

1365th meeting, 22 January 2020

10 Legal questions

10.2 Consultative Council of European Judges (CCJE)

b. Opinion No. 22 (2019): "The role of judicial assistants"

Item to be considered by the GR-J at its meeting on 16 January 2020

I. Introduction

1. The European Convention on Human Rights (ECHR) guarantees the right to an independent and impartial tribunal established by law.² Judges' independence and impartiality are protected both during their appointment and in the exercise of their duties so that they can adjudicate according to these guarantees. When judges are supported in the adjudicative process by assistants, the quality and efficiency of their work can further be improved in the interests of society and the parties to the proceedings. However, this must be done in a way not endangering the parties' rights under Article 6 of the ECHR. Therefore, in accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the present Opinion.

2. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010), and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), and Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities.

3. The Opinion also takes account of the replies of the CCJE members to the questionnaire "on the role of court clerks and legal assistants within the courts and their relationships with judges", of the summary of these replies and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Prof. Dr Anne Sanders (University of Bielefeld/Higher Regional Court of Hamm).

II. Support for judges: the scope of the Opinion

A. Who are judicial assistants?

4. The work of judges can be supported by different kinds of assistants and court staff. This Opinion focuses on judicial assistants. Judicial assistants have a legal education and support judges or panels of judges in their adjudicative work. Judicial assistants undertake a wide range of tasks such as research, preparing memos on legal questions or drafting judgments. Such persons may have many different titles including judicial assistants, law clerks, legal officers, secretaries, *Referendare*, *Wissenschaftliche Mitarbeiter*, *Gerichtsschreiber*, *référéndaires* or *greffiers*.³

B. Court staff outside the scope of the Opinion

5. Court employees managing security, the maintenance of court buildings and IT-services are indispensable for a court system. However, they are outside the scope of the Opinion.

¹ This document has been classified restricted until examination by the Committee of Ministers.

² Article 6 of the ECHR.

³ The information on the practice in the member States provided in this Opinion is highly condensed. For more detailed information, the reader is invited to refer to the responses of the CCJE members and the summary of the responses provided at <https://www.coe.int/en/web/ccje/opinion-no.-22-on-the-role-of-court-clerks-and-legal-assistants-within-the-courts-and-their-relationships-with-judges>.

6. Just like judicial assistants, administrative assistants often work closely with judges. They work, for example, on the organisation of files, correspondence, preparation of official versions of decisions, collecting documents and statistical data. While there can be considerable overlap between their work and the work of judicial assistants, this Opinion focuses on the status and duties of judicial assistants.

7. Undergraduate law students who work as interns at a court are outside the scope of the Opinion even if they provide support for judges.

8. Judicial officers or *Rechtspfleger*, or the Spanish *Letrados de la Administración de Justicia*, who have limited decision-making powers in certain cases, for example on questions of enforcement or registration, are also outside the scope of the Opinion. Such judicial officers decide their own cases and work on their own tasks rather than support judges in their adjudicative work. There are, however, member States where judicial assistants also have certain decision-making powers on their own which are distinct from the support they provide for judges. Moreover, in many member States, special court staff also performs duties such as registration, the authentication of judgments and other documents and also writing the official protocol of the hearing, such as the Belgian *greffier*. These specific duties are outside the Opinion as well, because they might demand a certain degree of independence even from the judge.

9. Judicial staff with the same title might perform different duties in different member states. Where they have a dual role, this Opinion is confined to that part of the role which consists of supporting the role of the judge.

10. In many cases, judges must rely on the knowledge and experience of experts with non-legal expertise to decide cases adequately. However, such experts, even if they are employed by a court on a permanent basis, are outside the scope of this Opinion.

III. The role and duties of judges and judicial assistants

A. What should be the rationale for employing judicial assistants?

1. *Supporting the administration of justice*

11. Supporting the administration of justice in the interest of society should be the main rationale for employing judicial assistants. Competent judicial assistants can provide valuable support to judges and thereby help to improve the quality of judicial decisions. The work of judicial assistants with specialised legal knowledge can be particularly useful.⁴ Nevertheless, the appointment of qualified judges and adequate training opportunities for judges should not be neglected in favour of hiring judicial assistants.

