

Committee on Judicial Ethics
Teleconference
Thursday, February 15, 2018

Committee members present via teleconference: Judge Maureen D. Dennis (Chair), Judge Christine E. Keller, Professor Sarah F. Russell, and Judge Robert B. Shapiro. Staff present: Attorneys Viviana L. Livesay and Adam Mauriello (Assistant Secretaries).

MINUTES

- I. Judge Dennis called the meeting to order at 9:31 a.m. Although publicly noticed, no members of the public were present.
- II. The Committee approved the minutes of the December 21, 2017 regular meeting.
- III. The Committee ratified **Emergency Staff Opinion JE 2018-01** concerning whether a Judicial Official may comment on the character of a recently appointed municipal chief of police (hereinafter the "appointee") for use in a profile of the appointee that will appear in a well-known local newspaper.

Before he/she was on the bench, the Judicial Official worked closely with the appointee as the appointee's supervisor while the Judicial Official was in a senior management position at a state agency. The Judicial Official does not currently sit in the judicial district that includes the police department headed by the appointee, and does not expect that he/she would sit in that judicial district for at least several years. However, because of the location of his/her residence, the Judicial Official occasionally rules on applications for ex parte warrants from the police department in question. The Judicial Official noted that it may be possible for his/her judicial title to be omitted from the article. The Judicial Official stated that he/she intended to describe the appointee's character in very favorable terms based upon his/her experience working with the appointee and knowledge of the appointee's background. The appointment process for this particular municipality requires that a candidate for chief of police be nominated by the mayor and confirmed by the city council.

Rule 1.2 states that a judge "should act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 1.3 states that a judge "shall not use or attempt to use the prestige of judicial office to advance the personal or economic interests of the judge or

others or allow others to do so.”

Rule 2.11(a) states in part that a judge “shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned....”

Rule 4.1 states in relevant part as follows:

(a) Except as permitted by law, or by Rules 4.2 and 4.3, a judge shall not:

(3) publicly endorse or oppose a candidate for any public office...

(8) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court...

(c) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

This inquiry was circulated to the Committee members and their input was solicited and received. Although the Committee has not previously considered this precise issue, its prior opinions have cautioned judicial officials against engaging in activity that could create the impression of partiality to law enforcement. In [JE 2017-09](#), the Committee considered whether a Judicial Official could keep a license plate that identified the Judicial Official as a retired police commissioner. The Committee determined that the Judicial Official should not display the retired police commissioner license plate on his or her personal vehicle "because it violates Rule 1.2’s requirement that a judge shall avoid impropriety or the appearance of impropriety and because it may unintentionally create the impression of partiality to law enforcement." Similarly, in [JE 2010-16](#), the Committee concluded that a Judicial Official should not accept honorary lifetime membership in a law enforcement alumni association "in view of the high likelihood of members of the association appearing before the Judicial Official and, in general, the impression of partiality to law enforcement that may be unintentionally created." See also [JE 2014-13](#) (Judicial Official that was social acquaintance of a municipal police chief should not preside over cases involving the police department, including ex parte proceedings, for a period of two years from the last date of social contact); [JE 2013-06](#) (Judicial Official should not be a Facebook “friend” of law enforcement officials).

Based on the facts presented and the above-referenced prior opinions of the Committee, the Judicial Official was advised that he/she should not comment on the appointee's character for a newspaper profile of the appointee. The Committee agreed that laudatory public comments from the Judicial Official regarding the appointee could call into question the Judicial Official’s

impartiality under Rule 1.2; the Judicial Official could be viewed as using his/her office to advance the interests of the appointee and/or the appointing authority in possible violation of Rule 1.3; under Rule 2.11, the Judicial Official would likely be required to disqualify him/herself from any ex parte proceedings involving the appointee's police department, at least for a period of time; and the Judicial Official's comments may be seen as having impermissible political overtones under Rule 4.1, given that the chief of police is nominated by the mayor in this particular municipality. Finally, the Committee noted that given the relatively high profile of the newspaper and the fact that the Judicial Official's name and former position likely would have been included in the article, it would have been a simple matter for readers to discern the Judicial Official's identity as a judge even if his/her title was not mentioned in the article.

- IV. The Committee ratified **Emergency Staff Opinion JE 2018-02** concerning whether a retiring Judicial Official, who plans to return to the private practice of law, may use his/her former judicial title in any law firm material. The Judicial Official stated that the dissemination of law firm material will not occur until after retirement.

The "Application" section of the Code of Judicial Conduct, which sets forth the applicability of this code in Section I, states that "the provisions of the Code apply to all judges of the superior court, senior judges, judge trial referees, state referees, family support magistrates appointed pursuant to General Statutes § 46b-231 (f), and family support magistrate referees."

This inquiry was circulated to the members of the Committee and their input was solicited and received. Based on the facts provided, including that no law firm material will be disseminated until after the Judicial Official retires from the bench, the Committee agreed that the Code of Judicial Conduct does not apply because the proposed activity is contemplated to take place after the Judicial Official leaves the bench. The Committee recommended that the Judicial Official be provided with a copy of ABA Formal Opinion 95-391 (April 24, 1995) and that he/she be referred to the Rules of Professional Conduct and Practice Book § 2-28B. Subsection (a) of Practice Book § 2-28B states, in relevant part, that "[a]n attorney who desires to secure an advance advisory opinion concerning compliance with the Rules of Professional Conduct of a contemplated advertisement or communication may submit to the statewide grievance committee, not less than 30 days prior to the date of first dissemination, the material specified in Section 2-28A (a) accompanied by a fee established by the chief court administrator." Although the Judicial Official's inquiry was broader than advertisements and communications, the Committee was of the opinion that this rule was worth highlighting. One member noted that while the Code does not apply in this instance, it does apply to Senior Judges and Judge Trial Referees.

