

MEMORANDUM

TO: All CJA Members

FROM: Nicole Virga Bautista
Executive Director & CEO

DATE: June 2022

SUBJECT: **Formal Ethics Opinion No. 79**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinion:

Opinion No. 79

ETHICAL CONSIDERATIONS REGARDING MEMBERSHIP IN NATIONAL ORGANIZATIONS THAT PROHIBIT CONFERENCES AND ORGANIZATION-SPONSORED ACTIVITIES IN STATES THAT HAVE ENACTED DISCRIMINATORY LAWS AGAINST PERSONS BASED ON SEXUAL ORIENTATION, GENDER IDENTITY OR GENDER EXPRESSION

Judges may direct questions on the Code of Judicial Ethics to the current 2021/22 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance. All opinions of the committee are advisory only.

Special thanks to Ethics Committee Members Judges Terri Mockler, Contra Costa Superior Court, and Elia Weinbach, Los Angeles Superior Court (retired) for preparing this Opinion.

NVB:jmg

CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 79

ETHICAL CONSIDERATIONS REGARDING MEMBERSHIP IN NATIONAL ORGANIZATIONS THAT PROHIBIT CONFERENCES AND ORGANIZATION-SPONSORED ACTIVITIES IN STATES THAT HAVE ENACTED DISCRIMINATORY LAWS AGAINST PERSONS BASED ON SEXUAL ORIENTATION, GENDER IDENTITY OR GENDER EXPRESSION

QUESTIONS PRESENTED:

- 1) Is it ethically permissible for California judicial officers to be members of judicial organizations that resolve to prohibit conferences and other activities in states that discriminate against members of the LGBTQ+ community?
- 2) Is it ethically permissible for California judicial officers to remain members of national organizations that do not discriminate against members of the LGBTQ community but that conduct conferences in states that have enacted laws that do so discriminate?

ANSWER: The short answer is “Yes” to both questions.

II. Applicable Authority

2C Membership in Organizations A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, or sexual orientation. This canon does not apply to membership in a religious organization. Commentary: *In addition, it would be a violation of Canon 2 and Canon 2A for a judge to arrange a meeting at a club that the judge knows practices such invidious discrimination or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A.*

3B(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeco-

conomic status, or political affiliation, or (b) sexual harassment.

3B(6) A judge shall require lawyers in proceedings before the judge to refrain from (a) manifesting, by words or conduct, bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment against parties, witnesses, counsel, or others. This canon does not preclude legitimate advocacy when race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, political affiliation, or other similar factors are issues in the proceeding.

3C(1) Administrative Responsibilities (1) A judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary. A judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.

3C(3) A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties.

4A Extrajudicial Activities in General A judge shall conduct all of the judge's extrajudicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially, (2) demean the judicial office, (3) interfere with the proper performance of judicial duties, or (4) lead to frequent disqualification of the judge.

5D Measures to Improve the Law A judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code.

III. Other Authorities

2A Promoting Public Confidence A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make state-

ments, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

3B(9) A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of staff and court personnel subject to the judge's direction and control. This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. In connection with a judicial election or recall campaign, this canon does not prohibit any judge from making a public comment about a pending proceeding, provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign. Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

4B Quasi-Judicial and Avocational Activities A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code.

4C(3) Subject to the following limitations and the other requirements of this code, (a) a judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of article VI, section 17 of the California Constitution; (b) a judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit.

5 A Judge or Candidate for Judicial Office Shall not Engage in Political or Campaign Activity That is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence, impartiality, and integrity shall dictate the conduct of judges and candidates for judicial office. Judges and candidates for judicial office shall comply with all applicable election, election campaign,

and election campaign fundraising laws and regulations.

CJA Formal Opinion 75

CJEO Oral Advice Summary 2015-014; CJEO Oral Advice Summary 2015-013

Standards of Judicial Administration, Rule 2.150

Rothman, California Judicial Conduct Handbook, 4th Edition, section 10:34, 10:38

Code section Civil Procedure section 231.7 (no attorneys may exercise peremptory challenges to jurors based on race, ethnicity, gender, nationality, sexual orientation, gender identity etc.)