2. *Educating young lawyers, especially (future) judges*

12. The work of judicial assistants can also serve educational purposes. By serving as judicial assistants, young lawyers can gain a useful understanding of the work of courts. This is shown in the experience of the member States. In some member States, supporting a judge is a mandatory part of legal education before practice.⁵ In other member States, serving as a judicial assistant is a formal or informal prerequisite or at least considered a helpful experience before applying to become a judge.⁶ Even in countries where there is no career judiciary and judges are appointed from the ranks of successful practitioners, obtaining a perspective from “behind the bench” is considered useful.⁷ In yet other countries, where young judges may serve as judicial assistants for a limited time at higher courts, such secondments⁸ can provide useful insights and experience before promotion to senior judicial posts.

⁴ For example, in international and European law: CCJE Opinion No. 9 (2006) para 19, Rec. A(e).

⁵ Germany, Slovenia.

⁶ Belgium, Bosnia and Herzegovina, Finland, Georgia, Poland, Republic of Moldova, Slovenia, Sweden, Switzerland.

⁷ Ireland, United Kingdom.

⁸ Albania, Croatia, Germany, Slovenia.

3. *Efficiency*

13. Deciding cases in a timely and cost-efficient way is an important goal for every judiciary. Moreover, the quality of judicial decisions after a fair consideration of the issues is an essential aspect of an efficient judiciary. Judicial assistants can be an important tool to unburden judges from non-judicial tasks, in order to speed up the work of courts and reduce backlogs,⁹ and also to help them in preparing decisions of a higher quality. As the CCJE has pointed out, it is the responsibility of the member States to ensure adequate resources to enable courts to provide judicial work of high quality in the interest of the public.¹⁰ First and foremost, this requires providing the financial means to appoint enough judges. However, judges do not work alone in courts. Therefore, adequate funding to employ qualified court staff, including judicial assistants, is necessary.¹¹

14. Moreover, the quality of judicial decisions after a fair consideration of the issues¹² is an essential aspect of an efficient judiciary. There must be a balance between a speedy judicial process and the right of the parties to an independent and impartial court. Article 6 of the ECHR guarantees the right of parties to have a decision by a fair and impartial tribunal. A judicial assistant is not part of that tribunal. Therefore, judicial assistants should not be employed at the expense of appointing judges in adequate numbers. If the workload of judges is too high, this might increase the pressure to delegate more duties to judicial assistants than is desirable.¹³

15. By supporting the decision-making of judges, judicial assistants may help to improve a court's work at all levels. Member States should reflect carefully whether to employ judicial assistants, and if so, in what instances of courts they should be employed and how to organise their work in order to support the quality and timeliness and thereby the efficiency of the judicial system. In this process, member States must be aware that different purposes of employing judicial assistants may be mutually exclusive. If member States aim to support speedy decision-making with judicial assistants, this purpose cannot be achieved by employing judicial assistants for purely educational purposes because that burdens judges with mentoring and teaching.

16. While all member States using judicial assistants agree that they provide valuable assistance and save judges' time, only very few member States collect data on how useful judicial assistants actually are.¹⁴ It is therefore recommended that member States evaluate the contribution of judicial assistants.

B. The role of the judge and the role of the judicial assistant

1. *The role of the judge*

17. The understanding of the role of the judge in any judicial system is inextricably linked to its history, legal and judicial culture. Therefore, the role of the judge is still understood in different ways in different member States. Considerable differences, might still exist, for example, between civil law and common law countries. In common law systems, writing a judgment may be perceived as a personal duty which should not be delegated to or shared with an assistant, regardless of how qualified the assistant may be.

⁹ See CCJE Opinion No. 6 (2004) para 65.

¹⁰ See Recommendation CM/Rec(2010)12, para 32, and CCJE Opinion No. 2 (2001), para 4; Opinion No. 10 (2007), para 37; Opinion No. 17 (2014), para 35; Opinion No. 18 (2015), para 22.

¹¹ See CCJE Opinion No. 11 (2008) para 14; CCJE Opinion No. 2(2001), para 8.

¹² See Recommendation CM/Rec(2010)12, para 31; for the quality of judicial decisions see CCJE Opinion No. 11 (2008).

