Alaska Commission on Judicial Conduct

Advisory Opinions

Adopted March 1, 1996 through August 28, 2020

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Advisory Opinion #97-1

(adopted February 7, 1997 and amended June 6, 1997)

Question: *May a judge write an unsolicited reference letter to the Alaska Judicial Council concerning an applicant for a judgeship?*

Opinion: A judge may write a letter to the Judicial Council concerning the qualities and abilities of an applicant for a judicial position. The letter need not be solicited by the Council, but its content should be limited to addressing those qualities about which the judge has direct knowledge and which relate to the criteria used by the Council in evaluating the applicant. A judge may ethically permit the Council to forward the letter to the governor.

The restriction on content should be extended to all official reference letters by judges, regardless of who the recipient may be. Any use of the judicial office to persuade and influence decision-makers, beyond comments addressing the qualifications of the individual concerned, is not proper. In addition, while sending an unsolicited letter to the Judicial Council is not improper, sending an unsolicited letter to the Governor is improper. The Governor's role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political.

Advisory Opinion #97-2

(adopted June 6, 1997)

Question: *May a judge contribute to charitable organizations that also are involved in political activity such as domestic violence groups?*

Opinion: Pursuant to Canon 7 A (1) (c) a judge should not contribute to a "political organization or candidate." While political organization is not defined in the Alaska Code of Judicial Conduct, it has been defined in the 1990 ABA Model Code of Judicial Conduct. That Code defines "political organization" as denoting "a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office." The Alaska Public Offices Commission has a similar definition, viewing such a group as any combination of two or more people "acting jointly who take action the major purpose of which is to influence the outcome of an election." Charitable organizations that also engage in some political activities are not considered political organizations under either of these definitions. Judges may, therefore, contribute to charitable organizations that also engage in some political activities if those organizations are primarily engaged in nonpolitical charitable work. Domestic violence groups, for example, generally have primary purposes such as running shelters and counseling programs that are not political in nature.

Judges should be aware, however, that making contributions to groups that have an interest in matters before the court may create a disqualification issue for that judge. These situations should be examined by each individual judge as the specific cases may arise.

Advisory Opinion #98-1

(adopted January 23, 1998)

Question: *May a judge allow a state official of the executive or legislative branch to sit on the bench next to the judge or in-court clerk while observing court in session?*

Opinion: Providing any preferential seating to visiting state officials that is not available to the general public while court is in session creates an appearance of impropriety in violation of Canon 2 of the Code of Judicial Conduct. State officials hold positions of power within state government that, through the doctrine of separation of powers, is meant to be distinct from the role of state courts. Treating a state official differently from any other member of the public by giving that official preferential seating, creates the appearance to the average observer that the official has special access to the court and its decision-making. While state officials have a special interest in observing how the courts are run to assist in proper legislative or executive decision-making, any questions regarding the court process can be addressed to the judge in private outside of the official public court session. So too, special demonstrations of equipment can be arranged for private observation by state officials, separate from the official court proceeding or special seating arrangements can be provided to both the officials and the public generally to allow observation of court equipment during proceedings.

Other special observers may not necessarily come under this opinion. Often school children tour the courts and are seated in special places, at times on the bench. Children are not in a position of power and, therefore, do not create an appearance of improper influence especially when their presence is explained to be for an educational purpose.

Advisory Opinion #98-2

(was later adopted as #99-1)

Advisory Opinion #98-3

(adopted September 14, 1998)

Question: *May a judge contribute to another judge's retention campaign fund?*

Opinion: A judge should not contribute to another judge's retention campaign fund. Canon 5 A (1) (b) and (c) of the Alaska Code of Judicial Conduct prohibits judges from engaging in political activity and expressly prohibits judges from financially contributing to political campaigns. The terminology section of the Code defines candidate for public office and judicial candidate separately. Arguably, candidates in a retention election are not necessarily candidates for "public" office under the Code. The purpose of these Code provisions is to insulate judges from the political pressures that campaigns and campaign fundraising necessarily entail. While judicial retention elections do not typically involve political positions and influence, when a judge's retention is contested it necessarily entails an organized opposition with defined issues. While the judge under attack clearly has the right to respond to that opposition, engaging other judges in the dialogue unnecessarily politicizes their positions as well.

Advisory Opinion #98-4

(adopted September 14, 1998)

Question: *Can a judge ethically financially contribute to The Alaska Legal Services Corporation?*

Opinion: Judges may contribute financially to The Alaska Legal Services Corporation without violating the Code of Judicial Conduct. In all other respects, judges must comply with Canon 4 C of the Alaska Code of Judicial Conduct regarding charitable activities. Judges should disclose the fact that they are contributors in any case involving a legal services attorney or if the judge knows that the attorney is participating in the case as part of the pro bono program. In fundraising efforts by The Alaska Legal Services Corporation, judges may be listed in the same manner as other contributors or may be listed anonymously but should not hold leadership positions in the organization. The sole exception is the Chief Justice of Alaska, who, as chief administrator of the state courts, may endorse and participate in the program in that role.

Advisory Opinion #99-1 [originally drafted as 98-2]

(adopted January 22, 1999)

Question: *When is a sitting judge obligated in court proceedings to disclose discussions concerning future employment with an entity involved in litigation before the judge?*

Opinion: A judge should disclose the fact that the judge is discussing employment with an entity involved in litigation before the judge. For purposes of this opinion, "an entity involved in litigation before the judge" refers to any party, witness, attorney, government entity, or law firm directly involved in the litigation. Once disclosure has occurred, the judge should offer to recuse. Once the judge has accepted the job, the judge should recuse and disclose the basis for the recusal.

Advisory Opinion #99-2
Confidential

(adopted April 2, 1999)

Advisory Opinion #99-3

(adopted September 8, 1999)

Question: *When a judicial officer receives an ex parte communication by a court employee concerning facts affecting a pending case before that judicial officer, does full disclosure of the communication include disclosure of the identity of the employee who initiated the communication?*

Opinion: Canon 3B(7) prohibits judges from initiating or considering "ex parte communications or other communications made to the judge outside the presence of the parties…." The only partial exception is for scheduling or other administrative purposes. It has been noted that while the "Code of Judicial Conduct does not address the question of remedies…courts have held that prompt disclosure of the ex parte communication to all affected parties may avoid the need for other corrective action." SHAMAN, LUBET, ALFINI, JUDICIAL CONDUCT AND ETHICS at 164 (2d ed. 1995).

