

MEMORANDUM

TO: All CJA Members

FROM: Nicole Virga Bautista
Executive Director & CEO

DATE: June 2022

SUBJECT: **Formal Ethics Opinion No. 80**

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

Opinion No. 80

SERVING ON GOVERNMENTAL TASK FORCE: THE ETHICAL CONSIDERATIONS

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 Member Judge James Dabney, Los Angeles Superior Court, for preparing this Opinion.

NVB:jmg

CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 80

SERVING ON GOVERNMENTAL TASK FORCE: THE ETHICAL CONSIDERATIONS

I. Introduction

Judges are often asked to serve on “government task forces” created to deal with issues that confront their local communities. These task forces are created by various governmental entities and can vary widely in the scope of their goals, duties and responsibilities. This opinion will address the ethical parameters governing whether service by a judge on a government task force is proper or improper and set out the factors a judge should consider before accepting an appointment to such a task force.

II. Authority

Terminology: “Law, the legal system, or the administration of justice.” When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether the activity impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the judge to be disqualified (Canon 4A(4)). See Canons 4B (Commentary), 4C(1), 4C(1) (Commentary), 4C(2), 4C(2) (Commentary), 4C(3)(a), 4C(3)(b) (Commentary), 4C(3)(d)(ii), 4C(3)(d) (Commentary), 4D(6)(d), 4D(6)(e), 5A(1) (Commentary), 5D, and 5D (Commentary).

Canon 2A: “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.”

Canon 3A: “All of the judicial duties prescribed by law shall take precedence over all other activities of every judge....”

Canon 4A: “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.”

Canon 4B: “Quasi-Judicial and Avocational Activities”

“A judge may speak, write, lecture, teach, and participate in activities concern-

ing legal and nonlegal subject matters, subject to the requirements of this code.”

Canon 4B(commentary): *“As a judicial officer and person specially learned in the law,* a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice,* including revision of substantive and procedural law* and improvement of criminal and juvenile justice. To the extent that time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law.”*

Canon 4C(2): “A judge shall not accept appointment to 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(2)(commentary): *“Canon 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice* as authorized by Canon 4C(3). The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial. Judges shall not accept governmental appointments that are likely to interfere with the effectiveness and independence* of the judiciary, or that constitute a public office within the meaning of article VI, section 17 of the California Constitution.”*

Canon 4C(3)(a): “[A] judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to 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.

Canon 5D: “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.”

Canon 6B: “A retired judge who has filed an application to serve on assignment, meets the eligibility requirements set by the Chief Justice for service, and has received an acknowledgment of participation in the Temporary Assigned Judges Program shall comply with all provisions of this code, except for...4C(2)—Appointment to governmental positions.”

California Judicial Conduct Handbook (4th ED.) §10.10

III. Discussion

As important members of the legal community, judges are natural candidates to serve on governmental task forces that involve issues that either are affected

by their court, or which effect their court. As courts deal with almost every facet of life, the range of issues that judges have been asked to address through participation in a governmental task force have varied greatly, as have the composition and scope of mission of the task forces themselves. All three of those facets, the issue being addressed, the composition of the task force and the scope of the task force's mission, come into play when determining whether it would be proper for a judge to participate.

To begin with, Canon 4C(2) limits judges' participation in governmental task forces to those dealing with issues related to "the improvement of the law, the legal system, or the administration of justice." The difficulty comes with defining what issues are related to the improvement of the law, the legal system or the administration of justice. Sadly, there is no precise definition provided in the Canons. The phrase is listed in the terminology section of the Canons, however, rather than define the term, the terminology section lists several other factors that one should consider before engaging in activities related to the improvement of the law, the legal system, or the administration of justice. CJA Opinion 61 (Membership on Advisory Committees to Government or Non-profit Entities) and Opinion 71 (The Law, The Legal System or the Administration of Justice: Community Involvement and Measures to Improve the Law) both addressed the issue but neither provided a precise definition, rather both provided examples of what were or were not activities involving the improvement of the law the legal system or the administration of justice.

Section 10:10 of the California Judicial Handbook attempts to provide some additional guidance in determining whether an activity concerns "the improvement of the law, the legal system, or the administration of justice." Citing a federal ethics advisory committee,¹ the Handbook notes two factors in determining whether it is appropriate for a judge to participate in a governmental commission:

First, "[i]f a judge's participation is sought for some [i] reason other than his or her judicial expertise, the activity is less likely to be a permissible activity." Second, participation in the government commission is appropriate if it "serves the interests generally of those who use the legal system, rather than the interests of any specific constituency," or if it "enhances the prestige, efficiency or function of the legal system itself. Thus, the government commission must have a direct connection with the legal system. 'It is not enough that the Committee be concerned with justice in a broader sense.'"