IV. BACKGROUND

In 2016, Government Code section 11139.8 was enacted which restricted state-funded or state-sponsored travel to states with discriminatory laws against individuals based on sexual orientation, gender identity, or gender expression. Government Code section 11139.8 subdivision (b) states this law applies to a state agency, department, board, authority, or commission, including an agency, department, board, authority, or commission of the University of California, the Board of Regents of the University of California, or the California State University, and the Legislature. Subdivision (c) provides exceptions for a number of specified purposes, including travel that is required for the enforcement of California law and for litigation.¹

In 2017, the Judicial Council adopted a policy of voluntary compliance with Government Code section 11139.8. The Judicial Council is the policymaking body of the California courts, and is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice. In adopting the policy codified in Government Code section 11139.8, the Judicial Council made clear that California courts are committed to conducting business in a manner that does not discriminate against people based on sexual orientation, gender identity, or gender expression.

It appears there was very little discussion about Government Code section 11139.8 until 2021 when California members of the National Association of Women Judges (NAWJ) were faced with the dilemma of how, or even whether, to attend the annual convention of NAWJ scheduled to be held in 2021 in Tennessee, one of the states that has enacted laws discriminating on the basis of sexual orientation, gender identity, or gender expression. A group of NAWJ members drafted a proposal to prohibit NAWJ conferences and organization-sponsored activities in any of the states that discriminate against members of the LGBTQ+ community. The proposal generated a robust debate within the organization, resulted in at least two states' ethical committees writing formal opinions on the issues, and created a huge rift within the organization before eventually getting adopted by the membership.

Judicial officers are required to follow the law. Judicial officers in California must follow the Canons of Judicial Ethics as well as state and federal laws and regulations. Canons 3B(5) and 3B(6), prohibit judicial officers and lawyers from discriminating against or manifesting bias against protected classes of people including members of the LGBTQ+ community. Canon 4C(3) requires judicial officers to ensure that no person working for the courts discriminates against or manifests bias against persons in the enumerated protected classes. Rule 2.150 of the California Standards of Judicial Administration requires every court in the state to establish bias committees to educate judicial officers on recognizing and refraining from conduct in the courtroom which manifests a bias against any member of a designated protected class, which includes members of the LGBTQ+ community.

More recently, the California Code of Civil Procedure has been amended to prohibit lawyers from exercising peremptory challenges on the basis of race, ethnicity, sexual orientation, gender identity, etc. (Code of Civil Procedure 231.7). Given all of these ethical and legal proscriptions against judicial bias on the basis of someone's sexual orientation, gender identity, or gender expression, it is not surprising that California judicial officers fought hard to get a national judicial organization such as the NAWJ to stand up and say it won't take its business to states that discriminate on the basis of orientation or gender identity. Somewhat surprisingly, in light of national efforts to root out bias in judicial decision-making, one state's ethical committee rendered an opinion that it might be "unethical" for a judge to be a member of a national organization that took stances on "political controversies" such as rights for the LGBTQ+ community (see Florida Advisory Opinion 2021-11).

Indeed, the national trend addressing judicial biases has moved beyond sexual orientation and now includes biases based on gender identity and gender expression. Gender Identity constitutes a segment of the mandatory ethics training required for judicial officers in California (that is, required if judicial officers desire the protection of competent legal representation if faced with a referral to the CJP). California judges also must take courses on the elimination of bias in the courtroom every three years. For decades judicial officers could not actively participate with their children in Boy Scouts' activities because of that organization's discrimination based on sexual orientation. Eventually, the Boy Scout's changed its policies on a national level and judges can now be members and participate in Boy Scout-sponsored programs.

The CJA Ethics Committee has previously opined that judges can ethically attend "Women's Marches" that supported the rights of women, the LGBTQ+ community, people of color, the disabled, and other groups that have experienced institutionalized discrimination. The Committee has also opined that a judge can write an article entitled "An LGBTQ Perspective on the Crisis in the Justice System" for publication in a legal journal. These are all examples of how

California judicial officers must respect the rights of all who come before them which include members of the LGBTQ community.

V. ANALYSIS OF NAWJ's RESOLUTION

At its annual conference in October 2021, the NAWJ membership adopted a resolution to not sponsor or hold annual or mid-year conferences in states that discriminate on the basis of sexual orientation, gender identity, or gender expression. Based on the adoption of the resolution, the question exists is it ethically permissible for California judges to remain members of a national organization that has taken such a position and the answer is—YES. The full resolution is cited below:

“RESOLVED, That the National Association of Women Judges will not sponsor or hold any mid-year or annual meetings or conferences in states that have voided or repealed state or local protections against discrimination on the basis of sexual orientation, gender identity or gender expression, or have enacted laws that authorize or mandate discrimination on the basis of sexual orientation, gender identity or gender expression.