Disclosure of ex parte communications should be a full disclosure. While the identity of the individual who initiated the communication may not always be a necessary element of full disclosure, where the parties have inquired as to the identity of that individual, absent any legal basis for maintaining the anonymity of that individual, the name should be disclosed. Court employees, in general, have no special privileges and should respect the integrity of the court process by insulating the judicial officer from factual information outside of the court record.

Advisory Opinion #99-4

(adopted December 14, 1999)

Question: *May a judge be a member of the Association of Trial Lawyers of America or other specialty bar associations?*

Opinion: Maintaining the appearance of impartiality is essential to an effective judiciary. Canon 2 Alaska Code of Judicial Conduct. While judges are generally encouraged to participate in bar associations, specialty bar associations are different. Specialty bar associations have been defined as those associations of lawyers who mainly represent a particular class of clients or engage in a specialized practice or reflect a partisan view on legal issues.

Judges are not permitted to be members of special bar associations, as it would convey the appearance of a special relationship to one side in the adversarial process. "An organization need not be racist or vitriolic, however, in order to give the appearance of partiality. Membership on the board of directors of a legal aid society might convey the impression that a judge was predisposed in favor of its lawyers. . . . Thus, judges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse or are dedicated to a particular legal philosophy or position." SHAMAN, LUBET, ALFINI, JUDICIAL CONDUCT AND ETHICS at 296 (2d ed. 1995). The Association of Trial Lawyers of America is a plaintiff's bar association. It promotes itself as leading the 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. Special categories of membership or affiliation do not obviate the problem. Consequently, judges should not be members of the Association of Trial Lawyers of America, regardless of whether the membership is general or limited, free or paid. (*See also* Arkansas Advisory Opinion 99-04)

Advisory Opinion #99-5

(adopted December 14, 1999)

Question: *May a judge receive free conference travel to a judicial conference sponsored by The Roscoe Pound Foundation, a not-for-profit arm of the Association of Trial Lawyers of America?*

Opinion: A judge should not accept an offer of conference travel to a judicial conference sponsored by The Roscoe Pound Foundation. Judges are not permitted to be members of special bar associations as it would convey a special relationship to one side in the adversarial process (*see Advisory Opinion 99-4*). The Association of Trial Lawyers of America, as a plaintiff's bar association, would not be a permissible organization for judges to join. The Roscoe Pound Foundation is a trust set up for educational purposes by the Association of Trial Lawyers of America. The by-laws of the foundation, however, indicate strong links to the Association of Trial Lawyers of America. For example: the trustees of the foundation are elected at the annual ATLA convention; one of the members of the executive committee is the ATLA President; the purpose stated is "to promote the well-doing or well-being of mankind and especially of injured persons"; and, the trust declaration notes an $800,000 loan by this foundation to ATLA. Consequently, any judicial conference sponsored by this foundation would give the appearance of a plaintiff supported conference and any gift of travel to the conference would give the appearance of a gift by the plaintiff's bar to judges.

Other states have noted that judges should not be guests of special bar associations at conferences. For example, Tennessee Advisory Opinion 96-4 states that judges should not be guests of a defense lawyers' association at its meeting or convention where the judges' registration, lodging, and travel would be paid by the association. Gifts of travel by specialty bar associations give the appearance of influence.

Advisory Opinion #2000-01

(adopted September 11, 2000)

Question: *May a Children's Court Master serve on a local juvenile corrections facility's citizens' advisory committee? May a Superior Court Judge serve on a community committee to plan for a Child Advocacy Center (a facility for children who are victims of physical or sexual abuse)?*

Opinion: Canon 4C(2) of the Alaska Code of Judicial Conduct provides: "A judge shall not accept appointment to or serve on 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." Canon 4C(3) explicitly allows judges to serve as officers, directors, trustees, or advisors of organizations or government agencies "devoted to the improvement of the law, the legal system, or the administration of justice" or of other not-for-profit organizations subject to two basic limitations. The two limitations are: (1) That a judge cannot serve "if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the judge's court." (2) Regardless of the nature of the organization or its role, the judge cannot engage in fund solicitation.

Judges also are obligated to avoid impropriety and the appearance of impropriety and to maintain the appearance of impartiality. Specifically, Canon 4A requires judges to conduct all activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge." Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge.

Both a juvenile corrections facility and a child advocacy center can be construed as being related to the administration of justice, as can an increasingly large number of various social service organizations. Consequently, the key issue will be whether a judge's participation as a member would create an appearance of partiality. Several factors will contribute to whether that appearance is created. These factors may include:

(1) whether its members represent only one point of view or whether membership in the group is balanced;

(2) whether the group will discuss controversial legal issues and those issues likely to come before the courts or merely administrative or procedural concerns;

(3) whether the group will be viewed by the public as a political or an advocacy group or merely as an administrative group;

(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 could be viewed as clearly central to the administration of justice.

Regardless of any of these factors, judges may provide information on matters concerning the law or the administration of justice to groups in which their membership would be precluded by the Code.

Applying these factors to the two groups that the judicial officers presented, one appears permissible, the other does not. The citizens' advisory committee for the juvenile corrections facility appears to be permissible for judicial membership as it is composed of a cross-section of interested parties who will not be advocates for any particular single interest and the group will be limited to administrative concerns. The child advocacy center planning committee is not appropriate for judicial membership as its membership is prosecutorial in nature and it appears to be fundamentally an advocacy group regardless of the purely administrative function of this particular committee.

Finally, judges who participate as members of permissible groups should constantly keep in mind the Commentary to Canon 4C(3): "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 the judge is affiliated to determine if it is proper for the judge to continue the affiliation."

Advisory Opinion #2000-02

(adopted October 16, 2000)

Question: *May a judge contribute to an aggregate campaign fund that supports the retention of one or more judicial candidates?*

Opinion: A judge may not contribute to any campaign fund for public office regardless of whether the fund is an aggregate fund or an individual fund or whether the fund supports the retention of a judicial candidate or exists for another elective purpose. This opinion reaffirms Advisory Opinion #98-3. That opinion noted that the purpose of the Code provisions in Canon 5 is to insulate judges from "the political pressures that campaigns and fundraising necessarily entail." Canon 5A(1)(e) specifically prohibits judges from making "a contribution to a political organization or candidate for public office." The only exception is for judges who are candidates seeking retention and are covered by Canon 5C. That Canon allows judges who are candidates for retention to engage in limited political activity to secure their own retention. There are no other express exceptions to the Canon 5A(1)(e) prohibitions. However, there is arguably a different definition for "candidate for public office" and "candidate" for judicial retention. If there is a differentiation between the two, neither the language of the Code's Canons, themselves, nor the terminology section of the Code makes that distinction clear.

