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Committee on Codes of Conduct Advisory Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association

Introduction

On several occasions, the Committee has given advice regarding judges' involvement with the American Constitution Society ("ACS"), the Federalist Society, and the American Bar Association ("ABA"). In addressing these issues, the Committee has never suggested, and does not now suggest, that the organizations act improperly or that their goals and missions are inappropriate. All are respected organizations that provide welcome services and benefits to their members. Participation in events hosted by these organizations through speaking engagements, panel discussions, attendance, and the like, as discussed below, is broadly permissible under the Code of Conduct for United States Judges. But membership in these organizations presents a different question.

The Committee considers the ACS, the Federalist Society, the ABA, and similar organizations to be law-related organizations, and thus our advice regarding involvement with those organizations is largely, but not exclusively, governed by Canon 4. The Commentary to Canon 4 and our advice related to Canon 4 note that changing circumstances require judges to regularly reassess whether their involvement in extrajudicial activities related to the law is proper under the Code. Similarly, changing circumstances require the Committee to review its prior advice concerning these organizations. For this reason, and because the Committee continues to receive inquiries regarding these organizations, the Committee finds it appropriate to issue an advisory opinion addressing whether membership in these organizations is consistent with the Judges' Code.

Background

We begin with a summary of the principles that guide the determination of whether extrajudicial activities related to the law are consistent with the obligations of

judicial office. The Commentary to Canon 4 discusses, in general terms, the Code's approach to extrajudicial activities:

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law.

Precisely because of a judge's "unique position" to further the goals and missions of law-related organizations, however, and because the law can be used to advance a wide variety of social, civic, and policy objectives, the Committee has frequently advised that participation in particular law-related activities is not appropriate. Our advice regarding involvement in law-related organizations has been guided by several specific principles.

First, a judge may participate in a law-related activity if it is directed toward improving the law or the legal system itself, "and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." Advisory Opinion No. 93. Permissible law-related activities are those that seek to benefit the legal system as a whole rather than to serve or promote a particular constituency, cause, or agenda. Consequently, as we said in Advisory Opinion No. 93 and reiterated in Advisory Opinion No. 116, "judicial participation in organizations that advocate particular causes rather than the general improvement of the law is prohibited." This conclusion finds further support in Canon 2B. Judicial participation in such organizations lends the prestige of judicial office to groups advocating particular causes.

Second, and related to the first principle, we have consistently advised that a judge must not become involved with an organization if that involvement would cast doubt on the judge's impartiality:

For example, if the organization takes public positions on controversial topics, association with the group might raise a reasonable question regarding the judge's impartiality. The judge should bear in mind that the public will normally be uninformed of any restriction or qualification that the judge may have placed on affiliation with the organization.

Advisory Opinion No. 82. Similarly, the Committee has cautioned that judicial involvement with advocacy groups may be inconsistent with the Code, and it has

cautioned judicial employees to avoid any involvement that might suggest a predisposition as to legal issues or influence due to the relationship with the organization. Advisory Opinion No. 116.

Third, we have stressed the importance of assessing whether the general public could reasonably view a judge's involvement with an organization as an endorsement of positions advocated by that organization. This principle is buttressed by Canon 2's requirement that a judge must avoid any appearance of impropriety. The Commentary to Canon 2 advises that an appearance of impropriety occurs when reasonable minds would conclude that a judge's impartiality is impaired.

Applying this principle, the Committee has advised that, if a judge's personal advocacy of the positions advanced by an organization would be improper and if the judge's involvement with that organization could reasonably be seen as endorsing those positions, then the judge's involvement with the organization is improper. Advisory Opinion No. 116, which provides advice regarding participation in education seminars sponsored by organizations engaged in public policy debates, states a similar principle: judges should consider whether a sponsoring organization "is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations." Public perception, therefore, is an important consideration when evaluating whether involvement in law-related activities is consistent with the Code.¹

Finally, our advice in this area is undergirded by the transcending admonition of Canon 1: a judge should uphold the integrity and independence of the judiciary. Canon 1 advises that judges should maintain and enforce high standards of conduct and should personally observe those standards in order to preserve the integrity and independence of the judiciary. As explained in the Commentary to Canon 1, this foundational principle exists because "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges." A judge's compliance with the law and the Code preserves public confidence in the impartiality of the judiciary, while "violation of this Code diminishes public confidence in the judiciary and injures our system of government under law." Commentary to Canon 1.

