



Committee on Judicial Ethics

State of Connecticut Judicial Branch
Superior Court Operations
100 Washington Street, 3rd Floor
Hartford, CT 06106

MEMBERS:

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Hon. Edward R. Karazin, Jr., Vice Chair
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Hon. Thomas J. Corradino, Alternate

October 7, 2011

Hon. Robert J. Devlin, Jr.
Judicial District Courthouse
1061 Main Street
Bridgeport, CT 06604

Re: Formal Advisory Opinion JE 2011-21

Dear Judge Devlin:

You have requested a formal opinion from the Committee on Judicial Ethics (hereinafter "Committee") concerning the propriety of your serving on the Connecticut Sentencing Commission (hereinafter "Commission"), established pursuant to Public Act 10-129 (codified as Conn. Gen. Stat. § 54-300). The Chief Justice has appointed you to serve on the Commission for a three year term.

The Commission has twenty-three members, including four judges, and is charged with reviewing the existing sentencing structure in Connecticut and proposing changes in sentencing laws, policies and practices to the Governor, the General Assembly and appropriate criminal justice agencies. In your request letter, you indicate that the mandate of the Commission is very broad, touching virtually every aspect of our criminal justice system including recidivism, the efficacy of treatment programs, the operations of the Department of Correction, as well as a host of other areas, including the technicalities of our sentencing statutes. According to the Act, the Commission is also charged with, inter alia, evaluating statutes, policies and practices related to certain judicial decisions, providing training, evaluating various court diversionary programs, and making legislative recommendations. The Commission is a criminal justice agency as defined in subsection (b) of Conn. Gen. Stat. § 54-142g. Some of the members of the Sentencing Commission are persons who may appear before you and other judges serving on the Commission.

You have asked whether service on the Commission poses any ethical concerns with respect to your principal duties as a Superior Court judge who regularly handles criminal cases. In your letter, you raise several specific questions. For example, may you cast votes on proposals to the legislature which relate to policy matters? If you do cast a vote on such a matter and a case comes before you that concerns the matter (e.g., a mandatory minimum sentence), do you have to consider issues of disqualification or notice to the parties? In other words, do you need to be concerned that your service on the Commission will run contrary to our Code of Judicial Conduct?

The Committee concludes that Canon 1, Canon 3, Rules 1.2, 2.4, 2.11, 3.1 and 3.4 of the Code of Judicial Conduct apply to this matter. Rule 3.4, which is the rule that primarily governs the proposed activity, permits a judicial official to accept an appointment to a governmental committee, board, commission, or other governmental position, provided it is one that concerns the law, the legal system, or the administration of justice. Comment (1) to Rule 3.4 states as follows:

Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

As noted in Rule 3.4, Judicial Officials are generally permitted to serve on governmental boards, commission, committees or other positions, if the governmental commission is one that concerns the law, the legal system or the administration of justice. However, even as to such commissions, service is proscribed if it would result in an appearance of impropriety (Rule 1.2), convey the impression that the commission is in a position to influence the Judicial Official's conduct or judgment (Rule 2.4), interfere with the proper performance of judicial duties (Rule 3.1), cast reasonable doubt on the Judicial Official's capacity to act impartially or otherwise violate other provisions of the Code.

Invitations to participate in activities off the bench come from many different sources, such as governmental agencies, community and civic groups and occasionally, legislative bodies. Regardless of the source of the invitation, a judge may not participate in any activity that would violate the code of judicial conduct.¹

¹ "Sometimes a statute that establishes a governmental commission will specify that a judge should be one of the members. Legislation, however, does not override the specific rules and general principles in the code of judicial conduct to render legitimate service that is otherwise impermissible under those standards.... Automatic deference to the legislature is not consistent with the principles of judicial independence that underlie the code. Although a legislature would not intentionally attempt to compromise judicial independence by requiring judicial participation in a government commission, the legislature may have mandated judicial participation without due consideration or understanding of the possible ramifications for judicial impartiality and independence." Cynthia Gray, *Ethics and*

Whether you may participate as a member of the Connecticut Sentencing Commission depends on the answers to two questions: (1) Does the work of the Commission concern “the improvement of the law, the legal system, or the administration of justice”? and (2) Would participation on the Commission undermine your independence, integrity, or impartiality?

