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CODE OF JUDICIAL CONDUCT

PREAMBLE

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times and should avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Utah Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards, as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct and to provide a basis for regulating their conduct through the judicial disciplinary system.

SCOPE

[1] The Utah Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and disciplinary action shall not be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The Rules of the Utah Code of Judicial Conduct are rules of reason that should be applied

consistent with the law and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.
[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.
[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

APPLICATION
The Application section establishes when the various Rules apply to a judge or judicial candidate.

I. APPLICABILITY OF THIS CODE
(A) The provisions of the Code apply to all full-time judges. Parts II through IV of this section identify those provisions that apply to three distinct categories of part-time judges. Canon 4 applies to judges and judicial candidates.
(B) A judge, within the meaning of this Code includes a court commissioner.
(C) A "full-time" judge, within the meaning of this Code, includes any judge of a court of record. A "full-time" judge also includes a judge of a court not of record who:
(1) serves in a court whose judicial weighted caseload measure, as approved by the Judicial Council, shows the need for at least 1.0 judges; or
(2) serves in more than one court whose total judicial weighted caseload measure, as approved by the Judicial Council, shows the need for at least 1.0 judges.
(D) Paragraphs (C)(1) and (C)(2) apply on the day of the judge's appointment for judges appointed on or after January 1, 2013, and they apply on January 2, 2017 for judges appointed before January 1, 2013.

COMMENT
[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.
[2] The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer depends upon the facts of the particular judicial service.

Annotations to Application Section
1. Judicial Council
The Code of Judicial Conduct does not apply to the institutional conduct of the Judicial Council, a constitutionally created body. Informal Opinion 98-17

2. Part-time Judge
It is a rebuttable presumption that a judge of a full-time justice court is a full-time judge prohibited from the practice of law. Informal Opinion 96-1

II. ACTIVE SENIOR JUDGE
An active senior judge appointed under Rule 11-201 of the Rules of Judicial Administration is not required to comply:
(A) at any time with Rules 3.4 (Appointments to Governmental Positions) and 3.8 (Appointments to Fiduciary Positions);
(B) with Rule 3.9 (Service as Arbitrator or Mediator), except while serving as a judge; or
(C) at any time with Rule 3.11(B) (Financial, Business, or Remunerative Activities).

COMMENT
[1] For the purposes of this section, an active senior judge is subject to this Code during any term of office to which he or she has been appointed to serve.

III. PART-TIME JUSTICE COURT JUDGE
A part-time justice court judge , including an active senior justice court judge appointed under Rule 11-203 of the Rules of Judicial Administration,
(A) is not required to comply:
(1) with Rules 2.10(A) and 2.10(B) (Judicial Statements on Pending and Impending Cases) and 3.14 (Reimbursement of Expenses and Waivers of Fees or Charges) except while serving as a judge; or
(2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), and 3.11 (Financial, Business, or Remunerative Activities)); and
(B) shall not practice law in the court on which the judge serves nor act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

COMMENT
[1] When a part-time justice court judge is no longer serving as a judge, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the informed consent of all parties, and pursuant to any applicable Rules of Professional Conduct.

IV. JUDGE PRO TEMPORE
A judge pro tempore appointed under Rule 11-202 of the Rules of Judicial Administration shall not practice law in the same small claims division in which the judge serves. The same small claims division means the courthouse at which the judge serves and includes small claims appeals heard at that courthouse. A judge pro tempore is not required to comply:
(A) except while serving as a judge, with Rules 1.2 (Promoting Confidence in the Judiciary), 2.4 (External Influences on Judicial Conduct), 2.10 (Judicial Statements on Pending and Impending Cases), or 3.2 (Appearances before Governmental Bodies and Consultation with Government Officials); or

(B) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.6 (Affiliation with Discriminatory Organizations), 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), 4.2 (Political and Campaign Activities of Judges in Retention Elections), and 4.3 (Activities of Judges Who Become Candidates for Nonjudicial Office).

V. SENIOR JUDGE

A senior judge is not required to comply with the provisions of this Code.

VI. TIME FOR COMPLIANCE

A person to whom this Code becomes applicable shall comply immediately with its provisions, except that as to Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) compliance shall occur as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.

COMMENT

[1] If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

TERMINOLOGY

Each time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).

"Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's committee, but also all contributions made indirectly with the understanding that they will be used to support the retention of a candidate. See Rule 2.11.

"Appropriate authority" means the presiding judge and the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rules 2.14 and 2.15.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.2.

"De minimis," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

"Directly solicit" means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. See Rule 4.2.

"Domestic partners" are persons who maintain a household and an intimate relationship, who are not legally married. See Rules 2.11, 2.13, 3.13, and 3.14.
"Economic interest" means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:
(1) an interest in the individual holdings within a mutual or common investment fund;
(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
(4) an interest in the issuer of government securities held by the judge. See Rules 1.3, 2.11, and 3.2.
"Fiduciary" includes relationships such as executor, administrator, trustee, personal representative, holder of a power of attorney, or guardian. See Rules 2.11, 3.2, and 3.8.
"Harassment" means verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. See Rule 2.3.
"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as presence of an objective and open mind in considering matters that come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.
"Impending matter" is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.
"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.
"Independence" means a judge's freedom from influences or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, 4.1 and 4.2.
"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rules 1.2, 3.1, 3.12, 3.13, 4.1, and 4.2.
"Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11 and 4.1.
"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.
"Law" encompasses, but is not necessarily limited to, court rules, statutes, ordinances, constitutional provisions, and case law. See Rules 1.1, 2.1, 2.2, 2.6, 2.9, 3.1, 3.2, 3.4, 3.7, 3.9, 3.12, 3.13, 3.14, 4.2, and 4.3.

"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family who resides in the judge's household. See Rules 2.11 and 3.13.

"Nonpublic information" means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute, rule, or court order or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

"Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.2. See Rule 4.1.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

CANON 1
A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE,* INTEGRITY,*AND IMPARTIALITY*OF THE JUDICIARY AND SHALL AVOID IMPROPRIETY* AND THE APPEARANCE OF IMPROPRIETY.

RULE 1.1
Compliance with the Law*
A judge shall comply with the law.

Annotations to Rule 1.1
A judge may ethically execute an agreement with a private probation provider as long as the judge's legal advisors determine that the agreement is legally permissible. Informal Opinion 99-5

A trial court judge must follow an appellate court directive even if it appears that the directive conflicts with statutes or rules. Informal Opinion 98-10

A judge must comply with the law even if the judge believes that the law is unconstitutional. In re Steed, 2006 UT 10, 131 P.3d 231.

A justice court judge who accepted a salary exceeding the statutory cap violated the law. The judge was ordered to repay the excess salary. In re Christensen, 2013 UT 30, 304 P.3d 835.

RULE 1.2
Promoting Confidence in the Judiciary
A judge should act at all times in a manner that promotes-and shall not undermine-public confidence in the independence* integrity,* and impartiality* of the judiciary and shall avoid impropriety* and the appearance of impropriety.

COMMENT
[I] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.
[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.
[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.
[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.
[5] Actual improprieties include violations of law or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge engaged in impropriety.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

Annotations to Rule 1.2

1. Appearance of Impropriety

Juvenile court judge has responsibility to ensure that probation officers adhere to appropriate ethical standards. Informal Opinion 88-1

Judge may participate in seminar in foreign country, purpose of which is to improve relations between the United States and foreign country, if neither issues discussed nor sponsoring organization are likely to be involved in matters before the court. Informal Opinion 88-10

Judge serving as officer of state bar may participate in discussion, debate and vote on bar's litigation matters unless those matters are likely to come before the court on which the judge sits or unless appearance of impropriety exists. Informal Opinion 89-1

Judge serving as officer of State Bar must abstain from discussion, debate and vote on bar admission and attorney discipline matters. Informal Opinion 89-1

Part-time commissioner who serves as justice of peace in neighboring state should not continue dual service if appearance of impropriety exists. Informal Opinion 90-4

Judges may not participate in a special banking program offered by a bank that has a contractual relationship with the judiciary. Formal Opinion 96-1

Judge may not attend an administrative checkpoint or a law enforcement "ride along" as an observer or a participant, because this is professional interaction with a single component of the criminal justice system, creating an appearance of impropriety. Informal Opinion 97-5

2. Integrity of the Judiciary

Judges and court personnel may not participate in soliciting donations from jurors for the CASA program. The possible coercive effect of the donation program undermines the integrity of the judiciary. Informal Opinion 97-9

A judge is not required to report criminal conduct of which the judge becomes aware, even if the conduct is admitted in testimony before the judge. The judge is not prohibited from reporting the conduct. Informal Opinion 00-3

Public confidence in the judiciary is not undermined simply based on the fact that a judge performs a marriage for a party who has a case pending before the judge. Informal Opinion 11-1

A judge may participate in social media, such as Facebook, provided the judge's actions and statements do not undermine public confidence in the integrity of the judiciary. Informal Opinion 12-01

Mere errors of law should ordinarily be dealt with through the appeals process and usually do not constitute violations of the Code of Conduct. However, excessive errors might support a charge of prejudicial conduct. In re Stoney, 2012 UT 64, 289 P.3d 497.

A judge who ignores the law with no apparent justification undermines public confidence in the integrity of the judiciary. In re Christensen, 2013 UT 30, 304 P.3d 835.

RULE 1.3
Avoiding Abuse of the Prestige of Judicial Office
A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others or allow others to do so.

COMMENT
[1] It is improper for a judge to abuse or attempt to abuse his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.
[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge, and if there is no likelihood that the reference or recommendation would reasonably be perceived as an attempt to exert pressure by reason of the judicial office. A judge may provide a general letter of recommendation assessing the qualifications and experience of an individual who has worked under the judge's supervision. The general letter of recommendation may be submitted to any prospective employer, including individuals and entities that regularly appear before the judge's court. In making such references or recommendations, the judge may refer to his or her judicial office and use official letterhead only for employment or educational opportunities.
[3] Judges may participate in the process of judicial selection by encouraging individuals to apply for judicial office and communicating with appointing authorities and screening committees,
[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

Annotations to Rule 1.3
1. Lending Prestige of the Judicial Office

Judge may not teach CLE seminar sponsored by for-profit entity. Informal Opinion 88-6

Justice court judge who is joint owner of business may not use any form of publicity or advertisement that refers to judicial office. Informal Opinion 89-12

Judge may write foreword to legal publication, but should take appropriate steps to ensure that neither content of foreword nor advertising or marketing of publication will exploit the judicial office or advance private interests of others. Informal Opinion 90-8

Judge's letter commending magazine's editor may not be published. Informal Opinion 91-1

Active senior judge's photograph and biographical sketch may be included in brochure promoting American Arbitration Association's Judicial Panel so long as the brochure does not distinguish active senior judges from former judges. Informal Opinion 92-1

An agreement with a private probation provider does not advance the private interests of a third party, but is a necessary part of doing business. Informal Opinion 99-5

A judge may refer victims to the Utah Crime Victims Legal Clinic provided the referral does not involve an assessment of the victim's case or the quality of the representation that the victim will receive. Informal Opinion 05-5

Judge may not recommend a specific mediator when asked by parties to provide such a recommendation. Informal Opinion 10-2

A judge may recommend the services of a particular attorney to the judge's siblings. Informal Opinion 11-02

A judge may create a roster of qualified providers for defendants who are sentenced as long as the criteria are reasonable and any interested entities may apply to be on the roster. Informal Opinion 12-02

2. Letters of Recommendation

Judge may write letter of recommendation on behalf of candidate for employment who judge knows in business capacity. Letter may include both judge's observations and judge's opinions based on those observations. Informal Opinion 91-2

Judge may not write letter of recommendation for individual seeking commercial loan to finance business that will receive referrals from the courts. Informal Opinion 91-2

In response to an inquiry from the Judicial Nominating Commission, a judge may provide a letter of recommendation based on the judge's personal knowledge of the judicial candidate honestly assessing the candidate's qualifications. Informal Opinion 94-5

Judge may not write a letter of recommendation in support of a private counseling service seeking a federal grant. A judge may be listed as a reference in the grant application. Informal Opinion 98-13

Judge may initiate contact with members of Judicial Nominating Commission and provide an honest assessment of an applicants qualifications. Informal Opinion 99-8

3. Special Position of Influence

Judge may not participate in community college or POST moot court program, in which participants are prospective law enforcement officers or certified peace officers, because such participation may convey impression that participants are in a special position of influence. Informal Opinion 90-2

Judge who hears cases brought by collection agency on behalf of state should not permit collection agency to convey impression that it is in a special position of influence. Informal Opinion 90-5

Judge may not attend an administrative checkpoint or a law enforcement "ride along" as an observer or a participant, because this would convey the impression that law enforcement is in a special position of influence. Informal Opinion 97-5

Judges and court personnel may not participate in soliciting donations from jurors for the CASA program. Participation would create the appearance that the CASA program is in a special position of influence. Informal Opinion 97-9

A juvenile court judge may not make referrals to a counseling center when the judge's spouse serves on the center's board of trustees. Informal Opinion 99-1

A plaque identifying a "trial lawyer of the year" may not be displayed in a courthouse. Informal Opinion 99-2

A judge's participation in the annual conference of the Attorney General's Office does not convey the impression that the attorneys are in a special position of influence. Informal Opinion 99-6

A judge may not accept an invitation to be recognized as a judicial fellow by the Association of Trial Lawyers of America. A judicial fellow is considered a member of ATLA. Informal Opinion 01-4

A judge may maintain membership in a cycling club that is sponsored, in part, by a law firm. Informal Opinion 03-1

A part-time justice court judge may accept a membership to the Association of Trial Lawyers of America. Informal Opinion 05-4

A juvenile court judge may make presentations to certain groups, such as a parenting class for DCFS, a CASA awards program, and the Foster Parents Association. Informal Opinion 06-6

Entities that are on a list of providers created by the judge are not perceived to be in a special position to influence the judge provided any interested entity may apply to be on the roster and the criteria for inclusion are reasonable. Informal Opinion 12-02

CANON 2
A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,* COMPETENTLY, AND DILIGENTLY.

RULE 2.1
Giving Precedence to the Duties of Judicial Office
The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT
[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.
[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

Annotations to Rule 2.1
Judge's participation in quasi-judicial and extra-judicial organizations must not necessitate undue absence from performance of judicial duties. Informal Opinion 89-1

Judge may teach a business law class at a local university during the judge's lunch break, even though the judge will need to extend the lunch break 20 minutes. Informal Opinion 08-1

Part-time commissioner who holds office of justice of peace in neighboring state should not continue to serve in both capacities if dual service interferes with diligent performance of duties as commissioner. Informal Opinion 90-4

A judge may serve as a commissioner for the Navajo Nation courts provided the service does not interfere with the judge's state duties. Informal Opinion 99-11

RULE 2.2
Impartiality* and Fairness
A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.

COMMENT
[1] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.
[2] When applying and interpreting the law, a judge may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.
[3] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Annotations to Rule 2.2
Judge may not refer parties to a specific mediator as this may appear to undermine the judge's impartiality if the mediator's cases come before the judge. Informal Opinion 10-2

If a court has created a list of qualified treatment providers, the court's referrals from the roster must be on a rotating basis unless the court can articulate how deviation from the regular rotation improves the administration of justice. Informal Opinion 12-02

RULE 2.3
Bias, Prejudice, and Harassment*
(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
(C) A judge shall take reasonable measures to require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT
[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.
[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.
[3] Examples of sexual harassment include but are not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

RULE 2.4
External Influences on Judicial Conduct
(A) A judge shall not be swayed by public clamor or fear of criticism.
(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT
[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Annotations to Rule 2.4
"Liking" someone or something on Facebook does not automatically convey the impression that the person or thing that is "liked" is in a position to influence the judge. Informal Opinion 12-01

RULE 2.5
Competence, Diligence, and Cooperation
(A) A judge shall competently and diligently perform judicial and administrative duties.
(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT
[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.
[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all judicial and administrative responsibilities.
[3] Competent and diligent disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.
[4] In competently and diligently performing judicial and administrative duties, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Annotations to Rule 2.5
Part-time commissioner who holds office of justice of peace in neighboring state should not continue to serve in both capacities if dual service interferes with the performance of duties as commissioner. Informal Opinion 90-4

RULE 2.6
Ensuring the Right to Be Heard
(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] If a judge participates in the settlement of disputes, the judge should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge may consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

RULE 2.7
Responsibility to Decide
A judge shall hear and decide matters assigned to the judge, except when disqualification is required or permitted.

COMMENT

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. A judge should not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

RULE 2.8
Decorum, Demeanor, and Communication with Jurors

(A) A judge shall take reasonable measures to require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall take

reasonable measures to require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.
(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

COMMENT
[1] The duty to hear all proceedings with patience and courtesy is consistent with the duty imposed in Rule 2.5 to dispose competently and diligently of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.
[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.
[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

RULE 2.9
Ex Parte Communications
(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:
(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.
(2) A judge may obtain the written advice of a disinterested expert on the law* applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.
(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility to personally decide the matter.
(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.
(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts to ensure that the judge does not receive inappropriate ex parte communications through or from court staff, court officials, and others subject to the judge's direction and control.

COMMENT
[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.
[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.
[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.
[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.
[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.
[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.
[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

Annotations to Rule 2.9
1. Communication with an Appellate Court

A trial court judge may not initiate communications with an appellate court concerning a pending case, unless the communication is solicited by the appellate court and the communication is placed on the record and provided to the parties. Informal Opinion 98-9

2. Communications Authorized by Law

The committee does not have authority to construe statutes to determine whether they expressly authorize ex parte communications. Informal Opinion 10-1

3. Communications with Attorneys and Parties

When using social media, judges must be cautious to ensure that they do not receive and are not engaging in ex parte communications with attorneys and parties about pending cases. Informal Opinion 12-01

4. Communications with Court Employees

Juvenile court judges may receive ex parte communications from juvenile court probation officers requesting warrants to detain juveniles. In that situation, juvenile court probation officers are court employees who aid the judge with adjudicative responsibilities. Informal Opinion 97-4

A juvenile court judge may review a previous case file of a minor who files a petition for permission to bypass parental consent for an abortion, provided that the judge makes all of this information a part of the record in the bypass case. A judge may also discuss the case with other judges who have presided over the minor's cases. Informal Opinion 07-3

RULE 2.10
Judicial Statements on Pending* and Impending* Cases
(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.
(C) A judge shall take reasonable measures to require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).
(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.
(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

COMMENT
[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.
[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.
[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

Annotations to Rule 2.10
Judge may respond to written inquiry regarding sentencing in criminal case that is neither pending nor impending, provided response does not subject sentence to collateral attack, does not exploit judge's position and does not allow others to do so, does not detract from dignity of judicial office, does not discourage public confidence in judiciary, does not result in confusion or

misunderstanding of judicial function, and does not contain confidential information. Informal Opinion 89-3

Ethics Advisory Committee will not review, edit, approve or disapprove specific content of judge's public comments. Content is left to discretion of judge. Informal Opinion 89-3

Judge may not comment on a case pending before U.S. Circuit Court of Appeals or U.S. Supreme Court. Canon prohibits all public comment on pending cases, regardless of court before which case is pending. Informal Opinion 90-2

Trial judge may not comment about any aspect of recently concluded trial until post-trial motions are resolved and appeal period has expired without appeal. Informal Opinion 90-7

When participating in social media, judges may not comment on pending or impending cases. Informal Opinion 12-01

RULE 2.11
Disqualification
(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:
(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.
(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:
(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
(b) acting as a lawyer in the proceeding;
(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or
(d) likely to be a material witness in the proceeding.
(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.
(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous three years made aggregate* contributions* to the judge's retention in an amount that is greater than $50 .
(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
(c) was a material witness concerning the matter; or
(d) previously presided as a judge over the matter in another court and is now acting as a judge who would hear the appeal or trial de novo.
(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.
(C) A trial court judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.
(D) An appellate court judge or justice subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may send notice to the parties disclosing the basis for the judge or justice's disqualification and asking them to consider whether to waive disqualification. With respect to paragraphs (A)(2) or (A)(3), the judge or justice may participate in the decision of the case if all parties, other than the party presumably benefitted by the apparent bias constituting the disqualifying circumstance, waive the disqualification. With respect to paragraphs (A)(4) through (A)(6), the judge or justice may participate in the decision of the case if all parties waive the disqualification. The responses to a notice of a disqualifying circumstance shall be included in the appellate file pertaining to the proceeding.

COMMENT
[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.
[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.
[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.
[4] A judge is disqualified in proceedings involving a law firm that employs the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household as an equity holder in the law firm. A judge is not disqualified in other situations unless the judge's impartiality might reasonably be questioned under paragraph (A), or

a relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c).
[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

Annotations Rule 2.11
1. Affiliation with Lawyer

Judge who previously worked as attorney in legal defender's office may not hear case in which legal defender attorney appears if representation in the matter was undertaken at time when judge was employed by legal defender. Informal Opinion 88-3

Judge must disqualify when former partner or firm appears as counsel in a civil case and 1) judge was formerly involved in matter, 2) judge will financially benefit from outcome of matter, or 3) representation in matter was undertaken at time when judge was associated with former partner or firm. Judge should also examine length of time since judge was affiliated with counsel, whether judge has maintained close relationship with counsel, whether judge has continuing financial interest in the practice, and whether judge has other business interests with counsel. Informal Opinion 89-2

When judge's former partner is affiliated with county attorney's office but does not appear as counsel, disqualification from county attorney's office cases is not automatically required. Informal Opinion 89-2

Judge who has previously represented criminal defendant in unrelated matter is not per se disqualified, though disqualification may be the better course. State v. Neeley, 748 P.2d 1091 (Utah 1988); State v. Petersen, 810 P.2d 421 (Utah 1991).

A guardian ad litem, who shared office space with a judge prior to the judge's appointment to the bench, may appear in the judge's court on cases other than those that the guardian had at the time the guardian and the judge shared office space. Informal Opinion 94-4

Judge was not required to enter disqualification even though judge's former law firm represented a party to the proceeding. The representation involved a separate matter. American Rural Cellular, Inc. v. Systems Communications Corp., 939 P.2d 185 (Utah App. 1997).

Simply because judge's former firm represents one of the parties does not create a reasonable inference of bias. Other factors must be present, such as the judge having a financial interest in the firm, or a close personal relationship with members of the firm. In re Affidavit of Bias, 947 P.2d 1152 (Utah 1997).

A judge is not required to enter disqualification in cases involving the county that previously employed the judge as a county attorney, as long as the issues in the litigation arose after the judge left the county's employment. Informal Opinion 98-16

A part-time justice court judge may not preside in cases in which the prosecuting attorney is in the same law firm as the judge's personal attorney. Disqualification may be remitted. Informal Opinion 99-9

A judge must enter disqualification in proceedings involving the attorney that represents the judge in a Judicial Conduct Commission proceeding. The disqualification requirement continues for six months after the representation ends. Informal Opinion 00-4

2. Comment on Allegations in Affidavit

A judge may comment on allegations in an affidavit of bias when the judge agrees to disqualification. The comments must reflect the appropriate demeanor, integrity, and impartiality of the judiciary. Informal Opinion 04-1

3. Court Employee Involvement

A judge should not hear cases involving an employee of the judge's district and should not hear cases involving an employee's immediate family or household. Informal Opinion 96-2 (Modified by Informal Opinion 98-14)

A judge is required to enter disqualification in cases involving an employee of the judge's district, excepting employees of different court levels if the court is not co-located. A judge must enter disqualification in cases involving family or household members of an employee that has a close working relationship with the judge. Informal Opinion 98-14

A judge is not required to enter disqualification in a proceeding in which the judge's clerk files an affidavit that recites only facts regarding the court's record of a defendant's compliance with the court's sentence. Informal Opinion 99-4

A judge is not required to enter disqualification when reviewing and deciding a motion and affidavit for disqualification of a judge from the same district. Informal Opinion 01-2

The judges of a district must enter disqualification in all cases in which a part-time referee of the district appears as counsel. Informal Opinion 07-2

4. Extrajudicial Source Rule

A judge is not required to enter disqualification when litigant has sued judge in judicial capacity. Disqualifying factors must be extrajudicial. Informal Opinion 97-8

Disqualifying bias or prejudice must normally be rooted in an extrajudicial source. Bias or prejudice does not arise simply based on the occurrences in a court proceeding. Informal Opinion 98-12

A judge is not automatically required to enter disqualification in a proceeding in which the judge has previously sanctioned one of the attorneys, held the attorney in contempt, or referred one of the attorneys to the Office of Professional Conduct, as these occurrences are not extrajudicial. Informal Opinion 05-2

It is not inappropriate for a trial judge to rely on what the judge learned about a defendant in prior proceedings, or to make a judgment based on those dealings, when considering the defendant's ability to succeed on probation. State v. Kucharski, 2012 UT App. 50, 272 P.3d 791.

5. Family Member Involvement

Judge may not hear case in which spouse appears as counsel. Informal Opinion 88-3

Judge whose spouse is attorney in legal defender's office may not hear case in which legal defender attorney appears. Informal Opinion 88-3

Judge may hear case brought by county attorney who employs judge's emancipated daughter as secretary, provided daughter's income is not affected by outcome of case and daughter will not appear or participate in the case in a substantive manner. Informal Opinion 89-2

Judge is not automatically disqualified in criminal case in which cousin participates as affiant or complainant. Informal Opinion 89-5

Although judge may not preside over case in which relative within third degree of relationship appears as counsel, automatic disqualification does not extend to situation in which relative is only affiliated with law firm that appears as counsel. In that situation, the judge must be disqualified only if relative has interest that could be substantially affected by outcome of proceeding. Partners in law firm have such an interest while associates in law firm may not have such an interest. Salary of associate is not such an interest. Informal Opinion 90-3 (Modified by Informal Opinion 97-2)

Under Canon 3, a relative of the requisite degree of relationship has an interest that might be sufficiently affected by the outcome of a case in every situation in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party to the case. Regional Sales Agency, Inc., v. Reichert, 830 P.2d 252 (Utah 1992).

A judge need not disqualify, but must disclose to the parties that the law firm that employs the judge's father in an "of counsel" capacity represents a party to the case. Informal Opinion 92-3

A judge whose spouse serves as an assistant attorney general must disclose the spouse's employment, and any other relevant facts and circumstances, and allow the parties to take any action they deem appropriate. Informal Opinion 94-6

The fact that the judge's nephew was an incorporator and director of plaintiff did not require disqualification, absent evidence that nephew had anything to gain from the outcome of the case. Gardner v. Madsen, 949 P.2d 285 (Utah App. 1997).

A judge must enter disqualification when a relative within the third degree is employed as an associate or law clerk of the firm appearing before the judge. Informal Opinion 97-2

A judge must enter disqualification when the spouse of the judge's front office and in-court clerk appears as counsel in a proceeding. Informal Opinion 06-1

A judge must enter disqualification in proceedings involving the employer of the judge's spouse. Informal Opinion 06-2

Judge must enter disqualification or obtain remittal from parties when a party contests or fails to appear on a citation issued by the judge's son-in-law who is the chief of the police department in the judge's jurisdiction. Informal Opinion 10-3

6. Financial Interest

Judge who is merely "potential" member of an alleged but uncertified class in a class action does not own a financial interest that would require disqualification. Madsen v. Prudential Federal Savings and Loan, 767 P.2d 538 (Utah 1988).

Even assuming judge owns interest in state money by right to receive retirement or salary, judge is not precluded from hearing bad check case where state is payee, because outcome of case would not likely substantially affect judge's interest in state funds. Informal Opinion 90-5

A judge must enter disqualification in proceedings involving the employer of the judge's spouse. Informal Opinion 06-2

7. Impartiality Might Reasonably be Questioned

Test is whether a person of ordinary presence knowing all the facts known to judge would find reasonable basis for questioning impartiality. Informal Opinions 88-3 and 89-2

Although first cousin is not person within third degree of relationship, the relationship requires disqualification if judge and cousin maintain such close relationship that judge's impartiality might reasonably be questioned. Informal Opinion 89-5

Although automatic disqualification does not extend to situation in which related attorney is only affiliated with law firm that appears as counsel, judge must still be disqualified if impartiality might reasonably be questioned because of relationship. Informal Opinion 90-3

Code may require disqualification even where actual bias or prejudice does not exist. State v. Neeley, 748 P.2d 1091 (Utah 1988); State v. Petersen, 810 P.2d 421 (Utah 1991).

A part-time justice court judge must enter disqualification in all proceedings involving the county department that employs the judge in a nonjudicial capacity. Informal Opinion 98-1

Judges who sit on a Judicial Council task force that has received donations from attorneys should disclose the circumstances of the donations in cases involving those attorneys. Informal Opinion 98-3

A judge is not required to enter disqualification simply because the judge has increased court security in response to information that a defendant might be a security risk. Informal Opinion 98-12

A commissioner must disclose the fact that the commissioner serves on a Utah Legal Services committee in all cases in which Utah Legal Services attorneys appears. Informal Opinion 00-1

A judge is not required to enter disqualification based solely on the fact that a litigant has filed a Judicial Conduct Commission complaint against the judge. Informal Opinion 05-3

The simple fact that a judge is a "friend" with an attorney on Facebook does not require the judge to enter disqualification in a case involving that attorney. Informal Opinion 12-01

The word "reasonable" connotes the idea that judges are not subject to disqualification in every situation where impartiality is questioned, particularly when the potential for bias is remote. The test is whether a reasonable person, knowing all of the circumstances, would believe that the judge's impartiality could be questioned. West Jordan City v. Goodman, 2006 UT 27, 135 P.3d 874.

Although litigants are entitled to a judge who will hear both sides and decide an issue on the merits of the law and the evidence presented, they are not entitled to a judge whose mind is a clean slate. Lunt v. Lance, 2008 UT 192, 186 P.3d 978.

There is no categorical rule that whenever a judge engages in an ex parte conversation he or she is deemed to be impartial, biased, or prejudiced such that disqualification is mandated. Evidence from the ex parte conversation must show that it involved personal bias or prejudice. Kearl v. Okelberry, 2010 UT App. 197 (not published in the Pacific Reporter.)

8. Other Interest That Could be Substantially Affected

Judge who is merely "potential" member of an alleged but uncertified class in a class action suit does not have an interest that could be substantially affected by the outcome of the proceeding. Madsen v. Prudential Federal Savings and Loan, 767 P.2d 538 (Utah 1988).

In situation where judge's former firm had advised one of the parties concerning a remotely related transaction, judge did not have sufficient interest to require disqualification. American Rural Cellular, Inc. v. Systems Communication Corp., 939 P.2d 185 (Utah App. 1997).

9. Party's Right to a Fair Trial

Criminal defendants' rights to fair trial are governed by constitution and statutes, not by this Code. State v. Neeley, 748 P.2d 1091 (Utah 1988); State v. Gardner, 789 P.2d 273 (Utah 1989).

10. Personal Bias or Prejudice

Code does not require that judges, upon taking the bench, set aside the biases and prejudices acquired through life's experiences. Disqualification is only required when those biases and prejudices interfere with the judge's ability to impartially decide the issues before the court. Madsen v. Prudential Federal Savings and Loan, 767 P.2d 538 (Utah 1988).

Disqualification is not automatically required when an attorney appearing before the judge has previously been involved in an adversary proceeding against the judge. Circumstances of the adversary proceeding must be considered before determining whether disqualification is necessary. Informal Opinion 96-3

A judge is not automatically required to enter disqualification when a party sues the judge in the judge's judicial capacity. Disqualifying facts must be extrajudicial. Informal Opinion 97-8

A judge is not automatically required to enter disqualification in a proceeding in a case involving litigants who had previously appeared before the judge. In re M.L., 965 P.2d 551 (Utah App. 1998).

A judge is not automatically required to enter disqualification in a proceeding in which the judge has previously sanctioned one of the attorneys, held one of the attorney in contempt, or referred one of the attorneys to the Office of Professional Conduct. Informal Opinion 05-2

Bias and prejudice are only improper when they are personal. Neither bias nor prejudice refers to the attitude that a judge may hold about the subject matter of a lawsuit. Bias or prejudice must stem from an extrajudicial source, not from occurrences in the proceedings before the judge. State v. Munguia, 2011 UT 5, 253 P.3d 1082.

11. Personal Knowledge of Disputed Facts

The fact that a judge had involvement with a zoning issue concerning the subject property, and the involvement was for less than 10 minutes nearly a decade prior, did not support a claim that the judge had personal knowledge of disputed evidentiary facts. Lunt v. Lance, 2008 UT 192, 186 P.3d 978.

12. Remittal

Judge may disclose facts on the record and allow attorneys to decide if conflict warrants disqualification. Informal Opinions 89-2, 89-5 and 90-3

Parties could waive disqualification of a judge who was involved with a zoning issue involving the subject property, when the involvement lasted less than ten minutes and was nearly a decade earlier. Lunt v. Lance, 2008 UT 192, 186 P.3d 978.

RULE 2.12
Supervisory Duties
(A) A judge shall take reasonable measures to require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's fulfillment of his or her obligations under this Code.
(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the timely disposition of matters before them.

COMMENT
[1] A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.
[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision timely administer their workloads .

Annotations to Rule 2.12
Juvenile court probation officer must be disqualified if spouse appears as attorney in proceeding. Informal Opinion 88-1

Code's absolute ban against acceptance of gifts does not apply to court clerks, court reporters, and other court employees. Court employees may receive gifts of nominal value during holidays. Informal Opinion 89-6

Court employees are required to comply with those code provisions that require diligence and fidelity. Service on governmental commission or committee involves an obligation of fidelity. Informal Opinion 97-6

An assistant court administrator may coordinate the State Charitable Fund Drive because judges and the prestige of the judiciary are not directly involved. Informal Opinion 98-2

The executive director of a Judicial Council task force may solicit funds for task force research activities as long as judges' names and titles are not used in the efforts. Informal Opinion 98-3

Justice court clerk may not participate in city mobile watch program because the purpose of the program is to directly assist law enforcement agencies. Informal Opinion 98-5

A court employee sitting on a court building committee may not authorize display in a courthouse of a plaque identifying a "trial lawyer of the year." Informal Opinion 99-2

A part-time court referee may not practice criminal law. The referee also may not practice civil law at any of the court sites that the referee serves. Informal Opinion 07-2

RULE 2.13
Administrative Appointments
(A) In making administrative appointments, a judge:
(1) shall exercise the power of appointment impartially* and on the basis of merit; and
(2) shall avoid nepotism, favoritism, and unnecessary appointments.
(B) A judge shall not appoint a lawyer to a position if the judge either knows* that the lawyer, or the lawyer's spouse or domestic partner,* has contributed more than $50 within the prior 3 years to the judge's retention campaign, or learns of such a contribution* by means of a timely motion by a party or other person properly interested in the matter, unless:
(1) the position is substantially uncompensated;
(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made contributions; or
(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.
(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT
[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).
[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.
[3] The rule against making administrative appointments of lawyers who have contributed in excess of a specified dollar amount to a judge's retention campaign includes an exception for positions that are substantially uncompensated, such as those for which the lawyer's compensation is limited to reimbursement for out-of-pocket expenses.

RULE 2.14
Impairment
A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT
[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.
[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

RULE 2.15
Responding to Judicial and Lawyer Misconduct
(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.*
(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.
(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action.
(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action.

COMMENT
[1] A judge has an obligation to address a known violation by a judge or a lawyer of the Code or the Utah Rules of Professional Conduct . Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.
[2] A judge who does not have actual knowledge that another judge or a lawyer may have violated the Code or the Utah Rules of Professional Conduct, but receives information indicating

a substantial likelihood of such misconduct, should take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation or reporting the suspected violation to the appropriate authority or other agency or body.

RULE 2.16
Cooperation with Disciplinary Authorities
(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.
(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT
[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

CANON 3
A JUDGE SHALL CONDUCT THE JUDGE'S EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

RULE 3.1
Extrajudicial Activities in General
A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:
(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
(B) participate in activities that will lead to unreasonably frequent disqualification of the judge;
(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;*
or
(D) make inappropriate use of court premises, staff, stationery, equipment, or other resources.

COMMENT
[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rules 3.7 and 3.12.
[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.
[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

Annotations to Rule 3.1
1. Appearance of Impropriety

Part-time justice court judge who is full-time social worker may not provide alcohol assessment and education services to defendants who have appeared in the judge's court. Informal Opinion 92-2

Judges may not participate in a special banking program offered by a bank that has a contractual relationship with the judiciary. Formal Opinion 96-1

Commissioner may not issue title insurance through a financial arrangement with the commissioner's former partner. Informal Opinion 98-7

A county justice court judge may not serve as president of a company that markets technology to correction facilities. A judge may not engage in frequent financial dealings with other components of the criminal justice system. Informal Opinion 05-1

An appearance of impropriety is not created by the simple fact that a judge performs a marriage for a party who has a case pending before the judge. Informal Opinion 11-01

A judge may participate in social media, such as Facebook, provided the judge's actions and statements do not undermine public confidence in the integrity of the judiciary. Informal Opinion 12-01

2. Casting Doubt on Impartiality

Judge should not teach course on courtroom demeanor if enrollment in course is limited to single adversarial component of legal system, students are likely to appear regularly in judge's court, or course is designed to teach students how to appear more credible in court. Informal Opinions 88-5, 89-9 and 90-2

Judge serving as officer of state bar association may participate in discussion, debate and vote on bar's litigation matters unless those matters are likely to come before the court on which judge sits or unless appearance of impropriety exists. Formal Opinion 89-1

Judge may not participate in community college or POST moot court program in which participants are prospective law enforcement officers or certified peace officers, because such participation may convey impression that participants are in a special position of influence. Informal Opinion 90-2

Generally, judge may teach for public and for non-profit entities. However, judge may not make comments that would cast doubt on judge's ability to decide impartially any issue likely to come before the court. Informal Opinion 90-7

Judge may write foreword to legal publication on issues that may occasionally come before the judge, provided foreword does not take an advocacy position on those issues. Informal Opinion 90-8

Although judge may serve as member of bar sponsored fee arbitration panel, judge should not serve if service interferes with impartial performance of judicial duties. Informal Opinion 91-3

A state court judge may serve as a mediator in the federal court's annexed alternative dispute resolution pilot program, provided that such service does not interfere with the judge's judicial duties and does not cast doubt on the judge's ability to impartially decide matters that may come before the judge's court. Informal Opinion 94-1

A justice court judge cannot simultaneously serve as an administrative law judge, because the judge would be handling similar types of cases in both areas. Informal Opinion 01-5

3. Exploiting the Judicial Position

Part-time justice court judge who is full-time social worker may not solicit alcohol assessment and education referrals from other judges because solicitation would exploit the judge's judicial position. Informal Opinion 92-2

A judge may communicate with the judge's insurance carrier, advocating coverage for a judge's family member, provided the judge does not use the judge's title in the communications. Informal Opinion 99-3

4. Interference with Impartiality

Justice court judge may jointly own small business that occasionally seeks relief in small claims court if cases are not filed in court where judge presides and co-owner appears on behalf of business. Informal Opinion 89-12

5. Interference with Performance of Judicial Duties

Generally, judge is only person who can ultimately decide if activities interfere with performance of judicial duties. Informal Opinions 89-11 and 89-14

Full-time justice court judge may not serve as volunteer for Special Olympics if service would require judge to be absent from court one day per week. Informal Opinion 89-11

Judge's participation in quasi-judicial and extra-judicial organizations should not require undue absence from performance of judicial duties. Formal Opinion 89-1

Performance of judicial duties not only requires judge to conduct scheduled hearings, but also to be available during regular court hours to deal with other legal issues that may arise. Informal Opinion 90-1

Judge may participate in non-profit musical education and performance organization as long as participation does not interfere with judicial duties. Informal Opinion 97-3

6. Teaching

Judge should not teach course on courtroom demeanor if enrollment in course is limited to single adversarial component of legal system, students are likely to appear regularly in judge's court, or course is designed to teach students how to appear more credible in court. Informal Opinion 88-5 and 89-9

Judge may not teach CLE seminar for for- profit entity. Informal Opinion 88-6

Judge may teach overseas CLE seminar for for-profit entity if seminar is not primary reason that individuals elect to participate. Informal Opinion 89-4

Judge may teach night courses on general legal topics at community college. Informal Opinion 89-9

Judge may not teach law enforcement course to peace officers. Informal Opinion 89-9

Judge may not teach class at university if teaching would require full-time judge to be away from the courthouse during regular business hours for six hours per week. Informal Opinion 90-1

Generally, judge may teach for public and non-profit entities. However, judge may not comment on any aspect of recently concluded trial until post-trial motions are resolved and appeal period has expired without appeal, and may not make general comments that would cast doubt on judge's ability to decide impartially any issue likely to come before the court. Informal Opinion 90-7

Judicial writing is governed by same principles as judicial teaching. Informal Opinion 90-8

A judge may teach a session at the annual conference of the Attorney General's Office provided the judge is willing and available to accept invitations from opposing groups of attorneys, and the judge does not give legal advice, comment on pending cases, or offer opinions that would indicate biases. Informal Opinion 99-6

A judge may participate on a Division of Child and Family Services panel designed to train foster parents. Informal Opinion 06-4

A juvenile court judge may make presentations to certain groups, such as a parenting class for DCFS, a CASA award program and the Foster Parents Association. Informal Opinion 06-6

Judge may teach a business law class at a local university during the judge’s lunch break, even though the judge will need to extend the lunch break 20 minutes. Informal Opinion 08-1

RULE 3.2
Appearances before Governmental Bodies and Consultation with Government Officials
A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law,* the legal system, or the administration of justice;
(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests,* or when the judge is acting in a fiduciary* capacity.

COMMENT
[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.
[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.
[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

Annotations to Rule 3.2
Judge must limit remarks to legislative and executive bodies to issues concerning the law, the legal system, and the administration of justice. Formal Opinion 89-1

A judge may contact legislators on bills and issues that directly and primarily involve the law, the legal system, and the administration of justice. Informal Opinion 01-1

RULE 3.3
Testifying as a Character Witness
A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly subpoenaed.

COMMENT
[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances

where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Annotations to Rule 3.3
Senior judge may not testify as paid expert witness in support of settlement agreement. Informal Opinion 88-8

Judge should not testify as character witness unless served with a subpoena. Informal Opinion 88-9

RULE 3.4
Appointments to Governmental Positions
A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law,* the legal system, or the administration of justice.

COMMENT
[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.
[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

RULE 3.5
Use of Nonpublic Information*
A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

COMMENT
[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.
[2] This Rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, if consistent with other provisions of this Code.

RULE 3.6
Affiliation with Discriminatory Organizations
(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual

orientation. A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.
(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join under paragraph (A) is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT
[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.
[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited, such as scouting organizations.
[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.
[4] This Rule does not apply to national or state military service.

RULE 3.7
Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities
(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law,* the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
(2) soliciting contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;
(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of

justice;
(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;
(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
(a) will be engaged in proceedings that would ordinarily come before the judge; or
(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.
(B) A judge may encourage lawyers to provide pro bono public legal services.

COMMENT
[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions and other not-for-profit organizations, including law-related, charitable, and other organizations.
[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization or the nature of the judge's participation in or association with the organization would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.
[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer or to perform similar functions at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.
[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.
[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

Annotations to Rule 3.7
1. Fundraising

Service as member of United Way's Board of Directors does not violate Code provided judge neither solicits funds nor allows the use of judicial office for that purpose. Informal Opinion 88-4

Judge may not participate in dunking booth at bar convention to help raise money for drug prevention program in public schools. Informal Opinion 89-8

Judge may not assist in fundraising for quasi-judicial organization comprised mostly of attorney members. Formal Opinion 89-1 and Informal Opinions 90-6 and 90-9

Judge's name and organizational title may be used on organization's letterhead even if the letterhead is used for fundraising purposes. However, judge's name should not be selectively emphasized and judicial title should not be used. Informal Opinion 90-6

Judge who serves as officer or director of extrajudicial organization may perform perfunctory tasks at organization's fundraising events, but should not take active part. Informal Opinion 90-6

"Fundraising activity" includes seminar sponsored by law school alumni association if excess proceeds are used to fund association's other activities, even though those activities are educational or charitable in nature. Informal Opinion 90-9

Judges on Judicial Council task force may not participate in task force fundraising. Informal Opinion 98-3

A judge may contribute a picture to a national campaign by the American Indian College Fund. The campaign is not solely for fundraising and there is no direct solicitation involved. Informal Opinion 01-3

2. Government Boards and Commissions

A judge may not participate on the Salt Lake County Child Abuse Coordinating Committee because the activities of the committee have gone beyond purposes permitted under the Code. Informal Opinion 88-2

Justice court judge may serve as member or chairman of county planning commission. Informal Opinion 89-10

A state court judge may serve as a mediator in the federal court's annexed alternative dispute resolution pilot program, provided that such service does not interfere with the judge's judicial duties and does not cast doubt on the judge's ability to impartially decide matters that may come before the judge's court. Informal Opinion 94-1

A judge should not serve on a subcommittee to the Utah Substance Abuse and Anti-Violence Coordinating Council because that subcommittee is concerned with matters of fact or policy other than improvement of the law, the legal system, or the administration of justice. Informal Opinion 94-2

An active senior judge may serve on the Board of Child and Family Services. Informal Opinion 95-1

A judge may not serve on the Board of Regents because such service constitutes an appointment to a governmental position that is concerned with matters of fact or policy other than the improvement of the law, the legal system, or the administration of justice. Informal Opinion 95-3

An active senior judge may serve as a hearing officer, on a contract basis, for the Board of Pardons and Parole, but may not then preside as a senior judge over criminal or habeas corpus cases. Informal Opinion 97-1

Appellate court employee may serve on the Grievance Council of the Utah Division of Child and Family Services because the Council is devoted to improving the law and the administration of justice. Informal Opinion 97-6

Judge may serve on Children's Justice Center Advisory Board but may not participate in discussions that focus on prosecutorial tactics or other discussions that do not benefit the system as a whole. Informal Opinion 98-4

An active senior judge may not accept an appointment to the Utah Antidiscrimination Advisory Council because it does not have a direct nexus to the administration of justice. Informal Opinion 98-11

A member of the Judicial Council may propose and vote on a Council resolution to file an amicus brief in a Utah Supreme Court case involving separation of powers. Informal Opinion 98-18

A judge may accept an appointment to serve as a commissioner for the Navajo Nation courts as this will improve the administration of justice. Informal Opinion 99-11

A part-time justice court judge may accept an appointment to the local school district board of education. Informal Opinion 00-2

A justice court judge cannot simultaneously serve as an administrative law judge, because the judge would be handling similar types of cases in both areas. Informal Opinion 01-5

A judge may not serve on a county ad hoc citizen's advisory committee that will address zoning issues. Informal Opinion 06-3

A part-time justice court judge may serve on a traffic safety committee appointed by a local school board. Informal Opinion 07-1

3. Service as Officer, Director or Trustee

Entity's stated purpose may be indicative of its classification as quasi-judicial or extrajudicial organization, but its actions should be regularly re-examined by participating judge to determine whether continued association is proper. Informal Opinions 88-2, 88-4, 89-1 and 90-6

Former Canon 5B, which affects judge's service as officer, director, trustee or non-legal advisor in civic and charitable organizations, also applies to judge's membership in such organizations. Informal Opinion 89-1

Judge may serve as officer of state bar. Formal Opinion 89-1

Judge serving as officer of state bar may participate in internal discussion, debate, and vote on Bar's litigation matters unless those matters are likely to come before the court on which judge sits or unless appearance of impropriety exists. Formal Opinion 89-1

Judge serving as officer of state bar must abstain from discussion, debate, and vote on bar administration and attorney discipline matters. Formal Opinion 89-1

Judge's participation in quasi-judicial and extrajudicial organizations should not necessitate undue absence from performance of judicial duties. Formal Opinion 89-1, and Informal Opinion 91-3

Judge may serve as president of local bar association. Informal Opinion 89-14

Judge may serve as officer of law school alumni association. Informal Opinion 90-6

Judge may serve as member of a bar sponsored fee arbitration panel. Informal Opinion 91-3

Active senior judge may serve as member of American Arbitration Association "Judicial Panel" consisting of active senior judges and former judges. Informal Opinion 92-1

A judge may not maintain membership in an organization that endorses candidates for partisan political office. Informal Opinion 93-1

Service on a local domestic violence coalition is permitted as long as the coalition is not an advocacy group, the membership is diverse, and individual cases are not discussed. Informal Opinion 98-6

A commissioner may serve on a Utah Legal Services committee, but must disclose the service in all cases involving Utah Legal Services attorneys. Informal Opinion 00-1

Judge may maintain membership in a cycling club that is sponsored, in part, by a law firm. Informal Opinion 03-1

A judge may serve as a trustee on the board of the Utah Certified Development Company, a nonprofit entity. Informal Opinion 06-5

A judge may not serve on the Board of the National Alliance for the Mentally Ill, because representatives of the Alliance frequently appear in the judge's court. Informal Opinion 07-4

RULE 3.8
Appointments to Fiduciary* Positions
(A) A judge shall not accept appointment to serve in a fiduciary position, except as a fiduciary for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.
(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.
(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.
(D) If a person who is serving in a fiduciary position becomes a judge, he or she shall comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

COMMENT
[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary. In such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Annotations to Rule 3.8
Although a judge is generally allowed to provide private assistance to siblings involved in estate matters, a judge may not provide such private assistance if the judge is the personal representative of the estate and the estate is involved in adversary proceedings in the judge's court. Informal Opinion 11-2 .

RULE 3.9
Service as Arbitrator or Mediator
A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

COMMENT
[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement

conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

RULE 3.10
Practice of Law
A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,* but is otherwise prohibited from serving as the family member's lawyer in any forum.

COMMENT
[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

Annotations to Rule 3.10
It is a rebuttable presumption that a judge of a full-time justice court is a full-time judge prohibited from the practice of law. Informal Opinion 96-1

Commissioner may not continue to issue insurance through Attorneys' Title. Informal Opinion 98-7

A part-time referee may not practice law at the court sites that the referee serves. The part-time referee may not practice criminal law in any district. Informal Opinion 07-2

A judge may privately provide legal advice to those with whom the judge maintains a close familial relationship including the judge's siblings. Informal Opinion 11-02

A judge may not conduct negotiations on behalf of siblings to whom the judge is providing legal advice. Informal Opinion 11-02

When participating in social media, a judge may follow legal blogs and post comments, but the judge must ensure that the judge is not giving legal advice. Informal Opinion 12-01

RULE 3.11
Financial, Business, or Remunerative Activities
(A) A judge may hold and manage investments of the judge and members of the judge's family.*
(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:
(1) a business closely held by the judge or members of the judge's family; or
(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.
(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;
(2) lead to frequent disqualification of the judge;
(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
(4) result in violation of other provisions of this Code.

COMMENT
[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.
[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

RULE 3.12
Compensation for Extrajudicial Activities
(A) A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law* unless such acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*
(B) A judge shall not receive compensation for performing a marriage ceremony during regular court hours. A judge may receive compensation for performing a marriage ceremony during non-court hours.

COMMENT
[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rules 2.1 and 3.1.

Annotations to Rule 3.12
Reasonable compensation is that compensation which a non-judge would receive for the same services. Informal Opinions 89-4 and 89-10

Part-time justice court judge who is a full-time social worker may not receive compensation for providing alcohol assessment and education services to defendants who have appeared in the judge's court because receipt of compensation creates appearance of impropriety. Informal Opinion 92-2

It is inappropriate for a judge to receive compensation for performing a marriage ceremony during regular court hours, regardless of where the ceremony is located. Moreover, a judge should not receive compensation for the performance of a marriage ceremony held at the court, regardless of whether the ceremony is performed during regular court hours. Informal Opinion 94-3 (Modified by Informal Opinion 98-8)

A judge may not charge a fee for marriage ceremonies performed during business hours. A fee may be charged for ceremonies performed during off hours if the ceremony is performed at an off-court location or at a portion of the court site set aside for such ceremonies. Informal Opinion 98-8

RULE 3.13
Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value
(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law* or would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*
(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following:
(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.11;
(3) ordinary social hospitality;
(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;
(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use;
(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally benefit the judge; or
(9) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:
(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or
(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge.

COMMENT

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low. In lieu of imposing financial reporting requirements, Utah has adopted stricter prohibitions than those proposed by the Model Code against the acceptance of gifts, loans, bequests, benefits, or other things of value.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of this Code.

Annotations to Rule 3.13

Even assuming that reimbursement for travel, lodging and meals incident to judge's participation in overseas seminar is gift, judge may accept such reimbursement from sponsoring organization whose interests have not come and are not likely to come before the court. Informal Opinion 88-10

Judge may not accept Christmas gift from lawyer or other person who is likely to come before the court. Value of gift is immaterial. Informal Opinion 89-6

Except on actual trial days a judge may engage in private social interactions with attorneys who have cases pending before the judge. Judges may attend larger social gatherings at which attorneys are present. A judge may accept a free meal from an attorney. Formal Opinion 98-1

RULE 3.14
Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.
(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,* or guest.

COMMENT
[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.
[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.
[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:
(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;
(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;
(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;
(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;
(e) whether information concerning the activity and its funding sources is available upon inquiry;
(f) whether the sponsor or source of funding is generally associated with particular parties or

interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;
(g) whether differing viewpoints are presented; and
(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

Annotations to Rule 3.14
Reimbursement for travel, food, and lodging incident to judge's attendance at and participation in overseas seminar should be limited to actual costs. Informal Opinion 88-10

CANON 4
A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE*, INTEGRITY,* OR IMPARTIALITY* OF THE JUDICIARY.

RULE 4.1
Political and Campaign Activities of Judges and Judicial Candidates* in General
(A) Except as permitted in this Canon, a judge or a judicial candidate shall not:
(1) act as a leader in, or hold an office in, a political organization;*
(2) make speeches on behalf of a political organization;
(3) publicly endorse or oppose a candidate for any public office;
(4) solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;
(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
(6) publicly identify himself or herself as a member of a political organization, except as necessary to vote in an election;
(7) seek, accept, or use endorsements from a political organization;
(8) use court staff or make excessive use of court facilities or other court resources in seeking judicial office;
(9) knowingly,* or with reckless disregard for the truth, make any false or misleading statement in seeking judicial office;
(10) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; or
(11) make pledges, promises, or commitments other than the faithful, impartial and diligent performance of judicial duties.
(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under this Canon.

COMMENT
GENERAL CONSIDERATIONS
[1] Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates.

PARTICIPATION IN POLITICAL ACTIVITIES
[2] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence.
[3] Although members of the families of judges and judicial candidates are free to engage in their

own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

[4] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections.

STATEMENTS AND COMMENTS MADE DURING A CAMPAIGN FOR JUDICIAL OFFICE

[5]Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Paragraph (A)(9) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[6] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by third parties or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate other provisions of this Canon, the candidate may make a factually accurate public response.

[7] Subject to the provisions of this Canon, a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her while seeking judicial office, although it is preferable for someone else to respond if the allegations relate to a pending case.

[8] Paragraph (A)(10) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

PLEDGES, PROMISES, OR COMMITMENTS

[9] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices.

[10] Paragraph (A)(11) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the judicial office.

[11] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.

[12] A judicial candidate may make promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action

outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse.

Annotations to Rule 4.1
Judge should neither host nor attend mass meeting (party caucus). Informal Opinion 88-7

Judge may not provide non-financial campaign assistance to school board candidate even in the privacy
of judge's home. Informal Opinion 89-7

Judge may not attend public gatherings where spouse is campaigning for public office and may not accompany spouse while spouse campaigns. Informal Opinion 89-15

Because this Canon does not apply to pro-tem judges, pro-tem judge may campaign for political office. Informal Opinion 89-16

"Political gathering" means any gathering of two or more people for political purposes. Informal Opinions 89-7 and 91-1

Judge may not participate in former law partner's campaign for out-of-state elective office. Informal Opinion 90-2

Part-time commissioner may campaign for and hold office of justice of peace in neighboring state provided campaign activities are in compliance with Canon. Informal Opinion 90-4

Non-partisan political activity is also prohibited by Code. Informal Opinion 91-1

A judge may not maintain membership in an organization that endorses candidates for partisan political office. Informal Opinion 93-1

An applicant for judicial office may participate in planning, and thereafter attend, a political fundraising dinner. Informal Opinion 95-2

An active senior judge may not serve as master of ceremonies for a PTA "Meet the Candidates" night, because the meeting is a political gathering. Informal Opinion 98-15

A judge may not attend a political party caucus. A judge may vote in a primary election, even when participation is conditioned on party affiliation. Informal Opinion 02-1

A judge may be a “friend” with an elected official on Facebook, but a judge may not be a “friend” on a page dedicated to the elected official’s campaign. The judge must maintain political neutrality. Informal Opinion 12-01

RULE 4.2
Political and Campaign Activities of Judges in Retention Elections
(A) A judge standing for retention shall act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary and shall encourage members of the judge's family* to adhere to the same standards of conduct in support of the judge that apply to the judge.
(B) If a judge standing for retention has drawn public opposition, the judge may operate a campaign for office subject to the following limitations:
(1) The judge shall comply with all applicable election, election campaign, and election campaign fund-raising laws* and regulations;
(2) The judge shall not directly solicit* or accept campaign funds or solicit public statements of support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. Committees may solicit campaign contributions* and public statements of support from lawyers and non-lawyers. Surplus contributions held by the committee after the election shall be contributed without public attribution to the Utah Bar Foundation. Committees must not permit the use of campaign contributions for the private benefit of the judge or members of the judge's family;
(3) The judge shall review and approve the content of all campaign statements and materials produced by his or her campaign committee before their dissemination;
(4) The judge may speak to public gatherings on the judge's own behalf;
(5) The judge may respond to personal attacks or attacks on the judge's record, provided the response is consistent with other provisions of this Rule; and
(6) When a party or lawyer who made a contribution of $50 or more to the judge's campaign committee appears in a case, the judge shall disclose the contribution to the parties. The requirement to disclose shall continue from the time the judge forms a campaign committee until 180 days after the judge's retention election. COMMENT
[1] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Judges are responsible for compliance with the requirements of election law and other applicable law and for the activities of their campaign committees.
[2] At the start of a campaign, the judge must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a retained judge are permitted to make campaign contributions, the judge should instruct his or her campaign committee to be especially cautious in connection with such contributions, so that they do not create grounds for disqualification if the judge is retained. See Rule 2.11.

Annotations to Rule 4.2
Although judge may not request or encourage family member to do anything judge is prohibited from doing under this Canon, independent political involvement by member of judge's family is not prohibited. Informal Opinion 88-7

Judge may not attend public gatherings where spouse is campaigning for public office and may not accompany spouse while spouse campaigns. Informal Opinion 89-15

Although member of judge's family has legal right to be involved in politics, judge has affirmative duty to try to dissuade family member from seeking political office and participating in political campaign. Informal Opinion 89-15

A judge who is not certified for retention by the Judicial Council may operate a campaign for election. Informal Opinion 00-5

A judge who has been certified for retention by the Judicial Council, but receives public opposition in the form of negative news articles or editorials, letters to the editor, lawn signs, etc., may operate a campaign for election. Informal Opinion 00-5

A judge who has been certified for retention by the Judicial Council, but is the subject of informal negative public discussions, may not operate a campaign for election in response to those discussions. Informal Opinion 00-5

RULE 4.3
Activities of Judges Who Become Candidates for Nonjudicial Office
(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.
(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

COMMENT
[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office together with the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.
[2] The “resign to run” rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the “resign to run” rule.

INFORMAL OPINION NO. 88-1
April 15, 1988

The Ethics Advisory Committee has been asked for its opinion on this question: Whether a Juvenile court probation officer can ethically serve as a probation officer in the same geographic location as the officer's spouse who is a prosecutor with the County Attorney's office.

It is the committee's opinion that the answer is yes unless the probation officer's spouse is appearing as the attorney of record in the same case that the probation officer is assigned to or the probation officer's diligence or impartiality might be reasonably questioned because of a personal bias or prejudice or the receipt of independent information acquired through the marital relationship.

The Public Officers and Employees' Ethics Act sets forth standards of conduct for officers and employees of the State of Utah and its political subdivisions in areas where there are actual or potential conflicts of interest between their public duties and their private interests. Utah Code Ann. § 67-16-1 et. seq. It is the belief of the committee that none of the provisions contained in the Act provide any specific guidance as to whether a juvenile court probation officer can ethically serve in the same geographic location as the officer's spouse who is a prosecutor with the County Attorney's Office. However, because juvenile court probation officers are employees of the court and under the broad supervisory authority of the juvenile court judges, the Code of Judicial Conduct provides some guidance.

Canon 3B requires a judge to diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials. The Canon also provides that a judge should require staff and court officials subject to judicial direction and control to observe relevant ethical standards of fidelity and diligence. Under this provision, a juvenile court judge has the responsibility to ensure that court staff and officials observe appropriate ethical standards.

The applicable ethical standard is contained in Canon 3C(l)(d) which provides that disqualification of a judge must be entered in any proceeding where the judge or the judge's spouse is a party to the proceeding, acting as a lawyer in the proceeding, has an interest in the proceeding that could be substantially affected by the outcome of the proceeding, or is likely to be a material witness in the proceeding. It is the committee’s opinion that Canon 3 establishes the relevant ethical standard for probation officers under these circumstances and that the Code would not prohibit a probation officer from serving in the same geographic location as the officer's spouse who is a prosecutor. However, the Code would require the probation officer to disqualify himself or herself in any proceeding where the probation officer's spouse was appearing as an attorney in the case. This practice would avoid any appearance of impropriety and the concern that the probation officer's impartiality might be reasonably questioned.

In addition, Canon 3C(l)(a) requires a judge to enter a disqualification in a proceeding if the judge has a personal bias or prejudice concerning a party or an issue, or has personal knowledge of disputed evidentiary facts concerning the proceeding. It is the committee's opinion that if a probation officer's diligence or impartiality might be reasonably questioned because of a personal bias or prejudice or the receipt of independent information acquired through the marital relationship, the probation officer should disqualify himself or herself from serving as a probation officer in that case.

INFORMAL OPINION NO. 88-2
April 15, 1988

The Ethics Advisory Committee has been asked for its opinion on the question of whether a judge's participation on the Salt Lake County Child Abuse Coordinating Committee (CACC) violates the doctrine of separation of powers or the Code of Judicial Conduct.

First, the Ethics Advisory Committee has the authority to respond to ethical questions which arise under the Code of Judicial Conduct. The committee cannot respond to legal issues concerning the doctrine of separation of powers. Therefore, the committee's opinion is limited to an interpretation of the applicable provisions of the Code.

Second, it is the committee's opinion that the Code permits participation on the CACC if the Committee's activities are limited to the improvement of the law, the legal system or the administration of justice. However, where the activities of the CACC involve issues of fact and policy on matters unrelated to the legal system, the Code prohibits the judge from participating as a member of the committee.

The CACC, according to its purpose statement, has been established by various state and local government agencies for the purpose of coordinating policies and procedures among government agencies dealing with child abuse cases. Its purpose is to improve the management of child abuse cases in the system to achieve justice for victims and perpetrators of child abuse.

Canon 4 of the Code of Judicial Conduct provides that a judge may engage in activities to improve the law, the legal system and the administration of justice. Subsection (C) of Canon 4 provides that a judge may serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law the legal system or the administration of justice.

The ABA commentary to Canon 4 provides as follows:

> 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 his time permits,

> he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of law.

Canon 5 of the Code requires a judge to regulate extra-judicial activities to minimize the risk of conflict with judicial duties. Subsection (F) of Canon 5 provides that a judge should not accept an appointment to a governmental committee or commission or any other governmental appointment that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration or justice.

The annotations to Canon 5 indicate that although a judge may participate on various boards and committees, the judge should not allow extra-judicial activities to interfere with the prompt performance of judicial duties nor should the judge discuss, debate or vote on matters which may present a conflict of interest or create the appearance of impropriety. Advisory Opinions No. 2 and 34, Federal Advisory Committee on Judicial Activities.

The ABA commentary to Canon 5B provides:

> The 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 he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

Collectively, the Canons, annotations and commentaries permit a judge to engage in activities to improve the law, the legal system or the administration of justice but prohibit a judge's participation in activities concerned with issues of fact or policy on matters unrelated to the legal system or on matters which may present a conflict of interest or create the appearance of impropriety.

Under these circumstances, the initial question is whether CACC is an organization concerned with the improvement of the law, the legal system or the administration of justice or whether the CACC is concerned with issues of fact and policy which pertain to other matters. CACC's purpose statement provides that the organization was established to coordinate policies and procedures among various agencies dealing with child abuse to enhance the flow of cases through the system to achieve justice for victims and perpetrators of child abuse.

The statement suggests that CACC is attempting to improve the legal system by better management of child abuse cases and improved communication among agencies responsible for handling those cases. The purpose statement indicates that the committee was established to achieve justice for both victims and perpetrators of child abuse, a purpose which expresses concern for the improvement of the law, the legal system and the administration of justice.

Given CACC's stated purpose, it is the opinion of this committee that neither Canon 4 nor 5 of the Code of Judicial Conduct would prohibit a judge from serving as a member. However, the more difficult question is whether CACC's activities have gone beyond its stated purpose and the improvement of the legal system. Specifically, the opinion request indicates that CACC has taken a public position against proposed legislation which establishes criminal penalties for false reporting of child abuse. This type of activity goes beyond the administration of justice and involves a fundamental policy question as to whether certain conduct should constitute a criminal offense. Under these circumstances, a judge's impartiality may be compromised by virtue of his or her association with the organization. Moreover, the appearance of impropriety would not be cured by the judge's recusal from the organization's discussion of or vote on the issue or its lobbying activities.

In summary, it is the committee's opinion that the Code of Judicial Conduct permits participation on CACC given its stated purpose. However, as the ABA commentary indicates, the changing nature of some organizations makes it necessary for a judge to reexamine the activities of each organization to determine whether it is proper to continue the association. In the present situation, where the activities of CACC have changed since its establishment and gone beyond the improvement of the law, the legal system or the administration of justice, a judge should not continue to serve as a member of that committee.

INFORMAL OPINION NO. 88-3
May 15, 1988

The Ethics Advisory Committee has been asked for its opinion concerning the circumstances under which the Code of Judicial Conduct would require a judge to disqualify him or herself from hearing cases when the Legal Defenders' Association (LDA), the former employer of the judge and the current employer of the judge's spouse, is involved in the proceeding.

It is the committee's opinion that the Code requires the judge to disqualify him or herself in all cases where LDA is the attorney of record and the judge was associated with LDA when it undertook representation, in all cases where the judge's spouse is the attorney in the matter and in all cases where LDA is the attorney and the judge's spouse is still associated with the office.

Canon 3 of the Code of Judicial Conduct requires a judge to perform the duties of the office diligently and impartially. Canon 3C provides generally that "disqualification must be entered in a proceeding by a judge whose impartiality might reasonably be questioned." The Canon also enumerates specific instances which require disqualification.

Subsection (1)(b) of the Canon requires a judge to enter a disqualification in a proceeding if the judge has served as a lawyer in the matter or has practiced law with a lawyer in the matter who had served in the matter at the time of their association. This language suggests that a judge would be required to disqualify himself or herself in any case where he or she had served as an attorney in the matter or where LDA is the attorney in the matter and the judge was practicing

law with LDA when it undertook representation. However, the American Bar Association's Commentary to Canon 3C(l)(b) states as follows:

> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection: a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Unfortunately, neither the Code nor the ABA commentary provide any guidance as to whether LDA is a governmental agency for purposes of the Code. LDA is funded primarily with funds from county and city government. However, LDA is not subject to the legal and procedural requirements imposed on other government agencies, such as compliance with the procurement code, the open and public meetings act, or the state personnel act. Nor are LDA or its employees entitled to legal representation or indemnification from a governmental entity as provided in the Governmental Immunity Act. Accordingly, it is the opinion of this committee that LDA is not a governmental agency and therefore, a lawyer employed by LDA has an association with other lawyers employed by that office. Thus, under Canon 3C(1)(b), a judge would be required to disqualify him or herself from those cases where the judge had served as an attorney in the matter or where LDA is the attorney and the judge was practicing law with LDA when it undertook the representation.

With respect to the judge's spouse, Subsection (1)(d) of Canon 3 requires disqualification where the judge or the judge's spouse is a party to the proceeding, acting as a lawyer in the proceeding, has an interest in the proceeding that could be substantially affected by the outcome of the proceeding or is likely to be a material witness in the proceeding.

It is evident that this provision requires a judge to disqualify himself or herself from any case in which the judge's spouse is acting as a lawyer. The more difficult question, however, is whether the judge is required to disqualify himself or herself from any proceeding where LDA is the lawyer because of the spouse's association with the firm. The American Bar Association's Commentary to Canon 3C (1)(d) states as follows:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer- relative of the judge is affiliated does not of itself disqualify the Judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(l), or that the lawyer relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(l)(d)(iii) may require his disqualification.

The general test as to whether a judge's impartiality might reasonably be questioned is “whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge would find that there is a reasonable basis for questioning the judge's impartiality” SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977). In the present case, it is evident that if the spouse's

association with LDA caused the judge to develop a personal bias or prejudice concerning a party or an issue in a particular case or placed the judge in a situation where the judge acquired independent information of disputed evidentiary facts through the marital relationship a person of ordinary prudence would find a reasonable basis for questioning the judge's impartiality and the judge would be required to disqualify him or herself.

However, the critical issue is whether the judge's impartiality might reasonably be questioned in all cases where LDA is the attorney because of the spouse's association with LDA. There are a number of cases and ethical opinions which address this issue as it relates to a lawyer-relative who is a prosecutor. These decisions conclude that a judge is not required to enter a disqualification in all cases handled by the prosecutor's office when a lawyer-relative of the judge is employed by the prosecutor's office. See State v. Logan, 689 P.2d 778 (Kan. 1984), Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984). American Bar Association's Lawyers' Manual on Professional Conduct. 801:3305: Indiana Opinion No. 2 (1983), Federal Advisory Committee Opinion No. 38 (1974). However, where the lawyer-relative is a public defender, a different result has been reached. The Cuyahoga County Bar Association concluded that a judge, who is the nephew or brother of a public defender must disqualify himself from hearing cases in which the public defender, personally or through one of the assistants represents a party in the case. Cuyahoga County Bar Association Opinion No. 82-1.

The difference in results is apparently based upon the distinction between government agencies and private law offices and the assumption that government agencies, by virtue of the number of attorneys which they employ, do not have the same opportunity for association and information sharing that exists in a small office. The public defender's office in Salt Lake functions like a private law office because information and strategies are shared among attorneys. Based on that fact, there is a substantial likelihood that the judge's spouse would discuss legal theories, evidentiary issues and case strategies with other attorneys in the office and that neither the prosecuting attorney nor the judge would know for certain when that occurred.

In addition, when the attorney-relative of the judge is the judge's spouse there is an even greater likelihood that the judge's impartiality might be questioned. In Advisory Opinion No. 60 of the Federal Advisory Committee on Judicial Activities, the Committee concluded that a person may not serve as a part-time magistrate in the district in which that person's spouse is an Assistant United States Attorney because of the appearance of impropriety. The Committee arrived at this decision despite an earlier opinion concluding that a judge would not be disqualified per se from hearing cases in which the United States was represented by the U.S. Attorney's Office where the judge's son was employed as an Assistant United States Attorney. The committee based its decision upon the differences between a husband and wife relationship and other judge and attorney-relative relationships. First, the spouse resides in the same household; second, each spouse presumably shares in the other's income; and third, their communications to one another are privileged. The committee indicated that the same appearance of impropriety would exist if the United States Attorney's son resided in the father judge's household or under circumstances where the parent and child, or siblings shared in the other's income.

Accordingly, it is the committee's view that a person of ordinary prudence in the judge's position knowing that the judge's spouse is an attorney with LDA, that the attorneys employed by LDA share case information and strategies among themselves, that the judge resides in the same household as the attorney-spouse, shares in the other's income and whose communications are privileged would find a reasonable basis for questioning the judge's impartiality in those cases where LDA is the attorney.

Under these circumstances, it is the committee's opinion that the judge would be required to enter a disqualification in all cases where LDA is the attorney until the judge's spouse is no longer associated with the office.

In summary, it is the committee's opinion that the Code of Judicial Conduct would require a judge to disqualify himself or herself in all cases where the judge was associated with LDA when it undertook the representation, in all cases where the judge's spouse is the attorney in the matter and in all cases where LDA is the attorney of record and the judge's spouse is still employed by LDA.

INFORMAL OPINION NO. 88-4
July 1, 1988

The Ethics Advisory Committee has been asked for its opinion on this question: Whether the Code of Judicial Conduct permits a judge to serve on the Board of Directors of United Way.

It is the committee's opinion that a judge may serve on the Board of Directors of United Way as long as the organization is not likely to be engaged in adversary proceedings and the judge is not involved in the fund-raising activities of the organization and does not permit the use of the judicial office for that purpose.

Canon 5 of the Code or Judicial Conduct provides that "[a] judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Canon 5B further provides in part:

> Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
>
> (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

> (2) A judge should not solicit funds for any . . . charitable, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge should not be the speaker or the guest of honor at an organization's fundraising events, but may attend such events. A judge should be especially sensitive to the potential conflicts which may result from serving in positions of responsibility in such organizations while carrying out judicial duties and limit the judge's duties in the area of solicitation of funds for the organization.

The Federal Advisory Committee on Judicial Activity has interpreted Canon 5(B)(1) in a number of factual situations and has concluded that a judge may not serve on the managing board of a legal aid bureau where its representatives make appearances in the court over which the judge presides. Similarly, the Committee has concluded that a judge cannot serve as an officer or director of the Sierra Club or the NAACP because these organizations may be regularly engaged in adversary proceedings in court. Advisory Opinion Nos. 12 and 40.

However, in the present situation, there is no factual basis to suggest that United Way's representatives or the organization itself are engaged in adversary proceedings that would ordinarily come before the judge or are regularly engaged in adversary proceedings in any court. Accordingly, it is the Committee's opinion that Canon 5(B)(1) would not prohibit a judge from serving on the Board of Directors for United Way.

Canon 5(B)(2) prohibits a judge from soliciting funds for any charitable organization or using the prestige of the judicial office for that purpose. In the fact situation presented, the Executive Director of United Way has written to the judge indicating that individual board members are not required to participate directly in the fund-raising process but that the board members oversee the fund-raising campaign in a general way. The only manner in which the judge would be affiliated with the fund-raising process is through the use of the organization's letterhead which lists the board members. Fundraising literature and press announcements do not identify individual board members. The Executive Director has also assured the judge that he would not be placed in any Board position which caused him concern about a potential conflict with the Code of Judicial Conduct.

By ensuring that neither he nor his office would be involved in United Way's fund-raising efforts, the judge has complied with Canon 5B(2).

The ABA Commentary to Canon 5 acknowledges that complete separation of a judge from extra-judicial activities "is neither possible nor wise; he should not become isolated from the society in which he lives." Nevertheless the ABA Commentary to Canon 5B explains that due to the changing nature of organizations and their relationship to the law, a judge should regularly "reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it."

The Federal Advisory Committee on Judicial Activities has discussed the fundraising issue in a number of advisory opinions. The Committee has concluded that a judge may serve on the Board of Directors of the Salvation Army or the Red Cross provided his service does not interfere with the prompt and proper performance of his judicial duties and he does not engage in the solicitation of funds or permit the influence of his name or office to be used in solicitation. Advisory Opinion No. 2. Subject to the same restrictions, the Committee has concluded that a judge may serve on the managing board of a religious, fraternal or charitable corporation or the board of a hospital so long as he does not solicit funds or permit the use of the prestige of his office for that purpose. Advisory Opinion Nos. 12 and 28.

Accordingly, it is the committee's opinion that where a judge has separated himself from the fundraising aspect of a charitable organization and does not himself solicit funds nor permit the judicial office to be used for that purpose, membership on the organization's board of directors does not violate the Code of Judicial Conduct.

INFORMAL OPINION NO. 88-5
September 15, 1988

The Ethics Advisory Committee has been asked for its opinion on these questions: Whether a judge may teach a course on the Utah Code and proper courtroom demeanor and testimony to law enforcement officers, and whether the judge may receive compensation from the Division of Peace Officer Standards for teaching the course.

It is the committee's opinion that, in this particular fact situation, a judge is prohibited from teaching the class. Although the Code not only permits, but encourages, judges to teach about the law, the legal system and the administration of justice, this particular activity is prohibited due to the presence of three factors. First, the judge is not teaching a course that will be attended by representatives from all components of the criminal justice system; instead the course will be attended by peace officers only. While the purpose of such a course is commendable, it is intended to primarily serve the needs of peace officers and law enforcement agencies and is not devoted to improvement of the legal system overall. Because the course is limited to the improvement of a single adversarial component of the justice system, teaching such a course may create the appearance of impropriety when peace officers appear in the judge's court. Second, in a small rural community such as the one involved in this question, the judge is likely to come in contact with these same officers on a regular basis in the courtroom. Finally, the subject matter of the course itself raises questions of propriety. The judge would essentially be instructing officers on how to appear in court and convince the judge that they are correct. This could create the impression that the officers are in a special position of influence with the judge.

