota,** and **Pennsylvania**, the impetus for the release is the request of the judge (in

Pennsylvania, the request must be in writing). The rules in **Hawaii** and **Minnesota** provide that any statement “be first submitted to the judge involved for comments and criticisms prior to its release, but the Commission on [Judicial Conduct (the Board on Judicial Stan-

standards in **Minnesota**)] in its discretion may release the statement as originally prepared.” In **West Virginia**, “prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.” In **California**, the judge submits a proposed statement and the Commission on Judicial Performance either issues the statement, advises the judge in writing that it declines to issue it, or issues a modified statement.

An explanatory statement commonly confirms that an investigation is pending (**Arizona, Arkansas, Hawaii, Idaho, Massachusetts, Michigan, Minnesota, Montana, Pennsylvania, Vermont, West Virginia, Wisconsin**) and clarifies procedural aspects of the disciplinary proceedings (**Alabama, Alaska, Arizona, Arkansas, Hawaii,**

Under some of the rules, explanatory statements are authorized when publicity about the confidential investigation results in substantial unfairness to the judge.

ject of widespread public concern” in **Colorado**). Under some of the rules, explanatory statements are authorized when publicity about the confidential investigation results in substantial unfairness to the judge (**Alabama, California, Missouri, North Dakota, Vermont**). In other states, the exception is used when the publicity threatens public confidence in the administration of justice or the justice system (**Alaska, Iowa, Missouri, North Carolina**). The rule for the **Louisiana** Judicial Commission provides that the Commission may issue a public statement “when sources other than the Commission cause notoriety concerning a judge or the Commission itself and the Commission deems that extreme circumstances dictate that the best interests of the judge or the Commission would be served” In **Michigan**, explanatory statements are issued on the Judicial Tenure

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Law Clerks' Acceptance of Perks from Future Employers *(continued from page 1)*

for assistance given as part of their official duties.” Although noting that this provision is aimed particularly at gifts given in recognition of services provided as an employee of the court, the Arizona advisory committee stated that the provision also addresses “the appearance of impropriety in accepting any gift from an attorney who does business with the court in which the employee is employed whether or not it is related to judicial services provided to the attorney.” The committee concluded “that it would be a violation of Canon 2B for a law clerk to accept a gift of payment of bar dues from a law firm.”

Alternatively, the Arizona judicial ethics committee considered whether payment of a clerk's bar dues should be considered, not a gift, but a benefit provided to all new associates by the law firm. In that interpretation, payment of the bar dues would constitute evidence of employment that would be inconsistent with the prohibition on a clerk engaging in secondary employment with any organization or a private employer that regularly conducts business with the court. *Arizona Advisory Opinion 00-3*.

The committee emphasized that a judge is required, under Canon 3B(5) of the code of judicial conduct, to direct a clerk who works for the judge not to accept the payment of bar dues from a law firm. However, after a clerkship ends, the committee stated, a former clerk may accept reimbursement of bar dues for the period of the clerkship if the law firm that employs the former clerk has a policy of reimbursing all new law school graduates hired for bar dues expenses incurred

between joining the bar and commencing employment. *Arizona Advisory Opinion 00-3*.

The Texas Supreme Court recently amended Canon 5 of its code of conduct for law clerks and staff attorneys to address acceptance of employment benefits from prospective employers (www.supreme.court.state.tx.us/Advisory/Ethics/ethics.html). The amendment followed a controversy

The new Texas rule cautions law clerks and staff attorneys to “participate only in such recruiting activity as would not detract from the dignity of their position or lend itself to an appearance of impropriety.”

about the signing bonuses that Texas law firms give to law students who will work for them after their clerkships with the state supreme court. The question raised was whether the clerks' acceptance of the bonuses violated the state's penal code provision that a public servant commits a criminal offense if he or she “solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.”

The new Texas rule permits law clerks and staff attorneys to “seek and accept other employment to commence after the completion of their employment” at the court but cautions them to “participate only in such recruiting activity as would not detract from the dignity of their position or lend itself to an appearance of improp-

riety.” Moreover, the canon also requires law clerks and staff attorneys to “restrict their recruiting travel to the home office or office of potential employment and limit reimbursement to those expenses reasonably related to the recruiting process.”

