

*Key Issues in
Judicial Ethics*

**ETHICS AND JUDGES' EVOLVING
ROLES OFF THE BENCH: SERVING ON
GOVERNMENTAL COMMISSIONS**

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This essay was developed under grant #SJI-00-N-011 from the State Justice Institute. Points of view expressed herein do not necessarily represent the official positions or policies of the American Judicature Society or the State Justice Institute.

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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 code, 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."¹

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, including 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

1. Unless otherwise indicated, references to the canons of judicial conduct are to the 1990 American Bar Association Model Code of Judicial Conduct. The 1990 model code retained most of the basic principles of the 1972 ABA model code, but made several significant substantive changes and contains many differences in details. Although the model code is not binding on judges unless it has been adopted in their jurisdictions, forty-nine states, the District of Columbia, and the United States Judicial Conference (for federal judges) have adopted codes of judicial conduct based on (although not identical to) the 1972 or 1990 model codes. (Montana has canons of judicial ethics, but they are not based on either model code.)

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 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.² There are dozens of opinions from many states that address the propriety of a judge's involvement in such reform efforts.

This essay examines those advisory opinions to analyze the limits the code of judicial conduct places on a judge's ability to participate on governmental commissions. (Although this essay focuses on judicial participation on governmental commissions, it will note advisory opinions discussing participation in not-for-profit organizations where those opinions are relevant or illustrative.) 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 it describes the limits of permitted judicial involvement. Where different opinions appear to offer contrary advice, the essay examines whether the differences can be explained by a distinction between the commissions

2. Over 35 states and the United States Judicial Conference have judicial ethics advisory committees to which a judge can submit an inquiry regarding the propriety of contemplated future action. In approximately eight states, the discipline commission also issues advisory opinions, but in most states, those roles are separate. In most states, a judicial ethics opinion is advisory only and not binding on the discipline commission or the supreme court, although a judge's reliance on an advisory opinion may be considered evidence of good faith in a discipline case. *See* JUDICIAL ETHICS ADVISORY COMMITTEES: GUIDE AND MODEL RULES (Chicago: American Judicature Society 1996). AJS has links on its website (www.ajs.org) to judicial ethics advisory opinions from Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Michigan, Nevada, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

and participation under discussion or whether some of the opinions fail to apply an analysis that is consistent with the ethical rules and underlying public policy considerations.

Finally, 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, this essay lists the factors that make judicial participation more likely to be appropriate and those that make it less likely to be appropriate.

THE APPLICABLE ANALYSIS

As prominent leaders in their communities and experts in the legal system, judges are often asked to serve on governmental commissions, committees, councils, and task forces addressing serious social problems, particularly those that frequently give rise to court cases. In general, a judge is prohibited from accepting an appointment to a government 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, a judge is allowed 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” (Canon 4C(2)).

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 conditioned on the appointment not “cast[ing] reasonable doubt on the judge’s capacity to act impartially as a judge” (Canon 4A(1)).³ Indeed, commentary to Canon 4C(2) emphasizes:

3. Canon 4A would also prohibit a judge from accepting an appointment that “demean[ed] the judicial office; or . . . interfere[d] with the proper performance of judicial duties.” However, it has never been suggested that service on domestic violence task forces and similar commissions would demean the judicial office. Whether a judge has the time for such service without interfering with the proper performance of judicial duties is a determination that can be made only on a case-by-case basis by the judge.

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.⁴ 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.*⁵

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 participation on the commission "cast reasonable doubt" on a judge's capacity to act impartially?

4. See, e.g., *Minnesota Board on Judicial Standards Annual Report* at 10 (1993) (judge may participate in district violence councils subject to other provisions of code); *West Virginia Advisory Opinion* (June 23, 1997) (judge may participate in domestic violence coordinating councils as long as participation is consistent with code of judicial conduct and judge's impartiality is not placed in question).

5. In Alaska, the judicial ethics committee is the Commission on Judicial Conduct, which also investigates complaints about judicial misconduct.

DOES THE WORK OF THE COMMISSION CONCERN "THE IMPROVEMENT OF THE LAW, THE LEGAL SYSTEM, OR ADMINISTRATION OF JUSTICE"?

"[F]acets of almost every social problem facing today's society will play themselves out in the courts," and efforts to solve those problems will "have an impact upon the courts." *Massachusetts Advisory Opinion 98-13*. Moreover, "[l]aw is . . . a tool by which many . . . social, charitable and civic organizations seek to advance a variety of policy objectives." *U.S. Advisory Opinion 93* (1998). Therefore, not every issue that arises in court cases can be considered to be related to the improvement of the administration of justice or the exception for service on legal system-related commissions would swallow the rule prohibiting a judge from being a member of most governmental commissions.

Several advisory committees have identified factors for distinguishing between legal system-related commissions that are appropriate for judicial membership and commissions that do not fall within the exception. For example, the Utah judicial ethics committee stated that the exception is limited to commissions that are primarily and directly concerned with the improvement of the law, the legal system, or the administration of justice. *Utah Informal Advisory Opinion 98-11*. If the nexus is less direct or is incidental or tangential, or if the permitted subjects are just one aspect of a much broader mission or focus, the committee advised, service by a judge is not permitted.

Applying its analysis to a state anti-discrimination advisory council, the Utah committee noted that the "concept of justice is broad and is certainly relevant any time discrimination is being discussed . . ." but concluded that "[i]t is not enough that the Committee be concerned with justice in a broader sense." *Utah Informal Advisory Opinion 98-11*.

Therefore, service on a commission concerned with access to the justice system for victims of discrimination, the committee advised, would be appropriate, while service on a commission dealing with discrimination issues faced outside of the legal system would be precluded.

Similarly, the Utah committee advised that a judge could not serve on a government commission charged with recommending state-wide substance abuse and anti-violence policies; developing priorities for programs to combat substance abuse and community violence; and recommending executive, legislative, and judicial action based upon policy needs and identified gaps in the continuum of services. *Utah Informal Advisory Opinion 94-2*. However, in the same opinion, the committee approved service on a commission with the narrowly tailored mission of providing a forum for education, coordination, and communication on violence and drug-related issues that affect the total judicial system and enhancing multi-disciplinary cooperation while preserving judicial independence. Further, the Utah committee stated that a judge may participate on a county child abuse coordinating council designed to improve the management of child abuse cases and to achieve justice for victims and perpetrators. *Utah Informal Advisory Opinion 88-2*. It also stated that a judge may serve on the advisory board for a program that provides a comprehensive, multi-disciplinary, not-for-profit, inter-governmental response to sexual and physical abuse of children but should not participate in any discussions of issues outside of the neutral administration of children's justice. *Utah Informal Advisory Opinion 98-4* (noting that "the administration of children's justice is inherently a broader concept than the administration of justice in other areas").

The Florida judicial ethics committee noted that participation by judges on many commissions tangentially related to the justice system or the improvement of the law "has in some instances blurred the distinction between the branches of government," affecting "the public's perception of the independence of the courts from the executive and legislative branches of our governments." *Florida Advisory Opinion 2001-16*. Therefore, the committee concluded that a judge should not serve on a municipal children's commission charged with fiscal oversight of government funds even though "a creative justifi-

cation" could be made that the commission was tangentially related to the justice system.⁶

The advisory committee for federal judges distinguishes between activities "directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice," and those "merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." *U.S. Advisory Opinion 93* (1998). To determine whether participation is permitted, the U.S. committee noted two factors. First, the committee limited the phrase "improving the law" "to the kinds of matters a judge, by virtue of . . . judicial experience, is uniquely qualified to address." Second, it stated that a judge should determine "if the beneficiary of the activity is the law or legal system itself"—in other words, if the activity "serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or enhances the prestige, efficiency or function of the legal system itself."