Prior Committee Guidance

Guided by these principles, the Committee in 2005 responded to an inquiry on whether a judge could serve in a leadership position with an ACS state chapter. To answer this inquiry, the Committee examined the ACS's website, which revealed that the ACS described itself as "one of the nation's leading progressive legal organizations" and that its membership was "comprised of law students, lawyers, scholars, judges, policymakers, activists and other concerned individuals who are working to ensure that the fundamental principles of human dignity, individual rights and liberties, genuine equality, and access to justice are in their rightful, central place in American law." The

ACS made clear why its members saw a need for its liberal agenda: “Today, American values, our constitutional heritage, and the freedoms and opportunities of our people are being undermined by a narrow, conservative approach to the law that lacks appropriate regard for the ways in which the law affects people’s lives and that has come to dominate American law and public policy This conservative vision, advanced by a highly organized movement, threatens to undermine the true promise of our Constitution.” Further, the ACS had said it was “committed to fostering a progressive vision of the law on issues such as access to the courts; anti-discrimination and affirmative action; civil liberties; consumer rights; criminal justice; disability rights; freedom of speech; gay rights; international human rights; immigration; labor law; open government; privacy; protection of health, safety and the environment; and women’s rights and reproductive choice.” To further its mission, the ACS sought to “[p]romote a progressive vision of the Constitution, the law and public policy.” Also, the ACS touted its efforts to “[e]ducate lawyers, law students, decision-makers and the public about the legitimacy and vitality of [its] vision.”

The Committee concluded that the Code prohibited the judge from serving in a leadership position with the ACS chapter. Noting the language quoted above, the Committee advised:

Whether our analysis is under Canon 4 or Canon 5, we believe that sitting on the advisory board or serving as an interim chair of the [state] chapter of the ACS might reasonably be seen as impairing your capacity to decide any issue of constitutional law that may come before you, and might reasonably be seen as your indirect advocacy of ACS’s policy positions.

Two years later, the Committee received an inquiry on whether a judge could, consistent with the Code, be a member of the ACS, be an organizer of a local ACS chapter, serve as a board member for the chapter, and be identified publicly as a member of the chapter. In response to the inquiry, the Committee again reviewed the ACS’s website, which still made clear that the ACS was “committed to fostering a progressive vision of the law” and that “American values, our constitutional heritage, and the freedoms and opportunities of our people are being undermined by narrow, conservative approach to the law . . . advanced by a highly organized movement [that] threatens to undermine the true promise of our Constitution.”

The Committee concluded that a judge’s personal advocacy of the ACS’s views might reasonably be seen as impairing the judge’s capacity to decide impartially issues of constitutional law that frequently arise in federal courts and that holding a leadership position in the ACS could reasonably be seen as indirect advocacy of those views. Thus, the Committee advised against holding a leadership position within the ACS.

As to the question of membership, the Committee reviewed previous guidance concerning membership in organizations for former prosecutors and former criminal

defense lawyers. In that guidance, the Committee had advised against membership because such affiliation could raise concerns about the judge's capacity to decide issues impartially. Those organizations, the Committee noted, restricted their membership to former prosecutors or former defense lawyers, and the Committee reasoned that, because the ACS did not restrict its membership to a particular group, membership in the ACS was permissible. The Committee further noted that it could not "distinguish between membership in the ABA and membership in ACS." Accordingly, the Committee concluded that membership in the ACS was not inconsistent with the Code. We cautioned, however, that a judge should regularly reexamine the activities of the ACS to determine the propriety of continued membership.

The Committee now believes that the reasoning leading to the conclusion that the Code permits membership in the ACS was flawed. The Committee has long held that the principles governing involvement with organizations are not limited to leadership positions but "are applicable to and govern membership in such organizations." Advisory Opinion No. 40. If, as we advised, holding a leadership position in the ACS could reasonably be seen as impairing a judge's impartiality, then membership in the ACS raises the same concerns. That the ACS, unlike an organization for former prosecutors or former defense lawyers, has an open membership policy in no way allays the concerns that may arise from a judge's association with the ACS's views. Nor was the Committee correct when it concluded it could not "distinguish between membership in the ABA and membership in ACS." As discussed below, membership in the Judicial Division of the ABA is not similar to membership in the ACS.