Canon 4 of the Code of Judicial Conduct clearly permits judges to teach classes concerning the law. Specifically, that Canon provides:

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast doubt on the capacity to decide impartially any issue that may he involved in matters before the court:

(A) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

By teaching peace officers about courtroom testimony and demeanor, however, the judge runs the risk of casting doubt on his or her capacity to impartially decide an issue involving the courtroom testimony of one of the peace officers who had taken the judge's class.

Canon 4 does not require the judge to actually be partial to a party, but rather prohibits any activities which might cast doubt on the judge's impartiality.

Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all activities and, specifically, a judge should not allow relationships to influence judicial conduct or judgment and should not convey or permit others to convey the impression that they are in a special position of influence.

Teaching peace officers about courtroom testimony and demeanor may create the appearance of impropriety or convey the impression that peace officers are in a position of special influence with the judge.

Similarly, being compensated for teaching the course would be prohibited because payment would come from the law enforcement agency responsible for training peace officers.

Canon 5C provides that a judge should refrain from financial dealings "that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. " Accepting payment from a law enforcement agency may reflect adversely on the judge's impartiality and may involve the judge in financial transactions with a law enforcement agency whose employees are likely to appear before the court. Although the frequency of these transactions is not evident from the fact situation presented, even occasional financial transactions with a law enforcement agency may reflect adversely on the judge's impartiality. In addition, the fact that the judge holds court in a rural area increases the risk that such transactions would be frequent.

Canon 6 permits a judge to receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by the Code, so long as the source of the payments does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety. Again, instruction to law enforcement officers on proper courtroom demeanor and testimony or the payment of compensation from a law enforcement agency may create the appearance of impropriety or give the impression that law enforcement officers are in a special position of influence with the judge.

Accordingly, given the language contained in the Code of Judicial Conduct, it is the committee's opinion that a judge who hears the testimony of peace officers in the course of his or her judicial duties should not teach and be compensated for teaching a class whose purpose is to instruct peace officers on the Utah Code and on proper courtroom testimony and demeanor.

INFORMAL OPINION NO. 88-6
September 15, 1988

The Ethics Advisory Committee has been asked for its opinion on this a question: Whether the Code of Judicial Conduct prohibits a judge from teaching a course for a continuing legal education seminar that is being operated by a private for-profit group composed of attorneys.

It is the committee's opinion that the answer is yes, since teaching would lend the power and prestige of the judicial office to advance the financial interests of the for-profit group sponsoring the seminar.

The subject-matter of the course is not a problem since judges are permitted to teach classes concerning the law. The Code of Judicial Conduct provides:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities. . .
>
> (A) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

In Advisory Opinion No. 1, the Federal Advisory Committee on Judicial Activities found it was permissible for a judge to participate as a faculty member at a university law school, provided the judge's teaching duties did not in any way interfere with the performance of his or her judicial duties.

This conclusion is repeated in Advisory Opinion No. 7, which states that a judge may participate as a faculty member at the National Judicial College provided there was no interference with his judicial activities.

It is significant that neither the university nor the National Judicial College are private for-profit organizations. In that respect, these opinions are distinguishable from the facts presented by this opinion, since the seminar at issue here is sponsored by a for-profit group.

Continuing legal education programs were addressed in Formal Opinion #298, and participation in them by lawyers and judges was approved, but the programs discussed in that opinion were those sponsored or assisted by bar associations, or affiliated groups, or non-commercial programs produced by television and broadcasting companies for use as public information programs.

Legal seminars are discussed in Informal Opinion No. 840 where it was stated that before an attorney may participate in a legal seminar, the seminar must have as its purpose the imparting of information to the participants. According to the opinion, it is improper for a lawyer to participate in a seminar, the main purpose of which is to publicize, or make money for its sponsor, the lawyer, or others. Arguably judges should be held to an even higher standard, making participation in this privately sponsored, for-profit, seminar improper.

Canon 2B provides that "a judge should not lend the prestige of the judicial office to advance the private interests of others. " Here, the goal of the seminar's sponsors, presumably, is for the seminar to be a financial success. By teaching at the seminar, the judge would be using the prestige of his or her office to advance the private interests of others. This activity violates the aforementioned provisions of the Code of Judicial Conduct.

Although none of the opinions or Code provisions specifically address the question before the committee, the inference is clear that judges may teach for public and for nonprofit entities, but that they should avoid lending the prestige of their office to private groups sponsoring continuing legal education seminars for profit.

It is the committee's opinion that the Code of Judicial Conduct prohibits a judge from teaching a class for a continuing legal education seminar sponsored by a private for-profit group composed of attorneys.

INFORMAL OPINION NO. 88-7
September 15, 1988

The Ethics Advisory Committee has been asked for its opinion on this question: Whether a judge or a judge's spouse may host or attend a mass meeting.

It is the committee's opinion that the answer is no as to the judge, since to do so would be to attend a political gathering or act as a leader in a political organization in violation of Canon 7B of the Code of Judicial Conduct. As to the judge's spouse, the Ethics Advisory Committee has no authority to advise the spouse of a judge as to the ethical propriety of his or her actions.

The term "mass meeting" was contained in the Utah Code prior to 1988. In 1988, the term "party caucus" was substituted for the term "mass meeting." Utah Code Ann. § 20-4-7 (Cum. Supp. 1998). The statute explains that a party caucus of citizens in each voting district is to be held by each political party in each county on the last Monday in April in each year in which a general election is to be held. Each voting district party caucus selects one delegate to the county primary convention of each political party.

Canon 7B of the Utah Code of Judicial Conduct provides: “A judge or a candidate for a judicial office who has been confirmed by the Senate should not:
(1) act as a leader or hold any office in a political organization;

(3) . . . attend political gatherings except as authorized in Canon 7C . . .”

Canon 7C permits a judge who is running for office to speak to public gatherings on his or her own behalf. The American Bar Association's Code of Judicial Conduct has a similar provision. Canon 7A of that Code provides that a judge or a candidate for election to judicial office should not attend political gatherings unless he or she is currently a candidate for the office, and at the same time engages in political activities.

The party caucus referred to in § 20-4-70 is clearly a "political gathering" and participation in a party caucus by a judge would thus be prohibited by the Code. The same reasoning would apply to hosting a party caucus, since that could be viewed as acting as a leader of a political organization, which is also in violation of the Code.

Canons of Judicial Ethics, Canon 28 was the precursor to Canon 7A of the Code of Judicial Conduct. Canon 28, prior to 1950, read:

> While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions. He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

In 1950, a sentence was added permitting a judge who must be nominated and elected as a candidate of a political party to attend or speak at political gatherings of the party that has nominated him and seeks his election.

Informal Opinion C-486 by the Committee on Ethics and Professional Responsibility indicates that those states adhering to the principle of the nonpartisan judiciary prohibit all political activity by one seeking judicial office as well as by the incumbent in office. This prohibition includes acting as a party leader, holding office in a political party or organization and permitting others to use the power or prestige of the office to promote candidacy for reelection, or for the success of a political party. The purpose of Canon 28, according to Informal Opinion C-486, was to avoid a suspicion that the judge permits political considerations to affect his decisions and is directed primarily at the suspicion which may arise when he performs judicial service

Formal Opinion No. 113 (May 10, 1934) of the American Bar Association Standing Committee on Professional Ethics states that Canon 28 prohibited a judge from appearing at public political gatherings intended to further the candidacy of one running for a political office, and to speak or otherwise indicate support of the candidate sponsored by the meeting. In so holding, the

Committee explained that the conduct would make the judge an active promoter of the interests of the candidate.

In Formal Opinion 312, the committee delineated activities prohibited by Canon 28. The list includes:

> 1. He should not become an active promoter of the interests of one political party as against another. This applies to appointed judges and elected judges whether or not the nomination and election is partisan or nonpartisan and extends during the entire tenure as judge.
>
> 3. He should avoid making . . . contributions to party funds or appearing at or participating in fund-raising dinners or other affairs.
>
> 6. He should avoid participation in party conventions, unless he must be nominated by such party convention.
>
> 7. He should not accept or retain a place on a party committee. This . . . extends during the entire tenure as judge.
>
> 8. He should not act as a party leader.
>
> 9. He should not engage generally in partisan activities.

By hosting or attending a party caucus a judge would be actively promoting the interests of one political party as against another. He would also be attending a function which is a precursor to a party convention and would arguably be acting as a party leader. Inasmuch as these political activities are prohibited by the Code, the judge should not participate in the party caucus. With respect to the judge's spouse, Canon 7(A)(2) of the Code of Judicial Conduct states that judges and all candidates for judicial office should not request or encourage members of their families to do anything that the judge or candidate may not do under this Canon.

Canon 7A of the American Bar Association's Code of Judicial Conduct does not address the propriety of political activity on the part of the judge's spouse, but Federal Advisory Opinion No. 53, from the Federal Advisory Committee on Judicial Activities, states that a judicial officer has a duty to try to dissuade his or her spouse from participating in a political campaign. In the Reporter's Notes to the Code of Judicial Conduct regarding 7B(a) it is stated:

> Although a candidate's spouse as a matter of legal right can hold an office in a political organization and can make speeches for other candidates for political offices, the candidate has the duty to try to dissuade his spouse from doing so. The Committee considered setting mandatory political conduct standards for members of the candidate's family, but rejected the idea because of lack of a means of enforcement.

The American Bar Association Standing Committee on Professional Ethics has stated it was not ethically proper for the judge to approve a practice on the part of his wife of making substantial financial contributions to party funds. Formal Opinion No. 113. The committee explained:

> A judge is entitled to entertain his personal views of political questions, but should not directly nor indirectly participate in partisan political activities. It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice some of the freedom in political matters that he might otherwise enjoy. When he accepts a judicial position, ex necessate rei, he thereby voluntarily places certain well recognized limitations upon his activities. It would be unethical for a judge to approve a practice on the part of his wife . . . of making substantial financial contributions to political party funds. The practice would generally be regarded as a subterfuge upon the part of the judge.

The committee also responded that it would be improper for the judge to approve the giving by the judge's spouse of a political tea at their home to advance the candidacy of partisan nominees for political office.

The Federal Advisory Committee on Judicial Activities in Revised Advisory Opinion No. 53, issued April 11, 1983, stated that Canons 7 and 2 (prohibiting a judge from political activity inappropriate to the judicial office and stating that a judge should avoid impropriety and the appearance of impropriety), adequately define a judge's obligation where the spouse engages in political activity. The Committee stated: "The committee does not advise spouses. Thus a judge should, to the extent possible, disassociate himself or herself from the spouse's political involvement." The committee explained that the judge should not accompany the spouse to any political functions; join in the use of the marital home for political meetings; or join in or approve any reference to the relationship between the judge and spouse in any communication relating to the spouse's political activity. The committee concluded:

> We note that if a judge's spouse participates in politics, that participation will undoubtedly increase the number of situations in which the judge will be obliged to recuse. This is especially true where the spouse is a candidate for elective office. We suggest that the judge make his or her spouse aware of such problems.

In the original Advisory Opinion No. 53 the committee stated:

> The Committee recognizes that as a matter of legal right a spouse can hold an office in a political organization and can take part in its activities. It recognizes that a judge or magistrate has the duty to try to dissuade the spouse from doing so. It recognizes that the Code does not and could not provide any sanctions against a spouse who engages in political activity.

> The spouses of many judges have concluded that the provisions of the Code should apply to them the same as to the judge. Thus they refrain not only from political activity but from solicitation of funds for charities and churches and from public comment about matters pending before the spouse, to mention but a few of the prohibitions on judges. Many spouses have regarded the applying to them of the ban on solicitation of funds as a "fringe benefit" which they welcomed. Each spouse has the right to reach his or her own conclusion as to such activity.

It is the committee's opinion that a judge should neither attend nor host a party caucus. The Ethics Advisory Committee cannot give advice to the judge's spouse.

INFORMAL OPINION NO. 88-8
September 15, 1988

The Ethics Advisory Committee has been asked for its opinion on the question or of whether the Code of Judicial Conduct prohibits an active senior judge from testifying as an expert witness on behalf of a public utility corporation in a federal court action as to the reasonableness of a settlement agreement entered into in a wrongful death case filed against the corporation in state court.

It is the committee's opinion that the answer is yes because the giving of such testimony lends the prestige of the judicial office to advance the private interests of others.

Senior judges are subject to the applicable provisions of the Code of Judicial Conduct. CJA Rule 11-201. The only provision in the Code of Judicial Conduct which addresses the ethical propriety of a judge testifying as a witness is contained in Canon 2B which provides: "A judge should not testify voluntarily as a character witness . . .."

However, neither the Code, the ABA annotations to the Code nor the advisory opinions interpreting the Code address the question about whether a judge may testify as an expert witness.

The Utah Code and the Utah Rules of Evidence provide that a judge may be called as a witness, but not in a trial over which he or she is presiding. Utah Code Ann. § 78-24-3 and URE 605. Thus, a judge is not disqualified by virtue of his or her office from testifying. McCormick on Evidence; People v. Tippett, 733 P.2d 1183 (Colo. 1987).

Rule 702 of the Utah Rules of Evidence provides that a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify as to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue.

In the situation presented, the senior judge has been asked to testify as an expert witness on behalf of a public utility corporation as to the reasonableness of a settlement agreement entered into between the plaintiffs in a wrongful death case and the public utility corporation. Although the senior judge has undoubtedly presided over many cases in which settlements were reached, this experience does not automatically qualify the judge as an expert on the reasonableness of the settlement. The reasonableness of a settlement in any given case may be based upon a number of factors. Many of which are neither available to the judge nor within the judge's knowledge or experience. For example, the reasonableness of a settlement agreement may be established by offering a comparative analysis of settlement data from similar cases. Such an analysis is not an activity uniquely within the expertise of a trial judge nor is such data available exclusively to trial judges. In fact, in Utah, settlement data is not even collected or compiled by the courts and in most cases not available as a part of the official court record. Thus, even if a judge were willing to undertake the task of reviewing settlement data in Utah cases, the amount of settlement data available for review is extremely limited.

Moreover, even if a judge was retained to testify as an expert witness solely based upon their trial experience, the judge would be hampered in his or her ability to compare settlement agreements in cases which he or she had presided over because in most cases, the factors which determine the terms and conditions of the final settlement agreement are never brought to the attention of the court. Consequently, if a judge's qualifications as an expert in the area of settlements is questionable, the question then is why is the judge being retained as an expert. The answer, most likely, is that the judge is being retained as an expert because of the prestige of his or her judicial office.

Canon 2B of the Code of Judicial Conduct provides that "[a] judge should not lend the prestige of the judicial office to advance the private interests of others: nor should a judge convey or permit others to convey the impression that they are in a special position of influence."

The Commentary to Canon 2B explains:

> Public confidence is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

By testifying as a paid expert on behalf of one of the litigants in support of a settlement which presumably benefitted that litigant, the judge would be lending the prestige of his office to advance the private interests of that litigant and may convey the impression that the litigant, a public utility corporation, engaged in frequent transactions in court, is in a special position of influence to the judge.

Informal Opinion No. 1311 of the American Bar Association committee on Professional Ethics concluded that it would be improper for a court to take any part in a cause by which the court

would become, or appear to be, an advocate for either party. Here, by testifying in support of a settlement offer on behalf of one of the litigants, the judge would appear to be acting as an advocate for that party.

It is the committee's opinion that where a judge has been asked to provide expert testimony as to the reasonableness of a settlement offer, the giving of such testimony lends the prestige of the judicial office to advance the private interests of others and thus is prohibited by the Code of Judicial Conduct.

INFORMAL OPINION NO. 88-9
September 15, 1988

The Ethics Advisory Committee has been asked for its opinion on the question of whether a justice of the peace may testify as a character witness for the defendant in a criminal proceeding.

It is the committee's opinion that the answer is no, unless the justice of the peace has been subpoenaed to testify.

A judge may he called as a witness, but not in a trial over which he is presiding. Utah Code Ann. § 78-24-3. Utah Rule of Evidence 605. The judge is not disqualified by virtue of his or her office from testifying. McCormick on Evidence section 68 p. 164 (3d ed.).

Canon 2(B) or the Code or Judicial Conduct provides in part: "A judge should not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life."

Canon 2B of the American Bar Association's Code of Judicial Conduct also states that a judge should not testify voluntarily as a character witness. The Commentary after Canon 2B states: "The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons."

Formal Opinion No. 15 of the American Bar Association Committee on Professional Ethics discussed the question of whether there was any impropriety in a judge testifying, in criminal cases, as to the good character of a defendant. The Committee stated:

> There is nothing in the Canons of Judicial Ethics which prevents a judge from testifying as to the good character of a defendant in a criminal case and the committee finds no inherent impropriety in such testimony. Cases can well be thought of, in which the cause of justice would be served by the testimony of a judge, not sitting in the trial, who believes the defendant is unjustly accused or is

likely to receive a more severe sentence than he deserves, or appears likely to be a victim of circumstances or prejudice.

It should be borne in mind, however, that a judge in so testifying is necessarily, to some extent giving to the defense the weight of his judicial position and dignity. This is especially the case where the court is one in which the judge sometimes sits, or is a court of similar jurisdiction in the same place in which the judge holds court. Some of the jurymen may perhaps have served in other cases before him and may have taken his instructions as the law when so serving. These considerations should be weighed, according to the circumstances, by a judge who is requested to so testify. He should consider well the propriety of testifying and determine whether his testimony is necessary and appropriate to give a fair trial to the accused, or is merely an attempt of the defense to throw into the scales the weight of his judicial position.

Similarly, Advisory Opinion No. 9 of the Interim Advisory Committee on Judicial Activities finds that the practice of judges appearing as character witnesses should be discouraged, but that if subpoenaed, a judge must respond to the subpoena. The Committee stated:

"If he testifies, we feel that some of the otherwise unfortunate effects from the giving of such testimony would be dissipated if the trial judge made certain that, either on direct or cross-examination, it was made clear that the judge witness was testifying in response to a subpoena."

In People v. Tippett, 733 P.2d 1183 (Colo. 1987), the Colorado Supreme Court considered whether it was error to allow a judge who presided over a divorce action to testify as to his opinion of the defendant's (a party to the divorce) character for truth and veracity in a subsequent proceeding. The court found that under Colorado law, there is no statutory prohibition against a judge testifying as a witness in a cause not on trial before him. The court stated that generally, a judicial officer called to the stand in a case in which he is not sitting as a judge is not disqualified by his office from testifying. The Colorado court cited Canon 2, section B of the Colorado Code of Judicial Conduct which is identical to the same ABA code provision. Because the record in Tippett was devoid of reference to a subpoena for the judge's testimony, the court was unable to determine the voluntariness of the judge's character testimony.

In United States v. Callahan, 588 F.2d 1078 (5th Cir. 1979), character testimony by a judge was also addressed. In that case, the judge was under an official subpoena, but the trial judge questioned the witness to determine whether the subpoena was merely an excuse concocted to legitimize what was really a voluntary appearance. The trial judge left the decision up to the testifying judge to decide whether he should testify in the case. The judge left the court without testifying. The appellant argued on appeal that the court intimidated the judge and deprived the defendant of a valuable character witness. The Court of Appeals held that the trial court had no power to bar the judge from testifying under a subpoena since the subpoena was legal and valid on its face and, as an official summons, it absolved and insulated the judge from any violation of the Judicial Canons. The court noted that, as a practical matter, the judge's testimony would have had to have been "voluntary," subpoena or no subpoena, since the defendant could command the

witness' appearance, but could not force the witness to speak well of him. The court added that the trial judge's concern about the possibility of an impropriety on the part of the testifying judge should have been handled by the initiation of appropriate action before local bar authorities.

In the letter requesting this committee's opinion, the justice of the peace states: "I have been asked by (the defendant's attorney) to be a character witness for (the defendant)." The letter does not make it clear that the justice of the peace has been subpoenaed to testify for the defendant. To comply with Canon 2, the justice of the peace must be testifying pursuant to a subpoena.

It is the committee's opinion that a judge should not testify as a character witness for a criminal defendant in a trial unless the judge has been subpoenaed. The giving of such character testimony by judges should be discouraged, and is appropriate only where a subpoena makes it unavoidable.

INFORMAL OPINION NO. 88-10
October 13, 1988

The Ethics Advisory Committee has been asked for its opinion on the questions of whether the Code of Judicial Conduct prohibits a judge from participating in a seminar in another country the purpose of which is to improve relations between the United States and that country and whether the Code prohibits the judge from attending at the expense of the American organization sponsoring the seminar.

It is the committee's opinion that a judge may participate in such a seminar and may attend at the expense of the American organization sponsoring the seminar as long as the judge's participation does not create the appearance of impropriety, the judge is not required to solicit funds for the organization or give investment or legal advice and the organization is not a party whose interests have or are likely to come before the judge. In addition, reimbursement for expenses must be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge.

The pertinent Canons of the Code of Judicial Conduct are Canon 2, which enjoins a judge to avoid the appearance of impropriety; Canon 5C(4), which prohibits a judge from accepting a gift, bequest, favor or loan except under specified circumstances; and Canon 6B, which permits reimbursement for extra-judicial activities permitted by the Code, limited to the actual cost of travel, food, and lodging.

Canon 2 of the Code provides that a judge should avoid impropriety and the appearance of impropriety in all activities. The ABA commentary to Canon 2 states:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept

> restrictions on his conduct that might be viewed as burdensome by the ordinary citizens and should do so freely and willingly.

In the present situation, the judge has been asked to participate in a seminar sponsored by an organization located in Washington D.C. The purpose of the seminar is to provide an opportunity for Americans to meet with the policy makers of a foreign country and discuss problems of mutual concern to both countries. With the exception of unscheduled meals and personal expenses, all of the judge's expenses from New York to the foreign country and back will be paid by the organization. In exchange for the payment of expenses, the judge is only required to attend the seminar. The judge is not required to conduct any portion of the seminar or provide any other professional assistance during the seminar.

Under these circumstances, the judge's participation in the seminar would not create an appearance of impropriety. The organization sponsoring the seminar is located in Washington D.C. and is not a Utah organization. The purpose of the seminar is to discuss issues of an international scope rather than domestic or local. It is extremely unlikely that the organization sponsoring the seminar would ever be involved in litigation in the Utah courts or have an interest in an issue submitted to the Utah courts. It is the committee's opinion that the judge's participation in the seminar would not create the appearance of impropriety and is not prohibited by Canon 2 of the Code.

Canon 5 of the Code governs a judge's extrajudicial activities and permits a judge to participate in avocational, civic, charitable, financial, and fiduciary activities subject to specified limitations. Canon 5 also prohibits the practice of law and limits a judge's appointment to extra-judicial positions.

In the present situation, the judge has been invited to participate in a seminar, the purpose of which is to improve relations between the United States and another country. The judge's participation is limited to attending the seminar. The judge is not required to conduct any portion of the seminar or provide any other professional assistance during the seminar. The judge's participation will not require that the judge solicit funds on behalf of the organization, give legal advice or financial advice. Accordingly, it is the committee's opinion that the judge's participation in the seminar would not be prohibited by Canon 5.

A separate issue is whether the Code prohibits the judge from accepting the organization's offer to pay the judge's expenses. Canon 5C(4) specifically prohibits a judge from accepting a gift, bequest, favor, or loan unless the donor is not a parry or person whose interests have come or are likely to come before the court. Neither the commentary to the Code of Conduct nor the ABA's opinions interpreting the Code of Conduct provide any guidance as to what constitutes a "gift" for purposes of Canon 5. However, assuming the organization's payment of the judge's expenses is a gift, its acceptance is not prohibited by the Code if the organization is not a party or a person whose interests have or are likely to come before the judge. As discussed above, the organization is located in Washington D.C. and its purpose is to promote better relations between the United States and another country. It is unlikely that the organization would ever be involved in litigation in the Utah courts or would have an interest in any case which came before the Utah courts. Accordingly, it is the committee's opinion that the judge's reimbursement for expenses is

not prohibited by Canon 5 since the organization paying the judge 's expenses is not a party or person whose interests have or are likely to come before the judge.

Finally, Canon 6 of the Code expressly permits a judge to receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by the Code. As discussed above, there is nothing in the Code of Conduct which prohibits a judge's participation in such a seminar and therefore, there is nothing in the Code of Conduct which prohibits a judge from receiving reimbursement for expenses incurred in participating in that seminar. The only limitation is that reimbursement must be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge. Any payment in excess of such an amount is considered compensation.

In summary, it is the committee's opinion that a judge may participate in a seminar to improve relations between the United States and another country and may attend at the expense of the American organization sponsoring the seminar as long as the judge's participation does not create the appearance of impropriety, the judge is not required to solicit funds or give investment or legal advice and the organization is not a party whose interests have or are likely to come before the judge.

INFORMAL OPINION NO. 89-1
January 20, 1989

The Ethics Advisory Committee has been asked for its opinion on the question of whether the Code of Conduct permits a Justice of the Peace to serve as a member of a local Youth Coordinating Council (YCC). It is the committee's opinion that the answer is yes, unless the Justice of the Peace is involved in fund-raising for the organization or permits the use of the judicial office for that purpose. The purpose of the YCC is to help young people refrain from the use of drugs and alcohol. Financing for the group is provided by a federal grant. The Justice of the Peace would like to serve as a member of the group but does not intend to hold office.

Justices of the Peace are considered "part-time judges" as defined by Utah's Code of Judicial Conduct. Such judges are not required to comply with Canons 4B, 5D, 5E and 5F of the Code but are required to comply with the remaining provisions.

Canon 5 of the Code of Judicial Conduct provides: "A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Canon 5B further states:

> Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic

> organization not conducted for the economic or political advantage of its members, subject to the following limitations:
>
> (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.
>
> (2) A judge should not solicit funds for any . . . charitable . . . or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge should not be the speaker or the guest of honor at an organization's fund-raising events, but may attend such events. A judge should be especially sensitive to the potential conflicts which may result from serving in positions of responsibility in such organizations while carrying out judicial duties and limit the judge's duties in the area of solicitation of funds for the organization.

In Advisory Opinion No. 40, the Federal Advisory Committee on Judicial Activities explained that, although Canon 5B is limited by its terms to service as an "officer, director, trustee or non-legal advisor," in the committee's opinion, "the same considerations are applicable to and govern membership in such organizations." There is no indication that the justice's membership on the YCC would in any way interfere with the performance of judicial duties. Nor is there any indication that this is the type of organization contemplated in 5B(1) that would be engaged in proceedings that would ordinarily come before the judge.

Finally, because the YCC is funded by a federal grant, there is no indication that the judge would be involved in fund-raising efforts. Accordingly, there is no apparent conflict with Canon 5B(2). This committee has previously quoted favorably from the ABA Commentary to Canon 5 acknowledging that “[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives." Informal Opinion No. 88-4. Due, however, to the changing nature of organizations, the ABA Commentary to 5B recommends that a judge regularly reexamine the activities of the organizations with which he is affiliated to determine if it is proper for him to continue his relationship with it.

The Federal Advisory Committee on Judicial Activities has considered this issue in several advisory opinions. The Committee has concluded that a judge is permitted to serve on the Board of Directors of such groups as the Salvation Army, or the Red Cross, Advisory Opinion No. 2; on the managing board of a religious, fraternal or charitable corporation, Advisory Opinion No. 12; and on the board of a hospital. Advisory Opinion No. 28. Service in these positions is permitted as long as the judge's charitable and civic work does not interfere with the performance of his/her judicial duties: and as long as he/she did not engage in the solicitation of funds or permit the use of his/her name or office for that purpose. In this particular instance, the committee recommends that the justice continually reassess his position on the committee to ensure that the policies and objectives of the committee do not interfere with the justice's ability to give impartial

consideration to those cases before him which involve trafficking in or use of alcohol and drugs. If the justice senses a public expectation of a particular disposition in these cases because of his committee involvement, such an expectation may interfere with the proper exercise of his judicial duties and require his resignation from the committee.

In conclusion, it is the committee's opinion that as long as the Justice's membership on the YCC will not involve fund-raising or interfere with the performance of his judicial duties, and where the organization is not likely to be engaged in proceedings which ordinarily come before the judge, membership in the organization does not violate the Code of Judicial Conduct.

INFORMAL OPINION NO. 89-2
February 9, 1989

The Ethics Advisory Committee has been asked for its opinion on the questions of whether the Code of Judicial Conduct requires a judge to disqualify himself from hearing cases when his former law partner or a member of his former law firm is the attorney of record, when his former law partner is the county attorney and the county attorney's office is the attorney or record, or when the judge's daughter is employed by another county attorney's office and that county attorney's office is the attorney of record.

It is the committee's opinion that a judge is not automatically disqualified in any of the foregoing situations, but that the decision must be made on a case-by-case basis based upon a variety of factors. In cases involving the judge's former law partner, either in his capacity as a private practitioner or as county attorney, or in cases involving a member of the judge's former law firm, the judge must determine whether the case is one which his partner or the law firm handled while the judge was still associated with them, one which he personally handled, or one which could result in a financial benefit to the judge based upon the outcome of the case. In cases where the county attorney's office is counsel of record but a deputy county attorney is handling the case, the judge need not disqualify himself unless the judge feels his impartiality might reasonably be questioned because of his former partner's association with that office. Finally, in those cases where the judge's daughter works part-time as a secretary for a different county attorney, the judge must consider whether there is an appearance of impropriety or a likelihood that he would gain information from his daughter about disputed evidentiary facts in a case pending before him.

The pertinent provisions of the Utah Code of Judicial Conduct are Canons 2A and 2B, and 3C and 3D. These provisions are substantially similar to the ABA Canons of Judicial Ethics Canons 2A and 2B state that a "judge should exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary," and a "judge should not allow family, social, or other relationships to influence judicial conduct or judgment." Canon 3C provides as follows:

> C. Disqualification.
> (1) Disqualification must be entered in a proceeding by any judge whose

impartiality might reasonably be questioned, including but not limited to instances where:
(a) The judge has a personal bias or prejudice concerning a party, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) The judge has served as lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;
(c) The judge knows of a financial interest, including fiduciary interest, of either the judge personally or the judge's spouse and/or minor children residing in the household, in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(d) The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person,
(I) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

D. Remittal of Disqualification. A judge may, instead of withdrawing from the proceeding, disclose on the record or in writing the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree that the judge's relationship is immaterial or that the financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement of the parties must be entered on the record or, if written, signed by all the parties and included in the case file.

FORMER PARTNER/FORMER FIRM AS PRIVATE COUNSEL

Where the former partner is serving as a private attorney in a civil matter or the former law firm is counsel of record, Canon 3C requires that the judge disqualify himself if he is being asked to hear a case in which the partner or the firm was involved while the judge was associated with them or one in which the judge, himself, was involved, or one in which the judge may benefit financially from the outcome. In addition, even where a judge can respond favorably to these considerations, if the judge feels his impartiality might reasonably he questioned because of the association he should disqualify himself.

The general test applied to determine whether a judge's impartiality might reasonably be questioned is “whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality.” SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977). The Annotations to Canon 3C explain that there is no automatic disqualification when a member of the judge's former law firm

appears in the judge's court. Rather, all of the facts must be examined. Some of the factors to be considered are: the amount of time which has transpired since the judge left the firm, whether the judge maintained a close relationship with the remaining members of the firm, whether the judge has any business interests with the members of the firm, whether the judge still receives money from the firm due to the termination of cases or the purchase of the judge's interest in the firm. The issue is whether these factors indicate to a person of ordinary prudence that the judge's impartiality might reasonably be questioned. Hall v. Hall, 247 S.E 1d 754 (Ga. 1978); In re Estate of Philbrick, 229 N.W.2d 573 (Wis. 1975).

At its March 1978 meeting, the United States Judicial Conference adopted a resolution cautioning judges against participating in any case in which their former law firm is appearing, and from which they are continuing to draw compensation for services previously rendered. A judge may continue to receive payments for his interest in the firm after assuming the bench, provided it is clear that he is not sharing in profits earned after his departure and he does not participate in any case in which his former firm or any partner or associate is active as counsel until the full amount which he is entitled to receive has been paid to him. Advisory Opinion No. 56 of the Advisory Committee on Judicial Activities.

Informal Opinion No. 594 of the American Bar Association's Committee on Ethics and Professional Responsibility discusses whether a judge should take part in cases where the law firm of which he was formerly a member appears as counsel. Although this opinion predated the current Canons 3C and 3D, it employs reasoning similar to the current provisions of the Code. The committee stated that good taste and a desire to avoid any seeming impropriety might cause a judge to decline to sit if the case was in the firm at the time he was a member; or where a regular client of the firm at the time he was a member is a party to the case; or where a son or other near relative, employed by the firm, had actively participated in the case, either in the trial court or on appeal. The committee concluded by stating:

> Your former firm and its clients, just as in the case of other clients, are entitled to the benefit of your judgment on the court on the cases presented, unless there is disqualification or some consideration of the character indicated above which would cause you to decline to sit. In the final analysis it must be left to the good judgment and conscience of the individual judge.

Informal Opinion 1372 considers a similar question and quotes Professor E. Wayne Thode in his Reporter's Notes to Code of Judicial Conduct, in which he stated that:

> Although the specific standards [under Canon 3C(a)] cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification.

One alternative available to the judge, pursuant to Canon 3D, is to disclose on the record or in writing the basis for his disqualification and allow the parties to determine whether the judge's basis for disqualification is immaterial.

FORMER PARTNER AS COUNTY ATTORNEY

In those cases where the county attorney's office is counsel of record and the former partner as county attorney is personally handling the case, the same considerations apply. The judge should consider the amount of time which has transpired since he was associated with his former partner, whether he has maintained a close relationship with the former partner and whether he has any business interests with the former partner. If these factors indicate to a person of ordinary prudence that the judge's impartiality might reasonably he questioned, the judge should disqualify himself. When other members of the county attorney's office are appearing as counsel of record, the judge is not necessarily required to disqualify himself. The Commentary to Canon 3C provides that where a former partner is employed in a governmental agency, his relationship to the judge does not ipso facto create a relationship between the judge and other members of the agency.

DAUGHTER'S EMPLOYMENT

The judge's daughter's employment with another county attorney's office does not pose a problem unless the judge appears biased toward that office as a result of the employment relationship or if, as a result of his daughter's employment, the judge obtains personal knowledge of disputed evidence facts concerning the proceeding Canon 3C(l)(a).

This committee's Informal Opinion No. 88-3 discusses the same reasonable basis test for determining when a judge should disqualify him or herself from a proceeding involving a relative. Applying that test, the committee found:

> It is evident that if the spouse's association . . . caused the judge to develop a personal bias or prejudice concerning a party or an issue in a particular case or placed the judge in a situation where the judge acquired independent information of disputed evidentiary facts through the marital relationship, a person of ordinary prudence would find a reasonable basis for questioning the judge's impartiality and the judge would be required to disqualify him or herself.

In this committee's Informal Opinion No. 88-1 it was held that a juvenile court probation officer can ethically serve in the same geographic location as the officer's spouse, who was a prosecutor in that area, as long as the probation officer's diligence or impartiality might not reasonably be questioned because of a personal bias or prejudice or the receipt of independent information acquired through the marital relationship. This same rationale applies to the present situation. As long as the judge would not be biased towards the office for which his daughter works and would not acquire independent information about disputed evidentiary material through his daughter about matters which will come before him, the judge does not need to disqualify himself from cases in which the county attorney is the prosecutor.

The fact that his daughter has a financial interest in her job is immaterial since she does not reside in the judge's household and her salary is not dependent upon the outcome of the cases handled by the county attorney's office. Canon 3C(l)(c).

Opinion No. 58 from the Advisory Committee on Judicial Activities discusses disqualification in a case in which a relative is employed by a participating law firm. The Committee stated that if compensation of the relative from the law firm (here, the county attorney's office) is affected by the result of the particular case before the judge, then the judge should recuse. The judge should also recuse if the relative appears in court or at the chambers of the judge for a presentation in the case. Neither scenario is likely in the present situation since the relative is employed in a secretarial capacity by the county attorney's office. The Committee concluded:

> A judge is disqualified and should recuse if a relative within the third degree of relationship to the judge or his spouse (a) is a partner in a law firm appearing in the case: or (b) will profit or lose from the judge's action in the case either financially or otherwise, for example, the reputation of the firm would be significantly affected by the litigation. We believe the judge should recuse if the judge's participation for any reason gives an appearance of impropriety or lessens the public confidence either in the integrity or in the impartiality of the judiciary.
>
> We further conclude if the relative herein described does not in any manner appear or participate in the case and does not take part in its preparation or presentation, and if the relative does not profit directly or indirectly from action by the judge, whether by decision on the merits or otherwise, and if the circumstances of the handling of the case by the judge, including hearings or trial, permit the judge to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary generally and of the participating judge in particular, the judge need not disqualify himself or recuse, even if his relative is an employee of a lawyer or firm appearing in the case.

As secretary to the county attorney's office, the judge's daughter would not appear or participate in the case in a substantive manner, nor would her salary be affected by the action taken by the judge. However, the judge may disclose on the record the basis for disqualification and allow the attorneys to decide whether the conflict is immaterial.

CONCLUSION

In conclusion, it is the committee's opinion that where a judge is hearing a case involving his former law partner or his former firm, he need not disqualify himself as long as the case is not one which his partner or law firm handled while he was associated with that firm, is not one which he personally handled or one which could result in a financial benefit to the judge based upon the outcome. In those cases where the county attorney's office is counsel of record, but the judge's former partner is not personally handling the case, the judge need not disqualify himself

unless the judge feels his impartiality might reasonably be questioned because of his former partner's association with that office.

Finally, in those cases involving the county attorney's office where the judge's daughter is employed in a secretarial capacity, the judge need not disqualify himself unless the judge's impartiality might be questioned or by virtue of his relationship with his daughter, he could acquire independent information of disputed evidentiary facts.

INFORMAL OPINION NO. 89-3
March 10, 1989

The Ethics Advisory Committee has been asked for its opinion on the questions of whether the Code of Judicial Conduct permits a judge to respond in writing to an inquiry from a citizen concerning sentencing in an automobile homicide case and assuming that providing such a response is ethically permissible, whether the specific response proposed by the judge is ethical. The judge included with his opinion request a copy of the proposed response.

With respect to the judge's initial inquiry, it is the committee's opinion that a judge may respond to such an inquiry from a citizen provided the case being discussed is neither pending nor impending. With respect to the judge's inquiry concerning the propriety or the proposed response, the committee believes that it should not review, edit, approve, or disapprove the content of the proposed response and that subject to the general guidelines set out in this opinion, the wording and content of the specific response should be left to the discretion of the individual judge.

In the present situation, the citizen sent to the judge copies of two newspaper articles which reported the sentences given two defendants in separate automobile homicide cases. The defendants were both charged with third-degree felony vehicle homicide. The judge who requested this opinion sentenced one defendant to 30 days in jail, fined her $625, and ordered her to pay restitution to the victim's family and to receive counseling. The other defendant was sentenced by a different judge to six months in jail, fined $1,250 and ordered to pay $1,105 in restitution. That defendant was placed on a work-release program during the term of his sentence and ordered to serve one year on probation following his jail term. The letter from the "citizen" was written on the stationery of a quasi-public agency and questioned the judge concerning the disparity between the two sentences.

The pertinent provisions of the Utah Code of Judicial Conduct are Canon 2A, which encourages a judge to exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary, and Canon 3A(6) which provides:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to judicial direction and control. This subsection does not

> prohibit judges, from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

In the present situation, the defendants have already been sentenced and the appeal time has expired, so their cases are neither pending nor impending. The response that the judge wishes to make to the citizen involves an explanation of the sentencing procedures of the court, which is permitted by Canon 3A(6).

The Advisory Committee on Judicial Activities, in Advisory Opinion No. 55 explained that, except as permitted by Canon 3A(6), a judge should not comment publicly about "any pending" case. Opinion No. 55 further states:

> The Canons do not, however, prohibit references to cases the judge has decided in writings subsequent to the final disposition of the cases.
>
> In writings referring to specific cases which the judge has decided, however, even after their final disposition, the judge should be particularly careful to avoid possible exploitation of his judicial position. In any reference to a criminal case he should consider also whether his comments might afford a basis for collateral attack on the judgment.
>
> In all cases he should avoid sensationalism and comments which may result in confusion or misunderstanding of the judicial function or detract from the dignity of his office. He should comply with the language, intent, and spirit of the Canons cited above.

Accordingly, the judge may respond to the citizen's inquiry as long as the judge's response comports with existing laws on the release of confidential information and does not subject the sentencing already handed down to collateral attack, exploit his judicial position in any manner or permit others to do so, result in confusion or misunderstanding of the judicial function, detract from the dignity of his office, nor discourage public confidence in the judiciary.

As to the particular response proposed, the committee does not believe that it should review or edit the specific content of the response from the judge. Rather, it is the committee's view that subject to the guidelines and Canons discussed in this opinion, the content of the proposed response should be left to the discretion of the requesting judge.

Moreover, even assuming that the committee's role appropriately included advising the judge concerning the specific response, in this case, given the information provided, the committee could not determine whether the proposed response complies with the guidelines and the Canons discussed in this opinion. It is not clear from the proposed response whether the information which it contains is part of the court record and therefore public, or whether the information is of a confidential nature and cannot be disclosed. In addition, the individual who wrote to the judge

requesting an explanation of the disparate sentences sent her letter on the stationery of a public agency. It is not clear from her letter whether her request for information is made in her official capacity as a representative of that organization, in her individual capacity as a member of the public, or in some other capacity, such as the representative of a public advocacy group. Although her identity is not determinative of whether the proposed response is ethical, her capacity may affect how the judge's response is used, and how broadly it is disseminated. Certain uses of an otherwise appropriate response could lead to the exploitation of the judge's office, create confusion or misunderstanding about the judge's function, detract from the dignity of the judicial office or discourage public confidence in the judiciary.

Accordingly, based upon the committee's belief that it should not advise the judge concerning the specific content of the proposed response and given the limited information available to the committee concerning the response, the committee will not express an opinion either approving or disapproving the judge's proposed response.

In summary, it is the committee's opinion that the Code does not prohibit a judge from responding in writing to an inquiry as to the court's sentencing practices, provided the subject matter of the letter is not a pending or impending case and the judge's reply does not subject that sentence to collateral attack, create confusion or misunderstanding of the judicial function, undermine confidence in the judiciary, or lead to the exploitation of the judicial position.

INFORMAL OPINION NO. 89-4
March 27, 1989

The Ethics Advisory Committee has been asked for its opinion on the question of whether an appellate judge may participate in a tour of another country where the judge's and the judge's spouse's trip are paid for by the travel group arranging the trip, and in exchange, the judge gives lectures to the group about the foreign country's legal system.

The for-profit travel group, based in Kansas, arranges continuing education travel programs for lawyers and doctors. Lawyers who attend often receive continuing education credit. Promotion for the trip is done by the travel group with a national mailing list. The judge has not provided the group with the names of any Utah lawyers nor has the judge signed any letters soliciting participation. A short biography of the judge will appear in the travel group's brochure along with a description of the lectures. The judge has indicated that the lectures were prepared on personal time and that vacation leave will be used to go on the tour.

It is the committee's opinion that the judge may participate in such a tour and may travel at the expense of the travel group arranging the trip, as long as the judge's participation does not create the appearance of impropriety, the judge is not required to solicit funds for the travel group or give investment or legal advice and the travel organization is not a party whose interests have or are likely to come before the judge.

Although most of the opinions interpreting the Canons of Judicial Ethics deal with the actions of judges of inferior courts and courts of general jurisdiction, the Canons apply to judges at all levels. In Formal Opinion No. 322, the American Bar Association's Committee on Ethics and Professional Responsibility stated, "probably, as they relate to appearances of impropriety, the Canons of Ethics apply with greater strictness to the judges of higher courts, for the conduct of judges of higher courts sets the tone for the whole judiciary."

CANON 4(A)

Canon 4(A) permits a judge, subject to the proper performance of his or her judicial duties to speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice. Through this activity, however, the judge must not cast doubt on his or her capacity to decide impartially any issue that may be involved in matters before the court.

A series of lectures on a foreign country's legal system would fall within the purview of this Canon. That country's legal system is not a subject matter that is likely to come before the court, so the lectures should not cast any doubt on the judge's capacity to impartially decide matters coming before the court.

Advisory Opinion No. 79 of the Advisory Committee on the Codes of Conduct discusses activities permitted by Canon 4. The opinion notes that the Code encourages judges to write, teach, and lecture concerning the law, the legal profession, and the justice system. The committee stated:

> We reaffirm the longstanding rule that it is appropriate for judges to receive reasonable compensation for outside speaking, teaching, lecturing activities related to the law. Reasonable compensation provides an appropriate incentive for judges to devote significant portions of their personal time to such work. Of course, care must be taken to avoid the fact or the appearance that such outside undertakings interfere with the prompt performance of judicial duties or exploit the judicial office.
>
> In the last twenty years or so, there has been a significant increase in the scope and importance of continuing education programs for the practicing bar, programs often conducted outside the confines of traditional legal education. It is appropriate for judges to participate in such programs for compensation, but there are some additional concerns. For instance, these programs are often widely advertised. Judges participating in such programs should ensure that promotion of the program does not trade on the judicial office, and in particular that the judge's official position is not emphasized to encourage participation in the program.

The judge would need to ensure that the travel agency in its advertisement of the trip, does not trade on the judicial office and that the judge's official position is not emphasized to encourage participation in the program.

Opinion No. 79 further cautions against the use of the facilities and staff in a judge's chambers for the research or preparation of the writings, lectures, or teaching materials, where the judge is receiving compensation. Where, as here, the judge has prepared the lectures on personal time, this would not pose a problem.

As to the judge's statement that "vacation leave" would be used for the trip, it should be noted that no leave or absentee policies exist which govern state court judges. Furthermore, although the presiding judges of the trial courts are responsible for formulating an orderly plan of judicial absences from court duties for vacation and education purposes (CJA Rule 3-104(3)(B)) no such coordination of schedules exists on the appellate court level. Due to the lack of articulated policies and the accompanying lack of guidelines, and without knowing what other extra-judicial commitments the judge has made, the committee is unable to comment on the appropriateness of the judge's travel plans as they pertain to the judge's absence from court duties. This committee has previously considered the propriety of a judge's participation in a seminar in another country at the expense of the American organization sponsoring the seminar. In Informal Opinion No. 88-10, the committee stated that the judge may participate and may have his or her expenses paid provided the judge's participation does not create the appearance of impropriety, the judge is not required to solicit funds for the organization or give investment or legal advice and the organization is not a party whose interests have or are likely to come before the judge. In addition, reimbursement for expenses had to be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge. Accordingly, the judge is not permitted to solicit funds for the travel group or give investment or legal advice. Because the travel group is not a party whose interests are likely to come before the judge, the judge's participation in the tour should not create the appearance of impropriety. The judge's compensation for providing the lectures will be limited to the actual cost of the trip.

CANON 2(B)

> Canon 2(B) of the Code of Judicial Conduct
> A judge should not lend the prestige of the judicial office to advance the private interests of others: nor should a judge convey or permit others to convey the impression that they are in a special position of influence.

In Informal Opinion No. 88-10, this committee found that Canon 2 did not prohibit that judge's participation in the seminar in another country. The committee stated:

> In the present situation, the judge has been asked to participate in a seminar sponsored by an organization located in Washington D.C. The purpose of the

> seminar is to provide an opportunity for Americans to meet with the policy makers of a foreign country and discuss problems of mutual concern to both countries.
>
> In exchange for the payment of expenses, the judge is only required to attend the seminar. The judge is not required to conduct any portion of the seminar or provide any other professional assistance during the seminar.
>
> Under these circumstances, the judge's participation in the seminar would not create an appearance of impropriety. The organization sponsoring the seminar is located in Washington D.C. and is not a Utah organization. The purpose of the seminar is to discuss issues of an international scope rather than domestic or local. It is extremely unlikely that the organization sponsoring the seminar would ever be involved in litigation in the Utah courts or have an interest in an issue submitted to the Utah courts. Therefore, it is the committee's opinion that the judge's participation in the seminar would not create the appearance of impropriety and is not prohibited by Canon 2 of the Code.

Unlike the judge in Opinion No. 88-10, this judge is required to conduct lectures on the trip in exchange for the payment of expenses. Although the judge is participating in the tour in this manner, the purpose of the trip is to provide a tour and information about the foreign country. The judge's role in this purpose is incidental and is not a focal point of the tour. Otherwise, like the organization in Informal Opinion No. 88-10, the travel group is located in Kansas and is not a Utah organization. The purpose of the tour and the lecture series is to discuss issues of an international scope rather than domestic or local. It is extremely unlikely that the organization sponsoring the seminar would ever be involved in litigation in the Utah courts or have an interest in an issue submitted to the Utah courts.

In Advisory Opinion No. 3, the Interim Advisory Committee on Judicial Activities considered a question involving a judge who had been invited to participate as a faculty member in a two-week seminar on humanistic studies. The judge was not compensated for his participation, but he was reimbursed for his and his wife's travel expenses and for their maintenance expenses during the period of the institute. Unlike the travel group in the current inquiry, the institute is a nonprofit program. The committee concluded that the judge may participate in the seminar provided the commitment will not, in any way, interfere or appear to interfere with his devotion to the expedition and proper administration of his official functions as a judge, and that the commitment will give no ground for any reasonable suspicion that his office persuades others to patronize or contribute to the institute. The committee added that the judge is the one best able to measure the impact of the canons upon his invitation and participation and the one best able to circumscribe his comments so as to avoid a positive commitment on any legal issue which is likely to arise before him.

In Informal Opinion No. 88-6, this committee considered whether the Code prohibits a judge from teaching a course for a continuing legal education seminar that was being operated by a

private for-profit group composed of attorneys. The committee found that teaching the course was prohibited since it would lend the power and prestige of the judicial office to advance the financial interests of the for-profit group sponsoring the seminar. The opinion stated that where the goal of the seminar's sponsors, presumably, is for the seminar to be a financial success, by teaching at the seminar, the judge would be using the prestige of his or her office to advance the private interests of others. The opinion concluded: "the inference is clear that judges may teach for public and for nonprofit entities, but that they should avoid lending the prestige of their office to private groups sponsoring continuing legal education seminars for profit."

While the travel group is a for-profit entity, they are not actually "sponsoring continuing legal education seminars for profit." Rather, they are sponsoring a trip abroad for profit. That the tour has the added feature of providing continuing education credit, does not change the character of the enterprise. The purpose of this trip, unlike the continuing education seminar considered in Informal Opinion No. 88-6, is to travel to the foreign country. The judge's lectures will presumably enable the participants to receive continuing education credit for the tour, but would not be the primary reason people would choose to participate. Thus, although the financial interests of the tour group will be advanced by people participating in the tour, the judge's lecture series would not necessarily encourage that participation and does not constitute an improper use of the judicial office to advance those financial interests.

CANON 6

As to the form of compensation the judge will receive, Canon 6 allows a judge to receive compensation and reimbursement of expenses for the quasi-judicial activities permitted by the Code, if the source of such payments does not give the appearance of influencing the judge in the performance of his or her judicial duties or otherwise give the appearance of impropriety. Compensation must not exceed a reasonable amount and should be comparable to what a person who is not a judge would receive for the same activity. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse.

Applying these factors to this matter, since the travel organization is not likely to be a party in litigation before this judge, there is no appearance of influencing the judge in the performance of judicial duties. Compensation is limited to the actual cost of the trip for the judge and the judge's spouse. There is no indication that the compensation would differ if a person who is not a judge were delivering the lecture series.

CONCLUSION

In conclusion, it is the committee's opinion that the Code does not prohibit the judge's participation in such a tour whose purpose is to visit a foreign country and not merely to attend the judge's lectures, as long as the judge's participation does not create the appearance of impropriety, the judge is not required to solicit funds for the travel group, the travel organization is not a party whose interests have or are likely to come before the judge, and the compensation

received by the judge is reasonable and is similar in amount to what a person who is not a judge would receive for the same activity.

INFORMAL OPINION NO. 89-5
March 27, 1989

The Ethics Advisory Committee has been asked for its opinion on the question of whether a judge may be involved in cases where the judge's cousin, a deputy county sheriff within the judge's district, has an active part. Specifically, the judge questions whether it would be proper to act as the signing magistrate where the judge's cousin is acting as the affiant or the complainant on search warrants, warrants of arrest, or informations or where the cousin is testifying before the judge at a preliminary hearing or trial.

It is the committee's opinion that the Code of Judicial Conduct does not prohibit the judge from performing these judicial functions provided there is no reasonable basis for questioning the judge's impartiality.

The pertinent provisions of the Code are Canons 2 and 3. Canon 2 provides:

> A. A judge should respect and comply with the law and should exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary.
> B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not tend the prestige of the judicial office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position of influence . . ..

Canon 3C(a) provides that a judge must disqualify in a proceeding if his or her impartiality might reasonably be questioned. This includes instances where “[t]he judge has a personal bias or prejudice concerning a party, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding." Furthermore, a judge must disqualify where:

> (d) The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> (I) is a party to the proceeding, or an officer, director, or trustee of a party;
> (ii) is acting as a lawyer in the proceeding;
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

For purposes of Canon 3C, the degree of relationship is calculated according to the civil law system. The Commentary after Canon 3C in the Code of Judicial Conduct provides:

> According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or her spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

Accordingly, it is clear that since the judge in this matter and the deputy sheriff do not fall within the third degree of relationship, disqualification is not automatic. However, the participation of a cousin in a case may still result in judicial disqualification under the general Canon 3C(1) impartiality standard if a close personal relationship exists. Leslie W. Abramson, Judicial Disqualification under Canon 3C of the Code of Judicial Conduct.

In a Mississippi case, the trial judge was not required to recuse himself where the victim in a murder case was the third or fourth cousin of the judge with whom the judge had little contact, Coleman v. State, 378 So.2d 640 (Miss. 1979). Similarly, a South Dakota court held a trial judge was not required to recuse where his wife was a first cousin of one of the prosecutors. State v. Robideau, 262 N.W.2d 52 (S.D. 1978). The court in Robideau cited Canon 3(C)(1)(d) of the Code and pointed out that the judge's wife and the prosecutor were related in the fourth degree. The court also noted that the evidence was clear that there were no significant social relations between them.

Unlike the judges in Coleman and Robideau, this judge has enjoyed a significant family and social relationship with the deputy sheriff. In the letter requesting this opinion, the judge stated that the judge and his or her cousin "see each other regularly and maintain close family contact." The Annotations to Canon 3C explain that, in addition to the Informal Opinion No. 89-5 specific situations set forth by 3C, the general test is whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality. SCA Services Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); Informal Opinion No. 88-3. The judge must determine whether his or her social and family relationship with the deputy sheriff would cause a person of ordinary prudence to find a reasonable basis for questioning the judge's impartiality. If the cousin's position as deputy sheriff caused the judge to develop a personal bias or prejudice concerning a party or an issue in a particular case or placed the judge in a situation where the judge acquired independent information of disputed evidentiary facts through the family relationship, a person of ordinary prudence would find a reasonable basis for questioning the judge's impartiality and the judge would be required to disqualify him or herself. Informal Opinion Nos. 88-3 and 89-2.

As an alternative to disqualification, Canon 3D states that a judge may disclose on the record or in writing the basis for disqualification. If the parties and lawyers, independently of the judge's participation, agree that the judge's relationship is immaterial or that the financial interest is insubstantial, the judge is no longer disqualified and may participate in the proceeding. Such an

agreement must be entered on the record or, if written, signed by all the parties and included in the case file. The committee recognizes that disclosure would not be possible in all the instances mentioned by the judge, such as the issuance of search warrants. In the other matters, however, disclosure is an option.

In Informal Opinion No. 1260, the American Bar Association's Committee on Ethics and Professional Responsibility considered an attorney practicing law in two counties in each of which there were two circuit judges. One of the judges was the attorney's sister-in-law. The Committee stated that the judge would necessarily have to disqualify herself whenever her relative appeared before her, but that the requirement would not impose a hardship because the second judge in the circuit could sit by interchange or, under subsection D of Canon 3, the judge could disclose on the record the basis of her disqualification and, if the parties agree that the relationship is immaterial, she would no longer be disqualified.

In conclusion, it is the committee's opinion that the Code does not automatically require a judge to disqualify him or herself from participation in a case in which the judge's cousin, a deputy sheriff, is involved, since a cousin is not within the third degree of relationship to the judge. However if, because of the relationship between the judge and the deputy sheriff, the judge's impartiality might reasonably be questioned, the judge should either recuse or, when possible, disclose the relationship to the parties and permit them to decide whether a recusal is warranted.

INFORMAL OPINION NO. 89-6
May 26, 1989

The Ethics Advisory Committee has been asked for its opinion whether the acceptance of Christmas gifts constitutes "ordinary social hospitality" which is permissible under the Code or whether judges or other court employees are prohibited from accepting Christmas gifts from lawyers and others who may appear before the court.

It is the committee's opinion that for the purposes of this opinion request, Christmas gifts do not constitute "ordinary social hospitality" and that the Code of Judicial Conduct prohibits judges from accepting such gifts, but that court clerks, court reporters, and other court employees may accept gifts of nominal value at Christmas time.

Canons 2 and 5 of the Utah Code of Judicial Conduct are the pertinent provisions of the Code. Canon 2(B) provides that a judge should not convey or permit others to convey the impression that they are in a special position of influence.

Canon 5(C)(4) states:

> A judge should not accept nor the judge knowingly permit a member of the family to accept a gift, bequest, favor, or loan from anyone except as follows:

> (a) they may accept a gift incident to a public testimonial; books supplied by publishers on a complimentary basis for official use, or an invitation to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice. To the extent a gift does not reflect adversely on the judge's impartiality, a part-time judge may accept gifts which are incident to some other profession or occupation to which the judge devotes time as permitted by law.
> (b) they may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative, a wedding or engagement gift; a loan from a lending institution in its regular course of business on the terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants:
> (c) they may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge.

Christmas gifts do not fall within any of the exceptions set forth in subdivisions (a) and (b) of Canon 5(C)(4). Moreover, in the present situation, the Christmas gifts are being offered by precisely the category of persons prohibited by subdivision (c): parties or other persons whose interests have come or are likely to come before the judge.

The American Bar Association's Committee on Ethics and Professional Responsibility in Informal Opinion 927 concluded that it is improper for judges to accept Christmas presents from lawyers practicing before them. That opinion was based on former Judicial Canon 32, which is similar to Canon 5(C)(4)(c) and provided: "A judge should not accept any presents or favors from litigants or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment." The committee also quoted Henry S. Drinker in his book Legal Ethics, at page 275 as follows: “A lawyer may not properly give presents to or bestow favors on judges before whom he might appear as counsel or litigant, nor may a judge accept such from lawyers, litigants, or their friends.”

The committee explained that the value of the gift is immaterial since the Canon sets forth a principle which is not to be measured by monetary considerations.

In Informal Opinion No. 900, the committee found that a judge may not accept a portrait to be hung in his courtroom from a group of attorneys who solicited funds for the painting of the portrait.

However, the Advisory Committee on Judicial Activities in Advisory Opinion No. 47 held that Canon 5(C)(4) permitted a judge to accept complimentary memberships in professional and social clubs. Before accepting such a membership though, the judge was cautioned to ascertain that the club is not involved or likely to become involved in litigation in the federal court.

The difference in treatment between the receipt of Christmas and other gifts and complimentary club memberships depends upon the donors. In the case of the gifts, the donors were either attorneys or litigants and as such, fell within the prohibition of Canon 5(C)(4)(c), whereas the clubs offering the memberships were not parties or attorneys likely to appear before the judge. Once the judge determines that the clubs are not likely to be federal court litigants, there is no appearance of partiality in the acceptance of the proffered memberships.

The same restrictions do not apply to other court employees. In Informal Opinion No. 514, the Committee on Ethics and Professional Responsibility found that court clerks, court reporters and other court employees may accept gifts of nominal value from attorneys at Christmas time.

In conclusion, it is the committee's opinion that the Code prohibits a judge from accepting Christmas gifts from attorneys or parties who are likely to appear before him or her, but that other court employees may accept Christmas gifts of a nominal value.

INFORMAL OPINION NO. 89-7
May 26, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether a judge may provide campaign assistance, such as preparing brochures for mailing, to a school board candidate in the privacy of the candidate's home.

It is the committee's opinion that the Code Judicial Conduct prohibits such political activity.

Canon 7 of the Code of Judicial Conduct provides in pertinent part:

> B. A judge or a candidate for a judicial office who has been confirmed by the Senate should not
> (1) act as a leader or hold any office in a political organization,
> (2) make speeches for a political organization or candidate or publicly endorse a candidate for public office,
> (3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings or purchase tickets for political party dinners or other functions, except as authorized in Canon 7C, or
> (4) take a public position on a non partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system.

Canon 7C permits a judge who is running for office to speak to public gatherings on his or her own behalf.

The question presented is whether assisting a school board candidate's campaign efforts in the privacy of the candidate's home is attending a "political gathering," prohibited by subsection (3).

Although the Code does not define a "political gathering" it is the committee's opinion that its plain and ordinary meaning is any gathering of two or more people for political purposes.

In Informal Opinion No. 88-7 this committee discussed whether a judge may host or attend a mass meeting. The committee concluded that a judge should not attend a mass meeting because the term "mass meeting" falls within "political gathering" as that term is used in the Code.

As a basis for its conclusion, the committee cited Canon 28, the precursor to Canon 7A of the Code. Canon 28, prior to 1950, read:

> While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions. He should neither accept nor retain a place on any party committee as party leader, nor act nor engage generally in partisan activities.

Informal Opinion C-486 by the Committee on Ethics and Professional Responsibility indicates that those states adhering to the principle of the nonpartisan judiciary, prohibit all political activity by judges and judicial candidates. This prohibition includes acting as a party leader, holding office in a political party or organization and permitting others to use the power or prestige of the office to promote candidacy for reelection or for the success of a political party. The purpose of Canon 28, according to Informal Opinion C-486, was "to avoid a suspicion that the judge permits political considerations to affect his decisions and is directed primarily at the suspicion which may arise when he performs judicial service and at the same time engages in political activities. "

In Advisory Opinion No. 19, the Interim Advisory Committee on Judicial Activities found that a judge was not permitted to be a member of a political club. Citing Canon 28's prohibition against direct or indirect participation by a Judge in partisan political activities, the committee quoted Formal Opinion 113 of the American Bar Association Committee on Professional Ethics as follows:

> A judge is entitled to entertain his personal views of political questions, but should not directly nor indirectly participate in partisan political activities. It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, ex necessitate rei, he thereby voluntarily places certain well recognized limitations upon his activities.

Formal Opinion 312 delineated political activities prohibited by Canon 28, which included "appearing at or participating in fund-raising dinners or other affairs," and "engaging generally in partisan activities."

In the present situation, the judge inquires whether he or she may provide campaign assistance in the privacy of the candidate's home. The judge's inquiry does not indicate whether other campaign workers would be in attendance or take into consideration the possibility that someone may visit the home while the judge is present, or that the candidate will mention the judge's participation in the campaign effort.

Accordingly, it is the committee's opinion that by providing campaign assistance to a school board candidate in the candidate's home, the judge would necessarily be meeting with the candidate, and perhaps others, for the express purpose of engaging in political activities and that such activity constitutes attendance at a political gathering which is prohibited by the Code.

In conclusion, it is the committee's opinion that a judge should not assist a school board candidate's campaign efforts because of the general prohibition against engaging in political activities.

INFORMAL OPINION NO. 89-8
June 8, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether a judge may assist in fund-raising for a charitable or civic organization by participating in a "dunking booth" at a bar convention or midwinter meeting of the bar. The funds raised in this manner would be used for a drug prevention program in the public schools.

It is the committee's opinion that the Code of Judicial Conduct prohibits such fund-raising activities.

Canon 5B of the Utah Code or Judicial Conduct provides, in pertinent part:

> Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
> (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but may be listed as an officer, director, or trustee of such an organization.

In Informal Opinion 390 of the American Bar Association's Committee on Ethics and Professional Responsibility, the committee explained that the reference to "charitable" enterprises in Canon 25, the precursor to Canon 5B(2), applies "equally to solicitation for funds for the establishment of an art museum or for educational purposes, or other matters of this sort." See also, Informal Opinion 866.

In Informal Opinion No. 603, the Committee on Ethics and Professional Responsibility held that "it is ordinarily not possible (for a judge) to solicit for charities without giving ground for reasonable suspicion that he is utilizing the power and prestige of his office to persuade or coerce others to contribute." The committee held again that Canon 25 applies equally to solicitation of funds for purposes other than charitable, such as philanthropic, civic, and ecclesiastical enterprises. Accordingly, Canon 5B applies to fund-raising for an "educational purpose" such as the establishment of drug prevention programs at the schools.

This committee has previously commented on Canon 5B's fund-raising prohibition in Informal Opinion No. 88-4 and Informal Opinion No. 89-1. In Informal Opinion No. 88-4 the committee was asked whether a judge could serve on the Board of Directors of United Way. The committee held that the judge could hold a position on the board as long as United Way was "not likely to be engaged in adversary proceedings and the judge is not involved in the fund-raising activities of the organization or permits the use of the judicial office for that purpose." Unlike United Way, the bar convention or a midwinter meeting of the bar would be attended by people who are likely to be engaged in adversary proceedings before the court. Furthermore, the activity proposed by the judge is strictly for a fund-raising purpose.

As this committee pointed out in Informal Opinion No. 88-4, the Federal Advisory Committee on Judicial Activities has also discussed the fund-raising issue in several advisory opinions. That committee has concluded that a judge may serve on the managing boards of the Salvation Army, the Red Cross, or religious, fraternal or charitable corporations, or a hospital board, but the judge may not solicit funds for any of these organizations or permit the use of the prestige of his office for that purpose. See Advisory Opinions Nos. 2, 12 and 28.

In Opinion No. 89-1, this committee held that a Justice of the Peace could serve as a member of the local Youth Coordinating Council (YCC), so long as the Justice was not involved in fund-raising for the organization or permitted the use of the judicial office for that purpose.

The Federal Advisory Committee on Judicial Activities in Advisory Opinion No. 32 found that a judge who was chairman of the Finance Committee, or an Area Council of the Boy Scouts of America, was prohibited from soliciting board members of the Council and a few trust funds for financial support. In finding that such fund-raising was prohibited, the committee addressed the fact that only certain persons were being solicited. The committee held: "Neither the canons nor our previous opinions make any exception of persons who can be solicited. The solicitation by a federal judge of funds for a charitable organization, even tough the solicitation is to a limited class of persons, is forbidden by the Code." Accordingly, here, even though the judges

participating in the dunking booth would only be soliciting funds from those attending the bar meetings, and not the public at large, the Code does not make any exception for persons who can be solicited.

The fact that the persons to be solicited in this situation are attorneys, arguably makes this an even more inappropriate area for fund-raising by the judiciary. In Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State & Federal Judges, p. 29, by Steven Lubet, the point is made that, even more than with private citizens, "lawyers or court personnel can be intimidated into contribution by the solicitation of sitting judges." Lubet explains the purpose behind the fund-raising prohibition of Canon 5B(2) as follows:

> The purpose of this prohibition is to avoid misuse of the judicial office. The rule addresses the dual fears that potential donors either may be intimidated into making contributions when solicited by a judge, or that they may expect future favors in return for their largesse. In either case, the dignity of the judiciary suffers, and, since most charitable organizations can raise funds perfectly well without the involvement of judges, a per se prohibition was deemed appropriate.

As to the nature of the solicitation of funds involved in this case--participation in a dunking booth--Canon 5B(2) has been interpreted as prohibiting judges from performing at fund-raising events. Vol. 7 Judicial Conduct Reporter No. 4, page 8 Winter/ 1986. In accordance with this proposition, a Texas judge was advised not to sing an aria at a fund-raising event. Id., quoting Tex. Adv. Op. 41 (1979). According to the commentary in the Conduct Reporter:

> The policy behind this section of the canon is to assuage the fear that potential donors will feel intimidated into making contributions because the judge might retaliate by ruling against them in lawsuits . . .. However, Canon 5B(2) has been broadly applied to prohibit a judge's appearance at a telethon, even though the judge would never know the names of those watching. Tex. Adv. Op. 16 (1976).

Similarly, two New York judges were admonished for violating Canons 1, 2, and 5B(2) when they acted as judges in mock court proceedings in their courtrooms to raise funds for the American Heart Association as part of the "Jail Bail for Heart" fund-raising program. In re John G. Turner, Unreported Determination (N.Y. Comm'n March 23. 1987); In re Joseph Harris, Unreported Determination (N.Y. Comm'n Jan. 22. 1988), cited in the publication of the 11th National Conference for Judicial Conduct Organizations (1988). A third New York judge was found to have violated the same Canons when she judged the "Buffalo's Sexiest Baldy Contest," a fund-raising event of the Cystic Fibrosis Foundation.

Participation in a dunking booth, with the proceeds to be used to establish an educational program in the school system, constitutes performing at a fund-raising event. This activity is similar in character to singing, judging mock court proceedings, and judging other contests,

where the proceeds raised in this manner are to be donated to a charity or for an educational purpose.

It is the committee's opinion that the Code of Conduct prohibits participation by a judge in fund-raising activities where the funds will benefit any educational or charitable purpose. This prohibition includes participation in a dunking booth at a bar convention or at a midwinter meeting of the bar, where the proceeds would be used to establish drug prevention programs in the schools.

INFORMAL OPINION NO. 89-9
July 7, 1989

The Ethics Advisory Committee has been asked for its opinion on these questions: whether the Code of Judicial Conduct permits a judge to teach legal classes for peace officers or students attending a community college and whether the judge may receive compensation from the sponsoring organization for teaching the courses. The first class involves teaching a general law class to criminal justice administration students at a community college. The curriculum would focus on the study of statutory provisions governing law enforcement. The second class is being taught to peace officers and would cover recent Utah Supreme Court, United States Supreme Court, and other appellate criminal law decisions. In both instances the judge's salary would be paid by the sponsoring organization and not by the students themselves. The judge's compensation for teaching the first course would be paid by the community college and the judge's compensation for the second course would be paid by the State of Utah through the Division of Finance, using the appropriation for the Peace Officers Standards Training Division.

It is the committee's opinion that the Code does not prohibit the judge from teaching the community college course and receiving compensation for teaching provided the judge does not, in any substantial degree, use judicial chambers, resources, or staff to research and otherwise prepare for the course. The Code does, however, prohibit the judge from conducting the training session for peace officers.

APPLICABLE CODE PROVISIONS
The pertinent provisions of the Code are Canons 4, 5C, and 6. Canon 4 permits judges to teach classes concerning the law. That Canon provides:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast doubt on the capacity to decide impartially any issue that may be involved in matters before the court.
>
> A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all activities and, specifically, a judge should not allow relationships to influence judicial conduct or judgment and should not convey or permit others to convey the impression that they are in a special position of influence. Canons 5C and 6 deal with the issue of compensation and will be discussed separately.

COMMUNITY COLLEGE COURSE

In the opinion request, the judge explained that the students attending the community college course are studying to become certified as private security guards, private investigators, constables, reserve peace officers and correctional officers. A smaller number of the students may be studying to eventually become full time peace officers in the State of Utah. The students are taught by a three-teacher team, one of whom would be a judge. The subject matter is divided among the teachers and includes instruction on the Utah court system, constitutional law, laws of evidence, criminal code, search and seizure, use of force, controlled substances laws, liquor control laws, and juvenile law and procedure. All examinations and evaluations of the students are conducted by the regular staff at the college and not by the three member teaching team. The classes are taught at night.

Applying the pertinent canons to this teaching situation, the judge would be teaching a class concerning the law and the legal system as permitted by Canon 4.

Inasmuch as the class is taught at night, there is no indication that teaching would interfere with the proper performance of judicial duties. Furthermore, because the subject matter of the course covers only general law topics and not current cases or issues before the court, it is unlikely that doubt would be cast on the judge's capacity to decide impartially any issue that may be involved in matters before the court.

Since the judge will simply be offering a series of lectures and not further interacting with the students nor evaluating their performance, no relationship should be created with the students that would convey the impression that the students are in a special position of influence with the judge. Although a few of the students may eventually become peace officers, it is a remote possibility that they would appear in this judge's court and, even if that were the case, there is no indication that the judge's participation in their basic training would place them in a special position of influence with him. Accordingly, Canon 2 does not prohibit the teaching of the course either.

The Interim Advisory Committee on Judicial Activities has permitted judges to teach such courses on several occasions. In Advisory Opinion No. 1, the committee approved of a judge teaching part-time as a special lecturer in law at a university law school for compensation. The committee commented that "limited work of this kind, to a judge so disposed, can be a source of refreshment and perspective."

Again in Advisory Opinion No. 7, the committee approved of a judge's participating as a faculty member of the National College of State Trial Judges. That judge received no compensation, but was reimbursed for his travel and other expenses.

Advisory Opinion No. 79 discussed the use of chambers, resources, and staff for activities permitted by Canon 4. In that opinion, the committee noted that teaching provides "intellectual enrichment for the judge, [is] an important source of improvement for the justice system, and [is] fully consistent with the public's perception of the appropriate role for judges in our society. "

The committee further stated that receiving compensation for teaching is also appropriate but that care must be taken to avoid the fact or the appearance that such outside undertakings interfere with the prompt performance of judicial duties or exploit the judicial office. Part-time teaching at law schools or other educational institutions generally does not involve these dangers, according to the committee.

The use of the facilities and staff in a judge's chambers for the research or preparation of the teaching materials is another consideration. Where, as is the case here, the judge is being compensated for the teaching position, stringent limits on such use apply because of the danger that a judicial position will be or appear to be exploited for personal gain.

Canon 4D of the ABA Code of Judicial Conduct provides that a "judge should not use in any substantial degree judicial chambers, resources, or staff to engage in activities permitted by this Canon. "

Accordingly, a judge who receives compensation to teach courses may not use the facilities or personnel of the judicial chambers for such work. This prohibition, however, does not extend to insubstantial uses of chambers and facilities for the preparatory work. Advisory Opinion No. 79 explains: "Insubstantial or occasional uses of resources are permissible provided the judge does not take for personal use assets or services otherwise available only at significant cost, or interfere with the discharge of official duties." For example, Canon 4 would not prohibit the judge from using a court library for compensated research at a time that does not interfere with the prompt performance of judicial duties. The Canon would, however, prohibit the use of a government-supplied computer research service that would not be available elsewhere except at substantial expense. Although Utah did not adopt Canon 4D, the Utah Code of Judicial Conduct also prohibits a judge from engaging in financial dealings that tend to exploit the judicial position. Canon 5C(l). As explained in Advisory Opinion No. 79, use of the judge's chambers and personnel would exploit or give the appearance of exploiting the judicial position.

PEACE OFFICERS TRAINING

The second course the judge is considering teaching involves instructing peace officers for the State Division of Peace Officers Standards and Training on recent state and national criminal law decisions. One class would be taught in a geographic area outside of the judge's judicial district. The other class would be taught to peace officers from throughout the state. Because of the

location of the first class outside of the judge's judicial district, the peace officers attending that course would not appear in the judge's court. The officers attending the second course would possibly appear before the judge. According to the judge, however, there is no substantial likelihood that they would appear because of the large number of officers in the state, the relatively few officers who will attend the class, the number of judges in this judge's judicial district, and the relatively few times that peace officers actually testify in court.

This committee has previously considered the propriety of instructing peace officers in Informal Opinion No. 88-5, September 15, 1988. In that opinion, the judge wanted to teach a course on the Utah Code and proper courtroom demeanor and testimony to peace officers. In holding that teaching such a course was prohibited, this committee relied on three factors. First, the judge was not teaching a course that would be attended by representatives from all components of the criminal justice system, instead the course was to be attended by peace officers only. It was accordingly not devoted to the improvement of the legal system overall, but was intended to serve the needs of peace officers. The committee felt that teaching such a course may create the appearance of impropriety when peace officers appear in the judge's court.

Second, this committee noted that the judge's district was rural and the course was being taught in this same rural area. The opinion pointed out that due to the small geographic area involved, the judge was likely to come in contact with these same officers on a regular basis in the courtroom.

The final area of concern was the subject matter of the course. The judge would essentially be instructing officers on how to appear in court and convince the judge that they are correct. The committee found that this could create the impression that the officers are in a special position of influence with the judge.

