

Committee on Judicial Ethics
Teleconference
Friday, March 22, 2013

Members present via teleconference: Justice Barry R. Schaller, Chair, Judge Edward R. Karazin, Jr., Vice Chair, Judge Christine E. Keller, Judge Maureen D. Dennis and Judge Thomas J. Corradino, Alternate. Staff present: Attorney Viviana Langou Livesay, Assistant Secretary.

MINUTES

- I. With the above noted Committee members present, Justice Schaller called the meeting to order at 1:02 p.m. Although publicly noticed, no members of the public were in attendance.
- II. The Committee members present unanimously approved the Minutes of the February 6, 2013 meeting. (Judges Keller & Corradino abstained.)
- III. The Committee ratified Emergency Staff Opinions **JE 2013-04 & JE 2013-07**.
- IV. The Committee discussed Informal **JE 2013-05** concerning whether a Judicial Official may continue to use for personal matters an email address created by the Judicial Official's former law office.

A Judicial Official would like to continue using his/her former law office email address for personal purposes and is willing to pay his/her prorated share of any expense required to maintain the email account to avoid any gift from the firm to the Judicial Official. The email address consists of the Judicial Official's three initials, followed by the Judicial Official's last name and the phrase "law.com." (i.e., the email address is in the form of: BCD@Doelaw.com and the law firm's name is "Doe & Doe"). The Judicial Official indicated that he/she plans to recuse him/herself from any case in which the law firm appears.

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 ... 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."

Based upon the information provided, the Committee unanimously agreed that the Judicial Official should not continue to use his/her former law firm's email address because it gives the impression that the Judicial Official is still associated with the law firm in violation of Rule 1.2's

proscription against avoiding impropriety and the appearance of impropriety.

- V. The Committee discussed **Informal JE 2013-06** concerning whether a Judicial Official may participate in an internet-based social networking site (a type of electronic social media or “ESM”) such as Facebook.

The inquiring Judicial Official is a newly confirmed Judicial Official who, prior to attaining that position, was an active Facebook member. The Judicial Official asks whether he/she may re-activate his/her Facebook account and resume participation. (The Judicial Official’s account was deactivated during the pendency of this inquiry.)

Facebook is an internet-based social networking site where acquaintances and other users with similar interests and backgrounds can communicate with each other. All users must register before using the site, after which they may create a personal profile, add other users as “friends”, and exchange messages. Additionally, users may join common-interest user groups, organized by workplace, school or college, or other activities or interests, and categorize their “friends” into lists such as “People from Work” or “Closer Friends”.

Users can create profiles with photos, lists of personal interests, contact information, and other personal information. They can communicate with acquaintances and other users through private or public messages or by means of a chat feature. They can also create and join interest groups and “like pages”, some of which are maintained by organizations as a means of advertising. When using a mobile device with location services, users can share their location with others by using Facebook’s “check-in” feature.

Facebook enables users to select their own privacy settings and to select individuals who can see specific parts of their personal profile page. Facebook requires a user’s name and profile picture (if applicable) to be accessible by everyone, but allows users to control who sees other information they have shared, as well as who can find them in searches.

The reasons for joining ESM networks include, but are not limited to, reconnecting with former classmates, increased interaction with distant family members, staying in touch with former colleagues, or even monitoring the usage of that same social network by minor children in the user’s immediate family. In ABA Formal Opinion 462 (February 21, 2013), the ABA recognizes that “[s]ocial interactions of all kinds, including [electronic social media], “can be beneficial to judges to prevent them from being thought of as isolated or out of touch.”

Rule 1.2 of the Code states that a judge “should act at all times in a manner that promotes public confidence in the ... 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 2.1 states that "[t]he duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities."

Rule 2.4 (b) states that a "judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."

Rule 2.4 (c) states that a "judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge's judicial conduct or judgment."

Rule 2.10 sets forth the restrictions on judicial speech.

Rule 2.11 requires disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of the facts that are in dispute in the proceeding...."

Rule 3.1 states that "when engaging in extrajudicial activities, a judge shall not:

- (1) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (2) participate in activities that will lead to frequent disqualification of the judge;
- (3) participate in activities that would appear to a reasonable person to be coercive; or
- (4) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use or for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law."

Rule 3.10 states that a judge shall not practice law.

Rule 4.1 sets forth the limitations regarding political activities.