There is a list of 18 states that currently meet those criteria attached to the resolution, and the resolution directs that the list “be updated as necessary” and “conform to the lists maintained by those states which track the enactment of such legislation, including, but not limited to, the State of California Attorney General’s office.”

In reaching this conclusion, the Committee has considered the advisory opinions of New York and Florida and finds the Florida Supreme Court’s Advisory Opinion (2021-11) declaring that continued membership in a national organization which takes positions on “current political controversies” such as prohibiting discrimination on the basis of sexual orientation, gender identity, or gender expression may be unethical is inconsistent with California law and California Canons of Judicial Ethics.

The Florida advisory opinion refers to three of that state’s canons of judicial ethics in support of its conclusion that NAWJ’s resolution may require Florida judicial members to reconsider continued involvement in NAWJ since NAWJ has taken a “public” position on a “current political issue”. These canons are: Canon 5A (“A judge shall conduct all of the judge’s extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) undermine the judge’s independence, integrity, or impartiality”); Canon 4A (“A judge shall conduct all of the judge’s quasi-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) undermine the judge’s independence, integrity, or impartiality”), and Canon 2A (“A judge . . . shall act at all times in

a manner that promotes public confidence in the integrity and impartiality of the judiciary.”). The cited Florida canons of judicial ethics mirror California’s Canons 2A, 4A, 4B but does not mention any ethical requirements that judges have with respect to bias based on class characteristics such as found in California Canons 3B and 3C.

This omission in the opinion is notable considering Florida’s Canon 3B(5)&(6) is quite similar to California’s Canon 3B and prohibits judicial officers in Florida from manifesting bias based on certain class characteristics.² The Florida canon includes bias based on sexual orientation but is silent as to bias based on gender, gender identity, or gender expression.

The Florida Advisory Opinion characterizes the NAWJ resolution as a “political statement on a current political issue” (page 2 of the opinion). In framing the issue in that way, the opinion fails to address the larger issues of the judicial branch’s role in diversifying the bench and in serving as a role model for the inclusion of a myriad of viewpoints. The opinion never mentions that the resolution, on its face, relates to the law, legal system, and the administration of justice and as such, is a proper subject for judicial involvement. Moreover, in advising Florida judicial members of NAWJ that they may now have to reconsider membership in an organization that has taken a “political stance” on a current political issue, the opinion seems at odds with its own canons of judicial ethics which prohibit discrimination on the basis of sex and sexual orientation. Florida Advisory Opinion 2021-11 fails to address the fact that the NAWJ resolution improves the law, the legal system, and the administration of justice by taking a stand against bias and discrimination based on sexual orientation, gender identity, and gender expression.

In contrast, New York’s Advisory Opinion 21-81 frames the issue as a matter relating to the improvement of the law, the legal system, and the administration of justices as the resolution attempts to eliminate bias based on sexual orientation, gender identity, or gender expression which is mandated for judicial officers in New York under that states canons of judicial ethics. New York’s opinion concludes that it is permissible for a New York judicial officer who is a member of the national organization in question to both vote on the resolution and continue as a member if it passes since the resolution is intended to improve the law, the legal system, and the administration of justice and does not cast any doubt on a voting member’s ability to perform judicial duties impartially.

The controversy in the ranks of the National Association of Women Judges raises another concern for California judges. If the resolution had not passed, could California judges remain members of an organization that held conferences in states that discriminated on the basis of sexual orientation, gender identity, or gender expression? The likely answer is yes, since the organization itself is not involved in invidious discrimination on the basis of sexual orienta-

tion, gender identity, or gender expression.

This position is consistent with prior Ethics Committee advice. The Committee has opined that judges who had children involved in the Boys Scouts or the Eagle Scouts could participate in scout activities, and even serve on a local board of directors, so long as the particular council or chapter involved did not discriminate on the basis of sexual orientation. (Jan. 2018 Update, V.A.7; Jan.2017 Update, IV.A.1) (See also CJEO Oral Advice Summaries 2015-013 and 2015-014.) California judges may remain members of the American Bar Association as long as judicial members do not engage in any political activity unrelated to the law, the legal system, or the administration of justice. (Canon 5D). Judges may remain members of a national judicial organization even though the organization condemned the killing of George Floyd in such strongly worded language that the condemnation could be interpreted as exhibiting bias against law enforcement.(Canon 2C and commentary; Canon 4C(3)). Similarly, judges can maintain membership in national organizations that take positions on political issues but cannot serve as a board member of such an organization if as a board member, the judge would have to sign statements that constituted impermissible political activity.(Canon 5). Moreover, many national organizations, such as NAWJ, currently have LGBTQ subcommittees further demonstrating that the organizations themselves do not discriminate on the basis of sexual orientation, gender identity, or gender expression.