Applying these factors to the teaching request under consideration, it is true that the judge would still be teaching a course attended by peace officers only and not one devoted to the general improvement of the legal system. However, the concern expressed that teaching such a limited course may create the appearance of impropriety when peace officers appear in the judge's court is not a factor where, as here, such contact in the courtroom is extremely unlikely.

Similarly, here, the judge is not working and teaching in a small rural community where he or she is likely to come in contact with these same officers on a regular basis in the courtroom. Rather, the judge is teaching one course completely outside of the applicable judicial district. The second course, although within the judicial district, would still not be likely to produce courtroom contact between the judge and the students for the reasons mentioned previously.

Finally, the subject matter of the courses under consideration here, are of a much more general nature and would not involve the judge instructing peace officers on how to appear in court. This opinion request involves substantially different facts than those presented in Informal Opinion No. 88-5. Under the circumstances presented here, it would not be improper for the judge to

teach the proposed courses. However, the same prohibition against the use of judicial resources and personnel to prepare for the courses would apply, since the judge is being separately compensated.

COMPENSATION
Compensation for the courses is governed by Canon 5C which provides that a judge should refrain from financial dealings "that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves." Canon 6, however, permits a judge to receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by the Code, so long as the source of the payments does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety.

Here, the judge will receive payment from the community college where the first course is held; and from the State Division of Finance on behalf of the government agency sponsoring the training sessions. In neither case would the judge's receipt of compensation reflect adversely on his or her impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves, as proscribed by Canon 5C. Similarly, the source of the payments does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety, as discussed in Canon 6.

Accordingly, there is no ethical impropriety in the judge receiving compensation for teaching the courses outlined in this opinion.

CONCLUSION
Given the language contained in the Code of Judicial Conduct and the specific fact situation presented, it is the committee's opinion that a judge may teach and be compensated for teaching a community college class involving various laws associated with law enforcement. Furthermore, the judge may instruct peace officers on recent state and national criminal law decisions. In both instances, however, since the judge will be separately compensated for teaching, the judge must avoid the use of judicial resources and personnel in preparing and teaching these courses.

INFORMAL OPINION NO. 89-10
July 7, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether the Code permits a justice court judge to serve as chair of a county planning commission.

The committee is of the opinion that the Code of Judicial Conduct permits a part-time judge to serve as the chair of a planning commission as that position is described in this opinion.

For purposes of addressing this issue, the Ethics Committee was advised that the planning commission in question serves as an advisory body to the Board of County Commissioners on questions concerning amendments to the county's development code, zoning map or master land use plan. The chair of the planning commission presides over the meetings and any public hearings which are held. The commission members occasionally take field trips to inspect property. The recommendations of the planning commission are submitted to the Board of County Commissioners for review and approval. The members of the planning commission are appointed from a pool of volunteers to three-year terms. They are paid ten dollars per meeting and twenty-five cents per mile for travel from their residence to the meetings. The meetings are held twice a month.

It should be noted at the outset that, as a part-time judge, a justice court judge is not required to comply with Canons 4B, 5D, 5E and 5F of the Code of Conduct, but is required to comply with the remaining provisions. Canon 5F, which is not applicable to this judge, prohibits a judge from accepting appointment to a governmental committee that is concerned with issues of fact or policy on matters other than those related to the law.

The applicable provisions of the Code of Conduct are Canons 5B and 6. Canon 5B provides in pertinent part:

> Civic and Charitable Activities. A judge may participate in civic . . . activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer . . . of [a] . . . civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
> (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.
> (2) A judge should not solicit funds . . .
> (3) A judge should not give investment advice to such an organization.

Canon 6 provides that a judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code. The source of such payments, however, must not "give the appearance of influencing the judge in performance of judicial duties or otherwise give the appearance of impropriety. " Furthermore, the compensation should be reasonable in amount and should not exceed what a person who is not a judge would receive for the same activity. Canon 6A. Expense reimbursement should be limited to the actual cost of travel, food, and lodging. Canon 6B.

Applying the pertinent canons to this situation, it is the Committee's opinion that membership on the planning commission constitutes participation in a civic activity and is permitted by Canon 5B. There is no indication that the judge's participation would reflect adversely on his or her impartiality or interfere with the performance of judicial duties. The latter is especially true given

the infrequency of the meetings and the part-time nature of the judge's position. Furthermore, the planning commission, due to its advisory capacity and its civic nature, is not conducted for the economic or political advantage of its members.

As to the specific limitations listed under Canon 5B, the organization is not likely to be engaged in proceedings that would ordinarily come before the judge inasmuch as the commission deals with questions regarding the development of real estate in the county. Statutorily, a justice's court cannot receive evidence or make any decisions which involve the title to or possession of real property. Utah Code Ann. § 79-5-9 (1987). Accordingly, there would be no basis for a proceeding in justice's court involving the planning commission. In addition, since the planning commission serves in an advisory capacity only and is not responsible for the ultimate zoning and land use decisions, there is no indication that the organization would be regularly engaged in adversary proceedings in any court. In the unlikely event that an issue should arise in the justice court which had previously been studied by the planning commission, (i.e.. violation of a zoning ordinance recommended for adoption by the commission) the justice court judge should consider recusing him or herself from hearing the matter.

Finally, the duties of the planning commission do not involve the solicitation of funds or the giving of investment advice which is prohibited by Canon 5B(2) and (3).

As to the judge's compensation, the payment of such a nominal amount does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety. Ten dollars per meeting is not an unreasonable amount for the judge to receive and, since the same amount is received by each member of the commission, there is no concern that the justice of the peace is being paid more for serving on the planning commission than a person who is not a judge. Canon 6A. Similarly, the twenty-five cents per mile expense reimbursement for travel from the commission members' homes to the meetings reflects the actual cost of such travel and is, accordingly, permitted by Canon 6B.

This committee previously found that a Justice of the Peace may serve as a member of a local Youth Coordinating Council without violating the Code of Conduct. Informal Opinion No. 89-1. In that opinion, this committee quoted the ABA Commentary to Canon 5 which acknowledges that "[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise, he should not become isolated from the society in which he lives." Due to the changing nature of organizations, the ABA Commentary recommends that a judge regularly reexamine the activities of the organizations with which he is affiliated to determine if it is proper for him to continue his relationship with it. Informal Opinion No. 88-4.

The Advisory Committee on Judicial Activities has held that there is no impropriety or appearance of impropriety in a judge serving on the board or a community health center or in a judge serving in a limited role as a non-aid, nonlegal advisor to an improvement association engaged in housing construction under the National Housing Act. Advisory Opinion No. 62. In Informal Opinion Nos. 759 and 759(a) the American Bar Association's Committee on Ethics and

Professional Responsibilities found that part-time judges were subject to the standards applicable to practicing attorneys and were accordingly permitted to serve as officers or directors of civic organizations.

In Informal Opinion 603, the ABA Committee on Ethics and Professional Responsibility stated:

> Members of the judiciary are not required to separate themselves from the social responsibilities necessarily incident to good citizenship, good moral character and to the religious conviction in which they have been reared, or to refrain from participation in community service. Short of solicitation, or permitting his name to be used in solicitations, there would appear to be a considerable realm of activity in which a judge might appropriately participate in the philanthropic, civic and ecclesiastical life of the community.

It is the opinion of this committee that the Code does not prohibit a justice of the peace from serving as chairman of a county planning commission, since the position does not involve the judge with an organization that is likely to appear in the judge's court, or involve the solicitation of funds or the giving of investment advice.

INFORMAL OPINION NO. 89-11
August 10, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether the Code of Judicial Conduct permits a Justice Court Judge to work as a volunteer with the Utah Special Olympics on a project that would require an average of one day per week away from regular court duties.

Specifically, the Justice Court Judge would like to help develop a program at the high school level involving normal high school students with Special Olympics athletes. The judge, who works full-time, estimates that developing the program would take approximately one day per week during regular business hours.

The committee is of the opinion that the Code permits participation as a volunteer in an organization of this nature, but prohibits work on a specific project, such as the Special Olympics program, when it requires the judge to be absent from the court an average of one day per week during regular business hours.

The nature of the Special Olympics organization does not pose a problem. Canon 5B of the Code of Judicial Conduct permits a judge to participate in charitable activities that do not reflect adversely upon the judge's impartiality or interfere the performance of judicial duties. The Canon further proscribes the judge's charitable activities if the organization is likely to be engaged in court proceedings; if the judge is required to solicit funds; or if the judge is asked to give investment advice to the organization. None of these limiting factors are relevant to the present

question in that the judge is not going to be involved in fund-raising for either this project or for the organization itself; it is not likely that the Special Olympics organization would be engaged in adversary proceedings that would ordinarily come before a justice court judge or would be regularly engaged in adversary proceedings in any court; and the organization is not requesting investment advice from the judge.

The Federal Advisory Committee on Judicial Activities has found that a judge is permitted to serve on the Board of Directors of the Salvation Army, the Red Cross, or on the managing board of a religious, fraternal or charitable corporation provided his or her service will not interfere with the prompt and proper performance of judicial duties and the judge does not engage in the solicitation of funds or permit the influence of his or her name or office to be used in solicitation. Advisory Opinion Nos. 2, 12 and 28.

The Committee on Ethics and Professional Responsibility in Informal Opinion 603 explained that members of the judiciary are not required "to separate themselves from the social responsibilities necessarily incident to good citizenship, good moral character and to the religious convictions in which they have been reared, or to refrain from participation in community service." Short of solicitation, the committee found there is a "considerable realm of activity in which a judge might appropriately participate in the philanthropic, civic, and ecclesiastical life of the community."

Accordingly, the judge's ongoing participation as a volunteer for Special Olympics is not prohibited by the Code, since this organization meets the criteria established by Canon 5B.

Since the type of organization involved in this question poses no difficulties, this committee's inquiry must turn to the specific project proposed by the judge.

Canon 3 of the Code of Judicial Conduct states: "The judicial duties of a full-time judge take precedence over all other activities." Canon 5B further specifies that any extra-judicial activities in which a judge is involved must not interfere with the performance of judicial duties.

Therefore, a judge must carefully avoid extrajudicial or quasi-judicial commitments of such a magnitude that they detract from the time the judge is able to devote to the courtroom. In achieving that balance, a judge must consider the fact that judicial responsibilities not only involve conducting scheduled hearings, but require a judge to be available during regular court hours to issue warrants, set bail and deal with other legal matters that may arise.

This committee has expressed concern in two previous opinions about extra-judicial activities interfering with the proper performance of judicial duties. In this committee's Informal Opinions 89-4 and 89-9 the committee explained that because no leave or absentee policies exist which govern the judge, and without knowing what other extra-judicial commitments the judge has made, this committee is unable to conclusively determine whether the extra-judicial activity contemplated by the judge is permissible. In Informal Opinion 89-9 the committee stated.

"Obviously, if such an activity interfered with the judge's ability to perform his or her judicial duties, that activity would be prohibited by the Code."

Here, it has been explained to this committee that the judge typically works a forty-hour week and there is no arrangement with the county tor vacation or sick leave. The judge sets his or her own calendar, although other judges are available to hear cases in the event of a conflict or an emergency. The judge presides over a high volume court and is current in his or her caseload, with no cases under advisement. In addition to the extra-judicial activity which is the subject of this opinion, the judge is also involved in at least four quasi-judicial activities by serving on various judicial committees.

The following statement of policy was adopted by the United States Judicial Conference at its October 1971 session and quoted in Advisory Opinion No. 28:

> The number of positions held by federal judges as officers or directors of educational, religious, civic and charitable organizations should not be so great in number as to jeopardize the particular performance of judicial duties. Judges participation as officers in such groups and organizations should not numerically exceed a quantity which would necessitate undue absence from the performance of judicial duties and responsibilities.

Pursuant to Canon 5, when a questioned activity is an extra-judicial activity a judge should avoid participation if it would raise questions regarding his or her impartiality or otherwise conflict with judicial duties by taking excessive time away from the business of judging. Copple, Robert F., From the Cloister to the Street: Judicial Ethics & Public Expression. 64 Denver University Law Review 549. 572 (Spring 1988). The article further explains:

> For an appellate judge, we know exactly what it is we must do before we can turn outside our chambers. The trial judge also knows which undecided motions and pending decisions have priority. The backlog of untried cases is a different matter. If a trial judge were forbidden to do anything outside the chambers until there were no cases awaiting trial, we would never see a trial judge outside of the chambers of courtroom. The well-being of a trial judge requires that a limit be placed upon the number of days confinement to the courtroom itself.

Quoting, Reavley, "Free Speech for Judges," 9 Litigation 5 (Fall 1982).

This committee recognizes that ultimately, the individual judge is the only one who can determine whether an outside activity will interfere with that judge's case management and that, as Judge Reavlev stated, supra, "the well-being of a judge requires that a limit be placed upon the number of days confinement to the courtroom itself." However, where, as here, the extra-judicial activity will require the judge to be away from the courtroom one day a week, detracting from the minimum time the judge ordinarily spends at work, the time commitment exceeds any reasonable

self-imposed limitation. Such a commitment, in this committee's opinion interferes with the performance of judicial duties and is accordingly prohibited by Canon 5B.

It is the committee's opinion that the Code permits participation as a volunteer in a charitable organization that meets the criteria enunciated in Canon 5B. It is the committee's further opinion, however, that the same Canon prohibits a judge from participating in a project that will require an average of one day per week away from regular court duties, since such an extra-judicial commitment interferes with the proper performance of judicial duties.

INFORMAL OPINION NO. 89-12
August 10, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether Utah Code Ann. § 78-5-128 (1989) prohibits a Justice Court Judge from jointly owning a small business, which occasionally seeks relief from unpaid debts through small claims court.

It should be noted at the outset that the Ethics Advisory Committee has only the authority to respond to ethical questions which arise under the Code of Judicial Conduct. The committee does not have the authority to respond to requests for legal opinions. Code of Judicial Administration, Appendix D. Accordingly, the committee's opinion is limited to an interpretation of the applicable provisions of the Code and not an interpretation of Utah Code Ann. § 78-5-128, as requested.

It is the committee's opinion that a justice court judge's joint ownership of a small business which occasionally seeks relief from unpaid debts through small claims court does not violate the Code of Judicial Conduct.

The judge and the judge's spouse are joint owners of a small gift shop. The judge's spouse manages, operates, and conducts the business of the shop and the judge performs custodial, repair and maintenance duties, and participates in some of the decision-making. During the fourteen years that the judge has jointly owned the shop, five small claims cases have been filed on behalf of the shop to collect unpaid debts. None of the cases have been filed in the county precinct court where the judge presides and the judge's spouse has filed the cases and handled the litigation.

Canon 5C of the Code of Judicial Conduct provides:

> (1) A judge should retrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.
> (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity.

In the present case, the fact that a business which the judge jointly owns sometimes seeks relief from unpaid debts by filing claims in small claims court does not reflect adversely on the judge's impartiality. Since the judge's spouse handles the litigation, there is no interference with the performance of judicial duties, no exploitation of the judicial position, and the judge does not become involved with lawyers or other persons likely to appear before him. Accordingly, the judge is permitted to engage in remunerative activity by participating as a joint owner of this small business.

The judge has not indicated whether he is identified as a part-owner of the business in any publicity that the business may receive. The committee notes that Canon 2B states that a judge should not lend the prestige of the judicial office to advance the private interests of others. Pursuant to this canon, any publicity or advertisement which referred to the judicial office would be inappropriate.

Based upon the foregoing, it is the committee's opinion that the judge may properly own a small business which occasionally litigates in small claims court without violating the Code of Judicial Conduct.

INFORMAL OPINION NO. 89-14
September 20, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether the Code of Judicial Conduct permits a judge serving on the Court of Appeals to serve as president of a local bar association.

It is the committee's opinion that the Code does not prohibit a judge from holding such an office, provided the judge does not allow the office to interfere with the proper performance of judicial duties and that no appearance of impropriety results.

PERFORMANCE OF JUDICIAL DUTIES
Canon 4C of the Utah Code of Judicial Conduct provides in pertinent part:

"A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice . . ."

The Commentary to Canon 4 states:

> 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 his time permits, he is encouraged to do so, either independently or through a bar association,

> judicial conference, or other organization dedicated to the improvement of the law.

The local bar association at issue here is the type of organization contemplated by Canon 4. According to the judge, the bar's purpose is to advance the administration of justice and the improvement of the bar. To that end, the bar sponsor continuing legal education program for its membership, provides newsletters containing legal updates, publishes legal practice manuals, and promotes pro bono work in the community.

This committee has previously considered whether a judge may hold office in a bar association. In Informal Opinion No. 89-13, the committee held that, based on Canon 4 and on precedent from the Federal Advisory Committee on Judicial Activities, the Code of Conduct does not prohibit a judge from serving as an officer of a bar association.

In that opinion, however, the presidency of the state bar association was at issue. Although the committee found no prohibition in the Code against serving as president of the association, several restrictions were placed on service in that position. The restrictions involved participating in legislative activities and other public policy initiatives; fundraising; litigation involving the bar; and bar admissions and disciplinary matters.

Unlike the state bar, the local bar association does not participate in these activities and therefore the same considerations do not apply.

In Informal Opinion No. 89-13, the committee also addressed the question of whether service as a bar officer would interfere with the proper performance of judicial duties.

Canon 3 of the Code of Judicial Conduct states: "The duties of a full-time judge take precedence over all other activities. " The Commentary to Canon 3 explains that "prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission." Canon 5B further specifies that any extra-judicial activities in which a judge is involved must not interfere with the performance of judicial duties.

Canon 4, which permits a judge to engage in certain quasi-judicial activities, starts with the caveat that the judge's participation is "subject to the proper performance of his judicial duties." The Commentary to Canon 4 also emphasizes that a judge is encouraged to contribute his/her expertise to an organization "to the extent that his time permits." Finally, Advisory Opinion No. 14, which found no impropriety where a judge serves as an officer of a state bar association, similarly cautioned that the participation must not "interfere with the performance of judicial duties."

This committee has expressed concern in previous opinions about extra-judicial activities interfering with the proper performance of judicial duties. In Informal Opinions Nos. 89-4, 89-9,

89-11 and 89-13, the committee explained that because no leave or absentee policies exist which govern the judge, and without knowing what other extra-judicial commitments the judge had made, this committee was unable to conclusively determine whether the extra-judicial activity contemplated by the judge was permissible.

Here, as a member of an appellate court, no leave or absentee policies exist which govern this judge. The judge has stated, however, that the duties of a local bar president include "presiding over the monthly meetings and representing the county bar." The meetings are held in the evenings. The judge further states that the position would not require spending "undue time" during regular business hours and would not interfere with the judge's primary responsibility to fulfill judicial duties. The judge states that he or she would have no difficulty performing the duties required by the bar association and staying "absolutely current" in his or her caseload.

As this committee noted in Informal Opinion No. 89-11, ultimately, the individual judge is the only one who can determine whether an outside activity will interfere with that judge's case management. Based on this judge's assurances that the time commitment involved in serving as bar president would not interfere with the proper performance of judicial duties, it is this committee's opinion that the Code of Conduct does not prohibit the judge from serving in that position.

APPEARANCE OF IMPROPRIETY

Canon 2 of the Code of Conduct provides that a judge should avoid impropriety and the appearance of impropriety in all activities. Specifically, a judge is required to exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary. Canon 2 also states that a judge must not lend the prestige of the judicial office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position of influence with the judge.

In serving as a local bar president, the judge must avoid any activities which cast doubt on judicial impartiality and must not lend the prestige of the judicial office to advance the interests of the bar association, or give the appearance that members of the bar association are in any special position of influence.

This committee also notes Advisory Opinion No. 82 from the Federal Advisory Committee on the Code of Conduct, which points out that "'the public will normally be uninformed of any restriction or qualification that the judge may have placed" on membership in an organization. Accordingly, if the judge finds it necessary to restrict his or her bar activities to avoid the appearance of impropriety, the judge should consider the fact that the appearance of impropriety may still result, based on the public's perception of the judge's activities.

CONCLUSION

It is the committee's opinion that the Code does not prohibit an appellate court judge from serving as president of a local bar association, provided the judge does not allow the office to

interfere with the proper performance of judicial duties; and that the judge's bar activities do not result in the appearance of impropriety.

INFORMAL OPINION NO. 89-15
September 7, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether the Code permits a justice court judge to participate in the judge's spouse's campaign for county office. Specifically, the judge would like to know whether he or she may attend public gatherings where the spouse is appearing as a candidate and whether the judge may accompany the spouse as he or she campaigns.

It is the committee's opinion that the Code prohibits such political activity.

Canon 7 of the Code of Judicial Conduct provides in pertinent part:

> B. A judge or a candidate for a judicial office who has been confirmed by the Senate should not
> (1) act as a leader or hold any office in a political organization;
> (2) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
> (3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings or purchase tickets for political party dinners or other functions, except as authorized in Canon 7C; or
> (4) take a public position on a non partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system.

Canon 7C permits a judge who is running for office to speak to public gatherings on his or her own behalf.

Although the justice court judge is a part-time judge, as defined by the Code, he or she is still required to comply with Canon 7 of the Code of Judicial Conduct.

By attending public gatherings where the spouse is appearing as a candidate, the judge would be publicly endorsing a candidate for public office, prohibited by Canon 7B(2), and attending a political gathering, prohibited by Canon 7B(3). Similarly, accompanying the spouse while the spouse campaigns would be tantamount to an endorsement of the spouse's candidacy and would involve regular appearances at political gatherings.

This committee has previously stated that political activity by a judge was prohibited by the Code. In Informal Opinion No. 88-7, this committee found that a judge was not permitted to host or attend a mass meeting.

In that opinion, the committee cited Informal Opinion C-486 by the Committee on Ethics and Professional Responsibility which indicates that those states adhering to the principle of the nonpartisan judiciary, prohibit all political activity by one seeking judicial office as well as by the incumbent in office. This prohibition includes permitting others to use the power or prestige of the office to promote candidacy for reelection or for the success of a political party. The purpose of Canon 28, the precursor to Canon 7, according to Informal Opinion C-486, was "to avoid a suspicion that the judge permits political considerations to affect his decisions and is directed primarily at the suspicion which may arise when he performs judicial service and at the same time engages in political activities."

Formal Opinion No. 113 of the American Bar Association Standing Committee on Professional Ethics further states that Canon 28 prohibited a judge from appearing at public political gatherings intended to further the candidacy of one running for a political office, and to speak or otherwise indicate support of the candidate sponsored by the meeting. In so holding, the Committee explained that the conduct would make the judge an active promoter of the interests of the candidate.

By attending public gatherings where the spouse is appearing as a candidate and otherwise accompanying the spouse as he or she campaigns, the judge would be actively promoting the interests of a candidate.

A similar conclusion was reached in Informal Opinion No. 89-7, where this committee found that the Code of Judicial Conduct prohibited a judge from providing campaign assistance to a school board candidate. In so holding, this committee relied in part on Advisory Opinion No. 19, where the Interim Advisory Committee on Judicial Activities found that a judge was not permitted to be a member of a political club. The committee in that opinion quoted Formal Opinion 113 of the American Bar Association Committee on Professional Ethics as follows:

> A judge is entitled to entertain his personal views of political questions, but should not directly nor indirectly participate in partisan political activities. It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, ex necessitate rei, he thereby voluntarily places certain well recognized limitations upon his activities.

This committee further notes that Canon 7D(2) states that judges "should not request or encourage members of their families to do anything that the judge . . . may not do under this canon."

In Advisory Opinion No. 53, the Federal Advisory Committee on Judicial Activities states that a judicial officer has a duty to try to dissuade his or her spouse from participating in a political campaign. Furthermore, in the Reporter's Notes to the Code of Judicial Conduct regarding Canon

7B(a), it is stated:

> Although a candidate's spouse as a matter of legal right can hold an office in a political organization and can make speeches for other candidates for political offices, the candidate has the duty to try to dissuade his spouse from doing so. The Committee considered setting
> mandatory political conduct standards for members of the candidate's family, but rejected the idea because of lack of a means of enforcement.

Revised Advisory opinion No. 53 concluded that Canon 7 and Canon 2 (stating that a judge should avoid impropriety and the appearance of impropriety) adequately define a judge's obligation where the spouse engages in political activity. The Committee stated: "The committee does not advise spouses. Thus a judge should, to the extent possible, disassociate himself or herself from the spouse's political involvement." The committee explained that the judge should not accompany the spouse to any political functions, join in the use of the marital home for political meetings, or join in or approve any reference to the relationship between the judge and spouse in any communication relating to the spouse's political activity. The committee stated:

> We note that if a judge's spouse participates in politics, that participation will undoubtedly increase the number of situations in which the judge will be obliged to recuse. This is especially true where the spouse is a candidate for elective office. We suggest that the judge make his or her spouse aware of such problems.

It is the committee's opinion that the judge is prohibited by the Code from participating in any manner in the judge's spouse's political campaign. Furthermore, although this committee does not advise spouses, the judge does have a duty, pursuant to Canon 7D(2) and Advisory Opinion No. 53, to try to dissuade his or her spouse from participating in a political campaign.

INFORMAL OPINION NO. 89-16
December 14, 1989

The Ethics Advisory Committee has been asked for its opinion as to whether the Code of Judicial Conduct prohibits a judge pro tempore from running for a non-judicial political office.

It is the committee's opinion that the Code does not prohibit such political activity by a judge pro tempore.

The Utah Code of Judicial Conduct contains a section governing judicial compliance with the Code. Subsection B provides:

> A lawyer who is serving as a specially appointed judge pro tempore under the provisions of Section 79-6-1.5, Utah Code Annotated, 1953 as amended or Article

> VIII of the Utah Constitution shall comply with Canon 1, Canon 2A and Canons 3A , 3C and 3D. The judge may not practice law in the same small claims division in which the judge serves but may act as a lawyer in the civil or criminal division of that circuit or justice of the peace court.

Accordingly, Canons 1, 2A, 3A, 3C and 3D are the only provisions of the Code of Judicial Conduct which apply to judges pro tempore.

These canons provide that a judge should uphold the integrity and independence of the judiciary, Canon 1; that a judge should respect and comply with the law and exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A; and enunciate the standards for adjudicative responsibilities, disqualification and remittal of disqualification in a proceeding, Canons 3A, 3C and 3D.

Canon 7, which describes the political activity considered inappropriate to the judicial office, does not apply to judges pro tempore.

Accordingly, there is nothing in the applicable canons which prohibits a judge pro tempore from running for a political office. However, if the judge's impartiality might reasonably be questioned in a particular case as a result of the judge's political activity, the judge would be expected to adhere to Canon 3C and enter a disqualification in that proceeding.

In conclusion, it is the committee's opinion that a judge pro tempore is not prohibited by the Code of Judicial Conduct from running for political office while serving as a judge pro tempore. In reaching this conclusion, the committee assumes that should any conflicts of interest arise as a result of the judge's candidacy, the judge would follow the disqualification procedures outlined in Canon 3C.

FORMAL OPINION NO. 89-1
October 24, 1989

The Judicial Council was asked to reconsider Informal Opinion No. 89-13 of the Ethics Advisory Committee and issue a Formal Opinion as to whether the Code of Judicial Conduct permits a judge with the Utah Court of Appeals to serve as president-elect and, subsequently, president of the State Bar. The Council granted the request for reconsideration and adopted Informal Opinion 89-13 of the Ethics Advisory Committee as set forth below.

The Code does not prohibit a Court of Appeals judge from holding the office of president-elect or president of the State Bar, provided no appearance of impropriety results, the judge does not participate in certain activities of the bar, and the judge does not allow the office to interfere with the proper performance of judicial duties.

SERVICE AS BAR PRESIDENT

The pertinent provision of the Utah Code of Judicial Conduct is Canon 4, which governs a judge's participation in quasi-judicial activities or organizations. According to Canon 4, a quasi-judicial activity or organization is one concerned with the improvement of the law, the legal system and the administration of justice. The Utah State Bar is considered a quasi-judicial organization under Canon 4. Canon 5, which regulates the extra-judicial activities in which a judge may participate, does not apply to this situation.

Canon 4 of the Utah Code of Judicial Conduct provides:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities if in doing so the judge does not cast doubt on his capacity to decide impartially any issue that may be involved in matters before the court:
>
> ---
>
> B. To the extent that an appearance does not reflect adversely on a judge's impartiality, a judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.
>
> C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice which may include a constitutional revision commission and may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fundraising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

The Commentary to Canon 4 states:

> 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 his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

The Federal Advisory Committee on Judicial Activities has stated there is no impropriety or violation of any canon of judicial ethics where a judge serves as an officer of a state bar

association, if the participation does not interfere with the performance of judicial duties and if the judge did not actively seek the office. Advisory Opinion No. 14. Accordingly, the Code does not prohibit a judge from serving as an officer of a bar association.

RESTRICTIONS ON SERVICE AS BAR PRESIDENT

In the opinion request, the judge acknowledged that certain restrictions would apply to judges serving as bar officers, including participation in policy or legislative activities which constitute a potential conflict of interest and which may be presented to the judge in his/her judicial capacity, participating in certain fund-raising activities, and ensuring that the office does not interfere with the prompt performance of judicial duties.

In addition, the judge questioned whether the Bar's involvement in litigation would affect his or her participation as an officer and whether the judge could participate in bar admissions and disciplinary matters.

This opinion responds only to those issues raised in the judge's opinion request and does not address any issues which were not identified by the judge but which may exist in connection with the bar president's responsibility to perform duties established by the Supreme Court and the Legislature, such as serving on or appointing bar members to serve on the Judicial Conduct Commission, this Council or the Judicial Nominating Commissions.

As to the specific duties of a bar officer that are raised by the judge in the opinion request, the Council is of the opinion that certain restrictions would apply. The restrictions will be addressed separately as follows.

LEGISLATIVE ISSUES AND OTHER PUBLIC POLICY INITIATIVES

Article 11, Section 1, of the Bar's By-Laws states that one of the Bar's purposes and objectives is "to recommend to the Legislature and other public bodies the enactment or change of laws in the public interest, and to oppose those laws or changes in laws not in the public interest."

In comparison, Canon 4B states that a judge may appear at a public hearing before a legislative body or official on matters concerning the law, the legal system, and the administration of justice and may otherwise consult with a legislative body, but only on matters concerning the administration of justice. Similarly, Canon 4C states that a judge may make recommendations; to public fund-granting agencies on programs concerning the law, the legal system, and the administration of justice.

It therefore would not be appropriate for the judge to make recommendations to the Legislature or to other public bodies about laws in the public interest. The judge would have to confine his/her participation in public legislative proceedings to matters concerning the law, the legal system and the administration of justice. The judge would further have to limit any other consultations with a legislative body to matters concerning the administration or justice.

The Federal Advisory Committee on Judicial Activities reached a similar conclusion in Advisory Opinion No. 50, where it stated that Canon 4B limits the subject matter of a judge's other consultations with a legislative body or official to "matters of judicial administration." The committee noted that, "[a]though the line between the latter phrase and the broader term law, legal system, or the administration of justice may be difficult to draw in marginal situations, usually the distinction is clear. Matters of court personnel, budget, housing, and procedures related to the operation and administration of the courts are all matters of judicial administration."

The purpose behind this distinction involves the judge's direct interest and expertise in matters of judicial administration and the fact that such matters are not likely to include issues that will be involved in litigation. On the other hand, a judge's views on the broader issues of the law, which are much more likely to be the topic of litigation, should be available to the Legislature only if those views are expressed in a public hearing so that lawyers and litigants may be apprised of them. Opinion No. 50 cautioned that in expressing views on matters of this kind, the judge should not cast doubt on his/her capacity to decide impartially an issue involving the subject matter in question. This warning is repeated in Canon 7B(4) which states that a judge should not "take a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system."

There is no provision in the Canons which authorize a judge to go beyond the broader area of the "law, legal system, and the administration of justice" and comment on matters generally affecting the public interest. The committee concluded in Opinion No. 50 that although Canon 4 speaks of "matters concerning the law" and that phrase could be broadly construed to include nearly all legislation and executive decisions, "the reach of the canon is not that broad and, indeed, was intended to be comparatively narrow."

The judge also notes that he or she will be asked, as President of the Bar, to take a public position in support of or in opposition to various legislative initiatives. Although Canon 4A permits a judge to speak or write on topics concerning the law, the legal system, and the administration of justice, Canon 7B(4) cautions the judge about taking a public position on a non-partisan political issue. Likewise, Canon 5 prohibits a judge from accepting an appointment to any committee or commission that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. Informal Opinion No. 88-2.

Thus, in the present case, the judge may not take a public position on a legislative or other public policy initiative if to do so would jeopardize the confidence of the public in the impartiality of the judicial system. If, for instance, the subject of the initiative is an issue that could come before the judge in his or her judicial capacity, Canon 7B(4) would prohibit the judge from taking a public position on that proposal. If, on the other hand, the matter concerned the law, the legal system, or the administrator of justice, and would not cast doubt on the judge's impartiality, Canon 4A would permit the judge to espouse a public position.

Accordingly, a judge serving as bar president or president-elect must limit public participation in legislative activities to matters concerning the law, the legal system and the administration of justice and all other consultations to matters of judicial administration. In taking a public position on any legislative initiatives, the judge must consider whether articulating the position would call into question his or her impartiality as a judge.

FUND-RAISING ACTIVITIES

In the opinion request, the judge states that the president of the Utah State Bar also serves on the Board of the Utah Law & Justice Center. Fund-raising is conducted through the Law & Justice Center. The judge states that he/she does not intend to participate in the fund-raising activities personally.

Canon 4C provides that a judge who is an officer of an organization devoted to the improvement of the law, the legal system or the administration of justice may assist such an organization in raising funds and participate in their management and investment, but may not personally participate in public fund-raising activities.

Thus, the Code permits a judge to assist in fund-raising on behalf of a quasi-judicial organization as long as the judge does not personally participate in public fund-raising.

In Advisory Opinion No. 34, the Federal Committee on Judicial Activities addressed this participation by judges in fund-raising and the investing of funds for organizations that fall within the scope of Canon 4C. The Reporter's Notes of the ABA Code of Judicial Conduct were quoted as explaining that, although Canon 5B(2) forbids judges from fund-raising for civic, charitable, and other similar organizations, there is sufficient difference between this situation and fund-raising for a Canon 4C organization to justify different standards.

In support of this argument, the Reporter's Notes point out that the membership of Canon 4 organizations is entirely or substantially composed of judges, whereas judges are a small percentage of the membership of civic or charitable organizations. Therefore, denying judicial participation in fund-raising in the former situation would exclude such organizations from engaging in projects that require substantial funding. Canon 4 accordingly authorizes a judge to assist in fund-raising but not to the extent of personally participating in public fundraising activities, according to the committee.

Unlike the type of organization discussed in Advisory Opinion No. 34, the Utah State Bar is not "entirely or substantially composed" of judges. The Utah State Bar is an integrated bar and although all state court judges are members, so are all of the licensed attorneys in the state. The number of attorney members far exceeds the number of judges. To deny judicial participation in fund-raising for the Bar would not exclude the Bar from engaging in projects that require substantial funding. Further more, the rationale behind prohibiting judicial fundraising in civic, charitable, and other similar organizations, see Canon 5B(2), is the danger that the persons contributing will feel coerced by the judicial office. Not only is that a danger when judges solicit

funds from the general public, but attorneys are particularly susceptible to this form of coercion. Thus, the rationale for permitting judges to participate in fund-raising does not apply to the present case and, in fact, suggests a contrary result.

It is the Council's opinion that the language in Canon 4C permitting judicial fund-raising on behalf of organizations devoted to the improvement of the law, the legal system, or the administration of justice, should not include a bar association whose membership consists primarily of attorneys. The Council believes that the discussion draft of the revised ABA Code of Judicial Conduct more realistically reflects the problems inherent in judicial fund-raising and provides a more meaningful standard by which judges should evaluate their conduct. The draft amends the language of Canon 4C to similarly restrict judicial fund-raising activities. The proposed language reads:

> A judge may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory authority. A judge shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as provided above, if the membership solicitation is essentially a fund-raising mechanism. A judge shall not use or permit the use of the prestige of [the] judicial office for fund-raising or membership solicitation.

The notes following the draft language explain that the changes were intended "to prohibit a judge from becoming involved in any active fund-raising except for solicitation of funds from judges over whom the judge has no supervisory authority. This exception is justified because it creates no danger of improper influence by the soliciting judge." Under this language, a judge would be prohibited from soliciting funds from attorneys as well as from the general public. Based upon the limited rationale which is offered in support of judicial fund-raising, the nature and membership of the organization in question, and the direction proposed by the American Bar Association with regard to judicial fund-raising, it is the Council's opinion that the judge should refrain from personally participating in the solicitation of funds or other fund-raising activities on behalf of the Bar or the Law & Justice Center or permitting the use of his/her name or office in any such fund-raising activities.

LITIGATION

In the opinion request, the judge states that the Bar is, on occasion, involved in litigation. This litigation involves appeals of admission and disciplinary decisions and occasional civil suits initiated by persons or entities other than the Bar.

The judge explained that in disciplinary matters involving sanctions, the sanctions are imposed by the Utah Supreme Court. Similarly, when the Bar Commission denies an applicant admission

to the bar, these decisions are appealed to the Utah Supreme Court. The civil rights matters filed in recent years have all been filed in federal court.

In Advisory Opinion No. 34 (1974), the Committee on Judicial Activities discussed whether a judge may serve as an officer of a bar association. The Committee relied on Canon 4 and on the following statement of policy adopted by the Judicial Conference of the United States in October 1971:

> Federal Judges should not serve as officers or directors of organizations, national, regional or local, which are present or potential litigants in the federal courts or are the promoters, sponsors or financiers of organizations sponsoring litigation in the federal courts.

The Committee on Judicial Activities considered whether the judge's service as an officer or member of the governing board of a bar association violated this statement of policy where the bar association might be involved in litigation and where the board determines whether the association should file amicus curiae briefs. The committee also was asked to decide whether the spirit and intent of this statement of policy was satisfied by the judge abstaining from discussion, debate and vote on matters being considered by the board of governors which present a conflict of interest or which might give the appearance of impropriety if the judge did participate in debate and vote.

The committee noted that under the previous Code of Conduct, Canon 33 gave at most "lukewarm" approval of a judge's continued participation in bar activities and did not address whether a judge may be an officer of a bar association. In contrast, Canon 4C specifically authorizes such activities, provided the judge does not become involved in such a way that casts doubt on his or her impartiality.

The committee concluded that the judge may properly serve as an officer of a bar association, subject to the restrictions set out in Canon 4, and that the spirit and intent of the statement of policy adopted by the Judicial Conference in October, 1971 is satisfied where the judge abstains from discussion, debate and vote on matters which may present a conflict of interest or which might give the appearance of impropriety if the judge did participate in debate and vote.

In the present case, the judge has been elected an officer of an organization which is both a present and a potential litigant in state and federal courts. However, none of the matters involving litigation have been filed in or will likely be reviewed by the Court of Appeals, where the judge serves. In light of this, the judge has questioned whether he or she may participate in the discussion of and vote on matters related to the bar's litigation.

It is this Council's opinion that the judge is not prohibited from participating in the discussion of and vote on matters related the bar's litigation, but that the judge should abstain from discussion,

debate and vote on any litigation which may present a conflict of interest or which might give the appearance of impropriety if the judge did participate and vote.

BAR ADMISSIONS AND DISCIPLINARY MATTERS

Part of the job of a bar officer involves participating in bar admissions and disciplinary matters. Bar applicants who are denied admission can appeal to the Bar Commission in a confidential proceeding. Bar disciplinary proceedings are also considered by the Bar Commission when a private reprimand or harsher discipline has been recommended.

Through these admission and disciplinary functions, a judge serving as president of the Bar would necessarily be privy to confidential information about attorneys who may appear before the judge. Canon 2 admonishes a judge to not only avoid impropriety, but the appearance of impropriety in all his activities.

A judge who is aware of such confidential information could consider that information when the attorney appears before him/her in court. Even if the judge is able to put the knowledge aside and deal with the attorney fairly, that does not cure the appearance of impropriety that is created when a judge operates in such dual roles. Similarly, the attorney who must appear before the judge in both capacities has no assurance that the judge has in fact put the confidential knowledge aside and is dealing with him/her impartially. Canon 2A states that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Therefore, a judge whom the public knows participates in disciplinary and admission matters involving the same attorneys who practice before him/her would not be promoting public confidence in that judge's impartiality.

There is case law to the effect that a judge who has filed a complaint against an attorney for unethical conduct need not automatically disqualify from future cases involving the attorney, but rather the judge can make that decision based on whether the judge feels his or her impartiality toward the parties is impaired. See e.g., Advisory Opinion No. 66; and Commonwealth v. Cresta, 336 N. E. 2d 910 (Mass. Ct. App. 1975). It is the Council's opinion that these cases do not govern this situation.

When examining the necessity of disqualification, ethical committees and courts weigh two competing interests: the judge's duty to perform judicial functions versus the judge's duty to report unethical conduct. In deciding that disqualification was not automatic, the committees and courts relied on the chilling effect automatic disqualification would have on the judge's affirmative duty to report unethical conduct.

In the present case, the interests are much different. This committee must weigh the judge's responsibility to perform judicial duties against the judge's desire to serve as president of a bar association. Clearly, the judge's duty must take precedence over her desire to serve as an officer of the state bar. Furthermore, with respect to disqualification, the judge has an affirmative duty to report unethical conduct. Here, the judge, who is similarly required to report such conduct, would

also be part of the body that renders judgment on that conduct. The Commentary to Canon 2 explains that judges must accept restrictions that might be viewed as burdensome by the ordinary citizen to avoid all impropriety and the appearance of impropriety. Limiting the activities in which a judge may participate as an officer of an organization such as the bar association is one of those restrictions.

Accordingly, to avoid any conflict with Canons 2 or 4, it is the Council's opinion that, in the future, the judge must abstain from discussion, debate and vote on matters which may present a conflict of interest or which might give the appearance of impropriety if the judge did participate in debate and vote. These matters would include bar admission and attorney discipline proceedings.

INTERFERENCE WITH JUDICIAL DUTIES

Finally, assuming that the judge is able to restrict his/her duties as bar association president to comply with the Code, this Council must also consider whether the time commitment involved in holding such an office would interfere with the judge's ability to perform his/her judicial duties. Canon 3 of the Code of Judicial Conduct states: "The duties of a full-time judge take precedence over all other activities." The Commentary to Canon 3 explains that "prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission." Canon 5B further specifies that any extra-judicial activities in which a judge is involved must not interfere with the performance of judicial duties.

Canon 4, which permits a judge to engage in certain quasi-judicial activities, starts with the caveat that the judge's participation is "subject to the proper performance of his judicial duties." The Commentary to Canon 4 also emphasizes that a judge is encouraged to contribute his/her expertise to an organization "to the extent that his time permits." Finally, Advisory Opinion No. 14, which found no impropriety where a judge serves as an officer of a state bar association, similarly cautioned that the participation must not "interfere with the performance of judicial duties."

The Council's Ethics Advisory Committee has previously expressed concern about extra-judicial activities interfering with the proper performance of judicial duties. In Informal Opinions No. 89-4, 89-9 and 89-11, the committee explained that because there are no leave or absentee policies which govern the judge, and without knowing what other extra-judicial commitments the judge has made, the committee was unable to conclusively determine whether the extra-judicial activity contemplated by the judge was permissible.

Here, as a member of an appellate court, no leave or absentee policies exist which govern this judge. Neither the Ethics Advisory Committee nor the Council know what other extra - and quasi-judicial commitments the judge may have made. What is known, is that the job of bar president represents a significant time commitment.

The following statement of policy was adopted by the United States Judicial Conference at its October 1971 session and quoted in Advisory Opinion No. 28:

> The number of positions held by federal judges as officers or directors of educational, religious, civic and charitable organizations should not be so great in number as to jeopardize the particular performance of judicial duties. Judges' participation as officers in such groups and organizations should not numerically exceed a quantity which would necessitate undue absence from the performance of judicial duties and responsibilities.

Accordingly, the judge should consider whether service as bar president or president-elect would conflict with the performance of judicial duties by requiring excessive time away from the business of judging.

CONCLUSION

Although it is the Council's opinion that, subject to the preceding restrictions, the Code of Conduct does not prohibit an appellate judge from serving as an officer in a state bar association, the decision ultimately rests with the individual judge. In making that decision, the judge should consider the fact that, even if the judge restricts his/her participation in the bar association in the manner discussed herein, the appearance of impropriety may still exist. As the Federal Advisory Committee on the Code of Conduct pointed out in Advisory Opinion No. 82, the judge should "keep in mind that the public will normally be uninformed of any restriction or qualification that the judge may have placed" on membership in an organization. Accordingly, even if the judge does not participate in the prohibited activity, that does not mean that the public will not assume such participation. Such an assumption could be seen as casting doubt on the integrity and impartiality of the judiciary in a manner that is prohibited by the Code. This is a particular concern in the areas, such as litigation, where the judge is making a case-by-case decision as to whether a conflict exists. The public may observe the judge participating in some litigation decisions and not realize that potential conflicts and the appearance of impartiality are being considered by the judge before the decision to participate is made.

In summary, it is the Council's opinion that the Code does not prohibit a Utah Court of Appeals Judge from serving as the president-elect or president of the Utah State Bar, provided the judge does not create the appearance of impropriety through his/her actions as president, the position does not interfere with the performance of judicial duties, the judge does not make any recommendation to legislative or other public bodies about laws that are "in the public interest," but restricts comments before public bodies to matters concerning the law, the legal system, and the administration of justice, and restricts other comments to matters involving the administration of justice, the judge abstains from discussion, debate and vote on matters which involve the Bar as a litigant in any court where such involvement would present a conflict of interest or which might give the appearance of impropriety, and the judge abstains from participating in Bar admissions and disciplinary matters. The Council also recommends that the judge refrain from personally participating in any form of fund-raising for the Bar or for the Law & Justice Center.

Finally, the judge asked whether the Canons and specifically Canon 7(B), impact her ability to assume leadership responsibility for the bar association. The Council is of the view that subject to the limitations set forth in this opinion, the judge's ability to assume leadership responsibility for the bar association is a question more appropriately referred to the Board of Bar Commissioners for resolution.

INFORMAL OPINION NO. 90-1
June 14, 1990

The Ethics Advisory Committee has been asked for its opinion on the question of whether the Code of Judicial Conduct permits a trial judge to teach a business law class at a university business school. The class is scheduled for spring quarter, April through June, and will be taught from 3:30 to 4:30 p.m. four days a week. The judge indicates that he has refused this particular offer to teach, but would like guidance concerning similar teaching opportunities in the future. It is the committee's opinion that the Code permits a judge to teach a business law class at a university business school as long as the judge's teaching does not interfere with the performance of the judge's official duties. In the present case, however, where the judge's proposed teaching activities would require a full-time trial judge to be away from the courthouse a minimum of six hours per week during regular court hours, such an activity would interfere with the performance of judicial duties and is prohibited by the Code.

The pertinent provision of the Code is Canon 4 which generally governs a judge's quasi-judicial activities and specifically permits judges to teach classes concerning the law. That Canon provides:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi- judicial activities, if in doing so the judge does not cast doubt on the capacity to decide impartially any issue that may be involved in matters before the court.
>
> A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice. Applying the language of Canon 4 to the proposed teaching activity, the judge would be participating in a quasi-judicial activity by teaching a class concerning the law and the legal system as defined and permitted by Canon 4.

The interim Advisory Committee on Judicial Activities has permitted judges to teach such courses on several occasions. In Advisory Opinion No. 1, the committee approved of a judge teaching part-time as a special lecturer in law at a university law school for compensation. The committee commented that "limited work of this kind, to a judge so disposed, can be a source of refreshment and perspective."

Again in Advisory Opinion No. 7, the committee approved a judge's participation as a faculty member of the National College of State Trial Judges. The judge received no compensation for the teaching activities, but was reimbursed for his travel and other expenses. In Advisory Opinion No. 79, the committee noted that teaching provides "intellectual enrichment for the judge, [is] an important source of improvement for the justice system, and [is] fully consistent with the public's perception of the appropriate role for judges in our society."

In Informal Opinion No. 89-9, this committee approved of a judge teaching part-time at a community college as long as the teaching did not interfere with the performance of the judge's official duties.

In the present case, the judge serves on a limited jurisdiction court which was created for the purpose of providing full-time judicial assistance. Utah Code Ann. § 78- 4-1. The court has jurisdiction over all classes of misdemeanors and exercises the powers and jurisdiction of a magistrate, including conducting preliminary hearings, issuing commitments prior to trial and ordering release on bail. Utah Code Ann. § 78-4-5.

The class in question is taught four days a week from 3:30 to 4:30 in the afternoon, during regular court hours. While the proposed teaching activity is permitted by Canon 4, the critical issue is whether the activity will interfere with the judge's performance of official duties. Canon 3 of the Code of Judicial Conduct states: "The judicial duties of a full-time judge take precedence over all other activities." Thus, a judge must carefully avoid quasi-judicial commitments of such magnitude that they detract from the time the judge is able to devote to judicial duties. In achieving that balance, a judge must consider the fact that the performance of judicial duties not only requires conducting schedule hearings, but also requires that a judge be available during regular court hours to issue warrants, set bail and deal with other legal issues as they arise.

This committee has expressed concern in previous opinions about extra-judicial activities interfering with the proper performance of judicial duties. In Informal Opinions 89-4 and 89-9, the committee explained that because there were no leave or absentee policies which govern state court judges, and without knowing what other extrajudicial commitments a judge may have made, the committee could not conclusively determine whether the judges' teaching activities at issue in those opinions were permissible. In Informal Opinion No. 89-11, this committee concluded that where an extrajudicial activity required the judge to be away from the courtroom one day a week, detracting from the minimum time the judge ordinarily spent at work, the time-commitment would interfere with the performance of judicial duties and was therefore prohibited by the Code.

This committee recognizes that generally the individual judge is the only one who can determine whether an outside activity will interfere with the performance of judicial duties. In the present case, however, it is the committee's opinion that where the proposed teaching activities would require a full-time trial judge to be away from the courthouse during regular business hours a

minimum of six hours per week, such a time-commitment would interfere with the judge's ability to perform official duties.

Accordingly, it is the committee's opinion that the Code permits a trial judge to teach a business law class at a university business school as long as the teaching does not interfere with the performance of the judge's official duties. However, where the judge's teaching activities require a minimum of six hours per week away from the courthouse during regular court hours, such an activity interferes with the performance of judicial duties and is prohibited by the Code.

INFORMAL OPINION NO. 90-2
September 18, 1990

The Ethics Advisory Committee has been asked for its opinion on three separate questions concerning the application of the Code of Judicial Conduct. First, the Committee has been asked whether the Code permits a judge to participate in separate moot court exercises conducted by a local community college, the Division of Peace Officer Standards & Training and the Department of Corrections.

Second, the committee has been asked whether the Code permits a judge to participate in campaign activities on behalf of a former law partner running for a statewide elective office outside of this state.

Finally, the committee has been asked whether the Code permits a judge to comment publicly on a case pending before the United States Courts of Appeal or the United States Supreme Court while teaching a legal course or participating in a professional seminar and whether the propriety of such comments depends upon whether they are made within this state.

It is the committee's opinion that first, the Code prohibits a judge from participating in moot court exercises sponsored by a local community college, the Division of Peace Officer Standards and Training or the Department of Corrections; second, that the Code prohibits a judge from participating in political activities, regardless of whether the candidate is running for office within this state; and third, that the Code prohibits a judge from making public comments concerning a pending case in the course of teaching a class or participating in a professional seminar.

I. MOOT COURT PARTICIPATION

The first question raised by the judge concerns the ethical propriety of judicial participation in moot court exercises. Specifically, the judge indicates that he has been asked to participate in moot court exercises conducted by a local community college, the Department of Corrections and the Division of Peace Officer Standards & Training. The judge indicates that the purpose of the program is "to give trainees a feel for courtroom appearances." The judge also indicates that judicial participation is generally limited to presiding over the direct and cross-examination of

the trainees, but that the judge is expected to offer additional comments concerning the importance of testifying accurately, testifying in an unbiased and honest manner, and being prepared for courtroom appearances.

The pertinent provisions of the Code of Conduct are Canons 4 and 2. Canon 4 generally governs a judge's quasi-judicial activities and specifically permits judges to teach classes concerning the law. That Canon provides:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast doubt on the capacity to decide impartially any issue that may be involved in matters before the court.
>
> A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all activities and specifically, a judge should not allow relationships to influence judicial conduct or judgment and should not convey or permit others to convey the impression that they are in a special position of influence.

COMMUNITY COLLEGE COURSE

In Informal Opinion No. 89-9, this committee addressed the ethical propriety of a judge teaching a legal course for students attending a community college. The committee concluded that the Code permits a judge to teach a community college course provided the judge does not allow the course to interfere with the performance of judicial duties, cast doubt on the judge's ability to impartially decide any issue before the court, or allow others to create the impression that they are in a position of special influence with the judge. The committee relied on Canon 4 which expressly authorizes judges to engage in quasi-judicial activities, including teaching classes concerning the law and the legal system.

The committee considered whether teaching the course would cast doubt on the judge's ability to decide impartially any issue that came before the court. The committee concluded that because the subject matter of the course covered general law topics and not current cases or issues before the court, it was unlikely that teaching would cast doubt on the judge's capacity to decide impartially any issue that may come before the court.

In addition, the committee considered that since the judge's participation was limited to providing a series of lectures and not further interaction with the students or evaluation of their performance, no relationship would likely be created with the students that would convey the impression that the students were in a special position of influence with the judge.

The circumstances in the present situation, however, suggest that judicial participation in moot court exercises sponsored by a local community college warrants a different result. The judge's participation in the moot court program will not be limited to a series of lectures on general law topics. Rather, the judge will be interacting with individual students and critiquing their testimony and demeanor as witnesses. Indeed, the subject matter of the program itself is devoted to the very issues which are frequently the focus of adversary proceedings -- witness demeanor and credibility. Although such participation may not cast doubt on the judge's ability to decide impartially any issue that may come before the court, such participation may convey the impression that the students are in a special position of influence with the judge. Informal Opinion No. 88-5. Accordingly it is the committee's opinion that a judge who hears the testimony of law enforcement officers in the course of performing official judicial duties is prohibited from participating in a moot court program at a community college when the purpose of such a program is to instruct prospective law enforcement officers on proper courtroom testimony and demeanor.

PEACE OFFICER TRAINING

The second, but related question asked by the judge concerns judicial participation in moot court exercises sponsored by the Division of Peace Officers Standards and Training, and the Department of Corrections. Both of these programs involve in-service training for individuals already certified as peace officers.

This committee has previously considered the propriety of a judge instructing peace officers in Informal Opinion No. 88-5 and Informal Opinion No. 89-9. In Informal Opinion No. 88-5, the judge inquired about teaching a course on the Utah Code and proper courtroom demeanor to peace officers. This committee relied on three factors to reach its decision that teaching such a course was prohibited. First, the judge was not teaching a course that would be attended by representatives from all components of the criminal justice system, but by peace officers only. Accordingly, it was not devoted to the improvement of the legal system overall, but designed to serve the needs of peace officers exclusively. The committee felt that teaching such a course may create the appearance of impropriety when peace officers appear in the judge's court.

Second, the committee noted that the judge's district was rural and the course was being taught in this same rural area. The opinion pointed out that due to the small geographic area involved, the judge was likely to come in contact with these same officers on a regular basis in the courtroom.

Third, the committee considered the subject matter of the course. The judge would be instructing officers on proper courtroom demeanor and how to be a credible and persuasive witness. The committee found that the judge's participation in the course could convey the impression that peace officers were in a position of special influence with the judge.

In Informal Opinion No. 89-9, the judge inquired about the ethical propriety of teaching peace officers in a non-rural judicial district. Following the same analysis of Opinion No. 88-5, the committee considered first, the subject matter of the course, which included a presentation on

recent state and national criminal law decisions. Second, the committee considered the location where the courses were being taught. One class would be taught in a geographic area outside of the judge's judicial district. The other class would be taught to peace officers from throughout the state. Because the first class would be taught outside of the judge's judicial district, the committee concluded that peace officers attending that course were not likely to appear in the judge's court, but that officers attending the second course may appear before the judge.

Finally, the committee considered the fact that the judge was not teaching a course that would be attended by representatives from all components of the criminal justice system, but by peace officers only. The committee concluded that such a course was not devoted to the improvement or the legal system overall, but designed to serve only one component of the system, specifically law enforcement and that judicial participation under these circumstances may create the appearance of impropriety.

Accordingly, the committee concluded that the Code prohibits a judge from teaching law courses to peace officers.

Following the analysis and reasoning of Opinion Nos. 88-5 and 89-9, it is this committee's opinion that a judge would be similarly prohibited from participating in moot court programs conducted for the benefit of peace officers. First, the judge would be participating in a moot court program for the benefit of a single component of the criminal justice system, rather than the criminal justice system overall. Judicial participation in a moot court program sponsored by an agency charged with the responsibility of providing for more efficient and professional law enforcement and which is offered exclusively to peace officers who appear and testify in court in criminal proceedings, may create the appearance of impropriety.

Second, in the present case, the training would involve peace officers from all over the state, which may include officers from within the judge's district. This creates a likelihood of courtroom contact between the judge and the students.

Third, the subject matter of the course under consideration here, includes issues which are frequently the focus of adversary proceedings in court, such as courtroom demeanor and witness credibility. Peace officers who have been instructed by a judge on these specific issues may convey the impression that they are in a position of special influence with the judge if demeanor or credibility become an issue in the proceeding.

Accordingly, based upon this analysis and the factors considered by the committee in Informal Opinion Nos. 88-5 and 89-9, it is the committee's opinion that the Code prohibits a judge from participating in moot court programs sponsored by law enforcement agencies.

II. POLITICAL ACTIVITIES

The judge has also asked whether the Code permits a judge to participate in political campaign activities on behalf of the judge's former law partner when the partner is running for a statewide

elective office outside of Utah. Specifically, the judge has asked whether the judge may contribute to the candidate's campaign, whether the judge may give advice or assistance to the campaign, or whether the judge may participate in fund-raising activities for the candidate either in Utah or outside of the state. It is the committee's opinion that the Code prohibits such political activity. Canon 7 of the Code of Judicial Conduct provides in pertinent part:

> B. A judge or a candidate for a judicial office who has been confirmed by the Senate should not:
>
> (1) act as a leader or hold any office in a political organization;
>
> (2) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
>
> (3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings or purchase tickets for political party dinners or other functions. except as authorized in Canon 7C; or
>
> (4) take a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system.

This committee has previously stated that political activity by a judge was prohibited by the Code. In Informal Opinion No. 89-15, this committee found that a judge was not permitted to attend public gatherings where the judge's spouse appeared as a candidate or accompany the spouse as he or she campaigned. The committee concluded that the judge's attendance at public gatherings where the judge's spouse appeared as a candidate would constitute a public endorsement of that candidate and attendance at a political gathering, activities prohibited by Canon 7B(2) and 7B(3).

In Informal Opinion No. 89-8, this committee considered whether a judge may provide campaign assistance - such as preparing brochures for mailing, to a school board candidate in the privacy of the candidate's home. Specifically, the committee considered whether providing campaign assistance in the privacy of the candidate's home was attendance at a "political gathering" as that term is used in Canon 7.

The committee concluded that the plain and ordinary meaning of "political gathering" was the gathering of two or more people for political purposes. Accordingly, the committee concluded that by providing campaign assistance to a school board candidate in the candidate's home, the judge would necessarily be meeting with the candidate, and perhaps others, for the express purpose of engaging in political activities and that such activity constitutes attendance at a political gathering which is prohibited by the Code.

In Informal Opinion No. 88-7, this committee discussed whether a judge may host or attend a mass meeting. The committee concluded that a judge should not attend a mass meeting because the term "mass meeting" falls within "political gathering" as that term is used in the Code.

As a basis for its conclusion, the committee cited Canon 28, the precursor to Canon 7A of the Code. Canon 28 prior to 1950, read:

> While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions. He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

Informal Opinion C-486 by the Committee on Ethics and Professional Responsibility indicates that those states adhering to the principle of a nonpartisan judiciary, prohibit all political activity by judges and judicial candidates. This prohibition includes acting as a party leader, holding office in a political party or organization and permitting others to use the power or prestige of the office to promote candidacy for reelection, or for the success of a political party.
In the present situation, the judge inquires whether he or she may participate in campaign activities on behalf of a candidate running for elective office outside of this state. The judge suggests that the prohibition against political activities is less compelling where the candidate resides out of state. The judge's theory, apparently, is that the judge's involvement is less likely to be construed as either a judicial endorsement or as use of the power and prestige of the judicial office since the judge's name and office will not be publicly recognized. Canon 7, however, does not provide for such an exception.

In fact, to the contrary, Canon 7 and the advisory opinions interpreting Canon 7 expressly prohibit precisely the type of political activities contemplated by the judge. Judges are prohibited from making speeches for a political organization or candidate, publicly endorsing a candidate, soliciting funds or making contributions to a political candidate or organization, or attending political gatherings.

The primary purpose for such a comprehensive prohibition was perhaps most aptly stated by the Committee on Ethics and Professional Responsibility in Informal Opinion C-486, as follows: ". . . to avoid a suspicion that the judge permits political considerations to affect his decisions and is directed primarily at the suspicion which may arise when he performs judicial service and at the same time engages in political activities."

Accordingly, regardless of whether the candidate resides outside of this state, the judge's participation in campaign activities on his or her behalf could still create the suspicion that the judge permits political considerations to affect the judge's decisions. Therefore, it is the committee's opinion that such activities are prohibited by the Code.

III. PUBLIC COMMENT

Finally, the judge asks whether the Code's prohibition against commenting publicly on pending cases applies to cases under consideration by the United States Courts of Appeals or the United States Supreme Court and whether such a prohibition applies to comments made in classes or seminars taught by the judge either within or outside of this state. The judge suggests that public comment about pending cases under these circumstances does not pose the ethical problems which the Canon was intended to guard against because such comments would not influence the position of either party to the proceeding or affect the outcome of the proceeding.

The applicable provision of the Code is contained in Canon 3A(6) which provides as follows:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

The committee was unable to locate any advisory opinions from either the ABA or the Federal Judicial Conference which analyze the scope of Canon 3A(6) or provide any guidance on such an issue. It is the committee's opinion, however, that the language of Canon 3A(6) is clear. A judge must abstain from public comment except when making public statements in the course of official duties or explaining for public information, the procedures of the court.[1] Neither exception is applicable here. Accordingly, it is the committee's opinion that the Code prohibits a judge from making public comments about a pending or impending proceeding in the course of teaching a class or participating in a professional seminar.

CONCLUSION

In conclusion, it is the committee's opinion that, first, the Code prohibits a judge from participating in moot court exercises sponsored by a local community college, the Division of Peace Officer Standards and Training or the Department of Corrections; second, that the Code prohibits a judge from participating in political activities, regardless of whether the candidate is running for office within this state; and third, that the Code prohibits a judge from making public comments concerning a pending or impending case in the course of teaching a class or participating in a professional seminar.

[1] The American Bar Association has recently approved modifications to the Code of Judicial Conduct and in particular Canon 3A(6) governing the scope of permissible public comment. The Canon now provides that a judge may comment publicly concerning a pending or impending case as long as the comment is not reasonably expected to affect the outcome or fairness of the proceeding. Although this standard is not currently applicable in Utah, in

conjunction with its overall review of the Code, this committee will consider whether a similar modification might be appropriate in Utah.

INFORMAL OPINION NO. 90-3
March 8, 1990

The Ethics Advisory Committee has been asked for its opinion on the question of whether the Code of Judicial Conduct requires an appellate court judge to enter a disqualification when the judge's relative is employed as an attorney by the law firm, which is counsel of record.

Specifically, the judge questions whether disqualification is required when the judge's brother is a partner in a law firm which is counsel of record, when the judge's son-in-law is a partner in a law firm which is counsel of record, or when the judge's daughter is an associate in a firm which is counsel of record. It is the committee's opinion that a judge is required to enter a disqualification when the judge's lawyer-relative is acting as a lawyer in the proceedings or the lawyer-relative is a partner in the law firm which is appearing as counsel of record.

It is also the committee's opinion that a judge would not be required to enter a disqualification when the lawyer-relative is only associated with a firm appearing as counsel unless the associate has an interest which would be significantly affected by the outcome of the litigation. Finally, it is this committee's opinion that if the judge's impartiality might reasonably be questioned by virtue of the judge's relationship to the lawyer-relative, regardless of the lawyer-relative's interest in the outcome of the proceeding, the judge must enter a disqualification or disclose on the record or in writing the basis of the disqualification and allow the parties to determine whether the judge's relationship is immaterial or that the financial interest is insubstantial.

The pertinent provisions of the Code are Canons 2A, 2B, 3C and 3D. These provisions are substantially similar to the ABA Canons of Judicial Ethics. Canons 2A and 2B state that "a judge should exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary," and "a judge should not allow family, social or other relationships to influence judicial conduct or judgment." Canons 3C and 3D provide in pertinent part as follows:

> C. Disqualification.
> (1) Disqualification must be entered in a proceeding by any judge whose impartiality might reasonably be questioned, including but not limited to instances where:
> (d)The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> (ii) is acting as a lawyer in the proceeding;
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> D. Remittal of Disqualification. A judge may, instead of withdrawing from the

> proceeding, disclose on the record or in writing the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree that the judge's relationship is immaterial or that the financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement of the parties must be entered on the record or, if written, signed by all the parties and included in the case file.

Canon 3C(l)(d)(ii) requires recusal when the judge, the judge's spouse or someone within the third degree of relationship to either of them, or the spouse of such a person within the third degree of relationship is acting as a lawyer in the proceeding. As with other portions of Canon 3C(1), the primary purpose of this subsection is to ensure that judges by their conduct maintain public confidence in the courts by avoiding situations which cast doubt on their independence and impartiality. Specifically, this subsection seeks to avoid situations where clients believe that special favor and consideration can be obtained in a case through retention of a judge's relative as attorney. The language only requires judicial disqualification in cases where the relative is acting as a lawyer in the case. Thus, when a judge's relative is merely affiliated with a law firm involved in the case rather than actually representing a party, Canon 3C(l)(d)(ii) does not require recusal. ABA Commentary to Canon 3C; U.S. ex. rel, Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977); Reilly by Reilly v. Southeastern Pa. Transp., 479 A.2d 973, 981 (Pa. Super. 1984), Abramson, Judicial Disqualification under Canon 3C of the Code or Judicial Conduct (1986). Canon 3C(l)(d)(iii), however, requires disqualification when the judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

This provision may require judicial disqualification when a judge's relative is only affiliated with the law firm involved in the case and not actually representing the party. This determination depends upon whether the lawyer-relative is known by the judge "to have an interest that could be substantially affected by the outcome of the proceeding." Both the Advisory Opinions from the Advisory Committee on Judicial Ethics and the case law interpreting these provisions have concluded that a lawyer-relative who is a partner in a law firm appearing as counsel of record will always have an interest that could be substantially affected by the outcome of the proceedings. Accordingly, a judge is required to enter a disqualification whenever a party is represented by a law firm in which the judge's relative is a partner. Ransom v. S & S Food Center, 700 F.2d 670 (5th Cir. 1983), Potashnick v. Port City Construction, 609 F.2d 1101 (5th Cir. 1980); Advisory Opinion No. 58, (1978); Advisory Opinion No. 77, (1985).

The more difficult question is whether the judge must enter a disqualification when a lawyer-relative is merely associated with the firm and is neither a partner in the firm nor actually representing a party. In Advisory Opinion No. 58 (1979), the Advisory Committee on Judicial Activities addressed the question of disqualification where a lawyer-relative is merely associated with a law firm appearing as counsel of record. The committee concluded, inter alia, that a judge must enter a disqualification if the lawyer-relative will profit or lose from the judge's action in

the case either financially - i.e. compensation will be affected by the outcome of the proceeding - or otherwise - i.e. the reputation of the firm would be significantly affected by the litigation.

In Ex Rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), the United States Court of Appeals for the Fifth Circuit reviewed an appeal of a district court's failure to enter a disqualification when the judge's son was an associate of the law firm representing the defendant, Equifax, Inc. The court, citing to the applicable federal statutory provisions governing disqualification, concluded that none of the provisions required recusal under the circumstances of that case. The court found that the judge's son did not actively participate in Equifax's defense, that the participation of the son's law firm did not mean that the son was "acting as a lawyer in the proceeding," and that the son's salary interest as an associate was too remote to fall under the "financial interest" prohibition. Accordingly, the court concluded that the district court was not required to enter a disqualification in the case. The court went on to state, however, that although none of these considerations required disqualification, they were considerations which might move the district judge to examine "whether his impartiality might reasonably be questioned."

In the present case, whether judicial disqualification is required when the judge's lawyer-relative is only associated with the firm appearing as counsel of record depends upon whether the lawyer-relative will profit or lose from the judge's action in the case either financially, or otherwise. In Weinberger, the Court concluded that the salary interest of an associate was too remote to fall under the financial interest prohibition. Accordingly, unless the associate has an interest, other than a salary interest, which would be significantly affected by the outcome of the litigation, a judge would not be required to enter a disqualification when the associate's firm appears as counsel.

Finally, as the Weinberger Court pointed out, regardless of the lawyer-relative's interest in the outcome of the proceeding, where a judge's impartiality might reasonably be questioned, the judge must enter a disqualification or disclose on the record or in writing the basis of the disqualification and allow the parties to determine whether the judge's relationship is immaterial or that the financial interest is insubstantial.

In conclusion, it is the committee's opinion that a judge must enter a disqualification when the judge's lawyer-relative is acting as a lawyer in the proceeding or the lawyer-relative is a partner in the law firm which is appearing as counsel of record. It is also the committee's opinion that the salary interest of an associate is too remote to fall under the financial interest prohibition and therefore, a judge would not be required to enter a disqualification when the lawyer-relative is only associated with a firm appearing as counsel unless the associate has an interest, other than a salary interest, which would be significantly affected by the outcome of the litigation.

Finally, it is this committee's opinion that if the judge's impartiality might reasonably he questioned by virtue of the judge's relationship to the lawyer-relative, the judge must enter a disqualification or disclose on the record or in writing the basis of the disqualification and allow

the parties to determine whether the judge's relationship is immaterial or that the financial interest is insubstantial.

INFORMAL OPINION NO. 90-4
May 30, 1990

The Ethics Advisory Committee has been asked for its opinion on the question of whether the Code of Judicial Conduct permits a part-time court commissioner, who resides out of state, to campaign for and serve in the office of Justice of the Peace in the municipality where the commissioner resides.

It is the committee's opinion that the Code does not prohibit the commissioner from campaigning for and serving in the office of Justice of the Peace as long as the commissioner/candidate complies with the campaign limitations set forth in Canon 7 of the Code of Judicial Conduct and assuming election to the position, avoids the appearance of impropriety and performs the duties of both offices impartially and diligently.

The commissioner is employed part-time, 20 hours per week, as a domestic relations commissioner in Utah. The commissioner is a resident of another state and has been approached by individuals in the community where she resides and asked to campaign for and, if elected, serve as justice of the peace. According to the commissioner, the justice of the peace position is a non-partisan, part-time position which involves a time commitment of one day per week. The commissioner indicates that there would be adequate time to handle the responsibilities of both positions.

CJA Rule 3-201(4)(B) provides that court commissioners must comply with the Code of Judicial Conduct. The rule does not distinguish between full-time and part-time commissioners. Therefore, unlike part-time judges, part-time commissioners are required to comply with all the provisions contained in the Code.

The applicable provisions of the Code are contained in Canons 2, 3 and 7. The committee was unable to locate any advisory opinions from either the ABA or the Federal Judicial Conference which reviewed the ethical propriety of a judicial officer simultaneously serving in two judicial positions on two separate courts, or which provided any guidance on such an issue. Accordingly, the committee's analysis and conclusions are based solely on the language of the applicable canons and the ABA's commentary to those canons.

In addition, it should be noted that this opinion addresses only the ethical issue raised by the commissioner opinion request and does not address any legal issue which may exist in connection with the statutory residency requirements for holding office as a commissioner.

Canon 2 provides that a judge "should avoid impropriety and the appearance of impropriety in all activities." The ABA commentary to Canon 2 states as follows:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Although there is nothing in the commissioner's proposed conduct that would clearly give rise to an appearance of impropriety, the responsibility for resolving disputes in two different courts in a rural area may, under certain circumstances, create such an appearance. Accordingly, the commissioner should be mindful of any conflict between the two positions which would create the appearance of impropriety and if such an appearance results, the commissioner should not serve in both capacities.

Canon 3 requires that a judge "perform the duties of the office impartially and diligently." Subparagraph (A)(5) requires that a judge "dispose promptly of the business of the court." The ABA Commentary to Canon 3(A)(5) provides:

> Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

Again, while the commissioner's proposed conduct would not necessarily interfere with the commissioner's ability to perform the duties of that job impartially or diligently, the demands of two part-time judicial positions could create such a conflict. Accordingly, the commissioner should ensure that the responsibilities of serving as a justice of the peace do not interfere with the commissioner's ability to impartially and diligently perform the responsibilities of commissioner and if such a conflict results, the commissioner should not serve in both capacities.

Finally, Canon 7 governs a judge's political and campaign activities and requires that a judge refrain from political activity inappropriate to the judicial office. Canon 7(C) governs the political activities of a candidate for judicial office in a contested non-partisan election. That section provides:

> (C) A candidate for judicial office in a contested non-partisan election or an unopposed retention election who has drawn active public opposition may operate a campaign for office subject to the following limitations:
> (1) The candidate shall not make pledges or promises of conduct in office other than the faithful ind impartial performance of the duties of the office or misrepresent his or her identity, qualifications, present position or other facts.

(2) The candidate should not directly solicit or accept campaign funds or solicit publicly stated support but may establish committees or responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. These committees may solicit campaign contributions and public support from lawyers but shall inform lawyers that their contribution or lack of contribution will not be known to the judge or candidate. A candidate shall not permit the use of campaign contributions for the private benefit of the judge or members of the family.
(3) The candidate may speak to public gatherings on the candidate's own behalf.

Canon 7(D) more generally governs a judge's political activities. That section provides:

(D) Judges and all candidates for judicial office:
(1) should maintain the dignity appropriate to judicial office;
(2) should not request or encourage members of their families to do anything that the judge or candidate may not do under this Canon; and
(3) should not authorize any public official or employee or other person under the judge's direction or control to do anything that a judge may not do under this Canon, with the exception of the permitted activities of a fundraising campaign committee.

Again, the commissioner's proposed campaign for office of the justice of the peace would not necessarily conflict with the prohibitions contained in Canon 7 regarding campaign and political activities. The commissioner, however, should be diligent in ensuring that those activities do not conflict with Canon 7, and if any conflicts arise, the commissioner should discontinue the offending campaign activities.

In conclusion, it is the committee's opinion that the court commissioner may campaign for and serve in the office of Justice of the Peace as long as the commissioner complies with the campaign limitations set forth in Canon 7 and assuming election to the position, avoids the appearance of impropriety and performs the duties of both offices impartially and diligently.

INFORMAL OPINION NO. 90-5
September 18, 1990

The Ethics Advisory Committee has been asked for its opinion as to whether the Code of Judicial Conduct prohibits a state-funded trial court judge from presiding over any case brought by a collection agency which also provides collection services to the state treasurer's office.

Utah Code Ann. § 79-4-22 requires that fines, fees, court costs and forfeitures collected by state-funded trial courts be paid to the state treasurer. Those funds become "state money" as defined by Utah Code Ann. § 51-7-3(17), and are subject to the control and management of the state

treasurer. According to the request, the state treasurer has contracted with a private collection agency for the collection of NSF checks, including those NSF checks received by state-funded trial courts as fines, fees, court costs and forfeitures. The collection agency in question provides similar services to a myriad of non-governmental businesses and individuals, and those services often result in litigation pending before the state-funded trial courts. Some of the state treasurer's NSF checks may be the subject of litigation.

Canon 3(C)(1)(c) requires disqualification when the judge or a member of the judge's family has a "financial interest" in either the subject matter in controversy or is a party to the proceeding. If such an interest exists because of the contract between the state treasurer and the collection agency, the judge must be disqualified from all of the collection agency's cases.

"Financial interest" is defined as "ownership of a legal or equitable interest, however small" but does not include ownership of government securities, ownership of deposits in a financial institution, the proprietary interest of policy holder in a mutual insurance company, the proprietary interest of a depositor in a mutual savings association, or a similar proprietary interest, unless "the outcome of the proceeding could substantially affect the value" of the interest. Even assuming that a judge owns some legal, equitable or proprietary interest in state money arising from the right to receive a salary or the right to receive money accumulating in a retirement account, it is unlikely that the outcome of any given NSF check case would substantially affect the value of that interest.