Although participating in social networking sites and other ESM clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions, the Code does not prohibit such participation. Accordingly, the Committee unanimously determined that a Judicial Official may participate in ESM (such as Facebook), subject to the following conditions:

(1) A Judicial Official must maintain dignity with respect to every comment, photograph and other information shared on a social networking site. Rule 1.2

(2) A Judicial Official must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. Rule 1.2

(3) A Judicial Official should not post any material that could be construed as advancing the interests of the judge or others. For example, a Judicial Official's profile page should not link to, endorse or "like" commercial or advocacy websites. Rule 1.3

(4) A Judicial Official should not form relationships with persons or organizations that may convey an impression that these persons or organizations are in a position to influence the Judicial Official. Rule 2.4

(5) A Judicial Official should not become a social networking "friend" of attorneys who may appear before the Judicial Official. Rule 1.2

(6) A Judicial Official should not become a social networking "friend" of law enforcement officials, social workers or any other persons who regularly appear in court in an adversarial role, but may add court staff as "friends." Rule 1.2

(7) A Judicial Official should not make comments about any matters pending or impending before any court in accordance with Rule 2.10

(8) A Judicial Official should not view parties' or witnesses' pages on a social networking site and should not use such a site to obtain information regarding a matter before the judge. Rule 1.2

(9) A Judicial Official should disqualify himself or herself from a proceeding when the Judicial Official's social networking relationship with a lawyer is likely to result in bias or prejudice concerning the lawyer for a party or the party. 2.11

(10) A Judicial Official may not give legal advice to others on a social networking site. Rule 3.10

(11) A Judicial Official should not engage in political activities on social networking sites. Some examples include, but are not limited to, the following: (a) a judicial official should not publicly endorse or oppose a candidate for public office, (b) a judicial official should not “like” a political organization’s Facebook page or create links to political organizations’ websites and (c) a judicial official should not post a comment on a proposed legislative measure or a controversial political topic. Rule 4.1

(12) A Judicial Official should be aware of the contents of his/her social networking profile page, be familiar with the site’s policies and privacy controls, and stay abreast of new features and changes. To the extent that those features raise further ethical issues, a Judicial Official should consult the Committee for guidance.

Given the circumstances of the inquiring Judicial Official’s deactivated Facebook account, the Committee concluded that, if the Judicial Official chooses to participate in ESM, the best course of action would be for the Judicial Official to terminate permanently the existing account and start anew. If this course of action cannot be accomplished, the Judicial Official should edit his/her profile page upon reactivation to ensure that it is in compliance with the conditions of this opinion in every respect. This includes, but is not limited to, removing inappropriate contacts, photos, links, comments, petitions, “friending,” and “Check In” postings. A Judicial Official should monitor closely new developments with respect to the ESM and keep abreast of applications instituted by the site managers. The Judicial Official also should monitor his/her participation with respect to maintaining appropriate dignity as well as insuring the precedence of the judicial office.

The Committee noted, as a security concern as much as an ethical concern, that judges who choose to participate should be mindful of the significant security/privacy concerns that such participation entails. It has been reported that data collected using Facebook “likes” alone allows researchers to predict accurately certain qualities and traits concerning users. In addition, accessing Facebook via a mobile device without certain security features enabled, may let other participants know a user’s physical location at any given time.

In reaching its opinion, the Committee considered ABA Formal Opinion 462 (February 21, 2013); Florida Ethics Advisory Committee Opinions 2010-06 & 2009-20; Massachusetts CJE Opinion 2011-6; Oklahoma Judicial Ethics Opinion 2011-3; New York Ethics Opinions 07-135 & 08-176; and California Judicial Ethics Committee Opinion 66.

- VI. The Committee discussed Informal **JE 2013-08**. The facts are as follows: Several years prior to a Judicial Official being appointed as a Judicial Official, he or she referred a case to another attorney pursuant to an arrangement which provided that the referring attorney would receive a referral fee upon successful conclusion of the case. The case was settled after the Judicial Official's appointment to the bench. May the Judicial Official accept the referral fee?

Rule 1.2 states that a judge shall 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 2.11 states that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned".

Rule 3.11 states that a judge shall not engage in financial activities permitted by under the Code if they will lead to frequent disqualification of the judge or involve the judge in frequent transactions with lawyers or others likely to come before the court on which the judge serves.