¹³ For the effects of an increased workload on the work with judicial assistants see Nina Holvast, In the shadow of the judge - the involvement of judicial assistants in Dutch district courts, 2017, p. 179-181; see also Peter Bieri, Law Clerks in Switzerland – A Solution to Cope with the Caseload, 7 International Journal for Court Administration (2016).

¹⁴ Czech Republic, United Kingdom; in Croatia research found that courts with judicial assistants are more productive than courts without such support.

18. Regardless of how different the practices and traditions of judicial systems may be, decision-making is at the heart of the judge's role everywhere. Article 6 of the ECHR establishes requirements for the legitimacy of judicial decisions. Procedures¹⁵ and substantial guarantees of judicial independence and impartiality aim at protecting the decision-making of the individual judge.¹⁶ These guarantees ensure that judges are free to decide cases independently and impartially, in accordance with the law and their interpretation of the facts.¹⁷ These guarantees are not privileges granted in the judges' own interest, but in the interest of the rule of law and the persons seeking justice as guaranteed by Article 6 of the ECHR.¹⁸ Decision-making is therefore not the privilege of judges which can be delegated at will but is at the heart of their duties in a society based on the rule of law. Judges are not simply case managers but must command the law and facts in a way that judicial decisions remain fully theirs.

2. *The role of the judicial assistant*

19. The role of the judicial assistant follows from the role of the judge. Judicial assistants must support judges in their role, not replace them. Whatever their duties are, they must be supervised by the judge or judges who remain responsible for the decision-making in all aspects. However, by supporting judges in their adjudicative process, judicial assistants are involved in the exercise of judicial tasks. Therefore, they must comply with the highest professional and ethical standards and thereby help to build high public trust in judicial institutions.¹⁹

C. The work of judicial assistants

20. Each legal system must decide whether and to what extent judicial assistants should be engaged. This decision will depend on many factors, including legal traditions and the understanding of the role of the judge and the parties.

1. *Which duties and responsibilities must remain with the judge?*

21. As already mentioned, decision-making is at the heart of the judge's duties in all legal systems. Therefore, it must remain with the judge or with the panel of judges responsible for the case. Decision-making requires applying the law on the basis of a comprehensive understanding of the facts. Judges hold hearings to establish the facts and to discuss the issues in dispute with advocates and parties. For example, in criminal cases, the hearing provides the opportunity to hear the victim and the accused. The drafting of the judgment must build on the judge's decision-making in every aspect of the case.²⁰

22. The closer judicial assistants come to the decision-making process, the more important it is that judges and judicial systems remain cautious. All preparatory work requires keeping a balance between efficient work organisation and the control of the judge. From the judges' perspective, this should be done by closely supervising the work of judicial assistants.

2. *Work of judicial assistants related to the decision-making process*

23. The responses of the member States show a variety of duties of varying responsibility that judicial assistants may undertake. If judicial assistants work actively in the decision-making process, member States must ensure that the judge remains in control in order to ensure the rights of the parties under Article 6 of the ECHR.

¹⁵ For the importance of the appointment of judges, see Recommendation CM/Rec(2010)12, paras 3, 4. See also European Court of Human Rights (ECtHR) decision of 12 March 2019 - *Astradsson v. Iceland* - Case no 26374/18.

¹⁶ See the EU Charter of Fundamental Rights: Court of Justice of European Union (CJEU), decision of 27 February 2018 - *Associação Sindical dos Juizes Portugueses v. Tribuna de Contas* - C 64/16, para 44. For the importance of separation of powers and judicial independence as an element of public importance in the freedom of speech, see ECtHR, decision of 23 June 2016 – 20261/12 *Baka v. Hungary* paras 162-176.

¹⁷ Recommendation CM/Rec(2010)12, para 5.

¹⁸ Recommendation CM/Rec(2010)12, para 11.

¹⁹ See Model Code of Ethics for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina, p. 4.

²⁰ About the importance of the professionalism of judges, see CCJE Opinion No. 11 (2008), paras 21-23.

(i) Organising papers and researching facts

24. Judicial assistants may help researching facts, for example by organising and sifting through large documents under the guidance and supervision of the judge.²¹ However, since judicial decision-making builds on the facts, the establishment and evaluation of facts remain the sole responsibility of the judge. Consequently, an assistant's role should remain limited in this respect.