With regard to the Federalist Society, the Committee advised in 2006 that a judge could properly contribute financially to the Federalist Society, as well as to the Heritage Foundation, because, although both societies were "considered 'conservative' organizations," they were not "political organization[s]" under the Code.² Looking only to the narrow issue posed by the inquiry, we found that the Federalist Society was not a "political organization" (as the Commentary to Canon 5 defines that term) because it did not identify with a political party and did not direct its activities "toward support for or opposition to candidates for public office." But the Committee "caution[ed] that this opinion does not speak to the propriety of a judge's or a judicial law clerk's participation in the various activities of such organizations, as other Canons may then come into play." The Committee noted previous guidance in which it had advised judicial employees to "avoid involvement with advocacy groups if the association suggests a predisposition as to legal issues or influence due to the relationship[.]"³

The ACS and the Federalist Society

With that background, the Committee turns to the question of whether membership in the ACS or the Federalist Society is consistent with the Code. As in the past, the Committee looks to the organizations' self-descriptions of their missions and goals. The ACS still describes itself as a "progressive legal organization," formed as

“the progressive response” to a Supreme Court case. *About Us*, The American Constitution Society, acslaw.org/about-us/ (accessed 3/8/2019). More specifically, early ACS leaders, according to media reports, acknowledged that the ACS in part formed in response to the Federalist Society’s success and was modeled on the Federalist Society. Michael McGough, *Supreme Court nomination battle spotlights legal societies and their divergent views*, Pittsburgh Post-Gazette, August 14, 2005, old.post-gazette.com/pg/05226/553199-84.stm (accessed 4/4/2019).⁴ The organization’s most recent publicly available Biennial Report notes that it advocates “for a judicial branch staffed with judges who . . . are committed to a vision of the Constitution that protects individual rights and liberties” and that it “worked nonstop to . . . demand that Senators consider President Obama’s nominees.” *2015-2016 Biennial Report*, The American Constitution Society, at 5, acslaw.org/wp-content/uploads/2011/06/ACS-Biennial-Report-2015-2016.pdf (accessed 3/8/2019). The ACS also helps formulate “legal context and arguments for the progressive viewpoint,” including, potentially, arguments and context in relation to pending cases in federal courts. *Id.* at 8. Finally, the ACS receives substantial funding from sources that support liberal political causes. See *id.* at 14-15.⁵

Similarly, the Federalist Society still describes itself as “a group of conservatives and libertarians dedicated to reforming the current legal order.” *Our Background*, Federalist Society, fedsoc.org/our-background (accessed 3/8/2019). It states that it has promoted appreciation for the “role of separation of powers; federalism; limited, constitutional government; and the rule of law in protecting individual freedom and traditional values.” *Id.* The Federalist Society defines its own purpose as one in opposition to “a form of orthodox liberal ideology,” which, it says, dominates law schools and the legal profession. *Our Purpose*, Federalist Society, fedsoc.org/about-us (accessed 3/8/2019). A founder of the Federalist Society said the founders were “very frustrated that conservative ideas weren’t being heard. We wanted very much to see some of the ideas that President Reagan was bringing to Washington brought to the law school campuses.” *The Federalist Society’s 25th Anniversary Tribute Video*, Federalist Society, youtube.com/watch?time_continue=2&v=PEsxcuP-Sv4 (accessed 2/12/19). Another founder recently stated that “the Federalist Society has come to play over the last 30 years for Republican presidents something of the role the American Bar Association has traditionally played for Democratic presidents” with regard to judicial nominations. thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations (accessed 3/12/2019). Just as the ACS attracts funding from liberal groups, the Federalist Society’s funding comes substantially from sources that support conservative political causes. See *2017 Annual Report*, Federalist Society, at 48, fedsoc.org/commentary/publications/annual-report-2017 (accessed 3/8/2019).⁶

As we said in Advisory Opinion No. 93, a permissible law-related activity “is one that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency” and that “judicial participation in organizations that

advocate particular causes rather than the general improvement of the law is prohibited.” Organizations advocating liberal or conservative causes clearly fall within this prohibition. The conclusion we reached 15 years ago, if anything, is more apt today than it was then: affiliation with organizations holding such views “might reasonably be seen as impairing [a judge’s] capacity to decide any issue of constitutional law that may come before [the judge], and might reasonably be seen as [the judge’s] indirect advocacy [of the organizations’] policy positions.” This alone warrants the conclusion that membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code.

This conclusion is buttressed by the nature of the factional missions of the ACS and the Federalist Society. A reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests. The Committee finds it particularly significant that a motivating factor in the formation of both the ACS and the Federalist Society was the perceived success of their ideological opposition. The Federalist Society formed in part to counter the perceived liberal influence of the ABA, and the ACS then formed to combat the perceived conservative success of the Federalist Society. The Committee cannot see how the public could perceive the two organizations any differently from how the organizations perceive themselves.