While the commentary to Canon 5C(3) (permitting limited political fundraising activity by retention judges) states that the sections of the Canon "are not intended to prohibit an organization of judges from soliciting money from judges to establish a campaign fund to assist judges who face active opposition to their retention," it does not address the prohibited political contribution activity of non-retention judges under Canon 5A(1). As stated above, that Canon addresses the ability of judges to contribute to political campaigns. The 5C(3) commentary seems to attempt to permit judges to do indirectly what they are prohibited from doing directly. In other words, the commentary implies that an organization of judges could solicit money from judges for a campaign fund (and necessarily that judges could then contribute to the campaign fund) that would not be permitted if the campaign fund were created by a single judge facing active opposition under Canon 5C(3). Judges should not be permitted to do indirectly what the Code prohibits directly.

The public will view an aggregate campaign fund supporting the retention of one or more judges as political activity opposing the various positions that the active opposition espouses. Aggregate funds, like those of individual judicial retention campaigns, necessarily engage the judges in the political forum. The commentary to Canon 5C(3) is unique to Alaska; other states with merit selection and retention systems do not permit judicial contributions. To best protect the non-political nature of Alaska's judiciary, judges should be insulated as much as possible from political influence and the

appearance of political influence. Prohibiting judicial contributions to judicial retention campaign funds, individually or as an aggregate, provides the necessary insulation.

Advisory Opinion #2001-01

(adopted February 26, 2001)

Question: *May a Superior Court Judge serve on a state Children's Justice Act task force created by federal statute and requiring state judge membership?*

Opinion: This opinion supplements our Advisory Opinion #2000-01 in which we noted how Canon 4C(2) of the Alaska Code of Judicial Conduct restricts outside community activities of judges. That opinion summarized the Code's restrictions by stating: "Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge."

To assist judges in determining whether any commission, task force, or committee is appropriate for judicial membership, Advisory Opinion #2000-01 set out four factors as follows:

(1) whether its members represent only one point of view or whether membership in the group is balanced;

(2) whether the group will discuss controversial legal issues, issues likely to come before the courts, or merely administrative or procedural concerns;

(3) whether the group will be viewed by the public as a political or an advocacy group or merely as an administrative group;

(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 could be viewed as clearly central to the administration of justice.

Regardless of any of these factors, judges may provide information on matters concerning the law or the administration of justice to groups in which their membership would be precluded by the Code.

The mere fact that federal legislation requires state judge membership on a task force as a prerequisite for funding, does not preclude an independent ethics analysis by appropriate state judicial conduct commissions as to the propriety of state judges sitting in that capacity. Applying the listed factors to the state task force under the federal Children's Justice Act, Alaska judges may be members of the state task force if they limit

their involvement to public policy positions that are appropriate for the courts and are not legislative or executive in nature. The task force has balanced membership, including both defense and prosecution, and appears to be chiefly concerned with administrative solutions to child- abuse problems.

One other state has addressed judge membership on a Children's Justice Act task force. That state, South Carolina, restricted the judge's membership to a court coordination subcommittee of the task force. In noting its restriction, the South Carolina Advisory Committee observed that the subcommittee was designed to "narrowly address matters concerning the administration of justice." (South Carolina Opinion no. 8-1996) The South Carolina view, consistent with our own, was concerned with judicial membership on "governmental advisory committees because the scope of the judge's involvement was vague and could extend into issues of fact or policy matters other than the improvement of the law, the legal system and the administration of justice." (S.C. Op. 8-1996)

While there is no indication that at the present the Alaska judges' involvement on the state task force will be limited to a "court coordination subcommittee," vigilance by the judge members in limiting their participation to matters directly concerning the administration of justice can achieve the same result. The judge members should avoid that aspect of the task force's work that concerns the investigation and prosecution of child abuse and neglect. Those areas are most appropriate for the legislative and executive agencies of our state government. Once the task force is constituted, the judge members should explicitly define their membership roles and advise the entire task force of the ethical limitations on their participation.

Advisory Opinion #2003-01

(adopted September 11, 2003)

Question: *May a Superior Court Judge who sentenced a felon write a letter to the pardon board or parole board at the request of the convicted felon?*

Opinion: Canon 2 B of the Alaska Code of Judicial Conduct states, in part, that "A judge shall not use or lend the prestige of judicial office to advance the private interests of the judge or others." The relevant commentary to that section states: "Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, except in very limited circumstances, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer. A judge may provide to such persons information for the record in response to a formal request."

A judge should not write a letter at the request of the convicted person nor write a letter on the judge's own initiative. Either a sentencing judge or a judge who presided over the criminal trial may respond to an official request by the pardon or parole board for information that the judge had at the time of sentencing or trial. That request is an official formal request that clearly addresses the judge in the judge's official capacity.

Trial or sentencing judges should not initiate letters to pardon or parole boards without a request by the board. A response that is either initiated by the judge or is at the request of an individual may lead a reasonable observer to believe that the judge has a personal interest in the matter and is using the prestige of judicial office to further that interest. The judge would also be wise to follow an U.S. advisory committee's view (*see U.S. Advisory Opinion 65*[*]*(1980)* that allows a judge to convey only objective information that would assist in the determination. These judges should also refrain from personal opinions, values, or conjecture about the character of the person in any letter and the content should be narrowly drafted to address the criteria used by the pardon or parole board. Because the only permissible communications are "official" communications, official court stationary should be used for the letters to the pardon or parole board.

This opinion is not intended to restrict the ability of judges to act in their personal capacity when a member of their immediate family is either the victim of the crime or the convicted person coming before the board.

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[*] U.S. Advisory Opinions are published by a committee of the Judicial Conference of the United States called the Committee on Codes of Conduct. Its opinions are addressed to federal court judges. The published advisory opinions are available in the Federal Judiciary's Guide to Judiciary Policies & Procedures or online at www.uscourts.gov/guide/bgol2/ch4.html

Advisory Opinion #2004-01

(adopted February 2, 2004)

Question: *What types of activities may judges perform to help further pro bono participation by attorneys?*

Opinion: Resolution of this question requires the Commission to address what judges may do to help further this participation, in response to the Alaska Supreme Court's application of a 50-hour pro bono aspirational rule to judges, while adhering to Canon 2's requirement that a judge "avoid impropriety and appearance of impropriety in all of the judge's activities," and Canon 4's requirement to "conduct the judge's extra-judicial activities [so] as to minimize the risk of a conflict with judicial obligations."

