

QUASI-JUDICIAL ACTIVITY:
CONSULTATION WITH LEGISLATORS

ISSUE

May a judge, who is widely respected for his expertise in a particular area of the law, consult with State legislators about controversial proposed legislation regarding that particular area of the law? **ANSWER:** Yes, provided he follow the canons' restrictions.

FACTS

A judge, who is widely respected for his expertise in a particular area of the law, has been asked to consult with State legislators about revising the current law in that area. This consultation would include meeting privately with various legislators and also providing written suggestions regarding the proposed legislation. This proposed legislation has been controversial in the past.¹

DISCUSSION

Because judges are specially learned in the law, Canon 4 encourages judges to engage in activities that improve the law, the legal system, and the administration of justice, i.e., quasi-judicial activities. *See also* Commentary, Canon 4. However, not every activity that involves the law, the legal system, and the administration of justice is considered a permissible Canon 4 activity. Canon 4 activities are explicitly limited in two regards: (1) the activity must not interfere with the proper performance of judicial duties, and (2) it must not cast doubt on the

judge's capacity to decide impartially any issue that may be presented to him in the performance of his judicial duties. Moreover, the activities must be permissible under the other canons.

Subject to the noted exceptions, Canon 4A permits a judge to speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice. More specifically, the Commentary to Canon 4C states a judge's permissible activities include contributing to the revision of substantive and procedural law and the improvement of criminal and juvenile justice. The Commentary, in fact, encourages judges to participate in such activities to the extent his time permits, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

[Thus], a judge may write or lecture on a legal issue, analyzing the present law and its history, its virtues and its shortcomings; he may commend the present law or propose legal reform without compromising his capacity to decide impartially the very issue on which he has spoken or written. There is a significant difference between the statement, "I will grant all divorce actions that come before me – whatever the strength of the evidence to support the statutory ground for divorce – because I believe that persons who no longer live in harmony should be divorced," and the statement, "I believe that limited statutory grounds for divorce are not in the public interest. The law should be changed to allow persons who no longer live in harmony to

¹ This advisory opinion does not address the legislative activities of a judge who has an interest as an individual, i.e., a private citizen, that would be affected by proposed legislation.

obtain a divorce.” The latter does not compromise a judge’s capacity to apply impartially the law as written, although it clearly states his position about improvements in the law.

E. Wayne Thode, *Reporter’s Notes to [1972] Code of Judicial Conduct* 74 (ABA 1973).

In addition, Canon 4B permits a judge to appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice. Unlike Canon 4B of the 1972 Model Code, upon which Alabama’s canons are based, Alabama’s Canon 4B also permits private consultation on any matter concerning the law, the legal system, and the administration of justice. It provides, in part, that a judge may “otherwise consult with an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice.” Moreover, the plain language of the canons does not prohibit a judge from acting on his own initiative with regard to legislative issues. *See* Florida Advisory Opinion 98-13; Utah Informal Advisory Opinion 01-1.

Thus, the general rule is that Canon 4 permits a judge to communicate with a member of the legislature on matters concerning the law, the legal system, and the administration of justice – with three requirements. The first, as noted above, is that the activities do not interfere with the proper performance of judicial duties. *See also* Canon 3 (a judge should perform the duties of the judicial office diligently, and the judicial activities take precedence over the judge’s other activities). Therefore, the judge should be available to perform his judicial duties. *See* Utah Informal Advisory Opinion

01-1 (cautioning against becoming too active in legislative matters, i.e., spending significant time speaking out on legislative issues during the legislative session could be perceived as allowing that activity to interfere with the judicial duties and as attempting to exploit the judicial office). In addition, the judge must avoid any legislative activities or involvement that would likely lead to disqualification from cases assigned to him.

The second requirement for a judge’s legislative activities to be permissible under Canon 4 is that the activities must not cast doubt on the judge’s capacity to decide impartially any issue that may be presented to him in the performance of his judicial duties. Advisory Opinion 91-436 (a judge must “scrupulously honor the admonition of Canon 4 that the judge ‘not cast doubt on his capacity to decide impartially any issue that may come before him’”). The Commission advises the judge to consider the following in scrutinizing his proposed involvement in legislative activities:

- The avoidance of the appearance of partiality is as important as avoiding partiality in fact.
- The judge, in conferring with legislators, must not appear to substitute his concept of what the law ought to be for what the law actually is, and he must express himself in a manner that promotes public confidence in his integrity and impartiality as a judge. *See In re Gridley*, 417 So.2d 950, 954 (Fla. 1982) (cautioning judges against “indiscriminately voicing their objection to the law lest they be

misunderstood by the public as being unwilling to enforce the law as written, thereby undermining public confidence in the integrity and impartiality of the judiciary”). Thus, there should be no doubt that the judge considers himself duty-bound to follow the law and would do so although he advocates law reform.

