

Committee on Judicial Ethics
Teleconference
Thursday, February 3, 2011

Members present via teleconference: Justice Barry R. Schaller, Chair, Judge Linda K. Lager, Vice Chair, Judge Edward R. Karazin, Jr., and Professor Jeffrey A. Meyer. Staff present: Martin R. Libbin, Secretary, and Viviana L. Livesay, Assistant Secretary.

MINUTES

- I. With four members present, Justice Schaller called the meeting to order at 1:21 p.m. Although publicly noticed, no members of the public attended.
- II. The Committee members present unanimously approved the revised draft Minutes of the January 19, 2011 meeting.
- III. The Committee considered Judicial Ethics Informal Opinion 2011-02. The issue presented is as follows: May a Judicial Official serve on a statute-created advisory committee to an Executive Branch official in the following circumstances: (1) the Executive Branch official's department or agency regularly participates in proceedings in state courts, both as a litigant and as a service provider, and specifically participates in proceedings before the Judicial Official (2) the statute creating the advisory committee does not mandate or specifically provide for the inclusion of a Judicial Official as a member, and (3) the advisory committee has broad responsibilities, including inter alia, providing recommendations to the Executive Branch official regarding programs, services and legislation to improve the department or agency's performance; providing policy interpretation and guidance to the public; assisting and monitoring the department or agency with its planning and the implementation of its plans; and issuing reports to the Executive Branch official and the Governor as the advisory committee deems appropriate?

The Executive Branch official's department or agency is responsible for a wide range of programs and services including, but not limited to, providing services for mentally ill and emotionally disturbed clients, establishing work programs, performing data collection, auditing and outreach, as well as providing services to persons involved with the courts. The department or agency has also been the subject of federal litigation and federal court supervision for many years. A significant percentage of the advisory committee members are family members of current or former clients of the Executive Branch department or agency.

Three of the four Committee members in attendance (Justice Schaller, Judge Lager, and Professor Meyer) determined that the Judicial Official's service on the advisory committee would be prohibited by Rule 3.4 of the Code of Judicial Conduct, which provides that "[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.”

The Committee majority emphasized that, however salutary for the public a judicial official’s service on governmental committees or commissions may be, Rule 3.4 prohibits such service unless the commission “is one that concerns the law, the legal system or the administration of justice.” Comment (3) to the rule states that it is “intended to prohibit a judge from participation in governmental committees, boards, commissions or other governmental positions that make or implement public policy unless they concern the law, the legal system or the administration of justice.”

The Committee majority adopted the position, as articulated in ethics opinions from other jurisdictions, that in order for a governmental committee or commission to qualify as one that concerns the law, the legal system or the administration of justice, “there must be a direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business.” Massachusetts Advisory Opinion 98-13. See also Utah Informal Advisory Opinion 98-11; Florida Advisory Opinion 2001-16; U.S. Advisory Opinion 93 (1998); Indiana Advisory Opinion 2-01. Applying the “direct nexus” standard to the facts presented, the Committee majority concluded that the scope of the advisory committee’s responsibilities (as described above) far exceeds the range of activities within the scope of the exception to Rule 3.4.

The Committee majority also expressed concern about the possibility of an appearance of impropriety under Rule 1.2, as well as conflict with the provisions of Rule 3.1(1), (2) and (3), that could arise from the Judicial Official’s service on the advisory committee, based upon the following factors: the membership of the advisory committee, the Executive Branch department’s or agency’s role as a frequent litigator and service provider in proceedings in the state courts and in proceedings before the inquiring Judicial Official, and the fact that the Executive Branch department or agency is the subject of federal litigation and federal court supervision. See generally JE 2008-24, JE 2009-10 and JE 2010-05.

One of the Committee members (Judge Karazin) dissented from the view of the majority of Committee members. The dissenting Committee member supported a broader interpretation of the phrase “the law, the legal system, or the administration of justice”, as has been adopted by some jurisdictions, and would have found the advisory committee to fall within the exception provided by Rule 3.4. That member cited Comment (1) to Rule 3.4, which acknowledges the value of judges accepting appointments to entities that concern the law, the legal system or the administration of justice, and the approach taken by such states as South Carolina, Utah and Alaska, which on occasion have permitted a judge to serve on a governmental commission

with a mission that extended beyond the law, the legal system or the administration of justice to issues of a legislative or executive nature, only if the judge is able to limit his or her involvement narrowly to those matters dealing with the administration of justice by, for example, just serving on a subcommittee or limiting participation to matters directly concerning the courts or the administration of justice. See generally South Carolina Opinion 8-1996, Utah Informal Opinion 94-2 and Alaska Opinion 2001-01.