Under the Texas rule, law clerks and staff attorneys may not accept an employment benefit from a prospective employer “after they report for work with the Court and until their employment with the Court is ended” even if the benefit is one that is “equally offered by a prospective employer to all prospective employees.” Further, the canon provides:

In negotiating for other employment, the law clerk or staff attorney may not ask for or accept

compensation or other employment benefit or the promise of compensation or other employment benefit that is not made equally available by the prospective employer to other prospective employees based on similar academic achievement and work experience whether obtained through government or private sector employment.

The advisory committee for federal judges stated that a law clerk may not, during his or her service as a law clerk, accept any bonus given in anticipation of services to be provided for the clerk's future employer. *U.S. Advisory Opinion 83* (revised 1998). The committee was interpreting Canon 4E and Canon 4B(3) of the code of conduct for judicial employees and the Ethics Reform Act, 5 U.S.C. § 7353(a). Canon 4D provides that “a judicial employee should not receive any salary, or any

(continued on page 4)


Law Clerks' Acceptance of Perks from Future Employers *(continued from page 3)*

supplementation of salary, as compensation for official government services from any source other than the United States." Canon 4B(3) states that judicial employees "should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the courts." 5 U.S.C. § 7353(a) provides: "No . . . employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person – (1) seeking official action from [or] doing business with . . . the individual's employing entity; or (2) whose interest may be substantially affected by the performance or nonperformance of the individual's official duties."

The federal committee advised that a prospective law clerk is not prohibited from accepting a clerkship bonus, a signing bonus, or other bonuses before the beginning of the clerkship, noting the code of conduct for judicial employees applies only to "employees of the Judicial Branch," not to prospective employees. *U.S. Advisory Opinion 83* (revised 1998). Moreover, in contrast with the Arizona committee, the federal committee saw no problem with a law clerk's accepting reimbursement for relocation or bar-related expenses from a future employer whether the reimbursement is received before or during the clerkship. The committee noted regulations under the Ethics Reform Act that

specifically permit a judicial employee "who has obtained employment to commence after judicial employment ends" to accept "reimbursement of relocation and bar-related expenses customarily paid by the employer."

The advisory committee for federal judges recognized that "some judges may prohibit their future or present law clerks from accepting bonuses that are permissible under this opinion." Therefore, the committee advised present or future law clerks to consult with their judges before accepting any bonus or reimbursement of expenses from the clerks' future law firms. *U.S. Advisory Opinion 83* (revised 1998).

Canon 5E of the Delaware code of conduct for law clerks prohibits a law clerk from accepting "the payment of any bonuses or moving expenses until the end of the clerkship." However, the code allows a clerk to accept during the tenure of the clerkship reimbursement for the expenses of (1) traveling to and from an interview and (2) taking a bar examination and a bar review course. The clerk is required to "promptly inform the appointing judge" of such payments. 

Judicial Conduct Reporter Spring 2002

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Corrections

The **winter 2002** issue of the *Judicial Conduct Reporter* stated that the California Commission on Judicial Performance removed Judge Patrick Murphy from office for falsely claiming to be ill, giving non-judicial activities precedence over judicial duties; and persistent failure to perform judicial duties. Although the Commission did originally decide he should be removed (*Inquiry Concerning Murphy*, No. 157, Decision and Order (May 10, 2001)), the Commission later established that Murphy had resigned just before it rendered its original decision, and the Commission resolved that its action was to be considered a censure and also barred him from receiving any assignment, appointment, or reference of work from any California state court. Therefore, in 2001, there were 14 removals (not 15) and 17 public censures (not 16) as a result of judicial discipline proceedings nation-wide.

The **fall 2001** issue of the *Judicial Conduct Reporter* stated that one member of the Pennsylvania judicial ethics committee dissented from an advisory opinion (*Pennsylvania Advisory Opinion 2000-1*) that declared a judge may not sign a nomination petition for a candidate. That statement in the article "May a Judge Sign a Nominating Petition?" should have reflected that a substantial minority of the committee members dissented from the advice.



The 18th National College on Judicial Conduct and Ethics

October 24-26, 2002 • Chicago

The Center for Judicial Ethics will hold its 18th National College on Judicial Conduct and Ethics on **October 24-26, 2002**, at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois. Registration is \$250.

