

Committee on Judicial Ethics
Teleconference
Thursday, December 15, 2016

Committee members present via teleconference: Judge Christine E. Keller (Chair), Judge Maureen D. Dennis (Vice Chair), Judge Angela C. Robinson, Professor Sarah F. Russell and Judge Robert B. Shapiro. Staff present: Attorney Martin R. Libbin (Secretary), Attorney Viviana L. Livesay (Assistant Secretary) and Attorney Adam P. Mauriello (Assistant Secretary).

MINUTES

- I. Judge Keller called the meeting to order at 9:32 a.m. Although publicly noticed, no members of the public were present.
- II. The Committee members present approved the minutes of the October 20, 2016 regular meeting.
- III. The Committee ratified **Emergency Staff Opinion JE 2016-15**. The facts of the inquiry are as follows. As part of a municipality's celebration of a milestone number of years since its founding, its historical society would like to hold a fund-raising dinner at which Judicial Officials who are connected to the municipality will be honored and will speak about the evolution of the law, the courthouses in the municipality, the municipality as a seat of judicial power, and the role of the judicial process. The entire event will be dedicated to a discussion of the law, the courthouse history, etc. The municipality, but not the historical society, has been a party to numerous lawsuits. The historical society, which is a 501(c)(3) nonprofit organization, will be the beneficiary of the fund-raiser. The Judicial Official will not be involved with the sale of tickets. A Judicial Official inquired whether he or she may participate.

Rule 1.2 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 2.10 states that a judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any non-public statement that might

substantially interfere with a fair trial. It further provides that a judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

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” including, but not limited to, when the judge has a personal bias or prejudice concerning a party.

Rule 3.1 states that a judge may engage in extrajudicial activities, except as prohibited by law, however, a judge shall not participate in activities that (1) will interfere with the proper performance of judicial duties, (2) lead to frequent disqualification, (3) appear to a reasonable person to undermine the judge’s independence, integrity or impartiality, (4) appear to a reasonable person to be coercive, or (5) make use of court premises, staff or resources except for incidental use or for activities that concern the law, the legal system or the administration of justice, or the use is permitted by law.

Rule 3.7 (a) states that subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations concerned with the law, the legal system or the administration of justice, as well as those sponsored by or on behalf of educational, religious, charitable, fraternal or civic organizations not conducted for profit, including, but not limited to, the following activities: “(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system or the administration of justice”. Comment (1) to this Rule notes that the activities permitted by subsection (a) “generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions and other not-for-profit organizations, including law related, charitable, and other organizations.” Comment (2) to this Rule notes that “Even for law related organizations, a judge should consider whether ... the nature of the judge’s participation in or association with the organization would conflict with the judge’s obligation to refrain from activities that reflect adversely on a judge’s independence, integrity, and impartiality.”

The issue of appearing at or receiving an award at a fund-raising event was previously considered by this Committee on multiple occasions. Some of those opinions are discussed below.

In [JE 2010-30](#), this Committee considered whether a Judicial Official could be (1) honored at a fund-raising event hosted by a law-related organization that provides legal services, and (2) featured in advance publicity. The Committee concluded that the Judicial Official may be honored at the event because it was

one that “concerns the law, the legal system, or the administration of justice” under Rule 3.7 (a) (4). With respect to publicity, this Committee advised that special care must be taken to ensure that the Judicial Official’s name is not being used to encourage law firm participation and that no appearance is created that any of the donors or the organization is in a special position to influence the Judicial Official.

In [JE 2012-15](#), this Committee determined that a Judicial Official who had served as a member of a task force created to study issues concerning the administration of criminal justice could attend and be acknowledged at a fund-raising event hosted by a nonprofit law-related organization.