It is the opinion of the committee that the Code does not require blanket disqualification in all cases in which the collection agency is a party simply because the agency has a service contract with the state treasurer. A contrary conclusion would preclude state-funded trial court judges from presiding over any case in which a state agency or state contractor is a party. However, in each individual case, the judge should consider the entire Code of Judicial Conduct, including the Canon 2(B) requirement that a judge should not allow "other relationships to influence judicial conduct or judgment" and the remaining Canon 3(C) disqualification standards. Finally, as mandated by Canon 2(B), the judge should not permit the collection agency to convey the impression that it is in a special position of influence because of its contract with the state treasurer.

INFORMAL OPINION NO. 90-6
October 18, 1990

The Ethics Advisory Committee has been asked for its opinion as to whether the Code of Judicial Conduct allows a trial court judge to act as a director, president-elect or president of a law school alumni association.

According to the request, the judge has served as a member of the board of directors of the association since earlier this year. The judge indicates that neither the judge individually nor the

association have engaged in fundraising activities in the past, although the association will likely engage in such activities in the future. The association will sponsor an annual alumni banquet, class reunions and other social events, will advise the law school administration on matters of mutual interest, and may sponsor continuing legal education seminars.

Canon 4 of the Code of Judicial Conduct deals with a judge's involvement in quasi-judicial activities - activities which improve the law, the legal system or the administration of justice.

Canon 5 of the Code of Judicial Conduct governs a judge's involvement in extra-judicial activities -- avocational, civic, charitable, financial and fiduciary activities. According to the opinion request, some of the alumni association's proposed activities fall squarely within Canon 4 while others more closely resemble Canon 5 activities. Consequently, the committee has examined the Judge's proposed role in the association under both Canons 4 and 5.

The applicable provisions of Canon 4 state:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast doubt on the capacity to decide impartially any issue that may be involved in matters before the court:
> (C) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice which may include a constitutional revision commission and may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fundraising activities.

Canon 5(B) provides:

> A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
> (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.
> (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but may be listed as an officer, director or trustee of such an organization. A judge should not be a speaker or the guest of honor at an organization's fundraising events, but may attend such events. A judge should

be especially sensitive to the potential conflicts which may result from serving in positions of responsibility in such organizations while carrying out judicial duties and limit the judge's duties in the area of solicitation of funds for the organization. A judge should disqualify him or herself in any cases where the position and authority of the judge in the organization would give an appearance of impropriety.
(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Although worded slightly differently, both Canons prohibit participation or service which interferes with the judge's performance of judicial duties. In Informal Opinion 89-11, the committee stated that participation in a charitable organization which would have required a judge to be away from the courthouse for an average of one day per week was prohibited. In Informal Opinion 90-1, the committee stated that teaching a business law class which would have required a judge to be away from the courthouse for approximately six hours per week during regular court hours was also prohibited. In the present matter, there is nothing in the opinion request to indicate that the judge's service in the association will interfere with the judge's judicial duties. However, the judge should examine the expected level of involvement and ensure that participation in the association does not interfere with judicial duties.

Both Canons also prohibit participation in any activity which casts doubt on judicial impartiality. Although no indication of such activities is apparent in the opinion request, the judge should ensure that service in the association does not adversely affect the judge's ability to impartially decide matters that may come before the court. In addition to the limitations contained in both Canons 4 and 5, Canon 5(B) prohibits a judge from serving as an officer, director, trustee or non-legal advisor in an educational, religious, charitable, fraternal or civic organization if the organization is conducted for the economic or political advantage of its members, will be involved in proceedings that would ordinarily come before the judge, or will be regularly engaged in adversary proceedings in any court. It does not appear from the opinion request that the judge's service will be prohibited for any of these reasons. However, the ABA Commentary to Canon 5(B) recognizes that the "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 he is affiliated to determine if it is proper for him to continue his relationship with it."

Subject to the limitations set forth above, it is the opinion of this committee that the Code of Judicial Conduct permits a trial court judge to serve as a director, president-elect or president of a law school alumni association. Although the proposed service is allowed, both Canons 4 and 5 proscribe involvement in certain activities associated with that service. While Canon 4 allows a judge to assist a quasi-judicial organization in raising funds, prohibiting only personal participation in public fundraising activities, Canon 5 utterly prohibits a judge from soliciting funds and from using or permitting the use of the prestige of the judicial office for that purpose in

an extra-judicial organization. Because the alumni association has characteristics of both a Canon 4 and a Canon 5 organization, this committee believes that compliance with the more rigorous standard set forth in Canon 5 is the more prudent course of action for the judge to follow. The more stringent standard is also appropriate because the alumni association's membership consists mostly, if not entirely, of attorneys. As stated in Formal Opinion 89-1:

> The rationale behind prohibiting judicial fund-raising in civic, charitable, and other similar organizations . . . is the danger that the persons contributing will feel coerced by the judicial office. Not only is that a danger when judges solicit funds from the general public but attorneys are particularly susceptible to this form of coercion.

Although Canon 5(B) precludes judicial involvement in fundraising activities, Canon 5(B)(2) states that a judge may be listed as an officer, director or trustee of a Canon 5 organization. The committee deems it advisable to address the use of an organization's letterhead, containing the judge's name as an officer thereof, in fundraising activities. The federal Advisory Committee on Judicial Activities, in its Advisory Opinion No. 35, was asked whether the use of a judge's name, without an indication of his position, on the stationery of a national charitable organization was permissible.

The Committee stated: “There is now no impropriety in the judge permitting his name to be used on stationery . . . used for solicitation purposes provided that his name and office are in no way selectively emphasized by the organization.”

In its Informal Opinion 1221, the ABA Committee on Ethics and Professional Responsibility opined that a judge could not send letters soliciting membership in the American Bar Association, either on his own letterhead or that of the ABA. However, the Committee continued:

> Nothing contained herein, however, is intended to prevent a judge from permitting his name to appear on the letterhead of a bar association or section or committee thereof of which he is a bona fide officer or (in the case of a committee) a member, no matter what the use to which that letterhead may be put.

The committee believes that a judge's name and organizational title may appear on the letterhead of a Canon 5 organization in which he serves, even though that letterhead may be used in the organization's fundraising activities. However, the use of the judge's judicial title and the selective emphasis of the judge's name is not allowed. Nor should the judge's name be listed on materials used solely for fund-raising purposes. Canon 5(B)(2) allows a judge to attend an organization's fundraising events, but states that a judge should not be a speaker or the guest of honor at such events. The committee believes that the Canon permits a judge who serves as an officer or director of an extra-judicial organization to perform perfunctory tasks such as welcoming guests and introducing those who will take a more active part in the event. Perhaps

the best advice comes from the language of Canon 5(B)(2) itself: "A judge should be especially sensitive to the potential conflicts which may result . . . and limit the judge's duties in the area . . ."

Finally, the Code of Judicial Conduct limits judicial involvement in the investment of funds raised. While Canon 4(C) allows a judge to participate in the investment decisions of a quasi-judicial organization, Canon 5(C) states that a judge should not give investment advice to an extra-judicial organization. Again, the committee believes that the more stringent limitation of Canon 5 should apply to a law school alumni association.

INFORMAL OPINION NO. 90-7
September 18, 1990

The Ethics Advisory Committee has been asked for its opinion on two related issues: first, whether the Code of Judicial Conduct permits a trial court judge to participate in a continuing legal education seminar sponsored jointly by a private non-profit organization and the Utah State Bar; and second, whether the judge may comment on or about litigation recently tried in the judge's court during the education seminar.

According to the request, the seminar is sponsored jointly by a private non-profit organization and the Utah State Bar and is open to both plaintiff and defense counsel. The requesting judge recently presided over a civil suit involving the subject matter which is the topic of the seminar. The time for filing a notice of appeal had not expired as of the date of this opinion.

Canon 4(A) allows judges to "speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice" provided the activity does not cast doubt on the capacity of the judge to decide impartially any issue that may be involved in matters before the Court. The Commentary to the ABA's Canon 4 states:

> 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 . . . . To the extent that his time permits, he is encouraged to do so, either independently or through a bar association judicial conference, or other organization dedicated to the improvement of the law.

This committee has consistently held that the Code allows a judge to participate in teaching activities as long as those activities do not lend the prestige of the judicial office to advance the private interests of others. In Informal Opinion No. 88-6, this committee determined that although the Code prohibited a judge from teaching a class for a for-profit organization's continuing legal education seminar, "the inference is clear that judges may teach for public and for non-profit entities . . . ." Accordingly, in the present case, where the seminar is sponsored

jointly by the State Bar and a private non-profit entity, the Code permits the judge to participate in teaching activities.

This committee has also previously held that judges may participate in teaching activities as long as the activity is not designed to serve the needs of only one component of the justice system. In Informal Opinion No. 88-6, this committee determined that a judge was prohibited from teaching a course on proper courtroom demeanor to law enforcement officers because such an activity may create an appearance of impropriety or convey the impression that law enforcement officers are in a position of special influence with the judge. By contrast, the seminar in question is open to both plaintiff and defense counsel, thereby avoiding the appearance of impropriety or the impression that either plaintiff or defense counsel are in a position of special influence with the judge.

The more critical question, however, is whether the judge's participation in this program is permissible when a civil suit involving the same subject matter is pending before the judge at the time of the seminar. Canon 3(A)(6) prohibits a judge from making public comments about a pending or impending proceeding in any court. Although this committee was unable to locate any advisory opinions from either the ABA or the Federal Judicial Conference which analyze the scope of Canon 3(A)(6), the language of the Canon is clear. A judge must abstain from public comment about a pending case except when making public statements in the course of official duties or explaining for public information the procedure of the court. Neither exception is applicable here. Accordingly, in the present situation, if a motion for a new trial or a notice of appeal is filed or the time for filing a notice of appeal has not expired, the judge is prohibited from commenting on any aspect of the pending litigation. Finally, regardless of the pendency of the litigation, Canon 4 prohibits a judge from engaging in any activity that would cast doubt on the judge's capacity to decide impartially any issue that may come before the court. Thus, in the present situation, the judge is not only prohibited from commenting on pending litigation, but is also prohibited from making any general comments concerning this type of litigation which would cast doubt on his ability to decide impartially any issue presented by this type of case.

Accordingly, it is the committee's opinion that a trial court judge may participate in a non-profit organization's continuing legal education seminar, as long as the judge's participation does not create the appearance of impropriety or convey the impression that the participants are in a position of special influence with the judge and the judge does not comment on a pending or impending proceeding or engage in any conduct which casts doubt on the judge's ability to decide impartially any issue presented to the court.

INFORMAL OPINION NO. 90-8
November 28, 1990

The Ethics Advisory Committee has been asked for its opinion on the question of whether the

Code of Judicial Conduct permits a judge to write a foreword for a book on the subject of child support negotiation and litigation.

It is the committee's opinion that the Code permits a judge to write a foreword for the book as long as the writing does not interfere with the performance of judicial duties, cast doubt on the judge's impartiality, or lend the prestige of the judicial office to advance the private interests of others.

According to the judge, the book contains accurate and good advice regarding the process of computing, negotiating, and acquiring court orders for child support payments in divorce cases. The judge further indicates that the book will be an excellent resource for lay people, litigants, lawyers and possibly commissioners and judges.

Canon 4(A) of the Code of Judicial Conduct provides that subject to the proper performance of judicial duties, a judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice provided the activity does not cast doubt on the judge's capacity to decide impartially any issue that may come before the Court. The Commentary to the ABA's Canon 4 states:

> 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 . . . . To the extent that his time permits, he is encouraged to do so, either independently or through a bar association judicial conference, or other organization dedicated to the improvement of the law.

Although this committee has never specifically addressed the question of judicial writing, this committee has previously held that the Code of Judicial Conduct permits a judge to participate in teaching activities consistent with the limitations set forth in Canon 4 Informal Opinion No. 89-9. Likewise, it is the committee's opinion that under Canon 4, a judge may write on subjects concerning the law, the legal system and the administration of justice as long as such writing does not interfere with the performance of judicial duties or cast doubt on the judge's ability to impartially decide any issue which may become before the court.

In the present case, the publication in question deals with the subject of child support negotiation and litigation, and thus is clearly a subject which concerns the law, the legal system and the administration of justice. The judge's proposed involvement with the publication is limited to writing the foreword and therefore is not likely to require a significant time commitment which would interfere with the performance of judicial duties.

The more difficult question is whether the judge's involvement in the publication would cast doubt on the judge's ability to impartially decide any issue which came before the court. In the present case, the judge sits on an appellate court presently, which, by statute, does not have direct

appellate jurisdiction over child support issues but may review such issues by certiorari. Thus, on occasion, the judge is likely to review cases involving child support issues.

According to the judge, the publication contains "accurate and good advice regarding the process of computing, negotiating and acquiring court orders for child support payments." Thus, although the judge may on occasion hear cases involving child support issues, it is the committee's opinion that as long as the publication and foreword contain only factual information about the process for obtaining court orders for child support and do not take an advocacy position with respect to those issues, the judge's participation in the publication would not cast doubt on the judge's ability to decide impartially. The judge then would be permitted to write the foreword under Canon 4.

In the present case, however, the judge has also questioned the propriety of judicial involvement in the publication under Canon 2B. Canon 2B prohibits a judge from lending the prestige of the judicial office to advance the private interests of others. The ABA commentary to Canon 2 provides as follows:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

This committee has been able to locate only one advisory opinion which addresses the scope of Canon 2B in connection with judicial writings. Unfortunately, the opinion does not provide much guidance on the issue. In Advisory Opinion No. 55, the Federal Advisory Committee on Judicial Activities was presented with two questions relating to judicial writings and publications: (1) the propriety of a judge writing about cases which the judge had heard; and (2) the extent to which the judge could permissibly advertise such writings. In response to the second question, the Committee stated as follows:

> With respect to advertising the writings and publications of a judge, the judge should, as far as possible, make certain that the advertising does not violate the language, spirit, or intent of Canons 2B, 5C and 6. To that end, it would advisable for a judge, in contracting for any publication of his writings, to retain a measure of control over the advertising so that it does not exploit the judicial position or use the prestige of the judge's office to advance the private interests of others.

There is no indication from the information contained in the opinion request that the judge would be lending the prestige of the judicial office to advance the private interests of others. It is the Committee's opinion, however, that the judge should take appropriate steps to ensure that neither the content of the foreword nor the advertising or marketing of the publication will exploit the judicial office or advance the private interests of others. In conclusion, it is the committee's

opinion that the Code permits a judge to write a foreword for the book on the subject of child support negotiation and litigation as long as the writing does not interfere with the performance of judicial duties, cast doubt on the judge's impartiality, or lend the prestige of the judicial office to advance the private interests of others.

INFORMAL OPINION NO. 90-9
November 8, 1990

The Ethics Advisory Committee has been asked for its opinion on the question of whether the Code of Judicial Conduct permits judicial participation in an educational seminar sponsored by the College of Law Alumni Association.

It is the committee's opinion that the Code prohibits a judge from participating in an educational seminar sponsored by the College of Law Alumni Association where the seminar is organized and planned to generate proceeds which are used to fund other Association activities.

According to the judge, the Alumni Association sponsors a Court Practice Seminar each spring to members of the bar for CLE credit. The seminar is taught by judges and lawyers on a voluntary basis. The Alumni Association charges participants a registration fee which is intended to cover the actual costs of the seminar. In the past, however, the registration fees have exceeded the actual costs of the seminar and the balance of those funds have been used to subsidize other Association projects.

Canon 4(A) of the Code of Judicial Conduct provides that subject to the proper performance of judicial duties, a judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice provided the activity does not cast doubt on the judge's capacity to decide impartially any issue that may come before the Court. The Commentary to the ABA's Canon 4 states:

> 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 . . . To the extent that his time permits, he is encouraged to do so, either independently or through a bar association judicial conference, or other organization dedicated to the improvement of the law.

This committee has previously held that the Code of Judicial Conduct permits a judge to participate in teaching activities consistent with the limitations set forth in Canon 4. Informal Opinion No. 89-9.

In the present case, the seminar in question deals with "Court Practice," and thus is clearly a subject which concerns the law, the legal system and the administration of justice. Judicial participation would be limited to preparation and teaching on a one-time basis and therefore

would not require such a commitment of time that it would interfere with the performance of judicial duties. The subject matter of the course -- "Court Practice" -- would consist of general information concerning practice and procedure in Utah courts. Thus, judicial participation in the seminar is not likely to cast doubt on a judge's ability to decide impartially any issue which may come before the court. Accordingly, under Canon 4A, a judge would be permitted to participate in an educational seminar sponsored by the Alumni Association.

Canons 4C and 5B, however, contain additional limitations on a judge's ability to participate in educational activities. Canon 4C provides:

> A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system. or the administration of justice which may include a constitutional revision commission and may assist such an organization in raising funds and may participate in their management and investment, and should not personally participate in public fund-raising activities.

Canon 5B provides in pertinent part:

> Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable. fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
>
> . . .
>
> (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civil organization, or use or permit the use of the prestige of the judicial office for that purpose, but may be listed as an officer, director, or trustee of such an organization.

In Informal Opinion No. 90-6, this committee noted the distinctions between the Canon 4 and Canon 5 prohibitions as they apply to fundraising on behalf of a Law School Alumni Association. The committee recognized that while Canon 4 allows a judge to assist a quasi-judicial organization in raising funds and prohibits only personal participation in public fundraising activities, Canon 5 absolutely prohibits a judge from soliciting funds and from using or permitting the use or prestige of the judicial office for that purpose.

The committee went on to state that because the alumni association had characteristics of both a Canon 4 and Canon 5 organization, the committee felt that compliance with the more rigorous standard set forth in Canon 5 was preferable. The committee reasoned that the Canon 5 standard

was more appropriate where the alumni association's membership consisted primarily, if not exclusively, of attorneys since attorneys are particularly susceptible to feeling coerced by the judicial office.

In the present case, the College of Law Alumni Association sponsors the Court Practice Seminar for the members of the bar. Historically, the registration fees for the seminar have exceeded the actual costs of the seminar and the balance of those proceeds have been used to subsidize other Association sponsored projects. Although the Code does not specifically define the term "fundraising activity," it is the committee's opinion that where the proceeds from the Court Practice Seminar are used to fund other Association sponsored projects, the Court Practice Seminar constitutes a fundraising activity. Accordingly, judges are prohibited from personally participating in the Court Practice Seminar or from using the prestige of their judicial office to promote that activity.

The charitable and educational nature of the Alumni Association generally, and the Court Practice Seminar specifically, do not change this result. In Informal Opinion No. 89-8, this committee concluded that the Code prohibits judicial participation in fundraising activities the purpose of which is to raise funds for educational and charitable purposes. The committee stated that this "prohibition includes participation in a dunking booth at a bar convention or at a midwinter meeting for the bar, where the proceeds would be used to establish drug prevention programs in the schools."

Accordingly, it is the committee's opinion that the Court Practice Seminar is a "fundraising activity" as that term is used in the Code; that the Code prohibits judicial participation in fundraising activities even where the funds are used for educational or charitable purposes; and that the Code's prohibition includes participation in a Court Practice Seminar sponsored by an Alumni Association where the proceeds from the seminar are used to fund other Association sponsored events.

Conclusion

It is the committee's opinion that the Code prohibits a judge from participating in an educational seminar sponsored by the College of Law Alumni Association where the seminar is organized and planned to generate proceeds which are used to fund other Association activities.

INFORMAL OPINION NO. 91-1
July 29, 1991

The Ethics Advisory Committee has been asked for its opinion as to whether a trial judge may serve as a member of the editorial advisory board of a magazine which focuses, in large part, on state and local political races and personalities, and whether the judge may vote in a secret poll of board members to determine the front-runners in Utah's major political races. The judge has also

asked whether excerpts of a letter written by the judge, commending the editor for the quality and concept of the magazine, may be published in the magazine.

The judge provided a copy of the first issue of the magazine and the proposed letter to the committee for review. Committee members also received and reviewed a copy of the magazine's second issue. The magazine is non-partisan - i.e., it does not promote candidates from one party over the candidates of another.

SERVICE AS MEMBER OF THE BOARD AND PARTICIPATION IN POLL OF BOARD MEMBERS

The board, as currently constituted, consists of approximately ninety well known individuals, most of whom are either directly or indirectly involved in Utah politics. A list of board members is prominently displayed in each issue of the magazine. The judge is interested in serving on the board in order to promote coverage of the activities, functions, and progress of the judiciary, and the magazine's editor has expressed an interest in including those types of articles in future issues. According to the opinion request, board members perform various functions including suggesting and writing articles, commenting on the content of articles, and periodically participating in board meetings in order to discuss the magazine and get better acquainted.

Having reviewed the first two issues, the committee believes that the magazine is first and foremost a political publication, participation in which is governed by Canon 7 of the Code of Judicial Conduct. Political activity need not be partisan to be prohibited by the Code. In Informal Opinion 89-7, this committee determined that a judge may not participate in a non-partisan school board campaign.

At least three of the activities prohibited by Canon 7 exist here: attending political gatherings or other functions, acting as a leader in a political organization, and taking a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system. In addition, Canon 1 requires a judge to uphold judicial independence and Canon 2 requires a judge to promote judicial impartiality.

This committee has defined a political gathering as "any gathering of two or more people for political purposes." Informal Opinion 89-7. Board meetings clearly fall within that broad definition. The committee also believes that board members are leaders in a political organization. Finally, the committee believes that participation as a board member could be viewed as taking a public position on a political issue, and that such a perception would jeopardize the public confidence in judicial impartiality. Having determined that the judge may not be a member of the board, it follows that the judge may not participate in the board members' poll.

PUBLICATION OF LETTER

This committee, in Informal Opinion 90-8, discussed the propriety of a judge writing the foreword to a book on child support negotiation and litigation. The committee concluded that the

judge could write the foreword if, in doing so, the judge did not lend the prestige of the judicial office to advance the private interests of the book's author or others. The committee has reviewed the judge's proposed letter, a letter which commends both the magazine and its editor, and believes that publication of excerpts from the letter would in fact advance the private interests of the magazine's editor. Consequently, publication of the letter is prohibited by the Code.

INFORMAL OPINION NO. 91-2
September 10, 1991

The Ethics Advisory Committee has been asked for its opinion as to whether the Code of Judicial Conduct allows a trial judge to write letters of reference upon request, and if so, what restrictions exist on the content of such letters. This opinion is limited to the two factual situations provided by the judge.

First, an individual who has done construction work for the judge personally has requested that the judge write a letter of reference to help him secure financial support for a new business venture. The proposed business is a treatment facility which would receive referrals from the courts. The judge is not certain to whom the letter will be offered.

Second, an employee of a county operated pre-trial release and supervision program who has applied for a position with the federal probation system has asked the judge for a letter of recommendation. The employee has appeared in the judge's court in her official capacity, and the judge has valued the employee's judgment and relied upon her recommendations in making release and bail decisions. The federal position would be similar to the employee's current position.

The judge has correctly indicated that the issues raised are controlled by Canon 2(B), which states in part:

> A judge should not lend the prestige of the judicial office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position of influence. A judge should not testify voluntarily as a character witness <u>but may provide honest references in the regular course of business or social life</u>.

Our Code differs from the ABA Code of Judicial Conduct by the inclusion of the underlined language. Although honest references are clearly authorized, they may not be given if they lend the prestige of the judicial office to advance the private interests of others, or if they convey or permit others to convey the impression that the subject of the reference is in a special position of influence with the judge.

At least two other ethics committees have dealt with letters of reference provided for the purpose of helping another to obtain financing. New York's Advisory Committee on Judicial Ethics, in its Opinion 89-15, determined that a judge may not furnish such a letter to a bank for a friend because the judge would be lending the prestige of the judicial office to advance the friend's private interests. The Federal Advisory Committee on Codes of Conduct has also stated that such letters are prohibited. In its Advisory Opinion No. 73, issued August 26, 1983, the Committee stated:

> With respect to non-political recommendations, the requirement of Canon 2B that a judge "should not lend the prestige of his office to advance the private interests of others" comes into play. This means, at the very least, that a judge should not make a recommendation in support of a commercial venture, or when a recommendation is, or could reasonably appear to be, requested primarily because of the prestige of his office. And this is very likely the case whenever the relationship between the judge and the person seeking the recommendation is such that the judge is in no better position than many others would be to evaluate that person.

This committee agrees that a judge should not provide a letter of reference in order to help a person obtain financing for a commercial venture when, as here, the judge is in no better position than any other person with whom the requesting party has dealt. The committee's opinion is even stronger in the situation related by the judge, because a reference could be perceived as an indication that the judge would make referrals to the requesting party's facility rather than other available facilities.

However, a letter of recommendation for employment, given on behalf of an individual whom the judge knows in a business or professional capacity is allowed under our Code. Even Codes of Judicial Conduct which do not contain a provision expressly allowing such references have not prohibited them. The Federal Advisory Committee, again in Advisory Opinion No. 73. stated:

> . . . judges are members of society, and of the community at large, and . . . not every action of a judge is intended, or could reasonably be perceived, as an assertion of the prestige of his judicial office. When a judge is personally aware of facts or circumstances which would facilitate an accurate assessment of the individual under consideration, a judge may properly communicate that knowledge, and his opinions based thereon, to those responsible for making decisions concerning the applicant, the judge's awareness may be based, for example, on a longstanding and intimate knowledge of the person or special knowledge derived from some relationship, such as that with a law clerk.
>
> In any case, the judge should carefully consider whether his recommendation or endorsement might reasonably be perceived as exerting pressure by reason of his judicial office, and should avoid any action which could be so understood.

The committee believes that the judge may provide a letter of recommendation on behalf of the federal probation applicant arising from the applicant's past involvement with the judge and the judicial system. The letter may include facts known to the judge, as well as the judge's opinions based on those facts.

INFORMAL OPINION 91-3
December 12, 1991

The Ethics Advisory Committee has been asked for its opinion as to whether a trial court judge may sit as a member of a fee arbitration panel established and administered by the Utah State Bar. The Bar's fee arbitration rules provide that each arbitration panel consists of one lawyer, one state or federal judge, and one non-lawyer. Both parties to the fee dispute must agree to arbitration before it can proceed. Panel members receive no compensation for their service.

Unlike the ABA Code of Judicial Conduct, our Code of Judicial Conduct does not contain a provision prohibiting judges from acting as arbitrators or mediators. In fact, Canon 4 provides that:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast doubt on the capacity to decide impartially any issue that may be involved in matters before the court.
> (C) A judge may serve as a member . . . of an organization . . . devoted to the improvement of the law, the legal system, or the administration of justice . . .

Because efficient resolution of attorney fee disputes serves to improve the legal system and the administration of justice, the committee believes that the judge may serve on the arbitration panel. However, the judge's service should not interfere with the proper performance of judicial duties and should not cast doubt on the judge's capacity to decide judicial matters impartially. This committee has previously opined that a full-time trial court judge should not teach a class which would require the judge to be away from the court during business hours for four to six hours per week (Informal Opinion 90-1) and should not serve as a volunteer for the Special Olympics if such service would require the judge to be absent from the court one day per week (Informal Opinion 89-11). In light of these opinions, the judge should ensure that arbitration panel service does not interfere with the timely performance of the judge's judicial duties. As stated in Canon 3, " [t]he judicial duties of a full-time judge take precedence over all other activities. "

The judge should determine, for each arbitration matter, whether service on the panel will cast doubt on the judge's ability to decide impartially matters which may come before the court. The judge should not serve if the disputed fees are related to a continuing judicial matter because the judge's participation on the arbitration panel may create a perceived perception of bias requiring disqualification in the judicial matter. This may be especially problematic in areas where there are a limited number of judges.

Nor should the judge serve on a particular panel if the judge has prior specific knowledge of the fees at issue in the dispute. For example, if the judge has ruled on the amount of attorneys' fees awarded in a civil case, the judge should not sit on an arbitration panel relating to those fees.

Finally, the judge should periodically review the arbitration service to ensure that it does not interfere with ethical obligations imposed by the Code, Informal Opinions 88-2, 88-4, 89-1 and 90-6.

INFORMAL OPINION 92-1
September 16, 1992

The Ethics Advisory Committee has been asked for its opinion as to whether active senior judges may serve as arbitrators for the American Arbitration Association (the "AAA"), and if so, whether their photographs and biographical sketches, along with the photographs and biographical sketches of other former judges, may be included in an AAA brochure describing and promoting a "Judicial Panel." Committee members were provided with a copy of the brochure in addition to the opinion request. According to the brochure, the AAA is a "public-service, not-for-profit organization offering a broad range of dispute resolution services."

APPLICABILITY OF CODE OF JUDICIAL CONDUCT
The Code of Judicial Conduct does not apply to former judges who are no longer involved in judicial service. However, active senior judges are included within the definition of "part-time judges" found in the Code's Compliance section:

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge.

Like other part-time judges, active senior judges are required to comply with all provisions of the Code except Canons 4B, 5D, 5E and 5F. None of those exceptions are at issue here.

SERVICE AS ARBITRATOR
As recognized in Informal Opinion 91-3, our Code, unlike the 1972 ABA Code of Judicial Conduct upon which it is based, does not contain a provision prohibiting judges from acting as arbitrators or mediators. In 91-3, the Committee concluded that a trial judge may serve on an arbitration panel established by the Utah State Bar to resolve attorney fee disputes, because participation on the panel serves to improve the legal system and the administration of justice. The Committee believes that participation in private, not-for-profit arbitration proceedings also improves the legal system and the administration of justice, and consequently, that active senior judges may serve as arbitrators.

AAA BROCHURE
The more difficult question is whether the Judicial Panel brochure may include the photographs and biographical sketches of the active senior judges, or whether such inclusion lends the prestige of the judicial office to advance the private interests of others, as prohibited by Canon 2B. In Informal Opinions 88-6 and 90-7, the Committee concluded that judges may teach CLE courses for public and non-profit entities without violating Canon 2B.

Despite the general grant of authority implied in those Opinions, care should be taken by the judge to ensure that the integrity of the judicial office is not compromised. For example, in Informal Opinion 90-8, the Committee stated that although a judge may write a foreword to a legal publication, the judge must take appropriate steps to ensure that neither the foreword's content nor the advertising and marketing scheme exploit the judicial office to advance the author's or publisher's interests, and in Informal Opinion 89-12, the Committee concluded that although a part-time justice court judge could own and operate a small business, the judge could not include any reference to the judge's judicial office in the business's advertisements.

The Judicial Panel brochure at issue does not indicate that some panel members are still occasionally active within the judiciary. Nor does it distinguish the active senior judges from the other panel members. Rather, it refers to all panel members generically as "former or retired justices or judges." The Committee therefore believes that the biographical sketches and photographs of the active senior judges may be included in the brochure, but takes no position on the other contents of the brochure.

INFORMAL OPINION 92-2
October 26, 1992

The Ethics Advisory Committee has been asked for its opinion as to whether a part-time justice court judge who is a full-time certified social worker may legally or ethically provide alcohol assessment/education services to persons who appear before the judge as defendants in DUI cases. The judge has also asked whether it is permissible to solicit alcohol assessment/education referrals from other courts within the state.

SCOPE OF OPINION
The Ethics Advisory Committee's role is limited to providing advisory interpretations of the Code of Judicial Conduct Code of Judicial Administration Rule 3-109(l). It cannot advise a judge

whether a proposed action is legal or illegal. Hence, this opinion is limited to the ethical considerations raised in the request.

PROVISION OF SERVICES TO PERSONS WHO APPEAR BEFORE THE JUDGE
Part-time judges are exempt from several of the Canon 5 restrictions on extra-judicial activities. However, Canon 5C is not among them. Canon 5C(l) provides that judges "should refrain from

financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves." The practice of referring DUI defendants to oneself for assessment and education violates each of the quoted 5C(l) prohibitions.

In addition, Canons 1 and 2 require judges to uphold the integrity and independence of the judiciary, avoid impropriety and the appearance of impropriety in all activities, exhibit conduct which promotes public confidence in the integrity and impartiality of the judiciary, and exercise judicial conduct and judgment free from the influence of family, social or other (including financial) relationships. Canon 6 provides that a judge may not receive compensation for extra-judicial activities that give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety. A convicted defendant ordered to appear before the judge for alcohol assessment and education may perceive that the judge's role in the judicial proceedings was influenced by the judge's financial self-interest. A situation which allows the formation of such a perception violates Canons 1, 2 and 6.

SOLICITATION OF REFERRALS FROM OTHER COURTS
In Informal Opinion 89-12, this Committee, relying on Canon 2B's prohibition against "lending the prestige of the judicial office to advance the private interests of others," opined that it would be inappropriate for a part-time justice court judge to include any reference to the judge's judicial office in the advertisements of a business partly owned by the judge. The instant opinion request does not disclose whether the judge's full-time occupation is conducted alone or in conjunction with others. If it is the latter, 89-12 resolves the question. Even if it is the former, the Committee believes that the Canon 5C(l) prohibition against "exploit[ing] the judicial position" forbids the practice.

The only remaining question is whether the judge may solicit referrals without reference to the judicial office. In resolving this question, the Committee makes two assumptions. First, most of the judges solicited would know that the judge is a judge, even in the absence of any reference to the judicial office within the solicitation. Second, judges who have jurisdiction to hear de novo matters from the judge's court would be included in the solicitation process. Based on these assumptions, the Committee believes that the proposed solicitations cannot be made without exploiting the judicial position, and that the practice is therefore prohibited by the Code.

INFORMAL OPINION 92-3
November 17, 1992

The Ethics Advisory Committee has been asked for its opinion as to whether a trial judge must be disqualified from all cases in which the law firm that employs the judge's father in an "of counsel" capacity represents a party to the case, if disqualification is not required in all such cases, the judge has asked whether the judge should disclose the relationship to the parties and

counsel, and if such disclosure is advisable, the judge has asked the Committee to provide guidance in drafting the disclosure notice. According to the opinion request, the judge's father receives only a salary and deferred compensation, is not currently a shareholder, partner, officer or director of the firm, and has no capital interest in the firm.

Canon 3C provides, in pertinent part, as follows:

> C. Disqualification.
> (1) Disqualification must be entered in a proceeding by any judge whose impartiality might reasonably be questioned, including but not limited to instances where:
> . . .
>
> (d) The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> . . .
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .

In Regional Sales Agency v. Reichert, 830 P.2d 252 (Utah 1992), the Supreme Court concluded that a judge's relative within the third degree of relationship has an "interest that could be substantially affected by the outcome" in every situation where a judge sits on a case in which the relative is an equity participant in a firm that represents a party. Although Regional Sales Agency clearly involved relatives who were equity participants, the Supreme Court noted that to the degree that a "significant proportion" of a non-equity participant's salary depended on factors similar to those used in fixing partners' or shareholders' salaries, disqualification might nevertheless be required by the Code. Id. at 258.

In the instant matter, the judge's father is "of counsel." As stated in Regional Sales Agency, the father's title is not dispositive. Rather, it is the method of establishing the father's compensation that drives the disqualification determination. If the father's salary and deferred compensation are fixed regardless of the firm's profits, disqualification is not required. On the other hand, if either the father's salary or deferred compensation is dependent on the firm's profits, and if the portion of the father's compensation that is dependent on profits is a "significant proportion" of the father's total compensation, disqualification is required in every case. There may be interests other than financial interests which could affect disqualification but which are not addressed in this opinion, and a judge should consider those interests in deciding whether or not to disqualify.

Canon 3D recognizes that even required disqualifications may be waived by the parties, and establishes the following process for submitting such waivers:

> A judge may, instead of withdrawing from the proceeding, disclose on the record or in writing the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree that the judge's relationship is immaterial or that the financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement of the parties must be entered on the record or, if written, signed by all the parties and included in the case file.

Even where disqualification is not required because the judge's relative is not an equity participant, the judge may wish to utilize Canon 3D to ensure that all parties are informed of the relationship between the judge and the relative. The Committee believes that a written disclosure could be sent to all parties indicating the nature of the judge's relationship to the attorney, the nature of the attorney's relationship to the firm, and the fact that disqualification is not required by the Code.

INFORMAL OPINION 93-1
March 15, 1993

The Ethics Advisory Committee has been asked for its opinion as to whether judges may continue as members of a professional organization in which, in addition to its other activities, has begun to publicly endorse candidates for partisan political office.

The request comes jointly from three judges, all long-time members of an organization which, during the 1992 general election campaign, publicly endorsed three candidates for political office on the basis of their commitment to certain issues of interest to the organization. The organization had not previously endorsed partisan political candidates. Of the three candidates who received the endorsements, two were candidates for national office and one was a candidate for state attorney general. Although the endorsements were voted upon by the organization's members, the three judges abstained from voting. The endorsements were printed in at least one major Utah newspaper, without mention of the judges' abstentions.

Although Canon 4C specifically allows judges to maintain membership in organizations devoted to the improvement of the law, the legal system, or the administration of justice, a judge's activities as a member of such organizations are governed by several Code provisions. Among them, Canon 7B(2) states that a judge should not publicly endorse a candidate for judicial office. Canon 2B provides that a judge should not lend the prestige of the judicial office to advance the private interests of others, and Canon 5B prohibits participation in activities that reflect adversely upon a judge's impartiality. Those Canons both prohibit a judge from personally endorsing, and from holding membership in an organization which endorses, candidates for partisan political office.

In Informal Opinion 88-2, the Committee was asked whether the Code allowed a judge to participate in an organization which had, as its stated purpose, the coordination of policies and procedures among various governmental agencies dealing with child abuse -- including the courts. The organization had taken a public position against proposed legislation establishing criminal penalties for false reporting of child abuse. The Committee determined that because the judge's impartiality might be compromised by virtue of the organization's position, the Code barred continued participation in the organization. Moreover, the Committee stated: ". . . the appearance of impropriety would not be cured by the judge's recusal from the organization's discussion of or vote on the issue or its lobbying activities."

The Committee believes that judges may not maintain their membership in an organization that endorses candidates for partisan political office, and that abstinence from the endorsement process, even coupled with public notice of the abstinence, does not clear the way for continued membership.

INFORMAL OPINION NO. 94-1
April 26, 1994

The Ethics Advisory Committee has been asked for its opinion as to whether a state trial judge may serve as a mediator in the federal court's court-annexed alternative dispute resolution pilot program. The pilot program is established by Rule 212 of the Rules of Practice of the United States District Court for the District of Utah. Under that rule, civil matters may be assigned for mediation pursuant to stipulation or court order. The mediator "serve[s] as a neutral facilitator, assisting the parties in defining and narrowing the issues and encouraging each party to examine the dispute from various perspectives, without undertaking to decide any issue, make findings of fact, or impose any agreement." Rule 212(j)(4).

This Committee recently noted, in Informal Opinions 91-3 and 92-1, that Utah's then existing Code of Judicial Conduct did not prohibit judges from serving as arbitrators or mediators. In Informal Opinion 91-3, the Committee concluded that a trial judge may serve on a fee arbitration panel established by the Utah State Bar, and in Informal Opinion 92-1, the Committee concluded that active senior judges may sit as arbitrators on the American Arbitration Association's Judicial Panel. In both instances, the Committee determined that service as an arbitrator in the situation presented served to improve the legal system and the administration of justice. Here too, the judge's participation in the federal ADR program will serve to improve the legal system and the administration of justice.

On January 1, 1994, the Utah Supreme Court adopted a new Code of Judicial Conduct based on the ABA's 1990 Model Code of Judicial Conduct. Although the new Code's Canon 4F prohibits a judge from "act[ing] as an arbitrator or mediator or otherwise perform[ing] judicial functions in a private capacity unless expressly authorized by law," the Committee does not regard

uncompensated participation in court annexed arbitration and mediation programs to constitute action "in a private capacity."

As noted in Informal Opinion 91-3, the judge should ensure that service does not interfere with the judge's full-time judicial duties and does not cast doubt on the judge's ability to impartially decide matters that may come before the judge's court.

INFORMAL OPINION NO. 94-2
April 26, 1994

The Ethics Advisory Committee has been asked for its opinion as to whether judges may serve as members of the Judiciary Subcommittee of the Utah Substance Abuse Coordinating Council. Subsequent to the receipt of the opinion requests, the Utah Legislature changed the name of the Council to the Utah Substance Abuse and Anti-Violence Coordinating Council ("USAAV").

USAAV is a legislatively created governmental agency which meets at least quarterly to provide leadership and generate unity for Utah's ongoing efforts to combat substance abuse and community violence; foster the coordination of statewide substance abuse and anti-violence policies; facilitate planning for a balanced continuum of substance abuse and community violence prevention, treatment, and criminal justice services; promote collaboration and mutually beneficial public and private partnerships; and coordinate recommendations made by its subcommittees (the Criminal Justice Subcommittee, the Prevention Subcommittee, the Treatment Subcommittee, the Judiciary Subcommittee, and the Anti-Violence Subcommittee). Utah Code Ann. § 63-25-10 and § 63-25-11. By statute, each subcommittee is charged with 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. Utah Code Ann. § 63-25-13. USAAV reports annually to the governor and the Legislature.

The Judiciary Subcommittee is comprised of 20 members, among them, three state trial judges, one state appellate judge, one justice court judge, and five non-judge court employees -- all appointed by the Judicial Council. Other Judiciary Subcommittee members are designated by specified governmental agencies or the Utah State Bar. The chair of the Judiciary Subcommittee sits on USAAV, and four additional members of the Judiciary Subcommittee sit on the other subcommittees, one member for each subcommittee.

The Judiciary Subcommittee has adopted the following mission statement:

> The mission of the Judiciary Subcommittee of the Utah Substance Abuse and Anti-Violence Coordinating Council is to provide a forum for education, coordination, and communication on violence and drug-related issues that affect

the total judicial system; and to enhance multidisciplinary cooperation while preserving judicial independence.

Canon 4C(2) of the Code of Judicial Conduct provides in part: "A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice."

To the extent the Judiciary Subcommittee's activities are limited to those three areas, judges may serve. However, where the activities of the Judiciary Subcommittee involve issues of fact or policy on matters unrelated to the improvement of the law, the legal system or the administration of justice, the Code bars participation. Informal Opinion 88-2.

The Subcommittee's statutory mandates are very broadly written -- it must recommend statewide substance abuse and anti-violence policies; develop priorities for programs to combat substance abuse and community violence; and recommend executive, legislative, and judicial action based upon policy needs and identified gaps in the continuum of services. Those purposes go far beyond the permissible purposes identified by the Code. The Subcommittee's mission statement, on the other hand, is more narrowly tailored and restricts, at least in principle, the Subcommittee's actions to issues that affect the judicial system. 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. If that cannot be accomplished, judges may not serve on the Subcommittee.

Because the Committee believes that none of the other four subcommittees or USAAV will be able to narrowly tailor their respective purposes to the three areas allowed by the Code, judges should not sit on any of the other subcommittees or USAAV. Because each governmental committee and commission has unique functions and mandates, the Committee expresses no opinion as to the general propriety of serving on other committees and commissions. Each must be examined independently to determine whether service is appropriate under the Code.

INFORMAL OPINION NO. 94-3
April 26, 1994

A justice court judge has asked the Ethics Advisory Committee for its opinion as to when it is appropriate for a judge to receive compensation for the performance of a marriage ceremony.

Canon 4H(1)(c) of the Code of Judicial Conduct provides: "A judge should not receive compensation for performing a marriage ceremony at the court during regular court hours. A judge may receive compensation for performing a marriage ceremony during non-court hours." Although the Code only expressly prohibits receiving compensation for ceremonies performed at the court during regular court hours, the Committee believes that it is equally inappropriate for a

judge to receive compensation for a ceremony performed at some other location during regular court hours. Canon 3A states in part: "[t]he judicial duties of a full-time judge take precedence over all the judge's other activities."[1] So must the judicial duties of a part-time judge take precedence over the part-time judge's other activities during that period of time in which the part-time judge is regularly scheduled to conduct court business.

For state court judges, the Committee believes that regular court hours means 8:00 a.m. to 5:00 p.m.. Monday through Friday. For justice court judges, regular court hours are defined by Code of Judicial Administration Rule 9-105, which requires every justice court to establish, and post in a conspicuous location at the court site, a "regular schedule of court hours." The Committee believes that each justice court's established schedule constitutes the regular court hours for that court's judge.

Finally, the Committee believes that it is inappropriate for a judge to receive compensation for the performance of a marriage ceremony at the court location, regardless of whether the ceremony is performed during regular court hours.

[1] The Canon identifies adjudicative responsibilities and administrative responsibilities as "judicial duties, and disciplinary responsibilities."

INFORMAL OPINION NO. 94-4
DECEMBER 2, 1994

A judge has asked the Ethics Advisory Committee for its opinion as to whether a judge must enter a disqualification in cases in which a guardian ad litem who had previously shared office space with the judge at a time when both were practicing lawyers appears before the judge.

At one time in their careers as practicing lawyers, both the judge and the guardian were engaged in separate private law practices, although they were tenants in the same shared office arrangement. During that arrangement, the judge and the guardian used letterhead which could have led others to believe that the arrangement was more formal than mere office sharing. In addition, for a short period, both were serving as guardians ad litem, though they did not associate on any guardian ad litem cases. Since the time of the judge's appointment nearly two years ago, the guardian has not appeared in the judge's court.

Cannon 3E(1) provides, in part, that a judge shall enter a disqualification in a proceeding in which the judge had practiced law with a lawyer who had served in the matter at the time of their association. Neither the ABA Model Code nor Utah's Code indicate whether an arrangement which consists of lawyers who merely share office space constitutes the practice of law with the other lawyers in the arrangement, but the Committee believes that something more is required. However, because the judge and the guardian used letterhead which may have led others to believe that a more formal relationship existed, the Committee will address the request as though the judge had practiced law with the guardian.

The simple fact that a judge and a lawyer had previously practiced law together does not require the judge to disqualify in every case in which the lawyer now appears before the judge. As stated by Professor Shaman:

> Disqualification is not required where the judge merely had a prior professional relationship with an attorney presently appearing before the judge. Rather, the association between the judge and the attorney must have occurred during the attorney's involvement with a case now pending before the judge. A policy requiring a judge to disqualify simply because he or she had a prior professional relationship with an attorney would be particularly burdensome on the judiciary.

Jeffrey M. Shaman, Steven Lubet & James A. Alfini, Judicial Conduct and Ethics § 5.17 (1990).

Canon 3E(1) also requires disqualification where a judge has a personal bias or prejudice concerning a party's lawyer. Such a bias may either be in favor of, or in opposition to, the lawyer. The Committee has been informed by the judge that no bias, favorable or unfavorable, exists toward the guardian here.

Finally, the Code requires disqualification in any situation that the judge's impartiality "might reasonably be questioned." The general test as to whether a judge's impartiality might reasonably be questioned is whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge would find that there is a reasonable basis for questioning the judge's impartiality. Informal Op. 88-3 (citing SCA Servs., Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977)). Where the guardian and the judge conducted independent law practices, although sharing office space for a short period of time, where the guardian has not appeared in the judge's court for an extended period of time, and where the guardian will not appear before the judge on a case that the guardian handled while the guardian and the judge shared office space, it is unlikely that a person of ordinary prudence would form a reasonable basis for questioning the judge's impartiality.

The Committee believes that the judge need not disqualify from cases in which the guardian appears other than those cases which the guardian was involved in at the time the guardian and the judge shared office space.

INFORMAL OPINION NO. 94-5
DECEMBER 2, 1994

The Ethics Advisory Committee has been asked for its opinion on the "manner and extent to which judges may respond to inquiries from judicial nominating commissions" and "the propriety of sitting judges recruiting applicants for judicial vacancies." Because specific factual situations have not been provided, this opinion provides only general instruction.

Both issues are controlled by Canon 2B, which states:

> A judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

Although not formally adopted in Utah, the Commentary to Canon 2B of the 1990 ABA Revised Model Code includes the following cogent statement:

"Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship."

When asked whether a judge could respond to a request from the governor to write a recommendation concerning the judicial appointment of an attorney with whom the judge was familiar, the California Judges Association's Committee on Judicial Ethics, in Opinion No. 40, noted that former Canon 4 also allows the judge to supply requested recommendations:

> Under [Canon 4], a judge is encouraged to write and otherwise contribute to improvements in the law and the administration of justice, to the extent that time permits. The writing of such a letter would not cast doubt on the judge's impartiality in hearing any issue, and it is therefore an appropriate quasi-judicial activity. The letter would offer specific knowledge of the personal and professional qualities pertinent to performance as a judge. The judge is thus uniquely able to contribute insight to the judicial selection process and thereby to the administration of justice.

Consistent with the foregoing, the Committee believes that judges may provide recommendations upon request. Any information provided by a judge should be an honest assessment of the candidate, limiting the response to the judge's knowledge of the candidate's qualifications or lack thereof.

The Committee finds nothing objectionable about a judge privately approaching an individual and requesting that the individual consider applying for judicial office.

INFORMAL OPINION NO. 94-6
January 25, 1995

The Ethics Advisory Committee has been asked for its opinion as to whether a judge whose

spouse serves as an assistant attorney general must disqualify from cases in which another attorney from the Attorney General's Office appears before the judge.

The Attorney General's Office consists of nearly 150 attorneys with offices throughout the state. The judge's spouse is assigned to one of approximately 15 divisions. The spouse's division is further separated into three sections. Attorneys occasionally transfer from one section to another, or from one division to another. In addition to representing other state agencies, certain lawyers in the Attorney General's Office have supervisory authority over the judge's spouse. Unlike the compensation structure in a private law firm where an attorney's financial remuneration is often affected by the outcome of a case handled by another member of the firm, no such connection exists between the spouse's salary and the outcome of a case handled by another member of the Attorney General's Office. See Utah Code Ann. § 67-8-3(3) (1993) (outlining criteria to determine salary of career status attorneys).

Disqualification questions are governed by Canon 3E. A portion of that Canon provides that a judge shall disqualify in a proceeding in which the judge's spouse is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding. To the extent a judge's spouse's salary may be affected by the outcome of a proceeding before the judge, it constitutes such an interest. Regional Sales Agency v. Reichert, 830 P.2d 252 (Utah 1992). Here, however, because the spouse's salary will not be affected by the outcome of any proceeding before the judge in which another assistant attorney general may appear, there is no pecuniary interest that would require disqualification.

More generally, Canon 3E requires disqualification where the judge's impartiality might reasonably be questioned. The test for whether a judge's impartiality might reasonably be questioned is whether a person of ordinary prudence knowing all the facts known to the judge would find a reasonable basis for questioning impartiality. Informal Opinions 88-3 and 89-2.

In Opinion 88-3, this Committee determined that a judge, whose spouse was employed by the legal defender's office, must disqualify from all cases in which any legal defender from that office appeared. However, the Opinion was based on the conclusion that the legal defender's office in question was more akin to a small law firm than a large government agency. The Opinion recognized that “some government agencies, by virtue of the number of attorneys which they employ, do not have the same opportunity for association and information sharing that exists in a small office.”

In Opinion 99-2, this Committee determined that a judge need not disqualify from every case brought by a county attorney's office which employed the judge's daughter as a part-time secretary. However, disqualification was required if the daughter participated in the case in a substantive manner or if the daughter's salary would be affected by the outcome of the case.

Here, due to the large number of attorneys employed, the geographic separation, and the divisional organization, the Committee does not believe that the Canon requires disqualification

in every case in which any assistant attorney general appears. In particular cases where the association of the spouse and the responsible attorney is known by the judge to be close or where the judge otherwise believes partiality or the appearance of partiality may exist, the judge is required to disqualify. In addition, in order to avoid any question about the judge's impartiality, the judge in every case where the Attorney General's Office represents a party, shall disclose the spouse's employment, and any other relevant facts and circumstances, and allow the parties to take any action they deem appropriate.

INFORMAL OPINION NO. 95-1
January 25, 1995

The Committee has been asked for its opinion as to whether service on the Board of Child and Family Services by an active senior judge violates Canon 4C(2).

The requesting judge has been appointed to the Board of Child and Family Services ("Board"), a statutorily created policy board of the Division of Family Services. The judge indicates that the Board has responsibility to carry out both the mandates of a consent decree entered in a federal lawsuit challenging many aspects of the state's child welfare system and the mandates of the Child Welfare Reform Act, a comprehensive piece of child welfare legislation. The judge represents that the Board will be instrumental in recommending legislative changes in order to improve the child welfare laws and the administration of justice regarding child welfare issues. The judge also represents that the Board will be involved in the development of policies that will assist the several agencies involved in child welfare issues, both within and without the judicial branch, in carrying out their duties under the consent decree and the Child Welfare Reform Act, and that such assistance will improve the law and the administration of justice. Finally, the judge notes that, as an active senior judge who sits only with the Court of Appeals, the judge is easily able to avoid any cases that involve issues concerning the Division of Family Services.

Active senior judges are required to comply with Canon 4C(2), which states, in pertinent part: “A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice.”

The Board is clearly a governmental committee or commission. The issue before this Committee is, therefore, whether the Board is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. In his opinion request, the judge has not indicated anything that would lead the Committee to conclude that the Board is exceeding, or will exceed, the allowable issues set forth in Canon 4C(2). To the contrary, the judge has provided the Committee with a detailed explanation of how the Board's actions will improve the law and the administration of justice. Consequently, based on the information conveyed to the committee by the requesting judge, service on the Board by the judge does not appear to violate the Code.

Although service on the Board is allowed, the judge must decline to hear any case in which the Board, any Board member, or the Division of Family Services is a party or has a pecuniary or policy interest. See Canon 3E(1)(a)&(c). Moreover, where by reason of service on the Board there would be the appearance of impropriety, the judge must disqualify. The Committee notes that it is significantly less burdensome for an active senior judge hearing only appellate cases, who can select the cases to which he or she will be assigned, to avoid cases in this manner than it would be for a full-time judge.

Because each governmental committee and commission has unique functions and mandates, the Committee expresses no opinion as to the general propriety of serving on other committees and commissions. Each must be examined independently to determine whether service is appropriate under the Code. Informal Opinion 94-2.

INFORMAL OPINION NO. 95-2
August 9, 1995

The Ethics Advisory Committee has been asked for its opinion as to whether an un-nominated applicant for a judicial office may participate in planning, and thereafter attending, a political fund-raising dinner. This inquiry requires that we first examine at what stage in the selection process an applicant for judicial office becomes a "candidate," and therefore is subject to the provisions of Canon 5.

The provisions of Canon 5 apply to judicial candidates. The "Terminology" section of the Code of Judicial Conduct, which precedes the several Canons, defines a [c]andidate [as] a non-judge seeking selection for judicial office, or a judge seeking selection for or retention in judicial or non-judicial office." Under this broad definition, an applicant for judicial office would be considered a candidate for purposes of applying the Code of Judicial Conduct. However, the definition goes on to state that "[a] person becomes a 'candidate' as soon as the person makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support, whichever comes first."

Unfortunately, this three-part test for determining when a person becomes a judicial "candidate" bears little relationship to the actual process employed in Utah for selecting judges for courts of record. First, an applicant need not publicly announce his or her candidacy. In fact, such an announcement would be somewhat unusual given that "[t]he policy in Utah is to maintain the confidentiality of all applicants and . . . [o]nly the names of the nominees submitted to the Governor are made public by the commission." (Manual of Procedures for Judicial Nominating Commissions).

Second, an applicant for judicial office, other than at the Justice Court level, does not "file as a candidate with the election or appointment authority." Instead, an applicant files his or her

candidacy with the Administrative Office of the Courts, which, after a pre-screening process, may send the application to the Judicial Nominating Commission for further consideration. The Commission's authority is limited to nominating judicial candidates. Only the Governor has "appointment authority." Therefore, because an applicant for judicial office in a court of record does not file his or her candidacy with the Governor, it cannot be said that such an applicant ever "files as a candidate with appointment authority."

Third, although Canon 5C allows a candidate for judicial office seeking retention or reappointment to solicit contributions or financial support in limited circumstances, there is no corresponding rule applicable to persons who seek an initial appointment to a judicial office. Simply put, defining when an applicant becomes a candidate cannot realistically be based on whether the person "authorizes solicitation or acceptance of contributions or support," because a person seeking appointment to a judicial office in a court of record cannot participate in such activities as part of the selection process.

Therefore, it is at best unclear at what stage during the selection process a mere applicant for a judgeship on a court of record becomes a "candidate" for purposes of Canon 5, a matter which should, no doubt, be clarified by amendment to the Canon. However, even if the Committee were to assume that the individual in the instant case were a "candidate" upon submission of the application, it would conclude that this candidate's intended conduct does not violate the express provisions of Canon 5.

The candidate intends to assist in the organization of a political fund-raising dinner on behalf of an elected official and then attend the same. Significantly, the elected official is not on the nominating Commission, is not the Governor, is not a State Senator, and thus has no role in the Judicial selection process. Canon 5A states, in pertinent part: "A candidate for selection by a judicial nominating commission shall not engage in political activities that would jeopardize the confidence of the public or of government officials in the impartiality of the judicial branch of government."[1]

While it is hard to imagine how the conduct of one individual, who is not yet a member of the judiciary, could ever call into question the impartiality of an entire branch of government, suffice it to say that the intended conduct of this candidate for judicial office does not "jeopardize the confidence of the public or of government officials in the impartiality of the judicial branch of government."

Moreover, we note that the type of conduct in issue is dealt with later in Canon 5, when it is stated that "a candidate for judicial office who has been confirmed by the Senate shall not . . . attend political gatherings or purchase tickets for political party dinners or other functions . . . ." Canon 5B(3). However, the aforementioned proscription, by inference, does not apply to a candidate for judicial office who has neither been nominated by the Commission nor appointed by the Governor. In fact, the proscriptions outlined in Canon 5B apply only after a candidate has been nominated, appointed, and confirmed.

While the Code of Judicial Conduct does not expressly prohibit a candidate for judicial office from participating, and thereafter attending, a political fund- raising dinner, the Committee wishes to express its concern that allowing judicial candidates to participate in this type of activity, especially as concerns certain political campaigns, may give the candidate an unfair advantage in the selection process vis-a-vis other candidates. Furthermore, this advantage is likely to be accentuated in smaller communities where candidates have greater relative visibility or in the case of candidates for justice court positions where selection is made directly by elected officials. Moreover, who the fund-raising activity is intended to support is critical. For example, a candidate's active participation in a fund-raiser for the Governor, or a member of the selection committee, would be highly problematic.

The nature of a candidate's participation is yet another relevant factor. Participation behind the scenes is less likely to raise questions than widely-known participation in political fund-raising activities.

Notwithstanding the Committee's concerns regarding the propriety of a candidate, or even an applicant, actively participating in a political fund-raising dinner, it cannot be said that such conduct is proscribed by the Canons. Canon 5 establishes the permissible limits of a candidate's involvement in political fund-raising activities. The Committee will not substitute its own judgment on the appropriateness of particular conduct for those expressed in the Canons. Therefore, it is the opinion of the Committee that even if an un-nominated applicant for a judicial office were considered a "candidate" for purposes of Canon 5, the candidate would still be permitted to organize a political fund-raising dinner at least until the time the candidate is nominated, and would be able to attend up to the time the candidate has been appointed and confirmed.

[1] Canon 5A also states that: “A candidate for selection to a judicial office shall not: . . . (3) seek support or invite opposition to the candidacy because of membership in a political party.” It is the opinion of the Committee that a candidate for judicial office does not violate this provision by mere association with a member of a political party. Thus, Canon 5A (3) does not prohibit a candidate for judicial office from participating in a political fund-raising dinner. Instead, Canon 5A(3) proscribes affirmative conduct by a candidate that others could construe as directly soliciting support or inviting opposition to his or her candidacy based on party membership. For example, Canon 5A(3) prohibits a candidate for judicial office from publicly announcing that, "All good Communists should support my candidacy for judicial office." Whether such a statement actually engenders support or invites opposition is largely dependent on the political philosophy of the audience. However, regardless of the result, conduct of this sort is expressly prohibited by Canon 5A (3).

INFORMAL OPINION NO. 95-3
August 10, 1995

The Ethics Advisory Committee has been asked for its opinion as to whether a judge may continue to serve as a member of the Board of Regents.

We begin our inquiry by exploring the nature of the Board of Regents and its relationship to the State. The State Board of Regents is endowed with "the power to govern the state system of higher education consistent with state law" and, to that end, "is vested with the control, management, and supervision of [the nine state colleges and universities]." Utah Code Ann. §§ 53B-1-101(2), -103(2) (1994). The Governor of the State, with the consent of the Senate, appoints fifteen of the Board's sixteen members. Utah Code Ann. § 53B-1-104(1) (1994). In addition, the Utah Governmental Immunity Act defines the term "State" to include "any office, department, agency, authority, commission, board, institution, hospital, university, or other instrumentality of the state." Utah Code Ann. § 63-30-2(9) (1993). Accordingly, a judge's service on the Board of Regents constitutes governmental service, and therefore, is governed by Canon 4C(2) & (3), Utah Code of Judicial Conduct.[1]

A judge's service on the Board of Regents is not permissible under Canon 4C(2), which prohibits a judge from "accept[ing] appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice." Id. The Board of Regents is concerned with policy issues pertaining to the governance of higher education, rather than with the "improvement of the law, the legal system or the administration of justice."

Canon 4C(3) also precludes a judge from serving on the Board of Regents. Canon 4C(3) provides, in part, that subject to specific limitations,

"[a] judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency, which may include a constitution revision commission, devoted to the improvement of the law, the legal system or the administration of justice, or of an educational, religious, charitable, fraternal or civil organization not conducted for profit . . . ."

At first blush, it may appear that service is permissible under Canon 4C(3) because the Board of Regents could be considered an educational or civil organization. However, a closer analysis of the language of the Canon reveals otherwise. The first part of Canon 4C(3) parallels Canon 4C(2) in permitting a judge to serve specific roles on any "organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice." Id. The second part of Canon 4C(3) permits a judge to serve in specified capacities on "an educational, religious, charitable, fraternal or civil organization not conducted for profit." Id. Significantly, the phrase "or governmental agency" is not carried over to the second part of the Canon. Simply stated, this part of the Code envisions two broad categories: private organizations and governmental agencies. If an entity's focus is on law, then a judge may serve whether the entity is a governmental agency or a private organization. Absent such a legal nexus, a judge may not serve in other branches of government. However, a judge's association in nongovernmental organizations is less restrictive. Under Canon 4C(3), subject to specific limitations, "[a] judge may serve [on] . . . an educational, religious, charitable, fraternal or civic organization not conducted for profit," with no requirement of a connection to matters of law.

Although the Board of Regents addresses both civic and educational issues, the Board is not a nongovernmental educational or civic organization. Instead, the Board of Regents is a governmental entity, and as such a judge's membership on this governmental body is precluded because the Board of Regents has a mission other than "the improvement of the law, the legal system or the administration of justice." Id.

Any other interpretation of Canon 4C(3) would render meaningless the separate analysis contained in Canons 4C(2) & (3) and undercut the restrictions imposed by Canon 4C(2). If we were to conclude that the Board of Regents, despite its governmental character, were an "organization" for purposes of Canon 4C(3), the exceptions would soon swallow the rule. Simply put, a judge would be permitted to serve in any governmental "organization" so long as that organization was either "educational, religious, charitable, fraternal or civic: and conducted "not for profit."[2]

We conclude that the Board of Regents is a governmental body not "devoted to the improvement of the law, the legal system or the administration of justice," as that concept is used in the Code. We also conclude it is not an educational or civic "organization" for purposes of Canon 4C(3). Accordingly, it is the Committee's opinion that Canon 4C(2) & (3) preclude a judge from serving on the Board of Regents.

Members of the Committee are divided on the question of whether judges ought to be able to serve the citizens of this State in nonjudicial governmental capacities such as by serving on the Board of Regents. A majority agree, however, that the Code of Judicial Conduct, as it has been promulgated by Utah Supreme Court, does not permit such extra-judicial governmental service unless the particular agency's mission is focused on the law.

* * * *

One Committee member, while joining in the foregoing opinion, also notes as follows:

A judge's service on the Board of Regents may also be prohibited by Article V, section 1, of the Utah Constitution, which states:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The Board of Regents, all but one of whose members are appointed by the Governor and confirmed by the Senate, exercises executive powers over state institutions. As such, I believe that if a judge, who also must be appointed by the Governor and confirmed by the Senate, is a member of the Board of Regents, he or she may be empowered to exercise both judicial and executive functions in violation of the Utah Constitution. I recognize that the role of this

Committee is to offer its opinion concerning the ethical propriety of judicial conduct. See Canon 2 (stating "[a] judge shall avoid impropriety and the appearance of impropriety in all activities.").

Valuable services have been rendered in the past to states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges might be reassessed however in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

Model Code of Jud. Conduct, Canon 5G commentary (quoted in Jeffrey M. Shaman, et al, Judicial Conduct and Ethics 259-60 n.30 (1990). But see Doing Utah Justice, Final Report (Commission on Justice in the Twenty First Century), Dec. 1991, at 47 (noting that judges should be encouraged to be more involved in government and community matters).

[1] The question of a judge's governmental service outside the judiciary presents a problematic policy question. On the one hand, the judiciary represents a reservoir of talented and committed individuals whose very status as judges may enhance their ability to serve. On the other hand, nonjudicial service tends to erode the appearance of impartiality which is essential to judging itself. The official commentary to the model code provision identical to our Canon 4C(2) elaborates on this dilemma.

[2] Perhaps the broad definition of "civic" most clearly illustrates the problems inherent in including the Board of Regents, a governmental body, as an educational or civic organization for purposes of Canon 4. A "civic" organization is concerned with or contributory to general welfare and the betterment of public life for the citizenry of a community or enhancement of its facilities; esp: devoted to improving health, education, safety, recreation, and morale of the general public through nonpolitical means. . . . [or] essential to or obligatory on citizens in connection with the administration of laws and regulations: relating to government. Webster's Third New International Dictionary 412 (1986). Thus, if we were to conclude that the Board of Regents, or any other governmental body, could be considered a "civic organization" for purposes of Canon 4C(3), then 4C(2) would be rendered meaningless as all governmental bodies are, by their very definition, civic in nature--each is designed to promote the general welfare of the citizenry of a community. The scheme of Canon 4C makes sense only if the word "organization" is viewed as contrasting with, rather than as including the term "governmental agency."

INFORMAL OPINION 96-1
June 21, 1996

The Ethics Advisory Committee has been asked for its opinion as to whether a judge of a full-time justice court, as designated through the Judicial Council's certification process, is therefore a full-time justice court judge prohibited from the practice of law under Canon 4G. The request is a general one and did not address a specific fact situation.

We note initially that the prohibition on law practice by full-time justice court judges occurs by necessary implication of part A of the Code's Applicability section, which exempts part-time justice court judges from, inter alia, compliance with Canon 4G. The Code does not define

"part-time" or "full-time." This appears to be deliberate, as an earlier version of the Code as adopted in Utah defined "part-time judge" as a "judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge." See Utah Code of Judicial Conduct, as adopted March 1, 1974, and revised May 18, 1987. The deletion of a definition does not appear, however, to have been intended to work a substantive change. Thus, in explaining the current Code when it was distributed for comment prior to adoption by the Supreme Court, the Ethics Advisory Committee noted that the prior "definition is broad enough to include both part-time justice court judges and active senior judges. The Ethics Advisory Committee believes that compliance issues for the two types of judges should be dealt with independently." The Committee went on to note that "[the present Code] exempts part-time justice court judges from the same provisions" they had been exempted from under the former version of the Code. Thus, the Committee believes the definition provided in the old Code is at least somewhat instructive in answering the question presented.

The Utah Judicial Council certifies justice courts within the state. The Council has created four classes of justice courts, three classes of which require the court to be open less than eight hours a day, while a fourth class is required to be open "full-time." Judges of full-time justice courts are specifically designated as "full-time" by the Judicial Council's certification standards. The Committee is of the opinion that when the Judicial Council's certification designation states that a judge is full-time for purposes of court certification standards, the judge is presumptively full-time for purposes of the Code of Judicial Conduct.

A judge might rebut this presumption by demonstrating unique circumstances such as the following: the judge does not receive a salary commensurate with full-time professional work; the judge, by contract or in practice, performs substantially less than forty hours in judicial service per week; the employing entity, by contract or in practice, permits or anticipates that the judge will have other employment; or the employing entity does not regard the judicial employment as full-time. Nonetheless, because of the duty to avoid even the appearance of impropriety, a judge of a full-time justice court must resolve any doubt in favor of adherence to Canon 4G.

INFORMAL OPINION NO. 96-2
June 26, 1996

The Ethics Advisory Committee has been asked the following question: Does Canon 3E of the Code of Judicial Conduct require disqualification of a trial judge in every case where a court employee or a member of the employee's family is a party? Resolution of this question requires review of two Canons and a general test applicable to the Canons.

Canon 3E requires judicial disqualification when "the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or

personal knowledge of disputed evidentiary facts concerning the proceeding." Canon 2B states that a judge "shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment." These Canons require a judge to closely scrutinize his or her involvement in a court proceeding when the judge is familiar with a participant. The scrutiny is not limited to whether the judge feels that he or she could be impartial. The judge must also objectively consider the perceptions of others.

As we have often stated, the Canons prohibit not only actual instances of bias and improper influences, but the perceptions of such. In Informal Opinion No. 88-3 we stated: "the general test applied to determine whether a judge's impartiality might reasonably be questioned is whether a person of ordinary prudence in the judge's position knowing all of the facts known to the judge would find that there is a reasonable basis for questioning the judge's impartiality." In determining the potential perceptions of others, this Committee looks to the opinions of other jurisdictions to see how similar issues have been treated.

The Oregon Judicial Conduct Committee, in its Opinion 89-6, stated that a judge may not hear cases involving the judge's court reporter's spouse. The spouse was a police officer and appeared occasionally as a prosecution witness. The Oregon Committee found that the police officer's appearance before the judge would create the appearance of impropriety, which must be avoided.

This Committee believes that the Oregon opinion provides a good reference point. The appearance of impropriety noted in that opinion is more pronounced when a court employee is involved in a court proceeding. The Committee is therefore of the opinion that, absent emergency circumstances, a judge should not adjudicate or participate in any proceedings involving employees of the judge's judicial district. It is possible that a judge may have little or no contact with certain district employees. However, an observer may presume that such contact occurs, and therefore the requirement of disqualification must extend to all cases where a district employee is a party.

As for other members of the employee's family, the requirement of disqualification should extend at least to the employee's spouse, as stated by the Oregon committee. However, disqualification need not extend to all relatives of court employees. The Alabama Judicial Inquiry Commission, in its Opinion 89-352, stated that a judge is not disqualified from hearing a case in which one of the parties was a third cousin to the husband of the judge's secretary. The relationship in that situation was not sufficiently close to create even an appearance of impropriety.

In order to have future predictability, and to avoid having to resolve each relationship on a case-by-case basis, the Committee believes that automatic disqualification should extend to proceedings where an employee's immediate family member, or other family member who resides in the employee's household, is a party to the action. This requirement is similar to that found in Canon 3E(1)(c), which requires judicial disqualification when a member of the judge's immediate family or household has an interest in the proceeding.

In situations involving relatives outside of the employee's immediate family or household, disqualification may still be required in some instances. A judge may, for instance, have a close working relationship with an employee whose cousin, who lives next door to the employee and with whom the employee has a close relationship, is a party in a case. Recusal may be necessary in such a situation to avoid the appearance of impropriety.

In conclusion, it is the Committee's opinion that the Code requires a trial judge to disqualify himself or herself from participation in proceedings involving an employee of the judge's district. This requirement of disqualification extends to members of the employee's immediate family and household. In all other situations where family members of court employees are parties, the judge should determine whether the particular facts suggest the need to recuse.

INFORMAL OPINION 96-3
December 3, 1996

The Ethics Advisory Committee has been asked whether a judge must enter disqualification in a case in which the attorney representing one of the parties has represented another client in a previous suit against the judge. The Committee also has been asked whether a judge must enter disqualification in a case in which the attorney representing one of the parties represented another client in presenting a complaint about the judge to the Judicial Conduct Commission. The issues are similar, each dealing with adversary proceedings against the judge, and will be treated together.

Canon 3E, Utah Code of Judicial Conduct, requires a judge to enter a disqualification where "the judge has a strong personal bias or prejudice concerning a party or a party's lawyer." The standard for disqualification set forth in the Canon is the same in the context of a party's lawyer as it is for a party. In Rogers v. Wilkins, 267 S.E.2d 86, 87 (S.C. 1980), a party who had brought a §1983 proceeding against a trial judge argued that the 1983 adversarial action, "standing alone," required the judge to disqualify himself from other proceedings involving the party. The Supreme Court of South Carolina disagreed, finding that there must be "independent evidence of bias or prejudice as a result of the 1983 action." Id. at 88.

The Committee agrees with the conclusion of the Rogers court and believes that the reasoning is easily extended to a party's attorney. An adversary proceeding against a judge does not automatically create the presumption that the judge is biased or prejudiced against the attorney involved in that proceeding. The adversary proceeding is a factor to be considered, but is not a dispositive factor.

Each situation must be analyzed separately and objectively. Disqualification may be necessary, but will depend on the factors associated with the previous adversary proceeding - e.g. the nature of the proceeding, comments made during the proceeding, results of the proceeding, the time that has passed since the proceeding was completed, whether the judge was sued in an individual or official capacity, etc.

When presented with a situation in which an attorney involved in a proceeding has represented another party in an adversarial proceeding against the judge, the judge must consider whether the previous proceeding affected his or her ability to be impartial. The judge must also consider whether a reasonable person, knowing all of the facts concerning the previous proceeding, would question the judge's ability to be impartial. See e.g. Informal Opinion 96-2. If the judge believes that his or her impartiality has been compromised or could reasonably be questioned, the judge should enter disqualification on his or her own initiative.

In conclusion, the fact that the attorney has previously been involved in an adversary proceeding against the judge, standing alone, does not require the judge's disqualification. A judge must evaluate whether factors associated with the proceeding have in fact affected the judge's impartiality or whether the judge's impartiality might reasonably be questioned.

FORMAL OPINION 96-1
September 1, 1996

The Judicial Council has been asked to reconsider Informal Opinion 95-04 of the Ethics Advisory Committee and issue a Formal Opinion addressing the question of whether judges may participate in the Executive Banking Program offered by Zions First National Bank under the terms of a contract with the Utah State Courts.

After a competitive bidding process, the Utah State Courts entered into a contract with Zions First National Bank for banking services. This contract was negotiated and executed through the Administrative Office of the Courts, without the need for involvement or approval by the Judicial Council. The contractual relationship results in Zions receiving deposits of state money, particularly that of the judicial branch.

As part of the contractual relationship, Zions has extended the "Executive Banking Program" to qualifying court employees.[1] The Executive Banking Program was not requested or negotiated by the Administrative Office, but was included in the contract solely at the behest of Zions. Participants in the Executive Banking Program are required to have a minimum net worth of $50,000. The Executive Banking Program offers benefits in checking, lending and bankcard services, as well as the attention of a personal banker to assist with financial issues. Zions offers the Executive Banking Program to officers and key employees of corporations and other entities that have a banking relationship with Zions. The program is apparently not available to the general public on an individual basis absent a depository relationship with the employing entity.

The Code of Judicial Conduct permits a judge to maintain certain financial relationships. For instance, Canon 4D(5)(f) allows a judge to obtain a loan from a financial institution, provided the loan is on the same terms generally available to the public. The Georgia Qualifications Commission, in Opinion 40, held that a judge could not only obtain a loan from a financial institution, but could also preside in cases involving the institution. The Florida Committee on

Standards of Judicial Conduct, in Opinion 79-4, held that a judge may obtain a loan at a favorable rate, provided the favorable rate was also available to persons who were not judges.

The Code does not limit its permissiveness to loans. Judges may avail themselves of other banking services. The Alabama Judicial Inquiry Commission, in Opinion Nos. 89-367 and 89-371, held that a judge was not disqualified from presiding in cases involving the financial institution in which the judge maintained a checking account and a safe deposit box, unless the checking account or safe deposit box could be substantially affected by the outcome of the proceeding.

As these authorities note, although a judge may partake of certain financial services, a judge's financial relationships are not limitless. A judge's financial relationships become troublesome when the judge receives services and benefits that are not generally available to the public.[2] When judges receive benefits not available to the public this creates the appearance of impropriety. For instance, in Matter of Seraphim, 294 N.W.2d 485 (Wis. 1980), a judge was disciplined for, among other things, accepting a favorable automobile lease rate from a litigant that had appeared before the judge. The rental rate was not available to other persons and the court found that this created "the appearance of impropriety." Id. at 499.

Zions Bank does not offer the Executive Banking Program to individual members of the public. Although Zions offers the program to other entities with which it has a banking relationship, individuals may only participate in the program by way of the position that they hold with the particular entity. In this situation, judges are offered the opportunity to participate in the program because of their employment within the state courts. Without Zions' contractual relationship with the state courts, the program would not be offered.