The "clearest examples" of activities to improve the law, the federal advisory committee stated, are those addressing the legal process, the administration of the business of the courts, the delivery of legal services, and the codification of judicial decisions. However, noting that "[w]hether an activity benefits a specific constituency or the legal system as a whole will sometimes be a close question," the committee stressed that the question "should be answered by evaluating how closely related the substance of an activity is to the core mission of the courts of delivering unbiased, effective justice to all." Moreover, the phrase "improvement of the law, the legal system, and the administration of justice," the committee stated, applies not just to activities related to improvements in procedures or administration, but also to "activities directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than to benefit any particular cause or group"

The Indiana advisory committee defined a governmental committee concerned with the improvement of the law, the legal system, or the administration of jus-

6. The committee noted that in an earlier opinion it had suggested that a judge may serve on the board of a supervised visitation program because it was "tangentially related to the courts." *Florida Advisory Opinion 97-11*.

tice as “one whose concern with the legal system is direct and exclusive, such as a community corrections board or a committee assigned to consider changes in existing law.” *Indiana Advisory Opinion 2-01*.⁷ However, the committee stated, a “governmental commission with a tangential or partial nexus to the legal system, such as a board concerned with protection and advocacy for particular groups of citizens, or a commission established to study the social status of minorities, for example, likely does not have a sufficiently direct and exclusive concern with the legal system”⁸

The Massachusetts judicial ethics committee stated that, to come within the exception allowing service on legal system-related commissions, a governmental commission must have a “direct nexus” to how “the court system meets its statutory and constitutional responsibilities—in other words, how the courts go about their business.” *Massachusetts Advisory Opinion 98-13*. The committee applied its analysis to a city commission that assists communities to build partnerships with the police department and assists the police department to expand community policing. The committee did note that “law enforcement efforts do have an impact upon the courts” but rejected an expansive reading of “the administration of justice” that would include law enforcement efforts.⁹ Service on the policing commission was precluded, the committee stated, because it focused “on how the police department goes about its business.” The committee concluded that the city community policing commission had no direct involvement with “the improvement of the law,

7. In Indiana, the advisory committee is the Judicial Qualifications Commission, which also investigates complaints of judicial misconduct.

8. Under the Indiana code, service on governmental commissions that are not related to the administration of justice is not precluded altogether but is subject to prior approval by the Indiana Supreme Court. The committee defined a “governmental” commission as “one to which some or all of the appointees are selected by non-judicial elected officials or their designees.”

9. The “administration of justice” and the activities of law enforcement authorities are not always synonymous. Indeed, one of the roles of the judiciary in a democratic society is to protect citizens from corrupt, overzealous, or mistaken law enforcement agencies and prosecuting authorities. Therefore, advisory opinions that allow judges to serve on police-related commissions appear to apply too broad a definition of the administration of justice. See, e.g., *Alabama Advisory Opinion 91-429* (judge may serve on special committee created by city council to study and recommend proposals for assisting police department to more effectively carry out its responsibilities and for reducing and deterring crime); *Alabama Advisory Opinion 00-765* (judge may serve on advisory board on use of local law enforcement block grant funds).

the legal system, or the administration of justice,” noting that the commission’s functions did not expressly mention any court or relate to such matters as the processing of criminal cases, the implementation of laws related to the court system, or proposed reform in these areas. *Massachusetts Advisory Opinion 98-13*. See also *Virginia Advisory Opinion 00-6* (judge may not serve on state crime commission with duties such as gathering information, with particular reference to organized crime, referring specific matters and information for further investigation or prosecution, recommending that a special grand jury be convened, and investigating specific criminal activity).

Partial service

A judge may be able to participate in a governmental commission that has a broader scope than improvement of the legal system if the judge is able to limit involvement to only those matters dealing with the administration of justice. For example, the South Carolina advisory committee stated that, although a judge could not serve on the state children’s justice task force, a judge could serve on a sub-committee of the task force that would address such issues as coordination of procedures between different types of courts and prevention of delay in child protection hearings. *South Carolina Advisory Opinion 8-1996*. The committee concluded, “where a judge knows prior to accepting an invitation to serve . . . that his participation will be limited to a specific sub-committee that will address specific issues related to the administration of justice, a judge may accept a position on the committee.”

Similarly, the Utah advisory committee stated that a judge may serve on a judiciary sub-committee of a government commission designed to provide leadership, recommend policies, and generate unity for the state’s efforts to combat substance abuse and community violence. *Utah Informal Advisory Opinion 94-2*. The sub-committee’s mission statement narrowly tailored its purpose to providing a forum for education, coordination, and communication on violence and drug-related issues that affect the total judicial system and enhancing cooperation while preserving judicial independence.

The advisory committee stated that “to the extent the Subcommittee can effectively limit its purposes to those set forth in the mission statement or the three

areas allowed by the Code, judges may serve on the Subcommittee.” However, the committee cautioned that if the subcommittee cannot limit its purpose, judges may not serve, noting that the sub-committee’s statutory mandate was written very broadly to include recommending statewide substance abuse and anti-violence policies; developing priorities for programs to combat substance abuse and community violence; and recommending executive, legislative, and judicial action based upon policy needs and identified gaps in the continuum of services.

Even in the absence of a formal sub-committee structure, a judge may be able to limit participation in a governmental commission to administration of justice issues—for example, by not being present when broader topics are being discussed. The Alaska advisory committee stated that, “while there is no indication that . . . the . . . judges’ involvement on the state [children’s justice act] task force will be limited to a ‘court coordination subcommittee,’ vigilance by the judge members in limiting their participation to matters directly concerning the administration of justice can achieve the same result,” and thus permitted judges to be members of the task force. *Alaska Advisory Opinion 2001-1*. The committee cautioned judge members to “avoid that aspect of the task force’s work that concerns the investigation and prosecution of child abuse and neglect,” noting that “[t]hose areas are most appropriate for the legislative and executive agencies of our state government.”

If partial membership is allowed, a judge who serves on a commission should expressly define his or her membership role and advise and remind the other members of the judge’s ethical restraints to ensure the judge’s role remains appropriately limited. *Alaska Advisory Opinion 2001-01*; *South Carolina Advisory Opinion 8-1996*.¹⁰

10. The “Special Concerns Involving Judicial Participation in Domestic Violence Coalitions” promulgated by the Iowa Supreme Court and directed toward non-judicial participants in domestic violence coalitions warns:

Judges maintain powerful positions within our communities. They are mindful that with this power comes certain responsibilities. If you expect a judge to favor a certain aspect of a case as a result of your connection with that judge on a domestic violence coalition, you will put yourself and the judge into an awkward situation. While a judge will work hard to remain at a certain distance to protect the independence and impartiality of the judiciary, coalition members should understand the necessity for that distance and honor it as well.

Not all advisory committees, however, have approved partial or limited participation by a judge on a governmental commission. For example, the Massachusetts judicial ethics committee stated that, even if a community policing commission was “concerned with issues surrounding ‘the improvement of the law, the legal system, or the administration of justice,’” a judge’s appointment to the commission “would be barred if the Commission were also concerned with matters beyond the scope of this exception.” *Massachusetts Advisory Opinion 98-13*. The Virginia advisory committee concluded that “[g]iven the broad investigative and fact-finding mandates of the Crime Commission, a judge would find it extremely difficult to serve as one of its members and restrict his or her consideration to issues relating only to the improvement of the law, the legal system and the administration of justice.” *Virginia Advisory Opinion 00-6*.¹¹

11. See also *California Advisory Opinion 46* (1997) (if group engages in advocacy with respect to substantive legal issues, it is not possible “to separate the judge from the advocacy functions of the organization and limit his or her involvement to the non-advocacy functions of the organization because the public will nevertheless perceive the judge as fostering the advocacy functions of the organization”).