Alaska Supreme Court Order No. 1496, effective April 15, 2003, amended Rule 6.1 of the Alaska Rules of Professional Conduct. It adopted an annual aspirational goal of 50 hours of pro bono publico legal service for all lawyers, including judges. See, Paragraph 5 of the Commentary. Judge may satisfy their pro bono obligation through participation in "activities for improving the law, the legal system or the legal profession." This Order, with its commentary, is consistent with the provisions of Canon 4C of the Code of Judicial Conduct.

A judge may make monetary contributions to further pro bono activities. See, Alaska Commission on Judicial Conduct Advisory Opinion #98-4. The commentary to Rule 6.1 allows for the satisfaction of some or all of the judge's pro bono obligation by contributions. These contributions should be "reasonably equivalent to the value of the hours of service that would have otherwise been provided." However, a judge may not personally participate in any solicitation of funds or be a guest or speaker at a fundraising event, even on behalf of an organization devoted to the improvement of the law, the legal system, or the administration of justice. The sole exception to this limitation is that a judge may solicit funds from other judges, if the judge holds no supervisory or appellate authority over the judge solicited. See, Canon 4C(3)(b)(i).

Judicial ethics opinions from a number of jurisdictions suggest strongly that it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs. Solicitations on behalf of specific organizations may lead to "the impression that they are in a special position to influence the judge." This is a violation of Canon 2B. Additionally, since such solicitations ask the attorney to contribute time, which is equivalent to money, it could be considered fundraising. Consequently, it is impermissible for a judge to individually solicit attorneys to participate in pro bono organizations or to accept particular cases. However, general appeals to participate in pro bono efforts are permissible. And a judge's reference to a list of available pro bono programs is also allowed.

The commentary to Canon 4B makes clear that a judge should undertake efforts to improve the law, the legal system, and the administration of justice. Encouraging attorneys to fulfill their obligation to perform pro bono work, through speaking in support of pro bono activities, serving on the board of a particular pro bono program (see below), or teaching at seminars for pro bono attorneys, would further this ethical responsibility. However, these activities should not refer attorneys to any particular pro bono program or specific cases.

Judges may be active in civic and/or charitable activities. Canon 4C(3) allows a judge to serve as an officer or director for an organization that is devoted to the improvement of the law, the legal system, or the administration of justice, subject to some specific limitations. Those limitations are of two types. The first is a general limitation that prohibits judges from serving as an officer or director for any organization that is involved in frequent adversary proceedings that would come before the judge, the court of which the judge is a member or a court over which the judge has appellate jurisdiction. The commentary to Canon 4C(3) directs judges to regularly reexamine the goals and activities of any organization to which he or she belongs to avoid this problem. The second severely limits the judge's involvement in the financial affairs of the civic or charitable organization.

Additionally, judges may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system and the administration of justice. See, Canon 4B. Examples of this activity could include participating in a workshop or CLE seminar that is made available at no (or reduced) cost for attorneys who agree to undertake pro bono cases. It would also be permissible for a judge to write articles for publication in bar or general-circulation media, encouraging members of the bar to participate in pro bono work.

Acknowledging the pro bono activity of particular attorneys would be permissible if it were done in a manner that is public, such as in a newspaper advertisement or displaying a plaque in a court. However, letters of congratulation that were sent directly to the attorney could be interpreted as evidence that the attorneys are in a special position of influence or that the judge's ability to act impartially has been compromised. This same problem would be presented if a judge hosted a social event for the such lawyers. In any activity, the judge must avoid impropriety and the appearance of impropriety. See, Canon 2A.

The Chief Justice of the Alaska Supreme Court serves a unique role in the Alaska Court System and should be provided more latitude when soliciting funds for organizations integrally concerned with the justice system in the state. Article IV, § 16 of the Alaska Constitution designates the Chief Justice the administrative head of all courts. As part of this responsibility, the Chief Justice appoints an administrative director of the court system. The State Personnel Act, (in AS § 39.25.020) grants the Chief Justice the authority to appoint all administrative and clerical personnel in the judicial system. These administrative duties of the office are clearly separate from judicial functions. This administrative role, for example, the Chief Justice gives a "State of the Judiciary" address to the legislature and testifies with the Administrative Director on proposed legislation and

budgetary needs of the court system.

Each of the other branches of state government has an identifiable spokesperson. The Chief Justice fills this position in the judiciary. There would be a unique void if the person filling that position, were not allowed to publicly solicit for the needs of the unrepresented. The concerns that led to the prohibitions in Canon 4C(3)(b) while applying with equal validity to the Chief Justice in charitable interests that are unrelated to the court system, fade when balanced against the need for an institutional voice from the court system who can speak to fundamental financial needs of justice administration. For these reasons, the Commission believes that a limited exception exists for the Chief Justice in pleas for funding assistance to particular charitable organizations that provide access to justice for those who are otherwise unable to pay.

Advisory Opinion #2006-01

(adopted October 30, 2006)

Question: *May a judge conduct settlement conferences in cases where the judge is also the assigned trial judge?*

Opinion: A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Canon 3(B)(7)(a)(iii)(e). Trial judges conducting settlement conferences in their own cases must, however, have a heightened awareness of the appearance that the parties might feel improper pressure to settle or that the judge will no longer be impartial if the case fails to settle.

Some guidelines for settlement conferences include:

(1) Before beginning the settlement conference, the parties' request for and consent to participation by the trial judge should be established either in writing or on record.

(2) Sensitivity to the appearance of impropriety must always be a consideration for the judge. In all cases, the judge should be aware that recusal may be required if the case fails to settle and the judge has learned information during the conference that might undermine objectivity or create the appearance of impropriety. In each instance, the judge should ask whether a reasonable person, with knowledge of all the circumstances of the conference, would question continued impartiality by the judge.

(3) The concerns about the appearance of impropriety mentioned above may be heightened in cases where the judge, not the jury, will decide the case. Courts are divided on the question of whether, if settlement efforts fail in such a case, the judge must recuse from further participation in the matter. One state supreme court has held that the judge must recuse if a party requests it.[1] Another state supreme court has held that recusal is automatic by virtue of participation in settlement negotiations.[2] Courts in four other states have not required automatic disqualification, leaving the decision to the individual judge to determine whether continued involvement would lead to an

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[1] *Schellin v. N. Chinook Irrigation Ass'n,* 848 P.2d 1043, 1045 (Mont. 1993) (holding that the judge should have recused himself after participating in settlement negotiations between the parties); *Shields v. Thunem,* 716 P.2d 217, 219 (Mont. 1986) ("[W]here a judge is to be the trier of fact, and he participates in pre-trial settlement negotiations which subsequently fail, he should, upon request, disqualify himself from sitting as the trial judge.").