The Committee noted that this opinion involves conduct subject to Rule 3.4, not Rule 3.2, and that its opinion does not necessarily reflect how the Committee may construe Rule 3.2.

- IV. The Committee considered Judicial Ethics Informal Opinion 2011-03. The issue presented is as follows: May a Judicial Official serve on a statute-created advisory committee to an Executive Branch official in the following circumstances: (1) the Executive Branch official's department or agency regularly participates in proceedings, both as a litigant and as a service provider, in state courts, and specifically participates in proceedings before the Judicial Official, (2) the statute creating the advisory committee does not mandate or specifically provide for the inclusion of a Judicial Official as a member, and (3) the advisory committee is responsible for providing on-going review and recommendations to the Executive Branch official for improvements to a specific program or facility including, inter alia, the clients served, the programs provided and their effectiveness in serving the needs of the clients, the policies in effect at the facility, and the cost of operating the facility?

The Executive Branch official's department or agency is responsible for a wide range of programs and services including, but not limited to, providing services for mentally ill and emotionally disturbed clients, establishing work programs, performing data collection, auditing and outreach, as well as providing services to persons involved with the courts. The department or agency has also been the subject of federal litigation and federal court supervision for many years. The particular program or facility that is the subject of the work of the advisory committee provides services for court-involved clients.

Three of the four Committee members in attendance (Justice Schaller, Judge Lager, and Professor Meyer) determined that the Judicial Official's service on the advisory committee would be prohibited by Rule 3.4 of the Code of Judicial Conduct, which provides that "[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."

The Committee majority emphasized that, however salutary for the public a judicial official's service on governmental committees or commissions may be, Rule 3.4 prohibits such service unless the commission "is one that

concerns the law, the legal system or the administration of justice.” Comment (3) to the rule states that it is “intended to prohibit a judge from participation in governmental committees, boards, commissions or other governmental positions that make or implement public policy unless they concern the law, the legal system or the administration of justice.”

The Committee majority adopted the position, as articulated in ethics opinions from other jurisdictions, that in order for a governmental committee or commission to qualify as one that concerns the law, the legal system or the administration of justice, “there must be a direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business.” Massachusetts Advisory Opinion 98-13. See also Utah Informal Advisory Opinion 98-11; Florida Advisory Opinion 2001-16; U.S. Advisory Opinion 93 (1998); Indiana Advisory Opinion 2-01. Applying the “direct nexus” standard to the facts presented, the Committee majority concluded that the scope of the advisory committee’s responsibilities (as described above) far exceeds the range of activities within the scope of the exception to Rule 3.4.

The Committee majority also expressed concern about the possibility of an appearance of impropriety under Rule 1.2, as well as conflict with the provisions of Rule 3.1 (1), (2) and (3) that could arise from the Judicial Official’s service on the advisory committee, based upon the following factors: the Executive Branch department’s or agency’s role as a frequent litigator and service provider in proceedings in state courts and in proceedings before the inquiring Judicial Official, and the fact that the Executive Branch department or agency is the subject of federal litigation and federal court supervision. See generally JE 2008-24, JE 2009-10 and JE 2010-05.

One of the Committee members (Judge Karazin) dissented from the view of the majority of Committee members. The dissenting Committee member supported a broader interpretation of the phrase “the law, the legal system, or the administration of justice”, as has been adopted by some jurisdictions, and would have found the advisory committee to fall within the exception provided by Rule 3.4. That member cited Comment (1) to Rule 3.4, which acknowledges the value of judges accepting appointments to entities that concern the law, the legal system or the administration of justice, and the approach taken by such states as South Carolina, Utah and Alaska, which on occasion have permitted a judge to serve on a governmental commission with a mission that extended beyond the law, the legal system or the administration of justice to issues of a legislative or executive nature, only if the judge is able to limit his or her involvement narrowly to those matters dealing with the administration of justice by, for example, just serving on a subcommittee or limiting participation to matters directly concerning the courts or the administration of justice. See generally South Carolina Opinion 8-1996, Utah Informal Opinion 94-2 and Alaska Opinion 2001-01.