Several committees have given apparently contradictory advice on the issue whether partial participation is permitted. Compare *Utah Informal Advisory Opinion 98-4* (judge may serve on advisory board for program that provides comprehensive, multi-disciplinary, not-for-profit intergovernmental response to sexual and physical abuse of children but should not participate in any discussions that focus primarily on prosecutorial tactics, do not benefit system as a whole, or might call into question judiciary’s neutrality) with *Utah Informal Advisory Opinion 98-11* (if permitted subjects are one aspect of much broader mission, service by judge is not permitted) and *Utah Informal Advisory Opinion 88-2* (appearance of impropriety created by judge’s participation on county child abuse coordinating committee that has taken public position on legislation dealing with child abuse would not be cured by judge’s recusal from organization’s discussion of or vote on issue or from lobbying activities). Compare *Arizona Advisory Opinion 90-11* (judge may serve on governor’s task force on the seriously mentally ill and governor’s select commission on juvenile corrections “with the caveat that the judge limit his participation to matters dealing with ‘improvement of the law, the legal system, or the administration of justice’”) with *Arizona Advisory Opinion 97-6* (judge may not serve on county domestic violence task force because, among other reasons, it is involved “in matters relating to education, legislation, training, child care, and law enforcement as well as issues directly concerning the judiciary”).

WOULD MEMBERSHIP ON THE COMMISSION "CAST REASONABLE DOUBT" ON A JUDGE'S CAPACITY TO ACT IMPARTIALLY?

As noted above, even if a governmental commission is related to "the improvement of the law, the legal system, and the administration of justice," a judge may not serve on the commission if membership would cast reasonable doubt on the judge's capacity to act impartially. Service on a commission dealing with a particular issue does not inevitably mean that a judge's impartiality on that issue can reasonably be questioned. Considering the propriety of judicial service on a domestic violence task force, the Arizona judicial ethics committee noted, "[o]f course, no judge supports criminal activity, including domestic violence. We agree . . . that '[t]he expression of intolerance toward criminal behavior should not disqualify membership on the commission.'" *Arizona Advisory Opinion 97-6*. In the context of motions to disqualify, courts have similarly held that a judge's membership on an issue-related commission does not necessarily indicate bias, absent additional circumstances.

For example, the Idaho Supreme Court found that nothing in the make-up or responsibilities of a governor's task force for children at risk on which a judge served cast doubt on the judge's capacity to be impartial while conducting a probation revocation hearing involving child abuse. *State v. Knowlton*, 854 P.2d 259 (Idaho 1993). The court noted that the task force was diversified "with representatives from nearly every facet of the legal system including a public defender and a member of the Probation and Parole Division of the Department of Corrections."¹² The court noted that the responsibilities of the task force

12. The responsibilities of the task force included the establishment of a multi-agency system of investigation of all reports of child abuse and neglect; working toward the goal of criminal prosecution of all substantiated cases; monitoring the disposition of all criminal cases of child abuse and neglect filed in the state; working toward the goal of ensuring psychological treatment for all abused and neglected children; and promoting legislation pertaining to services and laws affecting abused and neglected children.

"contain no specific agenda with respect to the treatment, probation or punishment of convicted child abusers." Therefore, the court concluded the judge's participation cannot be equated to acting as an "advocate" against persons charged with child abuse.

To hold otherwise would deprive the citizens of this state of the knowledge and experience which a judge brings to groups designed to improve the legal system. Similarly, our citizenry would also suffer if we discouraged our judiciary from heightening their knowledge and awareness of legal issues through participation in groups such as the Governor's Task Force for Children at Risk.

Similarly, in an appeal from a conviction for carnal knowledge of a female under the age of 16, the United States Court of Appeals for the Ninth Circuit rejected the defendant's argument that the trial judge's service on the attorney general's commission on pornography mandated recusal. *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1990), *cert. denied*, 503 U.S. 975 (1992). The court found "the connection between the judge's service on the Commission and the matters at issue in this case too attenuated to create an appearance of bias," noting that the commission did not focus on the particular case or even on the type of conduct charged in the case. The court held that neither "generalized policy views" nor "expertise on and exposure to a subject" "necessitate[s] recusal as a matter of course."

Moreover, the Washington Court of Appeals held that a judge's participation in a program designed to prepare children who are alleged victims of sexual abuse and assault for their appearance in a trial had not, of necessity, compromised the judge's ability to impartially decide issues of testimony credibility and reliability from any child witness. *State v. Carlson*, 833 P. 2d 463 (Washington Court of Appeals 1992).

Reduced to its most simple formulation, [the defendant's] argument is that whenever a judge has received special training or participated in the presentation of programs as to any given legal subject, the judge must be disqualified from sitting on any case in the future involving such issues. Thus, a judge who sits on the Minority and Justice Commission, or participates as a panelist in any of its sensitivity training sessions, would be disqualified from hearing any case involving issues of minorities and the law.

Likewise, a judge who sits on the Gender and Justice Implementation Committee, or participates as a panelist in any of the training programs fostered by such committee, would never be able to sit on a case involving any of the many gender issues in the law. A judge who either comes to the bench with specialized training and experience in a given field of law, or lectures in continuing legal education seminars in a given legal field would, if we adopted [the defendant's] argument, be prohibited from hearing cases involving issues arising in that legal field.

To state [the defendant's] argument is to refute it. The people of this state will be best served by a legal system which encourages judges to enhance their own and others' awareness of legal issues and develop their legal knowledge and skills. Without any support for his argument, [the defendant] confuses a judge's efforts to improve the legal system with an assumption of biased advocacy which prevents a judge from exercising the independent judgment and consideration required in the exercise of the judge's professional responsibilities.

In a concurring opinion in *Yates v. State*, 704 So. 2d 1159 (Florida 5th DCA 1998) (Harris, special concurrence), the judge stated that the trial judge, who had established and served as chair of a domestic violence task force, did not err in refusing to disqualify herself in a domestic violence criminal case:

Mere membership in the task force should not justify a belief that the judge cannot be fair unless there is a showing that the agenda of the task force advocates stiffer penalties for domestic abusers. The fact that a judge opposes domestic violence is no more relevant at sentencing than the fact that a judge opposes robbery or drug abuse; nor does it distinguish a particular judge from any other member of the bench [A]ll judges oppose criminal conduct.

See also *United States v. Glick*, 946 F.2d 335 (4th Circuit 1991) (judge's service as chair of sentencing commission did not require recusal from criminal cases raising issues about sentencing guidelines promulgated by commission); *Allen v. State*, 737 N.E.2d 741 (Indiana 2000) (judge's participation in organization seeking to assist victims of domestic violence did not raise rational inference of bias or prejudice in domestic violence cases); *State v. Haskins*, 573 N.W.2d 39 (Iowa Court of Appeals 1997) (judge's work on domestic violence coalition

did not require recusal from trial for attempted murder, domestic assault while displaying a firearm, and reckless use of a firearm, noting her "activities in the area of domestic abuse were not in the nature of victim advocacy, but were geared toward case management issues").

These cases indicate that a judge actively opposed to a particular crime is not necessarily considered biased against defendants charged with, or even convicted of, the crime and suggest that there should be no presumption of an appearance of bias from judicial participation on issue-related commissions. Therefore, advisory opinions based on such a presumption are not necessarily persuasive.¹³ The determination whether judicial service would create a reasonable appearance of bias depends on a review of the specific make-up, agenda, and responsibilities of the commission in question.