In [JE 2012-22](#), at issue was whether a Judicial Official, prior to his or her resignation from the bench, could authorize, assist and agree to be the guest of honor at a fund-raising event that would benefit an organization that concerns the law, the legal system or the administration of justice. Based upon the facts presented, including that the “retirement” event involved fund-raising for a nonprofit organization concerned with the law, the legal system or the administration of justice, that the Judicial Official would not know in advance of the event who had purchased tickets, the event would take place after the Judicial Official’s retirement, and that the Judicial Official would not preside over any contested matters once the tickets were offered for sale, the Committee unanimously determined that the Judicial Official could agree to be the guest of honor at the “retirement” fund-raising event. The Committee further determined that the proposed event would not create an appearance of impropriety in violation of Rule 1.2 and also would not constitute an attempt to use the prestige of office to advance the interests of others in violation of Rule 1.3.

While the foregoing opinions concern appearing and being a guest of honor at a law-related organization’s fund-raising event, it is important to note that the new Code of Judicial Conduct, which was adopted effective January 1, 2011, provides in Rule 3.7 that subject to the requirements of Rule 3.1, a judge may participate in activities (1) sponsored by organizations or governmental entities concerned with the law, the legal system or the administration of justice, and (2) those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations which are not conducted for profit. Rule 3.7(a) states that the Judicial Officials can participate in such activities “including, but not limited to, the following activities” and then lists 6 types of activities. Subdivision (4), as noted above, concerns appearing or speaking at, receiving an award, being featured on the program of and permitting his or her title to be used in connection with the event “of such an organization or entity, but if the event serves a fund-raising purpose, the judge may only participate only if the event concerns the law, the legal system, or the administration of justice”.

Applying the fund-raising purpose of an event to non-law related entities is consistent with the foregoing plain language of the Code as well as the opinion

expressed by Cynthia Gray in her article “Nexuses and tangents: The law, the legal system, or the administration of justice”, which appeared in *Judicial Conduct Reporter*, Vol. 37, No. 1, Spring 2015 (see Appendix A). (This is a change from the opinion Ms. Gray initially took when the model code was first adopted.) In particular, at page 11, she stated the following:

In a new exception created in the 2007 model code, Rule 3.7(A) (4) provides that a judge may appear, speak, or receive an award at, be featured on the program of, and permit his or her title to be used in connection with a fund-raising event for a non-profit organization “only if the event concerns the law, the legal system, or the administration of justice.” The Florida version of the rule provides that “the law, the legal system, or the administration of justice” applies to both the organization sponsoring the fund-raising event and the purpose for which the funds are being raised.

In this case, the sponsoring organization is a civic/educational organization not conducted for profit and therefore qualifies as an organization within the meaning of Rule 3.7. Therefore, under our Code of Judicial Conduct, the question presented is whether the “event” is one that “concerns the law, the legal system, or the administration of justice”. Unlike Florida, Connecticut does not require that the purpose for which the funds are being raised also relate to “the law, the legal system, or the administration of justice”.

In [JE 2011-02](#), this Committee, by a vote of 3 – 1, determined that in order for a governmental committee, board, commission or other governmental position to be deemed concerned with the law, the legal system, or the administration of justice for purposes of Rule 3.4, “there must be a direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business.” In a footnote, the Committee specifically noted that it was not deciding if the same interpretation of the phrase “the law, the legal system, or the administration of justice” would apply in interpreting Rule 3.2, which concerns appearances before governmental bodies and consultation with government offices. Similarly, the Committee has not formally adopted the definition used in Rule 3.4 for Rule 3.7, although it is construing the same phrase.

In [JE 2012-22](#), this Committee authorized a Judicial Official, while still holding office, to agree to be the guest of honor at an event recognizing the Judicial Official’s service as a judge, which event would take place following his or her return to the private practice of law. An event that is concerned with the evolution of the law, the history of courthouses in a locality, the role of the municipality as a seat of judicial power, and the role of the judicial process “concerns the law, the legal system, or the administration of justice” in a similar manner.