The grave concern raised by perceived judicial endorsement of liberal or conservative causes is not allayed by the potential argument that the ACS or the Federalist Society do not view themselves to be liberal or conservative in a political sense. First, their self-descriptions do not make that distinction. Second, even if they did, the Committee does not believe the public would appreciate such a distinction. For judges, this implicates Canon 2 (appearance of impropriety), Canon 3 (disqualification because a “judge’s impartiality might reasonably be questioned”), and Canon 4 (extrajudicial activities that “reflect adversely on the judge’s impartiality”). And although neither is a “political organization,” their activities nevertheless implicate Canon 5’s broad prohibition against political activity. To preserve the integrity and independence of the judiciary, the Committee has broadly interpreted the phrase “political activity” to include not only advocacy in favor of or against a particular political party or candidate but also any activity that is “politically oriented,” has “political overtones,” or involves “hot-button issues in political campaigns.” Advisory Opinion No. 116. As we advised in Advisory Opinion No. 116, judges should be mindful of whether an organization “is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations.”

For these reasons, the Committee affirms its previous advice that holding leadership positions in the ACS and, by necessary implication, in the Federalist Society violates the Code of Conduct. Because membership in these organizations implicates the same Canons that bar holding leadership positions, the Committee further concludes that judicial membership in both organizations is inconsistent with the Code.

As we discussed in Advisory Opinion 116, the relevant portions of the Code of Conduct for Judicial Employees, although not identical to the Code of Conduct for United States Judges, lead to similar conclusions on issues regarding outside activities, particularly for law clerks and staff attorneys. As we have noted, law clerks are perceived by the public as members of a judge's staff. Although we have not addressed the issue as frequently, the advice we have given law clerks on involvement in outside activities, particularly law-related activities, is consistent with the advice we give here. Accordingly, we also conclude that law clerk and staff attorney membership in the ACS or the Federalist Society is inconsistent with the Code of Conduct for Judicial Employees.⁷

The American Bar Association

The Committee has also received many inquiries concerning judicial participation in the ABA. These inquiries share a common thread: because the ABA has taken positions on certain controversial issues, judges question whether membership or other affiliation with the ABA violates the Code. As with other law-related activities, a judge's participation in bar associations is generally encouraged, and the Commentary to Canon 4 notes that participation in bar associations may contribute to the improvement of the law.

The ABA's website states that its mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." *ABA Mission and Goals*, the American Bar Association, americanbar.org/about_the_aba/aba-mission-goals/ (accessed 5/10/2019). The ABA describes its goals as providing membership benefits; promoting legal education, professionalism, and public service; "[e]liminat[ing] bias" and "[p]romot[ing] full and equal participation" in the legal profession and the justice system; and advancing the rule of law, including promoting access to justice and working for just laws. *Id.*

These goals are clearly oriented toward the improvement of the law as a whole. However, the ABA has, at times, advocated for particular constituencies, causes, or agendas, which has raised questions of partiality or the appearance of partiality. For example, in 1990, the Committee received an inquiry from a judge concerned about the ABA's adoption of a resolution opposing legislation interfering with a pregnant woman's decision to terminate her pregnancy "at any time before the fetus is capable of independent life . . . or thereafter when termination of the pregnancy is necessary to protect the woman's life or health." The Committee interpreted the judge's inquiry to be whether "a judge's mere membership in the [ABA], or participation in unrelated programs of the [ABA], [would] nevertheless be reasonably viewed by the general public as an endorsement by the judge of the abortion resolution." Although the Committee stressed the obligation of judges to regularly reexamine the activities of organizations to

determine the propriety of continued affiliation, the Committee advised that membership in the ABA and participation in noncontroversial activities of the ABA could not reasonably be viewed by the general public as an endorsement of the ABA's abortion resolution.