(ii) Drafting decisions or writing memos with a proposal for a decision

25. In many member States, judicial assistants are involved in drafting decisions and judgments. This may also include drafting procedural decisions.²² Some member States do not, however, allow the involvement of judicial assistants in the drafting process.²³ If judicial assistants are involved in the drafting process, they should work under the close supervision and with the guidance of the judge. Therefore, the member States should consider whether and to what extent it is appropriate to allow the presence and participation of judicial assistants at deliberations of cases.

26. If judicial assistants prepare complete drafts, there is a risk that the assistant's suggestions steer the judge's thinking (anchoring effect). Such an effect is also possible, however, if a judicial assistant just prepares a memo on how a case should be decided.²⁴ These risks may be particularly high if judicial assistants prepare a first draft or memo without guidance from the judge. However, even if such a draft judgment or memo is written after a judge has expressed a preliminary view, handing over the drafting to an assistant may prevent a judge from truly familiarising himself/herself with the case. In this situation, a judge may not realise that an initial impression may be changed by more detailed work on the draft judgment. Judges should be aware of these risks and ensure that they remain responsible for judgments at all times.

(iii) Independent work on cases

27. In some member States, judicial assistants work more independently on cases, for example by deciding procedural issues such as appointing an expert or deciding on the costs of proceedings. In a small number of member States, judicial assistants can also conduct hearings and work on minor cases.²⁵ In many cases, the judicial assistants' decisions require the approval of a judge. If member States allow judicial assistants to undertake such important tasks, this can only be done with a legal basis and under close supervision of the judge.

(iv) Work in the selection of cases for appeal or constitutional review

28. Supreme and constitutional courts have a unique role in the unification of case law²⁶ and often receive a large number of cases. Judicial assistants who serve at supreme and constitutional courts often summarise the facts of cases and the relevant law and make suggestions whether a case should be admitted for appeal or constitutional review.²⁷ Such help in the "sifting" of applications can help judges to focus on important cases while assistants help to deal more quickly with routine cases. However, there is a risk that judicial assistants gain influence on the selection of cases. Member States must be aware of such risks and ensure that judges remain in control of deciding and selecting cases themselves.

²¹ In Malta, judicial assistants collect evidence for judges.

²² Andorra, Austria, Belgium, Croatia, Finland, Georgia, Latvia, Lithuania, Republic of Moldova, Russian Federation, Sweden, Ukraine.

²³ Andorra, Ireland, United Kingdom.

²⁴ For an academic discussion of this problem with further references, see Nina Holvast, *In the shadow of the judge, the involvement of judicial assistants in Dutch district courts*, 2017, p. 216.

²⁵ Such opportunities are open in Bosnia and Herzegovina, Croatia, the Czech Republic, Finland, Iceland, Slovenia and Sweden.

²⁶ For the role of supreme courts in ensuring the uniformity of case law, see CCJE Opinion No. 20 (2017), paras 20-25.

²⁷ Andorra, Austria, Croatia, Czech Republic, Finland, Georgia, Germany, Iceland, Lithuania, Norway, Poland, Romania, Slovenia, Spain.

3. *Work of judicial assistants outside the decision-making process*

(i) Legal research

29. Judicial assistants may undertake research (if not done by the parties) of the law, including the analysis of case law. This is the practice in all member States where judicial assistants are employed. In some member States, however, research is primarily seen as the duty of the parties.²⁸ If, however, judicial assistants prepare memos with a proposal for a decision and/or reasons for a decision, they become more involved in the decision-making process.

(ii) Writing the official record of court hearings

30. In many countries, writing the official record of the court hearing has been and remains an important duty of certain judicial assistants.²⁹ This task is now taken over more and more by technology but might remain important in some cases.

(iii) Preparing decisions for publication

31. Other duties of judicial assistants may include proofreading of decisions, crosschecking references or preparing decisions for publication (especially including anonymisation).

(iv) Preparing information for the media

32. The CCJE has recognised the importance of providing the media with summaries of court decisions, factual information and information about hearings.³⁰ Drafting such papers under the supervision of a judge can be an important duty of judicial assistants.