[2] *Timm v. Timm,* 487 A.2d 191, 204 (Conn. 1985) ("When a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety and to avoid subtle suspicions of prejudice or bias.").

appearance of impropriety and bias.[3] The Alaska Supreme Court has not addressed this issue.

(4) Although the judge may explain the law to the parties, the judge should not state how he or she intends to rule on disputed legal issues.

(5) Particular care should be taken in cases involving unrepresented parties. The judge should consider the possibility of recording all discussion in order to resolve any later dispute about statements made during the course of negotiations.

(6) Many of the above concerns do not arise where judges share settlement conference work in a way that reduces or eliminates the need for assigned judges to conduct their own settlement conferences.

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[3] *Sinahopoulos v. Villa,* 224 A.2d 140, 142 (N.J. Super. 1966) ("[T]he mere fact that the judge participated in a pretrial conference with a view to possible settlement of the case does not and should not indicate prejudgment.").

In re Estate of Sharpley, 653 N.W.2d 124, 129 (Wisc. 2002) (disqualification required "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner…The determination of a basis for disqualification here is subjective.").

Enterprise Leasing Company v. Jones, 789 So.2d 964, 968 (Fla. 2001) ("A judge is presumed by law to be unbiased and unprejudiced. A mere allegation of bias without a specific factual showing in support is insufficient to require disqualification.").

Home Depot, U.S.A., Inc. v. Saul Subsidiary I Ltd., 159 S.W.3d 339, 341 (Ky. App. 2004) (holding that a trial judge is not required to recuse after conducting mediation).

Advisory Opinion #2007-01

(adopted January 22, 2007)

Question: *May a judge serve as a National Guard judge advocate?*

Opinion: A judge may serve as a National Guard judge advocate if the judge's role is limited to performing only those duties that do not resemble services provided by civilian attorneys for members of the military[4]. Alaska state court judges must comply with the Alaska Code of Judicial Conduct. Canon 4G of the Alaska Code prohibits judges from practicing law except for limited activity for the judge's family. Canon 2A requires judges to "avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary." And Canon 4 requires a judge to conduct all of the judge's extra-judicial activities in a way that will "minimize the risk of conflict with judicial obligations."

These Code provisions must be read together to guide a judge in determining whether duties required by service as a National Guard judge advocate would be permitted. The purpose behind the prohibition of practicing law is to ensure that the judge is not viewed in any way as an advocate or a less than impartial arbiter of the law. Judges are prohibited from assuming any role that could lead to the appearance that the judge is an advocate. Consequently, judges may not take any actions while serving as a National Guard judge advocate that would give the impression that the judge is an advocate on matters that concern the civilian justice system. Examples of impermissible activities include rendering legal advice and opinions on: environmental law, fiscal law, tort claims, administrative law matters, and discipline. Other impermissible activities include: serving as a recorder, legal advisor or military defense counsel or assisting military personnel in drafting personal legal documents such as wills or powers of attorney or advising in civil law areas such as consumer affairs and domestic relations. All of these roles are similar in nature to what civilian attorneys perform and could lead to an appearance of improper advocacy on the part of the judge.[5]

However, there are duties of the judge advocate that do not impact the judge's impartiality or appearance of impartiality. Those activities include: conducting training in the law of armed conflict, operations law, and international law. Judges are permitted to teach and training in these areas is compatible with the role of the judge.

So too, there is no apparent conflict or appearance problem for a judge who renders

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[4] This opinion is limited to the permissible activities of National Guard judge advocates performing duties while in state military status. The Alaska Commission on Judicial Conduct is not expressing an opinion on permissible activities of National Guard judge advocates who have been activated and are therefore subject to federal military orders.

[5] Our position is consistent with the views expressed by the Washington Ethics Advisory Committee in its opinion 04-8 and the Virginia Judicial Ethics Advisory Committee Opinion 03-4 that cautions "that certain types of legal assistance resemble the services provided by civilian attorneys. Performing those types of duties may give the impression that the judge is practicing law and could be a violation of Canon 2."

legal advice in a military capacity on a purely military issue. These purely military issues are issues without a civil law counterpart such as the law of armed conflict or operations law. Once again, the role here is limited to one of legal advice and should not involve the judge in appearing before a tribunal.

Advisory Opinion #2009-01

(adopted November 12, 2009)

Judge's post-verdict communication with discharged jurors

Question: *Do ethical considerations restrict a judge's communications with recently discharged jurors following the conclusion of a jury trial?*

Opinion: Yes.

Introduction

Once a civil or criminal jury trial is concluded, jurors commonly express a desire to speak with the judge. Frequently, discharged jurors will have natural curiosity and questions about the case in which they have just participated. Former jurors' questions and comments may range from uncontroversial, administrative matters (parking, jury accommodations, suggestions for improvement of the jury experience), to substantive matters such as trial procedure, evidentiary rulings, possible criminal sentence, and the possibility of an appeal.

Once discharged, the procedural and ethical restrictions, which previously barred contact with empanelled jurors, cease to apply.[6] Once discharged, a former juror reverts to the role of private citizen, with no further obligations to the judicial system.

A recently discharged juror is in no different role than any other citizen except for the fact that the recently discharged juror often will have an enhanced and natural curiosity about the case, courtroom procedure, subsequent legal activity, and the effect of the verdict the jury has just rendered.

The trial judge often will have a correspondingly understandable desire to be responsive and accessible to the discharged juror. To the extent that dialog contributes to the discharged juror's understanding and respect for the legal system, this communication can be positive.

However, the judge's communications are constrained by the Rules of Professional Conduct[7] and the Code of Judicial Conduct. The scope of those restrictions depends on whether the verdict and discharge of the jury represents the final litigation event (as in the

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[6] This opinion deals only with a judge's post-verdict contact with recently discharged jurors. The subject of mid-trial or mid-deliberation contact with empanelled jurors is beyond the scope of this opinion.

[7] Alaska R. Prof. Conduct Rule 3.5(c) (Impartiality and Decorum of Tribunal) provides that a lawyer may communicate with a former juror unless law or court order specifically prohibits the communication, the juror expresses unwillingness to communicate, the communication involves misrepresentation, duress, coercion or harassment, or the communication is calculated to improperly influence future jury service. Alaska R. Prof. Conduct 3.5(c), enacted by SCO 1680, effective April 15, 2009.

case of a verdict of (not guilty) in a criminal case) or whether subsequent post-verdict proceedings (such as criminal sentencing or post-trial motions in a civil trial) remain before the judge.