Although the Code permits judges to take advantage of services offered by financial institutions on the same basis as others who are not judges but are similarly situated,[3] Canon 2 suggests some limitations. Canon 2 mandates that judges "avoid impropriety and the appearance of impropriety in all activities." The prohibition against impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Model Code of Judicial Conduct Canon 2A. In this instance, it may appear that Zions was awarded the contract designating it as the depository for court funds, because of, at least in part, the availability of the Executive Banking Program for state court judges. Such appearance may undermine "public confidence in the integrity and impartiality of the judiciary." Canon 2A. Avoiding the appearance of partiality is as important to developing public confidence as avoiding partiality itself.

Because the implied connection between the deposit of state monies and the Executive Banking Program would reflect adversely on the impartiality of the judiciary, state court judges may not participate in the Executive Banking Program offered in connection with Zions' contractual relationship with the state courts.

[1] Only the appropriateness of a judge's participation in the Executive Banking Program is before the Council.

[2] These authorities also indicate that a judge should recuse in cases where the judge's financial interests might be affected, but this is not a relevant factor in the present inquiry.

[3] See In re McDonough, 296 N.W.2d 648, 693 (Minn. 1979) Judge is allowed to accept the same credit terms and services offered to other persons with similar "community reputation and professional stature."

Informal Opinion 97-1
April 10, 1997

The Ethics Advisory Committee has been asked for its opinion on the following two questions.

1. May an active senior judge, on a contract basis, serve as a hearing officer for the Utah Board of Pardons and Parole?

2. If the judge may so serve, what restrictions are imposed on the judge's service as a senior judge?

The Board of Pardons and Parole is an executive branch entity created by Article VII, Section 12 of the Utah Constitution. The Board is granted the authority to "grant parole, remit fines, forfeitures and restitution orders, commute punishments, and grant pardons after convictions." In carrying out its duties, the Board has authority to appoint examiners to conduct "any investigation, inquiry, or hearing that the Board has authority to undertake." Utah Code Ann. § 77-27-2(2)(f). Offenders appearing before the Board often raise issues which require evidentiary hearings. The Board contracts with examiners to conduct the evidentiary hearings and provide findings and conclusions to the Board. Because of the expertise a senior judge possesses in handling evidentiary proceedings, the Board would like to appoint a senior judge, on a contract basis, to conduct these hearings.

An active senior judge is required to comply with all provisions of the Code of Judicial Conduct except Canon 4F, which prohibits a judge from serving as a mediator or arbitrator or to "otherwise perform judicial functions in a private capacity unless expressly authorized by law."[1] Canon 4C(2) allows a judge to accept a "governmental position that is concerned with issues of fact or policy on . . . the administration of justice." The Committee assumes that regular contract work of the sort contemplated would qualify as a "governmental position." Clearly, the very purpose of the hearing officer is to resolve "issues of fact." The Committee also believes it is inarguable that the Board and its hearing examiners are engaged in the "administration of justice." The Board has jurisdiction over offenders who have committed Class A misdemeanors and felonies. The jurisdiction is similar to that which judges and courts have over persons convicted of Class B misdemeanors and lower. In either situation, the courts or the Board have authority to review the status of convicted persons. Each entity makes decisions based on that review. These status reviews involve the administration of justice. The evidentiary proceedings that the senior judge would be performing for the Board are similar to probation hearings and other proceedings conducted by judges with respect to convicted misdemeanor offenders.

Accordingly, service by the senior judge is permitted by Canon 4C(2). And even if such service is regarded as the performance of "judicial functions in a private capacity," Canon 4F does not bar such service in the case of an active senior judge.

The Committee is of the opinion, however, that the judge's service to the Board will require restrictions on the judge's service as an active senior judge. Canons 1 and 2 require judges to uphold the integrity and independence of the judiciary and to promote public confidence in the integrity and impartiality of the judiciary. Canon 4A(1) states that "a judge shall conduct the judge's extra-judicial activities so that they do not . . . cast reasonable doubt on the judge's capacity to act impartially as a judge." As a regularly employed hearing examiner for the Board, the judge will be, or at least appear to be, an integral part of the non-judicial component of the criminal justice system. The judge will be seen as connected with the executive branch in the context of the administration of criminal justice. The executive branch, albeit through other entities and agencies, is actively involved in the investigation and prosecution of criminal matters. An impartial observer, aware of the judge's ongoing service to both the judicial and executive branches, could reasonably question the judge's neutral impartiality in serving as a judge in criminal and habeas corpus proceedings. Because of the institutional connection to an important executive branch component of the criminal justice system, the senior judge must not accept assignment of criminal and habeas corpus cases.[2]

In conclusion, a senior judge may serve as a hearing officer for the Utah Board of Pardons and Parole, on a contract basis, because this is service to a government agency which is involved in the administration of justice. As both a hearing officer and an active senior judge, the judge must avoid situations which create the appearance of conflict. Thus, the judge may not accept assignments to preside as an active senior judge over criminal or habeas corpus cases.

[1] The rationale for this restriction is that "judges are appointed and paid for the purpose of resolving disputes, and that allowing what is essentially a private practice of the same profession necessarily exploits the judicial office." Jeffrey M. Shaman, et al., Judicial Conduct and Ethics § 239 (2d ed. 1995).

[2] The Committee understands that, as an active senior judge, the judge can make arrangements to only serve in civil and domestic matters.

Informal Opinion 97-2
April 10, 1997

The Ethics Advisory Committee has been asked for its opinion on whether an appellate court judge must enter disqualification in the following four circumstances:

1. When the judge's son has an offer for a summer clerkship with a firm appearing before the judge, but the clerkship has not yet started;

2. When the son is working as a summer associate (law clerk) at the firm;

3. When the son has accepted a position as an associate with the firm, but has not yet started working; and

4. When the son is working as an associate at the firm.

The relevant provisions of the Code of Judicial Conduct are Canons 2B and 3E. Canon 2B states that "a judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment." Canon 3E(1)(d) states that a judge shall enter disqualification when "the judge's impartiality might reasonably be questioned." The Canon states that this includes situations in which a person within the third degree of relationship to the judge "is acting as a lawyer in the proceeding" or has "more than a de minimis interest that could be substantially affected by the proceeding." When dealing with a relative within the third degree, such as a son, disqualification is therefore required in the following three circumstances:

1. When the relative is acting as a lawyer in the proceeding;

2. When the lawyer has an interest in the proceeding that is not de minimis that could be substantially impacted; or

3. When the judge's impartiality might otherwise be reasonably questioned.

In Regional Sales Agency v. Reichert, 830 P.2d 252 (Utah 1992), the Utah Supreme Court faced the issue of whether an appellate court judge must enter disqualification when a firm appearing before the judge employed the judge's father-in-law and brother-in-law as partners, even though another attorney with the firm had exclusive responsibility for the case. The Court stated that disqualification would clearly be required if the firm's fee was contingent on the outcome of the case. Disqualification would also be required when the attorneys' compensation, through profit sharing or other mechanisms, might ultimately be affected by the outcome. The Court stated, however, that it would be an "expensive and time consuming inquiry" to determine in every case whether the partner had a direct interest in the outcome of a particular case. Id. at 257. Because of that difficulty, the Court adopted "a bright-line proscription" extending disqualification to "every situation where a judge sits on a case in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party to the case." Id.

The Reichert Court did not have before it the situation of associates, but addressed it briefly, noting that "the simple model of an associate's drawing a fixed salary may not fit all firms." Id. at 258. The Committee also recognizes that an associate's compensation might depend significantly on factors similar to those used to establish partner or shareholder compensation. Even absent such an explicit arrangement, a firm's ability to offer raises or pay Christmas or year-end associate bonuses, or, ultimately, to make payroll is directly related to its financial success. Not only would inquiry into an associate's compensation package be "expensive and time consuming," but it is awkward for the judge or the court to inquire about the internal financial arrangements of a law firm. Even if satisfied that any financial interest was de minimis, the judge or the court would have to inquire about whether the associate or clerk had worked on the case,

which itself can be awkward given the restrictions on ex parte communication, and rely uncritically on the information received. Finally, even if the judge were convinced that the relative had only a de minimis financial interest in the case and had no substantive involvement in the case, the judge would have to be concerned about perceptions of partiality and consider whether the same would be reasonable under the circumstances. See Informal Opinion No. 94-4 ("The general test as to whether a judge's impartiality might reasonably be questioned is whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge would find that there is a reasonable basis for questioning the judge's impartiality.")

Accordingly, rather than leave each judge to navigate these principles on a case-by-case, associate-by-associate basis, the Committee believes it is best to extend Reichert's bright-line to associates, including summer associates. Thus, a judge should enter disqualification in every situation where a judge's relative within the third degree of consanguinity is employed by a law firm as a law clerk or an associate.

In issuing this opinion, the Committee is motivated in large measure by its goal of offering solutions which enhance predictability and ease of application, while promoting confidence in the judiciary and the impartiality of its processes. The Committee errs on the side of caution and circumspection. At the same time, the Committee recognizes that this opinion may go beyond what had been contemplated in prior opinions. See, e.g., Informal Opinions 90-3, 92-3. It may embrace a stricter interpretation of the Code of Judicial Conduct than is reflected in Reichert or is otherwise necessary.

Accordingly, the Committee's opinion applies prospectively only and not to cases already far along, where the disruption of a late recusal would be a greater evil than the potential -- and often remote -- evil that this opinion seeks to address. Moreover, the Committee notes the possibility for remittal of disqualification, even prospectively, in accordance with Canon 3F.

In answer to the four specific questions that have been asked, the Committee is of the opinion that disqualification is required as soon as the relative is employed by the firm and is drawing compensation. Disqualification is therefore required when the son is working as a law clerk or as an associate at the firm, but disqualification is not required when the son is not actually employed by the firm. Disqualification is not required when an offer is pending or when the offer has been accepted, but employment has not yet begun.

Informal Opinion 97-3
May 22, 1997

The Ethics Advisory Committee has been asked for its opinion on whether a judge may participate in a nationally renowned non-profit musical education and performance organization.

The organization is "committed to advancing the musical art form of barbershop harmony through education and performances."[1] Members are required to travel throughout the country

for performances and workshops. The required travel is irregular, involving, on average, one weekday per month.

Canon 4A states that "a judge shall conduct the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) exploit the judge's judicial position." The Committee believes that a judge's participation in the organization is permitted under the Code. The participation will not affect the public's perception of the judge's ability to perform the judge's duties, nor subject the judge to any apparent improper influences. The kind of music favored by the organization suggests participation will not demean the judge's office. The judge should ensure that weekday absences for organization activities, along with all other absences, do not exceed reasonable vacation time provided for judges.

As with other extra-judicial activities, the judge should use caution when participating in program activities to ensure that other sections of the Code are not impinged. For example, the judge should not participate in fundraising activities on behalf of the organization, nor use judicial staff for typing newsletters or correspondence to other organization members. Similarly, any photocopying, fax, and long distance charges incurred on office equipment for the benefit of the organization should be reimbursed in accordance with applicable policies.

[1] From the organization's mission statement as stated on its "web" page.

Informal Opinion 97-4
August 28, 1997

The Ethics Advisory Committee has been asked for its opinion on whether a juvenile court judge may ethically receive ex parte requests from juvenile court probation officers seeking warrants to detain juveniles who have violated court probation orders.[1]

Juveniles who are convicted of an offense by the juvenile court may be placed on probation. These juveniles are supervised by a juvenile court probation officer and are under the continuing jurisdiction of the juvenile court. Juvenile court probation officers are employees of the judiciary, supervised by judges and administrators of the juvenile court. See Utah Code Ann. § 78-3a-203.

If a juvenile violates any of the conditions of probation, the probation officer is required to "immediately report the alleged violations to the court and make appropriate recommendations." Rule 7-304, Utah Code of Judicial Administration. Among the officer's recommendations might be a request that the judge approve a warrant for the "immediate custody" of the juvenile. Rule 7, Utah Rules of Juvenile Procedure. These warrant requests are usually based on the probation officer's opinion that immediate detention is necessary to protect the minor or the public or because the juvenile may flee the jurisdiction.

During regular court hours, the warrant requests are in writing, accompanied by the probation officer's affidavit. During non-business hours, warrant requests are received by telephone. If issued by telephone, the probation officer is required to file an affidavit on the next business day. When a warrant is issued and executed, a hearing must be held within 48 hours to determine whether continued detention is appropriate. At the hearing, the juvenile is given the opportunity to review the evidence upon which the warrant was issued. Rule 9, Utah Rules of Juvenile Procedure.

Canon 3B(7) states:

> "Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court."

The canon creates a general prohibition against ex parte communications, with three relevant exceptions. The exceptions are: (1) communications authorized by law; (2) communications that do not concern a pending or impending proceeding; and (3) communications with court personnel whose function is to aid the judge with adjudicative responsibilities.[2] The telephonic warrant requests are clearly ex parte communications concerning a pending or impending proceeding. Thus, only exceptions (1) and (3) require further consideration.

With respect to the first exception, communications authorized by law, the committee notes that none of the statutory or rule provisions relied on specifically authorize ex parte affidavits or oral requests for such warrants. While it is possible that exhaustive review of case law and analogous statutes might lead to the conclusion that the practice is both authorized by law and constitutional, the committee doubts its institutional prerogative to undertake such an inquiry and render what would amount to a legal, rather than an ethical, opinion.[3]

We turn, then, to the third exception. Although the clearest examples of "court employees whose function is to aid the judge in carrying out the judge's adjudicative responsibilities" are "law clerks, secretaries, and colleagues on multi-judge courts[,] . . . [i]n the appropriate situation the definition of 'court personnel' may extend beyond the judge's immediate chambers." Jeffrey M. Shaman, et. al., Judicial Conduct and Ethics 159 (2d ed. 1995). Among the examples noted by Professor Shaman are probation officers. For instance, in U.S. v. Gonzales, 765 F.2d 1393 (9th Cir. 1985), the court stated than when a probation officer "is preparing a presentence report he is acting as an arm of the court and this permits ex parte communication." Id. at 1398.

The Utah Supreme Court has recognized the unique role of probation officers in the adult court system. In State v. Gomez, 887 P.2d 853 (Utah 1994), the court stated: "When preparing a presentence report, a probation officer . . . acts as an aide to the court." Id. at 855. The court approved of limited ex parte contacts between a judge and a probation officer, noting that certain

of those contacts are "helpful" and "necessary." Id. Other jurisdictions have recognized the role of a probation officer as an aid to the court. See, e.g., Opinion 37, California Judges Association Committee on Judicial Ethics ("[I]n carrying out their adjudicative responsibilities through preparation of presentence and ongoing investigations, reports and recommendations . . . probation officers do in fact act as 'court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.'")

Considering the facts that have been presented, juvenile court probation officers are performing different functions than the adult probation officers discussed by the above authorities.[4] However, the Committee is of the opinion that juvenile court probation officers are more clearly court personnel who aid the court than are officers with Adult Probation and Parole. As noted above, juvenile court probation officers are employees of the judiciary. The officers assist judges with the enforcement of probation orders, immediately reporting probation violations and offering recommendations. When acting within the statutes and rules noted above, juvenile court probation officers are acting as court personnel who aid the court with adjudicative responsibilities. Specifically, ex parte communications from a probation officer to a judge, in which probation violations are reported and warrants requested, should not be considered unethical.

In making this conclusion, the Committee does not suggest that all ex parte communications between a probation officer and judge are permissible. The Committee is also mindful of the due process violations that the ex parte prohibition is intended to avoid. See Note 2. While the communications between probation officers and judges under the circumstances described are not unethical, substantive information that is learned through these communications should ultimately be provided to the probationer in accordance with the applicable rules.

In conclusion, while the Committee expresses no opinion on whether the practice is legal or constitutional, it believes that no ethical violation occurs when judges engage in the ex parte communications discussed herein.

[1] The Committee recites the facts and procedures as provided in the request for opinion. The Committee does not comment on the legality of those procedures, but focuses only on whether a judge is within ethical bounds when following them.

[2] Before analyzing the communications involved in the warrant requests, it is important to note the purposes for the prohibition against ex parte communications. "Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge may be incomplete or inaccurate, the problem can be incorrectly stated. At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts." Jeffrey M. Shaman, et al., Judicial Conduct and Ethics, 149, 150 (2d ed. 1995).

[3] The committee's dilemma results from the admittedly circular language of the provision: The practice is ethical if it is legal, and unethical if illegal. The committee's responsibility, however, is to give opinions on "the ethical propriety of professional or personal conduct," not the legal propriety. Rule 3-109(3)(A)(i), Utah Code of Judicial Administration.

[4] Nonetheless, ex parte communication relative to the imposition of an initial sentence and ex parte communication relative to noncompliance with the terms of probation imposed as part of a sentence are not completely dissimilar.

Informal Opinion 97-5
October 20, 1997

A part-time justice court judge has requested an opinion from the Ethics Advisory Committee on the following three questions:

1. May a judge attend and observe an administrative checkpoint that the judge has authorized?

2. May a judge attend an administrative checkpoint that the judge has authorized, if the judge is attending as a member of the county emergency services team?

3. May a judge ride with law enforcement officers on patrol to observe law enforcement field procedures and otherwise gain knowledge about law enforcement operations?

Resolution of these questions involves Canons 2A and 2B. Canon 2A states: "A judge . . . should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B states that a judge shall not "convey or permit others to convey the impression that they are in a special position to influence the judge."

In previous opinions, the Committee has cautioned judges to avoid professional settings which create the appearance of partiality or that convey the impression that a particular group is in a special position of influence. For example, in Informal Opinion 90-2, we stated that a judge is prohibited from participating in a moot court program conducted for the benefit of peace officers. Participation was prohibited, in part, because the judge would be interacting with only a "single component of the criminal justice system." The single component interaction creates the appearance of impropriety and creates the impression that peace officers "are in a position of special influence with the judge if demeanor or credibility become an issue in a proceeding."

Attending an administrative checkpoint or riding with a law enforcement officer involves professional interaction with a single component of the criminal justice system. This is true even if the judge is simply an observer. It is the attendance at the event, and not the judge's role, which creates the appearance of partiality, and persons aware of this situation could reasonably question the impartiality of the judge. The situation may also create the impression that law enforcement is in a special position to influence the judge. A judge should not participate in these activities, whether as an observer or as a member of an emergency team.

The Committee is also concerned that attendance at the checkpoint or on the "ride along" would require disqualification in any case that results from these situations. By attending a checkpoint or riding with law enforcement, the judge is placed in the position of receiving information outside of a court case, or the judge may become a witness to criminal activity. The judge may

also be in a position of receiving improper ex parte communications in violation of Canon 3B(7). In any of these situations, the judge would then be required to enter disqualification. A judge should avoid situations that will require disqualification.

In conclusion, the Committee is of the opinion that a judge should not attend an administrative checkpoint or participate in a "ride along" with a law enforcement officer. These situations create the appearance of partiality and create the impression that law enforcement officers may be in a special position of influence.

Informal Opinion 97-6
October 1, 1997

The Ethics Advisory Committee has been asked by a court employee whether the employee may accept an appointment to the Grievance Council of the Utah Division of Child and Family Services (DCFS). The employee currently serves as a staff attorney to the Court of Appeals and will soon serve as appellate court mediator.

The Grievance Council was formed by the Board of Child and Family Services, pursuant to a federal court order, as an independent body to receive complaints from consumers concerning the handling of child welfare matters. The Council mediates complaints and provides recommendations to DCFS concerning resolution of complaints which cannot be mediated. The Council has the authority to adopt its own rules and procedures to accomplish its purposes.

Canon 3C(2) of the Code of Judicial Conduct states: "A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge." We note initially that the term "staff" is not defined in the Code. The term has been extended to court clerks, law clerks, bailiffs and secretaries. The committee is of the opinion that the term includes all those who are employed by the judiciary, including an appellate court mediator and staff attorney.

The application of Canon 3C(2) has not been uniform among jurisdictions. For instance, the Texas Committee on Judicial Ethics, in Opinion 106, stated that this canon requires court employees to adhere to all provisions of the Code of Judicial Conduct. The Oregon Judicial Conduct Committee, in Opinion 86-4, stated that this canon applies only to employees' administrative responsibilities and does not require employees to regulate their extrajudicial activities to minimize a risk of conflict with judicial duties.

This Committee has previously stated that judges have "the responsibility to ensure that court staff and officials observe appropriate ethical standards." Informal Opinion 88-1. However, the committee has chosen not to extend all of the canons to court employees. In Informal Opinion 89-6, the Committee determined that, although a judge is prohibited under Canon 4D(5) from accepting Christmas gifts from attorneys or parties, court employees could accept gifts of nominal value.

Although judicial employees will not be subject to all provisions of the Code of Judicial Conduct, the committee does not believe that 3C(2) is limited to the administrative responsibilities of employees, as determined by the Oregon Judicial Conduct Committee. Although this canon is found within the "Administrative Responsibility" section of the code, a plain reading indicates that court employees must, at a minimum, observe all code provisions which require diligence and fidelity. The question presented to the committee does not directly involve an issue of diligence. The committee must therefore determine whether service on the Grievance Council involves a standard of fidelity.

As defined by Webster's II, New Riverside University Dictionary, 475 (1994) fidelity is "faithfulness to obligations, duties, or observances." Canon obligations which require faithfulness to judicial duties, will apply to both judges and court employees. Service on the Grievance Council is governed by Canon 4C(2) which states that "A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice." The commentary to the Model Code of Judicial Conduct states that the reason for prohibiting governmental appointments, other than to those specifically authorized, is that the prohibited appointments are "likely to interfere with the effectiveness and independence of the judiciary." Governmental appointments may also interfere with judicial duties or "erode the appearance of impartiality which is essential to judging itself." Jeffrey M. Shaman et al, Judicial Conduct and Ethics, 287 (2d ed. 1995). The canon requires professional faithfulness to the mission of the judiciary, by limiting judges' professional activities to law-related issues. Canon 4C(2) is therefore a standard of fidelity imposed on a judge, and court employees must follow the same standard.

In Informal Opinion 95-1, we stated that every potential extrajudicial governmental appointment "must be examined independently to determine whether service is appropriate under the code." If any of the functions of a committee are not law-related, service will be improper even if the committee otherwise has permissible functions. In Informal Opinion 94-2, the committee disapproved service on a subcommittee to the Utah Substance Abuse and Anti-Violence Coordinating Council because the mandates of the subcommittee included developing policy recommendations to combat substance abuse and community violence and making legislative recommendations on program priorities. The subcommittee functions were not sufficiently limited and therefore a judge could not accept appointment.

In Informal Opinion 95-1, the Committee approved appointment to the Board of Child and Family Services because the Board's duties were limited to improving child welfare and ensuring agency compliance with the provisions of a federal court consent decree. The Committee is of the opinion that Informal Opinion 95-1 controls the outcome of the current fact situation. The Grievance Council is a body appointed by the Board of Child and Family Services, the committee that was at issue in Opinion 95-1. The Council was established pursuant to the same consent decree discussed in that opinion. Because the Council was established by the Board, it does not have any greater authority or responsibility than the Board. Based on the Committee's previous determinations that oversight of the consent decree is related to improving the law and

the administration of justice, the employee's service on the Grievance Council is permitted under Canon 4C(2).

As stated in Informal Opinion 95-1, however, the court employee may not be involved in any case in which DCFS "is a party or has a pecuniary or policy interest." This is true whether the employee is serving as a staff attorney or as appellate court mediator. If disqualifications from cases or time commitments to the Grievance Council become disruptive to court operations, the employee should resign from the Council.

Informal Opinion 97-8
October 20, 1997

The Ethics Advisory Committee has been asked whether a judge is required to enter disqualification when the judge is sued by a party who has a case pending before the judge. The lawsuit is against the judge in the judge's judicial capacity and seeks relief such as a change of venue and a jury trial in the pending case. The Committee has also been asked whether the judge must enter disqualification when the party has contacted the judge's family members in an attempt to discover information about the judge for inclusion in the complaint.

Canon 3E(1)(a), Utah Code of Judicial Conduct, requires a judge to enter disqualification when "the judge has a personal bias or prejudice concerning a party." In Informal Opinion 96-3, the Committee discussed whether a judge is required to disqualify when an attorney representing one of the parties in a proceeding before the judge had previously represented another client in a suit against the judge. The Committee determined that disqualification was not automatically required. In making this determination, the Committee cited Rogers v. Wilkins, 267 S.E. 2d 86 (S.C. 1980), in which a party who had a case pending before the judge brought a federal civil rights action against the judge. The party argued that the separate adversarial action "standing alone" required the judge to enter disqualification. The Supreme Court of South Carolina disagreed, determining that an adversarial action against the judge does not automatically require disqualification. The court stated that there must be "independent evidence of bias or prejudice as a result of the Section 1983 action." Id. at 88.

As noted in Wilkins, a lawsuit complaining of a judge's official actions will not automatically require the judge's disqualification. This conclusion is consistent with cases determining that disqualifying facts must have an extrajudicial source. See, e.g., U.S. v. International Business Machines Corp., 475 F.Supp. 1375 (S.D.N.Y. 1979). "As a general rule, bias or prejudice that is caused by occurrences in the context of a court proceeding is not grounds for disqualification. To require recusal, bias or prejudice normally must be rooted in an extrajudicial source. When not flowing from an extrajudicial source, bias or prejudice will not necessitate disqualification unless it is so egregious as to destroy all semblance of fairness." Jeffrey M. Shaman, et al. Judicial Conduct and Ethics, 102 (2d ed. 1995). A lawsuit complaining of a judge's official acts is not considered extrajudicial and disqualification is not automatically required.

This rule is necessary to insure that litigants are not able to judge shop or continually delay actions with well-timed lawsuits against judges. "A party should not be able to engage in 'judge-shopping' by manufacturing bias or prejudice that previously did not exist. . . . That a party . . . files a complaint against a judge will not usually require the judge to be disqualified on account of bias or prejudice." Id. at 104, 105.

Similarly, disqualifying bias is not automatically created by a litigant's actions which are ancillary to a lawsuit against a judge, such as by contacting the judge's family members for the purpose of gaining information to be included in the complaint or that would be useful in effecting service of process. However, disqualification will be necessary if the contact is so egregious or otherwise so upsetting to the judge or the judge's family that it actually results in bias. The judge must evaluate each situation to determine whether the contact has, in fact, resulted in the judge becoming biased against the party. The judge must also consider whether a reasonable person, knowing all of the facts available to the judge (including the fact that a party may not purposefully set out to create bias where none existed before) could question the judge's ability to be impartial.

In conclusion, facts prompting disqualification must stem from an extrajudicial source and therefore a lawsuit filed against a judge, complaining of acts in the judge's judicial capacity, will not ordinarily require the judge's disqualification. Absent actual bias, disqualification is not required when a party contacts members of the judge's family for purposes related to the lawsuit.

Informal Opinion 97-9
November 19, 1997

The Ethics Advisory Committee has been asked by the Board of District Court Judges whether judges and court employees may be involved in the CASA Juror Checkoff Program.

In 1997, the Utah State Legislature enacted a statute which allows jurors to donate their $17.00 juror fee to the CASA volunteer program. In order to make jurors aware of the donation option, court clerks distribute to jurors a flier which describes the CASA program and instructs jurors on how they may donate the $17.00 fee. If a juror chooses to donate, a clerk processes the bearer checks into the appropriate accounts.

The CASA program is operated by the judiciary's Office of the Guardian Ad Litem. The program assists children who are victims of child abuse or neglect. In appropriate cases, the court appoints a volunteer to work with one child to help that child through the court system. CASA volunteers occasionally appear as witnesses. The juror donations and other funds are used to train the volunteers who assist the children.

The concerns addressed by the Board of District Court Judges are that the judges are impermissibly engaged in fund-raising, and that the donation program creates the appearance of partiality. Canon 4C(3)(b) states that a judge "shall not personally participate in the solicitation of

funds or other fundraising activities." This canon has been strictly interpreted. Judges are prohibited from directly or indirectly participating in fundraising. See Jeffrey M. Shaman et al., Judicial Conduct and Ethics, 291 (2d ed. 1995). For instance, judges are prohibited from direct fundraising, such as requesting funds for the Boy Scouts of America. Federal Advisory Comm. on Judicial Activities, Advisory Op. No. 32 (March 4, 1974). Judges are also prohibited from indirect fundraising, such as sitting in a "dunking booth" at a fundraising event. Informal Opinion 89-8.

Because of the legislative enactment and the manner in which the program is structured, the CASA donation program is unique when compared to other fund-raising activities typically considered by ethics advisory committees and other authorities. The CASA donation program as presently constituted may or may not constitute indirect fund-raising by judges but, at the very least, the program creates the appearance of fund-raising and may compromise the integrity and impartiality of the judiciary.

Canon 2A states that "A judge . . . should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." Promoting the impartiality of the judiciary is an obligation of fidelity, and is therefore imposed on both judges and court personnel. See Informal Opinion 97-6. The committee has two primary concerns with the donation program and its effect on the integrity and impartiality of the judiciary.

First, because the CASA donation fliers are distributed on court premises before jurors have been paid or excused, jurors who receive the donation flier may feel pressure to donate. This perceived pressure may be compounded by the fact that CASA is clearly a court-sponsored or court-related program, and it alone is singled out for special consideration by the jurors. The coercive effect of the donation program undermines the integrity of the judiciary. When prospective jurors enter courthouses they do not expect to be solicited for donations, least of all by the judicial system for a judicial branch program. Prospective jurors anticipate playing a role in the judicial system and do not anticipate being viewed as a funding source for a volunteer program, no matter how worthwhile.

The committee's second concern is the appearance of partiality. The impartiality of the judiciary is compromised when a person or group conveys, or is allowed to convey, the impression that they are in a special position to influence the judge. See Informal Opinion 97-5 and Canon 2B. Through the juror donation plan, the CASA program occupies, or at least appears to occupy, a unique position. As the beneficiary of a court-sponsored donation arrangement, the CASA program appears to be a favored group of the judiciary. As witnesses and participants in court proceedings, CASA volunteers may be perceived by litigants or counsel as carrying special influence with the court. The CASA program must not be allowed to convey an impression that is not permitted by the Code.

In conclusion, the participation of judges and other court personnel in the CASA donation program compromises the integrity and impartiality of the judiciary. The integrity of the judiciary is affected by participation of court personnel and the use of court premises in the solicitation and

donation process. An appearance of partiality may result from allowing the CASA program to convey the impression that it has favored status with the judiciary. Neither court personnel nor court premises may be used in soliciting members of the public for charitable donations, even if those solicited are jurors, the amount sought is limited to the juror's statutory fee, and the intended beneficiary is a program for which the judiciary is ultimately responsible.

Informal Opinion 98-1
January 26, 1998

The Ethics Advisory Committee has been asked by the Justice Court Board whether a part-time justice court judge must enter disqualification in proceedings involving the county which employs the judge in a non-judicial capacity.

The request for opinion states that the judge's county employment, apparently in the Office of the County Treasurer, requires "the collection of fees in registration of vehicles, [as required by] county ordinances[,] that in all probability would give prior knowledge of violations that come before the local Court." The Board questions whether the prior knowledge of violations requires disqualification in judicial proceedings involving those same violations. The Board also questions whether the judge's "dual roles" present a conflict of interest.

Canon 3E(1) requires a judge to enter disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned." Impartiality might be questioned when a judge gains knowledge of a case through means other than the judicial process. "A judge is disqualified if he or she has prior personal knowledge of evidentiary facts regarding a proceeding before the judge." Jeffrey M. Shaman et al., Judicial Conduct and Ethics 113 (2d ed. 1995). Information learned through nonjudicial employment may therefore provide the basis for judicial disqualification. If the judge becomes aware of registration violations, or violations of other county ordinances, through the judge's nonjudicial employment, the judge may not preside over proceedings involving those violations in a judicial capacity.

The Committee is also of the opinion that disqualification is not limited to those proceedings concerning which the judge has actual, prior personal knowledge. The New York Advisory Committee on Judicial Ethics, in Opinion 89-147, stated that a town justice may serve on a local fire department and a county planning board. However, the judge was required to recuse if those agencies were a party or other matters concerning the operation of these agencies came before the judge's court. The Alabama Judicial Inquiry Commission, in Opinion 90-399, similarly held that a judge is disqualified from proceedings involving the county personnel board because the judge was a member of the personnel board supervisory commission, which was the appointing authority for the county personnel board. These opinions required disqualification even if the judge did not have personal knowledge of the facts or issue involved in the proceedings. Disqualification was not required for all county or municipal matters, but only those cases involving the department or board that employed the judge.

The Committee believes that a judge's impartiality might reasonably be questioned in all cases involving the department which employs the judge, even if the judge does not have personal knowledge of the facts or issues of the proceeding. The judge should enter disqualification in all proceedings involving the county department that employs the judge in a nonjudicial capacity.

Informal Opinion 98-2
January 26, 1998

An assistant court administrator has asked the Ethics Advisory Committee whether the administrator may serve on the committee in charge of, and as the coordinator for, the annual State Charitable Fund Drive.

Utah State Government annually conducts a charity fund drive among government employees. During the drive, every state employee receives a pamphlet listing the charities to which donations may be made and the options for donating. None of the charities are sponsored by the Utah judiciary and few have any connection to legal issues. A committee of state employees facilitates the fundraising. Each year one state employee is designated to chair the committee. The position rotates among representatives from the executive, legislative and judicial branches. The duties of the chair include contacting department heads about the fund drive, coordinating the activities of the committee, and encouraging high rates of giving. As the chair of the committee, the court administrator will be required to send letters to various persons. The letters will include the chair's name and title, and will be on letterhead of the Administrative Office of the Courts.

In Informal Opinion 97-6, we stated that nonjudicial court employees are required to follow those Code of Judicial Conduct provisions which impose obligations of fidelity and diligence. The obligations of fidelity and diligence insure that employees are faithful to the judiciary in the employee's professional duties. The code provision on fund-raising, Canon 4C(3)(b), states that "a judge ... shall not personally participate in the solicitation of funds or other fund-raising activities." The Committee is of the opinion that the fund-raising prohibition is not expressly an obligation of fidelity and diligence. Court employees are therefore not automatically excluded from fundraising. The prohibition against fundraising is personal to judges, and court employees should be free to engage in fund-raising activities unless those activities implicate the integrity and impartiality of the judiciary.

Although the fund-raising prohibition is personal to judges, other court personnel are sometimes circumscribed in their fund-raising activities when they belong to organizations in which judges are associated. Such persons may conduct fund-raising only as long as a judge is not directly or indirectly involved, and as long as the activities do not carry the prestige of the judicial office or affect the integrity or impartiality of the judiciary. See, e.g., Informal Opinion 88-4.

In Informal Opinion 97-9, we stated that court employees may not participate in certain fund-raising activities for the judiciary's CASA volunteer program. Participation was prohibited

because potential jurors were placed in the difficult position of being solicited on court premises by court personnel for a court-sponsored project. The Committee was concerned that potential jurors may have felt undue pressure to donate, and urging citizens required under process of law to serve as jurors to donate their statutory fees to help fund a court program was improper.

However, the state's charitable fund drive is readily distinguishable from the CASA donation program. The integrity of the judiciary is not impacted through the charity fund drive. Those solicited are solicited only because they are state employees, the vast majority of whom are not court employees, and not because of any special relationship to the judiciary. There is no captive audience, similar to the jurors, and the prestige of the judiciary is not being used to promote the fund drive. So long as the letterhead used does not bear the name or title of a judge (the committee notes that standard AOC letterhead does bear the name and title of the chief justice), recipients of fund drive communications can not reasonably perceive that judges are involved, or that the prestige of a judge or judicial office is being used. On the contrary, given the history and organization of the fund drive, the participation by the assistant court administrator would clearly be in the capacity of a state employee rather than as a representative of the judiciary.

In conclusion, the assistant court administrator may serve as a committee member and coordinator of the State Charitable Fund Drive. Court facilities and the prestige of the judiciary are not being used to prey upon a captive audience, and the focus is not to raise funds for a judiciary program. The administrator is performing a function in his role as a state employee, and not as a representative of the judiciary or of judges. The judiciary is simply taking its turn in furnishing a state employee to coordinate the efforts to encourage charitable giving by state employees.

Informal Opinion 98-3
March 9, 1998

The Ethics Advisory committee has been asked whether the executive director and/or other members of a Judicial Council task force may solicit funds for task force research and other activities.

The Utah Judicial Council has established a task force to examine the issue of racial and ethnic fairness in the criminal justice system. The task force consists of approximately thirty members. Eight members are judges, with the others being representatives from the community and from allied criminal justice agencies. The task force has hired a director to facilitate its activities. In order to accomplish its objectives, the task force wishes to seek funding from potential sources, such as state and federal grants, the state bar, private foundations, corporations, law firms, the legislature and the Judicial Council itself. Fund-raising inquiries and efforts will be conducted by the task force director and/or other task force members who are not judges.

Canon 4C(3)(b)(iv) states that a judge, as a member of a governmental agency, "shall not personally participate in the solicitation of funds or other fund-raising activities." Subparagraph

(iv) also states that a judge "shall not use or permit the use of the prestige of the judicial office for fund-raising." The Code contemplates that judges will become members of governmental committees that will address issues related to the law. The Code also contemplates that those committees might engage in fund-raising. Judges have traditionally been able to be members of these committees as long as they do not actively participate in fund-raising. The unique issue in this situation is that the judiciary has created the committee and hired a person to facilitate the committee's activities. The question, then, is whether the prestige of the judiciary would be implicated in the fund-raising activities by the task force director and its members. See Informal Opinion 98-2.

We note initially that the Code does not reach non-judicial employees, such as other members of the task force. However, judges must withdraw from participation in the task force if the non-judicial members use the prestige of judicial office in conducting the fund-raising activities.

The fact that the Judicial Council's name is associated with the task force does not automatically indicate that the prestige of the judicial office would be involved in fund-raising by task force members. To find otherwise would prohibit judicial committees, and the judiciary itself, from seeking government grants. See New York Advisory Committee on Judicial Ethics, Opinion 88-94 (determining that seeking grants is considered fund-raising). The fact that judicial organizations may solicit funds, even though individual judges can not, was implicitly supported by the Kansas Judicial Ethics Advisory Panel in Opinion JE-1. The Panel addressed whether a judge could solicit funds for the National Judges Education Association and Research Foundation, Inc. The Panel held that the judge could not personally solicit funds, but the Panel found that the judge could be associated with the organization even though it would conduct fund-raising. The Panel stated that "merely being an officer of the organization . . . is not to be considered as using the prestige of his office for gaining donations for the organization."

The Committee recognizes that the executive and legislative branches often organize committees, which have judges as members, devoted to the law and the administration of justice. These committees are free to fund-raise as long as judges are not actively involved in the fund-raising efforts. It would be ironic to allow those branches of government to seek funds for their efforts while applying a blanket prohibition against the judiciary, which is the branch most directly concerned with law and the administration of justice, from funding its efforts.

As a general rule, then, the task force director and other task force members may solicit funds for the task force, as long as judges do not participate in the process. In so concluding, the Committee does not determine that fund-raising would be appropriate by all judiciary committees. The purposes of the fund-raising will be important in determining whether the fund-raising implicates the prestige of the judicial office. Fund-raising for endeavors that will improve the administration of justice or the legal system will be less troublesome than fund-raising that will simply inure to the benefit of the judiciary. When fund-raising for projects that will improve the administration of justice, but not directly benefit judges, we believe that potential donors will be more concerned with giving to the particular project, than in attempting to curry favor with the judiciary. Thus, when a task force is seeking funds to study an issue such

as racial and ethnic fairness, it is much more likely that potential donors would be interested in the subject matter, rather than being concerned with any benefit they might obtain through donation.

When conducting fund-raising, the task force director and task force members must be careful to avoid using judges, their names, or titles in fund-raising. Thus, for example, judiciary letterhead should not be used in fund-raising correspondence. The director and members may not affirmatively use judges' names or titles in their efforts, but they could respond to inquiries as to who serves on the task force, including giving the names of judges if asked.

Judges should not assist in planning the fund-raising, such as by identifying potential donors or fund-raising mechanisms. Judges may assist in determining how the funds could be best spent in pursuing the mission of the task force. If at all possible, judges should not be told who has made donations to the task force if the donors are lawyers, law firms, or organizations or persons likely to appear in court. If a judge on the task force becomes aware of the identity of a donor who is then appearing before the judge, the judge should enter disqualification. The committee understands that the task force will issue a final report in which all donors will be recognized. The task force work will largely be completed and therefore disqualification will not be required. However, for those cases in which donors are appearing at the time the final report is issued, the task force judges should disclose the circumstances of the donation and their participation on the task force, providing an opportunity for objections.

In conclusion, the task force director and non-judge members may engage in fund-raising for the Judicial Council's task force to examine racial and ethnic fairness in the legal system. The director and members must be cautious in their fund-raising efforts to ensure that judges' names and titles are not used in the fund-raising efforts, except as may be necessary to respond to inquiries.

Informal Opinion 98-4
June 30, 1998

The Ethics Advisory Committee has been asked by a judge whether it is appropriate to serve as a member of the Advisory Board for the Salt Lake County Children's Justice Center and the State Advisory Board for Children's Justice Centers. The Committee referred the request to the Judicial Council pursuant to Rule 3-109(6), Utah Code of Judicial Administration. In accordance with that provision the Council opted not to issue a formal opinion and instead "[a]pproved . . . the opinion . . . as initially drafted" and "direct[ed] the Committee to release the opinion . . . as an informal opinion of the Committee." Id. 3-109(6)(A).

Children's Justice Centers are established pursuant to Utah Code Ann. § 67-5b-102. The purpose of the justice centers is generally described as "[a] program that provides a comprehensive, multi-disciplinary, non-profit, intergovernmental response to sexual abuse of children and serious physical abuse of children." Children's Justice Center Advisory Boards are established pursuant

to Utah Code Ann. § 67-5b-105 and 106. The membership of the Boards, as designated by statute, consists of professionals throughout the juvenile justice community, including law enforcement, medical professionals, prosecutors and criminal defense attorneys. The Advisory Board's duties include: recommending statewide guidelines for the administration of the Children's Justice Program; advising the contracting entities of each Children's Justice Center; making recommendations on training and improvements in training; reviewing, evaluating and making recommendations concerning the handling of child abuse, child sexual abuse and child neglect cases; making recommendations to improve the prompt and fair resolution of court proceedings; and making recommendations to change state laws and procedures to better protect children from abuse, sexual abuse and neglect.

Canon 4C(2) permits service by a judge on a governmental board that is concerned with "the improvement of the law, the legal system or the administration of justice." In Informal Opinion 94-2 we stated that "each governmental committee and commission has unique functions and mandates . . . [and] each must be examined independently to determine whether service is appropriate under the Code." We cautioned that statutory authority which is too broadly written may be cause for rejecting committee membership. We also stated that if a committee can effectively limit its focus to the three purposes permitted under the Code, judges may serve on the committee. If the focus can not be so limited, service is not appropriate even if much of the committee's work is within the scope of Canon 4C(2).

Nationally, some of these boards have judicial representation while many do not. Many of the boards have representatives from the executive branch only. Because there is no consistency concerning board representation, statutes and ethics opinions from other states provide little guidance in deciding whether judicial participation is ethical.

The statutory purposes of the Advisory Board are very broadly written, although focused on child abuse adjudication and related legal issues. However, the administration of children's justice is inherently a broader concept than the administration of justice in other areas. The child abuse, neglect and dependency provisions of the juvenile code, at Utah Code Ann. § 78-3a-301 through 78-3a-319, indicate that child abuse and neglect cases are multi-agency concentrations. Various agencies come together through the juvenile courts to address children's issues generally. Service by a judge on a board that addresses the broad concept of children's justice is therefore permitted under the Code. The Advisory Board's duties, summarized above, would seem to be limited to children's justice issues.

However, the Committee is concerned that the Children's Justice Centers are involved in issues outside of the neutral administration of children's justice, focusing instead on successful prosecution of abusers in the adult criminal system. For instance, § 67-5B-102 states that the centers shall minimize "the time and duplication of effort required to . . . prosecute" and obtain "reliable and admissible information which can be used effectively in criminal . . . proceedings." Such purposes are beyond even the broad concept of juvenile justice to the extent there is a focus on prosecution of criminal offenders in the adult system. A judge cannot assist the prosecutorial role. A judge could not therefore directly participate in the activities of the Children's Justice

Centers. The Committee is concerned that the Advisory Boards, while one step removed from the centers themselves, may, in fact, focus on assisting the centers in devising programs for more effective prosecution.

Although the Advisory Board is a step removed from the specific activities of the Children's Justice Centers, the discussions of the Advisory Board will most certainly address the manner in which the Children's Justice Centers can most effectively fulfill their purposes. Accordingly, from time to time the discussions will presumably center on effective investigation and prosecution of child abusers. When the discussions of the Board primarily center on assisting the prosecutorial role, judges may not participate. In making this conclusion, the Committee recognizes that more efficient prosecutions often benefit the defense as well. For instance, preserving uncoached testimonial evidence may assist the prosecution, but it may also benefit the defense. A judge would not be prohibited from participating in those types of discussions. However, in those circumstances in which the discussions focus on benefits or tactics which primarily benefit the prosecution, the judge should simply excuse him or herself from the meeting.

The Committee is ultimately of the conclusion that the Code does not prohibit a judge's service on the Children's Justice Center Advisory Board. However, the judge should not participate in those discussions which focus primarily on prosecutorial tactics which do not benefit the system as a whole, or other discussions which might call into question the judiciary's essential neutrality concerning the administration of the criminal justice system.

Informal Opinion 98-5
April 24, 1998

The Ethics Advisory Committee has been asked by a justice court judge whether the judge's court clerk may participate in a city mobile watch program. The city conducting the program is within the jurisdiction of the court.

According to materials provided by the requester, mobile watch is a community program in which citizens are trained by law enforcement to assist in deterring crime. Participants must complete eight hours of training, which training includes information on various crimes, patrol tactics, and communication with police. Mobile watch teams consist of two persons who patrol designated neighborhood boundaries. Participants do not leave their vehicles and are not allowed to carry weapons. Mobile watch participants are provided a cellular phone to report suspicious activity to the police. The participants may also communicate with neighbors about risky behavior such as leaving garage doors open or leaving personal property unattended.

Rule 3-109 (3)(A)(ii), Utah Code of Judicial Administration, states that with limited exceptions not applicable here, opinions should not address the conduct of persons other than the requester. Because the judge is concerned about the behavior of a clerk, the opinion request may appear to be an inquiry into the conduct of others. However, Canon 3C(2), Utah Code of Judicial Conduct,

states that "a judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge." Thus, judges have a responsibility to ensure that court employees comply with certain provisions of the Code. In answering this question, the Committee is advising the judge as to the judge's administrative responsibilities to ensure that court employees comply with applicable provisions of the Code.

Court employees must comply with those Code provisions which deal with fidelity and diligence. In Informal Opinion 97-6, the Ethics Advisory Committee determined that a court employee must comply with the Code when accepting governmental appointments. The Committee found that governmental appointments present an issue of fidelity. In making this determination, the Committee noted that governmental appointments may "erode the appearance of impartiality" and may "interfere with the effectiveness and independence of the judiciary." Activities on the part of court employees which may undermine the appearance of impartiality or independence of the judiciary are prohibited under the Code.

In Informal Opinion 97-5, the Ethics Advisory Committee stated that a judge may not attend a law enforcement administrative checkpoint or participate in a law enforcement ride-along because this may create the impression that law enforcement is in a special position of influence or it may create the appearance that a judge is partial toward law enforcement. Any time a judge or court employee participates in activities involving law enforcement, impartiality appearances will be a concern. The issue in this situation is therefore whether the mobile watch program is sufficiently linked to law enforcement as to create an appearance of partiality. If the mobile watch participants are acting as an arm of law enforcement then participation will be prohibited. If participants are simply engaged in a community or neighborhood program, with law enforcement playing no significant role, then participation will be permitted.

The materials provided by the requester state that a mobile watch participant "has no police authority and is to act as eyes and ears only, reporting suspicious situations in the neighborhood to the police." This language creates concerns as to the participant's activities. Although the mobile watch participants do not have authority to arrest persons, carry weapons or otherwise exercise law enforcement authority, they are acting as additional "eyes and ears" of law enforcement officials. The program encourages participants to directly assist law enforcement agencies. The participants patrol the community specifically looking for illegal activity in order to report that activity to law enforcement. Participants are observing on behalf of law enforcement and assisting law enforcement in deterring crime.

Because of this connection to law enforcement activities, persons may reasonably question the impartiality of the court and its connection with community law enforcement if a judge, or court personnel closely identified with a judge, participate. The court clerk should not participate in the mobile watch program and the judge should comply with her ethical administrative responsibilities and ensure that participation by a court clerk does not occur.

Informal Opinion 98-6
June 18, 1998

The Ethics Advisory Committee has been asked by a district court judge whether service is permitted on a Domestic Violence Coalition. The Committee referred the request to the Judicial Council pursuant to Rule 3-109(6), Utah Code of Judicial Administration. In accordance with that provision the Council opted not to issue a formal opinion and instead "[a]pproved . . . the opinion . . . as initially drafted" and "direct[ed] the Committee to release the opinion . . . as an informal opinion of the Committee." Id. 3-109(6)(A).

The Domestic Violence Coalition is not created by statute. The coalition is apparently based on similar efforts in communities throughout the nation. These coalitions are typically organized on a local level. The effort to organize a coalition may be initiated by a representative from any number of organizations. There are no set membership requirements, although the coalitions try to obtain representation from various entities that deal with domestic violence, including the judiciary.

Because the coalition is not a statutory creation, there is a lack of information on how this particular coalition will be structured and what its focus and purposes will be. This prevents the Committee from making a determination as to whether service is permitted on the domestic violence coalition in question. However, other states have dealt with the issue of domestic violence coalitions and have issued advisory opinions. Based on these opinions, the Committee can offer advice to the judge as to the factors that need to be evaluated in determining whether service is appropriate.

Canon 4C(3) allows service in nongovernmental organizations which are "devoted to the improvement of law, the legal system, or the administration of justice." Service is not appropriate if the purposes and focus are broader than those permitted by the Code. See Informal Opinion 94-2. Service is also prohibited if the focus of the organization is too narrowly linked to one side of an issue, such as prosecution or defense. See Informal Opinion 98-4.

In Opinion No. 201, the Georgia Judicial Qualifications Commission stated that a judge could participate in a limited manner on a "family violence task force." The task force had adopted a model which encouraged judges to advocate certain positions and to be proactive in other positions dealing with family violence. The Commission found that a judge could not be associated with such an "activist" cause. However, the Commission found that a judge could participate in the task force to the extent that it discussed "coordination among the courts, prosecutors, law enforcement agencies, and public assistance and other service providers, concerned with family violence." A consideration for the judge is therefore whether the coalition will include representatives from the various entities dealing with domestic violence. As noted by the Georgia Commission, the coalition must also be focused on improving coordination and not on advocacy. These positions are apparently supported by the Iowa Supreme Court, which in June 1995, also approved service by a judge on a domestic violence coalition as long as the coalition included broad representation and did not become an advocacy group. See Iowa

Guidelines for Judicial Participation in Domestic Violence Coalitions. The Committee endorses this position.

The West Virginia Judicial Investigation Commission, in a decision dated February 7, 1997, cautioned a judge from participating in a domestic violence coordinating council if the council was "intended to discuss specific cases or to be a forum for individual complaints." The Committee agrees that participation on the coalition would not be appropriate if specific cases are discussed or if the coalition simply becomes a forum where individual complaints are addressed. The details of specific cases should not be discussed, although the general issues from cases can be used to improve coordination.

In summary, service on a domestic violence coalition is permitted as long as the coalition does not have purposes other than those specified in Canon 4C(3), and includes representatives from various agencies and organizations that might be involved with domestic violence, including prosecution, defense, victim assistance and perpetrator assistance. The discussions of the coalition must focus on the system as a whole and not on individual cases or complaints. If the coalition's focus becomes too broad, the judge may nevertheless participate on a limited basis. Canon 4C(1)(a) allows a judge to address a public body on matters concerning the law, the legal system or the administration of justice. A judge could therefore decline to serve as a regular member of the coalition, but could offer to appear and participate in those discussions that concern the general administration of domestic violence justice. In order for the judge to participate in these discussions, the participants in the group will need to reflect the various representatives in the domestic violence process.

Informal Opinion 98-7
April 24, 1998

The Ethics Advisory Committee has been asked whether a commissioner may issue title insurance through Attorneys Title and, if so, whether the commissioner may issue the insurance in conjunction with an attorney from the commissioner's former law firm.

According to the facts presented in the request, prior to becoming a commissioner the requester issued one or two title insurance policies per year. The commissioner received a commission for this work. A former partner of the commissioner would like to develop a relationship in which the commissioner continues to issue title insurance policies for clients of the attorney. The attorney would do the title search and review the title, while the commissioner would issue the title insurance policy. The commissioner would receive a commission from Attorney's Title. The commissioner would pay the attorney for the legal work connected with the title search.

The applicability section of the Code of Judicial Conduct states that commissioners are subject to the Code to the same extent as full-time judges. Canon 4D(1) states that "a judge shall not engage in financial and business dealing that: (a) may reasonably be perceived to exploit the judge's judicial position; or (b) involve the judge in frequent transactions or continuing business

relationships with those lawyers or other persons likely to come before the court on which the judge serves." Other Code provisions which might be applicable include Canon 2B, which prohibits lending the judicial office to advance the private interests of others; Canon 4G, which prohibits the practice of law; and Canon 4A, which requires a judge to carefully scrutinize the judge's extrajudicial activities so that they do not interfere with the judge's duties, exploit the judge's position, demean the judicial office or cast doubt on the judge's ability to act impartially.

Several states have dealt with the issue of judges performing abstract and title work. The Alabama Judicial Inquiry Commission, in Opinion 76-12, stated that a district judge could not do abstract work while sitting as a judge. The Commission found that, although the work was not considered the practice of law, the work was an impermissible extrajudicial activity. The Texas Committee on Judicial Ethics, in Opinion 23, stated that a judge could not participate in a title insurance business because it would reflect adversely on the judge's impartiality, exploit the judge's judicial position and involve the judge in frequent transactions with persons likely to come before the court on which the judge serves. Conversely, the Indiana Commission of Judicial Qualifications, in Opinion 1-88, stated that a judge could participate passively in an abstract and title business because the issues in which the business were involved were not frequently litigated, the business would not reflect adversely on the judge's impartiality and the attorney which co-owned the business did not frequently appear in the judge's court.

According to the facts presented to the Committee, the attorney with whom the commissioner would engage in the financial dealings does not engage in litigation that is likely to come before the commissioner. The attorney is mostly engaged in transactional work that is not litigated. The concerns are therefore whether the commissioner would be engaged in the practice of law, or whether the business would reflect adversely on the commissioner's impartiality, demean the commissioner's office or interfere with the commissioner's duties.

Issuing title insurance has not been considered the practice of law by at least one ethics commission, because non-lawyers can participate. See Alabama Judicial Inquiry Commission, Opinion 76-12. However, issuing title insurance through Attorneys Title could be considered the practice of law, and at the very least creates the appearance of such. Attorneys Title accepts only lawyers as members and agents. Members must therefore be licensed to practice law, creating the appearance that insurance issued through Attorneys Title is a product of the practice of law. The commissioner's participation with Attorneys Title would create the appearance that the commissioner continues to practice law. The appearance is compounded by the relationship with the former partner. The relationship creates the appearance that both are serving the same clients.[1]

The Committee is also concerned that the relationship between the commissioner and the partner may exploit or demean the commissioner's office. Apparently, the former partner wants to take advantage of the benefits of Attorneys Title without becoming a member through the requirements of training and testing. The public's opinion of the judiciary may be affected when a commissioner assists in an arrangement which allows an attorney to take advantage of a program without submitting to the program's requirements.

In conclusion, the Committee is of the opinion that the commissioner may not issue title insurance through Attorneys Title. The connection with Attorneys Title and the proposed relationship with the former partner create an appearance of impropriety and create the appearance that the commissioner is practicing law.

[1] We also note that Utah Code Ann. § 78-7-2 prohibits a judge from having "a partner engaged in the practice of law." Although this statutory prohibition does not expressly extend to commissioners, it is at a minimum suggestive of the types of relationships that must be avoided.

Informal Opinion 98-8
May 12, 1998

The Ethics Advisory Committee has been asked several questions by a district court judge concerning the performance of marriages and related compensation.

The requester performs approximately one marriage per week. The marriages are conducted in the judge's courtroom and are performed on the lunch hour or as close to 5:00 p.m. as possible. The judge assumes all administrative costs related to the marriage ceremonies, such as for postage, typewriter ribbons and envelopes. The judge performs administrative duties related to the ceremonies at home during evening or weekends. The judge generally charges for the ceremonies, but will waive the fee if the couple is struggling financially. The judge declares all income on state and federal tax returns and the funds are sometimes used for office improvements or legal volumes. The judge questions whether any of these practices violate the Code of Judicial Conduct.

The authority for judges to perform marriages is found at Utah Code Ann. § 30-1-6. Perhaps significantly, the language authorizing judges to solemnize marriages is not qualified by language similar to that which authorizes county clerks to solemnize marriages, i.e., "if the clerk chooses to solemnize marriages." Thus, while officiating marriages is not a core judicial function, judges, as part of a small group of public officials empowered to perform civil wedding ceremonies, have a responsibility to perform this important public service. It is not acceptable for a public official to accept a fee for performing a statutory function while the official is or appears to be "on duty."

Thus, Canon 4H(c) states that "a judge should not receive compensation for performing a marriage ceremony at the court during regular court hours. However, a judge may receive compensation for performing a marriage ceremony during non-court hours." The Committee believes that the reason for this restriction is to prohibit judges from receiving private compensation for the performance of an official duty during the period when judges are doing the public's business. Compensation is permitted after court hours because judges are no longer on "company time." In Informal Opinion 94-3, the Committee construed regular court hours to be 8:00 a.m. to 5:00 p.m., Monday through Friday, for state-employed judges. A judge may not receive compensation for any marriage performed during these hours. In Opinion 94-3, the

Committee also stated that it is "inappropriate for a judge to receive compensation for a ceremony performed at some other location during regular court hours." Thus, a judge cannot accept compensation for a marriage performed on a weekday between 8:00 a.m. and 5:00 p.m. no matter where the ceremony is performed.

The Committee addressed several other issues related to the performance of marriages in Informal Opinion 94-3. The Committee stated that "it is inappropriate for a judge to receive compensation for the performance of a marriage ceremony at the court location, regardless of whether the ceremony is performed during regular court hours." The Committee is of the opinion that an exception to this rule should be recognized. The Committee believes a judge may receive compensation for a marriage at the court performed outside of regular court hours, if the ceremony is performed at a courtroom or other area that has been made available for private use consistent with governmental policy or if the ceremony is performed in the judge's chambers.

The requesting judge has inquired whether the noon hour is or should be included within the definition of regular court hours. Informal Opinion 94-3 did not carve out an exception for the noon hour and the Committee does not now see any reason to recognize such an exception since the courthouse is typically open during the noon hour and the lunchtime routine of individual judges varies so widely.

A judge may and, indeed, should be willing to perform marriage ceremonies at the court location during regular court hours without compensation, due regard being had for Canon 3A which states that "the judicial duties of a full-time judge take precedence over all the judge's other activities." Performing marriages during the lunch hour, scheduled recesses, and "under advisement" days is therefore advisable, while interrupting a trial or hearing to officiate a wedding is not. A judge should advise interested parties of the option of being married at the courthouse during the judge's regular workday, make reasonable efforts to accommodate them if they prefer it, and not deliberately steer business to evening or weekend hours.

The requester also notes that Canon 4H uses the word "should" rather than "shall." As noted in the definition section of the Code, violation of Canon 4H therefore cannot be the basis for disciplinary action. However, failure to comply with this section is nevertheless unethical. Furthermore, charging compensation in violation of this section might also implicate other Code sections, such as the requirement to avoid exploiting the judicial office found in Canon 4A(4).

In conclusion, the judge may continue to perform marriage ceremonies as described, but may not charge a fee for performing ceremonies at the court. If the judge performs ceremonies prior to 8:00 a.m. or after 5:00 p.m. on weekdays, or at any time on weekends or holidays, and the performance is at an off-court location or in the judge's chambers or in a portion of the courthouse that has been made available for private use in accordance with the policies of the government entity controlling the building, the judge may charge a reasonable fee because the judge is on his or her own time and appearances do not suggest otherwise. The Committee notes that administrative duties incident to performing marriages for which no fee is charged may properly be handled by the judge or other court personnel, during court hours, and costs of

postage and envelopes need not be borne by the judge individually. If a fee is charged, meaning the marriage was done on the judge's personal time, it is appropriate that the administrative duties be handled by the judge on his or her own time and that the related costs be borne by the judge.

Informal Opinion 98-9
May 12, 1998

The Ethics Advisory Committee has been asked by a district court judge whether a trial court judge has an ethical right or obligation to communicate with an appellate court concerning alleged misstatements made by counsel before the appellate court.

As an example, the judge describes a situation in which a petition for rehearing was filed with an appellate court. The petition for rehearing claims that the trial court took judicial notice of certain facts during the trial proceedings. The trial court judge did not take judicial notice of those facts. The judge wonders whether there would be a right or an obligation to inform the appellate court of the misstatement. As another example, a question arises as to a trial judge's responsibility when a party on appeal claims that off-the-record discussions were had and the judge does not recall such discussions or does not believe that the discussions were as represented by counsel.

Canon 3B(7) states that "[n]o communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties." This language in the Utah Code of Judicial Conduct is not part of the black letter ABA model code. The language originates from the commentary to the model code. The language in Canon 3B(7) must be read in light of Canon 2A, which requires impartiality, and Canon 3B(9), which states that "[a] judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." When read together, these Canons suggest the circumstances under which a communication between a trial judge and appellate court may occur.

In other jurisdictions, judges have been admonished against communicating with an appellate court when the communication would exhibit partiality. See Harrington v. Indiana, 584 N.E.2d 558, 561 (Ind. 1992). This is the primary concern. A communication with an appellate court may not, on its face, exhibit partiality. However, the effect and perception of any such communication must be considered. Any communication with an appellate court could be considered favorable to one side and in opposition to another, even if that is not the intention. Disclosure to the parties, as required by Canon 3B(7), provides an opportunity for scrutiny and response, but does not obviate the problem.

The adversarial system relies on the attorneys and parties to clarify the record on appeal. Unsolicited communication from a trial judge is not ordinarily necessary and undermines the neutrality of the bench. There may be circumstances when an appellate court requires additional

information from the trial judge. Canon 3B(7) allows communication in that circumstance, as long as all communications are provided to the parties and placed in the record. The Committee believes problems of this sort are avoided, or at least greatly minimized, if a trial court judge does not communicate with an appellate court concerning a pending or impending proceeding unless requested by the appellate court, with the requirements of Canon 3B(7) being followed. Such communication should be formal rather than casual. For example, the appellate court should not telephone or even write a letter asking for additional information. Rather, the appellate court should, by order, remand for the entry of additional findings, entry of a supplemental order, or resolution of an outstanding motion. The trial court's response should likewise be in the form of an order, memorandum decision, or other appropriate document.

Informal Opinion 98-10
June 30, 1998

A trial court judge has asked the Ethics Advisory Committee about the ethical duty of a judge when an appellate court order directs the judge to take actions which the judge perceives to be in conflict with statutory law or applicable rules.

By way of example, an appellate court might direct, without explanation or citation of authority, that the trial court proceed immediately with an evidentiary hearing. The trial court judge might conclude that this directive is in obvious conflict with statutes or rules which allow for dispositive motions before a hearing. The dilemma for the trial court judge is whether to follow the statutes and rules or the directive of the appellate court.

Canon 2A states that "a judge shall respect and comply with the law." Canon 3B(2) requires a judge to "apply the law." The difficulty results from determining what law to apply when an appellate court's directive appears to be squarely inconsistent with statutory or procedural law. It is the Committee's opinion that the appellate court's directive should be followed.

The Supreme Court creates rules of procedure and is the final arbiter on the meaning of statutes. The Supreme Court has comprehensive supervisory authority over the trial courts. The Court of Appeals also has supervisory authority over trial courts and determines the meaning of rules and statutes. Because of these factors and this authority, a trial court judge must follow the mandates of an appellate court even if the trial judge believes that the appellate court is wrong and that "the law," in an ultimate sense, requires otherwise.[1]

An analogy can be drawn between this situation and contempt proceedings. A person must obey a court's order, even if it is wrong, or be subject to contempt sanctions. The order could subsequently be reversed on appeal, but the reversal would not excuse the previous contempt. Similarly, a trial court judge must follow a higher court's order, even if it is wrong.

The law that binds trial judges is not the law in some abstract sense, but the law as implemented by the appellate courts. And as a purely practical matter, it is difficult to see how a trial court

judge could be faulted under the canons of judicial ethics for following an appellate court's order, although a judge could be faulted for a willful refusal to follow such an order.

The Committee notes that if the appellate court is in obvious error, the parties involved can usually be counted on to petition for rehearing or certiorari. Also, the trial court judge can memorialize any concerns about the appellate court's directives through orders and findings made while implementing the appellate court's mandate, which will facilitate reassessment in the event of further appellate review and make a record of the judge's personal disavowal of the rationale of the appellate decision. This course is preferable to a trial court judge choosing to follow his or her own view of the law, rules, and Code of Judicial Conduct in the face of an inconsistent appellate court directive.

Finally, the Committee notes that if the trial court judge's opinions about the case are so seriously affected by the appellate court's directive that the judge can no longer objectively preside over the case, the judge should enter disqualification. While judges are frequently required to set aside their personal opinions about the law in order to decide the case, the Committee recognizes that there may be particular circumstances in which an appellate court directive engenders such strong feelings that presiding over the case is no longer feasible.

In conclusion, a trial court judge must follow a mandate of an appellate court even if the trial court judge believes that the appellate court's mandate is in error.

[1] The Committee is sensitive to the concern that "just following orders" is not an adequate defense to all ethical situations, such as those typified by Dachau and My Lai. When governments run amok, ethical dilemmas are presented which transcend the usual notions of duty. The Committee in this opinion does not address horrors such as an appellate court becoming an arm of a tyrannical government and ordering trial judges to deviate from civilized norms. We consider here the circumstance of an appellate court erring on a point of statutory interpretation or procedure and a trial judge who can see the mistake and would prefer to do what the statute calls for rather than what the higher court has directed.

Informal Opinion 98-11
June 18, 1998

An active senior judge has asked the Ethics Advisory Committee whether it is appropriate to accept an appointment to the Utah Antidiscrimination Advisory Council.

The Utah Antidiscrimination Advisory Council is created pursuant to Utah Code Ann. § 34A-5-105. The Council consists of fifteen voting members appointed by the Governor. The fifteen members include five who represent employers, five who represent employees, and five who represent the general public. The duties of the Council are to advise the Labor Commission and the Division of Antidiscrimination and Labor "on issues requested by the commission, division, and the Legislature and also make recommendations to the commission and division regarding issues of employment discrimination and issues related to the administration of [the Utah Antidiscrimination Act]." Section 34A-5-105(7)(a). The Council is not involved in

adjudicative proceedings and is not involved in the management of the Antidiscrimination Division. The Committee has not been furnished any by-laws, minutes, or reports of the Council.

We first note that an active senior judge is required to comply with all of the Code provisions, except Canon 4F which deals with a judge acting as an arbitrator or mediator.

Canon 4C(2) allows a judge to "accept appointment to a governmental committee or commission or other governmental position that is concerned with . . . the improvement of the law, the legal system or the administration of justice." The Committee has stated on several occasions that the scope of each committee, commission or position must be reviewed separately to determine whether service is appropriate. See Informal Opinion 94-2. If the scope is limited to the three purposes, service is permitted. If the scope is beyond the purposes in any manner, service is not permitted. The Ethics Committee will typically look to the commission's statutory mandates or by-laws to determine whether service is permitted. However, in this instance the statute is of little assistance. The primary concern for this Committee is whether the subject matter of concern to the Council -- i.e., employment discrimination -- is within the purposes permitted by the Code. We look to other states findings to determine whether the subject matter is appropriate.

The Utah Antidiscrimination Division oversees and reviews issues related to discrimination in Utah work places. Discrimination issues may involve race or ethnicity, age, gender, religion, disability or other protected classes. While we are unable to find any ethics advisory opinions from other states that have dealt directly with this issue, other states have issued opinions on appointments to bodies that discuss discrimination issues. The New York Advisory Committee on Judicial Ethics, in Opinion 87-29, stated that a judge could serve as a member of a county board which was established to coordinate services for developmentally disabled persons involved with the criminal justice system. The New York opinion concerned a situation that dealt specifically with access to criminal justice and therefore service was permitted. Conversely, the New Hampshire Committee on Judicial Conduct, in Opinion 81-1, stated that a judge could not serve on a state council on aging because the council dealt with the problems of aging and the administration of complaints and problems concerning the elderly. While not explicit from this opinion, the New Hampshire committee did not find a sufficient nexus between the group for which there was potential discrimination and the legal or justice system.

The concept of justice is broad and is certainly relevant any time discrimination is being discussed, but in order for service by a judge to be appropriate, the issues must have a direct connection with the legal system. A distinction between the two opinions appears to be in how closely involved the committee or commission is with the legal system. The New York opinion dealt specifically with access to the criminal justice system, while the New Hampshire opinion dealt with discrimination issues that might be faced by the elderly outside of the legal system.

The Committee must decide how much of a direct connection between the Council and the legal system there must be for service to be appropriate.

The Committee is of the opinion that the work of a governmental commission or committee must have a direct and primary connection to the legal system in order for service to be appropriate. A more expansive definition does not appear to be contemplated by the code. See Canon 4C(3) ("A judge may serve as an officer . . . of an organization or governmental agency . . . devoted to the improvement of the law, the legal system or the administration of justice . . ."). The Code contemplates that judges may be involved in committees whose work has a primary and direct relationship with "the improvement of the law, the legal system or the administration of justice." It is not enough that the Committee be concerned with justice in a broader sense.

With the limited information available to the Committee concerning the nature of the Antidiscrimination Advisory Council's work, it is difficult to render an unqualified opinion.[1] If the Council is primarily concerned with issues like insuring compliance with the requirements of the Antidiscrimination Act, improving methods for the fair resolution of complaints, and improving the access of victims of discrimination to the courts, service would be permitted. If the Council is more frequently concerned with policy initiatives, employer education, sensitivity education in the workplace, and the like, service would not be permitted.

For better or worse, service by judges on governmental committees and commissions is generally prohibited. A narrow exception exists for non-judicial governmental service if it is "concerned with . . . the improvement of the law, the legal system or the administration of justice." The Committee believes that the exception is limited to nonjudicial governmental service that is primarily and directly concerned with the permitted subjects. If the nexus is less direct, incidental, or tangential, if the permitted subjects are just one aspect of a much broader mission or focus, then service by a judge is not permitted.

[1] The composition of the Council tends to suggest service by a judge is questionable. The fifteen members are allocated among employers, employees, and the general public. Committees and commissions where judicial service is permitted are more typically dominated by judges, lawyers, and others in the justice system. See e.g., Informal Opinion 97-6 (Service permitted on Grievance Council of the Utah Division of Child and Family Services. Grievance Council consists of lawyer representing plaintiffs, child welfare representatives, and others familiar with child welfare system.); and Informal Opinion 98-4 (Service permitted on Advisory Board for Children's Justice Centers. Board consists of judges, prosecutors, defense counsel and others involved in children's justice.) But see Informal opinion 94-2 (Service on Judiciary Subcommittee of Utah Substance Abuse and Anti-Violence Coordinating Council questioned, even though half of the members were judges and court employees, since statutory "purposes go far beyond the permissible purposes identified by the Code.")

Informal Opinion 98-12
June 18, 1998

A judge has asked the Ethics Advisory Committee whether disqualification is necessary in a proceeding in which the judge has heightened security concerns about a particular party and, because of those concerns, brings in extra security measures.

The issue for this Committee is whether a judge exhibits bias or prejudice toward a party when the judge invites extra security personnel or increases security measures based on information that a party is volatile or dangerous. The additional security is required to protect persons attending or participating in the judicial proceeding and to ensure that order is maintained.

Canon 3E(1)(a) requires disqualification when "the judge has a personal bias or prejudice concerning a party." "Bias and prejudice are only improper when they are personal. A feeling of ill-will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice." See Jeffrey Shaman et al., Judicial Conduct and Ethics, 101 (2d ed. 1995). The question, then, is whether adding additional security evidences ill-will toward the person who is perceived to be a security risk. A judge must enter disqualification when the judge feels that the volatile behavior has, in fact, created bias or prejudice. A judge must also enter disqualification if a person could reasonably perceive that the statements or actions of the judge indicate ill-will against a party.

It has been noted that judges are not absolutely prohibited from forming opinions about the persons appearing before them. Forming opinions about a person's demeanor is often necessary to decide a case. Those opinions do not necessarily create an inference of bias or prejudice. The U.S. Supreme Court has discussed bias or prejudice as follows:

> Not all unfavorable disposition towards an individual, or his case is properly described [as bias or prejudice]. One would not say for example, that world opinion is biased or prejudiced against Adolph Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree.

Liteky, et al. v. U.S., 510 U.S. 540, 550 (1994). Bias or prejudice is therefore exhibited by words or conduct that is undeserved, excessive or results from a source that the judge ought not to possess.

Applying these standards to this situation, the Committee is of the opinion that adding security because of the perceived volatility of an individual does not automatically indicate bias or prejudice toward that individual. Security is a normal concern of courts and judges. Judges must have the discretion to increase security as they deem appropriate, without having to worry about disqualification. Increasing security cannot automatically be construed as undeserved or excessive behavior toward an individual. It is also important to note that if disqualification were required in such a situation, parties could engage in acts calculated to require disqualification. The Code of Judicial Conduct does not reward persons who purposely engage in acts calculated to create bias or prejudice. See Informal Opinion 97-8.

This conclusion is consistent with case law and ethics opinions which have sated that disqualification is not required when a party threatens physical harm against a judge. For instance, in State v. Brown, 825 P.2d 482, 489 (Idaho 1992), it was held that a judge was not

required to enter disqualification even though the defendant had made death threats against the judge. See also Tennessee Judicial Ethics Committee, Opinion 93-5 and In re Marriage of Johnson, 576 P.2d 188 (Colo. App. 1977).

This Committee's conclusion is also consistent with the extrajudicial source rule, which we discussed in Informal Opinion 97-8. The extrajudicial source rule states that disqualifying bias or prejudice "normally must be rooted in an extrajudicial source." "Bias or prejudice that is caused by occurrences in the context of a court proceeding is not grounds for disqualification." Id. (quoting Jeffrey M. Shaman, et al. Judicial Conduct and Ethics, 102 (2d ed. 1995)). Security concerns typically arise in the context of a court proceeding and are not considered extrajudicial.

In conclusion, it is the Committee's opinion that a judge is not required to enter disqualification simply because the judge has information that a particular party might be a security risk and the judge orders extra security measures. Such action does not constitute bias or prejudice toward the party. Security concerns are legitimate and judges must be allowed to take reasonable actions to address those concerns.

Informal Opinion 98-13
September 8, 1998

The Ethics Advisory Committee has been asked whether a judge may sign a letter of recommendation in support of a private counseling service seeking a federal grant.

A private counseling service that receives referrals from the juvenile court has asked a juvenile court judge to sign a letter of recommendation that will be used in seeking a federal grant. The letter of recommendation contains the following language: “I have had a working relationship with [the specific therapist and the counseling center] for several years. I appreciate and admire their work and will continue to support their efforts at prevention and counseling of youth.” The letter will apparently be addressed: “to whom it may concern.”

Canon 2B, Utah Code of Judicial Conduct states:

> A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

The question for the Committee is whether the letter of recommendation is an honest reference in the regular course of business, or whether the letter will advance the private interests of others or allow others to convey the impression that they are in a special position of influence.

In Informal Opinion 91-2, the Committee addressed two situations involving letters of recommendation. In the first situation, an individual who had done construction work for the judge requested that the judge write a letter of recommendation to help the person secure financial support for a new business venture. The business was to be a treatment facility that would receive referrals from the courts. The Committee determined that the judge could not write the letter of recommendation in that situation. The Committee stated that the judge was in no better position than any other person to write such a letter and the writing of the letter would be lending the prestige of the judicial office to advance the private interests of another. The Committee was also concerned because the letter of reference could be perceived as an indication that the judge would make referrals to the requesting party's facility rather than other available facilities. This would convey the impression that the person was in a special position to influence the judge.

The second fact situation in that opinion dealt with a person applying for a federal probation position. The person had worked in the judge's court in a professional capacity. Because the judge knew the person in a professional capacity, the Committee found that a letter of recommendation could be written. The letter of recommendation was an honest reference in the regular course of business.