Based upon the foregoing, it was determined that the Judicial Official is permitted to participate as a guest of honor and speaker at the fund-raiser subject to the following conditions:

1. The Judicial Official does not discuss any pending or impending cases in any court and does not make any 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 non-public statement that might substantially interfere with a fair trial or hearing (see Rule 2.10);
2. The Judicial Official does not personally believe that attendance and participation as a guest of honor will create an appearance of impropriety (see Rule 1.2) or appear to a reasonable person to be coercive (see Rule 3.1);
3. The Judicial Official should retain authority to review any press release or invitation to make sure that there is no attempt to use the prestige of judicial official to advance the interests of the organization in violation of Rule 1.3, however, in accordance with Rule 3.7(a)(4), the Judicial Official may be featured on the program and allow his or her name and title to be used in connection with the event; and
4. If the organization appears before the Judicial Official as a party within a reasonable period of time following the event, the Judicial Official should disclose the fact that he/she attended the fund-raising event and was a guest of honor (see Rule 2.11).

- IV. The Committee discussed **Informal Opinion JE 2016-16** concerning whether a Judicial Official may support the American Civil Liberties Union, the Southern Poverty Law Center, the National Organization for Women, and a national ethnic bar association by: (1) donating money, (2) joining as a member, and/or (3) serving as an officer or board member.

Rule 1.2 of the Code of Judicial Conduct provides 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. 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 3.1 of the Code concerns extrajudicial activities and sets forth general limitations on such activities, such as not using court premises, staff or resources, except for incidental use or for activities that concern the law, the legal system, or the administration of justice unless otherwise permitted by law, and not participating in activities that (1) interfere with the proper performance of judicial duties, (2) lead to frequent disqualification, (3) appear to a reasonable person to undermine the judge's independence, integrity or impartiality, or (4) appear to a reasonable person to be coercive.

Rule 3.7(a) provides that a judge "may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal or civic organizations not conducted for profit... including,...(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity: (A) will be engaged in proceedings that would ordinarily come before the judge; or (B) will frequently be engaged in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member." The rule's commentary states that "[e]ven for law related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely on a judge's independence, integrity, and impartiality." Rule 3.7, cmt. (2).

Rule 4.1 of the Code of Judicial Conduct, entitled Political Activities of Judges in General, states in relevant part, as follows:

- (a) Except as permitted by law, or by Rules 4.2 and 4.3, a judge shall not:
 - (1) act as a leader in, or hold an office in, a political organization;
 - (2) make speeches on behalf of a political organization;
 - (3) publicly endorse or oppose a candidate for any public office;
 - (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for 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; or
 - (9) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office...
- (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.

Because each organization raises somewhat different concerns under the Code of Judicial Conduct, the Committee addresses them separately below.

American Civil Liberties Union

The American Civil Liberties Union's ("ACLU") website states that "[f]or nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country." <https://www.aclu.org>. The ACLU's priorities include LGBT equality, preserving abortion rights, freedom of speech and police misconduct, among others, and the website contains some material that is critical of prominent political figures. It does not appear as though the ACLU is a party to

any pending civil cases in the Connecticut Superior Court, although the Connecticut chapter of the ACLU has appeared as counsel or amicus in approximately 8 cases before the Connecticut Supreme Court within the past five years, one of which remains pending.

The ACLU seems to have attributes of both an organization "concerned with the law, the legal system, or the administration of justice" under Rule 3.7 and a "political organization" under Rule 4.1. This is consistent with the ACLU's designation as a 501(c)(4) "social welfare organization" under the Internal Revenue Code. Such organizations may engage in lobbying and "some" political activity; see <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations>; so long as political activity is not the primary purpose of the organization. Many of the issues championed by the ACLU through lobbying and litigation are controversial and of a high public profile.

