

A Manual for
Judges and Court Managers
About Judicial Involvement
in Legislative Processes

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Table of Contents

Preface

I have been working for over a decade with the California Legislature, the Governor's office, and the California Judiciary on matters affecting the administration of justice. In the course of that work, I have seen how the different perspectives, powers and roles of each branch of government inevitably affects its relationship with the other branches. These experiences are what triggered my interest in preparing this manual for use by judges and court managers who become involved in legislative processes.

I want to acknowledge and thank the State Justice Institute for their support of this work. I also owe a great debt of gratitude to the California Administrative Office of the Courts and, in particular, the Administrative Office of the Courts' Office of Governmental Affairs in Sacramento. The Office of Governmental Affairs shared with me their time and expertise in developing this manual. Finally, I want to thank Ms. Priscilla Dodson, my executive assistant, for her assistance in preparing the manuscript for publication.

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Chapter 1. Introduction	1
Chapter 2. Legislatures and Courts: Commonalities and Differences	3
A. Introduction	3
B. Vaguely Familiar Features of the Legislative Process	4
1. The Language of the Law	4
2. Public Hearings, Witnesses and Testimony	6
3. Rules of Procedure	6
C. Why Does the Legislature Do It That Way?	8
1. Delegation to Staff	8
2. Who Writes the Statutes?	9
3. What's the Purpose of a Committee Hearing?	11
4. Private Meetings with Legislators and Staff	13
Chapter 3. Separation of Powers and Judicial Involvement in Legislative Processes	16
A. Two Models of Separation of Powers	16
B. Judicial and Legislative Powers	17
C. Danger Areas	17
1. Judicial Branch Budget and Resources	18
2. Matters Directly and Substantially Affecting the Administration of Justice	19
3. Other Matters Affecting the Administration of Justice	24
4. Other Legislative Topics	26
Chapter 4. Ethical Considerations	28
Chapter 5. Practical Tips and Etiquette	31
A. Know Your Audience	31
B. Do's When Testifying	33
C. Don'ts When Testifying	34
D. Respect the Legislative Process	35
Appendix A. Bibliography	36
About the Author	41

Chapter 1 Introduction

This Manual is designed to acquaint members of the judicial branch of government, including both judges and court managers, with the basic principles, ethical rules and practical considerations that govern interactions with members of the legislative branch of government.

Over the course of the last fifteen or twenty years, as state courts around the country have become more involved in planning their own futures, judges and court managers have been drawn into the legislative process with increasing frequency. However, until the publication of this Manual, there has not been a single, concise source to which judges and court managers could turn to become familiar with the practical and ethical issues that arise when members of the judicial branch become involved with legislative processes.

A national conference sponsored by the State Justice Institute and the National Center for State Courts on “Legislative-Judicial Relations: Seeking a New Partnership” (National Center for State Courts 1991) (SJI-89-04X-B-017) recommended the establishment of “*educational programs* that orient judges, court managers, legislators, and legislative staff to the procedures, perspectives, and problems of each other’s branches.” *Id.*, pp. 21-22. This Manual, which is supported by a grant from the State Justice Institute (SJI-99-N-039), is intended to be a first step in providing the recommended education.

The remainder of the Manual is divided into four chapters:

- Chapter 2 reviews the differences and commonalities between legislative and judicial processes.

- Chapter 3 discusses separation of powers issues that arise when judges and court managers involve themselves in legislative matters.
- Chapter 4 highlights the general ethical rules that govern judicial conduct in the context of legislative processes.
- Chapter 5 contains a list of practical tips and rules of etiquette that should be followed as a matter of courtesy and respect for the legislative process.

For those who wish to do additional reading on the subject of judicial involvement in the legislative process, we have provided a partial bibliography of sources in Appendix A.

A twenty-minute Internet training course covering the contents of the Manual is available on the Capital Center’s website at www.mcgeorge.edu. We hope you will find these materials to be of use, and we invite any comments, criticisms or suggestions for improvement.

Chapter 2.

Legislatures and Courts: Commonalities and Differences

A. Introduction

Judges resolve problems and disputes using well-defined, mostly public processes that ensure interested parties a meaningful opportunity to be heard and that promote decision-making consistent with constitutional provisions, statutes, the common law, and rules of court. Ideally, the judicial mind frames an issue in light of existing law, and then reasons towards a conclusion that is publicly defensible (and, in the case of appellate judges, is generally explained in a written opinion). When a legal issue is unresolved, judges search for general principles of law and analogous situations and precedents on which to base a decision. These processes are appropriate for the structure and function of the judiciary and for the type of issues that are generally committed to the judicial branch (i.e., the resolution of individual disputes).

The processes employed in the legislative branch are quite different. Legislative fact-finding is not the same as judicial fact-finding since legislators are more interested in creating law to handle large classes of future issues or disputes than in trying to resolve individual past disputes in light of existing law. Moreover, legislators have an obligation to respond to democratic pressures while judges generally have an obligation to ignore democratic pressures and to decide cases in accordance with the law (particularly in the context of constitutional adjudication). The balancing of interests that may be achieved through negotiation and compromise (which lies at the very core of the legislative process), and the sometimes arbitrary line-drawing that may result, is generally avoided in judicial analysis and decision-making which prides itself on resolving each case fairly in light of the law. Finally, legisla-

tors are usually more concerned about the final result than about the process leading to that result, while principles of due process lie at the very foundation of the judicial process.