This formulation, while helpful in determining whether it would be appropriate for a judge to participate in a task force generally, does not squarely address the question of what constitutes issues of fact or policy that involve the improvement of the law, the legal system, or the administration of justice. In the end, what we are left with is akin to Justice Stewart's approach to defining hardcore

pornography,² rather than define the term precisely, you will know it when you see it. Policy issues that have no bearing on court proceedings, though related to the law in a broad sense, would not be matters involving the improvement of the law, the legal system, or the administration of justice. On the other hand, as the Commentary to Canon 4B recognizes, “a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revisions to substantive and procedural law and improvement in criminal and juvenile justice.” Defining the scope too narrowly of what the improvement of the law, the legal system, and the administration of justice constitutes would prevent judges from engaging in activities in which they are best suited to serve.

In addition to the issue being addressed having to be related to the improvement of the law, the legal system, or the administration of justice, the commentary to Canon 4C(2) sets out four other factors that must be assessed when accepting extrajudicial assignments: 1) the demands on judicial resources, 2) protecting the court from “involvement in extrajudicial matters that may prove controversial,” 3) potential interference with “the effectiveness and independence of the judiciary,” and 4) whether appointment would constitute a public office within article VI, section 17 of the California constitution. This last concern is explicitly set out in Canon 4C(3)(a) which states: “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.”³

The concerns addressed in the commentary to Canon 4C(2) dovetail with the proscriptions of Canon 4A which bar any extrajudicial activity that would: “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, and Canon 2A which require a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

When determining whether it would be appropriate to accept an appointment to a governmental task force a judge must assess whether any of the aforementioned concerns are implicated. In doing so it is necessary to look at the issue the task force is addressing, the composition of the task force and the scope of the task force’s activities. A review of the committee’s informal responses to inquiries related to service on a governmental task force reveal the following factors that should be examined:

- 1) Does the issue addressed by the task force relate to a core mission of the court? If the issue does not involve the courts or the administration of justice it is unlikely to involve the improvement of the law, the legal

system, or the administration of justice.

2) Does the task force focus on issues relevant to only one side of a controversy? If so, it may give rise to the appearance of partiality.

3) Will service on the task force involve the judge in matters, as opposed to issues, that will come before the judge's court?

4) Are all stake holders represented?

5) Will the service on the task force involve legislative advocacy on matters not directly related to improvement in the law, the legal system, or the administration of justice?

6) Will participating on the task force involve the court in controversial matters?

7) What entity is behind the creation of the task force?

8) Does the task force involve an issue that judges would normally be well versed in due to their position?

It should be noted that retired judges are exempted from the limitations of Canon 4C(2) and are allowed to accept appointment to 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. However, they are still bound by all the other Canons that apply to such service.

IV. Examples

A. Permissible.

1. A judge may accept appointment to the executive committee of the City Youth and Gang Violence Prevention Task Force. The executive committee serves as the Coordinating and Advisory Council for the Gang Reduction, Intervention and Prevention Project. The goal of the task force is to reduce youth and gang violence. Membership on the Task Force comes from a large cross-section of the community, including community leaders, educators, health workers, law enforcement, youth programs, etc.

2. Presiding Judge (PJ) has been invited to participate in a newly formed informal task force which will look at issues of racial bias in PJ's community. The Task Force includes the CEO of a local hospital, the superintendent of schools, the local police chiefs, and the county CEO. The Task Force will be addressing issues related to hiring, training, data collection, and how to hold each other accountable regarding the treatment of minorities in various institutions. PJ

may participate only if PJ's involvement can be limited to matters regarding the court system and the administration of justice and must make certain that the Task Force initiatives will not involve judicial proceedings that would ordinarily come before the court. PJ must not be a legal advisor to the Task Force and must make certain that the Task Force does not engage in political activity other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.

3. A family law commissioner may participate in a Domestic Violence Task Force created by the court which includes the District Attorney's Office, the Public Defender's Office, County Counsel, probation, and a variety of local law enforcement agencies to address issues related to domestic violence cases and how best to address them. These facts present a clear example of a task force that deals with the law, the legal system and the administration of justice. All the participants are involved in the legal system. The task force was created by the court and all sides are represented.

4. A judge may serve on the Gang Task Force, created by the mayor, where the purpose is for all of the stakeholders in the criminal justice system-including law enforcement, prosecutors, members of the defense bar, the probation department and representatives from community-based gang intervention programs- to be able to exchange ideas and offer suggestions on ways to address gang violence in the community. Participation is permissible given the composition of the committee and the lack of any affiliation with the mayor's political ambitions.

B. Impermissible

1. A judge, who is a Mental Health Hearing Officer, may not be a member of an Elder Abuse Task Force composed of representatives from the District Attorney's Elder Fraud Unit, the Public Guardian's Office, social workers and members of a community nonprofit group that provides legal services to elders because only one side of litigation is represented.

2. A judge who has a criminal law assignment may not join a State Task Force called the "Sober Driving Coalition." The task force is comprised of members of the CHP, local law enforcement and probation. The Task Force will explore ways in which "enhanced anti-DUI law enforcement patrols and increasing juvenile and adult probation enforcement checks" might combat DUI related collisions on a certain portion of State highway in J's jurisdiction. All of the agencies involved appear regularly before J. No prosecution or defense attorneys are represented on the Task Force. J's participation on this law enforcement-based Task Force which is designed solely for tougher enforcement of DUI laws would cast doubt on J's capacity to act impartially in matters involving law enforcement.