(v) Administrative duties

33. While administrative duties are usually performed by administrative assistants, duties such as writing the official protocols of hearings, the organisation of files, correspondence with the parties, the preparation of official copies of decisions, and the collection of statistical data are performed by judicial assistants in some member States.

34. Some regulations or guidelines should inform judges and judicial assistants of what kind of work can be delegated to judicial assistants, thereby creating transparency and accountability about an acceptable involvement of judicial assistants in the decision-making process.³¹ In particular, judicial systems must take into account that for overburdened judges, the temptation to involve judicial assistants more actively in the decision-making process can be very high.

D. The interaction of judges and judicial assistants

1. *Judicial assistants under the guidance of judges*

35. The protection of judicial independence is a prerequisite to the rule of law. Judicial assistants are not judges and therefore have no right in that capacity to judicial independence. Therefore, in their role as judicial assistants, they are not independent of the judges they support. In that capacity, they must follow the orders of judges.

²⁸ United Kingdom.

²⁹ Andorra, Austria, Belgium, Finland, France, Monaco, Romania, Russian Federation, Sweden, Switzerland.

³⁰ CCJE Opinion No. 7 (2005), para 42.

³¹ For the importance of regulation from an academic perspective, see Nina Holvast, *In the shadow of the judge, the involvement of judicial assistants in Dutch district courts*, 2017, p. 217-219.

2. *The leadership role of the judges*

36. As already mentioned, judges are not simply case managers. However, if assistants work with them, judges must have a leadership role which entails giving constructive feedback, helping the judicial assistant's development, building mutual trust, and planning which tasks can be delegated. This role is particularly strong if working with the assistant serves an educational purpose. The higher the number of assistants a judge works with, the more important such managerial skills become. Judges should be taught how to lead, delegate and communicate and be supported in their role by receiving adequate advice.

3. *Clear instructions*

37. Judges must give clear instructions to judicial assistants and provide them with all necessary information to enable them to do their work in the best possible way.

4. *Mutual respect*

38. Judges and judicial assistants should respect and appreciate each other's role and respective duties. Judicial assistants must respect the limitation of their role in respect to the role of the judge. Judges, however, must appreciate and respect the important contribution which judicial assistants make to the work of the court.

5. *Exchange*

39. On the basis of mutual respect and understanding of the respective roles of judicial assistant and judge, both can and should engage in mutually beneficial exchange. Since some people prefer "thinking out loud" over "thinking on paper", a judicial assistant serving as a "sounding board" can be useful for the judge, especially if the judge is not part of a panel of judges but sits alone. Constructive feedback is useful for both assistants and judges.

6. *Regulation of working relationship*

40. The role and duties of judicial assistants should be recognised by the member States. Some member States have regulated the working relationship of judges and judicial assistants by statute or internal regulations.³² Member States should identify critical issues in the relationship between judges and assistants and consider the best ways to resolve them. This can be through regulation, standards and guidelines or codes of conduct for the interaction of judges and judicial assistants. Soft law mechanisms and ethical rules can also help to avoid conflicts between judges and judicial assistants, and explain, for example, how to deal with a personality conflict³³.

³² In Croatia, judicial assistants are even mentioned in the Constitution.

³³ The Model Code of Conduct for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina provides a helpful example.

IV. The status of judicial assistants

A. The practice in the member States

41. The information provided by the member States shows a number of different approaches to the status and organisation of judicial assistants. In most member States, judicial assistants work at all courts and instances. In some member States, they are only engaged at the higher courts and constitutional court³⁴, or only the constitutional court³⁵, or at specialised courts³⁶. Judicial assistants can be civil servants³⁷ or employees³⁸, for a limited time or with long-term contracts. In some countries, judicial assistants can be first or second instance judges who serve as judicial assistants for a limited time before going back to their courts³⁹. While such seconded judges serve as judicial assistants, they keep their status as judges of the court they come from.

B. Selection

1. Selection process

42. Judicial assistants should be selected in a transparent process based on objective, merit-based criteria taking into account experience, qualifications, legal skills, integrity, communication skills and motivation. Diversity can be a factor in the selection process. If working as a judicial assistant is a prerequisite (formal or informal) for becoming a judge, this must be taken into account in the selection process. An educational purpose of a judicial assistant scheme must be given adequate weight in the selection process. If working as a judicial assistant is a necessary requirement of qualification for legal practice⁴⁰, as is the case in some member States⁴¹, these principles cannot be fully taken into account, because every qualified candidate must be given the chance to obtain the necessary qualifications for practicing law.