Judges, court managers and others who are not familiar with how a legislature works often find the legislative process to be incomprehensible and/or frustrating because access to the process does not seem to be guaranteed to all on an equal basis and principled reasoning and decision-making often seem to take a back seat to political compromise and expediency. It is also popularly believed that campaign contributions sometimes are more important than policy.

This Chapter explores the commonalities and differences between legislative and judicial processes so that you will better understand how a legislature functions and better appreciate its processes. Understanding the commonalities and differences will facilitate your involvement in legislative processes because you will know what to expect and you will know what others in the legislative process expect from you.

Many features of the legislative process will seem to be familiar to you both because of your general knowledge and education and because the processes seem, on their face, to be similar to judicial processes. However, the differences are much greater than the similarities, and part of the challenge in working in the legislative process is to understand that what may seem to be a similarity is actually a difference.

B. Vaguely Familiar Features of the Legislative Process

1. The Language of the Law

The first familiar feature is that the legislative process appears to be focused on the language of the law – statutory language and constitutional amendments. Virtually all of a

legislature's formal processes are designed to facilitate consideration of statutory or constitutional language. Parliamentary procedures regulate when a bill can be introduced, what committees a bill must be referred to, when amendments to a bill can be considered, and what vote requirements a bill must satisfy (e.g., majority or two-thirds). Along the way, committees and caucuses produce written analyses of a bill that explain its provisions. In light of these processes, the impression may be generated that the language of bills and how a bill fits into existing law is the most important thing on the legislature's collective mind.

This appears to be similar to the judicial process which similarly focuses its attention upon language in constitutional provisions, statutes and judicial opinions. Justice Felix Frankfurter's famous call to his Harvard students to "READ THE STATUTE, READ THE STATUTE, READ THE STATUTE!" as the three most important rules of statutory interpretation suggests the preoccupation with language that characterizes legal reasoning in the context of legislation.

Appearances can be deceiving. While a legislature's processes are designed to facilitate passage of bills and to permit a focus on language, legislators themselves may have very little interest in the precise language used in a bill. For legislators, the important questions more often than not relate to whether there is a problem, whether the bill in general terms addresses that problem, what the actual consequences will be if a bill is passed, and a bill's political implications. Legislators generally assume that experts in bill drafting (e.g., the legislative counsel's office or a lawyer consulting with the proponent of the bill) will have taken care of the technical details and that committee staff, working with the author and proponent, will work out any language problems or bring any remaining problems to the committee's attention. Remember that most legislators are *not* lawyers, and legislators may not

have the same fascination that lawyers and judges have with fine points of statutory interpretation.

Thus, although the text before a legislative committee looks like the sort of thing that judges deal with routinely in their work, legislators and a legislative committee are likely to treat the text very differently from the way a court treats the text. We will expand on the differences below.

2. Public Hearings, Witnesses and Testimony

Like the judicial process, the legislative process conducts some of its business in public hearings where witnesses testify and may be asked questions by legislators. Occasionally, legislative witnesses are required to take an oath to tell the truth (although legislative committees usually dispense with oaths from witnesses). Testimony at public legislative hearings is one common way in which judges may become involved in the legislative process.

The similarity between a legislative and judicial hearing pretty much ends by saying that both types of hearings are usually public, there are witnesses who deliver testimony, and the witnesses can be asked questions. The differences between legislative and judicial hearings far outweigh the similarities, and the differences will be explored below.

3. Rules of Procedure

Legislative processes, like judicial processes, are shaped by rules of procedure. Legislative rules regulate such things as when bills may be introduced, how many bills may be introduced, how many subject matters may be dealt with by a single bill, who decides to which committees a bill will be referred, and how many votes are required to pass a bill. Some committees may have written rules of procedure for how hear-

ings are to be conducted, and most committees at least have relatively well-known practices (well known, at least, to the professional lobbyists who regularly appear before the committee).

The presence of these parliamentary rules of procedure may give the impression that the legislature, like a court, is first and foremost concerned with adherence to principles of due process. To a limited extent, this is true. Legislators have a general concern that their processes are perceived to be open to the public and that there is a measure of equal access.

However, unlike many judicial rules of procedure, rules of procedure in a legislature can almost always be waived. The power to waive rules technically resides in the entire legislative body, but it often is exercised solely in the discretion of the leadership.

The ability to waive rules seemingly without limitation may suggest to an outsider that the rules of legislative procedure are virtually useless. Not so. For ordinary, run-of-the-mill legislation, the rules of procedure are generally followed strictly. Legislative deadlines must be met, and legislators are required to stay within the rules. Waivers of rules are generally seen only with respect to very important bills that are of special interest to the entire legislature and the leadership. It is with respect to these type of important bills, bills that usually are of importance to major interest groups and the public, that rules can be waived permitting fast action, often late in a legislative session.