Composition of the commission

As previously noted, a key factor relevant to judicial participation is the composition of the governmental commission: the more the membership reflects one point of view, the more likely judicial participation will indicate partiality and be prohibited; the more diverse the membership, the more likely judicial participation will be allowed. In other words, a judge must consider whether a commission's members "represent only one point of view or whether membership in the group is balanced." *Alaska Advisory Opinion 2000-1*.

The Alaska judicial ethics committee, for example, advised that a judge may not serve on a community council to plan a facility for abused children where the council's membership was prosecutorial in nature, making it appear to be fundamentally an advocacy group. *Alaska Advisory Opinion 2000-1*. In

13. See, e.g., *Kentucky Advisory Opinion JE-89* (1997) (appearance of partiality would be created if judge served as president of organization dedicated to curbing child abuse); *Louisiana Advisory Opinion 89* (1991) (judge serving as president of rape crisis foundation would give appearance of partiality to particular type of victim); *Massachusetts Advisory Opinion 91-2* (judge's membership in organization dedicated to needs of battered women would call judge's impartiality into question); *New York Advisory Opinion 91-124* (judge's service on stop/DWI advisory board could reasonably create public perception of lack of judicial impartiality); *South Carolina Advisory Opinion 22-2000* (judge's service on crime victim advisory board would create substantial doubt as to judge's capacity to impartially decide victim/witness related issues).

contrast, in the same opinion, the committee stated that a judge may serve on a local juvenile corrections facility's citizens' advisory commission composed of a cross-section of interested parties who would not act as advocates for any particular single interest. Similarly, in permitting a judge to join a domestic violence task force devoted to improving the legal system's handling of domestic violence matters, the New York advisory committee explained that "because the task force includes persons from both the District Attorney's and Public Defender's offices, the judge's participation will not cast doubt on his or her impartiality." *New York Advisory Opinion 95-34* (task force also included representatives from local police agencies, social service agencies, and family court representatives).

Further, the Utah advisory committee stated that a judge may serve on a domestic violence coalition if, among other considerations, the coalition included representatives from defense attorneys and perpetrator assistance as well as the prosecution and victim assistance. *Utah Informal Advisory Opinion 98-6*. In permitting a judge to serve on the advisory board for a program that provides a comprehensive response to child abuse, the Utah committee noted that the board's membership consisted of professionals throughout the juvenile justice community, including criminal defense attorneys, law enforcement, medical professionals, and prosecutors. *Utah Informal Advisory Opinion 98-4*. Other committees have also cited the "broad-based" composition of a group as a factor in approving judicial participation.¹⁴

The "Special Concerns Involving Judicial Participation in Domestic Violence Coalitions" promulgated by the Iowa Supreme Court caution

14. See *California Advisory Opinion 46* (1997) (judge may belong to not-for-profit corporation with representatives from public defender, courts, district attorney's office, county counsel, police, probation, and bar association that promotes public awareness and education about domestic violence and sponsors annual conference with judicial council but does not engage in political activity or promote legislation); *Illinois Advisory Opinion 98-1* (judge may serve on family violence coordinating council that includes representatives from law enforcement, prosecutors, public defenders, health service providers, clergy, and education system).

Assuming that the membership of the commission represents a cross section of relevant court system participants, that the chair is an advocate for a particular constituency should be irrelevant. But see *Florida Advisory Opinion 94-38* (judge may not participate in governor's domestic violence task force chaired by executive director of local domestic violence shelter that serves only female victims and maintains court watch program for domestic battery cases).

that "the structure of [a] coalition should adequately allow for a judge to remain neutral."

If your domestic violence coalition has active participation from prosecution, a very real attempt needs to be made to have active participation from the defense bar as well. If you have not done so already, you should invite public defenders and private defense attorneys to be a part of your coalition. If they refuse to become active participants, arrangements should be made to include them in your official coalition communications such as receiving meeting notices, agendas and minutes.

Committees also cite the possibility of a judge's fellow commission members appearing before the judge as a factor weighing against participation. For example, in advising that a judge should not serve on a domestic violence coordinating council with "clearly noble objectives," the West Virginia advisory committee noted that participation would bring the judge into "close association with individuals who would be appearing in adversary proceedings in court on a regular basis." *West Virginia Advisory Opinion* (February 7, 1997).¹⁵ Similarly, when it advised a judge not to serve on a crime victims' compensation task force, the South Carolina judicial ethics committee noted that "it is not uncommon for crime victim/witness personnel or representatives to make appearances in court and, therefore, if the judge were a member of the Task Force, the possibility exists that fellow committee members could appear before the judge." *South Carolina Advisory Opinion 3-1988*.¹⁶

15. In West Virginia, the advisory committee is the Judicial Investigation Commission, which also investigates complaints of judicial misconduct.

16. More recently, the South Carolina advisory committee has given some apparently inconsistent advice on this issue. In one opinion, the committee suggested that a family court judge may be a member of a leadership forum team to develop state level collaboration among public child welfare agencies, domestic violence agencies, and juvenile and family courts. *South Carolina Advisory Opinion 20-2001*. The committee stated, even though "the close collaboration between public child welfare agencies, domestic violence agencies, and family and juvenile courts in a leadership team forum causes concern that a judge's participation may [create] disrespect [for] the integrity and impartiality of the judge," the forum could highly benefit the legal system and the threat of impropriety was small. However, in an opinion issued shortly afterwards, the committee stated a family court judge may not participate with community leaders in a seminar to learn about ways to improve school safety because the judge's close interaction with the leaders may create the appearance of impropriety when the judge interacts later with one or more of the community leaders while performing judicial duties. *South Carolina Advisory Opinion 24-2001*.

Similarly, the Oregon advisory committee stated that a domestic relations department judge may not accept an appointment to a government commission on family violence in part because “it is probable that persons appearing before the commission seeking grants and to perform contractual services will also appear in court on abuse matters in that they often have direct concern and interest in these matters either as victims or counselors.” *Oregon Advisory Opinion 79-4*. But see *Missouri Advisory Opinion 177* (2001) (judge may serve on county domestic and family violence council that does not set up policies and procedures for agency likely to appear as witness or party before court).

Advocacy

Another factor affecting the propriety of a judge serving on a specific commission is if the commission has an agenda suggesting advocacy for particular participants in court cases or becomes directly involved in court proceedings by providing services for victims, law enforcement, the prosecution, or defense. For example, the Arizona judicial ethics committee concluded that a judge could not participate in a county domestic violence task force that had a “specific agenda and apparent tilt toward crime victims,” which were “incompatible with a judge’s basic role.” *Arizona Advisory Opinion 97-6*. Concluding that participation on the task force addressed in its opinion was inappropriate, the committee pointed to the task force director’s request that members who were judges sign a letter committing themselves and the court “to achieve an environment of zero tolerance” for intimate partner violence and on the inquiring judge’s conclusion that the task force was created to propound a “pro-victim mind-set,” with an agenda that included attempts to influence law enforcement, prosecutors, and the judiciary in their handling of domestic violence cases. The committee stated:

[J]udges are expected to treat all who come before them with evenhandedness. They cannot appear to favor victims over accused persons. They cannot seem to give preference to domestic violence cases over other criminal matters. . . . Participation in an advocacy group for domestic violence victims casts doubt on the capacity for unbiased decision making.