The fact situation in this instance contains elements of both of those fact situations and letters of recommendation. The judge is aware of the private facility because of work that occurs in a professional capacity. However, the facility is a private enterprise that receives referrals from the court and is seeking funding for its continued operations.

As the Committee has reviewed ethics advisory opinions it has previously issued, and opinions from other states dealing with letters of recommendation, it is apparent that letters of recommendation are permitted when judges are speaking on behalf of individuals. The Committee is not aware of any opinions in which an ethics advisory committee has approved of a judge writing a letter of recommendation on behalf of a private enterprise when the enterprise is seeking funding. Based on this precedent, or lack thereof, the Committee is of the opinion that the judge cannot write a letter of recommendation on behalf of the private facility.

There are several reasons for this conclusion. First, although there may ultimately be situations when a judge may provide a recommendation on behalf of an organization, the Code contemplates recommendations on behalf of individuals that the judge knows in a professional capacity. Second, because the organization receives referrals from the juvenile court, the letter of recommendation could be perceived as allowing the organization to convey the impression that it is in a special position of influence. Even when letters of recommendation are permitted on behalf of individuals, a judge may not write a letter on behalf of someone who will frequently appear before the judge. The reason for this is that it could be reasonably perceived that the judge would give undue credence to the arguments, testimony or evidence of the person who has received the letter. Finally, the Committee is concerned that the sole purpose of this letter is to raise funds for the organization. Canon 4C(B)(b)(1) prohibits a judge from direct or indirect

participation in fund-raising. The letter could be considered fund-raising on behalf of the organization.

In conclusion, the Committee finds that the judge should not sign the letter of recommendation. The recommendation could be seen as allowing the organization to convey the impression that it is in a special position of influence or could be seen as judicial participation in fund-raising. As a final note, the Committee believes that the judge could be listed as a reference in a grant application. The entity controlling the funds could then contact the judge for the judge's professional impressions. In this manner, the entity could determine whether the judge's opinion is necessary and the judge would not be allowing the organization to convey any impressions and would not be engaged in fund-raising.
* * * *
Two Committee members, while joining in the majority of the foregoing opinion would delete the comment in the last paragraph of the opinion beginning with "As a final note . . . ."
* * * *
One Committee member would replace the last three paragraphs of the opinion with the following:

It is interesting to note that the 1990 ABA Model Code of Judicial Conduct, on which the Utah Code is patterned, does not include in Canon B(2) the exception for providing references. Rather, the matter is covered in the commentary to the Code, which provides, in pertinent part, as follows:

> Although a judge should be sensitive to possible abuse of the prestige of office, a judge may provide a letter of recommendation based on the judge's personal knowledge. A judge also may permit the use of the judge's name as a reference, and respond to a request for a personal recommendation when solicited by a selection authority such as a prospective employer, judicial selection committee or law school admissions office.

There is obviously some tension between the prohibition on lending the judge's official prestige to advance the private interests of others and the authorization to "provide honest references in the ordinary course of business." It is inarguable that a letter of recommendation from a judge concerning the judge's law clerk will advance the private interests of the law clerk seeking employment with a law firm and that the law firm considering the employment application of the clerk will take the reputation of the judge--and unavoidably, the prestige of the judge's position--into account in considering the credibility of the recommendation. At the same time, it is well within the regular course of business for a prospective employer to require a letter of recommendation from a present or prior employer. It is, therefore, entirely appropriate for a judge to submit such a letter, so long as it is honest and limited to material relevant to a prospective employer.

Applying these considerations to the present inquiry, the requested letter may not be ethically submitted if such a letter is not required by the authority passing on the grant application, i.e., if it

is just something the applicant thinks will "dress up his or her application packet. An appropriate letter of recommendation may be submitted by the judge if one or more letters of recommendation, from a class of persons of which the judge may fairly be regarded as a part, are required as part of the grant application. To stay within the regular course of business exception, any requirements of length, subject matter, submission by applicant with application packet versus direct mailing by the judge to the grant authority, etc. must be strictly observed. If the application calls for a listing of references, to include judges or others who have made referrals to the grant applicant, the judge may permit his or her name to be listed as a reference and may respond to any inquiry thereafter received, but should not submit an unsolicited letter. To prevent any later unauthorized use of his or her recommendation, any such letter should not be written to whom it may concern, but should be addressed to the grant authority and make explicit reference to the particular application in connection with which it is submitted. Finally, the text of the letter must qualify as an honest, business-quality reference based on the judge's personal knowledge, which will necessarily focus on the judge's past experiences with the grant applicant. The proposed text of the letter in issue runs afoul of the latter requirement both because it is too general ("I appreciate and admire their work . . . .") and because it focuses on future support rather than past experience ("I . . . . will continue to support their efforts at prevention [sic] and counseling of youth.")

In conclusion, while the intended letter may not ethically be submitted by the judge, an appropriate letter may be if such a letter is required by the grant authority from one or more persons from a class of which the judge may fairly be regarded as part.

Informal Opinion 98-14
September 2, 1998

The Ethics Advisory Committee has been asked by a District Court judge whether disqualification is necessary in a proceeding involving a family member of an employee who does not have a close working relationship with the judge, and whether disqualification is required in a proceeding involving a family member of an employee who works in a different court level-e.g., Juvenile Court.

The Ethics Advisory Committee discussed these issues in Informal Opinion 96-2. The Committee addressed a specific fact situation, but also created a bright-line, stating that a trial judge should disqualify "himself or herself from participation in proceedings involving an employee of the judge's district." This requirement of disqualification extends to members of the employee's immediate family and household. We have received considerable comment about Informal Opinion 96-2, and in particular that it causes administrative headaches, accompanied by significant expense, in districts that have few judges but are large in size. Given these costs of the bright-line announced in Rule 96-2, it is appropriate that the conclusions of that opinion be reconsidered.

As stated in Informal Opinion 96-2, Canon 3E requires judicial disqualification when "the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding. Canon 2B states that a judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. The conclusions in Informal Opinion 96-2 were based on actual and perceived bias. In making the conclusions, we cited Opinion 89-6 issued by the Oregon Judicial Conduct Committee. The Oregon opinion required disqualification in a proceeding involving the spouse of the judge's court reporter. Based on the appearance of bias, and recognizing that the public, litigants, and the media may assume favoritism that does not actually exist, we extended that reasoning to all employees within the judge's district and to the employee's immediate family and household.

After additional consideration of this issue, the Committee is of the opinion that automatic disqualification need not be required in all of those situations. In certain circumstances, the judge should be allowed to simply disclose the nature of the relationship and allow the parties the opportunity to take whatever actions they feel are necessary. The Committee believes that it is not reasonable to perceive that a judge might be biased in all proceedings involving a family member of a district employee, without regard to the relationship between the judge and the particular employee. While a judge necessarily has a close working relationship with his or her in-court clerk, he or she may not even know a clerical employee based in another county or employed in a different court level.

In Informal Opinion 94-6 we addressed disqualification in situations involving the Attorney General's Office, which employed a judge's spouse. We held that disqualification was not required in every case in which an assistant attorney general appears. The judge was only required to disqualify in situations where there was a close working relationship between the spouse and the attorney general handling the case, i.e., when the attorney general handling the case worked in the same section as the judge's spouse. In all other situations involving the Attorney General's Office, the judge was advised to disclose the relationship with the Attorney General's Office, and any other relevant facts, and allow the parties to take any action they deem appropriate. The Committee believes that this combination of automatic disqualification in certain situations and simple disclosure in other situations is a better, or at least less disruptive, approach that would appropriately apply to the questions presented in the current opinion request.

The Committee remains of the opinion that a judge must disqualify from a case involving an employee of the judge's court level employed in the same district as the judge. For those counties in which the district court and the juvenile court are co-located,[1] the judge should enter disqualification whether the employee is with the district or juvenile court. In those counties without co-location, automatic disqualification is only required if the employee is of the same court level as the judge.

In cases involving a member of the employee's immediate family or household, a judge must automatically disqualify if the party is related to an employee that has a close working relationship with the judge. This would include the judge's clerk, bailiff, and reporter; the clerk

of the court; and the trial court executive. A judge may of course recuse himself or herself in other circumstances if he or she believes it appropriate. In all other situations involving a district employee's household or family, the judge should disclose the relationship and any other relevant facts and circumstances and allow the parties to take whatever action they deem necessary.

In conclusion, the Committee believes that automatic disqualification is required when the party is an employee of the judge's district, excepting only employees of different court levels if not co-located, or the party is a family or household member of an employee that has a close working relationship with the judge. In all other situations, the judge should at least disclose the existence and nature of the relationship and allow the parties to take whatever action, if any, they deem appropriate.

[1] For purposes of this opinion, co-location includes those court sites which have one or both of the following relationships between the district and juvenile courts: 1) cross-trained clerks who do work for both court levels; 2) clerks who office together. Based on the Committee's information it would appear that the first situation is typical in the First and Seventh Districts while the Cedar City courthouse is an example of the second. Sites such as the Matheson Courthouse and the courthouse in St. George, where clerks are not cross-trained and there is a physical separation of clerk's offices, are not considered co-located for purposes of this opinion.

Informal Opinion 98-15
October 28, 1998

An active senior judge has asked the Ethics Advisory Committee whether it would be appropriate to act as a master of ceremonies at a "Meet the Candidates Night" sponsored by a local PTA.

The active senior judge has been asked to serve as master of ceremonies at a gathering that is intended to introduce political candidates to the public. The gathering is advertised as a nonpartisan event, although "bipartisan" may be a more accurate characterization, and the sponsor of the event will not be endorsing or otherwise indicating support for any particular candidate. In acting as master of ceremonies, the judge would not be required to make any partisan remarks or representations.

Canon 5B(3) states that "a judge . . . shall not . . . attend political gatherings."[1] The Committee is of the opinion that this canon not only prohibits the judge from acting as a master of ceremonies at the Meet the Candidates Night, but also prohibits the judge from attending such a gathering.

Although the "Meet the Candidates Night" will be a bipartisan event, the Code does not distinguish among partisan, nonpartisan and bipartisan political gatherings. The Code, in unambiguous terms, applies to any event which is political in nature. Because the purpose of the Meet the Candidates Night is to provide a forum for candidates to elaborate on their political stands, the event is a political gathering and judges may not attend.

Our conclusion is consistent with an ethics advisory opinion from at least one other state. The New York Advisory Committee on Judicial Ethics, in Opinion 88-129, stated that a judge should not attend a social function at which school board candidates would be speaking. The election and the social event were nonpartisan, but that committee found that because political philosophies would be espoused at the event, it would be considered a political gathering. The committee is of the opinion that judges may not attend any events which are political in purpose, even if those events are bipartisan or nonpartisan.

[1] Canon 5C provides a limited exception for judges up for reappointment or retention election if the "candidate . . . has drawn active public opposition." In particular, "[t]he candidate may speak to public gatherings on the candidate's own behalf."

Informal Opinion 98-16
December 18,1998

A district court judge has asked the Ethics Advisory Committee whether disqualification is necessary in a proceeding involving the county that previously employed the judge as a county attorney.

According to the opinion request, the judge was a deputy county attorney for nine months of 1990 and the county attorney during 1991 and 1992. The judge did not reside in the county at the time of the employment. The judge did not work on any issues associated with the pending litigation involving the county.

Disqualification issues are governed by Canon 3E. The Canon requires disqualification:

> In a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party . . . [or] the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been the material witness concerning it.

Although the Committee has never directly addressed this type of situation, Utah case law and ethics advisory opinions have discussed issues related to a judge's former employment. In American Rural Cellular, Inc. v. Systems Communication Corp., 939 P.2d 185 (Utah App. 1997), the Court of Appeals discussed disqualification in a proceeding in which one party was represented by the judge's former law firm. The party was also represented by the firm when the judge was associated with the firm. However, the subject matter of the litigation had a limited connection to the former representation. Id. at 196. The Court of Appeals found that disqualification was not required under Canon 3E because the connection between the pending litigation and the former representation was very limited. Id.

The appearance of the judge's former employer or client does not automatically require disqualification. In reviewing our previous opinions, it is evident that disqualification is only required if the pending matter involves issues which the judge worked on while with the employer or party; or a previous partner or fellow employee was working on the matter while the judge was associated with the partner or employee; or if the judge has maintained a close relationship with the party or the attorney, such that the judge's impartiality could be reasonably questioned by an impartial observer.

According to the facts provided by the requester, the Committee believes that disqualification is not required in this instance. The issues related to the litigation arose after the judge left the employment of the county attorney's office so that the judge does not have any personal knowledge of the issues and was not associated with anyone who had personal knowledge of the issues. It also does not appear as if the judge has maintained a close relationship with the attorneys of the employer such that disqualification would be required.

In making this conclusion, the Committee recognizes State v. Neeley, 748 P.2d 1091 (Utah 1988). In Neeley the Supreme Court stated that a judge was not required to enter disqualification in a case involving a criminal defendant the judge had represented in an unrelated matter. However, the Court stated that disqualification may be recommended. Id. at 1094. In situations involving individuals or private entities, disqualification may be the better course. However, when the former client or employer is a governmental entity, disqualification is not necessarily the better course. The county is a frequent litigant. Disqualification in every proceeding involving the county would be disruptive. Disqualification is therefore only required under the circumstances already described.

Informal Opinion 98-17
December 14, 1998

The Judicial Council has asked the Ethics Advisory Committee about whether the Council may petition the Utah Supreme Court to file an amicus brief in a case that might involve separation of powers issues and, if the petition is granted, file such a brief.[1]

Although the Council is authorized to request opinions of the Committee, see Utah Code Jud. Admin. 3-109(3)(A)(I), including opinions about "the conduct of others," Id. (3)(A)(ii), the Committee is limited to issuing opinions "concerning the ethical propriety of professional or personal conduct." Id. (3)(A)(i) (emphasis added). Indeed, the purpose of the rule establishing the committee is "[t]o establish the Ethics Advisory Committee as a resource for judges to request advice on the interpretation and application of the Code of Judicial Conduct." Id. Intent statement. The rule shall apply to all employees of the judicial branch of government who are subject to the Code of Judicial Conduct." Id. Applicability Statement. See Id. (1) ("The Ethics Advisory Committee is responsible for providing opinions on the interpretation and application of the Code of Judicial Conduct to specific factual situations.").

A cursory review of the Code of Judicial Conduct shows that it regulates the conduct of judges and, by reason of the applicability statement at the end of the Code, the conduct of

commissioners and, in varying degrees, part-time justice court judges, judges pro tempore, and active senior judges. By reason of Canon 3C(2), some provisions of the Code of Judicial Conduct apply directly to court employees who are not judges or commissioners. See e.g., Informal Opinions 97-6; 98-2; 98-5. However, the committee does not believe that the Code of Judicial Conduct, the essential focus of which is the conduct of individual judges, governs the institutional conduct of a constitutionally-created[2] body like the Judicial Council, even though its members are mostly judges. The Committee has previously declined to opine, as a committee, about questions such as the separation of powers, seeing its mandate limited, in accordance with the terms of its governing rule, to ethical questions arising under the Code of Judicial Conduct. See Informal Opinion No. 95-3 (one committee member noting that service by a judge on the board of regents may violate the separation of powers doctrine under Utah Const. Art. V § 1 as well as Code of Conduct, while "recogniz[ing] that the role of this Committee is to offer its opinion concerning the ethical propriety of judicial conduct").

In conclusion, because the Code of Judicial Conduct does not apply to the Utah Judicial Council, the Code is no bar to any action the Council may undertake. Given its limited mandate as set forth above, the Committee lacks authority to otherwise opine about the propriety of the Council's involving itself in judicial proceedings in which it is not a party. The question appears to be one of law and institutional policy rather than of judicial ethics.

[1] The Council, which created the Ethics Advisory Committee and appoints its members, is authorized to request advisory opinions of the Committee. See Utah Code Jud. Admin. 3-109; Id. (3)(A)(I). Such requests are in a rather unique position given the opportunities for review and modification of the Committee's opinions which the Council enjoys under the applicable rule. See, e.g., Id. (6);(7)(A).

[2] Utah Const. Art. VIII, § 12.

Informal Opinion 98-18
December 15, 1998

A member of the Judicial Council has asked the Ethics Advisory Committee whether the judge may propose and/or vote on a Council resolution to file an amicus brief in a Utah Supreme Court case involving separation of powers issues; assist in the preparation of the brief; and cause the brief to be filed with the Supreme Court. The Council has already passed a resolution to file the brief, has requested leave to file the brief, and has been given leave to file the brief by the Utah Supreme Court. Because the brief has yet to be filed, the conduct in question is of an ongoing nature and thus the Committee is able to render this opinion even though the Committee is otherwise precluded from responding to inquiries concerning conduct which has already taken place. Utah Code of Jud. Admin. 3-109(3)(A)(i).

The Utah Supreme Court issued an opinion finding that legislators could not serve on the Judicial Conduct Commission. See In re Young, 961 P.2d 918 (Utah 1998). The Supreme Court's opinion addressed separation of powers issues. According to the requester, the opinion has created

concerns about whether members of one branch of government may serve on boards and committees in other branches. For instance, the judiciary has committees on which legislators serve, and the executive branch has committees on which judges serve. In response to the Supreme Court's opinion, the executive branch has requested permission to file an amicus brief to obtain clarification on whether judges and legislators may serve on executive branch boards and committees. The Legislature has requested permission to file an amicus brief addressing its boards and committees. Given the separation of powers issues and the fact that legislators and members of the executive branch serve on a variety of judicial boards, the Judicial Council would also like to file an amicus brief. The requester wonders whether the individual members of the Judicial Council may actively work toward that end without violating the Code of Judicial Conduct.

In Informal Opinion 98-17, this Committee determined that the Code of Judicial Conduct does not apply to the Judicial Council, a constitutionally-created institutional body with responsibilities for the governance and regulation of the judicial branch of government. If, as we said there, the Code of Judicial Conduct is no bar to the Council's filing an amicus brief in a proceeding of interest to it, it is difficult to see how individual members of the Council could be ethically prohibited from participating, as Council members, in the Council's decision and action.[1] Formal opinion 89-1 addressed the propriety of a judge participating in and voting on issues involving litigation in a different context. Formal Opinion 89-1 discussed issues surrounding a judge serving as president of the Utah State Bar. One of the issues involved whether the judge may participate in the discussion of and vote on matters related to the bar's litigation. The Council stated that the judge could participate in those discussions and vote on those matters to the extent that the judge's participation did not constitute a conflict of interest or give the appearance of impropriety.

Opinion 89-1 is easily extended to members of the Judicial Council when discussions involve litigation naming the Judicial Council as a defendant. Judicial Council members may discuss and vote on issues that concern the direction of such litigation. The Committee is also of the opinion that Council members may ethically discuss and vote on issues that may result in litigation for the Judicial Council, either as a plaintiff or as an amicus. To determine otherwise would allow the Code of Judicial Conduct to indirectly control the direction of the Judicial Council, a result which is not intended, as recognized in Informal Opinion 98-17.

In making this determination, the Committee is mindful of the Utah Supreme Court’s decision in In re McCully, 942 P.2d 327 (Utah 1997). In that case, a judge had filed an affidavit in a case in which a guardian ad litem filed a motion to quash a subpoena by a legislative auditor. The Supreme Court concluded that it was unethical for the judge to file the affidavit. The decision was based on a determination that the affidavit was intended to influence the outcome of a case, in violation of Canon 3B(9). The affidavit was also considered expert testimony, in violation of Canon 2B.

McCully is readily distinguishable from the instant inquiry. The Council's brief will presumably contain legal and policy analysis and argument, not testimony. More importantly, although it

must be assumed that the Council's brief is intended to influence the outcome of the proceeding in which it will be filed, the Judicial Council, and its individual members acting in their official Council capacity, are on a qualitatively different footing from an individual judge acting on his or her personal initiative. The Judicial Council is not a voluntary association of judges; it is a constitutionally-created body, which, with the Supreme Court, shares responsibility for the sound operation of a branch of government and for relations with the other branches of government.

The judge in McCully was not a party to the proceeding. When a judge is a proper party to litigation, the judge can of course file pleadings in that litigation even though those pleadings are intended to influence the outcome of the case. A judge should also have discretion to contemplate and pursue litigation in which the judge has a direct interest. Similarly, when the Judicial Council is a party to litigation, the Council can file pleadings without a perception that the judges on the Judicial Council are attempting to exert undue influence on the proceeding. The Council members must also have the discretion to discuss and pursue initiatives in litigation in which the Council, as an administrative and policy-making body, has an interest.

For the foregoing reasons, the Committee's opinion is that a Judicial Council member may ethically take an active role in the Council's filing an amicus brief in a pending case which the Council determines to be of institutional interest to it. In so holding, the Committee notes that it has not seen the brief and expresses no opinion on its content. The Committee notes, in this regard, that while the filing of such a brief ordinarily poses no ethical problems for individual council members, a brief containing, for example, fraudulent, racist, sexist, scurrilous, impertinent, or malicious statements would pose ethical issues above and beyond those treated here.

[1] It is significant to the Committee that the Supreme Court, which promulgated the Code of Judicial Conduct and has ultimate responsibility for judicial discipline, knowing that the Judicial Council can function only through the collective action of its individual judge members, granted the Judicial Council leave to file the amicus brief. The Committee doubts the Supreme Court would have granted such leave if filing such a brief would constitute an ethical violation on part of Judicial Council members.

Formal Opinion 98-1
January 26, 1998

The Judicial Council has received a request to reconsider Informal Opinion 97-7. The questions posed in that opinion were as follows:

1. May a judge have lunch or dinner with a lawyer who has a case before the judge when: a) there are no issues pending before the judge; b) motions have been filed but have not been submitted for decision; c) motions are under advisement; d) a trial is underway; or e) the case is under advisement. Does it make a difference if the attorney pays for the meal?

2. How should a judge handle situations such as CLE classes, Bar functions and other large social functions attended by judges and attorneys under the same scenarios as those involved in the first question.

The questions that have been posed distinguish between private social interactions, which will be between a judge and one attorney, and larger gatherings, which will be attended by more than several attorneys. The Council recognizes those distinctions in this opinion.

Resolution of these issues involves Canons 2B , 4A, and 4D. Canon 2B states: "a judge shall not allow family, social or other relationships to influence the judge's judicial conduct or judgment." Canon 4A states: "a judge shall conduct the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) exploit the judge's judicial position." Canon 4D(5)(c) permits a judge to accept "ordinary social hospitality" from attorneys and others.

When dealing with social activities of judges, the Code strikes a careful balance. The Code recognizes that it is not wise to isolate judges and therefore judges may accept social invitations, except when those invitations interfere with the duties of the bench, undermine public confidence in the judiciary, or create the appearance of partiality or favoritism. See Jeffrey M. Shaman et al, Judicial Conduct and Ethics, 303, 304 (2d ed. 1995).

Interaction and communication between the bench and the bar is important. This includes interaction between individual judges and individual attorneys. Although the bench and the bar perform different functions in the legal system, communication and cooperation are essential to the administration of justice. The Code of Judicial Conduct must be interpreted as allowing effective bench and bar interaction. The phrase "ordinary social hospitality," as used in the Code, must be interpreted in a manner that reflects the ongoing interaction between the bench and the bar.

The New York Advisory Committee on Judicial Ethics, in Opinion 92-22, discussed whether a judge may have lunch with local lawyers who practice before the judge. That committee stated that:

> No impropriety exists with a judge having breakfast, lunch, or dinner with an attorney who practices in the judge's court, as long as no discussions of pending matters take place between the judge and the attorney, and as long as there is no appearance of impropriety. [However], during the course of a trial, on actual trial days, a judge should avoid any private social activity with the attorneys appearing before the judge for one side in a matter so as to avoid the appearance of impropriety. In other situations, the judge should exercise discretion and circumspection, depending on the circumstances, to avoid justifiable fears or complaints by lawyers or their clients.

The Council is of the opinion that the New York committee's holding is appropriate. On actual trial days, a judge should not interact privately with an attorney participating in the trial. Private interaction on trial days creates the appearance of partiality. Opposing counsel, parties, and others who might witness such interaction could reasonably question the judge's ability to be impartial. Private social interaction on actual trial days is therefore prohibited.

During the other periods mentioned in the opinion request - i.e. motions pending, issues under advisement, etc. - private interaction is not automatically prohibited. Judges have the discretion to weigh the circumstances to determine whether private social interaction is appropriate. It is not possible to foresee all possibilities and to enumerate the factors that a judge should consider. The Council simply cautions judges to avoid those situations that create reasonable and justified perceptions of partiality. For instance, a judge may choose to avoid private interaction during the period that a dispositive motion is to be argued.

Judges are not restricted in any manner from participating in larger social settings such as Bar functions, CLE classes, law firm open houses, Inns of Court and other social settings attended by more than one attorney. This type of interaction helps foster communication and respect between the bench and the bar and should not be restricted.

Finally, the Council recognizes that social hospitality often includes, for example, a dining companion paying the tab for another. A judge may therefore accept a free meal from an attorney. There may be instances when a judge may not accept gratuities associated with a meal - e.g. an airline ticket for a meal in a neighboring city - but the free meal itself will be considered ordinary social hospitality.

In conclusion, the Council finds that a judge must avoid private social interactions with an attorney on actual trial days. A judge has discretion in other circumstances to determine whether other social invitations are appropriate, taking into consideration factors that would lead to reasonable and justifiable perceptions of partiality. Judges may attend larger social events at which attorneys are present, as these interactions foster the relationship between the bench and the bar. A judge must avoid gratuities that might be associated with a free meal.

Informal Opinion 99-1
April 1, 1999

Question:
The Ethics Advisory Committee has been asked by a juvenile court judge whether it is a conflict of interest for the judge's spouse to sit on the board of trustees of a counseling center that receives referrals from the juvenile court.

Answer:
The Committee finds that the spouse's position on the board could imply that the center holds a

special position of influence with the judge. Therefore, the judge should not specifically order, or allow juvenile court personnel to require, services to be sought from the center.

Discussion:
According to the facts provided by the judge, the judge's spouse serves on the board of trustees of a nonprofit counseling center. The counseling center provides services to adults and juveniles in the areas of substance abuse, domestic violence, and anger management, among other areas. The juvenile court intake workers and probation officers often recommend that a juvenile be ordered to receive services from the counseling center. The judge will typically order counseling services, but will not refer to a specific counseling center. However, on occasion the judge does refer to this particular counseling center. Because of the relationship between the counseling center and the juvenile court, the judge questions whether it is a conflict of interest for the judge's spouse to sit on the board of trustees.

The Code of Judicial Conduct does not govern the behavior of a judge's family. This Committee cannot provide instruction to a judge's spouse as to whether he or she may sit on a board of trustees. The Committee can only provide guidance to the judge and how the judge should deal with referrals to the counseling center.

Canon 2B, Utah Code of Judicial Conduct, states that "[a] judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." For purposes of this opinion, the Committee assumes that the judge's spouse has no financial interest, as defined by the Code, in the counseling center. If such a financial interest existed, referral by the juvenile court to the counseling center, whether or not specifically ordered by the judge, would be impermissible. Canon 3E(1)(c), Code of Judicial Conduct.[1] The question for the Committee is whether the service on the board by the spouse either uses the judicial office to promote private interests or conveys an impression that the center is in a special position to influence the judge, thereby prohibiting referrals by the judge.

In Informal Opinion 98-13, the Committee addressed the question of whether a judge may write a letter in support of a private counseling service seeking a federal grant. The Committee concluded that such a letter was not permissible because, among other reasons, the letter could be perceived as conveying that the organization is in a special position of influence. The Georgia Judicial Qualifications Commission, in Opinion 219, found that a juvenile court judge could not order children or parents to receive services from an organization from which the judge's spouse received remuneration as executive director. The Commission's opinion was based on Canons 2B and 3C.

While the Committee realizes that, unlike the situation addressed by the Georgia Commission, the judge's spouse does not have a financial interest in the center, the spouse's service on the board may convey the impression that the center is in a special position to influence the judge. While the judge's spouse does not benefit financially from the center's work, the private interests of the center presumably are advanced by providing services ordered by the court. An impression

that the center is in a special position to influence the judge could take two forms. The first would be that the center was able to receive more referrals than it would otherwise because of the board member's relationship with the judge. The second would be that the juveniles or parents would perceive that the judge would give undue credence to the arguments, testimony or evidence of the center. Therefore, the judge should not specifically order juveniles or parents to seek services from the center. In addition, the judge should not allow juvenile court personnel involved in cases in which the judge presides to require counseling from the center.

If the center appears on a list of providers from which the juvenile or parents could choose, the Committee's concerns are lessened. As long as juvenile court personnel do not make any recommendations about the services provided on such a list, parents and juveniles would choose without influence and each of the service providers would be in the same position.

[1] Canon 3E(1)(c) would require the judge to be disqualified in any case in which the spouse has "any other more than de minimis interest that could be substantially affected by the proceeding."

Informal Opinion 99-2
June 24,1999

Question:
A judicial employee, who is a member of the Matheson Building Committee, has asked whether the employee may authorize display in the Matheson Courthouse of a plaque recognizing the Trial Lawyer of the Year of the Utah Chapter of the American Board of Trial Advocates.

Answer:
The employee may not authorize display of the plaque in the courthouse.

Discussion:
The Matheson Building Committee (Building Committee)[1] has been asked to display a plaque recognizing the trial Lawyer of the Year of the Utah Chapter of the American Board of Trial Advocates. The Committee has been provided a photograph of the plaque. The plaque is similar in form to other award plaques. At the top, it identifies the name of the award. Underneath, it lists the award recipient for each year. The judicial employee questions whether the employee may vote to approve placement of the plaque in the courthouse.

Canon 3C(2) of the Code of Judicial Conduct states that "[a] judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge." "The obligations of fidelity and diligence insure that employees are faithful to the judiciary in the employees' professional duties." Informal Opinion 98-2. To resolve this opinion request, the Committee must initially determine whether displaying the plaque would implicate an obligation of fidelity.

This opinion request involves the following provisions of the Code of Judicial Conduct:

> Canon 1. A judge shall uphold the integrity and independence of the judiciary. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.
>
> Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all activities.
> A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge . . . .

The fundamental duties imposed by these Canons are preserving public confidence in the impartiality of the judiciary; not lending the prestige of the judicial office to advance others' private interests; and not allowing others to convey the impression that they are in a special position to influence a judge. These duties ensure faithfulness to the mission of the judiciary. The Committee is therefore of the opinion that these duties are ones of "fidelity and diligence" imposed upon judges and therefore must be followed by court employees.

Having determined that the court employee has an ethical stake in the placement of the plaque, the Committee must determine whether placement of the plaque violates any of the three duties discussed above. The Committee believes that, at the very least, the first duty is implicated.

Each of these duties relates to issues of perception. Impartiality, prestige and influence are all matters which can be reasonably perceived even in the absence of their actual existence. The Committee is concerned about the perception created by placing the plaque in the courthouse. Displaying the plaque in the courthouse is problematic because it may convey the impression that the court is endorsing certain lawyers. A courthouse is a symbol of impartial justice that reflects upon all the judges who work in the building as well as upon the judiciary as a whole. A plaque identifying particular advocates as "Trial Lawyer of the Year" in a court facility may imply to those seeing the plaque that the judiciary thinks more highly of particular lawyers. The Committee is particularly concerned about the effects upon litigants who might be involved in litigation against a client of one of the lawyers listed on the plaque. Because displaying the plaque may raise perceptions of partiality, displaying the plaque is inappropriate.

In making this conclusion, the Committee does not intend to imply that displaying the plaque will create partiality. Judges in the courthouse are often aware of attorneys who receive awards and distinctions. Simply becoming aware of those facts does not create actual partiality or even

lead to a reasonable appearance of partiality. The appearance problems are created by displaying a plaque in a courthouse. Furthermore, the Committee does not believe that any individual judge could be sanctioned if the plaque were displayed. Nevertheless, because displaying the plaque may create the perception of partiality by the judiciary as a whole, judicial employees should take the necessary steps to ensure that the plaque is not displayed.

[1] The Matheson Building Committee is a group of judicial branch employees with management responsibilities in the various state court components that are housed in the Scott M. Matheson Courthouse. The Building Committee oversees the management of the Courthouse.

Informal Opinion 99-3
April 7, 1999

Question:
A judge has asked the Ethics Advisory Committee whether the judge may engage in discussions with the judge's insurance carrier concerning insurance coverage.

Answer:
The judge may communicate with the insurance carrier concerning coverage for the judge's family member. Communications may be through telephone or letter. In these communications, the judge should not make any reference to the judge's position unless the information is elicited for the purpose of qualifying for insurance. For instance, the judge cannot use judicial letterhead, sign the letter as a judge, or mention the judge's occupation in the letter. In keeping with the private nature of the discussions, the judge should only draw upon personal, as opposed to professional experiences when discussing issues with the insurance carrier.

Discussion:
The judge has a family member who suffers from a serious mental illness. The judge would like to engage in discussions with the judge's insurance carrier concerning the merits of giving parity to the insurance coverage given to mental illnesses in relation to the coverage given other serious physical disorders. The financial implications of additional insurance coverage would be significant to the judge. The issue of insurance coverage for mental illnesses has also become a state and federal issue, with several states enacting statutes to require parity. The United State Congress has considered the issue, and a bill requiring parity was introduced in the Utah Legislature, but the bill was never presented for a full legislative vote.

The Code of Judicial Conduct reaches the private conduct of judges through Canons 2 and 4. Canon 2A requires a judge to "exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." Canon 4A states that "a judge shall conduct the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) exploit the judges' judicial position."

Canon 4 contains other proscriptions when a judge's extra-judicial activities are more public in nature. As a general rule, when a judge is in engaged in public activities, the judge can only participate in activities that involve the law, the legal system or the administration of justice or activities with certain non-profit organizations. In the fact situation presented, the judge would not be able to, for instance, attend a public meeting and engage in any public discussions concerning insurance coverage for mental illnesses, because this is not a subject that is directly related to the law, the legal system or the administration of justice. However, it is obvious that these proscriptions do not and should not extend to the private dealings of judges. A judge would be severely restricted in private dealings if the proscriptions applied. Because insurance coverage for mental illnesses is an issue on which the judge has a personal, private interest, the Committee believes that the judge should be able to engage in discussions with insurance company representatives with certain restrictions.[1]

"The policy justifications for placing restrictions on off-the-bench activities generally fall into the following broad categories:

(1) the need to avoid the appearance of partiality, favoritism, or other misuse of public office;

(2) the need to maintain public confidence in the members of the judiciary; and

(3) the need to ensure that judges will not be distracted by non-judicial activities."

Jeffery Shaman et al., Judicial Conduct and Ethics, 303, 304 (2d ed. 1995). "It is considered improper for a judge to take advantage of his or her position and title in order to advance an economic, political, social, or other interest. Furthermore, it is considered improper for a judge even to appear to do so." Id. at 305. A judge should certainly be free to engage in private negotiations and dealings in areas in which the judge has an interest. However, a judge must be careful when the judge's interests may be affected through these dealings. A judge must not create any perception that the judge is attempting to use influence. Obvious examples would occur if a judge were to mention his or her title in hopes of gaining special treatment, favors, discounts, etc. The judge must never attempt to use the judge's names or title as a tool in private dealings and the judge must never create a perception that the judge is attempting to use the judge's name or title in such dealings.

[1] The Committee does not address whether a judge could engage in these types of discussions if the judge did not have a direct, personal interest.

Informal Opinion 99-4
August 19,1999

Question:
A justice court judge has asked whether it is appropriate to preside over a proceeding in which the judge's clerk has filed an affidavit setting forth whether a defendant has made a required appearance or complied with a sentence imposed by the court.

Answer:
The judge is not disqualified from the proceeding, provided the clerk's affidavit recites only the status of court records regarding appearances and compliance with the court's sentence.

Discussion:
Canon 3E(1) requires a judge to "enter disqualification in a proceeding in which the judge's impartiality might reasonably be questioned." The issue for this Committee is whether the clerk's appearance as a witness, for the limited purpose of reporting on matters of court record, requires the judge's disqualification in that proceeding. In Informal Opinion 89-2, we stated that "the general test applied to determine whether a judge's impartiality might reasonably be questioned is whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge [would] find that there is a reasonable basis for questioning the judge's impartiality." In the absence of actual bias, disqualification is based on the perception of a reasonably prudent person.

According to the requester, the facts concerning which the court clerk files an affidavit are matters which are found in the court record. The affidavit would be limited to whether court records indicated a defendant's appearance or whether court records indicated compliance with the court's sentence, such as payment of a fine or completion of counseling. Because the facts are contained within the court record, there is a possibility that the court could take judicial notice of those facts. However, because an affidavit may be necessary to justify an arrest warrant, judicial notice might not be legally appropriate in this situation. The Committee cannot and will not offer an opinion as to whether judicial notice is appropriate or whether an affidavit is needed. The Committee can only offer an opinion as to whether a judge must enter disqualification in a proceeding in which a judicial employee's affidavit is filed because judicial notice may not otherwise support the actions to be taken by the court.

The Code prohibits a judge from presiding over a proceeding involving a party or witness with whom the judge has a sufficiently close relationship such that the judge's impartiality might be questioned. The concern is that, if the judge knows a witness well, the judge may tend to believe that person's testimony over another witness. The Committee believes that this concern is alleviated in situations such as this where the testimony recites only facts regarding the court's record of compliance. When an affidavit recites only such facts, there is little, if any, chance the court will give undue credence to the clerk's testimony based on the judge's professional familiarity with the clerk. The judge is therefore not required to enter disqualification. The Committee's determination is limited to affidavits that recite whether court records indicate a defendant's appearance or compliance with a court sentence. The Committee emphasizes that if the affidavit contains facts outside of the record, or facts introduced into the court record by someone other than court personnel, the analysis would change and disqualification may be necessary.

Informal Opinion 99-5
June 24, 1999

Question:
A justice court judge has asked whether the judge may ethically execute an agreement with a private probation provider, if applicable statutes, rules and ordinances otherwise allow the judge to sign such an agreement.

Answer:
The judge may execute the agreement if it is determined that the agreement is legally permissible.

Discussion:
The requester has provided the Committee with a copy of the proposed agreement between the probation provider and the court and the city. The proposed agreement contains a line for the judge's signature. Under the agreement, the probation provider will provide many of the same services as a public provider, such as collecting fines and restitution, and monitoring defendants' attendance at treatment programs.

The contemplated conduct is not prohibited by any of the express provisions of the Code of Judicial Conduct in Canons 3, 4, or 5. Resolution of the question therefore depends on whether the conduct falls within the more general proscriptions found in Canons 1 and 2. Canon 2A states that "[a] judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B states that "[a] judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

Canon 2A requires a judge to "comply with the law." Because of the unique nature of the proposed arrangement, there may be issues related to the legality of the agreement. The Committee cannot address those issues. The Committee suggests that the judge consult with the court and city's legal advisors. If those advisors determine that the agreement is legally impermissible, then it would be unethical for the judge to participate in the arrangement.

If the advisors determine that the agreement is legally permissible, the Committee believes that the judge's participation is permitted. An agreement to provide probation services would not lessen the public's confidence in the integrity or impartiality of the judiciary. The integrity of the judiciary may, in fact, be promoted. The probation provider will assist the court in ensuring that its orders are enforced, improving public confidence in the authority and impact of court decisions.

Also, although the probation provider's private interests will be advanced, the Committee does not believe that the prestige of the judicial office is being used to advance the private interests. The judicial branch often executes agreements with third parties, which agreements improve the

financial standing of the third parties. However, those agreements are a necessary part of business and do not involve the prestige of the judiciary. Therefore, if the agreement is legally permissible the judge is not ethically prohibited from participating in the agreement.

If the judge signs the agreement and it is later determined through litigation that the agreement is not legally permissible, the judge cannot be ethically faulted for signing the agreement if the judge reasonably relied on the opinion of the legal advisors.

Informal Opinion 99-6
September 23,1999

Question:
A judge has asked the Ethics Advisory Committee whether the judge may speak at a conference of the Attorney General's Office.

Answer:
The judge may participate in the conference provided the judge does not give legal advice, comment on pending cases, or show improper biases, and provided the judge is willing and available if requested to speak to groups of attorneys who handle cases adverse to the Attorney General's Office.

Discussion:
The judge who has requested the opinion has been invited to speak at a CLE conference of the Attorney General's Office. The judge will participate on a panel with other judges. The judges have been asked to speak on "Bench Trial Basics." The audience will be limited to attorneys and staff of the Attorney General's Office.

Canon 4B states that "[a] judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal topics subject to the requirements of this Code." Judges often receive invitations to speak and teach about the legal system and legal topics. These invitations typically involve bar conferences or CLE classes in which the audience is diverse. Judges are encouraged to accept these invitations to assist in a better educated bar and an improved legal system.

Canon 2A states that a judge "should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." When teaching and speaking, a judge must not undermine public confidence in the impartiality and integrity of the judiciary. The Attorney General's Office has many divisions and areas of practice. However, the divisions represent one side in litigation. For instance, the criminal division focuses on prosecution and the litigation division focuses on defense. Because the office represents only one side of litigation, the question that arises in this case is whether a judge may instruct a group that represents only a single adversarial component of the legal system.

The Ethics Advisory Committee has previously discussed a judge's ability to participate in training and education programs. In Informal Opinion 88-5, the Committee discussed three relevant factors in determining whether participation is permitted. The first factor is whether the program is attended by all components of the justice system. The second factor is whether the program is in a small geographic area such that the persons attending the program are likely to appear in the judge's courtroom. The third factor is the subject matter of the course. The first factor is relevant to this situation.

In Informal Opinion 88-5, this Committee determined that a judge was prohibited from teaching a course on proper courtroom demeanor to law enforcement officers. The Committee was concerned that such activity might "create the appearance of impropriety or convey the impression that peace officers are in a position of special influence with the judge." We have cited Informal Opinion 88-5 in other opinions discussing judicial interaction with law enforcement. For instance, in Informal Opinion 89-9 we stated that a judge could not teach a class on recent criminal decisions to law enforcement officers, and in Informal Opinion 97-5 we stated that a judge may not attend a law enforcement checkpoint or ride-along.

The previous ethics advisory opinions have not discussed single component interaction in educational settings involving only attorneys. The Committee must now determine whether judges may engage in teaching activities directed toward groups of attorneys who represent a single component of the justice system.

In deciding this question, the Committee has reviewed advisory opinions from other states to determine their treatment of single component interaction. The Committee has not identified any ethics opinions that prohibit judges from educating a group of attorneys that represent a single component of the system. Those states that have directly discussed the issue have determined other means to address the partiality concern. The Maryland Judicial Ethics Committee in Opinion 116, held that a judge may accept an invitation to educate one group of attorneys as long as the judge is willing and available to accept an invitation from a competing group. The Oregon Judicial Conduct Committee, in Opinion 87-3, stated that an appearance of impropriety is not a concern because attorneys can discern the judge's role in the education process. Judges are serving to improve the bar. Other states appear to allow educational opportunities, while placing restrictions on the content of the education. These restrictions include:

1) prohibiting comment on pending cases;
2) prohibiting the giving of legal advice; and
3) prohibiting judges from giving opinions that would indicate biases as to how particular cases would be decided by the judge.

After reviewing the ethics opinions from other states, the Committee believes that the single component interaction prohibition should not be extended to educational settings involving attorneys. In making this conclusion, the Committee is also mindful of the conclusions of Formal Opinion 98-1. In that opinion, the Judicial Council stated that private social interaction between attorneys and judges is permitted, except on actual trial days. The Council noted the important interaction between members of the bench and members of the bar. If social interaction is

permitted between judges and members of the bar who represent a single component of the bar, then educational opportunities should be encouraged.

The judge may therefore accept the invitation from the Attorney General's Office under the following conditions:

1) the judge is willing and available to accept invitations from groups of attorneys who represent other components of the legal system in cases involving the Attorney General's Office;
2) the judge does not give legal advice;
3) the judge does not comment on pending cases; and
4) the judge does not offer opinions that would indicate biases or a prejudgment of certain types of cases.

Informal Opinion 99-8
October 4, 1999

Question:
A judge has asked the Ethics Advisory Committee about the propriety of judges initiating contact with judicial nominating commission members to provide information on candidates for judicial office.

Answer:
A judge may offer unsolicited information to the nominating commission. Although providing information to individual commission members is discouraged, it is not unethical. The information must be an honest assessment of the candidate's qualifications based on the judge's professional familiarity with the candidate.

Discussion:
Canon 2B governs this issue. Canon 2B states:

> A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

This Canon prohibits a judge from allowing individuals or entities to use the judge's title for profit or personal gain. The exception to this rule is employment applications. In Informal Opinion 91-2 the Committee stated that a judge may provide a letter of recommendation on behalf of an employment applicant when the judge is aware of the applicant's professional qualifications. Employment recommendations are allowed even though the individual may gain personally by obtaining employment. The ability to offer recommendations is not absolute, however. In certain circumstances, the concern that the prestige of the judicial office may influence the recipient of the recommendation will override the judge's ability to write such a

letter. For instance, a judge cannot write a letter for a person seeking commercial funding for a business that will receive referrals from the court. See Informal Opinion 91-2.

Although this Committee has not addressed the issue directly, it is evident from opinions of this Committee and other states that a judge may write a letter of recommendation on behalf of an attorney seeking employment. The letter may be written even if the employer has not requested such a letter. This Committee has also determined that a judge may communicate with a judicial nominating commission about a judicial candidate. In Informal Opinion 94-5, the Committee stated that a judge may respond to an inquiry from a judicial nominating commission by providing "an honest assessment of the candidate, limiting the response to the judge's knowledge of the candidate's qualifications or lack thereof." The commentary to the model code of judicial conduct similarly states that "judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, as well as responding to official inquiries concerning the person being considered for a judgeship." Informal Opinion 94-5 and the model code commentary recognize that judges possess information that may be important to the selection process. Judges are encourage to share this information. The current opinion request raises two issues that have not yet been addressed by this Committee and are not expressly addressed by the commentary to the model code. The issues are whether a judge may offer unsolicited information concerning a candidate's qualifications and whether a judge may contact individual commission members, instead of, or in addition to, the commission as a whole.

In Informal Opinion 94-5 the Committee cited Opinion 40 of the California Judge's Association Committee on Judicial Ethics. That opinion stated that "a judge is encouraged to write and otherwise contribute to improvements in the law and the administration of justice, to the extent that time permits." The California opinion noted that judges are "uniquely able to contribute insight to the judicial selection process and thereby to the administration of justice." Judges are in a good position to offer information and assessments as to whether judicial candidates are suited for a judicial position. The primary issue for consideration is whether offering the assessment involves the prestige of the judicial office. Although judges are allowed to offer assessments upon request of a nominating commission, an argument could be made that through an unsolicited assessment the judge is attempting to use his or her office to influence the decision-makers. However, the Committee does not find such an argument to be sufficiently persuasive to overcome the general encouragement to judges to contribute to the improvement of the judicial system. As long as the judge provides an assessment that is honest and is based on personal knowledge of the applicant's abilities for judicial office, the judge is not prohibited from offering an unsolicited assessment to a judicial nominating commission.

This conclusion is consistent with ethics advisory opinions from other states. For instance, the Maryland Judicial Ethics Committee, in Opinion 83, stated that a judge need not be asked for a recommendation, but may voluntarily offer such to "those who may be in a position to recommend appointments to the Governor." The Georgia Judicial Qualifications Commission, in Opinion 63, stated that a judge may send an unsolicited recommendation letter to a screening committee. The Georgia Commission noted that the letter does not involve the prestige of the judicial office, but is an assessment from someone who uniquely knows the qualifications of the

candidate. Similarly, the Florida Committee, in Opinion 86-2, stated that a judge may communicate with a judicial nominating commission without being asked, as long as the information is "factual, succinct, and discreet."

The question that remains is whether a judge may contact an individual nominating commission member to offer such an assessment. The Committee does not believe that contacting individual commission members, as opposed to the commission as a whole, creates any greater concern that the prestige of the judicial office is involved. However, the Committee is concerned that such a practice may implicate the integrity of the judiciary in violation of Canon 2A. When contact is made with the commission as a whole, the information would be in writing and available to all members. If individual contact is made, the information would be oral. The member could relay the information, but the information would be subject to that member's interpretation. Individual contact could also result in public perception that an atmosphere exists for "back room" deals to promote or hinder particular applicants.

Despite these concerns, the Committee is not prepared to declare individual contact as being unethical. As noted above, the Maryland Judicial Ethics Committee determined that a judge may contact individuals who are in a position to recommend appointments to the Governor. The Committee believes that such an approach is ethically permissible. Although the integrity of the judiciary is a concern, judges should be strongly cautioned concerning the content of the communications, rather than prohibiting the communications. Any communications should be an honest assessment of a candidate's professional qualifications. Information should be clear and succinct to avoid misinterpretation.

Informal Opinion 99-9
November 16, 1999

Question:
Can a justice court judge preside in cases in which the prosecuting attorney is in the same law firm as the judge's personal attorney?

Answer:
Yes, if the relationship is disclosed in each case, and no party objects.

Discussion:
A justice court judge may receive an appointment to sit in another court. The prosecuting attorney for the new court is in the same law firm with the judge's personal attorney. The law firm consists of seven members. The judge asks if the judge can preside in cases involving the prosecuting attorney.

Canon 3E of the Code of Judicial Conduct addresses cases from which judges are disqualified. The following portions of Canon 3E are relevant to this opinion request:

> (1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might be reasonably questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The Committee does not think that the actual bias provision of Canon 3E(1)(a) is implicated by the facts presented in the opinion request. The judge's personal representation by another member of the prosecuting attorney's law firm does not indicate any bias concerning the prosecuting attorney. The importance of the Committee's determination that this situation is not governed by Canon 3E(1)(a) is that disqualification due to actual bias cannot be remitted. Canon 3F.

Disqualification in the circumstances presented by this opinion request is required if "the judge's impartiality might reasonably be questioned." In other words, disqualification is required in situations giving rise to the appearance of bias as well as actual bias. The test used to determine if an appearance of bias exists is "whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge [would] find that there is a reasonable basis for questioning the judge's impartiality." Informal Opinion 89-2.

Other states have issued ethics opinions involving similar facts. Most opinions that the Committee examined state that a judge should disclose the existence of the relationship with the law firm and, if any party objects, the judge should recuse. See Alabama Judicial Inquiry Commission Opinion 96-616; Arizona Supreme Court Judicial Ethics Advisory Committee Opinion 92-11; Florida Committee on Standards Governing Conduct of Judges 79-2; Michigan Bar Formal Opinion J-5; Washington Ethics Advisory Committee Opinion 93-14. New York originally adopted a per se rule that prohibits judges from hearing cases presented by lawyers from the same law firm as the judge's personal attorney. N.Y. State Bar Assoc. Opinion 511 (1979). However, the opinion was modified to no longer require recusal. Instead, the nature of the original representation, the amount of time that has passed, and whether the parties have waived disqualification needs to be considered. N.Y. State Bar Assoc. Opinion 574 (1986). Significantly, the Committee did not find any opinions that did not require at least disclosure of the relationship.

The Committee agrees with the majority of states cited above. Although not always explicitly stated, the gist of these opinions is that presiding in a case involving a member of the law firm of the judge's attorney creates a situation in which "the judge's impartiality might reasonably be questioned."[1] Using the "reasonable person" standard articulated in Informal Opinion 89-2, the Committee thinks that the fact that a judge is a client of another member of the prosecuting attorney's law firm may give the appearance of bias. It may appear that, by choosing to be represented by a member of the prosecuting attorney's law firm, the judge holds the law firm in particular esteem. In addition, the judge's relationship with the law firm may be viewed by litigants as evidence of a special relationship between the prosecutor and the judge. Although not

determinative in the analysis, the Committee notes that the fact that the attorney appearing is the prosecuting attorney, if anything, exacerbates the appearance problem. The prosecuting attorney is acting as an agent of the government asserting that defendants should be fined or incarcerated.

Because the judge's impartiality might reasonably be questioned, in all cases in which the prosecuting attorney appears the judge must disclose and enter recusal if the disqualification is not waived by the parties pursuant to Canon 3F. The Committee recognizes that this outcome may be problematic in a justice court for which criminal cases are a significant portion of the caseload. However, the appearance problem still exists.

The judge who requested the opinion asked if the judge was required to retain different private counsel.[2] As discussed above, the judge is not absolutely prohibited from presiding in cases in which a member of the judge's personal attorney's law firm appears. Therefore, the judge would not have to retain different counsel. However, should the judge decide to do so, the Committee will give guidance on the effect of having counsel appearing before the judge who is a member of the law firm of the judge's former attorney.

The Committee thinks that, as a general rule, once the attorney-client relationship ceases the judge need not disclose the former relationship when a member of the former attorney's law firm appears. The Committee does not think that a reasonable person would find an appearance of bias. First, no on-going relationship with the law firm exists. Second, the relationship between the judge and the member of the former attorney's law firm is always more tenuous than between the judge and the judge's attorney.

[1] The other states' opinions involved attorneys representing judges in both personal and official matters. The Committee believes that the nature of the representation is immaterial to the analysis of this opinion.

[2] The opinion request also asked if a different prosecuting attorney should be used. The Committee only addresses judicial conduct. The selection of a prosecuting attorney is the province of the city's executive branch and not the judiciary.

Informal Opinion 99-11
December 8, 1999

Question:
A district court judge has asked the Ethics Advisory Committee whether the judge may serve as a domestic violence commissioner for the Navajo Nation courts.

Answer:
The judge may serve as a domestic violence commissioner provided the service does not interfere with the judge's duties as a state court judge.

Discussion:
A district court judge has been asked to serve as a domestic violence commissioner for the Navajo Nation courts. The Navajo Nation boundaries extend through Utah, Arizona and New Mexico. While there are various court sites within the Navajo Nation, there is no court site within the Utah state boundaries. As a domestic violence commissioner, the district court judge will conduct hearings involving Navajo Nation members that include a mixture of state and tribal law. The district court judge will provide recommendations to a Navajo Nation judge, who will issue a final order. State facilities will be used for conducting these hearings, but the district court judge anticipates less than one filing per month.

There are two Canons implicated by the opinion request. Canon 3A states that "the judicial duties of a full-time judge take precedence over all the judge's other activities." Canon 4C limits a judge's extra-judicial activities to matters concerned with "the improvement of the law, the legal system or the administration of justice." Because the amount of time spent on the Navajo Nation cases will not be significant, the Committee does not believe that such service will interfere with the judge's full-time judicial duties. However, if the number of cases reach a point when the judge's state judicial duties are impacted, the judge would be required to re-evaluate the situation. The Committee is also of the opinion that the judge's service is consistent with the limitations of Canon 4C. The judge's service to the Navajo Nation would help improve the administration of justice.

In Opinion 93-2, the Arizona Judicial Ethics Advisory Committee addressed whether "state court judges [may] serve . . . as visiting trial judges or appellate judges on Indian Tribal courts." The committee determined that such service was not prohibited by the Code of Judicial Conduct, and was, in fact, an important means of improving the relationship between state and tribal courts. While the fact situation is somewhat different in this matter, the same principles apply. If a state judge can travel to the Navajo Nation and preside over cases in the Navajo Nation court, a judge could similarly hear cases involving Navajo Nation issues in the state court facilities. The Committee agrees that this is an important service and helps improve the relations between the two sovereign jurisdictions.

Informal Opinion 00-1
February 1, 2000

Question:
A court commissioner has asked the Ethics Advisory Committee whether the commissioner may serve on the Compliance/Service Delivery Committee to Utah Legal Services (the ULS Committee).

Answer:
The commissioner may serve on the ULS Committee provided the commissioner is not giving legal advice or acting as a legal advisor. The commissioner should also disclose the service in cases involving Utah Legal Services attorneys.

Discussion:
The Ethics Advisory Committee referred this question to the Judicial Council for resolution. The Judicial Council has determined a resolution to the question and instructed the Committee to issue this Informal Opinion.

Utah Legal Services is a private, non-profit organization whose prime purpose is delivering legal services to the poor. The organization employs attorneys who represent indigent clients. Utah Legal Services is governed by a board of trustees. The board of trustees is apparently assisted by various committees. According to the opinion request, the purpose of the ULS Committee is to "oversee compliance by the corporation, its attorneys, and employees with all statutory, regulatory, and ethical requirements and standards and report such compliance to the board of trustees." The commissioner has been asked to be an "at large committee member who would be non-voting."

Subject to certain limitations, Canon 4C(3), allows a judge to "serve as an officer, director, trustee or non-legal advisor . . . of an educational, religious, charitable, fraternal or civic organization not conducted for profit." In addition to fund-raising and membership solicitation restrictions, a judge may not serve as an officer, director, trustee or "non-legal advisor," "if it is likely that the organization will be frequently engaged in adversary proceedings before any court."

The Committee is initially concerned that the commissioner will be acting as a legal advisor to the ULS Committee and, in turn, to Utah Legal Services. As noted, the ULS Committee will oversee compliance with statutory, regulatory and ethical requirements and standards. Additional information has not been provided as to how the ULS Committee will fulfill its obligation. The Committee questions whether the commissioner is being asked to use the commissioner's legal expertise to determine whether Utah Legal Services is in compliance with legal and ethical standards. Such service would be inappropriate. The commissioner is prohibited from giving legal advice or judgments when serving a civic organization. Before accepting an appointment, the commissioner must clarify the commissioner's role on the ULS Committee.

The next question for the Committee is whether Utah Legal Services is an organization that is frequently engaged in adversary proceedings before any court. If so, service is prohibited even though the service would be as a non-voting member.

The Ethics Advisory Committee of the Michigan State Bar, in Opinion JI-38, recognized a distinction between organizations that are frequent litigants and organizations that provide counsel for indigents, but are not themselves parties in court. The Michigan committee noted that organizations such as the American Civil Liberties Union exist primarily for the purpose of bringing litigation. The organization itself is a frequent litigant and therefore service to such an organization is inappropriate. The Michigan Committee noted, however, that "a legal services organization regularly appears in court on behalf of others, advocating the interest of the particular client rather than the interest of the organization." The organization itself is not a litigant, but simply hires attorneys to represent clients.

The Michigan committee noted that legal service organization boards of trustees and committees are "segregated from information about particular cases in order to preserve the advocates' independent professional judgment about the representation." The Michigan committee therefore determined that a judge may serve on a legal services entity that hires attorneys to provide representation. The Michigan committee offered an additional caveat stating that service would not be appropriate if the organization "made policy decisions that have political significance or imply commitment to causes that may come before the courts for adjudication."

The Florida Ethics Advisory Committee in Opinion 86-16 noted a distinction between a "legal aid society [that] acts only as an administrative body to assign cases to lawyers on a pro bono basis," and a "legal aid society [that] engages in litigation directly or represents impoverished people through the use of staff counsel." The Florida committee determined that service would be permitted in the former situation, but not in the latter. The Florida committee did not address whether the Rules of Professional Conduct create a sufficient buffer between a legal services board and the attorneys who represent indigent persons in courts.

After reviewing these authorities, the Committee is of the opinion that Utah Legal Services is not an organization that is frequently engaged in proceedings before any court. The organization conceivably might appear in litigation, but most frequently the attorneys hired by Utah Legal Services appear on behalf of other parties, and not Utah Legal Services itself. The staff attorneys represent the interests of the indigent clients and not Utah Legal Services. The Committee believes that the Rules of Professional Conduct applicable to attorneys are a sufficient buffer between Utah Legal Services management and committees, such that there would not be a connection between the work of the commissioner on a committee and the activities of the attorneys hired by the organization. Service by the commissioner is therefore permitted under Canon 4, unless the ULS Committee directs the actions and judgment of the hired attorneys.

The final concern for the Committee is whether service to Utah Legal Services would violate Canon 2A, which requires a commissioner to "exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary," or Canon 3E which requires disqualification "in a proceeding in which the [commissioner's] impartiality might reasonably be questioned." The Michigan committee noted that there may be a perception issue when a judge is associated with an organization that provides assistance to litigants. Based on its conclusion, the Michigan committee apparently determined that the perception issue was not significant.

The Committee is concerned about the perception of parties who may appear before the commissioner in cases involving attorneys employed by Utah Legal Services. Although the attorneys may well understand that the commissioner's service to Utah Legal Services is sufficiently disconnected from the work of Utah Legal Service's attorneys, parties in those cases may reasonably question whether the commissioner can be impartial. While the Committee has little doubt that a commissioner could be impartial in such a circumstance, the perception of the public litigants is an important consideration.

The Committee recognizes that service to a civil organization such as Utah Legal Services helps to improve the administration of justice in the legal system. Judicial officers should be encouraged to serve, where appropriate. If the commissioner serves on this ULS Committee, the commissioner should disclose the service in cases involving Utah Legal Services attorneys. The parties may waive disqualification under Canon 3F. If disqualification ultimately disrupts case management for the commissioner's court, the commissioner should re-evaluate whether continued service to Utah Legal Services is appropriate.

Informal Opinion 00-2
February 11, 2000

Question:
A part-time justice court judge has asked the Ethics Advisory Committee whether the judge may accept an appointment to the local school district board of education.

Answer:
The judge may accept the appointment.

Discussion:
A school superintendent has offered a part-time justice court judge a position on the local school district board of education. The judge questions whether service is permitted under the Code of Judicial Conduct. The duties of the board include establishing the objectives of the school; adopting policies, procedures and regulations for governing the school system; establishing salaries; and representing and supporting the schools before county commissioners, State Board of Education, the Legislature and school patrons. Membership on the board is a paid position.

The board is a governmental entity. Membership on governmental entities is governed by Canon 4C(2) and Canon 4C(3). Canon 4C(2) states that "[a] judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice." Because the school board is concerned with issues other than legal issues, service by a judge would typically be inappropriate. However, the applicability section of the Code states that a part-time justice court judge is not required to comply with this section. A part-time justice court judge may therefore accept a governmental position on entities other than those concerned with legal issues.

Canon 4C(3) states that "[a] judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency, which may include a constitutional revision commission, devoted to the improvement of the law, the legal system or the administration of justice, or of an educational, religious, charitable, fraternal or civic organization not conducted for profit." A part-time justice court judge is required to comply with this provision. We noted in Informal Opinion 95-3, which discussed service on the state Board of Regents, that this Canon is also relevant in determining whether a judge may serve a governmental organization that is not

concerned with the law or the legal system. The difficulty that is presented is whether this Canon prohibits a part-time judge from serving on a government education board, even though service would be permitted under Canon 4C(2).

The Committee believes that exempting part-time justice court judges from Canon 4C(2) is intended to permit these judges to participate in governmental service beyond governmental boards that are concerned solely with the law and the legal system. Canon 4C(2) is phrased in proscriptive terms, while Canon 4C(3) is phrased in permissive terms. The primary focus of Canon 4C(2) is to limit governmental service. The primary focus of Canon 4C(3) is to proscribe a judge's activities when a judge serves on a governmental or civic organization - e.g. limits on fund-raising and membership solicitation. Once it is determined that service is permitted under Canon 4C(2) (or that the Canon does not apply as in this situation), Canon 4C(3) serves only to limit a judge's activities on the governmental board. A part-time judge may therefore serve on a governmental board, subject to the restrictions of Canon 4C(3). These restrictions include prohibitions against fund-raising and membership solicitation and, perhaps most importantly, a prohibition against serving an entity that is a regular litigant in any court.

In addition to the specific proscriptions in Canon 4C(3), a judge must consider other factors before accepting the appointment. The judge's service must not affect public confidence in the integrity and impartiality of the judiciary. The Committee does not believe that those factors are at issue with the school board, but the judge must make certain before accepting the appointment. The Committee also notes that there may be statutory and/or constitutional issues concerning a part-time judge's service to an executive branch entity. The Committee cannot offer an opinion on those issues, other than to state that if service is illegal, it would also be unethical. The Committee encourages the judge to consult her legal advisors as to whether service is authorized.

Part-time justice court judges are typically from smaller communities in which community leaders often have more than one role. Under the Code of Judicial Conduct, a part-time justice court judge may also participate in different roles.

Informal Opinion 00-03
May 3, 2000

Question:
A judge has asked the Ethics Advisory Committee whether a judge is obligated to report criminal conduct of which the judge becomes aware. The judge has also asked whether a judge has an ethical obligation to make available confidential court records, such as juvenile court records, to investigating or prosecuting entities.

Answer:
A judge does not have an ethical obligation to report criminal behavior. A judge has an ethical obligation to obey the law and may only disclose confidential information if required or permitted by law.

Discussion:
In the opinion request, the judge has provided examples of the type of criminal behavior of which a judge might become aware. For instance, according to the judge, domestic relations and juvenile court judges frequently receive testimony in which parties or witnesses admit to fornication, which is a violation of Utah Code Ann. § 76-7-104, or adultery, which is a violation of § 76-7-103. The judge questions whether there is an ethical obligation to report criminal conduct when those violations "become a matter of civil court record, volunteered and admitted in court proceedings." A related question concerns the ethical obligation to make records available to entities who may investigate and prosecute those crimes.

The Code of Judicial Conduct does not impose an affirmative duty to report illegal activity. The Code encourages judges to report unethical behavior by attorneys and other judges, but there is not an obligation to report criminal activity. Judges would be ethically required to report illegal activity only if a statute imposed this obligation, as child abuse reporting statutes often do.

An argument could perhaps be made that the obligation to maintain the integrity of the judiciary, as stated in Canons 1 and 2, requires a judge to report confessed crimes to ensure that the crimes do not remain un-prosecuted. The Committee has not found any other state which has made this an obligation of the Code and the Committee will not impose this obligation.

At least three other states have directly answered the question of whether a judge must report possible criminal conduct. Each of these states has determined that the Code does not create an obligation to report criminal or potential criminal conduct. See Opinion 86-1 of the Oregon Judicial Conduct Committee; Opinion 86-281 of the Alabama Judicial Inquiry Commission; and Opinion 73 of the Louisiana Committee on Judicial Ethics. Although not asked in the opinion request, these states also determined that a judge is not prohibited from reporting under the Code. A judge is therefore not ethically required to report possible criminal conduct, but if the judge feels compelled to do so, there is nothing that ethically prohibits a judge from reporting.

Although other states have not discussed the specific reasons for their conclusions (other than the explicit language of the Code itself) the Committee finds at lease one practical reason for this finding. A requirement to report illegal activity would impose an obligation to report suspected speeders, jaywalkers and tailgaters. Judges should not be ethically required to report, for example, every person they observe running a red light or a stop sign, although they certainly should not be prohibited from doing so.

Because judges are not required to report illegal conduct, ethical considerations will generally not be an issue in deciding whether judges should make records available. A judge's ethical obligation is tied to the judge's legal obligation. If records are public, or records are made accessible to prosecuting entities through statute or rule, then a judge is required to make those records available. If records are not available to the public and are not made available to prosecuting entities through statute or rule, then the judge is ethically obligated to maintain the confidentiality of the records. If a statute or rule gives a judge discretion as to who may have

access to records, the judge should weigh the relevant legal considerations in determining whether records should be disclosed.

Informal Opinion 00-4
July 5, 2000

Question:
The Judicial Council has asked the Ethics Advisory Committee whether a judge is required to enter disqualification in proceedings involving an attorney that is currently, or has previously, represented the judge before the Judicial Conduct Commission.

Answer:
Disqualification is required while the Judicial Conduct Commission proceeding is pending, and for a period of six months after the proceeding has ended.

Discussion:
The Judicial Council has submitted an opinion request pursuant to Rule 3-109(3)(A)(ii) which permits "an inquiry into the conduct of others" if the inquiry is "to matters of general interest to the judiciary." Because this is a general interest question, a fact situation has not been provided. However, the Committee is aware of certain facts that are relevant to this inquiry. Judges who are subject to Judicial Conduct Commission proceedings are entitled to be represented by counsel. A judge is required to hire private counsel because representation is not provided by the Attorney General's Office or the Administrative Office of the Courts. Because Judicial Conduct Commission proceedings are confidential, the fact that an attorney is representing a judge might not necessarily become apparent, unless the proceedings result in some type of public sanction.

Canon 3E(1)(a) requires a judge to enter disqualification if "the judge has a personal bias or prejudice concerning . . . a party's lawyer." Many courts and ethics advisory committees have discussed this provision in the context of a judge's lawyer who appears before the judge in other proceedings. Most, if not all, of these authorities have determined that a judge must enter disqualification if the representation of the judge is current or ongoing. The findings by these authorities are summed up in this statement in Jeffrey Shaman, et al., Judicial Conduct and Ethics, 3d ed. 2000): "Several questions arise when a judge's attorney appears before the judge as counsel of record. If the attorney in this instance represents the judge in a pending action, the judge's impartiality may be questioned by the other party, even if the resolution of the case appears fair to the public in general." Disqualification is not necessarily based on actual bias or prejudice, but a reasonable perception of such.

The unique aspect of this opinion request, in relation to the findings from authorities in other states, is that the representation involves a Judicial Conduct Commission proceeding. There are two possible factors that may justify an exception to the rule of disqualification. The first factor relates to whether the nature of the representation affects the reasonable perception of

impartiality. The second factor relates to the confidential nature of Judicial Conduct Commission proceedings.

There appears to be some split of authority about whether disqualification is required when the representation involves an official matter. As stated in Judicial Conduct and Ethics, "disqualification may not be required if the attorney before the judge has represented him or her on the basis of the judge's official acts." A judge might, for instance, be the subject of an extraordinary writ proceeding in which a litigant challenges a decision of the judge. Some authorities would find that disqualification is not required if the attorney representing the judge in the extraordinary writ proceeding appears before the judge in an unrelated matter. The question arises as to whether Judicial Conduct Commission proceedings are official to the extent that this exception might apply. It could be argued that, even though state attorneys are not provided for representation, Judicial Conduct Commission proceedings are based on an individual's status as a judge, and therefore the proceedings are based on a judge's official acts. The Committee finds such an argument to be unpersuasive.

Judicial Conduct Commission proceedings can be based on matters that occurred while the judge was on the bench, or proceedings can be based on off-the-bench activities, such as civic and political involvement. The proceedings can be based on conduct that does not involve official acts or activities. A judge has a much more personal stake in a Judicial Conduct Commission proceeding than a proceeding in which a challenge is being made to a judge's ruling. Because of the more personal nature of these types of proceedings, the Committee finds that there is no exception based on the nature of the representation.

The nature of the proceedings does create, however, an issue that has not been addressed by other authorities. Because Judicial Conduct Commission proceedings are confidential, the fact that a particular attorney is representing a judge is not public information and may not become known. Because disqualification is based on a perception of partiality the confidential status of the representation could lead to a conclusion that there is no public information upon which to justifiably base a reasonable perception. However, the Committee finds that this argument would also not be persuasive. The perception of partiality is based on whether a reasonable person, knowing all of the facts known to the judge, would question the judge's impartiality. The public or private status of the information has never been, and shouldn't be, a consideration. The standard is based on an objective analysis of the relevant facts. Furthermore, even though the Judicial Conduct Commission proceedings are confidential, if the proceedings result in a public sanction, the facts of the case, including the fact of representation, would become public when the case is filed with the Utah Supreme Court. It would not be appropriate to only require disqualification if the proceedings become public, because that would not become apparent until well into the representation. The Committee therefore determines that a judge must enter disqualification in any proceedings involving an attorney who is currently representing the judge in a Judicial Conduct Commission proceeding.[1]

The question of whether disqualification is required after the representation has ended has also created disparate opinions. Some authorities have determined that disqualification is no longer

required after the representation has ended, while other authorities have determined that disqualification is necessary for a period of time after the representation has ended.[2] In reviewing these authorities it is apparent to the Committee that those decisions which state that disqualification is not necessary after the representation has ended typically result from facts involving law suits in the judge's official capacity. Determinations in which disqualification is necessary for a period of time typically involve representation of the judge in a personal matter. Because the Committee has determined that Judicial Conduct Commission proceedings have personal aspects, the Committee feels that it would be appropriate for a judge to continue to enter disqualification for a period after the representation has ended.

The reason for requiring disqualification for an additional period is that a person could reasonably question a judge's impartiality while the case is still fresh in memory. There is no standard or basis upon which to calculate a reasonable time. The period of time should simply be sufficient to allow any reasonable inferences of partiality to subside. While it might be tempting to create different time lines based on the many different outcomes that can result from a Judicial Conduct Commission proceeding (keeping in mind the public or private nature of the result), it is more predictable and workable for a single time line to be established. The Committee believes that six months is a reasonable time. A judge must therefore enter disqualification in proceedings involving an attorney who represents a judge before the Judicial Conduct Commission and the requirement of disqualification continues for six months after the representation has ended.

Finally, although not specifically asked, the question arises as to whether the requirement of disqualification extends to proceedings involving other members of the judge's attorney's law firm. In Informal Opinion 99-9, we determined that disqualification is required in proceedings involving a prosecuting attorney who is a member of the law firm employing the judge's attorney. We stated that this type of disqualification can be remitted by the parties and the requirement of disqualification ends when the representation ends. The six-month period applicable to proceedings involving the judge's attorney does not extend to other members of the attorney's firm.

[1] The Committee notes that this type of disqualification can be remitted by the parties. However, the basis for disqualification must be disclosed to the parties. Whether a judge must disclose the nature of the representation, or may simply disclose the fact of representation has not been asked and we will reserve that question for another opinion.

[2] These authorities note, however, that disqualification would still be required if the judge maintains a close, personal relationship with the attorney.

Informal Opinion 00-5
August 31, 2000

Question:
The Judicial Council has asked the Ethics Advisory Committee whether a decision by the

Council to deny a judge certification for retention election constitutes "active public opposition" for the purpose of allowing a judge to operate an election campaign. The Judicial Council has also asked whether a judge who is certified for retention election, but has received lower than average survey scores or has been sanctioned by the Judicial Conduct Commission, faces "active public opposition." Finally the Judicial Council has asked whether the answer to the above two questions would be different under the following scenarios: a) members of the public discuss the judge in their conversations with others and recommend their listeners vote "no" in the judge's retention election; b) a member of the public circulates his or her opinion against the judge by a letter to the editor, lawn sign, paid advertisement or some other publication; c) a news service prints or broadcasts a story about the judge's qualifications, which contains negative inferences; and d) a news service prints or broadcasts an editorial recommending voters vote "no" in the judge's retention election.

Answer:
A judge may operate a campaign if the judge is not certified by the Judicial Council. A judge who is certified may not operate a campaign simply in response to below average scores or Judicial Conduct Commission sanction. However, a judge may operate a campaign when faced with the other scenarios discussed in (b), (c) and (d).

Discussion:
After being appointed to the bench, Utah judges are subject to periodic retention elections. Every two years, the names of judges who are subject to retention election are placed on the general election ballot. The public votes "yes" or "no" as to whether a particular judge should be retained in office. Because these elections are unopposed, the Code of Judicial Conduct limits a judge's campaign activities in relation to these elections. According to Canon 5C, a judge may only "operate a campaign for office" if the judge "has drawn active public opposition."

As a part of each retention election, the Judicial Council conducts a certification process for each judge subject to the election. The process consists of evaluating certain performance criteria such as knowledge of the law, punctuality, ability to communicate, and attentiveness to proceedings. The Judicial Council also evaluates physical and mental competence, compliance with education standards, cases that the judge has had under advisement for more than 60 or 120 days, and compliance with the Code of Judicial Conduct and the Code of Judicial Administration. In evaluating the performance criteria, the Judicial Council administers surveys that are sent to attorneys and jurors. A judge must receive a score of 70% or higher in 75% of fifteen categories in order to be certified. After evaluating all of the above criteria, the Judicial Council makes a decision as to whether to certify or not to certify a judge for the election.

A decision not to certify does not prohibit the judge's name from appearing on the election ballot. The certification decision is published in the voter information pamphlet, along with other information on the judge, including information about any sanctions from the Judicial Conduct Commission. The first question for this Committee is whether publication of the decision not to certify a judge in the voter information pamphlet constitutes active public opposition under Canon 5C sufficient to allow a judge to operate an election campaign.

Utah Canon 5C is somewhat unique in requiring active "public" opposition. The 1972 version of the Model Code of Judicial Conduct permitted a campaign by a judge who "has drawn active opposition." Other states with retention election provisions, such as Florida and Colorado, similarly permit campaigns after a judge has drawn "active opposition." Utah's inclusion of the word "public" may therefore have significance. If the phrase "active public opposition" refers to opposition by the public, then the Judicial Council's certification decision could not justify campaign activities. If the phrase refers to opposition that has become public, then it might be possible for the Council's decision to justify a judge's campaign activities. The reason for the inclusion of this language therefore becomes important.