The power to waive rules of procedure to permit action on important legislation needs to be viewed in the context of the legislature's primary focus upon the substance and politics of a bill. For a legislator, it is generally more important for a good piece of legislation to be enacted than it is for procedural

regularities and legislative deadlines to be strictly followed.

C. Why Does the Legislature Do It That Way?

Many of the processes routinely employed in the Legislature have no counterpart in the Judicial Branch and may seem to be "illegitimate" in some way (at least by comparison to judicial processes) or arbitrary. However, there are reasons for the differences. The differences reflect the fundamentally different goals, interests and needs of the Legislative Branch.

1. Delegation to Staff

A legislator's day is often packed with meetings and appearances, from breakfast through dinner: Meetings with constituents, meetings with lobbyists, meetings with other legislators and staff, committee meetings, meetings with potential campaign donors, and appearances and speeches at a wide range of events. Most legislators will tell you there simply is not enough time in the day to attend all of the meetings and events on the calendar. As a result, legislators must rely quite heavily upon staff and may delegate substantial discretion on the details of legislative matters to staff. Staff does not have total freedom of action, of course, and final decisions are made by the legislator and not by staff. But one sign of a good staffer is his or her ability to speak with a high degree of confidence about what his or her boss would find acceptable or unacceptable.

The degree of delegation to staff in the legislative branch is significantly higher than that found in the judicial branch. Most trial judges do not have law clerks to whom they can delegate research functions, and even appellate judges with such staffs must ultimately make their own decisions. Law clerks and judicial staff provide assistance to the judge; they do not substitute their judgment for the judge's.

The legislative reliance upon staff means that judges and court managers may sometimes find themselves dealing with staff instead of with legislators. If this occurs, it should not be viewed as a sign of disrespect. It may simply reflect the practical realities of a legislator's calendar. Moreover, a detailed discussion with staff may, in the long run, be much more productive than a discussion with a legislator (who may have delegated work on the details to staff).

On the other hand, developing good relations with individual legislators is an important part of lobbying and the legislative process. There will certainly be times when a judge or court manager needs to raise issues directly with a legislator, and legislators will often be willing to meet with judges and court managers on important issues.

2. Who Writes the Statutes?

As noted above, legislatures, like courts, work with statutory language, but a legislator's focus is more likely to be on the policy and less on the details of drafting. This raises the question, "who actually writes the statutory language?"

Statutory language usually originates in a vague idea for legislation. Ideas for legislation come from many sources: legislators, legislative staff, governmental agencies, private interests represented by lobbyists, newspapers and mass media, and constituents. Sometimes, ideas for legislation come from judicial opinions themselves which may be brought to a legislator's attention by interested parties. Legislators usually come into office with a set of ideas or an agenda which was the basis of their campaign, and legislators spend a great deal of their time listening to the public and to lobbyists for other ideas. Legislative staffers also spend a substantial amount of their time learning about issues and scanning the environment for problems that might be addressed by legislative solutions.

How does an idea for legislation get turned into a bill? A few legislators and legislative staff do their own drafting. Usually, however, it is not an efficient use of their time to draft statutes. There are any number of other experts who can do the initial drafting, and since the vast majority of proposed bills are never enacted, a legislator probably does not want to spend valuable staff time working on drafting issues. Instead, a legislator may request that the office of legislative counsel prepare language to address the problem identified by the legislator or may request that an interested organization assist in drafting language.

Legislators are also besieged by lobbyists representing public and private organizations with proposals for bills. These organizations usually come to a legislator with a complete package: an idea, supporting information and a draft bill.

The important thing to understand is that legislators themselves are probably focused more on the "big picture" of legislative proposals – whether there is a problem to be solved, what type of solution is being proposed, who supports and opposes the legislation, and the politics of the bill — than upon the details of the statutory language. This is not because legislators do not care about drafting details. It is because in the overwhelming number of cases, the legislator's time must be spent working on generating support for the big picture and overcoming opposition. In the context of this vote-gathering process, drafting details are important only insofar as they affect votes. Moreover, there are quite a few experts and interested parties who *will* be looking closely at the statutory language and who will raise possible problems in letters of support or opposition or in private discussions with legislative staff.

The judicial branch prides itself on attention to details. Judges do not delegate the task of sweating the important details to staff. Even at the appellate level where judges are as-

sisted by law clerks in drafting opinions, the final work product bears the signature of the author who is ultimately responsible for everything in the opinion.

When judges and court managers participate in legislative deliberations, this difference in attention to drafting details can cause problems. What may appear to a judge to be a major ambiguity creating interpretive problems for the courts, may appear to a legislator as a minor point to be dealt with, if at all, by staff. Both the judge and the legislator may be right. There may be a significant ambiguity that will create problems for the courts; but from a legislator's perspective, the ambiguity, even if not corrected, may not be a sufficient reason to stall the legislative process. Moreover, deliberate ambiguity can be a useful tool for legislators who may need to mollify groups with divergent interests and perspectives.