The Committee noted that this opinion involves conduct subject to Rule 3.4, not Rule 3.2, and that its opinion does not necessarily reflect how the Committee may construe Rule 3.2.

- V. The Committee considered Judicial Ethics Informal Opinion 2011-04. The issue presented is as follows: May a Judicial Official serve on an ad hoc advisory committee to an Executive Branch official in the following circumstances: (1) the Executive Branch official's department or agency regularly participates in proceedings in Connecticut's courts, both as a litigant and as a service provider, (2) the advisory committee is not required by statute or regulation and will be in existence only for a limited period of time, and (3) while the advisory committee is responsible for seeking input and providing recommendations to the Executive Branch official on how the official's department or agency can more effectively meet its mission by working together with public and private entities that serve the same people under the department or agency's jurisdiction, the Judicial Official would not participate directly in deciding or providing policy advice and basically would limit his or her role to facilitating the advisory committee's discussions?

The Executive Branch official's department or agency is responsible for a wide range of programs and services including, but not limited to, providing services for mentally ill and emotionally disturbed clients, establishing work programs, performing data collection, auditing and outreach, as well as providing services to persons involved with the courts. The department or agency has also been the subject of federal litigation and federal court supervision for many years. The Judicial Official is disqualified from presiding over cases involving the Executive Branch department or agency.

Three of the four Committee members in attendance (Justice Schaller, Judge Lager, and Professor Meyer) determined that the Judicial Official's service on the advisory committee would be prohibited by Rule 3.4 of the Code of Judicial Conduct, which provides that "[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."

The Committee majority emphasized that, however salutary for the public a judicial official's service on governmental committees or commissions may be, Rule 3.4 prohibits such service unless the commission "is one that concerns the law, the legal system or the administration of justice." Comment (3) to the rule states that it is "intended to prohibit a judge from participation in governmental committees, boards, commissions or other governmental positions that make or implement public policy unless they concern the law, the legal system or the administration of justice."

The Committee majority adopted the position, as articulated in ethics opinions from other jurisdictions, that in order for a governmental committee

or commission to qualify as one that concerns the law, the legal system or the administration of justice, “there must be a direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business.” Massachusetts Advisory Opinion 98-13. See also Utah Informal Advisory Opinion 98-11; Florida Advisory Opinion 2001-16; U.S. Advisory Opinion 93 (1998); Indiana Advisory Opinion 2-01. Applying the “direct nexus” standard to the facts presented, the Committee majority concluded that the scope of the advisory committee’s responsibilities (as described above) far exceeds the range of activities within the scope of the exception to Rule 3.4.

The Committee majority also expressed concern about the possibility of an appearance of impropriety under Rule 1.2 as well as conflict with the provisions of Rule 3.1 (3), that could arise from the Judicial Official’s service on the advisory committee, based upon the following factors: the Executive Branch department’s or agency’s role as a frequent litigator and service provider in proceedings in Connecticut’s courts, and the fact that the Executive Branch department or agency is the subject of federal litigation and federal court supervision. See generally JE 2008-24, JE 2009-10 and JE 2010-05.

One of the Committee members (Judge Karazin) dissented from the view of the majority of Committee members. The dissenting Committee member supported a broader interpretation of the phrase “the law, the legal system, or the administration of justice”, as has been adopted by some jurisdictions, and would have found the advisory committee to fall within the exception provided by Rule 3.4. That member cited Comment (1) to Rule 3.4, which acknowledges the value of judges accepting appointments to entities that concern the law, the legal system or the administration of justice, and the approach taken by such states as South Carolina, Utah and Alaska, which on occasion have permitted a judge to serve on a governmental commission with a mission that extended beyond the law, the legal system or the administration of justice to issues of a legislative or executive nature, only if the judge is able to limit his or her involvement narrowly to those matters dealing with the administration of justice by, for example, just serving on a subcommittee or limiting participation to matters directly concerning the courts or the administration of justice. See generally South Carolina Opinion 8-1996, Utah Informal Opinion 94-2 and Alaska Opinion 2001-01.