The first question involves an assessment of the Commission’s work to determine whether it is a legal system-related government commission that is appropriate for judicial membership or, rather, an organization that does not fall within the exception of Rule 3.4. This Committee has recently addressed the issue of law-related government commissions in its informal opinions in JE 2011-02, 2011-03, 2011-04, 2011-05 and 2011-15. The Committee majority adopted the position, as articulated in ethics opinions from other jurisdictions, that in order for a governmental committee or commission to qualify as one that concerns the law, the legal system or the administration of justice, “there must be a direct nexus between what a governmental commission does and how the courts go about their business.” To qualify as an acceptable law-related activity, “the activity must be directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.” (See Judicial Conference of the United States, Committee on Codes of Conduct, Guide to Judiciary Policy, Vol. 2B, Ch. 2, Published Advisory Opinions, No. 93, pp. 93-1 to 93-5). Applying the “direct nexus” standard to the facts presented, the Committee concluded that the Connecticut Sentencing Commission engages in activities that “concern[] the law, the legal system, or the administration of justice” within the meaning of Rule 3.4.

The second question involves determining whether participation on the Commission would undermine a judge’s independence, integrity, or impartiality. In evaluating this issue, the Committee considered Alaska Advisory Opinion 2001-01, which sets forth several factors that judges should take into account in determining whether any commission is appropriate for judicial membership. The factors are 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 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;
- (5) Regardless of any of these factors, judges may provide information on matters concerning the law or the administration of justice to groups in which

Judges’ Evolving Roles Off the Bench: Serving on Governmental Commissions, State Justice Institute of the American Judicature Society, *Key Issues in Judicial Ethics* series (2002), pp. 17-18.

their membership would be precluded by the Code. See Alaska Advisory Opinion 2001-01.

Based on the facts presented, including that membership in the Commission is diverse and represents more than one point of view and that the Commission is unlikely to be viewed by the public as a political or advocacy group, and consistent with Canon 1, Canon 3 and Rules 1.2, 2.4, 3.1 and 3.4 of the Code of Judicial Conduct, the Committee unanimously agreed that it would not be improper for you to serve on the Connecticut Sentencing Commission provided that you re-evaluate the propriety of participation in the event of statutory changes to the composition and mission of the Commission.

You have also asked whether you may vote on proposals to the legislature which relate to policy matters and whether you must recuse yourself when issues on which you expressed opinions and/or voted as a Commission member later arise during a court proceeding. The Committee considered *United States v. Glick*, 946 F.2d 335, 336-37 (4th Cir. 1991), in which a federal appeals court concluded that a judge's service as chair of the federal sentencing commission did not require recusal from criminal case raising issues about application of sentencing guidelines promulgated by the federal sentencing commission and not involving a "serious legal challenge to the Guidelines themselves." (internal quotations omitted). The Committee concluded that absent special circumstances that you believe would cause a reasonable person to question your impartiality, your service as a member of the Commission does not require recusal from criminal cases unless they involve a serious legal challenge to any guidelines that may be issued by the sentencing commission or to the validity of a sentencing statute, policy or practice that stems from a Commission recommendation in which you participated.

Although not specifically raised in your letter, the facts indicate that some of the members of the Commission are persons who may appear before you and other judges serving on the Commission. The Committee addressed similar issues in JE 2010-28, JE 2011-06, and JE 2011-11 by concluding that there was no duty to automatically disqualify, but that a Judicial Official should disclose the nature of his or her relationship to all parties and their counsel. Thereafter, if a motion is filed, a Judicial Official should exercise discretion in deciding the motion. Consistent with these opinions, the Committee concluded that you do not have a duty automatically to disqualify yourself when an attorney affiliated with the Commission appears before you in a court proceeding. You do, however, have a duty to disclose to the parties and their counsel the nature of your relationship with the Commission and any attorney affiliated with the Commission who personally appears before you. This duty to disclose prohibits presiding over an ex parte proceeding, since the opposing party would not be available to learn the nature of your relationship. Thereafter, if a motion to disqualify is filed, you should exercise your discretion in deciding the motion based upon the information provided in the motion and the accompanying affidavit, as provided for in Connecticut Practice Book § 1-23, as well as the particular circumstances of the case. See JE 2011-11 and cases cited therein.

The opinions of the Committee on Judicial Ethics are advisory in nature. Although judicial conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the judge's behalf, our opinions are not binding on the Judicial Review Council, the Superior Court, the Appellate Court or the Supreme Court in the exercise of their judicial discipline responsibilities. You may submit a written request for reconsideration, explaining the basis for the request, to the Secretary to the Committee within thirty days after distribution of this opinion. Policy & Rules of the Committee, §10.

Sincerely,

Barry R. Schaller, Chair
Committee on Judicial Ethics