There is an easy way of avoiding a clash with a legislator over drafting details: Discuss drafting issues with the committee staff or a legislator's staff *before* the next public hearing so that staff will have an adequate opportunity to brief the members regarding the drafting issue. Drafting details should, if at all possible, be worked out privately. A public hearing is generally not the best place to engage in what usually deteriorates into a failed attempt at group drafting.

3. What's the Purpose of a Committee Hearing?

Legislative committees and subcommittees hold public hearings where witnesses are permitted to testify and respond to questions from legislators. As noted above, that is about where the similarity between a legislative hearing and judicial hearing ends.

A judicial hearing, and the briefs and other documents filed in anticipation of a judicial hearing, is the primary basis of

communication between the parties and the court and is designed to give the parties the primary opportunity of presenting their positions and to give the court the best opportunity of learning about the dispute. Judicial decisions are then based upon the written filings and the record made at the hearing.

A legislative hearing has very different goals. A legislative hearing is *not* intended to be the primary mode of communication between legislators and interested parties. In fact, most of the communications and virtually all of the really important communications have taken place *before* the hearing in discussions among the interest groups and between interest groups and individual legislators and their staffs. It is during these private discussions that problems are raised, negotiations take place and compromises are struck. It is in the course of these private meetings where votes are sought and counted. In most instances, the votes of committee members are already known *before* the committee meets in public.

Since most of the important discussions have already taken place, and the votes have already been counted, what is the reason for holding a public hearing? First, it gives proponents and opponents a chance to present their views in public in a setting where the public (through the media) can see the arguments side-by-side. Second, it gives the legislators a convenient opportunity publicly to align themselves with proponents or opponents. Third, in some instances, it gives legislators an important opportunity to ask questions in a public setting. Sometimes, the public setting can affect votes (just as oral argument can sometimes, but not often, affect the votes on an appellate court).

However, because the content of legislative hearings often does not affect any votes and because of the incredible volume of business which most legislative committees face, legislative hearings on a bill are often short affairs, and the

committee chair may encourage witnesses simply to state their name, the organization they represent and the organization's position without giving much or any explanation. Moreover, many if not most of the committee members may actually miss the hearing and appear only for the vote (and in some states, members may vote without even showing up for the hearing by calling in a vote after the hearing has concluded).

These characteristics may breed cynicism about the legislative hearing process. But the cynicism is somewhat misplaced. The legislative process is deliberately designed so that most decisions can be made in private discussions and forums where negotiation and compromise is more likely. Unlike a judicial proceeding, the public hearing in the legislative process is not designed to be the center-piece of a process where decisions are made "solely on the merits" of information presented at the hearing.

This does not mean that legislative hearings are useless or mere political theater (and, in any event, there is nothing "mere" about political theater to representatives who work in a very political process). Thus, witnesses at legislative hearings should treat the hearing process with respect, even if participation is limited to stating your name, your organizational affiliation and your organization's position. It is worth remembering that anything you may present orally at a public hearing could also be presented in writing or could be communicated to legislative staff or to legislators in meetings prior to or after the hearing.

4. Private Meetings with Legislators and Staff

Much of the productive work with a legislature occurs in the context of private meetings with legislators and/or legislative staff. There is more time in private meetings to develop the sense of personal confidence and trust that is absolutely

essential to the smooth functioning of the legislative process. The private setting encourages frank discussions about the advantages and disadvantages of legislation and is the best time to raise questions about drafting details.

There is no real counter-part in the judiciary to the private meeting process in a legislature. Judges are generally forbidden to hold *ex parte* meetings with one side to a dispute in court. In the legislature, by contrast, *ex parte* meetings are much more common than meetings with all interested parties.

For judges and court managers, the most important legislators in general are the leaders of the two houses, the leaders of the party caucuses, and the chairs and members of the judiciary-related committees (in some states, there is a single judiciary committee in each house; in other states, there are two judiciary committees in each house, one for civil matters and one for criminal matters). These are the people who have the most power to move or stall judiciary-related bills. A well-orchestrated lobbying effort by the judicial branch will invariably involve "get acquainted" meetings with these legislative leaders. Depending on the resources available to the judicial branch, it may be useful to schedule similar meetings with *every* legislator, assigning a judge from the legislator's district to serve as a liaison with that legislator.

In addition to these general meetings, when a bill is introduced in which the judicial branch is interested, a meeting with the legislator who introduced the bill and/or his or her staff may be requested to present the judiciary's perspective. To be productive, a meeting needs to be held *before* the bill has been heard at the first committee hearing. As explained above, the committee hearing serves different functions in the legislative context. The hearing is generally *not* the first time to present formal opposition to a bill. That opposition should have been communicated *before* the hearing so that the legislator who

introduced the bill is not surprised at the hearing. Presenting formal opposition for the first time at a hearing is a good way to alienate legislators (even those legislators who may agree with you on the substance).