In [JE 2009-17](#), this Committee concluded that a judge could join the judge's section of the American Board of Trial Advocates, an organization that had "adopted over 40 resolutions on a variety of topics, as well as taking a position with respect to certain legislation and filing briefs as amicus curiae in various cases," subject to certain conditions. Similarly, in [JE 2013-16](#), this Committee determined that a Judicial Official could become a member of the Connecticut Bar Association, which "comments and takes public positions on legislation, engages in issue advocacy, including issues that directly impact the judiciary, sometimes files amicus curiae briefs and further that people in leadership positions customarily solicit opinions from and/or attempt to persuade CBA members concerning various matters," but advised that the Judicial Official should not serve as an officer, director or section leader. Also relevant is [JE 2013-35](#), in which this Committee considered whether a Judicial Official could attend, be acknowledged or honored, and speak at a fund-raising event co-hosted by a national nonprofit 501(c)(3) law-related organization whose mission is to achieve full recognition of the civil rights of a particular class of citizens through impact litigation, education and public policy work. The Committee also considered whether the Judicial Official could make a donation to the organization. The Committee determined that the Judicial Official should decline to be honored or acknowledged and should not speak at the event. However, the Committee determined that the Judicial Official could attend the event and make a donation to the organization, subject to several conditions.

Although this Committee apparently has not considered a Judicial Official's involvement in a 501(c)(4) organization, the New York Advisory Committee on Judicial Ethics has reached similar conclusions and recommended similar restrictions regarding a judge's activity in such organizations, including the New York Civil Liberties Union, provided that such organizations are not "political organizations" for purposes of the Code of Judicial Conduct. See New York Opinion 98-101 (judge may be a member of NYCLU and Planned Parenthood, but "should take care that such membership does not involve the judge in being

associated with matters that are the subject of litigation or public controversy," and should not participate in NYCLU's annual awards event); New York Opinion 03-45; (judge can make contributions to NYCLU); New York Opinion 15-210 (judge may be a member of a 501(c)(4) organization dedicated to educating the public regarding firearms and the second amendment, but should not assume a leadership position in the organization). See also Florida Opinion 2009-13 (judge may become a member of the National Rifle Association for the purpose of joining a local gun club, but must not become personally involved in NRA's lobbying or fundraising efforts, and must continually monitor membership to ensure compliance with ethical canons).

Based upon the information and authorities set forth above, the committee unanimously determined that the Judicial Official may join the ACLU as a member, and make monetary contributions to the ACLU, subject to the following conditions:

- 1) The Judicial Official should not serve as an officer, on a board of directors, or in any other leadership position in the ACLU;
- 2) The Judicial Official should not associate him or herself with organizational positions on matters of public controversy;
- 3) The Judicial Official should disqualify himself or herself from any litigation where the ACLU (including the Connecticut chapter) is a party or is representing a party;
- 4) If an issue comes before the Judicial Official for decision that involves a matter on which ACLU has taken a public position (such as by litigation or lobbying) the Judicial Official should disclose his or her affiliation with the ACLU and should consider whether recusal is necessary;
- 5) The Judicial Official should not use his or her judicial title in connection with ACLU membership or donations, and should request and obtain adequate assurances that his or her judicial title will not be publicized or used by the organization for any purpose;
- 6) The Judicial Official should regularly reexamine the activities and rules of the organization to determine whether it is proper for the Judicial Official to continue his or her relationship with it and should carefully consider whether specific programs or activities of the organization may undermine confidence in the Judicial Official's independence, integrity and impartiality.

Southern Poverty Law Center

According to its website, the Southern Poverty Law Center ("SPLC") is a 501(c)(3) organization "dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of our society. Using litigation, education, and other forms of advocacy, the SPLC works toward the day when the ideals of equal justice and equal opportunity will be a reality." <https://www.splcenter.org>. Key issues for the organization include hate crimes,

immigrant's rights, economic justice, children's rights and LGBT rights.