Ethical constraints governing all contacts with discharged jurors regardless of whether matters remain pending before the judge.

Two ethical provisions govern a judge's contact with all discharged jurors. Canon 2A requires all judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and avoids the appearance of impropriety. Canon 3B(10) prohibits judges from commending or complimenting jurors on their verdict, but permits an expression of appreciation for their service to the community.

Therefore, when communicating with a discharged juror in any case regardless of its procedural posture a judge may:

- express appreciation for the discharged jurors' service;

- inform the jurors that the attorneys may wish to speak with them, that there is nothing improper with this request, that the choice to speak (or decline to speak) with the attorneys is theirs, and that legal professional ethical rules prohibit attorneys from harassing or engaging in a non-consensual contact with a discharged juror; and may

- request that the jurors report any harassment or non-consensual communication stemming from the jurors' service in the case to the judge or staff.

A judge may not:

- volunteer information about inadmissible, suppressed, confidential or non-public information that could reasonably have the effect of bolstering or undermining the former juror's confidence in the "correctness" of the verdict, but may respond to a juror's question about any public matter including suppressed evidence where the answer is an explanation of the evidence rules and court process;

- offer excessively complimentary or derogatory critique regarding the performance or credibility of the attorneys or witnesses; or

- offer comment regarding the judge's view of the "correctness" of the verdict.

Judges must be mindful that a judge's communication is restricted to a greater degree than that of the attorneys, the trial participants or private citizens. Other trial participants may have a constitutionally protected right to communicate with the discharged juror about the case. Unlike some other jurisdictions, no Alaska statute or court

rule presumptively bars post-verdict communication with a discharged juror.[8]

The attorneys' conduct is governed only by the professional conduct rules, not the Judicial Canons. A private citizens' communication with discharged jurors is unregulated by state statute or court rule. In contrast, the judge's comments are restricted by the Canons referred to above. This distinction serves an important policy goal: the maintenance of an impartial and independent judiciary in appearance and in fact. Therefore, the judge's communication is held to a higher standard than the attorneys' or other private citizens' communications.

Ethical constraints governing contacts with discharged jurors where post-verdict matters are still pending before the judge, where post-trial motions may occur or there is the possibility of a retrial.

Where there is no verdict, i.e. a jury is unable to come to a decision resulting in a mistrial, judges must exercise extreme caution. Juror deliberations should be afforded the highest protection. While individual jurors cannot be restrained in the scope of their speech once discharged, a judge's interaction with a hung jury as a group may cause extreme discomfort among the jurors in the minority view as to a verdict. Further, if the prosecution decides to retry the matter, the judge's impartiality could be questioned for similar reasons to those that do not allow judges to participate in criminal plea bargains. Consequently, judges should avoid direct communication that goes beyond appreciation for service with a discharged jury that has not reached a verdict.

Commonly, after a guilty verdict is received and the jury discharged, substantive matters still remain before the trial judge. In a criminal case, sentencing is often scheduled several weeks after the return of verdict. In a civil case, post-verdict motions such as motions for new trial are common. It is in this circumstance where a judge must be cautious. Where post-verdict matters are foreseeable or pending before the judge, the judge must take affirmative steps to avoid even the appearance of communications that give the impression of pre-judging upcoming issues or that jurors can influence those decisions.

Where matters are still before the judge, additional provisions of the Judicial Canons apply. With several exceptions not applicable here, Canon 3B(7) prohibits judges from initiating or permitting ex parte communications regarding a pending matter. Canon 3B(9) prohibits judges from making a public comment that may impair the fairness of a pending proceeding.

Where a judge initiates or participates in a dialog with recently discharged jurors, extra care must be taken to insure that the conversation does not stray toward the discharged jurors' favorable or unfavorable opinion regarding a trial participant, witness or the factual merits of the case. In a criminal case, where the jury has found the defendant guilty, but sentencing has not yet occurred, it is foreseeable that the jurors will ask the judge about the

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[8] Alaska R. Evid. 606(b) provides that, where the validity of an indictment or verdict is at issue, a former juror may not testify about jury deliberations or deliberation processes. But, this is an evidence rule that governs admissibility of testimony. This rule does not categorically bar the discharged juror from speaking about the case, or bar any person from seeking to interview the discharged juror.

probable sentence, and express their opinion one way or the other. In a civil case, jurors may ask questions about the financial effect of their verdict upon the litigants, the collateral effect of the verdict, or insurance consequences.

The judge must be particularly on guard because a discharged juror's opinion about the merits of the just-completed trial could convey the impression that the judge will resolve future issues in a certain way. So too, discussing the probative force of the evidence, the performance of the advocates, or the relative culpability of the criminal defendant, could leave an impression of the likely future decisions by the trial judge. If the judge has post-trial matters still pending, the litigants may legitimately view the communication as appearing to influence, however subtly, the judge's ultimate ruling on post-trial matters. Even worse, should the judge express agreement or disagreement with a juror's opinion, the appearance of pre-judgment of any still-pending issue is obvious. A judge in this position runs the risk of inviting a motion for disqualification based upon the communication. A judge may advise the jury of the date for sentencing and the pre-sentence/sentencing process and advise the jury that they are free to attend the sentencing if they choose to do so.

Where matters remain pending, a trial judge must manage any jury conversation with care. While the judge may explain events that occurred on the public record, the judge must not allow or participate in discussion of the merits of the case and must politely decline to answer questions about probable post-verdict rulings.

Before the judge initiates a conversation with the discharged jurors, the judge must inform the litigants of the judge's intent to speak with them.[9] The judge should not engage in a lengthy dialog, as the chances of a questioned communication increase with the length of time the discharged juror spends speaking with the judge. Finally, if the judge is inadvertently exposed to an opinion about the merits of the case, or receives a report of substantive juror misconduct, the judge should immediately inform the parties orally on the record or in writing.

As stated above, mere statements of appreciation for the jurors' service raise no concern. Judges may also distribute various court approve d surveys to jurors that assist in addressing court administration concerns, and may explain court procedures or answer questions concerning matters that occurred in open court.

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[9] A private, off-record, meeting between the judge and the discharged jurors, outside the parties' presence, may generate questions about what was said; judges. Judges should determine the best method to address any discomfort by the parties and lawyers, such as allowing litigants the opportunity to be present. or, perhaps most appropriately, having that conversation on the record.