2. External independence of the judiciary

43. Judicial independence must be protected against external pressures (external independence⁴²). Because of the proximity of judicial assistants to the adjudicative process, the independence of the judiciary must be guaranteed in the selection process of judicial assistants. The judiciary, not the executive, should be responsible for the selection. Moreover, in principle, the judiciary is best suited to select candidates with the qualities and skills necessary to support the court, especially when there is a need for expertise in certain areas of law.

3. Internal independence

44. Judicial independence cannot only be infringed through external influences but also through measures taken within the judiciary (internal independence⁴³). Judicial assistants work closely with judges who must be able to rely on their trustworthiness, competence and motivation. This is especially important in cases where judicial assistants are assigned to an individual judge or panel of judges. In such cases, the individual judge who works with individual judicial assistants should have a say in their selection and assignment.

³⁴ Austria, Cyprus, Denmark, Germany (at first and second instance courts, however, graduates (*Referendare*) work for limited periods as a necessary requirement of qualification for legal practice), Ireland, Luxembourg, Norway, Spain, United Kingdom.

³⁵ Italy.

³⁶ Albania.

³⁷ Andorra, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Georgia, Iceland, Lithuania, Luxembourg, Monaco, Romania, Russian Federation, Slovenia, Spain, Sweden, Switzerland.

³⁸ Bosnia and Herzegovina, Czech Republic, France, Latvia, Malta, Republic of Moldova, Norway, Poland, Spain, United Kingdom.

³⁹ Especially in Germany and Spain, but the model exists also - with variations - in Albania, Austria, Croatia and Slovenia.

⁴⁰ Legal practice in this sense could mean, depending on the national legal system in each country, working as a lawyer and/or prosecutor and/or judge.

⁴¹ Germany and Slovenia, in some aspects Austria and Belgium. These interns or *Referendare* should not be confused with fully qualified judicial assistants who support judges for longer periods of time at all courts (Slovenia, Belgium) or the highest courts (Austria and Germany).

⁴² See Recommendation CM/Rec(2010)12, paras 11-21, see CJEU, decision of 27 February 2018 - *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* - C 64/16, para 44.

⁴³ See Recommendation CM/Rec(2010)12, para 22-25, see CJEU, decision of 27 February 2018 - *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* - C 64/16, para 44.

4. *Duration of employment*

45. Member States take different approaches to the length of time for which judicial assistants can be employed. In the majority of member States, serving as a judicial assistant can be a permanent career.⁴⁴ Although in such countries the position is not usually designed as a permanent career, in practice judicial assistants may stay for a long time or even until retirement. In particular, the latter can be the case in countries where the position of judicial assistants is meant to serve as a stepping stone to becoming a judge. If not enough new judges are hired, judicial assistants might get "stuck" in their position.⁴⁵ In other countries, serving as a judicial assistant is a short-term position, which also has an educational aspect.⁴⁶

46. Both systems of long-term and short-term employment have advantages and disadvantages. Keeping experienced judicial assistants can make courts more efficient. Frequent changes mean that new assistants must be trained and need time to become helpful. Experienced assistants can save time and can work on routine cases more independently. However, there are disadvantages as well if judicial assistants stay too long. If judicial assistants become very experienced, they might gain too much influence in the adjudicative process. This would be problematic considering the guarantees of Article 6 of the ECHR emphasised above. If serving as a judicial assistant has an educational purpose, it is especially important that judicial assistants move on. Moreover, a regular change among judicial assistants can help courts and judges to stay more dynamic and connected with new developments.

47. If member States and their judicial systems engage judicial assistants for a longer time, they should recognise their responsibility as employer and provide training opportunities and/or advanced roles for experienced judicial assistants to help them in their development. It might be possible to promote such assistants to more important roles in the court administration, or to promote them to higher courts.