Because of its complexity and the speed at which the legislative process operates, attempting to follow a bill and schedule meetings at the appropriate times with the appropriate people is not a job to be handled in one's spare time. That is why a professional lobbyist or, in the case of governmental entities, a governmental relations office, is so important. The lobbyist can track all legislation relevant to the courts' interests, arrange for meetings, ensure the judiciary's formal positions, if any, are appropriately communicated at the right time to the right offices, and guide judges and court managers through the process. This type of centralized management of legislative contacts also helps to ensure a consistent message from judicial branch representatives. In general, there is no substitute for an experienced, well-respected lobbyist who understands the legislative process.

One of the advantages of private meetings – open and frank exchanges – is also a possible danger spot for judges and court managers. Separation of powers and ethical considerations, discussed in chapters below, must be kept in mind. In addition, there can be a tendency in private meetings to speak more informally about possible amendments or changes in a bill. Misunderstandings can arise in these type of oral exchanges. To avoid such misunderstandings, it may be useful to reduce the substance of a private meeting to a follow-up letter thanking the member for the opportunity to meet on a bill and restating the judiciary's formal position.

Chapter 3. Separation of Powers and Judicial Involvement in Legislative Processes

A. Two Models of Separation of Powers

Over the years, judges and scholars have identified two primary models of separation of powers. The first may be called a “strict” model where there is virtually no direct interaction between judicial and legislative branches. Courts decide cases and, in the course of doing that, interpret legislative acts and exercise the power of judicial review. Legislative staffers may read judicial opinions every now and then, and judicial opinions are certainly brought to the attention of the legislature when relevant by proponents and opponents of particular bills. However, apart from the formal submission of the judiciary's budget, there are very few lines of communication between the branches.

The second is a more flexible model of separation of powers which recognizes that, although the branches are separate, there must be an integration of dispersed powers into a workable government. There is separateness but interdependence; autonomy but reciprocity. This was Justice Robert Jackson's view as expressed in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and this is the view that has generally predominated as a matter of constitutional law.

In the flexible model, there can be a greater amount of give and take between the branches, but there are limits. First, no branch can arrogate to itself the core functions of a coordinate branch of government. Second, no branch may deprive another branch of the powers and resources necessary to perform its core functions.

B. Judicial and Legislative Powers

In order to understand these limits, we need to consider the core functions and characteristics of the two branches. The judicial power includes the power of constitutional interpretation and judicial review. Courts also are the ultimate arbiters of statutory interpretation; they say what the law is. Finally, courts have the power to decide individual cases.

The legislature, by contrast, has power to make law (with, in many states, the power of initiative and referendum reserved to the people). The legislature is also empowered to raise revenue and make appropriations.

Because of their different core functions, the judicial and legislative branches have very different characteristics. The judicial branch is generally supposed to be non-partisan, non-political and non-representative (and these characteristics hold true even in states where judges are elected in partisan races). The legislative branch, by contrast, is partisan, political and representative. The judicial and legislative branches occupy two very different worlds.

C. Danger Areas

In order to maintain its non-partisan, non-political and non-representative characteristics, courts, judges and court administrators need to exercise caution when operating in the legislative process. There are danger areas that should generally be avoided. At the same time, there are some subject matter areas that are so within the core of judicial branch interests, that it is appropriate for judicial branch representatives to involve themselves with legislative processes even when such processes turn political.

It is useful to divide legislative subject matter into four

categories: (1) judicial branch budget and resources; (2) matters directly and substantially affecting the administration of justice; (3) matters indirectly affecting the administration of justice; and (4) other legislative topics.

1. Judicial Branch Budget and Resources

When it comes to the judiciary's budget and issues such as the number of judges and court employees, the judiciary's institutional interest is at its peak. Although the budget process is plainly political, the judiciary has no choice but to involve itself in that process. After all, separation of powers principles prohibit the legislature and executive from depriving the judiciary of the resources necessary for the judiciary to perform its core functions. Therefore, the judiciary must be vigilant when it comes to budget and personnel matters, even at the potential cost of substantial friction between the branches.

Over the course of the last decade, courts in several states have participated in particularly difficult and fractious budget negotiations. Some of the difficulties arose because state budgets were generally tight during a recessionary period, and legislatures were being forced to cut programs across the board. Some of the difficulties arose because of political reaction to decisions by a state's highest court.

When difficulties arise in the budget process, the judiciary must respond firmly, but with a clear understanding of the political nature of the process. A firm response should not be confused with arrogance. To many legislators, the judiciary is just another agency of government that is entitled to no greater and no less respect than any other agency of government. This perception is significantly at odds with the perception of many judges that the judiciary is a co-equal and independent branch of government. To bridge the gap between these different perceptions, judges and court administrators may need to remind

legislators about the constitutional role which the judiciary has been assigned to play.

However, courts cannot simply rely upon the phrase “judicial independence” to support the judiciary’s budget requests. Instead, the judiciary needs to be prepared to make a strong case on the merits for the rough details of its budget requests. After all, the budget process and the power of appropriation is a legislative function, and the judicial branch should respect that process in submitting and defending its budget.

