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**FORMAL
JUDICIAL ETHICS OPINION JE-117**

April 4, 2009

WITHDRAWAL OF JUDICIAL ETHICS OPINION ("JE") 64

In the course of its ongoing review of existing Judicial Ethics Opinions, the Ethics Committee of the Kentucky Judiciary ("Committee") considered, and received an inquiry regarding, the continued viability of JE-64. In JE-64, the Committee addressed the following inquiry:

MAY A KENTUCKY JUDGE OR JUSTICE, CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, SERVE AS A MEMBER OF THE BOARD OF TRUSTEES OF A PUBLIC UNIVERSITY?

The Committee answered with a "Qualified Yes," for the reasons expressed in the Opinion. The Committee has concluded that the current answer to the question is "No," and hereby withdraws JE-64 accordingly, and substitutes this opinion.

JE-64 was issued under the prior version of the Code of Judicial Conduct ("Code"). As indicated in JE-64, the Committee at that time wrestled with the apparent conflict between Canon 5B of the Code (permitting service as trustee of an educational organization) and 5G (prohibiting service on a governmental committee). The Committee at that time opted in favor of the conclusion that service as a trustee of a public university was permitted, and several Kentucky judges and justices have since that time served as such. As an aside, any service of federal judges on public university boards is not implicated by the Code, since they are not governed by the rules of the Kentucky Supreme Court. Furthermore, any service by Kentucky judges or justices on private university boards is clearly permitted by current Canon 4C(3), and is not complicated by Canon 4C(2).

When the current Code was adopted by the Kentucky Supreme Court, effective January 1, 1999, Canons 4C(2) and 4C(3) contained provisions identical to the current verbiage:

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is

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concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may accept appointment to a governmental committee or commission where a judicial appointment is authorized or required by law. A judge may represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

At the time the present Code was adopted, the Commentary to Section 4C(2) contained the following paragraph:

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. **For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).**

(Emphasis added.)

The Committee believes the change in this version of the model Code was adopted to clear up the apparent contradiction in the previous version of the Code, which was addressed in JE-64. Furthermore, the existing Commentary to Section 4C(3) states "Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2)." Our conclusion is that service on a public university board is "service in a governmental position".

In 2004, the Kentucky Supreme Court deleted the emphasized sentence in the Commentary to Section 4C(2). The Commentary to Section 4C(3) was not amended. The Committee believes that the Kentucky Supreme Court was attempting to clarify the section by amending the Commentary to Canon 4C(2) to delete the sentence which explained that service

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on public university boards was prohibited. However, the Code itself was unaffected, which is significant, because the preamble to the Code states:

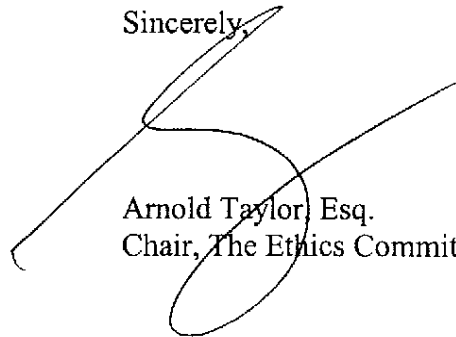
The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules.

The Supreme Court did not amend the text of the rule to permit service; it merely deleted a sentence that provided guidance, albeit one which as Commentary was not authoritative. The consensus of the Committee is that current Canons, and existing Commentary, support the conclusion that Kentucky judges and justices may not serve on public university boards.

The Committee believes this opinion should have prospective application only. In 2003, a judge was nominated for appointment to a public university board, and, the Committee advised the judge that service was not prohibited, relying solely on JE-64 and the provisions of Section 4C(3). In 2006, another judge was similarly nominated. In accepting his appointment, the second judge was aware of and relied upon the advice given the first judge. Since those two judges accepted appointments to their current terms in reliance upon JE 64, the Committee does not believe this Opinion should operate retroactively. Finally, as the Committee's conclusion rests solely on the provisions of the Code, the Committee considers it unnecessary to consider other sources which may bear on the issue, such as KY. CONST. §28; KRS 164.150; *Commonwealth, ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992); or Ky. OAG 94-5.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Sincerely,



Arnold Taylor Esq.
Chair, The Ethics Committee of the Kentucky Judiciary

AT:psw
Enclosure

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cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter
The Honorable Jean Chenault Logue
The Honorable Jeffrey Scott Lawless
Jean Collier, Esq.