Based on the facts presented, including that the case was resolved within a short period of time after the Judicial Official was appointed to the bench and that payment is pursuant to a referral fee agreement, the Committee unanimously determined that the Judicial Official may accept the referral fee subject to the following conditions:

1. In accordance with Rule 1.5 of the Rules of Professional Conduct, the client must have been advised in writing of the compensation sharing agreement and of the participation of all attorneys involved and did not object and the total fee paid to all attorneys is reasonable.
2. The Judicial Official should consider whether the decision to accept payment may necessitate the Judicial Official's disqualification to hear matters in the future involving the client and the attorney to whom the case was referred.

In reaching its opinion, the Committee considered JE 2008-19 and JE 2008-19A.

- VII. The Committee discussed Informal **JE 2013-09** concerning whether a newly confirmed Judicial Official may accept a gift from the Judicial Official's former state office (which term includes persons representing that office) to be given at a dinner celebrating the Judicial Official's judicial appointment. If acceptance of the gift is permissible, is there a duty to disclose or recuse when those who attended the dinner appear before the

Judicial Official in the future? If there is such a duty, is it for a specified period of time?

A newly confirmed Judicial Official's former state office plans to host a dinner in honor of the Judicial Official's appointment to the bench. A portion of the cost of the dinner will be used to purchase a gift that will consist of a framed piece of artwork.

Rule 1.2 requires a judge to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and to avoid impropriety and the appearance of impropriety.

Rule 2.4 prohibits a judge from permitting family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment and prohibits a judge from conveying or permitting others to convey the impression that any person is in a position to influence the judge's judicial conduct or judgment.

Rule 2.11 requires disqualification in any proceeding in which the judge's impartiality might reasonably be questioned.

Rule 3.13 of the Code (Acceptance and Reporting of Gifts) states that:

- (a) A judge may not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.
- (b) Unless otherwise prohibited by law, or by subsection (a), a judge may accept the following without publicly reporting such acceptance:
 - (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
 - (2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification under Rule 2.11;
 - (3) ordinary social hospitality;...

Based upon the information provided, the Committee unanimously agreed that the proposed gift is part of "ordinary social hospitality" within the meaning of Rule 3.13. As a result, the Judicial Official may accept the gift unless the value of the gift is so great that a reasonable person would believe that the gift would undermine the judge's independence, integrity or impartiality (in which event the judge may not accept the gift) and need not report it unless it is outside the bounds of ordinary hospitality based

upon the relationship of the individuals and any historical gift giving between them.

In addition, when the state office appears before the Judicial Official, the Judicial Official should disclose for a reasonable period of time, which is not less than two years from the date of the Judicial Official's commencement of service as a judge, that he or she was previously employed by the state office. Rules 1.2 & 2.4.

If a party requests that the Judicial Official recuse himself or herself, the Judicial Official, after considering the facts, law and argument of counsel, must exercise his or her discretion in accordance with Rules 1.2 and 2.11 in deciding whether to grant the motion.

- VIII. The Committee discussed Informal **JE 2013-10**. The facts are as follows: A newly appointed Judicial Official's family is planning a dinner/gathering of family and church members in honor of the Judicial Official's appointment to the bench. There will be no charge for attending the event. The church and family members have been included in the Judicial Official's life events for over 25 years. Does the invitation need to state "no gifts" or may the Judicial Official accept gifts from those who attend?

Rule 1.2 requires a judge to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and to avoid impropriety and the appearance of impropriety.

Rule 3.13 of the Code (Acceptance and Reporting of Gifts) states that:

- (c) A judge may not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.
- (d) Unless otherwise prohibited by law, or by subsection (a), a judge may accept the following without publicly reporting such acceptance:
 - (4) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
 - (5) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification under Rule 2.11;
 - (6) ordinary social hospitality;...

Based on the facts presented, including that the dinner/gathering is being hosted by family and close church friends who have celebrated Judicial Official's life events for over 25 years, the Committee unanimously

determined that the Judicial Official does not need to state “no gifts” on the invitations. The Judicial Official may accept gifts, unless the value of the gift is so great that a reasonable person would believe that the gift would undermine the judge’s independence, integrity or impartiality (in which event the judge may not accept the gift) and need not report it unless it is outside the bounds of ordinary hospitality based upon the relationship of the individuals and any historical gift giving between them. Rule 3.13(b)(2)&(3).

- IX. The Committee discussed Informal **JE 2013-11** concerning whether a Judicial Official may serve as a coach for a middle school mock trial team.

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 ... 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 2.10(d) of the Code contains exceptions to the restrictions on judicial speech. It provides: “Notwithstanding the restrictions in subsection (a), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.”