The National College provides a forum for commission members, staff, judges, judicial educators, and attorneys to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Thursday October 24 with registration. Friday through Saturday morning, there will be six sessions with several concurrent workshops offered during each

session. The topics for discussion are listed below.

The \$250 registration fee includes one set of conference resource materials, Friday luncheon, and a reception (with cash bar) on Friday evening. The Embassy Suites Downtown Lakefront has reserved a block of rooms for College participants at \$169 a night (single occupancy), plus tax. Reservations must be made with the hotel by **September 23, 2002**. Hotel registration information is on page 8.

The Center will apply for certification for continuing legal education credit for the College.

Concurrent Workshop Topics

Determining the Appropriate Sanction

Emphasizing the importance of articulating why a particular sanction is appropriate in a case, this session will examine criteria for sanctions, consider the factors frequently present in cases in which judges have been removed, and discuss cases in which the commission and the supreme court or dissenting members have differed on the question of sanction. **Faculty:** *Cynthia Gray*, Director, Center for Judicial Ethics

Disqualification

Looking at case law and advisory opinions, this session will consider the standard requiring disqualification "when a judge's impartiality might reasonably be questioned." When disclosure is required or appropriate will also be examined. **Faculty:** *Leslie W. Abramson*, Professor of Law, Louis D. Brandeis School of Law, University of Louisville; *Margaret J. Reaves*, Executive Director, Texas State Commission on Judicial Conduct; *Judge Michael J. Malone*, Administrative Judge and District Court Judge, Lawrence, Kansas

Ethical Guidelines for Commission Members

The benefits of adopting comprehensive ethical guidelines for judicial conduct commissions members will be discussed. Reviewing the guidelines adopted in several states, participants will also consider what areas such guidelines should cover and what the rules should be in areas such as political activity, disqualification, and contacts from com-

plainants and judges. **Faculty:** *Judge Gordon L. Low*, Member, Utah Judicial Conduct Commission; *John Morris*, Member, Pennsylvania Judicial Conduct Board

Ex Parte Communications

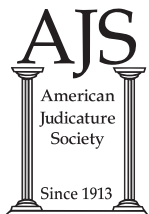
This session will cover issues relating to the prohibition on ex parte communications, including how long a case is "pending," what falls within the exceptions for communicating with court staff and other judges, and the remedy when an ex parte communication has occurred. **Faculty:** *James C. Alexander*, Executive Director, Wisconsin Judicial Commission; *Justice Gordon L. Doerfer*, Massachusetts Appeals Court

Issues for New Members of Judicial Conduct Commissions

New members will discuss topics such as the role of judicial conduct commissions, balancing judicial accountability and independence, and ensuring public confidence in the judicial discipline system. **Faculty:** *Victoria Henley*, Director-Chief Counsel, California Commission on Judicial Performance; *Judge David Waxse*, U.S. Magistrate Judge, Kansas

Judicial Speech

This session will discuss the tension between ensuring that the public understands of the justice system and guaranteeing that litigants have confidence that judges is impartial and their cases are being tried in the courthouse. Possible



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Check if you are a member of a judicial ethics advisory committee.

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page 8 and must be sent or faxed
to the hotel directly.**

questions for participants: What can a judge whose decision has been unfairly attacked do in response? How can a judge address problems requiring reform without undermining public confidence in the courts? **Faculty:** *Justice Randy J. Holland*, Delaware Supreme Court; *Jeffrey M. Shaman*, Professor, DePaul University College of Law

The Media and Judicial Discipline

This workshop will provide suggestions for addressing the challenges posed by media interest in judicial discipline cases and consider possible responses to common media criticisms of commission activities. Participants will consider the potential benefits and conflicts of being more responsive to media inquires and, for example, issuing press releases regarding public cases. **Faculty:** *Abdon Pallasch*, *Chicago Sun-Times*; *John Flynn Rooney*, *Chicago Daily Law Bulletin*; *Robert Tembeckjian*, Deputy Administrator, New York State Commission on Judicial Conduct