48. If it is possible in the respective judicial system, judicial assistants of the highest quality should be encouraged and supported on their way to becoming judges. This way, a judicial system can rely on candidates who have a comprehensive understanding of the duties and the role of a judge. To build on their experience can reduce training needs and help to develop an efficient court system.

49. Member States are encouraged to find a balance between the advantages and disadvantages of long and short-term engagements of judicial assistants. The time of work should not be too short, so that judicial assistants can provide support of high quality and gain valuable insights. However, in the light of the risks explained above, the stay of judicial assistants in the same role should also not be too long.

C. Evaluation

50. If the performance of judicial assistants is evaluated, this should be done by the judge or judges with whom the judicial assistant has worked. This is especially important if working as a judicial assistant serves an educational purpose. Grades and references achieved in the process might be of considerable importance for a judicial assistant's career opportunities. Evaluations must be done according to objective criteria, taking into account an assistant's legal competence, integrity, motivation and efficiency. While evaluations of judicial assistants do not raise problems of judicial independence, the principles developed for the evaluation of judges can be taken as a guideline.⁴⁷ Like a judge, a judicial assistant should be heard in the evaluation process.

⁴⁴ Andorra, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Georgia, Switzerland, Latvia, Lithuania, Republic of Moldova, Monaco, Norway, Romania.

⁴⁵ Croatia, Slovenia.

⁴⁶ Austria, Czech Republic, Denmark, Finland, France, Germany, Ireland, Luxembourg (not much experience yet) Norway, Poland, Sweden, United Kingdom.

⁴⁷ See CCJE Opinion No. 17 (2014).

D. Training

51. In a constantly changing legal environment, the judiciary should establish a culture of self-improvement and training for judges.⁴⁸ Such training opportunities should be open for judicial assistants in order to improve their ability to assist judges. If there is a system of training for judges, the training of judicial assistants should be offered by the same institution. It should take the assistants' training needs into account. Such training is of special importance if judicial assistants aim at becoming judges.

E. Organisation

52. As the responses from the member States indicate, there are basically three different ways to organise judicial assistants: A judicial assistant or a number of them might work with one judge.⁴⁹ Judicial assistants might also be assigned to a panel of judges.⁵⁰ In a third approach, judicial assistants are organised in a pool and work with different judges.⁵¹ In a rarely used fourth approach, teams of judicial assistants are built for special cases.⁵²

53. A judicial system should carefully consider which approach best suits its legal tradition and court system. Each of these approaches has advantages and disadvantages. If judges work closely with the same assistant or assistants, a high degree of trust can be built. In this case, judges should have a say in the assignment of judicial assistants. The number of judicial assistants assigned to each judge should not be too high so that judges have the time to review their work carefully. An advantage of a pool system might be that judges work with judicial assistants with different qualities.

F. Remuneration

54. The longer assistants work at courts, the more important it is that their work is paid adequately. Not only should the value of the work done by judicial assistants be properly recognised, but risks of corruption might arise as a result of underpaid judicial assistants.

G. Professional conduct

1. Impartiality

55. The parties coming to court will expect impartiality not only from the judge hearing their case but also from a judicial assistant supporting the judge working on the case. Therefore, judicial assistants have a duty to reveal any conflict of interest. Moreover, member States should consider introducing rules demanding that judicial assistants recuse themselves according to the same criteria as apply to the recusal of a judge.⁵³ The CCJE recommends that member States consider introducing regulation allowing parties to challenge the participation of a judicial assistant.

2. Confidentiality

56. Judicial assistants must keep confidential all information they gain in relation to their work. This is crucial for communications outside the court, e.g. with friends, on social media, with the press, with the parties, the executive and legislature. It is, however, also of importance inside the court, e.g. in relation to the court president and court management. Regulations regarding confidentiality must of course respect the rights and freedoms protected by Article 10 of the ECHR and other relevant provisions of the Convention.

⁴⁸ See CCJE Opinion No. 4 (2003).

⁴⁹ This might be called a "cabinet system": Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Germany, Ireland, Latvia, Lithuania, Malta, Republic of Moldova, Poland, Russian Federation, Spain (at the Constitutional Court), United Kingdom, Ukraine; it is also the practice at the Court of Justice of the European Union.

⁵⁰ Andorra, Belgium, Switzerland, Czech Republic, Finland, Germany, Iceland, Romania, Slovenia, Sweden.