Rule 3.1 of the Code provides that subject to certain conditions a judge “may engage in extrajudicial activities except as prohibited by law.” The rule’s commentary encourages judges to participate in appropriate extrajudicial activities and observes that “[j]udges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.” Rule 3.1, Comment (1).

Based on the facts presented, which are substantially similar to those presented in JE 2012-26, the Committee unanimously concluded that the Judicial Official may provide assistance to the middle school mock trial team subject to the following conditions:

- (1) The Judicial Official’s participation does not interfere with the proper performance of the Judicial Official’s duties nor create grounds upon which the Judicial Official may have to recuse him/herself;
- (2) The Judicial Official does not give opinions that would cast doubt on

the Judicial Official's impartiality or indicate that the Judicial Official has a predisposition with respect to a particular case; and

(3) The Judicial Official should refrain from inappropriate comment (as indicated below) about pending or impending matters.

Although Rule 2.10 restricts a judge from making "a public statement that might reasonably be expected to affect the outcome or to impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing", a judge who is engaged in teaching is not precluded in a classroom setting from identifying and describing pending or impending cases that are relevant to the subject matter under discussion because statements in that setting could not reasonably be expected to affect or substantially interfere with the outcome of any proceeding under Rule 2.10(a). The Judicial Official should, however, refrain from making unnecessarily controversial statements about such pending cases.

- X. The Committee discussed Informal **JE 2013-12** concerning whether a Judicial Official may answer questions posed by attorneys to whom the Judicial Official referred cases when the Judicial Official was appointed to judicial office. In this case, the attorneys have asked questions of the Judicial Official such as where certain documents are located in the materials and whether contact information exists for particular individuals.

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 ... 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 3.10 states that "[e]xcept as provided herein, a judge shall not practice law. A judge may act as a self-represented party and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family but is prohibited from serving as the family member's lawyer in any forum."

C.G.S. § 51-47 (4)(c) prohibits a judge from practicing law: "Each judge shall be an elector and a resident of this state, ... and shall not engage in private practice...."

Rule 1.16(d) of the Rules of Professional Conduct states as follows:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. If the representation of the client is terminated either by the lawyer withdrawing from representation or by the client discharging the lawyer, the lawyer shall confirm the termination in writing to the client before or within a reasonable time after the termination of the representation.

In *Ethical Issues for New Judges*, Cynthia Gray discusses issues relating to wind-up of a law practice. Ordinarily there is no exception in the rules dealing with the situation when a new judge is winding up his or her practice. Moreover, no such exception exists in the Connecticut Code of Judicial Conduct. According to Ms. Gray: "The ethical responsibilities owed to a client when an attorney leaves the practice of law to become a judge are no different than those owed when an attorney ends representation of a client for any other reason...."

Taking into account the prohibition on practicing law and the ethical duty to clients in winding up law practice, various ethics advisory committees have noted that, while a judge may not practice law, a judge "may provide information to a former client as part of the continuing duty to protect a client's interests upon conclusion of representation." *Ethical Issues for New Judges*, at p. 7. (See Illinois Advisory Opinion 94-19 and Nevada Advisory Opinion 98-003). A line has been drawn in the opinions, however, distinguishing between the providing of factual information pertaining to the referred matter and the providing of legal advice or litigation strategy. For example, opinions have permitted judges to transcribe notes that were not legible, respond to questions as to historical facts pertaining to the matter that are not readily apparent from the file, provide factual details within the judge's peculiar knowledge, and respond to similar matters of clarification. (See U.S. Compendium of Selected Opinions §2.7(g)(2001), New York Advisory Opinions 96-128, 95-20, 95-116 & 91-137 and Massachusetts Advisory Opinion 01-2).

Based upon the information provided, including that the inquiring Judicial Official seeks advice as to whether he or she may respond to factual questions that concern the nature and location of information pertaining to the referred matter, the Committee unanimously determined that the Judicial Official may respond to the questions from successor counsel subject to the following conditions:

- 1) The Judicial Official may not engage in the practice of law, as that term is defined in Practice Book section 2-44A, including but not limited to providing advice as to legal strategy, and
- 2) The Judicial Official may answer questions of the successor attorneys that relate to factual matters not readily apparent from the file or to the nature and location of documents and other historical information but should not answer questions involving legal advice or litigation strategy.

XI. The meeting adjourned at 1:49 p.m.