Misuse of Office

Can a judge's opponent receive a fair hearing in litigation? May a judge appear in an image campaign for the judge's alma mater? This session will examine classic examples of judges using the power or prestige of office to advance private interests and consider thorny issues regarding separating public role and private life in areas such as personal litigation, family problems, and community involvement. **Faculty:** *Judge Lorenzo Arredondo*, Lake County Circuit Court, Indiana; *Steven Scheckman*, Special Counsel, Judiciary Commission of Louisiana

Pro Se Litigants and Judicial Ethics

What ethical duties do judges have when dealing with pro se litigants? Should some of the code's restrictions be modified to allow judges to give more assistance to pro se litigants? These issues and others raised by the increase of self-represented litigants in the courts will be debated in this session. **Faculty:** *Judge Rebecca Albrecht*, Superior Court of Arizona, Phoenix; *Professor Jona Goldschmidt*, Loyola University of Chicago, Department of Criminal Justice

The Relationship Between Attorney Discipline and Judicial Discipline

This session will cover areas of overlapping concern between the attorney and judicial discipline systems such as discipline of judges for pre-bench conduct, discipline of former judges for conduct while on the bench, and discipline of judicial candidates. **Faculty:** *Jonathan Coughlan*, Office of Disciplinary Counsel, Ohio Supreme Court; *Mary Robinson*, Administrator, Illinois Attorney Registration and Discipline Commission

The Repercussions of the U.S. Supreme Court Decision in *Republican Party of Minnesota v. Kelly*

In 2002, the U.S. Supreme Court will decide whether a prohibition on judicial candidates announcing their views on disputed legal or political issues violates the First Amendment. This session will review the Court's decision and consider its ramifications for regulating judicial campaign speech and maintaining public confidence in the judiciary. **Faculty:** *Professor James J. Alfini*, Northern Illinois University College of Law; *Judge Charles J. Kahn, Jr.*, 1st District Court of Appeal, Member, Florida Judicial Ethics Advisory Committee

The Role of Public Members

Participants will share their experiences as public members of judicial conduct commissions and discuss what impact their perspective has on commission deliberations, commissioner training and qualifications, and the perception of the commission by the public and judges. **Faculty:** *Ann Borne*, Member, Indiana Judicial Qualifications Commission; *James Mick Middaugh*, Member, Michigan Judicial Tenure Commission; *Margarett E. Steele*, Member, Mississippi Commission on Judicial Performance

Rural Judges and Ethics

Participants will consider which ethical rules frequently raise compliance questions for rural judges and discuss how these problems can be addressed through education, advice, counseling, and enforcement. **Faculty:** *Judge Marc T. Amy*, Court of Appeals 3rd Circuit, Member, Louisiana Judiciary Commission; *Marla N. Greenstein*, Executive Director, Alaska Commission on Judicial Conduct

Settlement of Judicial Discipline Cases

Almost half of the public judicial discipline sanctions in 2001 were imposed pursuant to an agreement between the judge and the commission. The pros and cons of agreed dispositions for both judges and commissions will be debated in this session, and issues such as drafting and enforcement of agreements will be discussed. **Faculty:** *Carol Boothby*, Investigative Officer, Washington State Commission on Judicial Conduct; *John Strait*, Professor, Seattle University School of Law

Writing Judicial Ethics Advisory Opinions

What resources are available for researching judicial ethics advisory opinion requests? What are effective formats for advisory opinions? Should advisory committees be subject to review? How should opinions be distributed? Participants will share how they have solved these and similar issues in their states. **Faculty:** *E. Keith Stott, Jr.*, Executive Director, Arizona Commission on Judicial Conduct



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Statements of Clarification and Correction: Exception to Confidentiality (continued from page 2)

Massachusetts, Minnesota, Montana, North Carolina, Pennsylvania, Vermont, West Virginia, Wisconsin. Similarly, statements are frequently issued to defend or explain the right of a judge to a fair hearing (**Alabama, Alaska, Arkansas, Vermont, West Virginia**), without prejudgment (**Hawaii, Massachusetts, Minnesota, Montana, Pennsylvania, Wisconsin**), in accordance with due process requirements (**North Carolina**). Moreover, the statement may:

- correct any public misperception about actual or possible proceedings (**Maryland**).
- correct public misinformation (**Wisconsin**).
- confirm or deny the existence of a complaint (**Alabama, West Virginia**).
- state that the judge denies the allegations (**Arkansas, Hawaii, Massachusetts, Minnesota, Montana, Vermont, Wisconsin**).
- provide the judge's response to the complaint (**Pennsylvania**).
- supply information on the handling and status (**Georgia**), status and nature (**Iowa**), or status and procedural aspects (**North Carolina**) of the proceedings.