Unfortunately, the Committee has been unable to locate any information that would assist in determining a reason for the Utah Code's difference. As far as can be determined, the language has existed since at least 1974, when Utah adopted a modified version of the Model Code. Committee notes from 1974 are no longer available and therefore the Committee cannot determine the drafters' intent. However, because the language predates an active role by the Judicial Council in the certification process, the language is best given effect by defining it as opposition which has been made public, and not just opposition from the public.

The Committee believes that determining what constitutes active public opposition must be done on a case-by-case basis. The reporter's notes to the 1972 Model Code provides some insight behind the intent of this Canon:

> In theory, the merit system election removes a judge from politics and from the rigors of the campaign trail . . . . if, however, a candidate draws active opposition [the Canon] permits [the judge] to campaign in response to the opposition and to seek outside funding and publically stated support in the manner provided in [the Canon]. In thus authorizing a response analogous to self-defense, the Code allows a merit system candidate with active opposition to campaign under the same standard that is applicable to a candidate who is competing against another candidate for judicial office.

The Code thus permits a judge to defend him or herself against negative statements that are made public.

The question that next arises in this context is the meaning of the word "active." Giving effect to each of the three words within the phrase, the word "active" would require more than simple opposition, and more than that the opposition has been made public. In reviewing opinions from other states, there is very little discussion about the meaning of this phrase. However, these discussions may at least provide some insight into the Code's intent.

The commentary to the Florida Code of Judicial Conduct states that "active opposition is difficult to define but is intended to include any form of organized public opposition or an unfavorable vote on a bar poll." Based on that language, the Florida Judicial Ethics Committee has found that the following facts constituted active opposition: (1) Following a disputed visitation ruling, an

organization widely distributed literature opposing the judge's re-election and appeared on radio talk shows opposing the judge's re-election. Florida Judicial Ethics Committee Opinion 92-13. (2) A local citizen produced a newsletter frequently attacking a judge, calling the judge corrupt, and urging everyone to oppose the judge's re-election. Florida Judicial Ethics Committee Opinion 93-47. (3) Negative publicity about a judge standing for re-election appeared in a local newsletter. Florida Judicial Ethics Committee Opinion 94-10. These decisions seem to indicate that the opposition must be organized and/or broadcast to a large, public audience. However, it should also be noted that the Florida committee has not addressed a fact situation that did not constitute active opposition.

With this background, the Committee must now determine whether a Judicial Council decision not to certify a judge would constitute organized opposition to a judge's candidacy. According to the Judicial Council's opinion request, a Council's decision not to certify, "while possibly interpreted as a recommendation not to retain a judge, is, rather, a statement that the judge did not meet one or more of the Judicial Performance Evaluation standards." The Council therefore does not view a negative certification decision as "opposition," although it certainly recognizes the possibility that the decision could be perceived as such. The Committee believes that this perception is an important issue and could very well justify the operation of an election campaign. The question for the Committee is whether the anticipated perception is sufficient to begin a campaign, or whether the perception must first manifest itself through other public statements before a campaign may be operated. The Committee believes that the anticipation of the perception is sufficient to begin a campaign.

The primary reason for this conclusion comes from the information upon which the certification decision is made. The certification decision is generally based on objective criteria. The criteria appear to set forth minimum performance standards for judges. Although some of the criteria are gleaned from the subjective opinions of attorneys and jurors, a person could reasonably perceive the certification process as a means of determining whether a judge is objectively and minimally competent to hold judicial office. A failure to meet those minimum requirements, as manifested by non-certification, may reasonably be seen as a statement that the judge is not competent for office. In anticipation of such a perception, a judge should be able to engage in a "self-defense" campaign, offering information intended to rebut or overcome this perception. A judge may therefore operate a campaign in response to a Judicial Council's decision to not certify a judge.

The Judicial Council has also asked whether a judge may operate a campaign for office when "the judge has been certified by the Judicial Council but the judge's survey scores, while passing, are below average or the judge has been sanctioned by the Judicial Conduct Commission." The Committee does not believe that either of these factors is sufficient to justify the operation of a campaign. A negative decision concerning certification carries a reasonable perception of opposition. However, below average scores and Judicial Conduct Commission sanctions do not automatically carry such a perception. Below average scores may indicate a need for improvement in certain areas, but cannot be seen as a statement that the judge, after considering all factors, is not minimally competent for office. Similarly, a sanction by the Judicial Conduct Commission typically does not indicate opposition to the judge's candidacy, particularly when

considering that the Judicial Conduct Commission can recommend to the Utah Supreme Court that a judge be removed from office. Below average scores and Judicial Conduct Commission sanctions therefore do not automatically justify operating a campaign.

The Judicial Council has also asked whether certain additional circumstances would change the results of these questions. Because below average results or Judicial Conduct Commission sanctions cannot be seen as "opposition," the addition of other scenarios will not change those facts into reasonable perceptions of opposition. The additional scenarios may, however, constitute active public opposition on their own merits, which would allow a judge with below average scores or Judicial Conduct Commission sanctions to operate a campaign, if the judge so chooses. The Committee will address the scenarios in turn.

The first scenario involves situations in which members of the public discuss the judge in their conversations with others and recommend that their listeners vote "no" in the judge's retention election. The Committee does not believe that this scenario is sufficient to justify an election campaign. This scenario is certain to happen during every retention election and concerning every judge, as there will be a certain number of members of the public who will vote "no" and will encourage others to do the same. These "water cooler" type discussions are not organized or broadcast to a large audience and are therefore not sufficient to constitute active public opposition.

The second scenario involves a member of the public who circulates his or her opinion against a judge by a letter to the editor, lawn sign, paid advertisement or some other publication. These types of messages would be broadcast to a large audience of potential voters. The Committee believes that any of those activities by a member of the public is sufficient to justify an election campaign. This scenario creates the temptation to require a level of opposition manifested through a certain number of letters to the editor, law signs, etc., before a campaign could begin. However, a sufficient level of opposition in this arena is far too difficult to quantify. Ultimately a judge should have the discretion to evaluate the opposition and determine when, or if, to begin a campaign.

The third scenario involves a news service that prints or broadcasts a story about the judge's qualifications, which story contains negative inferences about the judge's qualifications. Whether this is sufficient to justify a campaign will depend on the context of the news story. Judges are frequently mentioned in new stories and are occasionally criticized. Judges are typically unable to, and should not, respond to these stories because of the prohibition against commenting on pending cases. This should be true even if such a story coincides with a judge's retention election. However, if a story appears timed to a judge's retention election, such that the story raises facts and qualification issues that are not immediately relevant to a news-making case, this will constitute active public opposition sufficient to allow a judge to operate a campaign.

The final scenario involves a news service that prints or broadcasts an editorial recommending voters vote "no" in the judge's retention election. This last scenario clearly involves an

organization's public opposition to a judge's retention and this scenario justifies a campaign by the judge.

The Committee must address two additional points not specifically raised by the Judicial Council's request. First, the active public opposition sufficient to justify a campaign must coincide with the period that a judge is a candidate for election. This would be from the time that the judge files his or her candidacy with the appropriate state office, until the date that the election is held. A judge could not, for instance, operate a campaign based solely on a newspaper editorial printed two years prior to a judge's candidacy. The opposition must occur during the period of the candidacy.

The Committee also notes that there may be other activities, short of operating a campaign, in which a judge could participate. Although the Committee is not currently in a position, and has not been asked, to address these types of situations, it is important to recognize that, for instance, a judge's letter to the editor in response to a public letter to the editor would not constitute operating an election campaign. (Although a letter to the editor might implicate other Canons such as those involving the integrity of the judiciary, comment on pending cases, or exhibiting biases and prejudices.) It might therefore be possible for a judge to respond to public comments that do not rise to the level of active public opposition, without the response constituting the operating of an election campaign.

Informal Opinion 01-1
January 25, 2001

Question:
A district court judge has asked the Ethics Advisory Committee the extent, if any, to which a full-time judge may support or oppose a bill that is pending before the Utah Legislature. The judge has also asked the extent to which a judge may express support for opposition to proposals that are not yet in bill form, that are before the Legislature or the Constitution Revision Commission.

Answer:
A judge may voice opinions concerning matters that directly involve the legal system, the law, or the administration of justice.

Discussion:
The answers to these questions are found primarily from Canon 4. The relevant provisions of Canon 4 are as follows:

> A. Extra-judicial activities in general. A judge shall conduct the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3)

interfere with the proper performance of judicial duties; or (4) exploit the judge's judicial position.

B. Avocational activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal topics subject to the requirements of this Code.

C. Governmental, civic or charitable activities. (1)(a) A judge shall not 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, or except when acting pro se in a matter involving the judge or the judge's interests.

As a general rule, a judge may participate in legislative activities on matters concerning the law, the legal system, and the administration of justice, provided the activities do not cast doubt on the judge's ability to act impartially or exploit the judge's position. Under this general rule, a judge could voice support for or opposition to bills or proposals that are related to the legal system, unless the judge's statements demean the judicial office, exploit the judge's position, or affect the public's perception of judicial impartiality. On its face, the general rule appears to be fairly broad, but there may be constraints that affect judges' activities.

An important consideration for this Committee is the context in which a judge may convey an opinion about legislative proposals. In other words, does the Code of Judicial Conduct permit a judge to contact a legislative body, or a legislator, on his or her own initiative, or is the judge limited to expressing an opinion only when asked, or through other structured circumstances such as being invited to speak to a legislative panel? The Committee believes that the plain language of the Code does not prohibit a judge from acting on his or her own initiative. There have been recognized instances in which judges were permitted to pro-actively express their opinions to legislative or executive bodies. For instance, in Opinion 98-13 by the Florida Supreme Court Judicial Ethics Advisory Committee, a judge expressed a desire "to submit proposed legislation to members of the Legislature" on domestic violence issues. The judge was apparently doing this on his or her own initiative. The Florida committee determined that "a judge may communicate with members of the Legislature on matters concerning the law, the legal system and the administration of justice." The Florida committee did not place any restrictions on the judge initiating those communications. Similarly, the state of Washington Ethics Advisory Committee, in Opinion 92-5, stated that the "[canons] permit a judicial officer to actively promote the passage of a bond issue or levy for a regional justice center."[1]

Although a judge can initiate discussions on legal issues, the Committee cautions against judges becoming too active in legislative matters. Unless legislative matters are a part of a judge's administrative responsibilities, such as through Judicial Council membership, a judge should exercise a certain degree of restraint. A judge who spends a significant amount of time speaking out on legislative issues during the legislative session could be perceived as allowing those

activities to interfere with the judge's judicial duties, and could be seen as attempting to exploit the judge's position.

An additional consideration for the Committee is the question of what constitutes the law, the legal system and the administration of justice as these phrases relate to legislative activities. Read broadly, this would permit judges to take positions on practically everything the Legislature does, because the Legislature's activities also concern the law. The Committee does not believe that the Canons should be construed so broadly. These issues must ultimately be resolved on a case-by-case basis, but the Committee notes that in Informal Opinion 98-11, the Committee determined that judges could only be involved in matters that had a "direct and primary connection" to the law, the legal system and the administration of justice. Although Opinion 98-11 discussed service on governmental committees, the principles are relevant to this issue. The issues on which judges can speak, must have a connection to the regular judicial or administrative activities of a judge.[2]

Finally, judges must ensure that their communications do not, in any way, compromise the impartiality of the judiciary. Judges must not take positions on issues that would indicate pre-judgment of or bias towards issues that might ultimately come before the judge's court. For instance, the Alabama Inquiry Commission, in Advisory Opinion 99-732, stated that a judge could not participate in lobbying for legislation mandating the placement of seat belts on school buses. The Commission stated that "because related issues are likely to come before the judge, such lobbying would call into question the judge's ability to decide impartially issues that come before him."[3] A judge could not, for instance, question the constitutionality of a law, or express an opinion on how a statute might be interpreted by the judge.

[1] The Committee cites these authorities in support of the proposition that a judge may act on his or her own. The Committee does not express an opinion on whether Utah judges could speak on the types of issues addressed in these opinions, because those questions have not been asked.

[2] The Committee also notes that it has given these phrases a more expansive definition when addressing juvenile justice issues. Informal Opinion 98-4. ("The administration of children's justice is inherently a broader concept than the administration of justice in other areas.")

[3] The Committee again notes that the Alabama opinion is cited for the general proposition that judges must not compromise their impartiality, and not for the conclusion on the facts.

Informal Opinion 01-2
May 30, 2001

Question:
A district court judge has asked whether a judge is required to enter disqualification in a proceeding involving a motion and affidavit for disqualification of a judge from the same district.

Answer:
Disqualification is not required.

Discussion:
Rule 63(b) of the Utah Rules of Civil Procedure and Rule 29 of the Utah Rules of Criminal Procedure allow a litigant to file a motion and affidavit for disqualification of the judge presiding over the litigant's case. The judge against whom an affidavit is filed may certify the motion and affidavit for review by another judge. Both rules specifically state that the "presiding judge of the court [or] any judge of the district . . . may serve as the reviewing judge." The question that has arisen is whether a judge of the same district may ethically serve as the reviewing judge in light of Informal Opinion 96-2, which requires a judge to enter disqualification in "proceedings involving an employee of the judge's district."

The Code of Judicial Conduct and the rules of procedure are both enacted by the Utah Supreme Court. The procedures in Rule 63 and Rule 29 were amended in 1999. Prior to that time, the rules simply stated that an affidavit could be submitted to any other judge for review. These facts are significant because the Utah Supreme Court is the final arbiter of judicial ethics and judicial procedure, and the Court has specifically determined that a judge may review a disqualification affidavit filed against a judge of the same district. Based on the Utah Supreme Court's authority, the Committee believes that it is ethical for a judge to follow the procedures that have been established.

Even without the Utah Supreme Court's specific determination embodied in the rules, the Committee believes that it generally is not unethical for a judge to review disqualification motions filed against another judge of the district. This opinion is based on the nature of disqualification proceedings, as presently constituted.

Disqualification of a judge is required under Canon 3E, which states:

> (1) A judge shall enter disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In Informal Opinion 96-2 (and its companion opinion, 98-14), the Committee construed this Canon to require disqualification in "proceedings involving an employee of the judge's district." This opinion request initially raises the question of whether a judge is an "employee" of the district. The Committee is of the opinion that a judge is an employee of the district, but the nature of the disqualification proceeding reduces or eliminates the possibility of improper bias.
As noted in Opinion 96-2, "the general test applied to determine whether a judge's impartiality might reasonably be questioned is whether a person of ordinary prudence in the judge's position knowing all of the facts known to the judge would find that there is a reasonable basis for questioning the judge's impartiality." Disqualification is required when a district employee is a

party to a proceeding because of the perception that a judge may be inclined to decide issues in the employee's favor. For instance, a judge cannot preside in a divorce proceeding involving an employee of the judge's district because of the need to avoid any perception that the employee may be receiving favorable treatment. Similarly, a judge could not preside in a divorce proceeding involving a judge from the same district.
Opinions 96-2 and 98-14 involved situations in which an employee was a party to the case. The reasoning of those opinions could also be extended to situations in which an employee is otherwise personally affected by the outcome of the proceeding. Those circumstances are absent from a disqualification proceeding because a judge is not a party to the proceeding and is not personally affected by the outcome.

The nature of Rule 63(b) and Rule 29 proceedings significantly reduces any reasonable perceptions of partiality. Unlike most other court proceedings, a judge is not a party to these proceedings. Under the rules, a litigant may file an affidavit alleging bias or prejudice on the part of the judge. The judge against whom the affidavit is filed has two options: disqualification, or certification of the affidavit to a reviewing judge for a determination of whether disqualification is required. A judge against whom the affidavit is filed cannot comment on the merits of the petition or otherwise "enter the fray." See e.g. Barnard v. Murphy, 882 P2.d 679 (Utah App. 1994), and Young v. Patterson, 922 P.2d 1280 (Utah 1986).

The standard for the judge reviewing the affidavit is "legal sufficiency." An affidavit is legally sufficient if the facts, as alleged, require disqualification. See In re Affidavit of Bias, 947 P.2d 1152 (Utah 1997). A hearing is not held, arguments are not made, and significant fact finding is not conducted. For example, if an affidavit alleges that disqualification is required because the judge's second cousin has a financial stake in the litigation, the allegations would not be legally sufficient to require disqualification, because a second cousin is not within the degree of relationship automatically requiring disqualification. If the affidavit alleged a financial stake by the judge's child, the affidavit would be legally sufficient. In either situation, the allegations are generally assumed to be true, although the reviewing judge can request additional information. This process removes the potential for bias to become a factor because issues of fact are presumptively decided in favor of the affiant.

Through the above-described process, the Utah Supreme Court has eliminated the potential for reasonable perceptions of partiality. The judge against whom an affidavit is filed is prohibited from showing any attempts to influence the outcome of the proceeding, and the reviewing judge determines whether the affidavit is legally sufficient, which is a fairly sterile review. A judge may therefore decide disqualification issues involving a judge of the same district.

Informal Opinion 01-3
August 7, 2001

Question:
A judge has asked the Ethics Advisory Committee whether a judge's picture may be used in a

national campaign by the American Indian College Fund. The campaign may result in donations to the fund.

Answer:
The judge may contribute a picture to the campaign.

Discussion:
The requesting judge has been asked by an advertising agency, which is assisting the American Indian College Fund (AICF), to participate in a campaign to raise awareness about the AICF. The AICF, a non-profit organization, is soliciting the participation of Native American individuals from many different professions for an advertising campaign in national magazines. Pictures of the participating individuals will be displayed under a caption that reads: "Have you ever seen a real Indian?" The reader is directed to contact the AICF for more information about the program. There are several stated purposes for the program. First, the program hopes to address stereotypes that the general public may have about Native Americans. Second, the program hopes to offer role models to young Native Americans. Third, the program admittedly hopes that the magazine readers will donate to the AICF. The Committee's focus is on this third purpose.

The fund-raising prohibition in Canon 4C of the Code of Judicial Conduct has typically received a strict interpretation. The Canon states that a judge "shall not personally participate in the solicitation of funds or other fund-raising activities." Ethics advisory opinions from Utah and other states are fairly unanimous in prohibiting direct solicitation, such as through personal contact with potential donors, and indirect solicitation, such as performing at a fund-raising event. See Informal Opinion 89-8. A judge's personal appearance before potential donors, along with explicit or implicit endorsement of fund-raising, is usually a concern.

On the other hand, ethic opinions have approved some limited, incidental involvement in fund-raising. This Committee and other states' committees have allowed the use of a judge's name on letterhead that will be used for fund-raising, as long as the letterhead is not used solely for fund-raising and the judge's title is not used or the judge's name is not selectively emphasized. See Informal Opinion 90-6.

The fact situation that the Committee has been asked to address lies somewhere between direct, personal contact and the incidental contact resulting from a name on letterhead. The judge will not personally appear before any potential donors and potential donors will not appear before the judge. Also, the materials on which the judge will appear do not have fund-raising as their sole purpose. However, it is evident that the judge's title will be used and the judge's image would be emphasized. The Committee must decide whether those facts are fatal to the judge's ability to participate in this campaign.

In resolving this question, the Committee believes that it is important to revisit the purposes of the fund-raising prohibition. The commentary to the ABA Model Code states that "a judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone." The commentary goes on to state that "use of an organization’s letterhead for

fund-raising . . . does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation." The drafters of the model code were concerned with direct, personal solicitation. The drafters were also concerned with selective emphasis of a judge's title. The Committee believes that the campaign at issue does not infringe on either of those concerns. The judge is not directing communications at a captive or specifically targeted audience. The campaign itself is not conducted solely for fund-raising purposes and does not specifically request donations. Furthermore, although the judge's title will be used, all of the individuals involved in the campaign (doctors, college professors, etc.) will also have their titles used. The judge is one of many individuals in the campaign and the judge will not receive selective emphasis in relation to those individuals.

The Indiana Commission on Judicial Qualifications stated that "the restrictions in Canon 4 on judicial participation in fund-raising activities are meant to address 'the dual fears that potential donors either may be intimidated into making contributions when solicited by a judge, or that they may expect future favors in return for their largesse'" (citing Shamen, Lubet and Alfini, Judicial Conduct and Ethics, 2 ed., page 289). The "dual fears" addressed by Canon 4 are not evident in this particular situation.

It is again important to note that this is not solely a fund-raising campaign. Potential donors are not being specifically targeted and they are not receiving a direct solicitation. The materials will be included in national magazines and the potential donors will not have any direct or indirect contact with the judge or any AICF representatives. Furthermore, the participating judge will not have any information on donors or others who may respond to the campaign. Therefore, there is not a concern about any quid pro quo expectations. The judge may therefore contribute to the AICF's public relations campaign.

Informal Opinion 01-4
August 30, 2001

Question:
May a judge receive a complimentary judicial fellowship from the Association of Trial Lawyers of America?

Answer:
No. A judge cannot accept the fellowship.

Discussion:
The Association of Trial Lawyers of America (ATLA) has sent to judges an invitation to be recognized as a judicial fellow. The invitation describes three specific benefits to being recognized as a judicial fellow: Judicial fellows receive a complimentary subscription to Trial Magazine, a complimentary guest registration to ATLA conventions, and various educational

materials concerning the civil justice system. The invitation also contains the following disclaimer:

> If you have concerns about this offer because several states supreme courts have ruled it unethical for judges to join organizations that represent a single side in legal disputes, ATLA recognizes members of the judiciary as judicial fellows, not members.

In order to be recognized as a judicial fellow, and to receive the benefits, a judge must submit a judicial fellow enrollment form. The form requests basic information such as name, mailing address, date appointed to the bench, and the name of the court on which the judge sits. ATLA is recognized as a plaintiffs-oriented organization.

Canon 2A requires a judge to "exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." Canon 4A requires a judge to "conduct the judge's extra-judicial activities so that they do not . . . cast a reasonable doubt on the judge's capacity to act impartially as a judge." Because ATLA is a plaintiffs organization, ethics advisory committees that have discussed judicial membership in ATLA have generally determined that judges cannot ethically maintain a membership in the organization. As stated by the Alaska Ethics Advisory Committee, in Opinion 99-4:

> Judges are not permitted to be members of special bar association [sic], as it would convey the appearance of a special relationship to one side in the adversarial process. . . . The Association of Trial Lawyers of America is a plaintiffs' bar association. It promotes itself as the leading fight for the rights of injured persons and engages in lobbying activity against efforts to limit defendant liability. Because the Association of Trial Lawyers of America advocates the position of plaintiffs in civil disputes, a judge's membership in that organization could convey a sense that the judge is predisposed toward plaintiffs.

Because judicial membership in ATLA has been prohibited, ATLA states that it does not recognize judicial fellows as "members." The committee must decide whether this distinction is sufficient to allow a judge to become a judicial fellow. The committee must also decide whether its opinion in Informal Opinion 99-6, which permitted a judge to attend a gathering of attorneys who represent only one side in a dispute, opens the way for membership in one-sided specialty bar associations.

Among the states that have considered the distinction between a member and a judicial fellow, there has not been consensus of opinion. The Alaska Advisory Committee stated that "special categories of membership or affiliation do not obviate the problem" of judges being perceived as predisposed toward one side of a dispute. Similarly, the Arkansas Judicial Ethics Advisory Committee, in Advisory Opinion No. 99-07, stated that "to be a member, whether or not the judge pays dues, whether or not the membership is described as honorary or complimentary, identifies the judge as generally supportive of the positions taken by that part of the bar." On the

other hand, the Nebraska Ethics Advisory Committee, in Opinion 00-2, stated that if recognition as a judicial fellow is "limited solely to [receiving the three benefits] outlined in the invitation, acceptance of the invitation would not be prohibited. If, however, such recognition entails anything else which amounts more to complimentary membership in the organization or could in some way imply endorsement of the organization and the organization's goals and purposes, then acceptance of the invitation would be prohibited." The Nebraska committee found that if the invitation is "taken at face value . . . it would appear that acceptance of the invitation is acceptable."

Although the committee believes that ATLA's attempt to distinguish judicial fellow from full membership is important, the attempt is nonetheless insufficient to eliminate the concern related to the appearance of partiality. ATLA has established a process by which judges must specifically enroll to receive the judicial fellow benefits. By taking this step, a judge could be perceived as separating him or herself from other judges, and aligning with ATLA. The committee therefore agrees with those states which have determined that ATLA has simply created a different class of membership; a membership that could still create the perception of a predisposition toward plaintiffs. The question that remains is whether our opinions have nevertheless opened the way for judicial membership in a one-sided specialty bar association.

In Informal Opinion 99-6, the committee decided that "the single component interaction prohibition should not be extended to educational settings involving attorneys." The committee determined that, as long as the judge is willing and able to accept invitations from other components of the bar (among other prohibitions), a judge could lecture before groups of attorneys who represent only one side of litigation. The committee recognized the important role of judges in providing education to the bar, a role which should be facilitated when possible.

The important role that judges play in educating the bar does not extend to judicial membership in one-sided specialty bar associations. The committee agrees with the Arkansas Ethics Advisory Committee which determined that "certainly judges are permitted to attend ATLA meetings and forums, to speak at ATLA programs, to receive ATLA mailings, to receive ATLA materials, and to prepare materials for ATLA publications," (within the restrictions discussed in other Utah opinions), but membership of any sort can create a perception of endorsement. The committee therefore determines that a judge cannot enroll to become, and cannot accept a designation as, a judicial fellow of ATLA.[1]

[1] The committee also notes that issues are raised concerning the "complimentary" nature of the benefits. Questions arise concerning the acceptance of gifts outside the course of ordinary social hospitality. The committee does not address whether a judge could accept these complementary benefits if they were not conditioned on becoming a judicial fellow.

Informal Opinion 01-5
November 26, 2001

Question:
The Board of Justice Court Judges has asked the Ethics Advisory Committee whether a justice court judge may serve concurrently as an administrative law judge hearing officer in administrative traffic cases.

Answer:
Because the types of cases would be similar, a judge cannot simultaneously serve in both positions.

Discussion:
Justice Courts have subject matter jurisdiction over class B and C misdemeanors and infractions committal within their territorial jurisdiction. In some jurisdictions, local authorities are electing to decriminalize certain matters, and to prosecute such as civil, administrative cases, rather than treating them as crimes.[1] The jurisdictions that establish these administrative proceedings will hire administrative law judges or hearing officers to resolve these matters. The question has been asked as to whether a justice court judge may accept an appointment to become an administrative law judge or hearing officer, and to preside over the administrative cases.

The administrative proceedings established by the local jurisdictions are within the executive branch. A judge's participation in these proceedings is therefore considered "extra-judicial," for purposes of the Code of Judicial Conduct. Canon 4A requires a judge to "conduct the judge's extra-judicial activities so that they do not . . . cast reasonable doubt on the judge's capacity to act impartiality as a judge . . . [or] interfere with the proper performance of judicial duties."

A judge is required to avoid extrajudicial activities that may create doubt as to the judge's capacity to act impartially as a judge. The fact situation in this opinion is similar to the situation addressed in Informal Opinion 97-1. In that opinion, an active senior judge was asked to act as a hearing officer for the Board of Pardons and Parole. The Ethics Advisory Committee determined that the judge could accept the appointment as long as the judge did not hear the same types of cases as both a judge and a hearing officer. The Committee noted that, as both a judge and a hearing officer, the judge would be a key component of the criminal justice system in both the judicial and executive branches. The Committee noted that the executive branch's focus on the criminal justice system is different from the judicial branch's focus and therefore the judge could not be simultaneously tied to these different objectives. The judge could therefore only preside in civil matters when also serving as a Board of Pardons and Parole hearing officer.

As an administrative officer, a judge would be presiding over matters that have been decriminalized and therefore are deemed civil. However, the distinction between civil and criminal, as noted in Informal Opinion 97-1, is not as important as the type of cases. The perceived ability to act impartially is the most important consideration. A judge would be hearing the same types of cases in both settings. However, in one setting the judge would be focused on

judicial branch resolution of a case, and in another setting the judge would be focused on executive branch resolution of a case. This dual, simultaneous focus may, at the very least, create perceptions of partiality and therefore service is inappropriate.[2]

The decision as to whether a judge is hearing the same type of cases in two different arenas ultimately cannot depend on whether they are designated civil or criminal. In a situation such as this, local governments have the authority to determine whether certain offenses should be classified as civil or criminal. This classification may differ from entity to entity and could potentially change from year to year. The nature of the cases must therefore be reviewed. Although the Ethics Advisory Committee has not been provided with detailed facts on the types of cases, it appears as if similar cases would be handled in both arenas. According to § 10-3-703.5, the penalties for violations of civil ordinances are to be consistent with criminal penalties and potential offenders are subject to law enforcement steps similar to criminal offenders. The case types are similar. Based on our decision in Informal Opinion 97-1, the judge's service and role to the executive branch of government could reasonably create perceptions of partiality concerning the judge's role as a justice court judge, particularly considering the differing involvement of the employing entity in criminal cases compared to civil, administrative cases. A justice court cannot accept the role of administrative hearing officer.

[1] Utah Code Ann. § 10-3-703.5.

[2] The Committee also notes a potential constitutional issue raised by a person serving key roles in two branches of government. The Committee does not have authority to address this issue. However, a violation of the Utah Constitution would also constitute an ethical violation under Canon 2A.

Formal Opinion 02-1
June 26, 2002

Question:
Two judges have asked the following questions concerning the electoral process: 1) May a judge participate in neighborhood party caucuses as long as the judge does not seek election or appointment to any office which the caucus may elect? 2) May a judge vote in a primary election when the election is limited to registered members of a particular party?

Answer:
A judge may not attend a party caucus. A judge may vote in a primary election even when participation is conditioned on party affiliation.

Discussion:
Canon 1 of the Code of Judicial Conduct states:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

It is well established that the judiciary is to be an independent and impartial branch of state government. The Code of Judicial Conduct indicates that this principle should overarch the consideration and discussion of other provisions of the Code. Canon 2A states that "a judge . . . should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary." Canon 5B of the Code of Judicial Conduct provides the language that is most specific to the political questions that are asked:

> A judge . . . shall not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate or publically endorse a candidate for public office; (3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings or purchase tickets for political party dinners or other functions . . . ; or (4) take a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system.

Party caucuses are conducted during election years. At the caucuses, people gather to discuss issues and to vote for delegates who will vote at the political party conventions. Each caucus meeting is sponsored by a partisan political party, typically either the Democrats or the Republicans. At a Republican party caucus, for example, the individuals will discuss issues and positions that the Republican party deems important and will elect delegates to attend the Republican party convention.

Subsequent to the caucuses, party conventions are held. The delegates elected at the caucuses attend the conventions and vote for candidates who will represent the party during the Fall elections. Candidates who do not receive a certain percentage of the votes at the convention face a run-off in a primary election.

Under current state law, a political party can elect to participate in the primary election process. If it chooses, the political party can also limit its primary election to those who are registered members of that political party. For the current election year, the Republican party is limiting its election to registered party members. The Democratic party primary is not limited to registered party members. No other political parties have elected to participate in the primary election process.

For purposes of this opinion, there are essentially two types of polling places. In some counties, the Democratic party will not be conducting a primary election. The polling places in those counties will be for Republican candidates. In counties in which the Democratic party is conducting a primary election, the polling places will be combined. In polling places which are

Republican only, the potential voters will be screened to ensure that they are registered to vote and are registered with the Republican party. In combined polling places, the potential voters will be asked in which primary they wish to vote. If a person selects the Republican primary, the voter will be screened to ensure that the person has registered with the Republican party. If the person has not previously registered with the party, the person will be able to register at the polling place. If a voter selects the Democratic party, the person will only be screened to ensure that the person is registered to vote.[1]

The Ethics Advisory Committee has previously addressed whether a judge may attend a party caucus. In Informal Opinion 88-7 the Committee determined that a party caucus (previously referred to as a "mass meeting") is a political gathering. The Committee found that Canon 5B expressly prohibits attendance at a political gathering and therefore a judge could not attend a party caucus. Opinion 88-7 remains relevant and has been reaffirmed by later opinions.

In Informal Opinion 98-15, the Committee discussed whether a judge may serve as a master of ceremonies at a "Meet the Candidates Night" sponsored by a local PTA. The Committee determined that, not only was the judge prohibited from serving as a master of ceremonies, a judge could not attend the event. The Committee determined that the event would be a political gathering "because the purpose of the 'Meet the Candidates Night' [was] to provide a forum for candidates to elaborate on their political stands." The Committee concluded that "judges may not attend any events that are political in purpose, even if those events are bi-partisan or non-partisan." Under this precedent, a judge clearly may not attend a political party caucus. These events are political in purpose, even more so than a "Meet the Candidates Night." It therefore does not matter whether a judge seeks a delegate position. The Judicial Council concludes that a judge may not attend a party caucus.

The more difficult question is whether a judge may participate in the primary election. It could be argued that primary elections are political gatherings because, particularly as presently constituted, they are a part of the parties' nominating process and their purpose is to bring together individuals with similar political philosophies. However, the Judicial Council believes that an election should not be considered a political gathering for purposes of the Code of Judicial Conduct. Because judges are prohibited from attending partisan, non-partisan and bi-partisan political gatherings, to declare an election to be a political gathering may have unintended consequences for other, permitted activities by a judge. The partisan nature of the Utah primary elections is nevertheless a consideration in determining whether a judge may participate in light of Canon 1 and Canon 2A, and other provisions of Canon 5.

The Committee has previously issued opinions that may be helpful in resolving this question. In Informal Opinion 88-7, the Committee quoted the following language from Canon 28 which was found in the Code prior to 1950:

> While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the

> active promoter of the interest of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions. He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

In Informal Opinion 89-7, the Committee was asked whether a judge could provide campaign assistance to a school board candidate. In determining that such activity was prohibited under the Code, the Committee quoted Formal Opinion 113 of the American Bar Association Committee on Professional Ethics. This opinion stated:

> A judge is entitled to entertain his personal views of political questions, but should not directly nor indirectly participate in partisan political activities. It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, ex necessitate rei he thereby voluntarily places certain well recognized limitations upon his activities.

Based on the previous precedent, in Informal Opinion 93-1 the Committee determined "that judges may not maintain their membership in an organization that endorses candidates for partisan political office." In Informal Opinion 91-1, the Committee determined that a judge could not serve as a member of an editorial advisory board of a magazine which focused on political races and published political endorsements. All of these opinions indicate that a judge may not be actively or publically involved in the political process, even to the extent of avoiding membership in an organization that endorses candidates for political office.

Few other states have addressed this specific question, but there are a couple of relevant opinions. The Washington Ethics Advisory Committee, in Opinion 92-4, determined that a judge could participate in a presidential preference primary. Although Washington had a code provision that prohibited judges from identifying themselves as members of a political party, the primary election did not require such identification as a condition of participation.

The Virginia Judicial Inquiry and Review Commission, in Opinion 99-6, discussed whether a judge may participate in an open primary election. Citing Canon 2, the commission determined that a judge cannot participate in those elections. The commission stated that "judges who vote in a party primary risk compromising the non-partisan, apolitical nature of the judiciary and eroding the public respect accorded the judiciary." In making this conclusion, the commission noted that "the average citizen" sees the elections as "partisan vehicles."

There are several important facts about these opinions. Washington is a state in which judges are elected. The Virginia Commission noted this fact and determined that Washington judges were thus allowed to be more political than Virginia judges, who are subject to retention election.

Utah also has retention elections. Also, the Washington Committee stated that it was compelled to construe the canons narrowly in order to avoid disenfranchisement of judges. This is also an important consideration for the Judicial Council. Finally, the Washington election did not require a judge to declare party affiliation as a condition of participation.[2]

The judges who have requested this opinion have stressed the fact that many elections are decided at the primary stage. This is true either because, in certain areas, one of the political parties is so dominant that other parties do not offer a candidate in opposition, or the opposition candidate does not have a reasonable chance of being selected during the general election. The point is made that, if a judge is denied an opportunity to participate in the primary election, the judge has been effectively disenfranchised. The Judicial Council recognizes these considerations, but also notes that ultimately the decision cannot be affected by unique political circumstances that may exist in this state or from county to county. The language of the code and Committee precedent must control.

If the possibility of disenfranchisement were not present, the conclusion to this question might be relatively simple. According to Committee precedent, a judge may not maintain membership in an organization that endorses candidates for partisan political office. This would lead to the conclusion that a judge may not maintain membership in any of the political parties. The Code also prohibits a judge from publicly endorsing candidates for political office. By registering as a member of a political party, a judge could also be perceived as endorsing the candidate who ultimately receives the party nomination, even if the judge did not vote for that candidate. The question that remains is whether these conclusions are consistent with a narrow construction of the code.

Although the Judicial Council cannot and will not offer an opinion on whether a decision prohibiting judges from participating in the election process would result in a constitutional violation, the Judicial Council believes that the disenfranchisement specter must weigh heavily into the considerations. The Judicial Council believes that the political proclivities of a judge are not so closely watched by the public that reasonable conclusions could be drawn from a judge's participation in the primary election process. Participation in the process would be witnessed by relatively few and would have no impact on the perceived impartiality of the judiciary.

Although the Ethics Advisory Committee has previously determined that a judge may not maintain membership in an organization that endorses candidates for partisan political office, the Judicial Council believes that this conclusion should not be extended to the point that a judge would be prohibited from participating in an election. The Code is concerned with public endorsements and affiliations by judges. The Code does not specifically prohibit party affiliation in this circumstance. Registering with a political party is largely a private act, known only to the judge and the individual or individuals accepting the judge's application. Although the information then becomes public, such information is rarely sought out or disclosed.

The election process is also relatively private. A judge appearing at a polling place will be seen by few people and the perception of the appearance is most likely to be recognition of the fact

that the judge is participating in an election process, and not a perception that the judge is tied to any political ideology. The public recognizes the rights of judges as citizens and understands that a judge's participation in that process does not have significant meaning related to the integrity and partiality of the judiciary. In sum, the potential for disenfranchisement constrains us to interpret the Code, and public perception, in a way that allows judges to participate in this process.

[1] On the election's website page, (http://elections.utah.gov) sponsored by the Lieutenant Governor's Office, it is noted that this year's elections are different from previous years. In previous years, a ballot was selected inside the voting booth, lending to a private decision as to which party the voter chooses to follow. The website also states that "primary elections are nominating functions of political parties. Utah's election law allows each political party to choose whom it will allow to participate in its primary election. If you do not affiliate with a party, you may be restricted from participating in the primary." It is thus recognized that some individuals may be restricted from participating in the primary election process.

[2] Even though Washington judges are elected, they are not allowed to affiliate with a political party.

Informal Opinion 03-1
June 11, 2003

Question:
May a judge maintain membership in a cycling club that is sponsored, in part, by a law firm? The law firm's logo is represented on the cycling club's jersey.

Answer:
The judge may continue club membership and wear the club jersey.

Discussion:
The judge is currently a member of a bicycling club. The club offers members the opportunity to train and compete with other cyclists. Every year, the club distributes a new jersey to each cyclist to recognize club membership. When the judge received his jersey for this year, he discovered that the jersey includes the logo of a local law firm. The judge subsequently learned that the law firm has contributed six hundred dollars to the club. The funds are used to help cover certain club costs, such as the expenses the club incurs in sponsoring a race, assisting junior riders, and paying for replacement jerseys. The judge does not receive the benefit of any of the funds.

The judge' s questions are governed by Canon 2B and Canon 4A. Canon 2B states that a judge "shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." Canon 4A states that:

> A judge shall conduct the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2)

demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) exploit the judge's judicial position.

Membership in a cycling club is an activity that is generally permitted under the Code. Judges are permitted and encouraged to engage in these types of activities. The questions for the committee are whether the law firm's sponsorship of the cycling club, or whether the display of the law firm's logo on the jersey, conveys the impression that the firm is in a special position to influence the judge, or casts reasonable doubt on the judge's capacity to act impartially. The Committee believes that membership is permitted in the cycling club, even under the conditions described.

Canon 2B's prohibition has received attention by this Committee when discussing interactions between judges and attorneys. The committee has stated, for instance, that judges may teach groups of attorneys who practice in one area of the law (such as prosecuting attorneys,) without impinging Canon 2B's prohibition. See Informal Opinion 99-6. One-sided interactions are permitted and do not automatically convey the impression that attorneys are in a special position to influence.

The Judicial Council has permitted judges to ethically engage in social interactions with attorneys, on a regular basis, without violating Canon 2B or Canon 4. In Formal Opinion 98-1, the Council recognized that the Code permits interaction and relationships between judges and attorneys because there is an important connection between the bench and the bar. The Council recognized that judges may engage in regular interactions with bar members, such as going to lunch together and attending law firm open houses and bar functions, without automatically risking the partiality of the judiciary. The Council also recognized that judges may accept ordinary social hospitality from attorneys, such as receipt of a free meal.

The Committee's and Council's opinions have recognized, directly or indirectly, that because of the connection between the bench and the bar, a judge is able to engage in social and professional interactions without automatically creating an impression that the judge's impartiality might be compromised. The Committee is aware that judges often attend activities that are sponsored by law firms or members of the bar, such as CLE classes and bar convention socials, without those situations creating the impression that the law firm or attorney is in a special position to influence or that the judge might somehow favor that law firm or attorney. Because those situations are permitted, the Committee believes that the facts related to the cycling club would not create an impression of favoritism or partiality by the judge.

The law firm's sponsorship of the cycling club is minimal as far as the judge is concerned. The law firm's sponsorship is not based in any way on the judge's membership in the club. The judge does not personally receive or benefit from any of the funds. The situation does not create a reasonable perception of allegiance by the judge toward the law firm. Membership in the cycling club is therefore permitted under the Code of Judicial Conduct.

The Committee also does not believe that wearing the jersey with the law firm logo creates any ethical difficulties. The jersey is a uniform that is worn by all club members. The jersey will be

worn in settings in which members of the public will not automatically associate the judge with the law firm. The jersey is reasonably seen as recognizing the club sponsors and not as otherwise creating loyalty by individual club members to the sponsors. As previously noted, judges engage in other public settings in which law firms publically sponsor activities and these settings do not create any association problems for the judges. The Committee therefore believes that the judge may maintain membership in the cycling club and wear the jersey that has been distributed for use by club members.

Informal Opinion 04-1
June 15, 2004

Question:
The Ethics Advisory Committee has been asked whether a judge, in granting a motion for disqualification, may comment on the allegations in the affidavit or make comments about the person who filed the affidavit. If a judge may comment, what are the limits on the comments that a judge may ethically make?

Answer:
If permitted by procedural rule, a judge may ethically comment upon the allegations in a motion for disqualification. The judge's comments must reflect the appropriate demeanor, impartiality and integrity that is mandated by the Code of Judicial Conduct.

Discussion:
The Utah Supreme Court has enacted rules to govern the process when a litigant or attorney seeks the disqualification of a judge. Rule 63, Utah Rules of Civil Procedure, and Rule 29, Utah Rules of Criminal Procedure, are the principal rules. As of the date of this opinion, these two rules contain essentially the same language. Under these rules, a person seeking disqualification of a judge must file a motion and affidavit stating facts sufficient to show bias or prejudice. The moving party must also file a certificate stating that the motion is filed in good faith.

The challenged judge has two options upon receipt of a motion. The challenged judge may either grant the motion and refer the case to the presiding judge for reassignment, or certify the motion to another judge for review of the allegations. Both the Utah Court of Appeals and the Utah Supreme Court have stated that, when certifying a motion to another judge for review, the challenged judge may not comment on the merits of the allegations. In Barnard v. Murphy, 852 P.2d 1023 (Utah App. 1993), the Utah Court of Appeals held that Rule 63 contemplates only a certification order without comment by the judge. In Young v. Patterson, 922 P.2d 1280, 1281 (Utah 1996), the Utah Supreme Court stated that "the policy of the rule is to insulate trial judges from participating in unseemly disputes regarding their impartiality and thereby to preserve the appearance (as well as the actuality) of the detachment necessary to the legitimacy of our court system." In light of these opinions, the question that has arisen is whether the challenged judge may comment upon the allegations when granting a motion to disqualify.

The Barnard and Patterson decisions both dealt with constructions of Rule 63 of the Utah Rules of Civil Procedure. Through these opinions, neither appellate court declared that commenting upon the merits of a motion violates the Code of Judicial Conduct. These opinions stated that comment in a certification order violates the procedural rule. These opinions therefore do not constrain our interpretation of the Code. Furthermore, the appellate courts have not addressed whether a judge's comments in a motion granting an order for disqualification would violate the procedural rules. That issue is within the province of those courts and those courts may ultimately decide whether comment in an order granting disqualification violates the procedural rules. The role of this Committee is simply to determine whether the Code of Judicial Conduct prohibits comment.

There are several canons that might control the decision on this issue. The disqualification provisions in Canon 3E do not address this situation and therefore the Committee must determine whether other, more general provisions of the Code prohibit or circumscribe comment.

Canon 3B(9) states that "a judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." The Committee believes that, as a general rule, a court order is not the type of "public comment" with which this provision is concerned, and the disqualification rules contemplate that a judge will "enter an order granting the motion." The provision is nevertheless relevant because of the principle it espouses: judges should not make comments that might inappropriately affect the fairness of a proceeding. The canon is relevant in those situations in which a judge will be leaving a case, but is adding arguably superfluous comments into the court record, which comments may influence, or create the appearance of influencing, the new judge. However, this canon does not prohibit all public comment, but only those that might affect the outcome or impair the fairness of a proceeding, or interfere with a fair hearing. The provision does not stand as a bar to comments, but only circumscribes the contents of those comments.

The other canons that may address this situation include Canon 1, Canon 2B, and Canon 3B(4). These canons require a judge to, respectively, maintain high standards of personal conduct, avoid acting as a character witness, and to be patient, dignified and courteous. These canons also do not stand as a bar to making comments about the allegations in a motion for disqualification, although they may address the content of those comments. The Committee thus notes that there is nothing in the Code of Judicial Conduct that prohibits a judge from commenting on allegations in a motion for disqualification.

Although a judge may comment on the allegations in an affidavit, the code places restrictions on the substance of those comments. In granting a motion for disqualification, the judge will be removing him or herself from the case. In doing so, the judge must avoid any comments that might affect or create an appearance that the subsequent proceedings will be tainted. Canon 3B(9) will prohibit a judge from making any comment about the merits or substance of the underlying litigation. The canon will also prohibit a judge from making any comments that might affect the new judge's impressions of the parties in the case. Canon 1, Canon 2B and Canon

3B(4) will prohibit a judge from making any comments that indicate a lack of impartiality, which involve the character of any of the parties, particularly the party moving for disqualification, and from making any comments that may be discourteous or otherwise undermine the public's confidence in the integrity of the judiciary.

The opinion requester has not provided specific examples of possible comment in an order granting disqualification and therefore the Committee cannot provide anything other than general guidance. Allegations in a motion for disqualification will be directed toward bias and prejudice. A judge may occasionally feel the need to respond to the allegations even when agreeing to step aside. The comments should therefore address only the allegations in the motion, and even then, only if the comments do not address the merits of the litigation. Furthermore, because the person who filed the motion will still be involved in the litigation, the judge must avoid any comments that address the character of the movant, to avoid any appearance that the judge's comments will impact the new judge's opinion of the movant. Finally, as with all court proceedings, the judge's comments must be dignified and courteous.

As a final note, the Committee believes that judges should generally avoid commenting when granting a motion for disqualification. Comments in such an order serve no purpose in the litigation. Nevertheless, the Committee also understands that promoting public confidence in the judiciary may sometimes require judges to affirmatively address or clarify allegations of bias. If, as a policy matter, the judiciary believes that judges should not comment in these situations, the rules of procedure can reflect that policy as they currently do for comments in certification situations. In the meantime, judges can comment in the limited scope provided in this opinion.

Informal Opinion 05-1
June 8, 2005

Question:
The Ethics Advisory Committee has been asked whether a justice court judge may serve as president of a corporation that markets products to correctional facilities?

Answer:
The judge may not hold a position with the corporation.

Discussion:
A county justice court judge has been asked to serve as president of a company that markets a specific technology to correctional facilities. The technology relates to maintaining electronic medical records for those incarcerated in jails and prisons. The company intends to market the technology to facilities within Utah and to facilities across the country. The judge was asked to serve as president of the company because he has many years of service with several states' departments of corrections.

The Committee first notes that Utah Code Ann. § 78-5-128 lists restrictions on the secondary employment of justice court judges. The Committee cannot offer an opinion on the interpretation of this statute. Under Canon 2A, a judge is required to "respect and comply with the law." The judge is therefore also encouraged to consult local legal advisors to determine whether the proposed activity violates the law, and therefore the Code. Although the Committee cannot offer an opinion on the interpretation of the statute, the language of the statute may be relevant in evaluating whether the activity violates other provisions of the Code of Judicial Conduct.

Canon 4 governs the extra-judicial activities of judges. Canon 4A states that a judge "shall conduct the judge's extra-judicial activities so they do not: (1) cast doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) exploit the judge's judicial position." Canon 4D(1) states that "a judge shall not engage in financial and business dealings that: (a) may reasonably be perceived to exploit the judge's judicial position; or (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." It is apparent that the judge cannot engage in any financial dealings with correctional facilities or entities that serve the judge's court. The provision will also prohibit a judge from involvement with a company that engages in such transactions. The judge cannot associate with a company that markets its products to the local county jail. This provision would also prohibit the judge from using the judge's title or judicial experience in marketing the products.

Besides these apparent prohibitions, there is still a question about whether the judge's service to the company may be perceived as exploiting the judge's position or might otherwise cast doubt on the judge's ability to act impartially. A case from Louisiana may be helpful in resolving this question. In In re Johnson, 683 So.2d 1196 (La. 1996), a judge was involved in a company that provided pay telephone services for local jail inmates. The Louisiana court determined that the judges's involvement was a clear violation of the Code because it involved frequent transactions with individuals likely to come before the court, including the jailers and the inmates. In discussing this issue, the Louisiana court stated that "the judiciary, the sheriff and the prisons are all indispensable, separate components of our justice system. There should be no financial dealing, bargaining and profiteering among these justice system components." Id. at 1201. The court also stated that "the off-bench behavior of a judge should not only be above reproach but such as to inspire confidence of the public in the judiciary." Id. at 1201-1202. The Committee agrees with these statements. Although the Louisiana opinion dealt only with a local jail, the reasoning extends to other transactions. A judge, both personally and as an officer of a company, should not engage in financial and business dealings with other components of the criminal justice system, no matter where the businesses are located.

Utah Code Ann. § 78-5-128(4) states that "a justice court judge may not hold any office or employment, including contracting for services in any justice agency of state government or any political subdivision of the state including law enforcement, prosecution, criminal defense, corrections, or court employment." As previously noted, there may be a legal question about whether this provision applies to a judge serving as a president of an entity that markets a product

to justice agencies. However, the Committee believes that this statute is strong support for the principle that "there should be no financial dealing, bargaining and profiteering among . . . justice system components." The fact that a judge is a president and not an employee of, or contractor with, these entities might be relevant for legal purposes, but the distinction is insufficient for purposes of the Code of Judicial Conduct. As a company officer, the judge is engaged in financial dealings. A judge's service to an organization that markets products to correctional facilities "may reasonably be perceived to exploit the judge's judicial position," and may "cast reasonable doubt on the judge's capacity to act impartially as a judge." The perception of those involved with the criminal justice system, such as inmates and law enforcement officers, is important in this situation. The Committee recognizes that the primary reason the judge has been asked to serve is because of his corrections experience. There will still be a perception, however, that the judge's current position is being used to advance the mission of the corporation. There will be a perception that the judge's title may carry some weight with criminal justice organizations. The judge therefore cannot serve as president of this corporation.

Informal Opinion 05-2
November 22, 2005

Question:
The Board of District Court Judges has asked the Ethics Advisory Committee whether disqualification is necessary in a proceeding in which a judge has previously (1) held one of the attorneys in contempt; (2) sanctioned one of the attorneys; or (3) referred one of the attorneys to the Office of Professional Conduct.

Answer:
A judge is not required to automatically enter disqualification in any of the situations.

Discussion:
Canon 3E(1)(a) requires disqualification when a "judge has a personal bias or prejudice concerning a party." The question for the Committee is whether a perception of bias or prejudice is automatically created when a judge holds an attorney in contempt, sanctions an attorney, or refers an attorney to the Office of Professional Conduct.

In Informal Opinion 97-8, the Committee stated that disqualifying bias or prejudice "normally must be rooted in an extra-judicial source." A judge is usually not required to enter disqualification based on events or actions arising from a court proceeding. The extra-judicial source rule recognizes that court proceedings require judges to form opinions about litigants and to issue rulings adverse to the participants. The Code of Judicial Conduct also requires judges to maintain order and decorum in the courtrooms and to report unethical conduct of which they may become aware. See Canons 3B(3) and 3D. Because of these realities and responsibilities, a judge is typically not required to enter disqualification based on occurrences during court proceedings. A judge is only required to enter disqualification from occurrences during court proceedings if a

judge's statements or actions exhibit deep-seated antagonism toward a party or attorney. See In re M.L., 965 P.2d 551, 556 (Utah App. 1998).

In Informal Opinion 98-12, the Committee cited Liteky v. U.S., 510 U.S. 540, 550 (1984) concerning the attitudes that will and will not require disqualification:

> Not all unfavorable dispositions toward an individual, or his case, is properly described [as bias or prejudice]. One would not say for example, that world opinion is biased or prejudiced against Adolph Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree.

Consistent with the extra-judicial source rule, occurrences from judicial proceedings will only support disqualification when the court action or opinion is undeserved and indicates deep-seated antagonism. Each of the situations described by the Board of District Court Judges arises from a judicial proceeding. They would result from an attorney's interaction with a judge as a part of a case. Disqualification is therefore not required based solely on the fact that a judge had taken one of these actions.

The Virginia Judicial Ethics Advisory Committee, in Opinion 99-4, answered the question of whether a judge must enter disqualification when a judge has filed an ethics complaint against a lawyer with the Virginia State Bar. The Virginia committee stated that a judge is not required to enter disqualification. The Virginia committee cited the Alabama Judicial Inquiry Commission, in Opinion 97-655, which had concluded that disqualification is not required when a judge refers a lawyer to a professional conduct committee.

The Virginia committee cited Jeffrey M. Shaman et. al., Judicial Conduct and Ethics, 2d ed § 409, which addressed situations of contempt:

> A judge is not automatically disqualified from presiding over the contempt of court proceedings by virtue of the fact the allegedly contemptuous behavior occurred in the presence of the judge or was directed at the judge. Even where the contemptuous conduct consists of strong, personal criticism of the judge, disqualification is not necessary. At some point, though, a line will be crossed where disqualification from contempt proceedings is mandated where a judge has become biased or prejudiced. Thus where a verbal attack upon a judge become particularly offensive, or where a judge becomes enraged at offensive conduct, recusal is necessary.

The Virginia committee noted that contempt and referral to a professional conduct committee are similar and neither situation requires disqualification.

This Committee agrees with the above authorities. Disqualification is not automatically required in any of the three situations mentioned in the Board of District Court Judges' request. Each of the situations is rooted in judicial sources and would not automatically indicate that a judge is biased or prejudiced against an attorney. In each of the situations, a judge would presumably be doing that which is expected as a part of the judge's duties. There may be situations in which a contempt proceeding, a referral to the bar, or an award of sanctions might require disqualification of a judge, but only if the judge had indicated, by words or conduct, deep-seated antagonism toward the attorney. Disqualification is not otherwise required.

Informal Opinion 05-3
November 28, 2005

Question:
A district court judge has asked whether a judge is required to enter disqualification based solely on the fact that a litigant has filed a judicial conduct commission complaint against the judge.

Answer:
A judge is not required to enter disqualification based solely on the fact that a judicial conduct commission complaint has been filed.

Discussion:
Canon 3E of the Utah Code of Judicial Conduct requires a judge to enter disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned." This Committee has previously addressed situations similar to the question at issue. In Informal Opinion 96-3, the Committee determined that a judge was not required to enter disqualification in a proceeding involving an attorney who had previously been involved in an adversary proceeding against the judge. In Informal Opinion 97-8, the Committee determined that a judge was not required to enter disqualification in a case in which a party had a pending lawsuit against the judge. The Committee cited a couple of reasons for its decisions. The Committee stated that requiring disqualification in these situations would permit an attorney or party to engage in judge-shopping, by manufacturing bias. The Committee also noted that disqualifying factors are generally those that are rooted in extra-judicial sources, and the facts of those opinions arose from judicial proceedings.

The Committee believes that the reasoning of these opinions can be extended to this situation. The mere fact that a litigant has filed a judicial conduct commission complaint against a judge does not automatically require disqualification by that judge. A litigant or an attorney should not be able to remove a judge simply by filing a complaint.

In many cases, a challenged judge might not even be aware of the judicial conduct commission complaint. According to the procedures of the Utah Judicial Conduct Commission, complaints are often resolved without the judge becoming aware that a complaint has been filed. Even if a judge is aware of the complaint, disqualification is not automatically required. There must be

separate facts that would support a disqualification determination. As we stated in Informal Opinion 97-8, "the judge must consider whether a reasonable person, knowing all of the facts available to the judge (including the fact that a party may not purposely set out to create bias when none existed before) could question the judge's ability to be impartial." The fact that a complaint has been filed is insufficient, and therefore there must be other facts upon which a reasonable person could perceive bias.

The Committee notes that other ethics advisory committees have made similar conclusions. For example, the Arizona Committee, in advisory opinion 98-02, stated that "a judge is not required to automatically recuse when a complaint is filed against the judge with the commission on judicial conduct." The committee listed several factors that a judge should consider in determining whether independent facts create a basis for disqualification. These include "whether the complaint has merit on its face or whether it appears to be a tactical maneuver designed to remove the judge," "whether the complaint alleges specific facts from an extra-judicial source," "whether the complaint alleges specific facts concerning bias against the complainant," and whether the complaint has, in fact, caused any actual, personal bias." The Committee agrees that these may be relevant considerations in determining whether independent facts support disqualification. The Committee does not have other facts before it and therefore cannot state when disqualification would be required. However, disqualification is not automatically required when a complaint is filed.

Informal Opinion 05-4
November 22, 2005

Question:
A part-time justice court judge has asked whether a part-time judge may accept a membership in the Association of Trial Lawyers of America.

Answer:
A part-time justice court judge may accept a membership.

Discussion:
In Informal Opinion 01-4, this Committee determined that a judge could not accept a membership to the Association of Trial Lawyers of America. The Committee relied upon Canon 2A and Canon 4A for its conclusion. Canon 2A requires a judge to exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary. Canon 4A requires a judge to ensure that the judge's extra-judicial activities are in accordance with this requirement. The Committee has not addressed whether a part-time judge can accept a membership to ATLA. ATLA membership was prohibited because ATLA is a plaintiff's organization and membership would reflect negatively on the public's perception of impartiality.

Canons 2A and 4A apply to part-time justice court judges. However, these canons should be construed in light of the realities of part-time justice court judges' practices. Part-time justice

court judges are permitted to practice law. There are certain restrictions on a part-time judge's practice, such as limitations on criminal law practice, but a judge may practice law in civil cases. However, the Code of Judicial Conduct does not restrict a part-time justice court judge's law practice in the area of civil matters. A part-time justice court judge could concentrate his or her practice on plaintiff's litigation, or defense work. Because a part-time justice court judge may concentrate his or her practice in this manner, the Code of Judicial Conduct should not be construed to prohibit membership in a specialty bar association. This would include membership in the Association of Trial Lawyers of America. The public's perception of impartiality is not compromised by permitting part-time justice court judges who practice law in a specific area to associate with an organization focusing on that area. A part-time justice court judge may therefore accept membership in this organization.

Informal Opinion 05-5
December 14, 2005

Question:
A judge has asked whether a judge is ethically restricted from making a referral to the Utah Crime Victim's Legal Clinic.

Answer:
A judge may refer a victim to the clinic as long as the referral is not based on an assessment of the victim's case or the quality of representation.

Discussion:
The Utah Crime Victim's Legal Clinic has been established through a grant from the National Crime Victim's Legal Institute and the U.S. Office for Victims of Crime. The clinic provides legal representation to crime victims. Representation is provided by a paid staff attorney, or through a roster of pro bono attorneys and law students. During a judicial conference, it was suggested that judges refer victims to the clinic. The requester has questioned whether judges may ethically refer victims to the clinic and, if so, whether there are any restrictions on such referrals.

The Utah Constitution and the Utah Code create and define victim's rights. Victims have the right to be informed about criminal proceedings, to attend certain proceedings, and to be represented throughout those proceedings. The Utah Code requires all "criminal justice agencies" to facilitate victims' rights.

Canon 2B states that a judge may not "permit others to convey the impression that they are in a special position to influence the judge." The Committee has addressed several circumstances involving this provision. In Informal Opinion 97-5, the Committee stated that a judge may not attend an administrative checkpoint or participate in a law enforcement ride-along because these situations may create the impression that law enforcement is in a special position to influence the judge. In Informal Opinion 97-9, the Committee stated that a judge may not be involved in the

CASA Juror Checkoff Program. The Committee determined that judicial participation would create the impression that the CASA program is in a special position of influence with the court. In Informal Opinion 98-13, the Committee stated that a judge may not sign a letter of recommendation in support of a private counseling service and in Informal Opinion 99-1, the Committee stated that a judge could not refer juveniles to a counseling center on which the judge's spouse sat on the board of trustees. In each of these opinions, a deciding factor was that such a referral or recommendation could convey the impression that the entity was in a special position of influence.

In each of the above-referenced opinions, the Committee addressed situations involving individuals or entities who might regularly appear before the judge. The clinic will also be an entity that regularly appears in court and therefore it is important that the entity not be allowed to convey the impression of special influence. However, there is a legitimate question as to whether simply making a referral to this entity would create that impression.

Although the Committee has never addressed such an issue, it is evident that a judge could never make a referral to a specific law firm. At the same time, there are circumstances in which judges refer individuals to legal providers. For example, in criminal cases a judge might be required to appoint a specific law firm to represent an indigent defendant. There are also circumstances in which a court might notify an individual of the availability of certain legal services, such as organizations that serve impecunious litigants.

A judge is often required to help guard the rights of certain individuals while also making certain that those individuals do not convey a special position of influence. A law firm referral would be prohibited because there is nothing that requires a judge to refer to such a firm and would involve a judge assessing an individual's case and assessing an attorney's qualifications to assist that individual. When appointing a defense firm to represent a defendant, a judge does not engage in such an evaluation. The appointment is based solely on the indigent status of the defendant. Therefore, if there is a means and mechanism by which a judge may refer a victim to the clinic without making an assessment of the victim's case or the quality of the representation, then such a referral would be permitted.

A judge could notify a victim of the existence of the Utah Crime Victim's Legal Clinic as long as the judge does not make any assessment of the victim's interests in making such a referral. Any referral should be on the same basis as referring an individual to an indigent defense or similar organization. The referral must be based solely on the individual's status as a victim, as defined in the Utah Code, and not on other criteria.

The Committee notes that, under the Utah Code, prosecuting attorneys have many duties and responsibilities for protecting the rights of crime victims. For example, prosecuting attorneys are required to notify victims of their right to attend important criminal justice proceedings. Because of these statutory responsibilities, a judge could also refer a victim to the prosecuting attorney for a discussion on rights, information and resources available.

Informal Opinion 06-1
February 17, 2006

Question:
A district court judge has asked whether disqualification is necessary in a proceeding involving a court clerk's spouse appearing as counsel of record.

Answer:
Disqualification is required if the court clerk has a close working relationship with the judge. Judges in the district with whom the court clerk does not have a close working relationship may preside over such a proceeding.

Discussion:
According to the facts provided by the judge, a judge's clerk's spouse is a criminal defense attorney in the district. The clerk apparently does front-office and in-court work for a specific judge. The question posed by the judge is whether the judge for whom the clerk works is required to enter disqualification in cases involving the clerk's spouse.

Canon 3E requires a judge to enter disqualification when "the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding." In Informal Opinion 98-14, the committee construed this provision to require a judge to enter disqualification in cases involving a party who is a member of a court employee's immediate family or household and the employee has a close working relationship with the judge presiding in the case. The committee stated that "this would include the judge's clerk, bailiff, and reporter; the clerk of the court; and the trial court executive." Informal Opinion 98-14 involved a party, and not an attorney, but the same principles will generally apply. Canon 3E discusses "a party or a party's lawyer" in the same sentence, and therefore the same disqualification standard is generally applicable. A judge cannot hear cases involving an employee's attorney spouse, if the employee has a close working relationship with the judge.

Disqualification in these situations would involve not only the judge, but the clerk. A clerk is generally disqualified from involvement in cases under the same principles that apply to the judge. See e.g. Informal Opinion 97-6 ("court employees must . . . observe all code provisions which require diligence and fidelity.") However, this does not mean that the remedy in such a situation is for the clerk to be removed from the case so that the judge can preside. If the clerk has a close working relationship with the judge, both are disqualified and another judge must hear the case, assisted by a different clerk. In some situations this may create difficulties for a district. For example, if a trial court executive's spouse were an attorney, all of the judges in the trial court executive's district could not hear any cases involving that attorney. However, in situations involving a judge's in-court or front-office clerk, a case can be assigned to another judge in the district.

In conclusion, the judge for whom the clerk directly works is disqualified from presiding over any cases involving the clerk's spouse. The requirement of disqualification does not extend to other judges in the district because, according to the facts provided by the requester, the clerk does not have a close working relationship with the other judges in the district. Other judges in the district may hear cases involving the employee's spouse. If this situation were to change, such as the employee advancing to a different position and developing a closer working relationship with other judges, the status would need to be re-evaluated.

Informal Opinion 06-2
June 19, 2006

Question:
A judge has asked the Ethics Advisory Committee whether disqualification is required in proceedings involving IHC Health Services, Inc., which employs the judge's spouse part-time.

Answer:
Disqualification is required, although the disqualification can be remitted.

Discussion:
The judge's spouse is a licensed registered nurse. Since 1989, the judge's spouse has been employed at Intermountain Health Care (IHC) owned hospitals. The spouse works approximately four to six hours per week at a fixed hourly rate. The spouse also occasionally receives bonuses or gifts at special occasions. The spouse does not serve as an officer, director or other active participant in the affairs of IHC and does not own an interest in the corporation.

The judge was recently assigned a case involving IHC Health Services, Inc. The judge anticipates that IHC will be a party to other cases and therefore asks whether disqualification is required in proceedings involving IHC.

Canon 3E discusses disqualification. The canon requires disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . . . any . . . member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimis interest that could be substantially affected by the proceeding" or "the judge's spouse . . . is known by the judge to have a more than de minimis interest that could be substantially affected by the outcome of the proceeding." Disqualification is required if the judge's spouse has a more than de minimis interest that could be substantially affected by a proceeding, owns an economic interest in IHC or the subject of the litigation, or if the judge's impartiality might otherwise reasonably be questioned.

The terminology to the Utah Code of Judicial Conduct defines economic interest as "ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of the party." Under this latter definition, the

judge's spouse does not have an economic interest in IHC. The spouse does not own any interests in IHC and is not an active participant in its affairs. The Code defines de minimis as "an insignificant interest that could not raise reasonable questions as to the judge's impartiality." The question is then whether the judge's spouse has a more than de minimis interest that could be substantially affected by the proceedings, or the judge's impartiality might otherwise reasonably be questioned.

The Committee has previously discussed other situations in which a judge's spouse or other relative is employed by a party. In Informal Opinion 97-2, the Committee determined that a judge should enter disqualification in a proceeding involving a law firm that employs the judge's son as a law clerk. In this opinion, the Committee sought to establish a bright line test that offered judges "predictability and ease of application." The Committee noted that a law firm's ability to meet its payroll may depend on its success and therefore it was possible that a law clerk's financial interest could be substantially affected by the outcome of any given proceeding. The Committee also noted that a law clerk might have worked on a case before the judge. The Committee adopted a bright line to eliminate a need to inquire into facts about compensation and the relative's involvement in the case.

Establishing a bright-line in this situation would similarly provide easiest application. There may be cases involving IHC in which the judge's disqualification would not be automatically required. Even assuming that the judge's spouse has a more than de minimis interest, there would be cases in which that interest would not be substantially affected by the outcome of a proceeding. On the other hand, there would also be cases in which IHC's ability to maintain its employment and salary levels might be affected by the outcome of the case. Disqualification would be required in those cases. The problem for the Committee is providing guidance on the types of cases and the threshold involved in those cases that would require disqualification. Without more specific facts about a specific case or class of cases, the Committee is unable to provide guidance on appropriate thresholds and therefore a bright-line provides the most workable solution. The judge should therefore enter disqualification in a proceeding involving IHC.

As a final note, the disqualification at issue is a type that may be remitted under Canon 3F. As in Informal Opinion 97-2, the Committee recognizes that this bright-line may be "stricter . . . than . . . is otherwise necessary." The effects of this strict interpretation may be mitigated, however, by a remittal of the disqualification in appropriate cases. In essence, the Committee has created a presumption of disqualification in cases involving IHC. If there are cases in which the judge reasonably determines that the spouse's interest could not be substantially affected by the outcome of the proceeding and that the judge's impartiality will not otherwise reasonably be questioned, the judge could request remittal of disqualification following the procedures of Canon 3F.

Informal Opinion 06-3
June 19, 2006

Question:
A justice court judge has asked whether the judge may serve on a county ad hoc citizen's advisory committee, which will make recommendations on zoning for a specific area.

Answer:
The judge may not serve on the committee.

Discussion:
The judge has been asked to serve on a county advisory committee, formed on an ad hoc basis, that will discuss a zoning issue. The committee will make recommendations on a "local zoning ordinance allowing for the transfer of development rights (TDR) between land owners in specific resorts areas and target opened space zones." The judge also states that "the nature of the recommendations would involve the technical aspects of the implementation, scope and effect of the TDR program." The judge owns real property in the area that might be affected by any new zoning ordinance.

The primary canon at issue is Canon 4C(2). This canon states that "a judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice." The canon is broad enough to include both standing and ad hoc committees and therefore the primary question is whether this particular advisory committee is concerned with issues other than the improvement of the law, the legal system or the administration of justice.

In Informal Opinion 94-2, we stated that "each governmental committee and commission has unique functions and mandates . . . [and] each must be examined independently to determine whether service is appropriate under the code." In Informal Opinion 98-11, we stated that "the work of a governmental commission or committee must have a direct and primary connection to the legal system in order for service to be appropriate." The committee stated that "it is not enough that the committee be concerned with justice in a broader sense." The issue in that opinion was whether a judge could accept an appointment to the Utah Anti-Discrimination Advisory Council. The Committee determined that the judge could not serve because the Council focused on issues broader than direct legal matters. The Committee provided additional guidance in Informal Opinion 01-1, in which it stated that "the issues on which judges can speak must have a connection to the regular judicial or administrative duties of a judge." Although this opinion dealt with appearing before a public body, the principle applies in determining whether a committee has a direct connection to the law. The committees on which a judge may serve must have direct connection to the regular judicial or administrative duties of a judge.

In the publication Ethics and Judges Evolving Roles off the Bench: Service on Governmental Commissions, Cynthia Gray, 24 No. 1 Judicial Conduct Reporter 1 (Spring 2002), a four-part

consideration was discussed for determining whether service on a government committee is appropriate. The considerations include (1) whether commission members represent only one point of view or whether membership is balanced; (2) whether the group will discuss controversial legal issues likely to come before courts, or merely administrative or procedural issues; (3) whether the group will be viewed by the public as a political or an advocacy group or merely as an administrative group; and (4) whether the group will take public policy positions that are more appropriate to the other two branches of government than to the courts, or whether the policy positions would be viewed as clearly central to the administration of justice. Based on the second and fourth factors, the committee believes that service would not be appropriate on this commission.

Although the zoning issues are not likely to come before the court on which the judge serves, the important criteria is whether the issues are likely to come before any court. Zoning issues often are litigated. These issues might find their way to a court. Furthermore, the development of policy related to zoning restrictions belongs to the other two branches of government, and not to the judicial branch. The focus of the committee is therefore not on the administration of justice, but on other policy issues. The committee will not have a direct, primary effect on the administration of justice, the law, or the legal system and therefore service is not appropriate. The

Committee notes, however, that the judge may participate in meetings and discussions that affect his direct, personal interests as a property owner. See e.g. Informal Opinion 99-3.

Informal Opinion 06-4
June 19, 2006

Question:
A juvenile court judge has asked whether he may participate on a panel designed to train foster parents.

Answer:
The judge may participate as long as the panel consists of representation from the entities involved in juvenile court cases.

Discussion:
In the opinion request, the juvenile court judge explains that the Division of Child and Family Services sponsors a yearly panel to train foster parents. The panel consists of a judge, a representative from the attorney general's office, a guardian ad litem, and a parent's counsel representative. Foster parents do not automatically have standing in abuse, neglect, and dependency cases, but they may come before the court based on a desire to adopt, or based on other interests. The judge asks whether he may ethically participate on this panel.

Canon 4C(4) states that "as a part of the judicial role, a judge is encouraged to render public service to the community. Judges have a professional responsibility to educate the public about

the judicial system and the judicial office, subject to the requirements of this code." Canon 4C(4)(a) states that "a judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, and the administration of justice." These canons encourage and permit a judge to educate others about the law and the legal system.

In participating in these activities, a judge must comply with Canon 4A which states that a judge "shall conduct the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on a judge's capacity to act impartially as a judge; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) exploit the judge's judicial position." A judge must ensure that the judge's extra-judicial educational activities do not cast doubt on the judge's impartiality or demean the judicial office. Based on the information provided to the Committee, the Committee determines that the proposed activity does not cast doubt on the judge's impartiality or demean the judicial office, and therefore the judge may participate.

In previous opinions, we have cautioned judges against participating in activities in which only a single component of the judicial system is present. For example, in Informal Opinion 88-5, we stated that a judge should not teach peace officers about the Utah Code and proper courtroom demeanor, because this may create the appearance that law enforcement officers are in a special position of influence. Law enforcement officers are on one side of a legal dispute and a judge cannot be viewed as aligning him or herself with one side of dispute. We have stated, however, that judges may participate in extra-judicial activities in which all of the components of the system are represented. For example, in Informal Opinion 98-4, we discussed whether a judge could serve as a member of the advisory board for the Salt Lake County Children's Justice Center. In finding that a judge could participate, we noted that it was important that the advisory board consisted of broad representation of individuals and entities involved in juvenile justice.

Similarly, in Informal Opinion 98-6, we stated that a judge could participate on a domestic violence coalition as long as (among other considerations) the coalition included representatives from the various entities dealing with domestic violence.

The fact that the Division of Child and Family Services panel consists of representative components of juvenile court cases is important. Because of this broad representation, the judge's participation would not cast reasonable doubt on the judge's capacity to act impartially, nor would it otherwise demean the judicial office. The panel appears to be an excellent opportunity for the judge to comply with the ethical obligation to engage in public outreach. The judge must make certain that his comments on the panel do not compromise impartiality, but the participation is otherwise acceptable.

Informal Opinion 06-5
June 19, 2006

Question:
A full-time justice court judge has asked whether he may serve on the Board of Trustees of Utah

Certified Development Company, which is an approved lender under the U.S. Small Business Administration Loan Program.

Answer:
The judge may serve as a trustee.

Discussion:
According to the facts provided by the requester, the judge has been asked to serve on the Board of Trustees of the Utah Certified Development Company ("Utah CDC"). The Utah CDC is a non-profit corporation that is an approved lender under the U.S. Small Business Administration 504 Loan Program. The 504 loan program works in conjunction with commercial lenders to finance small business loans. The loans are primarily secured by the Utah CDC issuing twenty year second trust deed secured loans subordinate to the first lien trust deed held by the commercial bank. Once the loans are closed, the loans are assigned to the U.S. Small Business Administration, which becomes the owner and holder of the loan, the note, the trust deed, and of other guarantees or collateral. The CDC continues to service the loans.

If any of the loans are defaulted, the Small Business Administration initiates and prosecutes any foreclosure or other collection efforts in its name as the assignee of Utah CDC. The judge asserts that any court appearances are by the SBA and actions are brought either in state district court or federal district court, and not by the Utah CDC.

Canon 4C(3) permits a judge to "serve as an officer, director, trustee or non-legal advisor . . . of an educational, religious, charitable, fraternal or civic organization not conducted for profit" as long as the organization is not frequently engaged in proceedings before any court and the judge does not engage in membership solicitation or fund-raising. According to the facts provided by the requester, the organization is a non-profit entity that would not be regularly appearing in court, and the judge would not be engaging in membership solicitation or fund-raising. Therefore, provided the judge does not act as a legal advisor to the organization, the question to be answered is whether the Utah CDC is "an educational, religious, charitable, fraternal or civic organization." The Code does not define these terms and therefore we look to the term's plain meanings or to other resources to answer this question.

