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Nexuses and Tangents

Cynthia Gray

The phrase "the law, the legal system, or the administration of justice" creates several exceptions to prohibitions in the code of judicial conduct. For example, a judge may only serve on governmental commissions[1] and only consult with the executive or legislative branches[2] on those issues. In general, judges can express themselves more and get involved more in extra-judicial activities that are related to "the law, the legal system, or the administration of justice."

On the one hand, the exemptions make sense: legal-system-related issues are within the judiciary's expertise, and judges' interests, and promoting improvements in those areas may be an appropriate expenditure of the capital accumulated in the prestige of judicial office. On the other hand, "facets of almost every social problem facing today's society will play themselves out in the courts,"[3] and the law and the legal system are "used as a means to achieve social, political, or civic objectives."[4] Thus, the connection between "the law, the legal system, or the administration of justice" and judicial duties means involvement in those matters off-the-bench will more often raise more serious questions about judicial impartiality on the bench than would, for example, service on a library board.

Further, the phrase has a potentially all-encompassing sweep with uncertain limits. It has, for example, been broadly interpreted to include such issues as childcare, transit, a community-college-legal-secretary program, law school recruitment, police department improvement, and crime deterrence. Moreover, "practically everything the Legislature does" could arguably fall within the exception because, by definition, legislation concerns the law.[5]

Several advisory committees have tightened up the phrase to prevent the exceptions from swallowing the rules. Those definitions condition judicial involvement on a direct,[6] "readily articulable"[7] nexus between the specific activity and the courts' "core mission of . . . delivering unbiased, effective justice to all"[8] and their "statutory and constitutional responsibilities—in other words, how the courts go about their business."[9] That narrower, more precise formulation of the phrase means that a concern "with justice in a broader sense" is not enough[10] and that activities with a tangential, incidental, partial connection to the courts stay within the code's restrictions.[11]

Interpreting the phrase recently, the Utah judicial ethics committee refused a judge permission to be involved in efforts to get the state legislature to ratify the Equal Rights Amendment.[12] The committee acknowledged that "the judiciary is certainly concerned about equality and fairness" and that "any law that promotes equality is consistent with the judiciary's objectives." However, it explained:

> [T]he proposed Equal Rights Amendment does not have a direct and primary impact on the administration of justice. The proposed Equal Rights Amendment may affect the judicial system, but the efforts are not directed toward the judicial system. The amendment would impact countless organizations, including private and public entities.

Footnotes

1. Rule 3.4, MODEL CODE OF JUDICIAL CONDUCT (ABA 2007) (https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_4appointmentstogovernmentalpositions/).
2. Rule 3.2, MODEL CODE OF JUDICIAL CONDUCT (ABA 2007) (https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_4appointmentstogovernmentalpositions/).
3. Massachusetts Advisory Opinion 1998-13 (https://www.mass.gov/opinion/cje-opinion-no-98-13).
4. U.S. Advisory Opinion 50 (2009) (https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf).
5. Utah Informal Advisory Opinion 2001-1 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/2001/01-1.htm).
6. *See* Connecticut Formal Advisory Opinion 2011-21 (https://www.jud.ct.gov/Committees/ethics/formal_op/JE_2011-21.pdf) (""there must be a direct nexus between what a governmental commission does and how the courts go about their business""); Ohio Advisory Opinion 2002-9 (https://ohioadvop.org/advisory-opinion-by-year/2002-2/op-02-009/) (there should be "a direct concern with the improvement of the law, the legal system, and the administration of justice").
7. Minnesota Advisory Opinion 2014-2 (http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2014-2.pdf).
8. U.S. Advisory Opinion 50 (2009) (https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf).
9. Massachusetts Advisory Opinion 1998-13 (https://www.mass.gov/opinion/cje-opinion-no-98-13).
10. Utah Informal Advisory Opinion 1998-11 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/1998/98-11.htm).
11. *See* Indiana Advisory Opinion 2-2001 (https://www.in.gov/courts/jqc/files/jud-qual-adops-2-01.pdf) (a governmental commission concerned with the improvement of the law, the legal system, or the administration of justice is "one whose concern with the legal system is direct and exclusive," not tangential or partial); Ohio Advisory Opinion 2002-9 (https://www.ohioadvop.org/wp-content/uploads/2017/04/Op-02-009.pdf) (there should be more than "a tangential relationship in which there is involvement with the law in some way"); Utah Informal Advisory Opinion 1998-11 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/1998/98-11.htm) ("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").
12. Utah Informal Advisory Opinion 2020-2 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/2020/20-02.pdf).