The Committee noted that this opinion involves conduct subject to Rule 3.4, not Rule 3.2, and that its opinion does not necessarily reflect how the Committee may construe Rule 3.2.

- VI. The Committee considered Judicial Ethics Informal Opinion 2011-05. The issue presented is as follows: May a Judicial Official serve on an ad hoc advisory committee to an Executive Branch official in the following circumstances: (1) the Executive Branch official’s department or agency

regularly participates in proceedings in Connecticut's courts, both as a litigant and as a service provider, (2) the advisory committee is not required by statute or regulation and will be in existence only for a limited period of time, and (3) while the advisory committee is responsible for seeking input and providing recommendations to the Executive Branch official on how the official's department or agency can more effectively meet its mission by working together with public and private entities that serve the same people, the Judicial Official would not participate directly in deciding or providing policy advice and basically would limit his or her role to connecting the Executive Branch official to people in some of the constituencies that the official's department or agency serves?

The Executive Branch official's department or agency is responsible for a wide range of programs and services including, but not limited to, providing services for mentally ill and emotionally disturbed clients, establishing work programs, performing data collection, auditing and outreach, as well as providing services to persons involved with the courts. The department or agency has also been the subject of federal litigation and federal court supervision for many years. The Judicial Official would recuse himself or herself from presiding over cases involving the Executive Branch department or agency during the period that he or she served on the committee.

Three of the four Committee members in attendance (Justice Schaller, Judge Lager, and Professor Meyer) determined that the Judicial Official's service on the advisory committee would be prohibited by Rule 3.4 of the Code of Judicial Conduct, which provides that "[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."

The Committee majority emphasized that, however salutary for the public a judicial official's service on governmental committees or commissions may be, Rule 3.4 prohibits such service unless the commission "is one that concerns the law, the legal system or the administration of justice." Comment (3) to the rule states that it is "intended to prohibit a judge from participation in governmental committees, boards, commissions or other governmental positions that make or implement public policy unless they concern the law, the legal system or the administration of justice."

The Committee majority adopted the position, as articulated in ethics opinions from other jurisdictions, that in order for a governmental committee or commission to qualify as one that concerns the law, the legal system or the administration of justice, "there must be a direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business." Massachusetts Advisory Opinion 98-13. See also Utah Informal Advisory Opinion 98-11; Florida Advisory Opinion 2001-16; U.S. Advisory Opinion 93 (1998); Indiana Advisory Opinion 2-01. Applying

the “direct nexus” standard to the facts presented, the Committee majority concluded that the scope of the advisory committee’s responsibilities (as described above) far exceeds the range of activities within the scope of the exception to Rule 3.4.

The Committee majority also expressed concern about the possibility of an appearance of impropriety under Rule 1.2, as well as conflict with the provisions of Rule 3.1(1), (2) and (3) that could arise from the Judicial Official’s service on the advisory committee, based upon the following factors: the Executive Branch department’s or agency’s role as a frequent litigator and service provider in proceedings in Connecticut’s courts, and the fact that the Executive Branch department or agency is the subject of federal litigation and federal court supervision. See generally JE 2008-24, JE 2009-10 and JE 2010-05.

One of the Committee members (Judge Karazin) dissented from the view of the majority of Committee members. The dissenting Committee member supported a broader interpretation of the phrase “the law, the legal system, or the administration of justice”, as has been adopted by some jurisdictions, and would have found the advisory committee to fall within the exception provided by Rule 3.4. That member cited Comment (1) to Rule 3.4, which acknowledges the value of judges accepting appointments to entities that concern the law, the legal system or the administration of justice, and the approach taken by such states as South Carolina, Utah and Alaska, which on occasion have permitted a judge to serve on a governmental commission with a mission that extended beyond the law, the legal system or the administration of justice to issues of a legislative or executive nature, only if the judge is able to limit his or her involvement narrowly to those matters dealing with the administration of justice by, for example, just serving on a subcommittee or limiting participation to matters directly concerning the courts or the administration of justice. See generally South Carolina Opinion 8-1996, Utah Informal Opinion 94-2 and Alaska Opinion 2001-01.

The Committee noted that this opinion involves conduct subject to Rule 3.4, not Rule 3.2, and that its opinion does not necessarily reflect how the Committee may construe Rule 3.2.

VII. The meeting adjourned at 1:52 p.m.