Similarly, the Nebraska committee stated that a judge is “absolutely prohibited” from being a member of a community response team with the objective of “fully utilizing the community’s civil and criminal justice system to protect victims, hold abusers accountable for their violent behavior, and enforce society’s intolerance for domestic violence.” *Nebraska Advisory Opinion 97-6*. The Utah committee stated that a judge may not serve as a regular member of a domestic violence coalition if the focus of the organization is “too narrowly linked to one side of an issue, such as prosecution or defense.” *Utah Informal Advisory Opinion 98-6*.¹⁷

The Illinois judicial ethics committee concluded that a judge may not serve as a member of a task force on sexual assault that assists victims during court cases. *Illinois Advisory Opinion 97-3*. If the task force had only provided medical care and counseling for victims, the committee apparently would have allowed the judge to serve. However, in addition, the task force provided aid to law enforcement agencies and, at the request of the prosecutor, but never the accused, provided expert witnesses to testify as to the appearance of the victim when arriving at a shelter. Task force members followed cases “through the

17. See also *California Advisory Opinion 46* (1997) (judge may not serve on board of directors of local women’s shelter that had become dissatisfied with district attorney’s prosecution policies and wanted to take active role in persuading district attorney to implement new policies); *Florida Advisory Opinion 2001-14* (judge may not serve on domestic violence council with court watch program that monitors domestic violence-related cases); *Florida Advisory Opinion 98-8* (judge may not belong to victims’ rights council that reviews judicial decisions, sponsors unofficial training for judges, and supports legislation); *Florida Advisory Opinion 91-14* (judge should not belong to organization that pushes stiff penalties and practices court watching to protect interests of children); *New York Advisory Opinion 97-108* (judge should not serve as member of county juvenile crime prevention commission that will recommend law enforcement activities and policies, because that connection “renders such service incompatible with judicial office”); *South Carolina Advisory Opinion 3-1990* (probate judge should not become member of advisory council for program devoted to advocacy of rights for mentally ill).

In one opinion, the West Virginia judicial ethics committee stated that a judge may not participate in a domestic violence coordinating council with goals that would involve judges in discussions of strategies and support of victims. *West Virginia Advisory Opinion* (February 7, 1997). In a subsequent opinion, the West Virginia committee, without explanation, seemed to reverse itself, stating that judges may participate in domestic violence coordinating councils “as long as participation is consistent with the Code of Judicial Conduct and the judges’ impartiality is not placed in question.” *West Virginia Advisory Opinion* (June 23, 1997). However, whether participation is consistent with the code and places a judge’s impartiality in question is a crucial question, and the committee’s failure to address it renders the more permissive opinion unpersuasive.

court system working closely with law enforcement and prosecution to ensure successful prosecution of those guilty of sexual assault.” In light of the task force’s stated goal of increasing successful apprehension and prosecution of rapists, the committee concluded the judge’s affiliation may “reflect adversely upon his or her impartiality.”

Similarly, the Texas judicial ethics committee stated that a judge may not serve on the judicial council of a center that provides “a professional, compassionate and coordinated approach to the treatment of sexually abused children and their families and . . . serve[s] as an advocate for all children in our community.” *Texas Advisory Opinion 270* (2001). The center videotapes forensic interviews with victims and provides sexual assault examinations, expert testimony in civil and criminal court, and advocacy for children as they make their way through the justice system. The committee emphasized that “[f]or a judge to give advice to an organization whose mission is to advocate for witnesses/parties in law suits is a violation of this Canon,” and “[m]embership on this council would require frequent recusal in cases in which the members of the organization were testifying.”

Other committees have relied on similar considerations.

- A judge may not serve on a board of directors of a not-for-profit corporation that assists individuals referred from law enforcement agencies and prosecutors by providing emotional and financial support to allow successful prosecution of individuals charged with family offenses. *New York Advisory Opinion 95-126*.
- A judge may not serve as a board member of a victim services agency that deals with victims of domestic violence where the agency’s counselors have been called as witnesses in court proceedings and the district attorney has a program that requires any person wishing to withdraw charges against a domestic partner to receive counseling from the agency. *New York Advisory Opinion 96-96*.
- A judge should not serve on a domestic violence community coordinating council that engages in vigorous advocacy on behalf of domestic violence victims. *New York Advisory*

Opinion 99-46.

- A judge may not sit on a domestic violence advisory panel for a program that provides client advocacy, referrals, and crisis intervention. *South Carolina Advisory Opinion 3-1987*.
- A judge may not serve on the board of a rape crisis council that engages regularly in legal advocacy and guides victims through trials. *South Carolina Advisory Opinion 4-1991*.

In the absence of advocacy in individual cases, however, judicial ethics committees have allowed judges to serve on some governmental commissions. The Illinois advisory committee, for example, stated that a judge may serve on a family violence coordinating council that proposes procedures for addressing issues of domestic violence but does not appear in court, provide testimony for any litigants, take sides, or intervene for a particular individual in a particular case. *Illinois Advisory Opinion 98-1*. Similarly, the Missouri judicial ethics committee stated that a judge may serve on a county domestic and family violence council that does not provide any direct services, treatment, or support programs for the victims or perpetrators of domestic violence. *Missouri Advisory Opinion 177* (2001).¹⁸

The Iowa Supreme Court’s “Special Concerns Involving Judicial Participation in Domestic Violence Coalitions” caution that “[j]udges will be prohibited from assuming advocacy roles concerning many of the issues which will be considered by domestic violence coalitions.”

Consequently, if judges are to be member participants in coalitions, the coalitions may not advocate, as membership organizations, those positions which the judges are prohibited from advocating. The issue of domestic violence has been brought to the attention of the general public through the diligent work of domestic violence advocates. This had led to a strong connection in the minds of some people that the issue of domestic abuse is necessarily linked to a specific agenda that may not be shared by all people. There may be the propensity of some

18. In Missouri, the judicial ethics committee is the Commission on Retirement, Removal and Discipline, which also investigates complaints about judicial misconduct.

individuals to label any efforts to better the administration of justice as it relates to domestic abuse as advocacy for a particular view/social agenda. In fact, some coalitions have done advocacy work, such as writing letters to the editor about specific cases. Judges are not prohibited from speaking out to better the law, and, of course, judges have no conflict with being against crime. However, judges do have to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” If your coalition has taken an advocacy stance in the past, it will not be able to do so if it wishes to have full participation of the judiciary. This is not to suggest that people who are members of a coalition cannot fully advocate their point of view or their social agenda. The advocacy would simply have to remain outside the official realm of the coalition.

Commissions that establish protocols

Judicial participation probably is not permissible on a commission responsible for preparing protocols that bind judges to exercise their judicial responsibilities in a certain way or that direct the conduct of non-judicial officials such as police and prosecutors.

For example, the Washington judicial ethics committee advised that a judge may not participate in a domestic violence task force that will adopt a specific agenda recommending judicial policy. *Washington Advisory Opinion 96-2* (amended). The committee noted:

Some of the task force goals for the courts are: prosecution and courts need to develop standards for sentencing; courts should not sentence any defendant in domestic violence cases until the defendant’s background and prior convictions have been researched; domestic violence assaults should result in supervised probation; priorities should be given to domestic violence assault cases so the victim will not be required to wait long periods of time before a trial; and sentence revocation hearings should be held promptly.

Similarly, the Georgia judicial ethics committee considered judicial membership on a domestic violence task force that would establish protocols for police intervention in domestic violence, victim and witness contact and assistance, prosecutorial standards and activities in domestic violence cases, com-

munity mental health intervention, and sentencing considerations and alternatives for judges. *Georgia Advisory Opinion 115* (1988).¹⁹ The committee advised that a judge could not be on the task force because “a judge should not become personally associated as an activist with particular causes which relate to issues which may come before him in his judicial capacity”

Subsequently reaffirming that opinion, the Georgia advisory committee warned that a judge may not participate in the formulation or dissemination of protocols that attempt to encourage judges to “advocate” certain positions and to be “proactive” in domestic violence and that outline in detail exactly how judges should conduct hearings, set bail, issue protective orders, accept civil settlements, defer prosecutions, reduce charges, dismiss cases, issue ex parte orders, and handle sentencing. *Georgia Advisory Opinion 201* (1995) (revised). *But see Georgia Advisory Opinion 174* (1992) (chief magistrate may set out in writing role county magistrate court will assume in county child abuse protocol).