A judge thus may not express public support for or opposition to the proposed Equal Rights Amendment.

Repeating that "the judiciary wholeheartedly supports efforts that promote equality and fairness," the committee encouraged judges to promote "diversity on the bench, for the judiciary as a whole, and among members of the bar" and to promote "equality and fairness in the legal system."

Thus, a judge or group of judges may "voice a commitment or sign a resolution that says all judges should treat all litigants fairly and equally without regard to race, creed, color, national origin, sexual preference, gender, etc. and take steps to ensure that this goal of equality is achieved," according to a recent Florida advisory opinion.[13] Emphasizing that the proposed activity would take place "entirely within the judiciary," the committee noted that the resolution "expresses a valid concern of both judges and litigants and seeks to remind each of us to be aware of the need to conduct ourselves in a manner that would encourage confidence on the part of all persons in the fairness of the judicial system."

Although noting that law enforcement affects the courts, the Massachusetts judicial ethics committee rejected an expansive reading that would have equated the administration of justice with law enforcement, and the committee disapproved of a judge's service on a commission focused "on how the police department goes about its business."[14] Similarly, the New York committee recently stated that a judge may not participate in a county executive's initiative to "recommend changes to current police force deployments, strategies, policies, procedures, and practices."[15] The program began after "multiple high-profile, racially-charged incidents of police violence" that "resulted in ongoing or reasonably foreseeable litigation and intense local and national controversy." The committee concluded that improving the county's law enforcement model was not an "issue of fact or policy involving the improvement of the law, the legal system or the administration of justice." The opinion explained that "while judges may be called upon, in their judicial capacity, to gauge the constitutionality of specific uses of force in cases that come before them, broad policy decisions concerning use or prohibition of specific law enforcement techniques are generally the province of the legislative or executive branches." The committee was also concerned that participation in the initiative would "insert the judge 'into the center of matters of substantial, local controversy'" and involve "frank conversations about recent events" that would violate the prohibition on judges making public comments on pending cases.

The California advisory committee has distinguished between judges' sharing their unique judicial perspective with the other branches and "judicial advocacy for or against the wisdom or morality" of a proposed policy.[16] For example, the committee stated that a judge could, based on the judge's experience, comment on whether the current death penalty system is dysfunctional for the courts or on increasing or decreasing sentence ranges for a particular type of offender but could not advocate as a policy matter for or against eliminating the death penalty or for longer or shorter sentences for certain crimes. The committee reasoned that the law-related exception does not allow the judicial branch to tell the legislative or executive branches "whether a law or proposed law is good or bad social or economic or scientific policy."[17]

On and off the bench, judges are accustomed to balancing different interests that are in tension, but the lines should be as clear as possible given the changing variety of circumstances in which judges need to apply ethics rules. Distinguishing between the core judicial mission and other government and society concerns is simpler and less abstract than hypothesizing on what may or may not undermine judicial impartiality and public confidence in the courts. As tempted as judges may be to weigh in on how to right every societal wrong they see played out every day in their courts, that judges should keep to their own lane is one of the conservative principles (in the "marked by moderation or caution" meaning[18] of "conservative") underlying the code of judicial conduct and judicial independence and impartiality. There is enough work to do in-house to strengthen and reform the judiciary, a task judges cannot delegate to the other branches.

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.*

13. Florida Advisory Opinion 2020-18 (http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2020/2020-18.html).
14. Massachusetts Advisory Opinion 1998-13 (*https://www.mass.gov/opinion/cje-opinion-no-98-13)*.
15. New York Advisory Opinion 2020-112 (https://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/20-112.htm).
16. California Supreme Court Committee Formal Opinion 2014-6 (https://www.judicialethicsopinions.ca.gov/wp-content/uploads/cjeo_formal_opinion_2014-006.pdf).
17. *Cf.*, Wyoming Advisory Opinion 2011-1 https://www.courts.state.wy.us/wp-content/uploads/2017/05/ 201101.pdf (a judge may not advocate for an increase in the maximum incarceration for a fourth or subsequent DUI but may provide empirical or anecdotal evidence about their experiences); Ohio Advisory Opinion 2002-9 (https://ohioadvop.org/advisory-opinion-by-year/2002-2/op-02-009/) (a judge may explain to the public a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, compare it to current law, and describe its potential impact on the constitution, the law, and the operation of the courts).
18. *See* https://www.merriam-webster.com/dictionary/conservative.