3. A retired judge in the assigned judge program may not join a task force created in response to an incident involving a minority teenager and a county sheriff. The task force is charged with 1. reviewing options for and making recommendations regarding a model for an independent citizen review body; 2. reviewing options for and making recommendations for community policing; 3. considering whether the Office of Coroner should be separately elected from the Office of Sheriff; and 4. bringing to the Board of Supervisors any feedback from the community on these issues that merits County attention. The Task Force is to meet on a weekly basis with the overall goal of furthering a safe, healthy, and caring community. While Canon 4(C)(2)'s prohibition from serving on a government committee or commission or other governmental position that does not concern the improvement of the law, the legal system, or the administration of justice does not apply to retired judges, Canon 2A and 4A do apply. Because the task force deals with issues related to law enforcement and policing, participation could give rise to an appearance of impartiality and involve matters that could come before the retired judge's court.

4. A dependency judge may not participate in a multi-disciplinary task force called the Perinatal Substance Abuse Task Force. Members include people from public health, social workers, doctors, and some others, but no representatives from the legal community other than the Judge. Judge became interested in participating in the Task Force because Judge noticed that referrals to Child Protective Services from hospitals on drug-exposed infants had dropped off and judge sought to investigate the reason for this phenomenon and ensure that all drug exposed infants being referred to Child Protective Services. The composition of the task force suggests that it involves matters not related to the law, the legal system or the administration of justice. Moreover, the Judge's stated desire to ensure cases are referred to social services would involve Judge in matters that would come before the dependency court.

5. Commissioner may not serve on a governmental task force called "Grandparents Raising Grandchildren." This task force was set up by the County Board of Supervisors to help with the problems associated with grandparents raising their grandchildren. J serves on a subcommittee of the task force which tries to help grandparents maneuver through the court system. The task force has as its members, the Office of Aging, grandparents, County Department of Education, representatives of the probate court clerks, juvenile court clerks, Department of Social Services and Child Protective Services. The task force receives most of its funding from federal programs. The subcommittee assists litigants that will be engaged in adversary proceedings in the court. This task force would necessarily involve the judge in matters that may come before Judge's court and appears to promote the interests of only one side in litigation.

6. A judge may not serve on a Gang Task Force formed by the mayor. The task force is oriented to intervention, prevention, and enforcement. The task force will make recommendations regarding gang prevention and how to curb gang

activity. It will also evaluate current programs and suggest new ones. The task force is made up of political representatives, representatives from the District Attorney's Office, the police department, schools, and other community leaders. Members of the defense bar are not represented. The lack of representation from the defense bar here creates an appearance of bias.

IV. Conclusion

Whenever a community is faced with problems that adversely affect members of that community, such as gang violence, gun violence, racism and police misconduct, it is not unusual for task forces to be created to deal with the problem. The advantage of such task forces are their ability to draw in representatives from different entities that play some role which is impacted by or could impact the problems. When a judge is asked to participate in such a task force, unless you are a retired judge accepted into the assigned judges program, the first question is whether or not the task force deals with the law, the legal system, or the administration of justice. If it does, the question becomes whether or not there are any other ethical constraints to serving on the task force.

In addressing the threshold question of whether the task force deals with the law the legal system or the administration of justice a good place to start is asking why is a judge being asked to participate? Is it because of the knowledge gained through judicial experience, or is it simply because the judge is a well-respected member of the community? If it's the latter, it is more likely that the task force does not involve the law, the legal system, or the administration of justice. If it's the former, the next step involves examining the scope of the task force's mission. The broader the scope the greater the likelihood that the task force will be involved in matters not involving the law, the legal system, or the administration of justice. If that is the case, the question then becomes whether the judge's involvement can be limited to matters that do involve the law, the legal system, or the administration of justice. If not, participation would be improper.

Assuming the task involves the law, the legal system, or the administration of justice, the question becomes whether there are any other ethical constraints to participating in the task force. Here the concerns are the appearance of bias, or involvement in matters that may come before the court or involve the court in controversial issues. If the task force does not include all the parties normally associated with litigation involving the subject matter being addressed, participation would lead to an appearance of bias against the excluded group and in favor of the included group. If the task force involves direct assistance to individuals involved in litigation, it would necessarily involve matters that may come before the judge's court. Another concern is whether participation would interfere with performance of judicial duties. While arguably court-related, permissible participation in a governmental task force would be improper if it

interfered with fulfilling ones primary judicial responsibilities by, for example, consuming too much of the judge's time or leading to frequent disqualification.

When permitted by the Canons, judicial participation in governmental task forces is not only appropriate, it is to be encouraged. Judges are in an especially good position to advise on matters concerning the law, the legal system, or the administration of justice. However, it is important to examine the issues involved, the composition of the task force and the scope of the task force's mission.

Endnotes:

- 1 Guide to Judiciary Policy 2B Ch.2 p.154.
- 2 *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
- 3 The question of whether a position constitutes a public office is a legal question which by rule the CJA Ethics Committee does not address.

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