The South Carolina advisory committee stated that a judge should not serve as a member of a crime victims’ compensation task force that will formulate model policy guidelines for judges, prosecutors, and law enforcement agencies in handling crime victims and witnesses. *South Carolina Advisory Opinion 3-1988*. The committee explained:

Service on a committee designed to formulate and implement policy and guidelines concerning the treatment of crime victims and witnesses could create substantial doubt as to the judge’s capacity to impartially decide many of the victim/witness related issues that come before him.

* * *

While such commitment is admirable, a judge should not allow himself to become identified with such a pro-victim position. The integrity and independence of the judiciary could be questioned simply because of the judge’s association with an organization that advocates victim/witness rights.

19. In Georgia, the judicial ethics committee is the Judicial Qualifications Commission, which also investigates complaints about judicial misconduct.

Other committees have cited similar considerations.²⁰

The Ohio advisory committee stated that a judge may consult and participate in collaborative efforts regarding domestic violence but may not endorse protocols that establish required behavior for police officers, prosecutors, and judge. *Ohio Advisory Opinion 96-5*.²¹ The committee explained:

Independence of the judiciary is not fostered by the endorsement of protocols that endorse procedures for peace officers and prosecutors because they must carry out their functions separate from the judiciary. Written endorsements of some provisions in the protocols may color a judge's ability in cases to decide motions, set bonds, weigh defenses, decide credibility between peace officers and defendants, and hear certain cases such as those involving false arrest or malicious prosecution.

The judicial fact finder should not be involved in the arrest and prosecution. The judiciary's role is to interpret the law through case by case determinations, not through general protocol. Although the protocols set forth an admirable response to a serious problem, one problem should not be traded for the other. An independent judiciary is needed to rule properly on each case that comes before a court. When that independence no longer exists, a new problem has been created.

On a related issue, the Alabama judicial ethics committee stated that a judge who handles domestic violence cases may not enter into an inter-agency agreement, composed by the county domestic violence task force, that addresses issues of policy and procedure in domestic violence cases. *Alabama*

20. See *South Carolina Advisory Opinion 22-2000* (judge may not serve on state crime victim advisory board that considers improvements in and monitors effectiveness of victims' compensation fund, comments on budget, and approves regulations pertaining to compensation fund and victim/witness assistance program because it deals with policy issues); *South Carolina Advisory Opinion 27-1995* (family court judge may not serve on advisory subcommittee of joint legislative committee on children and families charged with reviewing practices and procedures of the state department of social services and family court in child abuse and neglect cases and recommending changes to law, practices, and procedures). *But see Missouri Advisory Opinion 177* (2001) (judge may serve on county domestic and family violence council that, among other activities, facilitates development and implementation of uniform protocols and procedures).

21. The Ohio advisory committee labels *Ohio Advisory Opinion 96-5* as "not current" because the Ohio code of judicial conduct was amended in 1997, although none of the code provisions interpreted by that opinion were significantly changed in the new code.

Advisory Opinion 90-409.²² The agreement stated that domestic violence cases "shall receive expeditious processing and shall have high priority in the overall case management of the court;" provided for certain priority scheduling in the domestic relations and juvenile courts; and required the domestic relations and juvenile courts to provide copies of restraining orders to the central registry of the police department and to review these orders periodically and see that all stale or rescinded orders are removed. Although noting that "the mission of ending domestic violence is laudable," the committee explained:

The proposed agreement raises issues bringing the independence and impartiality of the judiciary in domestic violence cases into question. . . . By signing the presented agreement it appears that the judge agrees to schedule certain cases and give priority to certain cases whether or not under the facts presented to the judge such priority or scheduling is required. The agreement further appears to place upon the judge the duty of checking the police department's central registry file to make certain that it is not outdated, thus giving the judge certain administrative functions of the police department. These are merely two examples of the appearance of diluting the independence and impartiality of the judiciary which would occur by a judge's entering into the proposed agreement.

Commissions that conduct fatality reviews

Opinions indicate that, if a governmental commission reviews fatalities occurring in abuse cases that have been in the courts, a judge should not participate on the commission. Such review often involves examining and critiquing the policy and practice of law enforcement and executive branch agencies, which does not fit within the administration of justice exception to the prohibition on serving on governmental commissions. Moreover, a fatality may give rise to a case in the judge's court, either a criminal case or a civil suit alleging negligence by government agencies and/or others.

For example, the West Virginia advisory committee considered whether a judge could participate on a domestic violence fatality review team, estab-

22. In Alabama, the judicial ethics committee is the Judicial Inquiry Commission, which also investigates complaints about judicial misconduct.

lished by the executive branch, that would review homicide cases that had already been through the court system, focusing on how the deaths could have been avoided. *West Virginia Advisory Opinion* (February 16, 2001). The teams would “establish a baseline for measuring trends in domestic violence fatalities; identify and review deaths occurring in West Virginia related to domestic violence; [and] use the knowledge to inform policy makers and the public about the dynamics of domestic violence fatalities and the effectiveness of community prevention and intervention efforts.” The teams included members of the department of public safety, the state medical examiner, advocates for individuals in domestic violence matters, prosecuting attorneys, and the executive director of the medical association. Concluding it would not be a good practice for the inquiring judge to join the team, the committee stated:

[T]he team would discuss only domestic violence fatalities which are likely to come before your court and other courts. While the cases which would be reviewed would have already worked their way through the court system, similar cases would no doubt be entering the court system subsequent to any discussions.

Similarly, the Alabama advisory committee stated that a judge should not serve on a state department of human resources panel that evaluates child fatality cases. *Alabama Advisory Opinion 97-635*. Noting the panel examines policies and procedures of state and local agencies, the committee concluded that the panel’s activities concern issues of fact and policy that “do not primarily concern the improvement of the law, the legal system, or the administration of justice. Rather, the ultimate goal is ‘efficiency in the discharge of child protection responsibilities.’”

Moreover, the Georgia judicial ethics committee stated that a magistrate should not participate in investigations that are the responsibility of the child abuse protocol committee.

[B]ecause participation by the Magistrate in child fatality investigations could conceivably cast doubt on his capacity to impartially decide issues which may well come before him . . . and because such participation could also result in frequent disqualifications and recusals . . . , the Commission is of the opinion that the Magistrate should not personally participate in child fatality investigations.

Georgia Advisory Opinion 174 (1992) (chief magistrate may set out in writing role that county magistrate court will assume in county child abuse protocol and designate as magistrate’s representative required by statute someone who is not a magistrate judge). *But see Nevada Advisory Opinion 00-5* (domestic violence commissioner may participate on team that will review and analyze hypothetical or actual cases involving domestic violence fatalities as long as the cases are not pending in, and reasonably may not come before, court in which commissioner presides and may review closed domestic violence fatality cases that were adjudicated in court in which commissioner serves).

Commissions that review requests for clemency

Opinions also indicate that a judge should not be a member of a commission that reviews requests for clemency. The Florida judicial ethics committee advised that the administrative judge of a domestic violence division may not serve on a panel that plays a role in determining whether domestic violence victims are granted some form of clemency for the offenses they commit—for example, murder or attempted murder of the abuser. *Florida Advisory Opinion 96-16*. The panel determines “whether applicants suffered from domestic abuse at the time of the offense for which they have been convicted” and “may consider whether incarcerated applicants should be granted a waiver of the rule which provides that incarcerated persons cannot apply for clemency.” In addition, a report from the domestic violence clemency review panel may be included with the parole commission’s recommendation to the clemency board. Although noting “[t]here is no disagreement that the review panel serves a laudable purpose,” the committee concluded that the judge’s service on the panel would call the judge’s impartiality into question and would likely require the judge’s disqualification in domestic violence cases. *See also Florida Advisory Opinion 94-32* (judge may not serve on advisory committee for battered women’s clemency project).