CONCLUSION

Judicial officers have a duty and an obligation to maintain impartiality and to manifest a respect for all persons, regardless of race, ethnicity, national origin, religion, gender, sexual orientation, gender identity, gender expression, age, disability, sex, marital status, socioeconomic status, or political affiliation. Judicial officers are required to ensure that the people who work or appear in their courtrooms also manifest a respect for all. This duty is part of the judicial oath of office and was accepted without hesitation or mental reservation by every judicial officer. This duty applies both on and off the bench.

Furthermore, judicial officers have a duty to take corrective action when they become aware that other judicial officers or lawyers appearing in their courtrooms engage in speech or conduct that manifest discrimination against or intolerance of any persons coming before the court based on the aforementioned class characteristics. It behooves the judiciary to take a stand against such intolerance and the failure to do so impacts the duty to be impartial. A national organization that resolves to refrain from doing business in states that discriminate against individuals based on their sexual orientation, gender identity, or gender expression has taken a stand against the very types of discrimination that judges are obligated to prohibit in their courtrooms, in their chambers, and in their daily lives. It is a stand that is entirely consistent with

judicial ethical duties and it is stand that improves the law, the legal system, and the administration of justice.

For all of these reasons, yes, it is permissible to remain a member of a national organization that has resolved not to do business in states that discriminate against members of the LGBTQ community. It is also permissible to remain a member of a national organization that does not itself discriminate on the basis of sexual orientation, gender identity, or gender expression but does conduct some activities in states that do discriminate on those bases with the caveat that if California judges attend such activities, they must comply with Government Code section 11139.8.

Endnotes:

1 Government Code § 11139.8. (a) The Legislature finds and declares all of the following: (1) California is a leader in protecting civil rights and preventing discrimination. (2) California's robust nondiscrimination laws include protections on the basis of sexual orientation, gender identity, and gender expression, among other characteristics. (3) Religious freedom is a cornerstone of law and public policy in the United States, and the Legislature strongly supports and affirms this important freedom. (4) The exercise of religious freedom should not be a justification for discrimination. (5) California must take action to avoid supporting or financing discrimination against lesbian, gay, bisexual, and transgender people. (6) It is the policy of the State of California to promote fairness and equality and to combat discrimination. (b) A state agency, department, board, authority, or commission, including an agency, department, board, authority, or commission of the University of California, the Board of Regents of the University of California, or the California State University, and the Legislature shall not do either of the following: (1) Require any of its employees, officers, or members to travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression or has enacted a law that authorizes or requires discrimination against same sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to anti-discrimination laws in order to permit discrimination against same sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression. (2) Approve a request for state-funded or state-sponsored travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression. (c) Subdivision (b) shall not apply to travel that is required for any of the following purposes: (1) Enforcement of California law, including auditing and revenue collection. (2) Litigation. (3) To meet contractual obligations incurred before January 1, 2017. (4) To comply with requests by the federal government to appear before committees. (5) To participate in meetings or training required by a grant or required to maintain grant funding. (6) To complete job-required training necessary to maintain licensure or similar standards required for holding a position, in the event that comparable training cannot be obtained in California or a different state not affected by subdivision (b). (7) For the protection of public health, welfare, or safety, as determined by the affected agency, department, board, authority, or commission, or by the affected legislative office, as described in subdivision (b). (d) The prohibition on state-funded travel described in this section shall continue while any law

specified in subdivision (b) remains in effect. (e) (1) The Attorney General shall develop, maintain, and post on his or her Internet Web site a current list of states that, after June 26, 2015, have enacted a law that voids or repeals, or has the effect of voiding or repealing, an existing state or local protection against discrimination on the basis of sexual orientation, gender identity, or gender expression, or have enacted a law that authorizes or requires discrimination against same sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression. (2) It shall be the responsibility of an agency, department, board, authority, or commission described in subdivision (b) to consult the list on the Internet Web site of the Attorney General in order to comply with the travel and funding restrictions imposed by this section.

2 **Canon 3: A Judge Shall perform the duties of Judicial Office impartially and diligently**

B. Adjudicative Responsibilities

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

2021-22 JUDICIAL ETHICS COMMITTEE

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