

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)**

**C.J.E.A.B. ADVISORY OPINION 2005-04
(Finalized and effective October 27, 2005)**

ISSUE PRESENTED

A judge has been nominated to be a member of a municipal commission devoted to crime control and prevention (“the commission”). The enabling ordinance specifies that the purposes of the commission are to: 1) reduce crime, in part by reducing recidivism; 2) facilitate coordination among criminal justice system agencies; 3) support the development of a data-driven criminal justice system that offers a range of evidence-based sanctions and programs; 4) facilitate the development of information technology and data necessary for effective criminal justice policy development, jail population management, and evaluation of sanctions and programs to hold offenders accountable; 5) facilitate efficient use of jail space by encouraging alternatives, where appropriate; and 6) recommend expenditures from a substantial crime control fund. Among other things, the commission is given the power to undertake an evaluation of the capacity and operations of the criminal justice system by analyzing offender flow and bed usage, recommending policies to utilize scarce jail beds for the most serious offenders, and facilitating sanctions and programs that will reduce recidivism. The commission reports to the mayor and city council and is tasked with recommending policy and program changes to reduce victimization and recidivism, generating alternatives to incarceration, and developing a “coordinated criminal justice system sanctioning philosophy and policies.” The ordinance creating the commission specifically contemplates that a judge will be one of twelve members drawn from law enforcement and civic milieus.

The judge has asked whether the judge may accept the nomination and join the commission. If so, the judge asks for guidance about the scope of permissible service on the commission and whether the judge would be allowed to cast votes on any issues that come before the commission.

CONCLUSIONS

Canon 5G generally prohibits a judge from participating on governmental commissions unless there is a close nexus between the work of the commission and the improvement of the law, the legal system, or the administration of justice. Service on the commission also must not call into question the judge’s impartiality, independence, and effectiveness. Under those standards, the judge’s service on the crime prevention and control commission would be inappropriate. The judge may, however, be able to provide the commission with specific factual information to assist it in its policymaking efforts.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 4 generally encourages a judge to engage in quasi-judicial activities so long as his or her capacity to decide impartially any issue that may come before the judge is not impaired by participation in those activities. Canon 4A encourages a judge to “participate in other activities concerning the law, the legal system, [and] the administration of justice.” Canon 4B authorizes a judge to “consult with, or appear at a public hearing before, an executive or legislative body, or an official thereof, on matters concerning the law, the legal system, [and] the administration of justice.” Similarly, Canon 4C encourages a judge to “serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, the judicial branch or the administration of justice. . . . A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.”

Canon 5B encourages a judge to participate in civic activities that do not adversely reflect upon the judge’s impartiality or interfere with the performance of judicial duties. Subsection (1) cautions, however, that a judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

Canon 5G provides that a judge should not accept appointment to a governmental committee, commission, or other 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.

DISCUSSION

As societal problems have become increasingly complex and entrenched, judges have been called upon with greater frequency to share the unique insights gleaned from their judicial experience by participating in governmental commissions directed at finding solutions to these social problems. Judges are encouraged under the various subsections of Canon 4 to participate in activities concerning the law, legal system, or administration of justice where such participation would not impair the judge’s independence or effectiveness. Canon 5G, however, generally constrains judges from accepting an appointment to a governmental commission that addresses policy questions unless the commission is considering matters related to the improvement of the law, the legal system, or the administration of justice. As the commentary to Canon 5G indicates, the general prohibition against participation on a governmental commission is animated by concerns that appointment to a governmental commission could interfere with the judge’s effectiveness and independence. In light of this general prohibition against participation on governmental commissions, the exception for activities designed to improve the law, the legal system, and the administration of justice generally is defined and construed narrowly. *See, e.g.,* Federal Ad. Op. No. 93. Not every issue that has a

connection to the law or that arises in court cases can fairly be characterized as related to the improvement of justice. *See, e.g.*, Cindy Gray, “Serving on Governmental Commissions: What Are the Limits for Judges?,” *Judicature*, Vol.86, No.4 (Jan./Feb. 2003); Mass. Ad. Op. 03-13; Mass. Ad. Op. 98-13. Otherwise, the exception in Canon 5G would swallow the rule prohibiting a judge from being a member of most governmental commissions.

Determining the line between appropriate and inappropriate participation in governmental commissions requires an analysis of the link between service on the commission and improvement of the law, legal system, and administration of justice. Like many of our sister jurisdictions, we conclude that for service on a governmental commission to be consistent with Canon 5G, there must be a close nexus between what the commission does and improvement of the law, legal system, or the administration of justice. In other words, there must be a direct link between the commission’s work and how courts go about the business of meeting their statutory or constitutional duties. If the nexus is indirect, incidental, or tangential, or if the permitted subjects are just one aspect of a broader mission or focus, service by a judge is not permitted. Further, even where a close nexus is found to exist, participation on a particular commission is appropriate only where it would not cast reasonable doubt on a judge’s capacity to act impartially. *See, e.g.* Mass. Ad. Op. 03-13; Mass. Ad. Op. 98-13; Utah Ad. Op. 98-11.