Commissions responsible for proposing legislation

Several advisory opinions state that a judge may not serve as a member of a governmental commission that has the responsibility of preparing recommended changes to statutes or proposing legislation. The South Carolina judicial ethics committee, for example, disapproved service by a family court judge on a governmental commission that will develop legislation to address domestic violence “because legislation that originated from this committee would impact issues and parties that appear before the family court judge.” *South Carolina Advisory Opinion 16-2000*.²³ Other judicial ethics committees have issued similar advice.²⁴

However, the code expressly allows a judge to contribute to “the revision of substantive and procedural law” (commentary to Canon 4C(1)) and to “appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice” (Canon 4C(1)). Therefore, opinions that automatically preclude any judicial involvement in recommendations regarding

23. See also *South Carolina Advisory Opinion 32-1995* (judge may not serve on task force to prepare recommended changes to statute regarding alcohol); *South Carolina Advisory Opinion 30-1994 (amended)* (judge may not participate on committee that develops legislation, policies, and programs to reduce family and domestic violence).

24. See *California Advisory Opinion 46* (1997) (judge may not belong to organization of community leaders that introduces and endorses legislation making currently legal acts illegal and/or increasing penalties for existing criminal acts, is high profile, and sponsors many activities concerning treatment and prevention of drug addiction); *Delaware Advisory Opinion 1991-1* (judge may not serve on government committee that will recommend proposed legislation regarding revision of mental health code that may be controversial); *Utah Informal Advisory Opinion 88-2* (judge may not participate on county child abuse coordinating committee that has taken public position on legislation); *Washington Advisory Opinion 88-9* (judge may not serve on board of directors of not-for-profit corporation that, among other activities, promotes and supports legislation, including contacting local legislators).

Some committees have issued apparently inconsistent opinions on this issue. Compare *Florida Advisory Opinion 98-13* (judge may submit and discuss with legislature proposed legislation that would increase maximum periods of incarceration and probation for those convicted in domestic violence cases) with *Florida Advisory Opinion 91-14* (judge should withdraw from membership in not-for-profit organization that actively seeks child protective legislation) and *Florida Advisory Opinion 98-8* (judge may not belong to victim's rights council that, among other activities, supports legislation). Compare *Missouri Advisory Opinion 177* (2001) (judge may serve on county domestic and family violence council that, among other activities, examines and makes recommendations relative to domestic violence legislation) with *Missouri Advisory Opinion 159* (1991) (judge may serve as advisory director for not-for-profit corporation that educates school children about effects of drugs and alcohol if organization does not lobby for legislation).

legislation apparently are applying a rule that is broader than that required by the code. A more specific analysis is required.

The federal advisory committee has construed the code's reference to “revision of substantive law” to allow a judge to participate in “activities directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than to benefit any particular cause or group” *U.S. Advisory Opinion 93* (1998). Similarly, the Indiana advisory committee identified “a committee assigned to consider changes in existing law” as a committee with a direct and concern with the legal system for which judicial participation is appropriate. *Indiana Advisory Opinion 2-01*.

Under this interpretation, a judge could probably not be involved in drafting, recommending, or supporting legislation making currently legal acts illegal and/or increasing penalties for existing criminal acts. However, if a judge has found while adjudicating cases that there is inconsistency between statutes or sections of statutes or that certain statutes need to be clarified or up-dated, or that statutory terms need to be defined, a judge could probably belong to a commission that will propose or support legislation to remedy those deficiencies.

Commissions that advocate increased commitment of resources

Few advisory opinions directly address whether a judge may engage in efforts to increase the resources and services available for individuals involved in court proceedings—such as victims, perpetrators, children, juveniles, and families.²⁵ Canon

25. Those opinions that do address the issue suggest that a judge may engage in such activities. See *Arkansas Advisory Opinion 96-1* (judge may serve on policy and planning board required by the department of human services that will determine the services needed for delinquents, families in need of services, and at risk juveniles, will determine what organizations will provide services, and will establish amount of money to be awarded); *Florida Advisory Opinion 99-21* (judge may participate in group consisting of judges, government officials, state attorneys, public defenders, law enforcement agencies, etc., organized to lobby legislature to increase funding for mental health and substance abuse treatment); *Florida Advisory Opinion 97-20* (judge may serve on children's services council that governs independent special district to provide funding for children's services where legislation authorizing council provides that juvenile judge be voting member but abstain from votes about setting of taxes); *Florida Advisory Opinion 91-22* (judge may speak in favor of establishing children's services council in judge's county as authorized by state law).

4C(3)(b)(ii) allows a judge on behalf of a governmental agency (or not-for-profit organization) devoted to the improvement of the law, the legal system, or the administration of justice to “make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice.” If the focus of the judge’s involvement is to increase the options available to the courts for sentencing in criminal cases, ordering treatment in cases involving substance abuse or mental illness, providing for services for children and juveniles caught in the system, or similar dispositions, the judge’s efforts would appear to have a direct nexus to the court’s business and to serving the interests of those involved in the legal system that makes the activity one related to “the improvement of the law, the legal system or the administration of justice.” Moreover, arguing in favor of increasing options available for adjudication of cases and sufficient funding for those options does not indicate any partiality or bias on the part of the judge.

However, as in all extra-judicial activities, a judge would have to exercise care to limit advocacy related to increasing resources to the narrowest focus consistent with the judicial role. Although arguing in general that increased options and adequate funding of services may be unobjectionable, a judge should not promote any particular option or endorse programs designed to prevent certain types of court cases from arising, as distinct from handling those cases once they arise. Moreover, such advocacy may involve the judge in issues outside the judge’s expertise and in contentious debates within the service-provider community and even in political debates within and among executive agencies and between the legislative and the executive branches. Finally, the judge’s promotion of a specific treatment or sentencing option would be a use of the prestige of office to promote the private interests of those providing that option, which violates Canon 2B of the code of judicial conduct.

OFFERING EXPERTISE

Even if a judge may not be a member of a governmental commission, a judge may offer “expertise and knowledge” to assist the commission. *Georgia Advisory Opinion 201* (1995) (revised). For example, although disapproving judicial service on a commission with “a prosecutorial tilt,” the Arizona committee stated nothing prohibits “a judge from providing information about the judicial system to such a body or from speaking on subjects relating to the improvement of justice in a forum that the commission might provide.” *Arizona Advisory Opinion 97-6*. Similarly, the Utah committee stated that, while a judge may not serve as a member of a domestic violence coalition, a judge could offer to participate in any discussions concerning the administration of domestic violence justice if the group reflects the various representatives in the domestic violence process. *Utah Informal Advisory Opinion 98-6*. The South Carolina committee suggested that the entire judiciary could comment on and critique the proposals of a crime victims’ compensation task force even though a judge could not serve on the task force. *South Carolina Advisory Opinion 3-1988*. See also *Virginia Advisory Opinion 00-6* (noting that a “judge’s insight” on a crime commission would be “very valuable” but that there are ways other than judicial membership “for the Commission to obtain the views of the judiciary on those matters upon which judges may properly comment”).