Advisory Opinion #2014-01

(adopted August 22, 2014)

Question: *When conducting independent research using the Internet, what research can be considered "judicial notice" and when does the research become improper factual investigation?*

Opinion: Judges understand the requirement of Canon 3 B (12): "Without prior notice to the parties and an opportunity to respond, a judge shall not engage in independent ex parte investigation of the facts of a case." However, the commentary to that Code provision acknowledges that this provision "does not prohibit a judge from exercising the judge's authority to independently call witnesses if the judge believes that these witnesses might shed light on the issues being litigated or to take judicial notice of certain facts. "

Evidence Rule 201 defines a judicially noticed fact as one **"**not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The evidence rule, when applied to documents or sources of information accessed through the Internet, on its face, can raise question as to what is "generally known within this state" or the nature of "sources whose accuracy cannot reasonably be questioned." However, common sense and procedural safeguards can guide use of this research.

The rules that apply to facts obtained from the Internet are no different from the rules that apply to any other facts for which judicial notice might be taken. The problem that arises in this context is that facts are more readily accessed on the Internet, which can lead to a temptation to use the Internet when a judge otherwise would know better than to conduct the research. For example, while it is clear to judges that it is improper to drive to view a crime scene, it may appear less clear to bring up a view of the same scene on Google "street view" from the court computer on the bench. There are no unique rules for facts obtained through the ease of Internet accessibility. Judges should be diligent when using the Internet in court cases to ensure that the research is either purely legal research or judicial notice of public documents of which the judge may properly have taken judicial notice had those documents been obtained by the judge through more traditional means.

Where facts are available on the Internet that can aid in deciding a factual dispute relating to issues in a case before the judge, the best practice is for the judge to inform the parties of the information upon which the judge proposes to rely, as well as how and when that information was obtained, and to allow the parties an opportunity to respond. In addition, where a judge is clearly taking judicial notice, Evidence Rule 203 requires that the judge give proper notice and the opportunity for parties to object and be heard.

Because the difficult question arises in determining whether it is “factual” research, notice and a meaningful opportunity for parties to object remains a recommended safeguard.

Advisory Opinion #2014-02

(adopted September 15, 2014)

Question: *May judges make financial contributions to "Justice Not Politics", a non-profit 501(c) (4) organization that has as its mission to oppose efforts to alter the Alaska Constitution's Judiciary Article or similar organizations addressing judicial selection, retention and justice system issues?*

Opinion: Judges are not only permitted, but are encouraged to speak to the public about justice issues. Canon 4B states: "As 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…" The commentary to that section adds: "Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession."

At the same time, to ensure an apolitical judiciary in our state, the Code does not permit judges to contribute to political organizations. (Canon 5 A(1)(e))

Because judges in Alaska are generally prohibited from engaging in any political activity or to contribute to a political organization under Alaska Code of Judicial Conduct Canon 5(A)(1)(e) and yet judges are encouraged to speak on improvements in the law and the administration of justice, each provision must be considered. The Alaska Code of Judicial Conduct recognizes that potential conflict in its definition of "political organization:"

"Political organization" means a party, committee, association, club, foundation, fund, or any other organization, whether incorporated or not, whose primary purpose is to:

(i) influence the selection, nomination, election or appointment of any individual to public office or to office in a political party, or

(ii) influence the outcome of any recall effort or ballot proposition, or

(iii) further or defeat proposals to change the law *in matters other than the improvement of the law, the legal system, or the administration of justice*.

Because the mission of "Justice Not Politics" concerns improvement of the legal system or the administration of justice, judges may participate and contribute funds that go to its educational mission. However, because the organization may, in the future, be active in opposing a ballot proposition, any judicial contributions to the organization should not be used for those purposes. So too, judges may participate and contribute

funds for educational purposes to an organization that may seek changes to the current judicial system. Contributions by judges, regardless of the viewpoint, can be made to educate the public on the administration of justice issue but cannot be used to influence the outcome of any ballot proposition.

Advisory Opinion #2018-01

(adopted October 9, 2018)

Question: *Does a judge's personal use of marijuana violate the Alaska Code of Judicial Conduct?*

Opinion: Judges are required to "comply with the law" (Canon 2A, Alaska Code of Judicial Conduct). While personal marijuana use is lawful under Alaska state law, it remains illegal under United States federal law. The specific language of Canon 2A is:

In all activities, a judge shall exhibit respect for the rule of law, comply with the law, and avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity ad impartiality of the judiciary.

The Commentary to this provision emphasizes that: "Actual improprieties under this standard include violations of law, court rules, and other specific provisions of this Code."

Colorado is the only other state having legalized personal use of marijuana that has issued an opinion addressing the specific question of whether a judge's personal marijuana use violates their Code of Judicial Conduct. Relying on their Code provision 1.1 that provides not only that a judge "shall comply with the law" but also a specific provision addressing conduct by a judge that violates a criminal law, that opinion concludes that Colorado judges violate their Code by using marijuana as the use of marijuana is a federal crime. Colorado's Code has an unusual provision excluding minor violations of criminal law from their ethical requirements. Rule 1.1 (B) of the Colorado Code provides: "Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law." Consequently, much of the Colorado opinion surrounds whether marijuana use is a "minor violation" of federal criminal law, before concluding that it is not a minor offense within the meaning of their Code provision.

In Alaska we not only look to our Code for a minimal standard for discipline but also as a guide to ethical conduct. Our ethics advisory opinions further that purpose by applying provisions of the Code to specific fact situations such as the one proposed here. There are two aspects of Canon 2A that are implicated here: (1) a judge must respect and follow the law and (2) a judge must avoid the appearance of impropriety. The requirement that a judge shall comply with the law includes federal law as well as state and local laws.

Alaska law surrounding marijuana use is unique among the states. In a 1975

Supreme Court opinion, *Ravin v. State*[10], the right to privacy in the Constitution of the State of Alaska was held to protect the right to personal use of marijuana in the home. While recognizing the special privacy that the home provides, the court did recognize that there are limitations to that right of privacy in the home:

> No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.[11]

Judge's personal rights in some areas are limited by the Code of Conduct. Judges are limited in speech, financial endeavors, and political activity to preserve their impartiality and ability to hear cases. Our Code of Conduct provides limitations on judges that are reasonable and necessary to provide confidence in the integrity and impartiality of our courts.