⁵¹ Andorra, Austria, Bosnia and Herzegovina, Denmark, Finland, Ireland, Latvia, Lithuania (Supreme Court), Luxembourg, Monaco, Norway, Spain; it is also the practice at the European Court of Human Rights.

⁵² Sometimes Finland; it is also the practice at the International Criminal Court (ICC).

⁵³ As in Croatia, Romania, Slovenia, Switzerland.

3. *Independence*

57. Judicial assistants have a dual role: they are part of the court administration but also help judges in fulfilling their independent duties. Therefore, respecting and promoting judicial independence is an important duty of judicial assistants. This special role must be reflected in their status. The regulation of their duties, their legal rights and status must ensure that their dual role is neither abused from outside the judiciary nor from inside the judiciary to infringe the independence of judges. For example, in case of conflicting orders from the judge working on a concrete case and from the court administration, the decision of the judge must be respected.

4. *Standards of ethical and professional conduct*

58. Judicial assistants - especially those who are involved in the drafting process of decisions - undertake important duties within the judiciary. Their conduct can directly influence the confidence of society and parties seeking justice. The CCJE recommends developing standards of ethical and professional conduct for judicial assistants reflecting their role and duties⁵⁴. Notwithstanding the important differences in the role of judges and judicial assistants pointed out before, many principles expressed in the standards concerning ethical and professional conduct of judges have relevance for judicial assistants as well. Judicial assistants must act with integrity, propriety and impartiality. They must perform their duties diligently and with high competence.

V. **Conclusions - Recommendations**

1. Decision-making is at the heart of the judge's duties in all legal systems (para 18). Judicial assistants must support judges in their role, not replace them (para 19). Therefore, judicial assistants should not be engaged at the expense of appointing judges in adequate numbers (para 14).

2. Competent judicial assistants can provide valuable support to judges and thereby help to improve the work of courts at all levels (paras 11, 15). In particular, judicial assistants can be an important tool to improve the efficiency of courts (para 13). Member States should reflect carefully whether to employ judicial assistants, and if so, in what instances of courts they should be employed and how to organise their work in order to support the quality and timeliness and thereby the efficiency of the judicial system (para 15).

3. Member States should provide adequate funding to employ qualified court staff including – where they are engaged - judicial assistants (para 13).

4. In order to ensure the rights of the parties under Article 6 of the ECHR, judges must command the law and facts in a way that judicial decisions remain fully theirs (para 18). The closer judicial assistants come to the decision-making process, and the higher the workload of judges is, the more important it is that judicial systems and judges are vigilant in ensuring that judges keep control by closely supervising the work of judicial assistants (paras 14, 22).

5. Member States should consider introducing regulations or guidelines which inform judges and judicial assistants of what kind of work can be delegated to judicial assistants, thereby creating transparency and accountability about an acceptable involvement of judicial assistants in the decision-making process (para 34).

6. Member States should consider the regulation of the status of judicial assistants, taking into consideration their selection, remuneration, evaluation, organisation, training needs and - if applicable - the situation of long-term assistants (paras 41-54).

7. Member States are encouraged to find a balance between the advantages and disadvantages of long and short-term engagements of judicial assistants (para 49). If it is possible in the respective judicial system, judicial assistants of the highest quality should be encouraged and supported on their way to becoming judges (para 48).

⁵⁴ See as an example the Model Code of Conduct for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina.

8. It should be the judiciary, not the executive, who should be responsible for the selection of judicial assistants in a transparent process based on objective and merit-based criteria (paras 42, 43).
9. The conduct of judicial assistants can directly influence the confidence of society and the parties seeking justice. Therefore, regulations and guidelines should provide guidance on the working relationship of judges and judicial assistants and the professional and ethical conduct of judicial assistants (paras 35-40, 58).
10. Judicial assistants must keep confidential all information they gain in relation to their work (para 56).
11. Judicial assistants have a duty to reveal any conflict of interest. Member States should consider introducing rules on the recusal and challenge of judicial assistants, similar to those that apply to judges (para 55).
12. The proximity of judicial assistants to the judges they support must neither be abused from outside nor from inside the judiciary to infringe the independence of judges (para 57).