Thus, a judge may attend a commission meeting (*Florida Advisory Opinion 2001-14*; *South Carolina Advisory Opinion 27-1995*), meet with a commission on court-related matters (*Washington Advisory Opinion 96-2*), or appear at a public hearing (*Washington Advisory Opinion 95-4*) to provide information on matters concerning the law or the administration of justice (*Alaska Advisory Opinion 2000-1*; *Washington Advisory Opinion 95-4*), to accurately relate the role of judges in the court system (*Georgia Advisory Opinion 201* (1995) (revised)), or to answer questions concerning current practices in the court system or court procedures (*Florida Advisory Opinion 2001-14*; *South Carolina Advisory Opinion 27-1995*). However, a judge must not comment, or listen to comments,

about a pending or impending proceeding. *Florida Advisory Opinion 2001-14*.²⁶

OTHER CONSIDERATIONS

Statutory mandate

Sometimes a statute that establishes a governmental commission will specify that a judge should be one of the members. Legislation, however, does not override the specific rules and general principles in the code of judicial conduct to render legitimate service that is otherwise impermissible under those standards.

The Washington judicial ethics committee advised that a judge may not serve on the community public health and safety network established by a statute that specifically refers to a judge serving as a member because the network was concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. *Washington Advisory Opinion 95-4*. The committee explained:

Although the legislation makes specific reference to judicial officers serving on the network, the Code of Judicial Conduct is the primary authority for setting forth the conduct by which members of the judiciary are bound. The legislature cannot preempt the Code of Judicial Conduct via legislation.

Similarly, the Alaska advisory committee stated that the “mere fact that federal legislation requires state judge membership on a task force as a prerequisite for funding, does not preclude an independent ethics analysis . . . as to the propriety of state judges sitting in that capacity.” *Alaska Advisory Opinion 2001-01*.

The Nebraska Supreme Court has held that a statute that required judicial membership on an executive branch commission on law enforcement and criminal justice violated the state constitution separation of powers principles. *State of Nebraska ex rel. Sternberg, v. Murphy*, 527 N.W.2d 185 (Nebraska 1995). The court explained:

The clause prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. The clause also prohibits one who exercises the powers of one department of government from being a member of the other departments. The clause thereby provides a check against the concentra-

26. See also *Georgia Advisory Opinion 201* (1995) (judge may teach, speak, and present information to educate the public about purposes and efforts of task force); *Georgia Advisory Opinion 194* (1994) (chief judge may convene organizational meeting to establish task force on family violence in judge's circuit as long as judge's participation does not include rendering advice or sharing opinions on family violence but is limited to assisting in establishing task forces and encouraging community leaders to participate in organizational meeting).

tion of power and guards against conflicts of interest which arise when one serves two masters (citations omitted).

Other states, however, have been more deferential to legislative mandates. For example, the Alabama judicial ethics committee advised that a circuit or district judge may sit on the board of a county work release commission where the law providing for the commission specifically provides that its membership shall include the presiding circuit judge and a county district court judge. *Alabama Advisory Opinion 97-681*. The committee explained:

[T]he Canons of Judicial Ethics do not prohibit a judge from sitting in a position which, by law, is ex officio to the judicial office he holds. Judges who hold such positions should take care that their work with the board does not involve individual supervision of participants or employees so that the judicial responsibilities remain separate from their administrative responsibilities with the program.

Here, the legislature has made the public policy decision that the presiding circuit judge and a district court judge . . . are necessary members of the board of directors of the county work release program, presumably due to the unique knowledge gained from serving in these judicial offices. Likewise, the legislature has implicitly determined that the program relates to the administration of justice. Given these legislative directives, service on the board of directors for the work release program is not prohibited by the Canons.

Similarly, the Florida judicial ethics committee stated that a judge may serve on a children's services council where legislation provides that a juvenile judge be a voting member (although the legislation required judge-members to abstain from votes about the setting of taxes). *Florida Advisory Opinion 97-20*. The committee relied on the statement in the preamble to the code of judicial conduct that "[t]he Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances."

Several codes of conduct specifically allow legislation to determine the propriety of judicial service. Canon 4C(2) of the Kentucky code of judicial con-

duct provides: "A judge may accept appointment to a governmental committee or commission where a judicial appointment is authorized or required by law." The commentary to the code of conduct for federal judges states:

The dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious when the appointment of a judge is required by legislation. Such assignments ordinarily do not involve excessive commitments of time, and they typically do not pose a serious threat to the independence of the judiciary.

A code of conduct ought not to compel judges to refuse, without regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest. Although legislatively prescribed extra-judicial assignments should be discouraged, where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that the judge's services would not interfere with the performance of the judge's judicial responsibilities or tend to undermine public confidence in the judiciary.

Automatic deference to the legislature is not consistent with the principles of judicial independence that underlie the code. Although a legislature would not intentionally attempt to compromise judicial independence by requiring judicial participation in a government commission, the legislature may have mandated judicial participation without due consideration or understanding of the possible ramifications for judicial impartiality and independence. Permission under the code of judicial conduct for judges to participate should not be automatically granted based on presumptions or inferences about legislative intent and findings. An independent analysis based on judicial ethics standards should be conducted before participation is permitted.

Re-examining judicial participation

Commentary to Canon 4C cautions that "[t]he changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue

the affiliation.” Although this commentary specifically addresses participation in not-for-profit organizations, the principle it establishes applies as well to government commissions. Judicial ethics committees that have permitted judicial participation in governmental commissions have reiterated that advice and recommended that judges, even after serving for a time, re-consider whether a commission has changed to an extent that renders judicial participation no longer appropriate.

For example, the Utah committee stated that a judge should not continue to serve as a member of a child abuse commission that, acting beyond its initial purpose, had taken a public position against proposed legislation to establish criminal penalties for false reporting of child abuse. *Utah Informal Advisory Opinion 88-2*. The committee noted that the judge’s original participation had been appropriate because the commission’s statutory purpose was the better management of child abuse cases and improved communication among agencies. However, the committee concluded that the activities of the commission had changed since its establishment to go beyond the improvement of the law, the legal system, or the administration of justice.

Similarly, the Florida judicial ethics committee advised that a judge may not continue to serve on a domestic violence council that appeared to have become an advocacy group. *Florida Advisory Opinion 2001-14*. The committee noted that “when it was created, the mission of the Council was declared to be to ‘work toward the prevention of family violence, to promote victim safety, and to reduce the impact of family violence on individuals, communities and society, through cultural competence, education, support, advocacy and referral.’” As long as the council was acting simply as “a clearinghouse for the exchange of information and coordination of efforts among the various organizations, agencies, and individuals working in the field of domestic violence,” the committee stated, the judge’s participation was appropriate. However, the Florida committee observed that recently the council had initiated a court watch program that monitored domestic violence cases and collected information and statistics on the manner in which they were handled. The committee also noted recent complaints by the council’s chair to the chief judge about a particular judge’s

rulings in domestic violence injunction cases and a request for a meeting to discuss that judge’s “philosophical variance with the thinking of the domestic violence community.”

CONCLUSION

When the interests of the courts and society in judges' contributing to solving problems that have repercussions in the courtroom are balanced against the vital importance of judicial impartiality and independence, neither absolutely precluding nor unconditionally permitting judicial participation on issue-related governmental commissions appears necessary or wise. The propriety of judicial participation will depend on a wide variety of factors including the composition and responsibility of the particular commission.

Judges should take affirmative steps to learn sufficient information to thoroughly analyze whether participation would violate the code of judicial conduct. Advisory committees also must carefully examine the issue, without relying on assumptions or overlooking factors, and ask all necessary questions about the scope of the commission's mission, the make-up of the commission's membership, the extent of the judge's participation, and the effect on the judge's impartiality. If permission is initially given for a judge to participate on a commission, the judge needs to educate other participants about ethical limitations on the judge's participation and then frequently re-evaluate the propriety of continued participation as composition and mission may change. Even if a judge may not be a member of a commission, however, a judge may offer expertise and information to educate and assist the commission.

The following factors, culled from the advisory opinions discussed above, will guide judges, advisory committees, and courts in determining in specific situations 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

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