In several states, if an investigation or complaint has become public, the commission may make public its decision not to file charges against the judge, a decision that would otherwise be confidential. For example, the **Arizona** Commission on Judicial Conduct may disclose "the final disposition of a complaint," and the **North Carolina** Judicial Standards Commission may disclose "any official action or disposition by the Commission, including release of its written notice to the complainant or the judge of such action or disposition." In other states, the commission may disclose:

- information concerning insufficient cause to proceed or a finding

of no misconduct (**Colorado**).

- that the investigation is complete and that there is insufficient evidence for the commission to file a complaint (**Michigan**).
- that there is insufficient evidence for a finding of good cause (**Montana**).
- a matter has been dismissed (**Pennsylvania**).
- that there is no basis for probable cause to file a formal complaint (**Vermont**).
- its determination that there is no basis for further proceedings or a recommendation of discipline or retirement (**Missouri, North Dakota, Washington**).
- that an investigation has been completed and no probable cause was found (**Wisconsin**).

The **Alabama** Judicial Inquiry Commission recently relied on this exception to confidentiality rules to release public statements announcing that it had dismissed several complaints filed against the Chief Justice of the Alabama Supreme Court. The Alabama rule provides:

In any instance where accusations against a judge have been considered by the commission and it has been determined that there is no basis for the filing of charges against him or for further proceedings before the commission, the commission may, at the request of the judge, issue an explanatory statement.


Three complaints were filed against the Chief Justice arising from his statements about homosexuality in a concurring opinion in a child custody case. Both the Chief Justice's statements and the complaints were the subject of extensive media coverage. On March 21, 2002, the Commission released a public statement announcing that it "has dismissed a complaint made by the Lambda Legal Defense & Education Fund against Chief Justice Roy S. Moore relating to his concurring opin-

ion in *Ex parte H.H.* The Commission found no reasonable basis to charge a violation of the Alabama Canons of Judicial Ethics in connection with the complaint." On April 18, the Commission released a second public statement, explaining it had dismissed two complaints against the Chief Justice, finding "no reasonable basis to charge a violation of the Alabama Canons of Judicial Ethics in connection with one of the complaints, and no reasonable basis to investigate in connection with the other."

Examples of the exception follow.

Hawaii. In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the judge, the Commission [on Judicial Conduct] may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge to a fair hearing without pre-judgment, and to state that the judge denies the allegations. The statement shall be first submitted to the judge involved for his or her comments and criticisms prior to its release, but the Commission in its discretion may release the statement as originally prepared.

Idaho. If allegations against a judge are made public by the complainant, judge or third persons, the Judicial Council may, in its discretion, comment on the existence, nature, and status of any investigation.

Iowa. The chairperson [of the Commission on Judicial Qualifications] may issue one or more clarifying announcements when the subject matter of a complaint or charge is of broad public interest and failure to supply information on the status and nature of the formal proceedings could threaten public confidence in the administration of justice. 

Ethics and Judges' Evolving Roles Off the Bench: Service on Governmental Commissions

(continued from page 1)

Introduction

Judges are increasingly challenged to become involved off the bench in finding solutions for the societal problems that inevitably result in cases they will hear on the bench. Legislators, members of the executive branch, law enforcement, and advocacy groups assume that the judiciary will join them in laudable initiatives to deal with issues such as domestic violence, the needs of children and juveniles, and substance abuse. Public confidence in and support for the courts may be undermined if the judiciary is seen as standing aloof from society's problems and unwilling to cooperate in their resolution. Judges themselves often feel frustration knowing their decisions will have little impact if policies are not adopted, practices are not changed, and resources are not committed to address the underlying problems that cannot be solved from the bench.