- V. The Committee ratified **Emergency Staff Opinion JE 2018-03**. The facts are as follows. A Judicial Official received two letters from an out-of-state attorney seeking responses to questions concerning the granting of a criminal defendant's application for the Accelerated Rehabilitation Program (AR). The Judicial Official presided at the hearing on the AR application and granted the program to an out-of-state police officer charged with assault. The case is still pending, as the AR program is still in effect.

The police department that employs the defendant police officer and its municipality hired the out-of-state attorney to prosecute a civil employment disciplinary case against the defendant police officer. The out-of-state attorney alleges that the police officer's counsel made untruthful representations to the Judicial Official regarding the defendant officer's past police department history. The out-of-state attorney would like the Judicial Official to answer the following questions for purposes of obtaining testimony from the Judicial Official for the upcoming disciplinary trial:

- (1) Did you expect [the defendant] and his counsel to provide full, truthful and accurate information about his work history so as to formulate your discretionary decision to grant or deny him the Accelerated Rehabilitation Program?
- (2) Had you been truthfully informed that [defendant] did indeed have a [town] Police Department disciplinary history, how would that have impacted your decision-making rationale to grant him the Accelerated Rehabilitation Program?

The Judicial Official would like the Committee's advice: (1) on how to respond to the letters, (2) whether s/he is ethically required to notify the parties of the communication and (3) whether s/he needs to take any action regarding any potential lawyer misconduct on the part of the attorney representing the defendant police officer.

Rule 1.2 of the Code of Judicial Conduct states that a judge "should act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Rule 1.3 states that "[a] judge shall not use or attempt to use the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so."

Rule 2.9 (a) states that "[a] judge shall not initiate, permit, or consider ex parte communication or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter,..."

Rule 2.9 (b) states that “[i]f a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of the matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

Rule 2.15 (b) states that “[a] judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall take appropriate action including informing the appropriate authority.”

Rule 2.15 (d) states that “[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.”

The questions raised in this inquiry were circulated to the members of the Committee and their input was solicited and received.

Question (1): How should Judicial Official respond to the letters? With respect to any testimony, judges may not be compelled to testify as a witness with respect to facts or conduct relating to their judicial activities absent extraordinary circumstances or a showing of compelling need. “It is true that an examination of the mental processes of a judge in arriving at a judicial decision should not be permitted. *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L. Ed. 1429 (1941); *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982)(en banc), rev’d on other grounds, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984); *Henderson v. Department of Motor Vehicles*, 202 Conn. 453, 521 A.2d 1040 (1987).” *Gold v. Warden*, 222 Conn. 312, 319, footnote 11 (1992). Such protection, rooted in the constitution, ensures that judges have the freedom to do the critical work of their office free from the threat of harassment or interference with the performance of their duties. *United States v. Ianello*, 740 F. Supp. 171, 189 (S.D.N.Y 1990).

Even in an extraordinary situation, where there is a compelling need for the judge to testify, any inquiry into the basis of a judge’s decision that invades the mental processes of a judge is prohibited. In the instant matter, the out-of-state attorney is seeking factual testimony from the Judicial Official about his/her mental processes in arriving at the decision to grant the request for Accelerated Rehabilitation. Any testimony by a judge that would involve the judge’s deliberative processes and mental impressions in conducting a judicial proceeding is “clearly barred by the doctrine of judicial immunity.” *Statewide Grievance Committee v. Burton*, 299 Conn. 405, 415 (2011).

Based on the foregoing, the Committee agreed that the Judicial Official should respond to the attorney by notifying him that, pursuant to the Code of

Judicial Conduct, judges are prohibited from engaging in any ex parte communications regarding an ongoing case and that communications received will be disclosed to the parties in the case. In addition, the Committee stated that the attorney should be reminded that judges are barred by the doctrine of judicial immunity from providing testimony about the judge's deliberative processes and mental impressions in conducting a judicial proceeding. The Committee also recommended that instead of responding to the attorney personally, the Judicial Official should ask someone (such as a clerk) to respond to the attorney on his/her behalf.

Question (2): Is the Judicial Official ethically required to notify the parties of the communication? The Judicial Official was advised that he/she should notify the parties of the substance of the communication and provide the parties with an opportunity to respond pursuant to Rule 2.9 (b).

Question (3): Does the Judicial Official need to take any action regarding any potential lawyer misconduct? Under Rule 2.15, a judge must have knowledge that a lawyer committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyers' honesty, trustworthiness and fitness before taking appropriate action. The Committee agreed that the allegations contained in the two letters from the out-of-state attorney do not satisfy the "knowledge" requirement because the Judicial Official did not have enough information to conclude that the defendant's counsel misrepresented the defendant officer's past police department history at the AR hearing. In addition, the allegations do not qualify as "information indicating a substantial likelihood that a lawyer has committed a violation" under Rule 2.15 (d). As such, the Committee concluded that the Judicial Official does not need take any action regarding any potential lawyer misconduct.

- VI. The Committee discussed **Informal JE 2018-04** concerning whether American Bar Association (ABA) Formal Opinion 478 is a proper interpretation of the comparable provisions in the Connecticut Code of Judicial Conduct. Given the virtually identical wording of the Model Code and the applicable provisions adopted in Connecticut, as well as the clear rationale behind the ABA Formal Opinion, the Committee determined that ABA Formal Opinion 478, including the analysis of the five hypotheticals, is applicable to Judicial Officials in Connecticut based upon the Connecticut Code of Judicial Conduct.
- VII. The meeting adjourned at 9:44 a.m.