2. Matters Directly and Substantially Affecting the Administration of Justice

When it comes to matters directly and substantially affecting the administration of justice, the courts still have a significant role to play in legislative processes, although the judiciary’s institutional interest is probably somewhat less here than with the judiciary’s budget. Because the judiciary’s interest is somewhat diminished with respect to matters affecting the administration of justice, there will be times when the judiciary should avoid or limit its involvement with legislative proposals affecting the administration of justice.

In general, the more politicized a particular legislative proposal, the more cautious members of the judicial branch should be about commenting upon it. Many factors affect or evidence the politicization of a bill including the following:

- whether a bill makes only narrow and technical changes versus broad reforms;
- whether a bill reflects the views of only a few individuals or a large, organized group;

- whether the bill is likely to be reported in the legal or popular press and to have low or high saliency with the public;
- whether the bill is likely to be part of a political campaign; and,
- whether support and opposition lines up along partisan or ideological lines.

A few examples will illustrate some of the considerations that judges and court administrators should take into account in deciding whether to comment upon legislative proposals that directly and substantially affect the administration of justice.

Suppose that a bill is introduced which requires that all appellate opinions be issued within 120 days after submission of the appellant’s reply brief. The proponents of the bill, a small group of appellate practitioners, assert that it is necessary to address a serious problem of appellate delay. Support and opposition for the bill does not appear to fall neatly upon any partisan or ideological lines, and the subject matter of the bill, appellate delay, has low saliency among the public. In short, this is not a bill that will generate much interest among legislators, either pro or con. The judiciary can make a strong case for the proposition that a 120-day deadline would impair the administration of appellate justice by requiring justices to devote inadequate time to the merits of appeals simply to meet the deadline.

Should the judiciary take a position on this bill? Probably yes for the following reasons:

- the bill clearly, directly and substantially affects the administration of appellate jus-

tice which means the judiciary has a legitimate interest in the bill;

- the bill deals with a problem that has low saliency among the public and is unlikely to be of much interest to most legislators which means the judiciary's official position will be given substantial, and perhaps dispositive, weight;
- because the bill has low saliency among the public and is unlikely to be of much interest to most legislators, support and opposition does not fall neatly along partisan or ideological lines which means the judiciary can take a strong position of opposition to the bill without risking antagonizing an entire group of legislators; and,
- the likely impact of the bill upon the administration of appellate justice is so serious, that the judiciary should take a strong position of opposition to protect the integrity of the judicial process even though there may be a risk of offending the proponents and legislators who support the bill.

Next, suppose that a bill is introduced to create a "Three Strikes" system patterned upon the law adopted in California (pursuant to which someone convicted of a third felony after having been convicted of two violent or serious felonies generally must be sentenced to twenty-five years to life). The bill is supported by a coalition of law enforcement officials, the attorney general and leaders in both houses of the legislature (both houses of which are controlled by the same political

party). The bill is opposed by the minority party in the legislature and by the governor who is a member of the minority party. Many judges are concerned that passage of the bill will have a substantial impact upon criminal caseloads and jury trials, will unwisely take sentencing discretion away from trial judges, and is unlikely to have the intended deterrent effect. The chair of the Senate Judiciary Committee has invited the judicial branch to present testimony at the next hearing on the bill.

Should the judiciary take a position on this bill, and should a judge or court manager appear at the Senate Judiciary Committee hearing? The judicial branch (and judges and court managers) should *probably not* take a position on the bill, but probably should appear at the hearing to answer any questions about how the trial courts in the state would respond to any increase in criminal jury trials resulting from passage of the bill. Here are some relevant considerations:

- the bill arguably directly and substantially affects the administration of criminal justice (and potentially the administration of civil justice as well depending upon the impact of the bill) which means the judiciary has a legitimate interest in the judicial administration aspects of the bill (i.e., how the trial courts will respond to any impacts);
- the bill is likely to have high saliency among members of the public and is likely to be followed closely by the popular press which means any opposition or support will be widely reported creating a political risk for the judicial branch and for

judges and court administrators who take public positions on the bill;

- support and opposition for the bill falls largely upon political party lines which means the judicial branch, if it indicated support or opposition to the bill, would have to align itself with the views of one political party on a politically important bill;
- whether passage of a California-style “Three Strikes” measure would have a substantial impact upon the administration of justice is likely to be a debatable point which means a judge or court manager taking a position on the question of whether the measure would have a substantial impact could be accused of shading the facts on likely impact in order to conceal a position of support or opposition on the wisdom of the measure, thereby drawing the judiciary into an argument about the merits of the measure;
- limiting testimony to a statement of how, hypothetically, the trial courts would react and what resources the trial courts might need if there were an impact keeps the judicial branch out of the policy and political argument while still presenting legitimate judicial branch concerns about the administration of justice.

There is no single, bright-line test for determining the appropriate level of judicial involvement in bills that directly

and substantially affect the administration of justice. Formal support or opposition will be appropriate in some cases; in other cases, judicial involvement should be limited to providing essentially technical information (e.g., what will be the likely impact, and how will the courts respond to that impact?); in other cases, the best involvement will be no involvement at all. Making the right decision about the level of judicial involvement requires the exercise of informed, experienced and careful judgment.