On the other hand, as the code of judicial conduct makes clear, a judge's principal role is that of neutral arbiter, not social reformer or activist. Canon 1A of the 1990 American Bar Association Model Code of Judicial, for example, begins, "An independent and honorable judiciary is indispensable to justice in our society." Canon 2A states, "A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Precisely because social issues have repercussions in court cases, a judge's off-the-bench participation in issue-related governmental commissions may result in an identification or a perceived identification with one side in cases before the judge. Moreover, such involvement may give rise to an association with members of the legislative or executive branches, in-

cluding police and prosecutors, that further detracts from the judge's impartiality. Although the image of an impartial judiciary is more abstract than that of an activist judiciary, distorting the judge's role to an extent that impartiality is lost will have a substantial, negative impact on the courts' ability to do their job that will eventually undermine any immediate contribution a judge can make in even the most commendable project.

The Applicable Analysis

In general, a judge is prohibited from accepting an appointment to a governmental commission concerned with issues of fact or policy (Canon 4C(2)). However, commentary to Canon 4C(2) notes:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession

Therefore, as an exception to the general rule, Canon 4C(2) allows a judge to accept appointment to a governmental commission that is concerned with issues of fact or policy related to "the improvement of the law, the legal system or the administration of justice."

Like all of a judge's extra-judicial activities, however, a judge's acceptance of an appointment to a commission related to "the improvement of the law, the legal system or the administration of justice" is condi-

tioned on the appointment not "cast[ing] reasonable doubt on the judge's capacity to act impartially as a judge" (Canon 4A(1)). Indeed, commentary to Canon 4C(2) emphasizes:

The appropriateness of accepting extra-judicial assignments must be assessed in light of . . . the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Therefore, advisory opinions that state participation on a particular commission is permissible "subject to the requirements" of the code beg the question and cannot be considered persuasive in the absence of a more thorough analysis. Similarly, opinions that conclude that a particular commission is related to the improvement of the law and, therefore, approve judicial participation are incomplete and not authoritative because they do not also consider whether participation raises questions about the judge's impartiality.

Fundamentally, whether a judge may sit on any board or committee turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge. *Alaska Advisory Opinion 2000-1*.

When Canon 4A(1) and Canon 4C(2) are read together, a judge's participation on a particular commission depends on the answers to two questions: (1) Does the work of the commission concern "the improvement of the law, the legal system, or administration of justice"? and (2) Would par-

ticipation on the commission “cast reasonable doubt” on a judge’s capacity to act impartially?

Guidelines


The following factors, culled from advisory opinions, offer guidance to judges, advisory committees, and courts in determining whether judicial participation on a specific commission is acceptable under the ethical standards established in the code of judicial conduct.

Membership of a judge on a governmental commission is *more likely to be appropriate* if the commission:

- Is directly and primarily connected to how the courts function to deliver unbiased, effective justice
- Takes policy positions clearly central to the legal system and relating to matters arising in and directly affecting the judicial branch
- Serves the interests of those who use the legal system
- Relates to matters a judge, by virtue of judicial experience, is uniquely qualified to address
- Has a diverse membership that represents more than one point of view
- Recommends legislation that benefits the law and legal system itself rather than any particular cause or group
- Has a structure that will enable the judge to limit involvement to only those matters dealing with improvement of the law, the legal system, or the administration of justice

Membership of a judge on a governmental commission is *less likely to be appropriate* if the commission:

- Merely utilizes the law or the legal system as a means to achieve a social, political, or civic objective
- Is comprised of members who reflect one point of view

- Is comprised of members who will appear as witnesses before the judge
- Advocates the rights of specific participants in the justice system in specific cases
- Reviews judicial decisions in a court watch program
- Provides services, guidance, or support for victims, law enforcement, the prosecution, or defense in connection with court cases
- Adopts protocols that bind judges to exercise their judicial responsibilities in a certain way
- Establishes protocols that direct the conduct of non-judicial officials such as police and prosecutors
- Reviews fatalities or requests for clemency
- Recommends legislation making currently legal acts illegal and/or increasing penalties for existing criminal acts 



Ethics and Judges’ Evolving Roles Off the Bench: Serving on Governmental Commissions

by Cynthia Gray, Director,
AJS Center for Judicial Ethics

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