Under the plain meaning of the terms, the Utah CDC does not appear to be an educational, religious, charitable, or fraternal organization. The Utah CDC does not engage in educational or religious activities, and does not appear to be organized for purposes of charity. The Utah CDC also does not appear to be a fraternal organization. The Utah Code provides one definition of a fraternal organization. Utah Code Ann. § 31A-9-101 states that a fraternal society is a

> Cooperation organized or operating under this chapter that: has no capital stock; exists solely for the benefit of its members and their beneficiaries and any lawful social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic, or religious purpose for the benefit of its members or the public, carried on through voluntary activity of its members and their local lawyers or through

> institutional programs of the fraternal society or its local lodges; has a lodge system; has a representative form of government; and provides insurance benefits authorized under this chapter.

Although this definition is not binding, it provides a fairly common understanding of what is considered to be a fraternal organization. The Utah CDC is not a fraternal organization.

The Utah CDC may, however, be considered a civic organization. Utah Code Ann. § 35A-3-302 defines a civic organization as

> Community service clubs and organizations, charitable health care and service organizations, fraternal organizations, labor unions, minority and ethnic organizations, commercial and industrial organizations, commerce and business clubs, private non-profit organizations, private non-profit corporations that provide funding to community service organizations, organizations that advocate or provide for the needs of persons with low incomes, religious organizations, and organizations that foster strong neighborhoods and communities.

Under this definition, it appears as if the Utah CDC might qualify as a civic organization. The organization could be considered a commercial organization, a private non-profit organization, or private non-profit corporation that provides funding to community service organizations. Under this definition, the judge would be permitted to serve the Utah CDC as a trustee.

As noted above, the judge should not act as a legal advisor, engage in membership solicitation or engage in fund-raising. The judge should be careful to avoid conflicts, but service appears to be permitted.

Informal Opinion 06-6
December 5, 2006

Question:
A juvenile court judge has asked the Ethics Advisory Committee for an opinion on whether the judge may ethically make presentations to certain groups. These include a parenting class at the Division of Child and Family Services (DCFS), an award program sponsored by the Court Appointed Special Advocate (CASA), the Foster Parents Association, juveniles in a detention center, and school officials.

Answer:
The judge may make presentations before the groups as long as the judge is careful about the contents of the discussions.

Discussion:
The judge states that he receives various requests throughout the year to make presentations to

different groups of people. The presentations include a class sponsored by DCFS to improve parenting skills. Some of the parents are court-ordered to attend the program and are within the jurisdiction of the court on which the judge sits. The judge has also been invited to give presentations at the CASA Awards Program and before the Foster Parents Association. The former would include both CASA volunteers and the local guardian ad litem, while the latter would include foster parents and potential foster parents for kids who will require court placement. The judge has also been invited to meet with school officials to discuss and coordinate truancy matters and other issues. Finally, the judge would like to periodically visit detention centers and speak to the juveniles in the centers. The juveniles in the center would have been sent there by the judge and most will be back before the court.

There are several canons involved in resolving this question. Canon 2A is implicated as judges must promote public confidence in the integrity and impartiality of the judiciary. Canon B(7)'s prohibition against ex-parte communication may be relevant as may Canon 3B(9), which prohibits a judge from publically commenting on pending cases. Canons 4A and 4C are also involved. Canon 4A states that a judge must conduct extra-judicial activities in a manner that does not cast doubt on the judge's capacity to act impartially. Finally, Canon C(4) states that judges have a professional responsibility to educate the public about the judicial system and the judicial office, subject to the requirements of this code.

The Committee has previously discussed a judge's professional interaction with individuals or organizations who might appear before the judge. In Informal Opinion 90-2, a judge was asked to participate in moot court exercises conducted by the Division of Peace Officers Standards and Training, and the Department of Corrections. The Committee determined that a judge could not participate in the moot court exercises. The Committee based its decision on three factors: the program benefitted a single component of the criminal justice system, the program involved individuals who were likely to appear before the judge, and the subject matter of the exercise would include issues that are frequently the focus of adversary proceedings. In subsequent opinions, the Committee determined that a judge could not participate in a law enforcement ride-along (Informal Opinion 97-5) nor could a judge participate in the CASA juror check-off program (Informal Opinion 97-9). In both of these opinions, the Committee stated that a judge cannot permit organizations and individuals to appear as if they are in a special position of influence with the court.

The Committee has determined, however, that a judge can appear before a group of attorneys who represent a single component of the justice system. Informal Opinion 99-6. The Committee noted a difference between single component interaction with attorneys and single component interaction with other participants in court proceedings. In the former situation, the Committee recognized the importance of interaction between the bench and members of the bar. Judges can appear before single components of the bar because this promotes an educated bar and bench.

The judge could not give legal advice, comment on pending cases, or offer opinions that would indicate biases or prejudgment of certain types of cases. The judge must also be willing to accept invitations from other components in the system. The Committee has also determined that

juvenile justice is inherently a broader concept than justice in the adult system. The Committee made this determination in a question involving service to a governmental board, but the principle is relevant to the immediate question. In Informal Opinion 98-4, the Committee did not prohibit a judge from sitting on the board of a Children's Justice Center, a multi-disciplinary board addressing juvenile justice issues. The Committee instead provided advice on the content of the judge's discussions and participation. The judge could not participate in discussions that would benefit only a single component of the system (i.e. prosecutorial tactics), and would not benefit the system as a whole.

The question before the Committee is whether the Committee should retreat from the prohibition against interaction with non-attorney groups consisting of only one component of the legal system, at least in matters involving juvenile justice. The Committee determines that there should not be an absolute prohibition against such interaction, but a judge must be very circumspect in the judge's comments and discussions before such groups.

Canon 4C(4) states that judges have a professional responsibility to educate the public about the judicial system. The Committee agrees that there may be some benefit to a judge appearing before the groups listed by the judge. The interaction can increase respect for the court and can increase the participant's understanding of the judicial process. In appearing before such groups, a judge should therefore focus comments on the judicial system as a whole and on the workings of the judicial office. A judge should not discuss pending cases, give legal advice, show any inappropriate biases, or participate in any other specific discussions that might benefit one component of the system, without benefitting the system as a whole. A judge must also be open to invitations from all components of the system. Under these restrictions, the judge may engage in the anticipated activities.

Informal Opinion 07-1
January 22, 2007

Question:
A part-time justice court judge has asked whether he may serve on a school traffic safety committee.

Answer:
The judge may serve, but should avoid any actual conflicts.

Discussion:
Utah Code Ann. § 53A-3-402(17) states that each local school board is to establish a traffic safety committee. The statute states that the purpose of a traffic safety committee is to:

> (i) receive suggestions from parents, teachers and others and recommend school traffic safety improvements, boundary changes to enhance safety, and school traffic safety program measures;

(ii) review and submit annually to the Department of Transportation and affected municipalities and counties a child access routing plan for each elementary, middle, and junior high school within the district;
(iii) consult the Utah Safety Council and the Division of Family Health Services and provide training to all school children in kindergarten through grade six, within the district, on school crossing safety and use; and
(iv) help ensure the district's compliance with rules made by the Department of Transportation.

The composition of a traffic safety committee includes representatives from the schools and the district and the parent teacher associations of the schools within the district, a representative of the municipality or county, and law enforcement and traffic safety engineering representatives. § 53A-3-402(17)(b). The justice court judge has not yet been appointed to the committee. However, he will be seeking an appointment and therefore asks whether such an appointment is permitted under the Code of Judicial Conduct.

Canon 4C(2), which discusses a judge's ability to accept an appointment to a governmental committee or commission, does not apply to part-time justice court judges. In Informal Opinion 00-2, the committee stated that "exempting part-time justice court judges from Canon 4C(2) is intended to permit these judges to participate in governmental service beyond governmental boards that are concerned solely with the law and the legal system." In that opinion, the committee stated that a part-time justice court judge could accept an appointment to a local school district board of education (subject to the judge consulting with legal advisors about whether service would be constitutional).

Based on our decision in Informal Opinion 00-2, the committee is similarly of the opinion that a part-time justice court judge may accept appointment to a traffic safety committee established by a local school board. In making this determination, the committee has also considered the judge's obligations under Canon 1, Canon 2 and Canon 4A. A judge is required to promote public confidence in the integrity and impartiality of the judiciary. A judge cannot engage in extra-judicial activities that cast doubt on the judge's capacity to act impartially, demean the judicial office, interfere with the proper performance of judicial duties, or exploit the judge's judicial position.

As a justice court judge, the judge undoubtedly presides over many traffic cases. As a committee member, the judge would also be dealing with traffic matters. Although there is a potential for some conflict between the two duties, the committee believes that the potential is remote as the judge's duties as a judge and as a committee member would not directly overlap or conflict. The traffic safety committee's duties involve safety plans for children and making recommendations to schools to enhance child safety through programs, boundary changes and other improvements. On its face, we do not think that these duties would impact the judge's ability to act impartial as a judge. The issues handled by the traffic safety committee would rarely if ever come directly before the judge. However, if the judge has a case before the court that directly or indirectly involves any of the duties of the traffic safety committee, the judge must enter disqualification in

that case. If disqualification becomes relatively frequent, the judge must step down as a traffic safety committee member.

As a committee member, the judge must also comply with Canon 4C(3). The judge may not engage in fund-raising or membership solicitation. The judge is also prohibited from acting as a legal advisor. Again, as stated above, if the judge frequently encounters conflicts, the judge must resign from the committee.

Informal Opinion 07-2
May 22, 2007

Question:
The Ethics Advisory Committee has been asked about the ethical restrictions placed on a part-time traffic referee.

Answer:
A part-time referee may not practice criminal law. The referee also may not practice law at the court or courts which the referee serves. The judges of the district must enter disqualification in all cases in which the referee appears as counsel.

Discussion:
A district court has employed an attorney as a part-time traffic referee. The traffic referee has signed a contract stating that the referee will comply with the Code of Judicial Conduct. As a court employee, the actions of the referee also have implications for the judges within the district who must ensure that court employees "observe the standards of fidelity and diligence that apply to the judge." Canon 3C(2). The opinion request notes that the referee "is doing an excellent job serving the citizens of [the county]."

The Code of Judicial Conduct does not have any provisions specifically governing the conduct of referees. The Code also does not contain provisions on part-time judicial officers in the state system. However, the applicability section of the Code contains a provision on part-time justice court judges. The committee finds that this provision is helpful in deciding the ethics restrictions on a part-time referee and the provision should be followed in this circumstance. The restriction on part-time justice court judges states that a part-time judge "shall not practice law in the court on which the judge serves or any court subject to the appellate jurisdiction of that court, or act as a lawyer in a proceeding in which the judge has served as a judge or any other proceeding related thereto."

The Model Code of Judicial Conduct provides guidance on the scope of this prohibition. The applicability section of the Model Code states that "anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including officers such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below." The Model Code then

states the restrictions placed on a "continuing part-time judge." The restriction is similar to Utah's Code.

As a judicial officer, a part-time referee who also has a law practice is restricted in the referee's practice of law.[1] The part-time referee may not practice law in the court on which the judge serves. This restriction applies whether the practice is civil or criminal. The restriction applies specifically to the court site or sites where the referee works, but not to other court sites within the district.

The committee is also concerned about a referee's criminal law practice. The Utah Code prohibits part-time justice court judges from criminal law practice. The Code of Judicial Conduct does not contain a similar prohibition. However, the Code requires a judge to comply with the law, and therefore it is also unethical for a part-time justice court judge to practice criminal law.

Other jurisdictions have prohibited part-time judges from practicing criminal law. For example, the New York State Bar in Opinion 181 and Opinion 228 stated that a part-time judge may not practice criminal law. Similarly, the West Virginia Bar stated that a part-time municipal judge could not practice criminal law. In reaching this conclusion the committee stated that

> One who assumes to act as a judge one day and as an advocate the next is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system. To permit a judge with criminal jurisdiction to practice criminal law would weaken the confidence of the public in the impartiality and objectivity of the judiciary.

The committee agrees that the appearance of impartiality is very important in this situation. Under Canon 2, a judicial officer must promote public confidence in the impartiality of the judiciary. The referee's position in resolving criminal cases may be affected by the appearance issues that exist when a referee subsequently represents criminal defendants. At the very least, the practice may appear to compromise impartiality. The referee therefore may not practice criminal law.

In Informal Opinion 96-2 and Informal Opinion 98-14, the committee considered the question of whether a judge must disqualify from cases involving an employee of the judge's district. In Informal Opinion 96-2, the committee determined that a judge could not hear a case involving an employee of the judge's district who was a party to a court proceeding. In Informal Opinion 98-14, the committee confirmed that "automatic disqualification is required when the party is an employee of the judge's district." The committee based its decision on Canon 3E, which requires disqualification when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." The committee also relied on Canon 2B, which states that a judge "shall not allow family, social or other relationships to influence the judge's judicial conduct or judgment." In Informal Opinion 96-2, the committee stated that "these canons require a judge to closely scrutinize his or her involvement in a court proceeding when the judge is familiar with a participant. Scrutiny is not limited to whether the judge feels that he or she could be impartial.

The judge must also objectively consider the perceptions of others."

Canon 3E places a party and a party's lawyer on the same footing for purposes of disqualification. A judge is therefore automatically required to disqualify in cases involving an employee of the judge's district, whether the employee is appearing as a party or as a lawyer. The restriction applies to all judges within the district. This obligation is placed on the judges and not on the referee. However, the committee recognizes that this restriction will undoubtedly have an impact on the referee's practice within the judicial district.

In conclusion, the committee determines that a court referee may not practice at the specific court site or sites which the referee serves. The referee may practice at other court sites within the district. The practice may not include criminal law. The judges of that district must disqualify themselves from any proceedings involving the referee. The referee can practice civil law in other judicial districts without the need for disqualification by the judges in those districts.

[1] The state system does not employ any part-time judges. Therefore, there possibly was not a need to adopt code provisions dealing with part-time state judges, only provisions dealing with part-time justice court judges. As far as can be determined, the part-time referee referenced in this request is the only part-time judicial officer in the system.

Informal Opinion 07-3
April 13, 2007

Question:
The Ethics Advisory Committee has been asked whether a juvenile court judge presiding over a petition for judicial bypass to parental consent for abortion may consider, inter alia, the history of the minor's involvement, if any, with the juvenile court, and the court file established in any previous case, including the legal and social files, and whether the court may consult with the judge who presided over the previous case involving the minor.

Answer:
The judge may review this information.

Discussion:
Under Utah Code Ann. § 76-7-304.5, a minor who wishes to have an abortion without parental consent may seek permission from a juvenile court judge. The minor files a petition with the juvenile court and the juvenile court judge then considers whether the minor is mature and capable of giving consent. If the minor is not mature and capable, the juvenile court considers whether an abortion is nevertheless in the best interest of the minor.

The question posed to the Ethics Advisory Committee involves potential ex parte communications. The juvenile court judge questions whether, in considering a petition for permission to have an abortion, the judge may review and consider information that is already in the possession of the juvenile court independent of any information included in the petition for

permission to have an abortion. The question is also whether a judge may contact another juvenile court judge to gather information and seek that judge's perspective on issues involving the petition.

Canon 3B(7) states that "except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court." The important principles for discussion are 1) the prohibition against initiating ex parte communications and 2) the permission to discuss cases with court personnel.

The committee has previously had only one occasion to discuss ex parte communications. In Informal Opinion 97-4, the committee determined that a judge could ethically receive ex parte requests from juvenile court probation officers who are seeking warrants to detain juveniles. The committee recognized that juvenile court probation officers are court personnel who aid the court with adjudicative responsibilities and therefore the communications were expressly authorized by Canon 3B(7). However, the committee also cautioned that, if a communication involved substantive information about a juvenile, the information must subsequently be disclosed to the juvenile. The probation officer situation is different, however, from the posed question because in this situation the judge will be initiating the contact.

In cases from other jurisdictions, judges have been cautioned against conducting an independent investigation of a pending case. For example, in State v. Emanuel, 768 P.2d 196, (Ariz. App. 1989), a judge impermissibly contacted a couple of attorneys and the clerk of the trial court (who was the victim) to gain additional information on the defendant before sentencing. The court held that the judge's initiation of these contacts violated the code.

There is a concern any time a judge goes beyond the facts presented by the parties in a case and independently gathers additional information. This fact situation is a little different, however, because the facts are already in the possession of the judicial system. The situation also calls for a reasonable application of the ex parte prohibition.

If a petition for permission to have an abortion is assigned to a judge who is already familiar with the petitioner from prior judicial proceedings, the judge would not be required to disqualify from the petition. Disqualification is not required under the extra-judicial source rule. The judge would be required to decide the case fairly and impartially, but the information already possessed by the judge would not be considered an ex parte communication. Based on a disqualification situation and the precedent from the previous opinion, the committee determines that the general rule established in Informal Opinion 97-4 is applicable to this situation also. A judge may review information that is already in the possession of the judicial system in a case file, and may consult with other judges who are familiar with the petitioner, without violating the prohibition against ex parte communication. However, the fact that the judge has consulted these sources must be made a part of the record in the abortion case, and the juvenile judge must reveal to the juvenile

all of the information that the judge has reviewed. A judge should not conduct an investigation beyond matters that are already in the court's possession.

The committee notes that this conclusion applies only to the abortion cases. It is unlikely that this conclusion would apply to other juvenile court cases. However, the committee will not address that issue because the question has not been asked.

Informal Opinion 07-4
May 7, 2007

Question:
The Ethics Advisory Committee has been asked whether a judge may serve on the Board of the National Alliance for the Mentally Ill (NAMI).

Answer:
A judge may not serve on the Board.

Discussion:
Canon 4C(3) permits a judge to "serve as an officer, director, trustee or nonlegal advisor . . . of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations: . . . A judge shall not serve . . . if it is likely that the organization will be frequently engaged in adversary proceedings before any court." According to the judge who requested the opinion, representatives of NAMI frequently appear in the judge's court to advocate for individuals who suffer from mental illness. NAMI representatives also appear in court to offer mentors and programs for defendants and their families. The question for the committee is whether the organization is a frequent litigant in court.

The committee addressed a similar question in Informal Opinion 00-1. The question in that opinion was whether a court commissioner could serve on a Utah Legal Services committee. The committee determined that the commissioner could serve on the committee, but must disclose that service in cases involving Utah Legal Services' attorneys. In reaching this conclusion, the committee reviewed opinions from other states that had addressed similar questions.

The committee cited Michigan State Bar Opinion JI-38. The Michigan committee had determined that a judge could serve on a legal service organization because the organization itself did not appear in court, but only staff attorneys who appeared on behalf of individual clients. The Michigan committee had noted that the boards of legal service organizations are "segregated from the information about particular cases in order to preserve the advocate's independent professional judgment about the representation." The Michigan committee cautioned, however, that service would not be appropriate if the organization "made policy decisions that have political significance or imply commitment to causes that may come before the courts for adjudication." This condition is important for the question that has been asked.

Although NAMI itself is not a frequent litigant before the judge's court, NAMI makes policy decisions that might have significance for the cases that come before the judge's court. The

NAMI Utah website contains information on how NAMI members and volunteers may be active lobbyists. The web page also contains policy statements on issues that might come before the court, such as court ordered treatment of individuals determined to be mentally ill, and diversion programs for the mentally ill. NAMI is also an active lobbyist before the Utah State Legislature.

NAMI is committed to causes that come before the judge for adjudication. Unlike the attorneys who are employed by a legal services organization, NAMI advocates who appear in court are not only advocating for individuals, but also appear to be advocating for the policies adopted by NAMI. Because the board of NAMI would apparently be involved in shaping the policies of NAMI, a judge may not serve on the NAMI board.

Informal Opinion 08-1
February 25, 2008

Question:
A judge has asked whether the judge may teach a class at a local university. The class will be four days a week, for an hour and twenty minutes each day. The time will mostly be during lunch breaks.

Conclusion:
The judge may teach the class because the time away from regular judicial duties is not unreasonable.

Discussion:
The judge has been asked by a local university to teach a business law class. The class will be taught Monday through Thursday of each week and the class time will be for one hour and twenty minutes. The class will last for about seven weeks. The class will be scheduled at a time when the judge can use lunch breaks to teach the class.

In Informal Opinion 90-1, the Ethics Advisory Committee discussed whether a judge could teach a business law class at a university four days a week, from 3:30 to 4:30 p.m. With travel time, the class apparently would have required the judge to be away from judicial duties for a minimum of six hours per week. The Ethics Advisory Committee determined that the judge could not teach the class because the six hours per week would interfere with the performance of judicial duties. The issue in this situation is whether the class will unreasonably interfere with judicial duties when the class will be taught mostly during lunch hours.

Canon 3A states that the "judicial duties of a full-time judge take precedence over all the judge's other activities." Canon 4B permits a judge to "speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal topics subject to the requirements of this code." In Informal Opinion 90-1, the committee stated that

> A judge must carefully avoid extra-judicial commitments of such magnitude that they detract from the time the judge is able to devote to judicial duties. In achieving that balance, a judge must consider the fact that the performance of judicial duties not only requires conducting scheduled hearings, but also requires that the judge be available during regular court hours to issue warrants, set bail and deal with other legal issues as they arise.

In Informal Opinion 98-8, on performing marriages, the committee declared that regular court hours are from 8:00 a.m. to 5:00 p.m. In that opinion, the committee stated that a judge could not receive compensation for performing a marriage ceremony during lunch hours because the judge is still on duty as a judge. Based on this opinion, there is a legitimate question about whether a judge can perform other activities during a lunch hour, without those activities being considered interference with judicial duties. The committee determines that a judge can conduct other activities during a lunch hour without those being considered interference with judicial duties. Although there are no set hours for judges to take lunch and other breaks, a judge is clearly entitled to take lunch time and an hour of lunch time is not unreasonable.

Because a judge can perform other activities during a lunch break, without those activities interfering with judicial duties, the question is whether the additional 20 minutes a day unreasonably interferes with judicial duties. The committee is of the opinion that the extra 20 minutes a day does not unreasonably interfere with judicial duties. Unlike Informal Opinion 90-1, in which the judge would have been teaching in the middle of the afternoon four days a week, which would be disruptive to a judge's calendar, the judge will be teaching at the beginning or end of lunch breaks and there will be minimal interruption with judicial duties. The total amount of time away from regular judicial duties during a week amounts to a little over an hour and one-half. The committee determines that this amount of time is not unreasonable. The time is not of a sufficient magnitude as to detract from judicial duties.

Informal Opinion 10-1
January 24, 2011

Question:
Utah Code Ann. §30-3-10(1)(d) states that, in child custody proceedings, a judge may inquire of the children and take their desires into account when determining custody and parent-time. The judge may interview the children in camera. In relation to this statute, the Board of District Court Judges has asked the following questions:

1) When a guardian ad litem has been appointed by the court in a child custody proceeding, is it a violation of Canon 2, Rule 2.9[1] for the guardian ad litem to attend and participate in the in camera meeting?

2) When a custodial guardian (a non-parent who has been given the temporary custody of the children) has been appointed by the court in a private proceeding, is it a violation of Canon 2,

Rule 2.9 for the custodial guardian to attend and participate in the in camera meeting?

3) Is it a violation of Canon 2, Rule 2.9 for a judge to meet or speak with an appointed guardian ad litem and/or an appointed custodial guardian without the children present?

Answer:
The Committee is unable to provide answers because the questions involve legal conclusions that are outside the scope of the Committee's authority.

Discussion:
Canon 2, Rule 2.9(A)(5) of the Utah Code of Judicial Conduct states that

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows: . . . . A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law.

The Code prohibits ex parte communications unless the communication falls within one of the exceptions listed in the Code. The relevant exception in this opinion is for ex parte communications expressly authorized by law.

Utah Code Ann. §30-3-10(1)(d) states that, in child custody proceedings, "the court may inquire of the children and take into consideration the children's desires regarding future custody or parent-time schedules . . . ." Subsection (1)(e) states that if

> Interviews with the children are conducted by the court pursuant to Subsection (1)(d), they shall be conducted by the judge in camera. The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with the children is the only method to ascertain the child's desires regarding custody.

This statute authorizes a judge to engage in an ex parte communication with a child for the limited purpose of determining a child's wishes for custody. The questions posed by the Board of District Court Judges involve whether the statute also authorizes the judge to engage in an ex parte communication with the child's guardian ad litem or custodial guardian. If the statute does not expressly authorize ex parte communication, then a judge's communication with a child's representative is impermissible unless the other parties are present.

The questions presented by the Board of District Court Judges present a dilemma for the Committee. The Committee is charged with interpreting the Code of Judicial Conduct. In order to resolve this question, the Committee would be required to interpret a statute and determine whether the statute authorizes a judge to engage in ex parte communications.

The Committee faced a similar dilemma in Informal Opinion 97-4. The question in that opinion was whether a juvenile court judge "may ethically receive ex parte requests from juvenile court probation officers seeking warrants to detain juveniles who have violated court probation orders." The Committee recognized that one of the exceptions to the ex parte communication prohibition involves communications authorized by law. The Committee noted, however, that "none of the statutory or rule provisions relied on specifically authorized ex parte affidavits or oral requests for such warrants. While it is possible that exhaustive review of case law and analogous statutes might lead to the conclusion that the practice is authorized by law and constitution, the Committee doubts its institutional prerogative to undertake such an inquiry and render what would amount to be a legal, rather than an ethical, opinion."

The Committee stated that the dilemma "results from the admittedly circular language of the provision: the practice is ethical if it is legal and unethical if illegal. The Committee's responsibility, however, is to give opinions on the ethical propriety of professional or personal conduct, not the legal propriety."

The Committee was able to resolve the question in Informal Opinion 97-4 based on other provisions within the Code. The Committee did not engage in a legal analysis as to whether a specific law authorized the ex parte contact. In this case, the Committee is of the opinion that it is unable to resolve these particular questions because they require a legal interpretation of §30-3-10.

The Committee is not in a position to state whether §30-3-10 allows ex parte contact with a guardian ad litem or other representative of the children. An argument can be made that authorization to speak ex parte with a child naturally includes authorization to speak with the child's attorney or other representative. The argument would be that this is analogous to something such as a request for an ex parte domestic violence protective order, which may be communicated to a judge by a party, a party's attorney, or the party and the attorney jointly, even though the statutes do not expressly identify those individuals. Conversely, it can be argued that the statute is expressly limited to children because it mentions personal "interviews" and not other forms of communication that are often done through representatives. The resolution of the arguments involves a legal conclusion. The Committee does not have authority to interpret and declare the meaning of the statute.

The Committee recognizes the difficultly that this creates for judges in trying to anticipate their conduct. Considering the language of Rule 2.9, if judges are concerned about whether their conduct falls within the exception, the remedy is to establish clarity through statute or rule. The Committee therefore suggests to the Board that this question be answered prospectively by amending the statute to eliminate any confusion, or by the Board itself offering an opinion to judges on the meaning of the statute.

[1] The Board referenced Canon 3B(7) in its opinion request. However, the Committee received the request after Canon 3B(7) was repealed and replaced with Rule 2.9 on April 1, 2010. Because the Committee is limited by Rule

3-109 of the Rules of Judicial Administration to addressing only future conduct, the Committee cannot offer an opinion on how Canon 3B(7) might have applied to these questions.

Informal Opinion 10-2
January 24, 2011

Question:
A judge has asked the Ethics Advisory Committee whether a judge may refer parties to a specific mediator.

Answer:
A judge may not refer parties to a specific mediator.

Discussion:
It is not unusual for parties in litigation to pursue mediation in the middle of litigation, either because mediation is required by statute or rule, or because mediation is desired. The question posed by the judge in this situation has two parts: 1) If parties to a case ask the judge for suggestions on a mediator, may the judge offer a recommendation? 2) May the judge offer a recommendation without being asked?

These questions implicate three rules in the Code of Judicial Conduct. Canon 1, Rule 1.3 states that a judge "shall not abuse the prestige of judicial office to advance the personal or economic interests of . . . others or allow others to do so." Canon 2, Rule 2.2 states that a judge "shall perform all duties of judicial office . . . impartially." Rule 2.4 states that a judge "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." The concern in this situation is that a judge would be using his or her office to advance the pecuniary and reputational interests of a mediator, and that the judge's underlying motives might be based on a relationship with the mediator.

The Committee has located one opinion discussing this issue. The Florida Judicial Ethics Advisory Committee, in Opinion 08-1, stated that if a judge in an adversarial probate case is asked by both sides to recommend a mediator, the judge may provide the parties with a list of at least three persons, without showing a preference for any of the three. The Committee also stated that the judge should not repeatedly include the names of the same mediators. Thus, according to the Florida Committee a judge may not recommend specific mediators, although a judge may have a rotating list.

The Committee agrees with the Florida Committee that a judge may not refer individuals to a specific mediator. As noted by the Florida Committee, "judges are not to use their public office to promote the private interests of others." Referring to a specific mediator would be using the prestige of the judicial office to advance the personal and economic interests of the mediator.

The Committee is also concerned that a judge may be sending a message that the judge will approve any agreement that comes from the particular mediator. Although agreements are approved in most situations, the judge should not give the parties any impression that the mediator is in a position that might unduly influence the judge.

At this point the Committee will not offer an opinion on whether a judge may provide a list of mediators as was approved by the Florida Committee. The Committee has not been asked that particular question. However, the Committee again emphasizes that a judge may not create any appearance that someone is in a position to influence the judge's conduct.

The Committee notes that the Administrative Office of the Courts maintains a roster of mediators for public reference. Because a judge cannot recommend specific mediators, the Committee believes that it would be a good practice for judges to simply refer parties to the roster. By referring to the roster, a judge will avoid any scrutiny that would be associated with providing the judge's own list.

Informal Opinion 10-3
November 10, 2010

Question:
A municipal justice court judge has asked the Ethics Advisory Committee for guidance on handling cases involving his son-in-law, who is the chief of police in the same jurisdiction covered by the justice court.

Answer:
The requested guidance is outlined below.

Discussion:
The municipal justice court judge presides over a court that receives approximately 1000 filings per year. The judge's son-in-law is the chief of police over the same municipality's police department. As chief of police, the son-in-law personally writes citations that are filed with the court. The son-in-law also supervises other officers who write citations.

The justice court judge currently has a procedure that he follows on cases involving his son-in-law. If a defendant contests a citation, the judge provides the defendant with a form that discloses the conflict[1]. The defendant then has the option of either requesting the judge's disqualification or stating that the judge need not be disqualified. The judge is asking the Committee whether this process is acceptable. The judge is also asking the Committee to provide guidance on any other processes that should be followed.

There is little question that the judge would have a conflict on all contested cases on which the citation was written by his son-in-law or the son-in-law is otherwise a primary witness. Rule 2.11(A)(2)(d) requires a judge to "disqualify himself or herself . . . [when] the judge knows that .

. . a person within the third degree of relationship . . . or the spouse . . . of such a person is . . . likely to be a material witness in the proceeding." In addition to the Code language, the Utah Supreme Court, in In re Inquiry Concerning a Judge, 2003 UT 35, ¶10, 81 P.3d 758, determined that a son-in-law is considered to be within the third degree of relationship for purposes of disqualification.

Disqualification is not required in cases involving other officers from the police department, unless the son-in-law becomes a material witness in a particular case. This is unlikely on citations written by others and would not be known at the time a citation is filed.

The disqualification of the justice court judge is of the type that may be waived under Rule 2.11(C) of the Utah Code of Judicial Conduct. The judge may therefore disclose the conflict and ask the parties to consider waiving the disqualification. The primary question for the Committee is whether the son-in-law is "likely to be a material witness" upon the filing of a citation, requiring the judge to recuse or disclose the conflict at that stage. The Committee recognizes the practical realities of the citation process. The Committee will consider those realities in deciding whether disclosure is required when a citation is filed or whether a different outcome is justified given those realities.

When a law enforcement officer issues a citation, the officer has five days to file the citation with the court. See Utah Code Ann. § 77-7-20. In most cases, the defendant must pay the citation no sooner than five and no later than 14 days from the date of receiving the citation. In other cases, the defendant is required to personally appear before the judge in order to resolve the citation. On non-mandatory appearance cases, if the defendant pays the citation, the court clerk handles the case without any involvement by the judge. The court clerk receipts the fine, enters a conviction in the court docket, and closes the case. One of the reasons why the subject justice court judge has implemented the court's current procedure is because the judge does not have involvement at that early stage. The court only notifies defendants of the conflict if the case becomes contested, which is the point when the judge will become involved. It is also arguably the point at which the son-in-law is likely to become a material witness.

The majority of citations are resolved by the defendants paying the appropriate fine without ever appearing in court. By writing the citation, presumably the son-in-law is a witness to the crime. The question for the Committee is whether, given the fact that the majority of citation cases are settled without hearing or trial, the son-in-law is only likely to be a material witness once it is determined that the citation will be contested. The Committee believes that is the situation in citation cases[2]. The important consideration is whether the witness's testimony is likely to come before the judge in some form. In citation cases, it is unlikely that the judge will be personally aware of the son-in-law's testimony unless and until some act occurs other than the voluntary payment of the fine.

In reaching this conclusion, the Committee also recognizes some of the practical difficulties that would arise if the notice and option for waiver must be sent at the time the citation is filed. There would undoubtedly be situations in which a defendant would submit payment on a citation

without returning the waiver form. This could be because the form and the payment cross in the mail, the form is never actually received by the defendant, or the defendant simply does not take the time to complete and return the form. If the Committee's opinion were that the notice and option for waiver must be sent when a citation is filed, then the court could not process those cases in which the fine amount is submitted without the waiver form being included, unless a different judge is appointed to preside over the case. However, appointing a new judge would not have any practical effect in these circumstances. The court clerk would still be the one to process the case without any involvement by the appointed judge. The judge would appear in name only.

The same result happens if a defendant submits payment but also requests disqualification of the judge. A new judge would be appointed, but the court clerk would still handle the case without involvement by the new judge. The Committee could determine that a defendant waives the judge's disqualification by voluntarily making a payment within the appropriate time frame, but there would still be circumstances in which defendants would not have seen the notice and option for waiver, which would undermine the validity of such implicit waivers.

Having considered the requirements of the Code and the interests of defendants, along with the practical realities associated with citations, the Committee determines that the process the judge is currently following generally complies with the Code. On non-mandatory appearance cases, the judge is not required to send notice of the conflict at the time citations are filed. On mandatory appearance and contested cases, the judge must either recuse or provide the notice and option for waiver when the defendant personally appears. If the defendant chooses not to waive the conflict, another judge must be appointed to handle the mandatory appearance or contested cases. If a case is initiated by information and the son-in-law is mentioned as a witness in the case, the judge must enter disqualification and another judge must issue the summons or warrant.

The Committee notes that contested cases include those when a defendant fails to respond to or appear on a citation. If the court issues an order to show cause, bench warrant, or other document requiring judicial authority, a different judge must handle those cases. At that point, the son-in-law's affirmation in the citation is relied upon by the judge to issue process, and the defendant will not have waived the conflict.

The Committee reminds the judge that Rule 2.11(C) states that when a party is considering whether to waive the conflict, the party must do so "outside the presence of the judge and court personnel." When the judge or court personnel provide a notice and option for waiver to a defendant, the defendant should take a moment outside the presence of court personnel to make a decision.

In conclusion, the Committee determines that the son-in-law is only likely to be a material witness if the defendant does not voluntarily pay the citation or the defendant is required to personally appear in court to resolve the case. The son-in-law also becomes a material witness for purposes of issuing a summons or warrant in cases initiated by information if the son-in-law is mentioned in the information.

[1] Throughout this opinion the Committee assumes that the prosecutor has waived or will waive the judge's conflict. The judge should ensure that the prosecutor's waiver is documented.

[2] The Committee recognizes that, statistically, the majority of criminal and civil cases are also settled without ever going to trial. An important distinguishing factor in citation cases is that, in the majority of cases, the judge does not have any involvement with the case at all. Therefore, this opinion should not be construed as automatically applying to other criminal and civil cases. It may very well be that the determination of whether someone is likely to be a material witness in those cases must be made at the time of filing because the judge will have some involvement in the case. However, that question will only be answered if the question is ever posed to the Committee.

Informal Opinion 11-1
March 2, 2011

Question:
The Board of District Court Judges has asked the following questions: May a judge perform a marriage ceremony for any of the following persons: (1) an attorney who has one or more matters pending before the judge; (2) a party who has one or more matters pending before the judge; or (3) the child or other close relative of an attorney or party who has one or more matters pending before the judge?

Answer:
A judge may perform a marriage ceremony in each of those situations.

Discussion:
The Board of District Court Judges has referenced two rules that apply to this question. Rule 1.2 states that "a judge should act at all times in a manner that promotes - and shall not undermine - public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Rule 3.1(C) states that "a judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality . . . ." The Committee agrees that these rules apply. Rule 3.12 on compensation for marriages may also be relevant.

The Committee has been unable to find any ethics advisory opinions from other states that address these questions. The Committee found, however, several newspaper articles questioning the propriety of judges performing marriages for individuals who had cases before the judges. In one case, a judge performed a marriage for a defendant in a domestic violence case that was before the judge. The marriage was to the defendant's accuser. Allegedly, one of the purposes of the marriage was so that the spousal privilege could be invoked. The judge was criticized by numerous media outlets throughout the country, an indication that the judge's actions may have undermined public confidence in the judiciary.

In another case, a federal court judge was criticized for performing a marriage for a defendant who was awaiting sentencing before the judge. The prosecutors had objected to the judge performing the ceremony, claiming that the marriage would shift focus away from the sentencing. The judge was criticized by at least one legal ethicist, again suggesting a lack of public confidence, although the criticism was not on the scale of the other scenario.

In two previous opinions, the Committee addressed issues related to judges performing marriages. These opinions addressed the circumstances under which a judge may receive compensation for performing a marriage. However there is language in one of the opinions that is relevant to this opinion. In Informal Opinion 98-8, the Committee recognized that performing marriages is an important judicial function. The Committee stated that "while officiating marriages is not a core judicial function, judges, as part of a small group of public officials empowered to perform civil wedding ceremonies, have a responsibility to perform this important public service." The Committee determined that judges may not accept compensation for performing marriages during regular court hours because the judges are on "company time." The fact that performing marriages is an official duty is an important consideration in answering these questions.

Although performing marriages is a judicial duty, the traditional rule on conflicts of interest does not apply. A judge may perform marriages for friends and family members even though the judge could not preside over cases involving those individuals. The question is then strictly related to whether public confidence in the integrity of the judiciary is undermined if a judge performs a marriage for someone who has a case pending before the judge. The Committee determines that public confidence is not automatically undermined in those situations.

As to the first question on whether a judge may perform a marriage ceremony for an attorney who has one or more matters pending before the judge, the Committee believes that Formal Opinion 98-1 provides some perspective on this issue. In Formal Opinion 98-1, the Judicial Council determined that judges may engage in social interactions with attorneys who have cases pending before the judge, except on actual trial days. If a judge may have lunch with an attorney who has a case before the judge, the Committee sees no reason why the judge should not be able to perform a marriage ceremony for the same attorney. Although Formal Opinion 98-1 was premised, in part, on the important interaction between the bar and the bench, the implication is that public confidence is not undermined by that type of interaction. Because a judge may perform a marriage for an attorney who has a case before the judge, a judge may also perform a marriage for a relative of the attorney.

The Committee also determines that a judge is not prohibited from performing a marriage for a party who has a case before the judge. Judges often have interactions with the same individuals in separate cases. Simply because a judge has interacted with a party in one case does not mean that the judge has a conflict in deciding another case involving that party. Public confidence is not undermined if, for example, a judge finds an individual guilty in one case, but then finds the same individual not guilty in another case. The public generally recognizes that a judge is able to impartially perform his or her duties in different settings.

Performing marriage ceremonies is an important judicial responsibility and a judge who fulfills the judge's duty by performing a marriage ceremony for a party does not erode the public's confidence in the judge's ability to fulfill the judge's other duties involving the same individual in a courtroom. A judge may interact with a party in a courtroom setting and then in a marriage ceremony. This conclusion also extends to the family members of parties. This conclusion is particularly important in smaller communities where the judge may be the only person a couple can ask to perform the ceremony.

Although a judge is not prohibited from performing marriages for attorneys, parties, and their family members, the Committee cautions judges that there may be circumstances in which performing a marriage ceremony may undermine public confidence. In the above story in which a judge performed a marriage ceremony for the defendant and the alleged victim in the domestic violence case, the Committee believes that the judge is justifiably criticized for the judge's actions. The ceremony was between an alleged abuser and an alleged victim in a domestic violence case, and one of the stated purposes of the marriage was to effectuate the marital privilege. The judge thus participated in an action that was calculated to increase the possibility of dismissal. The Committee is not stating that this ceremony violated the Code of Conduct, but simply recognizes that, at the very least, the better course of action would have been for the judge not to perform the ceremony.

At the same time, the Committee believes that the federal judge who performed a marriage ceremony for a defendant who was awaiting sentence did not undermine public confidence in the judiciary. There is nothing to suggest that the judge's judgment was compromised in any way by performing the ceremony. The Committee cautions judges to exercise appropriate discretion, for example, in a high profile case or a case in which the marriage is likely to affect the outcome of the case. The circumstances under which a judge should not perform a marriage would be rare.

In conclusion, the Code of Judicial Conduct does not prohibit judges from performing marriages for those who appear before the judge or for the family members of those who appear. By performing marriage, judges are exercising an important judicial function.

Informal Opinion 11-2
December 7, 2011

Question:
The question that has been posed to the Ethics Advisory Committee is whether a judge may "act as the representative of his father's heirs in advising, negotiating, resolving or retaining counsel to litigate in defense of a claim" that may be made against a relative's estate.

Answer:
The judge may privately advise family members but may not negotiate on their behalf. The judge may retain an attorney or recommend an attorney to the judge's siblings.

Discussion:
The judge was the personal representative of his father's estate prior to the judge's appointment to the bench. A creditor of the estate failed to timely file a claim and now the creditor seeks to file the claim against the judge's stepmother's estate. The judge's siblings would like the judge to advise them on their legal rights and obligations. The judge asks whether the judge may advise the judge's siblings and negotiate and resolve issues involving the estate. The judge also asks whether the judge may personally select an attorney to defend the siblings or the estate. The judge asks whether the judge may continue to provide assistance if adversary proceedings involving the estate occur before another judge in the state, but not before a judge in the judge's district.

The rules implicated in this request are Rule 3.10, addressing the practice of law, and Rule 3.8, dealing with appointments to fiduciary positions. Rule 3.10 prohibits a judge from engaging in the practice of law, except a judge may "give legal advice and draft or review documents for a member of the judge's family, but is otherwise prohibited from serving as the family member's lawyer in any forum." The terminology section of the Code defines a "member of the judge's family" as "a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship." The definition does not include siblings. However, if the judge has a close relationship with the judge's siblings then the judge may provide legal advice within the parameters of Rule 3.10. The Code does not define "close familial relationship." The committee determines that an appropriate guideline for a close familial relationship would be contact between the judge and the judge's siblings on average at least once a month. However, ultimately a judge has a significant amount of discretion in determining whether the judge has a close relationship with a family member. The committee believes that in most circumstances an individual has a close relationship with his or her siblings.

Assuming the judge has a close relationship with the judge's siblings, the judge may advise siblings on whether they have any legal responsibilities concerning the creditor's claim.[1] The rule essentially allows a judge to privately assist family members. This would prohibit the judge from negotiating on behalf of the siblings or the estate, but the judge could advise the siblings on the negotiations that they may undertake. The judge could, for example, provide legal analysis, discuss relative strengths and weaknesses of the respective positions, and prepare documents for the siblings.

The Code does not contain any limitations on a judge's behind-the-scenes legal advice for siblings on issues that might come within the jurisdiction that the judge serves. The judge may therefore privately assist the siblings no matter where controversies might occur.[2] The answer to this question would be different if the judge were acting as personal representative for the estate, as permitted under Rule 3.8. The judge would not be able to serve as personal representative under certain circumstances, such as if the estate were involved in adversary proceedings in the judge's court. However, it does not appear from the opinion request that the judge will be serving as an official fiduciary for the stepmother's estate.

The question of whether a judge may select an attorney to represent the siblings or the estate is a little more difficult. The judge clearly could hire any attorney the judge chooses if the attorney were personally representing the judge. The committee determines that the judge could also select the attorney if the judge's interests are implicated in the creditor's claim. If the attorney will only be assisting the siblings or the estate, then the question is whether the judge would be making a prohibited recommendation of an attorney.

This committee has never addressed whether a judge may recommend attorneys to others. In looking at opinions from throughout the country on this issue, the committee finds the determinations of the Colorado Judicial Ethics Advisory Board, in Advisory Opinion 2006-01, to be reasonable. The advisory board stated:

[J]udges do not relinquish their friends or family members upon taking the bench, and requiring them to refrain from providing advice to such close friends and relatives about whom to retain would be unrealistic. Thus, it is the opinion of the Board that the Code does not extend this far. Accordingly, the Board concludes that where the family members or friends enjoy a sufficiently close relationship with the judge that the judge would automatically recuse from the case under Canon 3C, irrespective of whether he was asked to recommend a lawyer, the judge may share with those family members or friends the names of as many or as few lawyers as the judge wishes to recommend.

The committee thus determines that the judge may recommend a particular attorney to his siblings or to the estate.

Although not specifically covered by the opinion request, the committee believes that the issue of the judge's disqualification in cases involving the recommended attorney should be addressed. In Informal Opinion 00-4, the committee stated that when a judge retains an attorney to defend the judge in a Judicial Conduct Commission proceeding, the judge must enter disqualification in court proceedings involving the attorney while the Judicial Conduct Commission proceeding is pending and for a period of six months after the proceeding has ended. This standard is helpful in this circumstance.

If the judge specifically retains the services of the attorney because the judge's interest are involved, then the situation would be similar to Informal Opinion 00-4. The judge would enter disqualification in proceedings involving the attorney until six months after the representation ends. If the judge does not retain the services of the attorney or the judge does not have any interest in the proceedings, but simply recommends the services of an attorney to the judge's siblings or the estate, then disqualification is not automatically required. However, if the attorney representing the siblings or the estate appears before the judge during the period of representation, the judge should disclose the fact that the attorney is presently representing the judge's siblings or the estate. The judge need not disclose the fact that the judge referred the attorney to the siblings, but only that representation is being provided.

In conclusion, the judge may privately provide legal advice to the siblings if the judge maintains a close relationship with the siblings. The judge may not conduct negotiations on behalf of the siblings or the estate, but may advise the siblings on the negotiations. The judge may hire an attorney on behalf of the siblings, or the judge may recommend the hiring of a particular attorney. If the judge has a personal interest in the matter for which the attorney is providing representation, the judge must enter disqualification in proceedings involving the attorney during the period of representation and for six months after the representation has ended. If the judge does not have a personal interest in the matter for which representation is provided, then the judge must simply disclose that the attorney is providing representation to the judge's siblings or the estate.

[1] If the judge has a close relationship with some but not all of the siblings, the judge may nevertheless advise all of the siblings on any joint interests. If there are separate interests, the judge may only advise those with whom the judge has a close relationship.

[2] The committee notes that any litigation involving the judge's family may require recusal of judges in the district based on the conclusions made by the committee in Informal Opinions 96-2 and 98-14. These conflicts are created whether or not the judge provides legal assistance and therefore does not affect this discussion.

Informal Opinion 12-01
August 31, 2012

Question:
The Ethics Advisory Committee has received opinion requests from two judges about the use of social media. The Committee has elected to combine the two requests into one opinion because of overlapping issues. The questions can be summarized as follows:

1) May a judge be “friends” or accept “friend” requests on Facebook from lawyers who appear before the judge?
2) If a judge is “friends” with a lawyer on Facebook, does that require a judge to recuse from the lawyer’s cases?
3) May a judge identify him or herself as a judge on Facebook?
4) May a judge appear in his or her robes in a photo on Facebook?
5) May a judge “like” events, companies, institutions, etc., that advertise or post on Facebook?
6) If a judge “likes” an entity or activity, does that require the judge’s recusal in any case involving that event or entity?
7) May a judge be “friends” with individuals who are candidates for political office?
8) May a judge be “friends” with elected officials?
9) May a judge “follow”or “like” law firms or others in the legal profession?
10) May a judge follow an attorney on Twitter if that attorney might appear before the judge?
11) May a judge follow a particular blog on legal or political issues when those blogs are also

followed by lawyers or politicians?
12) Once associated with an individual or entity, does a judge have a responsibility to continually monitor the comments and webpage contents of those individuals or entities to ensure that the judge is not associated with material that might reflect poorly on the judiciary?
13) If a judge may not identify him or herself as a judge on a webpage, may a judge use a pseudonym to post content. For example, if it is inappropriate to be identified as a judge in posting a restaurant review, may a judge use a pseudonym to post such content?
14) Is a judge required to always identify him or herself as a judge in order to avoid inappropriate ex parte communications?
15) May a judge post content related to personal pursuits and interests?
16) May a judge post comments and content on legal topics, particularly when such comments may be along side a post that would be inappropriate if made by a judge?
17) May a judge maintain a profile on LinkedIn?
18) May the LinkedIn profile identify the occupation of the judge?
19) May the LinkedIn profile identify the court on which the judge serves?
20) May a judge join LinkedIn groups, law related or otherwise, such as groups created specifically for those in the legal profession?
21) May a judge "recommend" someone on LinkedIn either at the judge's initiation or at the individual's request?
22) May the judge ask another person to "recommend" the judge?
23) If the judge does "recommend" someone, would the judge be required to enter recusal in a proceeding involving that individual?

Discussion:
One of the judges has provided detailed background on the bases for the judge's request. This background provides helpful information in answering these questions and is repeated verbatim:

> Prior to and since becoming a judge, I have participated in various forms of what is now known generically as "social media." These Internet-based services generally provide content to participants as well as permit participants to post their own content to the Internet site involved. Examples of services I use include Facebook, Google+, Twitter, Flickr, Panaramio, Food52, Garmin Connect, Earndit, Yelp, Food Spotting, Four Square, and others.
>
> A common feature of these sites is the ability to associate with other users. In the course of using a particular service, a user may choose to have the content posted by other users of the same [service] displayed when the first user visits the Internet site. Facebook users "friend" or "like" other users, thus electing to have content from those users displayed in their respective "feeds." Twitter users "follow" other users, meaning they select other users whose "tweets" will appear in their Twitter feeds. Google+ users select others for various "circles," again resulting in content from those others appearing on the users' Google+ interface. Similar opportunities are available on Fickr and Panaramio to follow other users' photo postings, on Food52 to follow recipes and cooking posts from other users,

and on Garmin Connect or Earndit to follow others' exercise and recreational activities.

In some cases (such as Facebook "friends" or Google+ circles) the relationship has to be by mutual agreement-one must accept a Facebook "friend" before one's content is then displayed for the other party. In other cases, a "follow" request does not require permission by the person publishing content on the web-the person desiring content simply opts to have a particular user's content displayed. In some cases, the publishing user may choose whether to require permission for their content to be displayed or not. On Twitter, for example, a user can hide posts from the public, but allow followers permission to see them. Similarly, on Facebook, some users (generally businesses or celebrities) can set up an account that permits other users to "like" that publisher, again driving that publisher's content to the user's feed without permission from the business.

In some cases, other users of the service can view who another user has elected to associate with their feeds. In other words, other users with access to a given user's content can generally view the other users that person has decided to view as part of their feeds. To be specific, Twitter users who I have granted permission to "follow" me can view my profile and see who else follows me and who I follow. My Facebook "friends" can see who else I have "friended." In fact, Facebook encourages new associations by suggesting new friends based on a user's existing friends, and who they have, in turn, "friended."

The use of social media is becoming commonplace. Computers, laptops, tablets, and smartphones have made internet content and social media easily accessible and regularly viewed. Facebook has more than half a billion users worldwide. Twitter is used by media outlets, celebrities, politicians, and others to instantly update followers on current events. Individuals are able to access web sites on topics that interest them and individuals are able to post comments on those topics and read comments from others. Individuals can respond directly to the comments made by others. Although some of these activities may occur privately between individuals or small groups, much of this activity is widely accessible to, and capable of being viewed by, the public. The use of social media has become a topic of particular interest to judges because of the public nature of the activities and the multitude of topics on which comments may be posted and viewed. Social media are frequently used by the families and friends of judges, which raises questions about whether judges may use social media in the same manner as others.

A few states have issued ethics advisory opinions on judges' use of social media. These opinions have not addressed all of the questions listed above, but they may provide some guidance in answering the questions. The opinions have primarily addressed judges' use of Facebook and judges' contacts with lawyers or others on Facebook pages. Not surprisingly, the states have issued differing opinions on these topics.

The Florida judiciary has issued two ethics advisory opinions and those opinions are perhaps reflective of the minority view to date. In opinion number 2009-20, the Judicial Ethics Advisory Committee of the Florida Supreme Court answered two questions relevant to this opinion. The first question was whether "a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct." The Florida committee answered this question in the affirmative. The second question was whether "a judge may have lawyers who appear before the judge as 'friends' on a social networking site and permit such lawyers to add the judge as their 'friend.'" The Florida committee answered that question in the negative.

The committee answered the first question in the positive because it addressed the mode of communication and not the substance, and this particular mode of communication in and of itself is not prohibited. In answering the second question in the negative, the committee stated:

> The committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that the lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but whether instead the proposed conduct, the identification of a lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum where a lawyer may appear before the judge does convey this impression and therefore is not permitted.

The Ethics Committee of the Kentucky Judiciary issued an opinion that is perhaps representative of the majority position. The questions in that case were whether a judge may "participate in an internet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be friends with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials?" The committee stated that the answer to the question is a "qualified yes." The committee stated that the designation of someone as a "friend," by itself, does not reasonably convey to others an impression that the person is in a special position to influence the judge. The committee stated:

> Judges have many extrajudicial relationships, connections and interactions with any number of persons, lawyers or otherwise, who may have business before the judge and the court over which he or she presides. These relationships may range from mere familiarity, to acquaintance, to close, intimate friendships, to marriage. Not everyone of these relationships necessitates a judge's recusal from a case.

The committee noted that "a designation of a 'friend' on a social networking site, does not in and of itself indicate the degree or intensity of a judge's relationship with the person who is the 'friend.' The committee conceives such terms as friend, fan and follower to be terms of art used by the site, not the ordinary sense of those words." The committee cautioned that social networking sites are "fraught with peril for judges" and that judges "may [not] participate in such sites in the same manner as the general public."

Having considered the various sides of the issue, the committee determines that the majority position reflected by the Kentucky opinion is the most persuasive.

In issuing this opinion, it is important to answer the questions in a way that will also provide guidance in a landscape that is constantly changing. The Facebook of today may look completely different tomorrow or be replaced with a different social networking site that presents new questions. Throughout history, technology and social circumstances have continually evolved. The changes in and of themselves typically do not create problems for judges. The changes simply create new circumstances under which judges must take care to avoid violating the Code of Judicial Conduct. The proliferation of social media creates new questions based primarily on the very public nature of the participant's comments and activities.[1] However, social media is ultimately an extension of public fora that already exist. In other words, the same principles that apply to judges in other public settings will apply to judges in the "virtual" setting. Although social media have a potentially much broader public reach, it would be difficult to conclude that a judge's activity in one public setting is prohibited if performed in a different setting. It would be difficult to state, for example, that the same comments made in a public meeting would be prohibited if posted on a public internet bulletin board. Similarly, whether a person is a "friend" that might require a judge's recusal is based on the same criteria as when an individual personally observes a judge's interactions with others.

In answering these questions, the most relevant rules in the Code of Judicial Conduct are 1.2, 1.3, 2.4, 2.9, 2.10, 2.11, 3.1, 3.10, and 4.1. The sheer number of relevant Code provisions is indicative of how, as noted by the Ethics Committee of the Kentucky Judiciary, "social networking sites are fraught with peril for judges." However, this is also indicative of how the problems presented by social media are simply the same problems that have existed in other social and public settings.

The overarching principles guiding judges' use of social networking sites are found in Rule 3.1. The rule states that judges shall not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality" or "participate in activities that will lead to unreasonably frequent disqualification of the judge." Because of the public nature of social networking, judges must ensure that their activities do not undermine public confidence in the judge or the judiciary. This is also reflected in Rule 1.2, which states that a judge "should act at all times in a manner that promotes-and shall not undermine-public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety or the appearance of impropriety." Other relevant provisions of the Code require a judge to prevent others from abusing the prestige of the judicial office (Rule 1.3), avoid external

influences on the judge's judicial conduct, such as permitting others "to convey the impression that any person or organization is in a position to influence the judge." (Rule 2.4), avoid ex parte communications about pending or impending matters (Rule 2.9), refrain from making public statements about pending or impending cases (Rule 2.10), enter disqualification when the judge's impartiality might reasonably be questioned (Rule 2.11), refrain from giving legal advice (Rule 3.10), and maintain political neutrality (Rule 4.1).

The Committee also notes that, given the fact that the internet and social media are regularly used by the majority of individuals in the country, most individuals understand what it means to be a "friend," or to be associated with another person on LinkedIn, or to post comments or material on a website.[2] There are also most certainly members of the public who do not personally use social media, but are nonetheless aware of the specifics on how to use social media. This opinion reflects the vantage point of the reasonable person who understands social media, which is the majority of the population. With this background, the committee addresses each of the questions in order. This opinion is ultimately general in providing answers to many of these questions, because the questions themselves are broad. More specific answers must await more specific questions regarding a judge's intended activities.

1) May a judge be "friends" or accept "friend" requests from lawyers who appear before the judge?

Answer: Yes. Being friends with someone is not a violation of the Code of Judicial Conduct. Furthermore, the designation of someone as a "friend" on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term. Many Facebook users have hundreds and even thousands of "friends." Whether someone is truly a friend depends on the frequency and the substance of contact, and not on an appellation created by a website for users to identify those who are known to the user.

2) If a judge is "friends" with a lawyer on Facebook, does that require a judge to recuse from the lawyer's cases?

Answer: Maybe. Disqualification is not automatically required simply because a judge and a lawyer are "friends" on Facebook. Being a "friend" of a judge on Facebook does not automatically create the appearance that the lawyer is in a special position to influence the judge. Lawyers and judges frequently interact in public and private settings. Those interactions create opportunities for lawyers to attempt to influence judges. However, they don't necessarily create, or appear to create, special positions of influence. Because the committee considers a site such as Facebook to be another public setting, simple interaction as "friends" does not create a special position of influence, nor does it create an appearance of a special position to influence. Being "friends" is one factor to consider when deciding whether recusal is necessary. If the judge and lawyer frequently interact on Facebook then that may require the judge's recusal in cases involving that lawyer. By communicating frequently, a judge may create the appearance that the lawyer has a special position in relation to the judge. The frequency and substance of the contacts will be determinative.

3) May a judge identify him or herself as a judge on Facebook?

Answer: Yes. A judge may identify him or herself as a judge on Facebook.

4) May a judge appear in his or her robes in a photo on Facebook?

Answer: Yes. A judge may post a photograph of the judge in his or her robes provided that the photograph was taken in an appropriate setting where wearing the robe would otherwise be appropriate, such as in the judge's chambers. When posting to a webpage, the photograph must be displayed in a context that does not undermine the integrity of the office.

5) May a judge "like" events, companies, institutions, etc., that advertise or post on Facebook?

Answer: Yes. A judge may "like" events, companies, institutions, etc. on Facebook.

6) If a judge "likes" an entity or activity, does that require the judge's recusal in any case involving that event or entity?

Answer: No. Liking an event, activity, or entity does not automatically require the judge's recusal. The term "like" is created by the website and the term itself does not import much about the judge's thoughts. A judge is not required, for example, to enter recusal in a case involving the financial institution where the judge does his or her banking, unless the judge has an ownership interest in the institution or another interest that could be substantially affected by the outcome of the case. (See the definition of "economic interest" in the terminology section of the Code of Judicial Conduct, and Madsen v. Prudential Federal Savings & Loan Ass'n, 767 P.2d 538 (Utah 1988)). The judge "likes" the financial institution enough to bank there, but that simple fact does not require recusal. A judge frequently displays his or her preferences, such as through the car the judge drives, the church the judge attends, the university events the judge attends, or the stores where the judge shops. These public displays of preferences do not automatically require disqualification from cases involving the manufacturer of the vehicle, the university, the religious organization, or the businesses. "Liking" something does not constitute a detailed statement about the judge's thoughts on a particular entity or subject.

7) May a judge be "friends" with individuals who are candidates for political office?

Answer: Yes. A judge may be "friends" with individuals who are candidates for political office. Again, this in and of itself is not sufficient to fall within prohibited political activity under Rule 4.1. Many judges have friendships with individuals who are running for office. Being "friends" with a candidate does not automatically constitute endorsement of that individual for office, which is the standard in Rule 4.1. The judge must simply be careful about any statements that the judge makes on the webpage that might create an appearance of endorsement. Also, many individuals who are candidates for office have a Facebook page specifically designed

to promote the individual's candidacy. A judge may not be a "friend" on that type of webpage, as that may constitute endorsement.

8) May a judge be "friends" with elected officials?

Answer: Yes. A judge may be friends with elected officials.

9) May a judge "follow"or "like" law firms or others in the legal profession?

Answer: Yes. A judge may follow or like law firms or others in the legal profession. In Formal Opinion 98-1, the Judicial Council recognized that judges may socialize with attorneys, such as by having lunch with attorneys or attending a law firm's open house. Social interaction between judges and attorneys occurs in other public settings. A judge may "like" a law firm enough to attend an open house or have lunch with one of the partners, and that degree of interaction does not automatically create perceptions of bias. As noted above, "liking" something or someone does not convey much about the judge's thoughts on a topic. A simple designation on a webpage, without more, does not create an appearance of bias. As noted, a judge may be required to avoid posting comments when liking or following a firm, but the designation of "liking" something does not otherwise convey much meaning.

10) May a judge follow an attorney on Twitter if that attorney might appear before the judge?

Answer: Yes. Similar to the answer above, following an attorney on Twitter does not automatically create issues. If the judge were to begin receiving ex parte communications, for example, that would create problems and the judge could no longer follow that particular attorney.

11) May a judge follow a particular blog on legal or political issues when those blogs are also followed by lawyers or politicians?

Answer: Yes. Simply following a blog that is also followed by politicians or those in the legal profession does not create issues for a judge. Judges and lawyers frequently read the same legal materials, distributed by the same sources. A blog is not that much different.

12) Once associated with an individual or entity, does a judge have a responsibility to continually monitor the comments and webpage contents of those individuals or entities to ensure that the judge is not associated with material that might reflect poorly on the judiciary?

Answer: No. A judge is not required to monitor other webpages. A judge has a responsibility to monitor his or her own activities to ensure that the judge is not associated with material that reflects poorly on the judiciary. However, a judge is not required to continually monitor the websites of others. If a judge happens to review a website with which the judge is associated, and the website contains questionable content, the judge may be required to

disassociate from the site. The question of what might be considered "association" and what might be considered questionable content will have to await a more specific fact situation.

13) If a judge may not identify him or herself as a judge on a webpage, may a judge use a pseudonym to post content. For example, if it is inappropriate to be identified as a judge in posting a restaurant review, may a judge use a pseudonym to post such content?

Answer: Yes. As noted above, a judge may identify him or herself as a judge on websites, provided that the identification is in an appropriate context. However, a judge should not use his or her title when posting something such as a restaurant review because that may create the appearance that the judge is using the prestige of the judicial office to advance the interests of a for-profit entity. There is no legitimate reason for using the title in such a situation.

The Committee recognizes that on many websites users participate under "screen names" or pseudonyms. In fact, users are sometimes required to use a pseudonym. Judges may post comments under such a screen name. In posting comments, a judge should operate under the assumption that those who view the judge's comments will know that the commenter is a judge and therefore the judge must be careful in his or her comments to ensure that the comments do not undermine public confidence in the judiciary.

14) Is a judge required to always identify him or herself as a judge in order to avoid inappropriate ex parte communications?

Answer: No. A judge is not required to always identify him or herself as a judge. If a judge inadvertently receives ex parte communications, then the judge must take appropriate action, the same as in any other situation in which ex parte communications are inadvertently received. This may require recusal or notifying other parties of the communication.

15) May a judge post content related to personal pursuits and interests?

Answer: Yes. A judge may post content on personal interests and pursuits.

16) May a judge post comments and content on legal topics, particularly when such comments may be alongside a post that would be inappropriate if made by a judge?

Answer: Maybe. A judge may post comments and content on legal topics, unless the comments show a bias toward an issue that may come before the judge's court or the comment could be considered legal advice. A judge may post comments even if the comments might appear in the same post as comments that would be inappropriate if made by a judge. However, if the public might associate the judge with a particular comment in a way that would undermine the judge's impartiality, such as a judge specifically taking a position adopting a poster's comments on a legally or politically controversial topic, then such a post would be inappropriate.

17) May a judge maintain a profile on LinkedIn?

Answer: Yes. A judge may maintain a profile on LinkedIn.

18) May the LinkedIn profile identify the occupation of the judge?

Answer: Yes. A judge may identify him or herself as a judge.

19) May the LinkedIn profile identify the court on which the judge serves?

Answer: Yes. The profile may also identify the judge's court.

20) May a judge join LinkedIn groups, law related or otherwise, such as groups created specifically for those in the legal profession?

Answer: Yes. A judge may join law related or other groups.

21) May a judge "recommend" someone on LinkedIn either at the judge's initiation or at the individual's request?

Answer: Maybe. A judge is not automatically prohibited from recommending someone on LinkedIn. Judges are permitted to write letters of recommendation, for example, and this would be somewhat similar. There are, however, restrictions placed on judges when writing letters of recommendation. A judge may be prohibited from writing a letter if the recommendation will be directly received by an individual or entity that regularly appears in the judge's court. There may be a perceived coercive effect on someone who regularly appears before the judge. However, recommendations on LinkedIn are usually not specifically directed toward individuals and therefore this aspect typically won't be an issue.

A judge may not, however, "recommend" someone who regularly appears before the judge. A recommendation on LinkedIn is different from being a "friend" on Facebook, or "liking" the attorney, because the recommendation may be perceived as an endorsement of the person's skills and credibility. LinkedIn is a professional networking site and the purpose of recommendations is to promote the professional careers of members. A judge may "recommend" attorneys who don't appear before the judge or individuals in other professions. A judge may also recommend someone who has worked for the judge, such as a law clerk.

22) May the judge ask another person to "recommend" the judge?

Answer: Maybe. A judge may ask another person to recommend the judge if the judge is seeking another judicial position. When judges are seeking judicial positions, they often ask others to provide recommendations. However, if the judge is seeking a position outside of the judiciary, such as at a law firm upon the judge's retirement, then the judge should not seek a recommendation while still occupying the judicial office.

23) If the judge does "recommend" someone, would the judge be required to enter recusal in a proceeding involving that individual?

Answer: Maybe. If the judge recommends someone on LinkedIn, the judge is not automatically required to enter recusal. If the recommendation is, for example, for a law clerk who has worked for the judge, then the recommendation is based on the judge's working relationship with the individual and is not based on court performance. Recusal is not automatically required. As noted above, however, recommending someone on LinkedIn is different from liking someone on Facebook because of the stronger statement it makes about the skills of the individual. Recusal would therefore be required when the judge is recommending the attorney based on the judge's interactions with the attorney in court. Because judges must avoid activities that result in frequent disqualifications, judges should not recommend attorneys or others who regularly appear before the judge.

Conclusion:
In answering the above questions, it may have been simpler to answer most in the negative. This would have created a bright line for judges to follow. However, social media have become so prevalent and in many ways an important form of communication. Similar to other public settings, judges should be permitted to enter. Once they have entered, judges must be cautious. However, most of the activities and statements contained in the questions are very minimal. They are not the types of activities and statements that would create issues in other public settings. There must be more. There may be times when actions will be prohibited or will otherwise have consequences requiring the judge to act. As judges participate in social media, the committee encourages judges to submit opinion requests dealing with more specific factual situations.

[1] The committee recognizes that a website such as Facebook allows users to restrict access to the users' websites, such as allowing access only to family members. The committee is nevertheless of the opinion that even if a Facebook page has restricted access, the page should be considered as potentially available to the public and therefore the same rules apply.

[2] According to the website www.internetworldstats.com, the percentage of the population in the United States that uses the internet is approximately 80% and the number of Facebook users is approximately 50%.

Informal Opinion 12-02 [1]
August 16, 2013

Question:
The Judicial Conduct Commission has requested an opinion on whether a judge may refer criminal defendants to a specific service provider when the provider is on a preapproved roster created by the court and the referrals are made on a rotating basis.

Answer:
Yes, the court may create a preapproved roster as long as the criteria the court creates for being admitted to the roster are reasonable and directly related to the services that the court needs and any interested individual or entity may apply to be included on the roster. Referrals should generally be made on a rotating basis or by allowing the defendant to select a provider.

Discussion:
The Judicial Conduct Commission (JCC) has requested an ethics advisory opinion on the propriety of a judge referring defendants to a specific service provider. The JCC states that the request arises from a concern "that a justice court's on-going referral program . . . may violate [the] Code of Judicial Conduct." The JCC provided the following background:

> [T]he judge preapproves a pool of providers and then makes referrals among those providers on a rotating basis. Any state licensed provider may apply to be admitted to the pool by complying with the provisions of the [court's] administrative orders. There is no evidence that the judge or the court benefits financially from the arrangement or that admission to the pool is based on anything other than state licensure and a willingness to adhere to the principles and requirements set forth in administrative orders.

The JCC also provided information from the justice court showing the criteria and process for inclusion on the roster.

In making its request, the JCC referenced Informal Opinion 10-2 in which this Committee determined that a judge may not refer parties to a specific mediator. The Committee determined that referring parties to a specific mediator would create the impression that the mediator is in a special position to influence the judge. The Committee also determined that referring to a specific mediator would be using the prestige of the judicial office to advance the personal and economic interests of the mediator. The Committee did not address the question of whether a judge could, for example, give parties a list of mediators and allow the parties to select from the list. However, the Committee stated that a judge could refer individuals to the roster of mediators maintained by the Administrative Office of the Courts.

According to the facts provided by the JCC, referrals in the justice court are made from a roster of court-approved licensed providers. The court has established criteria for being listed on the roster. Any licensed provider may apply to be on the roster. The provider must be willing to make the commitments required by the court. Under the criteria, providers are required to have a representative present in the courtroom when referrals are made. The court will then make referrals from the list on a rotating basis, but a referral may also include consideration of a provider's proximity to a defendant's domicile or work. Thus, although referral will generally be on a rotating basis, some deviation may occur when the court deems it appropriate.

The Committee determines that a judge may create a roster from which referrals will be made provided the creation of the roster and referrals are based on unbiased considerations. The

criteria for being included on the roster must be reasonable, unbiased, and directly related to the needs of the court. For example, if licensure is required to provide the services, either because a law specifically requires a licensed program, or the court determines that only licensed providers are capable of providing the necessary services, then licensure is a reasonable criterion. Requiring a provider to offer specific services is also a reasonable criterion. The reliability of providers might also be a consideration.

Referrals from the roster must also be based on neutral principles, such as referrals being made on a rotating basis or by having the defendant select from the list of approved providers. By creating a list that is open to those who are interested and by making rotating referrals, the court will eliminate any perception that the providers are in a special position to influence the judge. Also, the judge will not be using the prestige of the judicial office to advance the interests of others, as all interested and qualified providers will be on the list and have the same opportunities. Although the providers will benefit financially from the referrals, by allowing all interested providers to apply for inclusion, and by insuring that referrals are based on neutral criterion, the prestige of the judicial office is not a factor. The judge will not be favoring one provider over another.

When establishing a roster and making referrals the judge may not establish any criterion that reflects bias toward a specific provider or a specific type of provider. A judge must carefully consider every factor that could be perceived as a deviation from neutrality. For example, in this circumstance one of the criterion for receiving referrals is that the provider be present in court when the referral is made. A provider might be next on the rotation list but would not receive the referral because a representative is not present. Deviation might nevertheless be permissible if the judge can articulate reasons why having the provider present is important for doing the business of the court. For example, does it lead to more efficient treatment and processes? Similarly, the facts in this circumstance indicate that the court considers proximity when determining which provider is next in line to receive a referral. The judge must again be able to articulate how deviating from the regular rotation by considering proximity helps the court and defendants in the administration of justice. The Committee simply raises these questions to ensure that judges carefully consider the criteria they adopt.

In conclusion, courts may create rosters of service providers as long as all interested individuals and entities have an opportunity to apply for inclusion, and provided the criteria for being included are reasonable and unbiased. The court must make referrals on a rotating basis or allow defendants to select from the roster. Under these circumstances, the court would not be lending the prestige of the judicial office, and providers will not be receiving economic benefits to the exclusion of others.

The Committee recognizes that the conclusions of this opinion may raise questions about court referrals in other areas, such as specialty courts. The Committee is unable to anticipate how this opinion will affect those areas because the questions will be fact specific as to how a provider is selected and being used. The Committee must therefore await opinion requests dealing with other situations before offering advice.

[1] The original Committee opinion was reviewed and modified by the Judicial Council pursuant to Rule 3-109 of the Utah Rules of Judicial Administration. The Council has directed the Committee to release the modified opinion as an informal opinion.

Informal Opinion 14-1
January 7, 2014

Question:
A district court judge has asked the Ethics Advisory Committee whether the judge may write a letter to an AP&P agent's superiors commending the agent's work in connection with establishing and helping with drug court.

Answer:
The judge may write the letter but must avoid using any language that might subsequently raise questions about the judge's ability to be impartial.

Discussion:
The requesting judge presides over drug court. The judge is appreciative of the work that an AP&P agent has done for the drug court. The judge proposes to write a letter to the supervisors of the AP&P agent to express appreciation for the agent's efforts. The letter would address the agent's efforts generally and not in relation to any particular case. The agent is one of only two agents in the county and it is possible that the agent may testify in the future at an evidentiary hearing on an alleged probation violation.

Although the proposed letter would not constitute a letter of recommendation, the ethics advisory opinions on such letters may be helpful in answering this question. The ethical restrictions related to letters of recommendation are primarily found in Rules 1.2 and 1.3 of Canon 1 of the Utah Code of Judicial Conduct. Rule 1.3 states that a "judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so." The Comment to the rule states that a "judge may provide a reference or recommendation for an individual based upon a judge's personal knowledge, and if there is no likelihood that the reference or recommendation would reasonably be received as an attempt to exert pressure by reason of judicial office."

Letters of recommendation are used by applicants to bolster qualifications for employment. The letters are thus used to advance the economic interests of the applicant. Nevertheless, judges may write such letters provided that they do not abuse the prestige of judicial office by writing letters under circumstances that could be perceived as coercive. The proposed letter in this situation is not for the purpose of endorsing an individual for employment nor is it otherwise intended to advance the interests of the agent. The circumstances do not otherwise suggest that the letter could be perceived as unduly influencing the agent's supervisors. The proposed letter therefore is not prohibited under rule 1.3.

The question then is whether writing the letter might undermine public confidence in the impartiality of the judiciary in violation of rule 1.2. Writing the letter might also implicate rule 2.2, which requires judges to perform all duties of judicial office fairly and impartially. Because the AP&P agent might someday testify before the judge, the question is whether writing the letter could be perceived as undermining the judge's ability to impartially evaluate the agent's testimony.

In Informal Opinion 98-13, the Ethics Advisory Committee answered the question of whether a judge may sign a letter of recommendation in support of a private counseling service seeking a federal grant. In answering that question, the Committee provided guidance that is relevant to this opinion:

Even when letters of recommendation are permitted on behalf of individuals, a judge may not write a letter on behalf of someone who will frequently appear before the judge. The reason for this is that it could be reasonably perceived that the judge would give undue credence to the arguments, testimony or evidence of the person who has received the letter.

Although the Committee was referencing letters of recommendation, the same concerns apply to the proposed letter. A judge may not write a letter commending the work of an individual if it creates a perception that the judge would give undue credence to the individual's testimony if the individual were to testify. The question is then whether such commendation letters are prohibited entirely or whether it is possible for a judge to craft a letter that avoids creating impressions of partiality. The Committee is of the opinion that the Code does not require a blanket ban on such letters. However, judges must be very careful about the language used in any such letter.

In this circumstance, the judge is grateful for the AP&P agent's efforts in establishing and helping with the operation of the drug court. Although the judge does not provide details on the agent's work, the Committee is of the opinion that the judge could write a letter generally describing the agent's efforts and generally expressing appreciation for the efforts. The judge should avoid using specific examples of the agent's work when those examples might convey an opinion on the agent's veracity or integrity. The commendation should be in the simplest terms possible. For example, a judge could iterate the fact that the agent has provided services to the drug court, the judge is appreciative of the agent's effort, and the judge wants the agent's supervisors to know that the efforts are appreciated.

In conclusion, a letter of commendation concerning an AP&P agent who appears in the judge's court is not prohibited by the Code of Judicial Conduct. However, a judge must be very careful and not express opinions beyond appreciation for the individual's efforts.