As long as federal law criminalizes marijuana use, Alaska judges who choose to use marijuana will violate the Alaska Code of Judicial Conduct. Marijuana use violates federal law and its use by a judge would reflect a lack of respect for the law by showing a selective attitude towards the law suggesting that some are appropriate to follow but others are not. Public use of marijuana by a judge would further create an appearance of impropriety. This restriction on judges, even in their personal use in the home, is reasonable and necessary to preserve public confidence in the judiciary.[12]

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[10] 537 P2d 494 (Alaska 1975)

[11] Id. At 504

[12] Indeed, at least in an earlier time, a judge's puff on a joint passed around at a Rolling Stones concert attracted considerable public and media attention. *In re Gilbert*, 668 N.W. 2d 892 (Michigan 2003) One never knows when an iPhone is out and ready to take a picture of a momentary indiscretion.

Advisory Opinion #2019-01

(adopted February 7, 2019)

Question: *When a former public defender becomes a judge what disqualification is mandated under Alaska law and the Code of Judicial Conduct?*

Opinion: Conflicts for judges in Alaska are governed by both statute and the Alaska Code of Judicial Conduct. The statute, AS 22.20.020, establishes various grounds for disqualification of a judge. In establishing grounds for disqualification, the statute sets out timeframes affecting new judges to provide distance for the judge from the judge's prior active practice of law. While many of the grounds set out for disqualification do not distinguish between public agencies and private law firms, there are two provisions that do.

In subsection (a)(5), the statute states that a judge may not act in a matter in which "a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter." This statutory provision requires prior public defenders to not hear matters involving their former clients for 2 years after becoming a judge unless the disqualification is waived. Similarly judges who were in private practice have a conflict with previous clients who may appear in front of them in new matters up to 2 years later. Former prosecutors or other government lawyers who represented the state or a municipality do not need to be concerned if those entities come before them in matters unless there is another basis for disqualification.

The rationale for this distinction is clear. It would be impractical for prior government lawyers to sit on entire types of cases if excluded from the entire government they represented. So too, we can assume that it is unlikely that representing an abstract entity, like a state or municipality creates the allegiances and closeness that representing an individual party does. While a former public defender may not easily recall all of the clients that they represented in the two years before becoming a judge, it is not an undue burden on that new judge to give notice and recuse.

Subsection (6) is the other parallel provision in the statute that distinguishes government parties and applies when the judge represented someone against a party currently before the judge. This section provides "the judicial officer has represented a person as attorney for the person against a party except the state or a municipality of the state, in a matter within two years preceding the assignment as judicial officer to the matter." Because the public defender represented individuals against the state, this provision appears to be designed to recognize that public entities, again, do not create the same conflicts as private clients.

Another provision of the statute proves more problematic. Subsection (a)(8) of the statute prohibits a judge from acting in a matter in which "the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter." The statute does not explicitly define "law firm" as a private entity, and in fact, under ethical rules governing the conduct of lawyers, government agencies are considered law firms for purposes of determining conflicts. By reading this section in conjunction with subsection (5) it can be inferred that this provision was not intended to extend to lawyers who previously represented the state or a municipality of the state. The question remains, however, whether the public defender agency (the state's largest law firm) was intended to be covered by this provision. If so, any former public defender could not sit on any matter where a public defender appears for two years, regardless of who the client is.

In the Commission's opinion, the public defender agency should not be considered a "law firm" for purposes of judicial disqualification. There are many reasons why a former private lawyer should not consider matters involving that lawyer's previous firm for the first two years. Pending matters before the firm may remain unsettled for a time, with resulting remunerations due to the new judge. So too, a private law firm is a business enterprise where the members not only share legal expertise, but close financial relationships. None of those interests are present in the public defender agency. Public defenders are salaried state employees in the same way their counterparts in the prosecutor's office are. Their relationships with their colleagues are no different from the relationships that colleagues who represent government parties may have.

Because there is no public policy or ethics concern that would reasonable require the public defender agency to be treated as a law firm under the statute and interpreting the statute otherwise creates a formidable barrier to public defenders who may be selected to serve as a judge, the Commission does not believe that the statute should be interpreted to include the public defender agency as a law firm for disqualification purposes.

Advisory Opinion #2020-01

(adopted August 28, 2020)

Question: *When is it appropriate for judges to use official court letterhead for correspondence?*

Opinion: Generally, judicial court letterhead may be used for any correspondence where the judge is appropriately exercising the judicial office. Consequently, court letterhead may be used for reference letters where the judge is comfortable providing a reference and has knowledge relating to the reference as a judge. For example, it is appropriate to use court letterhead for reference letters for the judge's law clerk or other court employees seeking future employment opportunities. So too, a judge may use official letterhead for reference letters for lawyers who have appeared before the judge, whether that lawyer is seeking new employment or a judicial office.

Official letterhead may not be used for any private purpose unrelated to the judicial office or for any purpose otherwise prohibited by the Alaska Code of Judicial Conduct. Our previous Advisory Opinion #97-1 addressed the special issues surrounding letters from judges to the Alaska Judicial Council. While not specifically addressing whether those letters may be written on official letterhead, the opinion assumes that those communications would. In that opinion, we advised that unsolicited letters to the Judicial Council concerning the qualities of an applicant for a judgeship are appropriate but distinguished those letters from letters that would be sent to the Governor to influence the Governor's final selection (if unsolicited are improper).

While use of judicial letterhead for a personal purpose unrelated to the judge's official role is clearly improper, there are many activities related to the judicial role that are not clear. For example, whether a judge can write to a funding source for a program that the court has found useful may be an appropriate communication and one that can be authored on official letterhead. Questions that need to be addressed include: (1) Is the recipient a neutral entity unlikely to come before the court? And, (2) Are there competing entities for the funds that are equally deserving of support by the court? Because judges may not solicit funds, the content of any letter of support should focus solely on the merits of the program and the judge's experience with the service provider.

Finally, because official letterhead is an assertion of the judicial office, the judge should know to whom the letter will be addressed. To avoid embarrassment or unanticipated conflicts, a judge should not author a letter on official letterhead "to whom it may concern."

This opinion differs from the Commentary to Rule 1.3 of the ABA Model Code of

Judicial Conduct[13]. It is the Commission's view that there is no appropriate "personal" use of official letterhead. While some uses are not directly related to the adjudicative functions of the judge, the content must be related to the judge's official role. A judge's official role, permitting use of official letterhead, includes various educational outreach and civic leadership activities under Canon 4 of the Alaska Code of Judicial Conduct. Further, in these "off the bench" judicial activities, judges must be cautious to maintain the dignity and impartiality of judicial office.

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13 American Bar Association Model Code of Judicial Conduct
Comment on Rule 1.3

[1] It is improper for a judge to use or attempt to use 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. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.
[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.