3. Other Matters Affecting the Administration of Justice

Legislation very often has *some* impact upon the judiciary, but often the impact is insubstantial or indirect. As the subject matter and impact of a bill moves away from matters of judicial administration to matters that only indirectly affect judicial administration, the need for judicial restraint in the legislative process becomes much greater. Bills that only indirectly affect judicial administration and bills that affect judicial administration in only insubstantial ways are matters that are not as critical to the judiciary’s interest and fall squarely within the legislature’s core law-making powers. As a general matter, judges and court managers should avoid entirely or strictly limit their involvement with such bills.

Suppose, for example, that a bill is introduced in a state to repeal an existing cap upon emotional distress damages that may be recovered in a medical malpractice action. The bill is supported by the plaintiff’s trial bar and is opposed by doctors, HMOs and health care insurance companies. The supporters and opponents of the bill are politically active groups both in terms of campaign contributions and in terms of active lobbying in the legislature. The bill is supported by most members of one party and is opposed by most members of another party. The introduction of the bill in the legislature was widely

reported in print media throughout the state and is being closely followed by political reporters. The proponent of the measure requests that a representative from the judicial branch present testimony dealing with the confidence which judges generally have in juries and the jury system.

Should the judiciary take a position on the bill, and should a judge or court administrator accept the invitation to testify? The judicial branch (and judges and court managers) should *definitely not* take a position on the bill, and should politely *decline* the invitation to testify at hearings on the bill. Here are some of the considerations:

- the bill deals with a narrow, though important, question of substantive law (i.e., remedies in medical malpractice actions) and does not directly deal with the administration of justice (unless “administration of justice” is defined so broadly as to encompass all of substantive law, a definition that is likely to increase the conflicts between the judicial branch and the legislature on policy questions that are properly before the legislature);
- the bill has relatively high salience with the public and media which means the judiciary’s position will be widely reported;
- the bill’s supporters and opponents are divided along political party lines which means the judiciary cannot take a position without aligning itself with one or the other party;

- the supporters and opponents are politically active, and in many states quite powerful, lobbying groups which have the potential to create serious problems for the judiciary on legislative matters that are more at the core of the judiciary’s interests;
- it will be virtually impossible to give useful testimony about judicial confidence in juries without addressing whether juries do a good job of awarding emotional distress damages in medical malpractice actions, which means that any testimony on the bill is likely to draw a judge or court manager into a discussion of the merits and wisdom of the bill.

When it comes to bills that only indirectly or insubstantially affect the administration of justice, if there is any doubt about the usefulness or propriety of judicial involvement in the legislative process, those doubts should be resolved *against* judicial involvement. These bills are only tangentially related to the judiciary’s core interests, and the risk of antagonizing supporters or opponents and of being perceived as taking sides on a political or policy question are too great to justify judicial involvement. When in doubt, just say “no.”

4. Other Legislative Topics

The final category encompasses everything else that a legislature does that does *not* have an impact upon the administration of justice, from the run-of-the-mill technical clean-up bills to major legislative reform efforts affecting education, health care, or the environment. These are matters that are entirely outside the judiciary’s legitimate sphere of interest.

The judicial branch, judges and court managers should generally avoid involvement in these type of bills since, absent a connection to the administration of justice, any involvement, no matter how slight, is likely to be perceived as an attempt to influence policy or politics.

Chapter 4. Ethical Considerations

Although now superseded by the 1990 Code of Judicial Conduct, the American Bar Association's 1972 Code of Judicial Conduct contained a very clear and useful statement regarding judges and legislatures, and it distinguished between public appearances at a hearing and private lobbying.

Canon 4 expressly authorized judges 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." Canon 4 continued by providing that a judge "may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice." Note that for private meetings, Canon 4 limited the range of subject topics to "matters concerning the administration of justice." In effect, this prohibited private lobbying by judges regarding legal matters that did not touch upon the administration of justice.

The commentary to Canon 4 gives the traditional explanation for why judges should be permitted to work with executive and legislative branch officials: "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice." This commentary broadly endorses judicial involvement in legislative policy-making, including involvement in matters of substantive law.

Although the commentary broadly endorses judicial involvement in legislative processes, the distinction drawn in Canon 4 between public appearances at hearings and private

lobbying should be borne in mind. On matters of judicial administration, matters directly affecting the administration and operation of the courts, judges and court managers can consult privately with legislators and legislative staff. On any other matters, judicial involvement should be limited to testimony at public hearings (and, as noted in Chapter 3, great caution should be exercised when venturing out of the administration of justice and into more controversial topics such as changes to the substantive law).

The 1990 revision by the ABA of its Code of Judicial Conduct removed the language expressly authorizing judicial involvement with the legislative and executive branches, and, in effect, collapsed several separate and specific provisions into one general provision. According to the revised Canon 4B, "a judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this code." Appearing before a legislative committee or talking to a legislator would apparently be covered by this language.

