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Helping Judges Look Before They Leap: Judicial Ethics Advisory Committees

Cynthia Gray

Recently, in publicly reprimanding an appellate judge for using his judicial position to solicit paid speaking engagements, the Illinois Courts Commission stated that it was “frankly puzzled” that the judge had not sought guidance from “the excellent advisory opinions produced by the Illinois Judges Association’s committee on judicial ethics,” as well as the Commission’s prior decisions.¹ That case is a reminder to judges of the assistance available if they ask before they act.

Approximately 45 states, the District of Columbia, and the United States Judicial Conference have judicial ethics advisory committees to which judges can submit inquiries regarding the propriety of contemplated future action under the code of judicial conduct. The Center for Judicial Ethics website has a table with information on each committee² and links to advisory committee websites.³

Most committees post their opinions online, and some of the sites are searchable and have topic indices. Some committees, however, do not have a website, and others seem inactive as they have not posted an opinion in years. Perhaps those committees are relying on oral advice to respond quickly. But even a rapid answer can be later memorialized in writing and published to assist more judges, as some committees do.⁴

Occasionally, a judge may be faced with a unique issue. (For example, probably few courts have had any reason to ask whether to accept a \$1,000 bequest to fund a holiday party.⁵) However, most inquiries are about common quandaries, and opinions announce general rules that can be applied to specific

situations. An advisory committee is not doing the best it can for the state’s judges if it is not routinely making its guidance available online, where most people turn automatically for answers. Further, as an online resource, advisory opinions can be used to train new judges and provide a refresher course for more experienced judges. Finally, by posting opinions online, advisory committees advance the national conversation on judicial ethics.

In 2017, judicial ethics committees posted more than 325 advisory opinions online. Areas in which advice was frequently sought and obtained include acting as a reference; court staff issues; financial activities; the conduct of senior or part-time judges; teaching, writing, and speaking; and political and campaign conduct.

Not surprisingly, disqualification and disclosure are the most common subjects for inquiries as judges must consider in every case whether a past or present relationship, interest, or other circumstance raises reasonable questions about judicial impartiality, and a judge trying to apply that objective standard benefits from the advice of experienced colleagues. Committees will not necessarily rule whether a judge is disqualified from a specific case but will answer general questions about anticipated conflicts, such as, is a judge married to a public defender disqualified from cases in which other public defenders appear?⁶ Or can a judge hear matters involving a credit union where he holds an account?⁷ Or is a county magistrate who is dating the county sheriff disqualified from matters in which the sheriff’s employees appear as witnesses?⁸ Or is a judge required to disclose that a

Footnotes

1. In re Steigman (Illinois Courts Commission August 13, 2018), available at <https://tinyurl.com/y9u3gkxt>.
2. Center for Judicial Ethics, Judicial Ethics Advisory Committees by State, available at <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JudicialEthicsAdvisoryCommitteesbyState.ashx>.
3. Center for Judicial Ethics, Links to State Advisory Committees, available at <https://www.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx?cat=Ethics%20Advisory%20Committees>.
4. See California Supreme Court Committee on Judicial Ethics Oral Advice Summaries, available at <http://judicialethicsopinions.ca.gov/oral-advice-summaries/>.
5. A town justice, on behalf of the justice court, may accept a \$1,000 testamentary bequest approved by the surrogate’s court to hold a holiday party at the courthouse and may invite lawyers by posting notices with the bar association and/or at the courthouse. New York Advisory Opinion 2018-124, available at (<http://www.nycourts.gov/ip/judicialethics/opinions/18-124.htm>).
6. See, e.g., Florida Advisory Opinion 2018-13 (a judge married to a public defender who supervises the public defenders assigned to diversion courts may not preside over cases in which her spouse is the attorney of record or cases that her spouse supervises but may preside over other criminal cases, may refer cases to a diversionary court presided over by another judge, and may accept cases returned to the trial division from a diversionary court), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2018/2018-13.html>.
7. New York Advisory Opinion 2018-44(A) (a judge is not disqualified from matters involving a credit union where he is a member and account holder), available at [http://www.nycourts.gov/ip/judicialethics/opinions/18-44\(A\).htm](http://www.nycourts.gov/ip/judicialethics/opinions/18-44(A).htm).
8. South Carolina Advisory Opinion 2-2018 (a county magistrate who has just began dating the county sheriff shall disqualify himself from any matters in which employees of the sheriff appear as witnesses), available at <http://www.sccourts.org/advisoryOpinions/html/02-2018.pdf>.

lawyer appearing before her is a former Facebook friend?⁹

Other recent advisory opinions related to judicial duties include:

- A magistrate may not hire as constable the son of another magistrate from the same county.¹⁰
- A court website may not include information promoting a district attorney's traffic diversion program but may include a link to the DA's website as a convenience to defendant motorists.¹¹
- A court may, with an appropriate disclaimer, allow a non-profit legal aid program to set up a table outside a courtroom to offer financially eligible parties free legal advice, pro se pleadings, and, in some cases, representation.¹² Judicial robes should be free of adornments.¹³
- A judge may ask state legislators for financial support for a problem-solving court that will address mental health issues.¹⁴
- A judge may make a public service television announcement to encourage persons to become foster parents.¹⁵

Judges also frequently ask advisory committees for help in resolving the tension between their desire to remain involved in their communities and their commitment to the rules that protect judicial impartiality and prohibit misuse of the prestige of office. Recent opinions on those issues have advised:

- A judge may allow his home to be featured in a tour that raises funds for the symphony provided his title is not used in publicizing the event.¹⁶

- A judge may accept a distinguished alumni award from the law school where she graduated at a ceremony that raises funds for scholarships.¹⁷
- A judicial officer may serve on the board of the Girl Scouts of Connecticut.¹⁸
- A judge who appoints CASA to provide information on cases may not serve on CASA's advisory board.¹⁹

Judicial ethics advisory committees also provide guidance on "hot topics" that reflect changes in society that affect the judiciary. For example, the Nebraska committee ensured that all judges in the state were on the same ethical page in 2015 when, just three days after the United States Supreme Court decision in *Obergefell v. Hodges*, it advised that a judge may not refuse to perform marriages for same-sex couples based on a personal or religious belief.²⁰ Other committees concurred,²¹ and those opinions not only answered the specific question but explained the governing ethical principles, not just to the judges, but to the public.

Similarly, as decriminalization of marijuana use spreads to more states, judges may wonder whether the new leniency applies to them. The answer is "no" according to the Colorado committee in 2014²² and the Alaska committee more recently,²³ both of which advised that, as long as marijuana use violates federal law, it also violates the code of judicial conduct.

As an example of the useful role advisory opinions can play, several advisory committees anticipated the problems inherent in judicial use of social media and issued opinions on numerous issues that also cautioned judges to be extremely careful.²⁴ In fact, given the increasing number of embarrassing headlines and judicial discipline cases involving Facebook, it is puzzling

9. Massachusetts Letter Opinion 2018-3 when a judge knows that a lawyer is a former Facebook friend, disclosure is not presumptively required, but the judge should consider whether disclosure is warranted based on relevant factors), available at <https://www.mass.gov/opinion/cje-opinion-no-2018-03>.

10. South Carolina Opinion 13-2018, available at <https://www.sccourts.org/advisoryOpinions/html/13-2018.pdf>.

11. New York Opinion 2018-101, available at <http://www.nycourts.gov/ip/judicialethics/opinions/18-101.htm>.

12. New Mexico Advisory Opinion 2017-7, available at http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_17-07.pdf.

13. Arizona Advisory Opinion 2018-3, available at <http://www.azcourts.gov/Portals/137/ethics%20opinion%2018-03.pdf>.

14. New York Advisory Opinion 2018-8, available at <http://www.nycourts.gov/ip/judicialethics/opinions/18-08.htm>.

15. California Advisory Opinion 75 (2018), available at <https://www.caljudges.org/docs/Ethics%20Opinions/Op%2075%20Final.pdf>.

16. South Carolina Opinion 12-2018, available at <https://www.sccourts.org/advisoryOpinions/html/12-2018.pdf>.

17. Florida Advisory Opinion 2018-29, available at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jea_copinions/2018/2018-29.html.

18. Connecticut Informal Opinion 2018-5, available at <http://jud.ct.gov/Committees/ethics/sum/2018-05.pdf>.

19. New York Opinion 2018-100, available at <http://www.nycourts.gov/ip/judicialethics/opinions/18-100.htm>.

20. Nebraska Advisory Opinion 2015-1, available at <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/ethics/judges/15-1.pdf>.

21. Arizona Advisory Opinion 2015-1, available at (http://www.azcourts.gov/Portals/137/ethics_opinions/2015/RevisedAdvisoryOpinion15-01.pdf); Louisiana Advisory Opinion 263 (2015); New York Advisory Opinion 2011-87, available at <http://www.nycourts.gov/ip/judicialethics/opinions/11-87.htm>; Ohio Advisory Opinion 2015-1, available at http://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf; Wisconsin Advisory Opinion 2015-1, available at <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=146878>.

22. Colorado Advisory Opinion 2014-1, available at https://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/Pro_Se_Divorce_Information/2014-01.pdf.

23. Alaska Opinion 2018-1, available at <http://www.acjc.alaska.gov/advopinions.html#2018-01>.

24. See, e.g., Arizona Advisory Opinion 2014-1, available at http://www.azcourts.gov/LinkClick.aspx?fileticket=zNRP1_l8sck%3d&portalid=137; California Judges' Association Advisory Opinion 66 (2010), available at <http://www.caljudges.org/docs/Ethics%20Opinions/Op%2066%20Final.pdf>; Connecticut Advisory Opinion 2011-14, available at <http://jud.ct.gov/Committees/ethics/sum/2011-14.htm>; Massachusetts Letter Opinion 2016-1, available at <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-01.html>; Missouri Advisory Opinion 186 (2015); New Mexico Advisory Opinion Concerning Social Media (2016), available at

that more committees have not provided comprehensive guidance in an area that is very publicly tripping judges up.

Judicial ethics advisory committees provide a great service to judges who want to adhere to the highest possible ethical standards while balancing the competing interests that define their role as judges. Judiciaries have a responsibility to support a committee that is responsive, functional, and visible.



Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization's October 2014 dissolution.)

She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf; Ohio Advisory Opinion 2010-7, available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/default.asp; Utah Informal Advisory Opinion 2012-1, available at <http://www.utcourts.gov/resources/ethadv/index.asp>; U.S. Advisory Opinion 112 (2017), available at

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>; ABA Ethics Formal Opinion 462 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf.

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