Shortly after that, and perhaps to make public its conclusion in the 1990 confidential opinion, the Committee issued Advisory Opinion No. 85, which addressed the issue of whether a judge could properly be a member of the ABA and participate in ABA programs, "considering that the ABA occasionally takes positions on controversial issues." With little analysis, the Committee advised that membership in the ABA and participation in noncontroversial ABA activities could not "reasonably be viewed by the bar or the public as an endorsement of any of the positions the ABA has occasionally taken on controversial issues." *Id.*

In 2002, the Committee received an inquiry from a judge who was considering joining the ABA but was "concerned that such membership would be contrary to the Code of Conduct since the ABA takes positions on 'overtly political' issues." It appeared to the Committee that the judge had concluded that the ABA's continued practice of taking positions on controversial issues and advocating for those positions negated our prior advice. The Committee responded:

Your thoughtful letter suggests that the activities of the ABA are now such that judges should not be involved in the organization. We recognize that judges must constantly be attentive to the concerns you raise. However, the Committee's present view is that, given the diversity of the ABA's activities and membership, the possibility of a particular ABA position or activity being reasonably attributed to individual judge members is not yet sufficient to indicate an appearance of impropriety.

With respect to their personal activities, many judges interpret particular provisions of the Code of Conduct more strictly than the Committee, as you apparently have in this matter. Your decision to discontinue your membership in the ABA, and your reluctance to join the organization at the present time are matters of individual choice.

The Committee noted a 1991 report by the ABA's Appellate Judges Conference concluding that neither the ABA Model Code of Judicial Conduct nor our Code forbids ABA membership but advising that a judicial member of the ABA "should not participate in any way in the formulation or adoption of a policy, including by voting on the policy, if the policy concerns an issue on which the judge could not properly comment publicly in the judge's own name." That report, the Committee observed, also advised that no judge should hold an ABA office that would "reasonably permit the public to associate the judge with ABA policy." The

Committee advised that, on these points, the Appellate Judges Conference report “is entirely consistent with the Committee’s published opinions.”

In 2008, we responded to an inquiry from a judge who had been elected chair of a section of the ABA. Neither the section nor the judge’s responsibilities as chair involved taking positions on matters of public policy. We advised that a judge should not chair an ABA section “responsible for developing positions on controversial political and social matters that are frequently the subject of federal court litigation, where the judge could not properly advocate such policies individually and cannot as a practical matter be disassociated from the section’s positions.” Because the section which the judge would chair did not develop or take positions on such matters, we concluded that his service as chair was permitted under the Code.

As these and other opinions illustrate, we have consistently advised that the Code does not necessarily preclude membership in the ABA even though the ABA takes positions on controversial issues and sometimes advocates those positions in federal court. Although not previously addressed, we think it significant that, since 1912, the ABA has maintained a separate membership section for judges, now called the Judicial Division. According to the Judicial Division’s Bylaws, “judicial members of the Division will not be deemed to endorse positions and policies adopted by the ABA that conflict with a judge’s obligation to comply with the ABA Model Code of Judicial Conduct or the Governing Code of Judicial Conduct in the judge’s jurisdiction.” Judicial Division Bylaws, Art. I § 1.03. This longstanding division in membership lessens the risk that membership in the Judicial Division “might reasonably be seen as [a judge’s] indirect advocacy of” the ABA’s policy positions.

Even so, it is apparent from the inquiries the Committee has received that many judges have concluded that membership in the ABA is problematic. This concern is not limited to judges. As noted, influential Federalist Society members believe the Federalist Society acts as a conservative counterweight to the ABA in the judicial nomination process. Writers at the Federalist Society also claim that the ABA regularly takes “progressive” positions on controversial issues. Amy E. Swearer, *The ABA is Against You and Other Things No One Tells Conservative Or Christian Law Students*, fedsoc.org/commentary/blog-posts/the-aba-is-against-you-and-other-things-no-one-tells-conservative-or-christian-law-students (accessed 3/8/19). Also, the Federalist Society, for many years, maintained an initiative called “ABA Watch,” which reported on the ABA’s activity, noting especially its perceived liberal stance on contentious issues. See “ABA Watch,” Federalist Society, fedsoc.org/aba-watch (accessed 3/15/2019). In the current politically divisive climate, the Committee agrees that positions taken by the ABA’s House of Delegates could reasonably be viewed to favor liberal or progressive causes.

Still, the ABA's mission, unlike that of the ACS or the Federalist Society, is concerned with the improvement of the law in general and advocacy for the legal profession as a whole. Any individual policy agenda advanced by the ABA's House of Delegates is ancillary to the ABA's core, neutral, and appropriate Canon 4A objectives. Thus, the ABA is not defined and focused to the point that membership could necessarily be perceived as indirect advocacy for or agreement with its positions on controversial issues. The Committee again advises that membership in the ABA's Judicial Division is not *necessarily* inconsistent with the Code. That is not to say, however, that membership is never problematic. Again, times have changed. Judges should be vigilant to the possibility that even "mere" membership in the Judicial Division could lead a reasonable person to question a judge's impartiality in a particular matter involving an issue on which the ABA has taken a position. This, of course, raises the possibility of disqualification. And once again, the Committee stresses that judges should bear in mind that "Canon 4 places the duty upon each judge to regularly re-examine the activities of each organization to determine the propriety of continued affiliation."