The only apparently relevant limitation is the general provision that "a judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." Of these three, the first is the most important limitation when appearing before a legislative committee. Judges need to avoid making statements about a bill that would cast doubt upon their impartiality. For example, a judge should generally not render an opinion about the constitutionality of a bill since offering that opinion publicly would probably cast doubt on a judge's impartiality if the issue of the bill's constitutionality ever arose before that judge.

The ethical restrictions on judicial involvement in legislative processes are essentially the same restrictions that govern judges in other types of extra-judicial activities. There are no special restrictions upon involvement in legislative processes. However, speaking before a legislative committee is not the same thing as speaking before a law school class. Judges need to keep in mind the distinctive characteristics of the legislative context, where political, policy and legal arguments are played out in public for the express purpose of considering changes to the law. In this context, heightened sensitivity to ethical boundaries is appropriate.

Chapter 5 Practical Tips and Etiquette

The practical pointers set forth in this Chapter deal most immediately with the situation where a judge or court manager is required directly to interact with a legislator, legislative staff or a legislative committee. These pointers reflect the combined experience of many long-time lobbyists, including especially the experience of the California Judicial Council's Office of Governmental Affairs, located in Sacramento, California.

A. Know Your Audience

As a general matter of good communication, a speaker needs to take account of his or her audience and understand what the audience needs and expects to receive. The most important characteristics of the legislative process have been reviewed in Chapter 2. A brief listing of those characteristics here will set the stage for our review of practical pointers and etiquette:

- The legislature and individual legislators are generally burdened with a crushing workload. A legislator's day is often packed with meetings and appearance, from breakfast through dinner. *Time is limited and must be used carefully.*
- The legislative process is lengthy and multi-step. It begins by convincing a single legislator to introduce a bill, the bill then goes through one or more hearings in the house where the bill was introduced, is voted

on by the members of the house where the bill was introduced, and then goes through a similar process in the other house of the legislature. *To be truly effective, involvement in legislative processes must begin early and continue through the process.*

- There is a significant amount of delegation to committees and legislators to work on individual bills, and a lot of work is done in private meetings and on the phone before and in between public hearings. *Involvement in legislative processes means face-to-face meetings at appropriate times and often with staff.*
- Because the votes of committee members are often known before a committee hearing takes place, committee hearings are often designed primarily to give proponents and opponents a chance to make their case *to the public*, and to give legislators an opportunity to make *public* statements about a bill. *Don't expect a committee hearing on a bill to be a hearing on the merits where there is a real opportunity to get legislators to change votes.*
- Legislators usually do not draft the language which appears in statutes. Language is suggested by supporters and opponents of a bill, and much of the drafting is done by professionals in an office of Legislative Counsel. Legislators are more concerned with bottom-line results than with draft-

ing issues. *Drafting problems should be pointed out first to the author and sponsor of the bill. Don't expect a committee hearing to turn into a drafting session.*

- Decisions are often made very quickly in the legislature and are often made on political grounds. *Timing is crucial, and knowledge of the politics of a bill is critically important.*

B. Do's When Testifying

We now have some practical do's and don'ts when testifying before a committee. Many of the same do's and don'ts apply equally well to face-to-face meetings with legislators or staff. Observing these simple rules of etiquette and practice will improve your interaction with legislative committee, legislators and legislative staff.

- At the beginning of testimony at a hearing, thank the chair and members of the committee for the opportunity to present your views, and then state your name and who you represent.
- Clearly state the position being taken (i.e., support the bill, oppose the bill, oppose the bill unless amended, neutral on the bill).
- Concisely state the reasons for the position.
- Remember your ultimate goal (i.e., passage, defeat or amendment of bill).

- If asked a question, answer it as specifically as you can. Ask for clarification if needed.
- If you are uncertain whether a proposed amendment would affect your position, say so; if you need to consult with others before indicating whether an amendment would affect your position, indicate that you will get back to the committee staff as soon as possible to clarify your position.
- Be truthful.
- Assume that all questions are sincere. Do not second-guess the motivations that you think may lie behind a question or line of questions.

C. Don'ts When Testifying

- Do not read from a written statement. Reading from a prepared statement is less effective and, in some committees, is not tolerated by the chair.
- Do not interrupt legislators or other witnesses.
- Do not take criticism or disagreement personally.
- Do not argue with legislators or other witnesses.
- Do not talk beyond the point of effectiveness; not knowing when to stop can lose votes.

A fifteen-second statement may be all that is necessary. "Less is more."

- Do not display a condescending attitude.
- Do not use "legalese."

D. Respect the Legislative Process

Finally, and above all, respect the legislative process. You may have personal doubts about the process, but don't let those doubts affect your performance. Remember, the legislature is a co-equal branch of government and is entitled to the same respect as the judicial branch and its processes.

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In recognition of his service to the administration of justice, the California Judicial Council selected Professor Kelso to receive the 1998 Bernard E. Witkin Amicus Curiae award, which is given to an individual other than a member of the judiciary for outstanding contributions to California's courts.