The Committee's analysis regarding the ACLU is equally applicable to the SPLC, with the observation that the SPLC apparently has far less of a local presence than the ACLU. Therefore, Committee unanimously determined that that the Judicial Official may become a member of and donate to the SPLC, subject to the conditions outlined above for such activity in connection with the ACLU. In addition to the authorities cited above in the Committee's discussion of the ACLU, the Committee also considered [JE 2012-30](#) (Judicial Official may make donation to 501(c)(3) organization subject to several conditions) and New York Opinion 14-117 (judge may donate to the Southern Poverty Law Center) in rendering its opinion.

National Organization for Women

The National Organization for Women ("NOW") is a 501(c)(4) organization that describes itself as "the grassroots arm of the women's movement, the National Organization for Women is dedicated to its multi-issue and multi-strategy approach to women's rights, and is the largest organization of feminist grassroots activists in the United States," see <http://now.org/>. Key issues for NOW include protecting abortion and reproductive rights, LGBT equality and fighting violence against women. The Frequently Asked Questions section of NOW's website states that it is not affiliated with any political party and that all candidates for office are eligible for NOW's endorsement. However, NOW's website and its affiliated political action committee; see <http://nowpac.org/>; appear to be one-sided in their support of one of the major political parties and its candidates, and NOW's president has been outspoken about the results of the 2016 presidential election.

The foregoing raises the question of whether a Judicial Official's involvement with NOW through membership and donations would constitute improper political activity under Rule 4.1. See [JE 2010-24](#) (Code of Judicial conduct prohibits a Judicial Official "from making contributions to federal and non-Connecticut, as well as Connecticut, political organizations and candidates"); [JE 2012-32](#) (Judicial Official should not submit for publication an op-ed that that would, among other things, suggest the Judicial Official's political views and priorities in violation of Rule 3.1 and Canon 4).

The New York Advisory Committee has opined that certain nonprofit organizations may be considered "political organizations" for purposes of the Code of Judicial Conduct. See New York Opinion 14-95 (judge may not donate to or become a member of 501(c)(4) organization "that seeks to promote individuals with a particular viewpoint on abortion for election and appointment to public office at every level of government"); New York Opinion 14-117 (judge should not contribute to MoveOn.org even though it encompasses a nonprofit education arm).

Given the clear political bent of NOW and its political action committee, it

appears that the Judicial Official's proposed involvement with NOW would constitute improper political activity under Rule 4.1(a)(4) and (c). In addition, such activity could call into question the Judicial Official's independence, integrity and impartiality under Rules 3.1 and 3.7. Therefore, the Committee unanimously determined that the Judicial Official should not become associated with NOW through donations or membership.

National Ethnic Bar Association

The national bar association in question supports, guides and mentors local chapters; serves as a resource tool for its local chapters; provides networking and referral opportunities for its members; and encourages the formation of new local chapters, among other things. There does not appear to be any requirement that members of the national bar association be of a particular ethnicity, sex, age, group, or subscribe to a particular religious belief. In [JE 2012-10](#), this Committee approved of a Judicial Official's proposed membership in a local ethnic bar association in a very similar factual setting, but suggested that the Judicial Official "should regularly reexamine the activities and rules of the association to determine whether it is proper for the Judicial Official to continue his or her relationship with it and should carefully consider whether the Judicial Official's identification with or involvement in specific programs or activities of the association may undermine confidence in the Judicial Official's independence, integrity and impartiality." On the basis of JE 2012-10, the Committee unanimously determined that the Judicial Official may donate to and join the national bar association as a member, subject to the above-quoted conditions as set forth in that opinion. The Committee further concluded that the Judicial Official may serve as an officer or on the board of directors of the national bar association, also subject to the conditions outlined in JE 2012-10.

In reaching the latter conclusion, the Committee also considered [JE 2013-16](#) (Judicial Official should not serve as an officer, director or section leader for the Connecticut Bar Association, citing Rules 1.2, 1.3, 3.1 and 3). The Committee distinguished that opinion on the basis that the national bar association's presence and activities in Connecticut with respect to the Connecticut bar, litigation and legislation are considerably less pervasive in comparison to the Connecticut Bar Association.

- V. The meeting adjourned at 9:44 a.m.