Conclusion

In sum, the Committee advises that formal affiliation with the ACS or the Federalist Society, whether as a member or in a leadership role, is inconsistent with Canons 1, 2, 4, and 5 of the Code. Official affiliation with either organization could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge's impartiality on subjects as to which the organization has taken a position; and generally frustrate the public's trust in the integrity and independence of the judiciary. Membership in the ABA's Judicial Division does not raise these same concerns and is not necessarily inconsistent with the Code. However, as we have noted, judicial members of the ABA should carefully monitor the activities of the ABA to determine whether membership remains consistent with the Code and must query whether a position taken by the ABA might call the affiliated judge's impartiality into question and necessitate recusal in a given matter.

The Committee recognizes that many judges participate in events sponsored by these organizations, such as speaking engagements and panel discussions. We have advised that judges may participate in such events even if other affiliation with such organizations would be inappropriate. This is because speaking engagements or panel discussions do not necessarily indicate, nor could they be reasonably perceived as indicating, the endorsement of the organizations' views or positions. Thus, as a general rule, participation in events sponsored by the ACS, the Federalist Society, and the ABA that are open to the public and that address appropriate subject matter is permitted. Of course, in all public remarks, a judge should avoid making statements that could lead a reasonable person to question the judge's impartiality in a matter involving an issue that may come before the judge.

In closing, we emphasize two important points. First, this advisory opinion should not be interpreted as raising ethical concerns with the membership of judicial nominees in either the Federalist Society or the ACS. Second, as detailed above, this opinion reflects a refinement of the Committee's past guidance, dictated by changed circumstances and evolving public perception. Nothing in this opinion should be construed to impugn the ethics or the integrity of judges who have held or currently hold membership in either organization. In other words, our conclusions are neither retrospective nor retroactive. To that end, the Committee anticipates a reasonable period of time for this opinion to circulate among federal judges and for compliance therewith.

Notes for Advisory Opinion No. 117

¹ The Committee recognizes that measuring public perception is fraught with difficulty. Relevant here, scores of media articles and commentary critical of the goals and activities of the ACS and the Federalist Society could be cited. Specific references, however, almost certainly raise the question of bias on the part of the critics themselves. Rather than attempting to discern what public information fairly and reasonably shapes public perception of these organizations, the Committee relies on the organizations' self-descriptions and the statements of their leaders. Even so, the sheer number of media accounts associating these organizations with political factions or controversial issues has some significance.

² We note that contribution may not be permitted under all circumstances. For example, the ACS states that "ACS memberships are based on a minimum donation of . . . \$25 for government, nonprofit, and academic employees." Join ACS, acslaw.org/membership/joinacs/. Thus, it appears that any contribution above \$25 may result in membership in the organization. In light of the conclusions of this Advisory Opinion, a judge should take care to ensure that a contribution will not inadvertently result in membership.

³ We stated that principle more fully in Advisory Opinion No. 116: "Where the participation of a judge or judicial employee in a seminar could create the impression of a predisposition regarding a legal issue or could suggest that a proposed decision may be influenced by the relationship with the advocacy group, participation is likely inappropriate."

⁴ Indeed, both ACS and Federalist Society leaders have suggested that their organizations represent opposite ideological poles. The cited 2005 media article reported that ACS leaders agreed that the ACS was a response to a "conservative ascendancy," and reported that the president of the Federalist Society welcomed the ACS "to the fray," adding, "If the ACS will be an

organization on the left trying to encourage debate and discussion, I think that's a good thing.”

⁵ Among these sources are the American Civil Liberties Union, the Brennan Center for Justice, the Center for Reproductive Rights, and the Open Society Foundations.

⁶ Among these sources are Koch Industries, Inc.; The Lynde & Harry Bradley Foundation; Donors Trust; and the Sarah Scaife Foundation.

⁷ This conclusion applies only to law clerks and staff attorneys. We note, however, that Canon 4A of the Code of Conduct for Judicial Employees requires all judicial employees to consult their appointing authorities before engaging in law-related activities.

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