- The judge must abstain from commenting on a pending or impending case in any court, including how he would rule on pending matters or matters that may come before him. Canon 3A(6). *See* Advisory Opinion 99-732 (a judge’s lobbying for legislation mandating the placement of seat belts on school buses is prohibited because related issues would likely come before the judge and, thus, such lobbying could present a reasonable question of his ability to decide those issues impartially).
- The judge’s participation should be sought only because of his judicial expertise. *See* U.S. Advisory Opinion 93 (the phrase “improve the law” is described as “being limited to the kinds of matters a judge, by virtue of [the judge’s] judicial experience, is uniquely qualified to address”; if a judge’s participation is sought for some reason other than his judicial expertise, the activity is less likely to be a permissible Canon 4 activity); Ohio Advisory Opinion 2002-3 (a judge may discuss, with a legislative body or official, a proposed constitutional amendment regarding drug treatment in lieu of incarceration;

his support or opposition to the proposed amendment is based on his understanding of the potential impact on the courts, the law, the legal system, and the administration of justice). Accordingly, the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual. *Id.*

- The judge’s legislative activity must not merely utilize the law or the legal system as a means to achieve an underlying social, political, or civic objective. U.S. Advisory Opinion 93. It is with a judge’s expertise in the law and particularly the specific area of the law, and not a personal agenda, by which he may consult with legislators. Such participation, i.e., based on expertise rather than personal agenda, is particularly necessary regarding controversial legislation not directly related to the administration of justice. For example, where a judge testifies in favor of legislation to decriminalize drug possession, it could be argued that this is not an issue with respect to which a judge’s view as a judge seems particularly relevant, and it may create the perception that if the judge feels so strongly about the law as to lobby the legislature for its repeal, he may not be able to uphold the law impartially in his courtroom. James J. Alfani et al., *Judicial Conduct and Ethics* § 9.03B (4th ed. 2007).
- A judge’s legislative activity that arises from his participation in a group that engages in advocacy towards the

adoption, repeal, or modification of particular substantive laws or towards the courts' use and application of existing laws in a particular manner could create the danger that his ability to act impartially may be cast in doubt. A.B.A., *Annotated Model Code of Judicial Ethics* 264 (2004) (citing California Judges Ass'n, Comm. on Judicial Ethics, Op. 46 (1997)). *See also* Advisory Opinion 99-732 (“[w]henever a group engages in advocacy regarding substantive legal issues, participation by a judge should be carefully scrutinized” pursuant to a number of specified factors). Whether a judge may participate in a group turns not only on whether that group is devoted to the improvement of the law or the administration of justice, but also on whether participation would lead to an appearance of partiality in cases coming before that judge. *See, e.g.*, Advisory Opinion 99-732 (a judge should not join with a citizens' group lobbying for placement of seat belts on school buses because such activity constitutes a “narrow advocacy function” and thus would call into question the judge's ability to decide impartially issues that come before him).

Finally, as noted above, the judge's legislative consultation must be permissible under the other canons. Such proposed activity must be considered in light of the following canons: 1 (a judge should uphold the integrity and independence of the judiciary); 2 (a judge should avoid impropriety or its appearance); 2A (a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); 2C (a judge should not lend the prestige of the judicial office to advance the private interests of others, i.e., exploiting the judge's position); 3 (a judge should perform the duties of the

judicial office impartially); and 7 (although a judge may engage in activity on behalf of measures to improve the law, the legal system, or the administration of justice, Canon 7A(3), a judge should refrain from political activity inappropriate to judicial office). *See also* Advisory Opinion 03-819 (under Canon 7A, a judge must conduct himself in such a manner as to prevent political considerations, entanglements, or influences from becoming involved in, or from appearing to be involved in, any judicial decision or the judicial process).

Under the specific facts known to the Commission, the inquiring judge may, pursuant to Canon 4, participate in legislative consultation regarding the particular proposed legislation.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1, 2, 2A, 2C, 3, 3A(6), 4, 4A, 4B, 7, 7A, and 7A(3)

Commentary, Canons 4 and 4C

Advisory Opinions 03-819, 99-732, and 91-436

In re Gridley, 417 So. 2d 950, 954 (Fla. 1982)

U.S. Advisory Opinion 93

California Judges Ass'n, Comm. on Judicial Ethics, Op. 46 (1997)

Florida Advisory Opinion 98-13

Ohio Advisory Opinion 2002-3

Utah Informal Advisory Opinion 01-1

A.B.A., *Annotated Model Code of Judicial Ethics* 264 (2004)

A.B.A., *Code of Judicial Conduct* 74 (1972)

E. Wayne Thode, *Reporter's Notes to [1972] Code of Judicial Conduct* 74 (A.B.A. 1973)

James J. Alfani et al., *Judicial Conduct and Ethics* § 9.03B (4th ed. 2007)

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043.