Applying this “direct nexus” standard to the requesting judge’s proposed membership on the crime prevention commission, the Board concludes that there is not a sufficient connection between the work of the commission and improvement of the law, legal system or administration of justice to overcome the general prohibition of Canon 5G. An examination of the commission’s enabling legislation reveals that the commission generally is charged with reducing crime and increasing neighborhood safety and specifically is tasked with generating policy recommendations for the mayor and city council regarding offender sanctions and jail population management. The commission is instructed to facilitate the efficient use of jail space by encouraging alternatives to incarceration; when formulating these recommended alternatives, such as expansion or concentration of community corrections facilities, the commission is directed to consider the impact on residential neighborhoods related to releasing offenders into the community. The commission also is instructed both to make recommendations on how crime prevention monies should be appropriated and to seek federal grants and private sources of funding for innovative criminal justice projects and programs. While the commission’s goals and tasks all broadly implicate the law and the legal system, the work of the commission is not directly linked to improvement of the law *qua* law, nor is it related to the improvement of the legal system or the administration of justice. There is no doubt that the issues surrounding crime reduction, jail management, and sentencing alternatives are all very important components of a broad criminal justice policy; they do not, however, possess the close nexus that Canon 5G requires.

Even if there were a close nexus between the commission’s work and the improvement of the law, legal system, or administration of justice, the judge’s participation on this particular commission would be inappropriate because it would call

into question the judge's impartiality, effectiveness, and independence. Here, the commission is engaged primarily in a quasi-legislative policymaking function, making recommendations on policy related to offender sanctions, incarceration alternatives, and jail management. Concerns about the judge's impartiality and independence invariably will arise when a judge sentences a defendant to incarceration or an alternative pursuant to policies that the judge helped to develop. Similarly, a judge's independence and impartiality will be called into question when the judge makes decisions about jail overcrowding and how to prioritize among inmates if the judge also has been involved in formulating policy on the most efficient use of jail space. In the event that the policy issues addressed by the commission become the subject of litigation, the judge could be called upon not only to apply these policies, but to interpret them as well. A judge's involvement in recommending policies concerning the operation of the jails and the sanctions an offender could face would likely be seen as an endorsement of the substantive positions and recommendations of the commission, and, thus, would interfere with the fundamental value of judicial independence. Additionally, the commission's role in soliciting funds for new criminal justice programs and advising how the criminal justice system should spend its money and conduct its operations could give rise to the perception that the judge is aligned with the interests of law enforcement. *See Fla. Ad. Op. 97-24; NY Ad. Op. 97-108.* This impression could be reinforced by the composition of the board, which, although it does include representation from the public defender, is heavily oriented toward law enforcement and prosecution. *See Mass. Ad. Op. 03-16.* Service on this particular commission, then, would blur the distinction between the branches of government, simultaneously making the judge legislator, advisor to law enforcement, as well as neutral arbiter, and affecting the public's perception of the independence of the courts from the executive and legislative branches of government.

In reaching the conclusion that service on this commission would be inappropriate, the Board is mindful that the ordinance establishing the commission specifies that a judge should be one of the members. This legislation, however, does not override the specific rules and general principles embodied in the code of judicial conduct, and it cannot render legitimate service that is otherwise impermissible under the code's standards. *See Gray, "Serving on Governmental Commissions," supra, at 208.*

Canon 5G's focus on assuring the continued independence of the judiciary is not intended, however, to result in the withholding of valuable judicial advice from other branches of government. Accordingly, under Canon 4B, which permits a judge to consult with an executive or legislative body "on matters concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government" the judge may be able to provide specific factual information to the commission. Thus, in the Board's view, it would be appropriate for the judge to explain to the commission, if requested, what is happening in the courts and what kinds of programs might be helpful in meeting unfilled needs, so that the commission can make informed policy choices. If the judge does consult with the commission in this fashion, the judge should take care to insure that any mention of the judge's name in commission publications is accompanied by a note clarifying the judge's limited, consulting role and

announcing that the judge takes no position on the commission's overall recommendations. *See* Mass. Ad. Op. 03-13; Mass Ad. Op. 03-16.

FORMALLY FINALIZED AND EFFECTIVE this 27th day of October, 2005 by the Colorado Judicial Ethics Advisory Board.