

**Committee on Judicial Ethics**  
**Regular Meeting**  
**Thursday, February 20, 2020**

Committee members present via teleconference: Judge James T. Graham (Chair), Judge Robert B. Shapiro, Judge Vernon D. Oliver, Judge Michael P. Kamp and Professor Carolyn W. Kaas. Staff present: Attorney Joseph J. Del Ciampo, Attorney Adam P. Mauriello and Attorney Viviana L. Livesay.

**MINUTES**

- I. Judge Graham called the meeting to order at 9:35 a.m. Although publicly noticed, no members of the public were present.
- II. Judges Graham, Shapiro, Oliver and Kamp approved the minutes of the January 16, 2020 regular meeting. (Professor Kaas abstained.)
- III. The Committee discussed **Informal JE 2020-01** concerning whether a Judicial Official may create an LLC with a long-time friend for the purpose of developing real estate and selling the properties if the Judicial Official limits his or her involvement to that of an investor.

A Judicial Official, who previously was in the building trades, has inquired if he or she may form an LLC with a long-time friend who owns some building lots. The friend, who is not an attorney, currently holds a developer's license and owns a couple of undeveloped lots. The desire is to develop one or more of those lots with a spec house (i.e. the property would be sold "as is"). The Judicial Official noted that he or she would never be involved in the development of a "custom contract buyer" property where the buyer and the builder agree in advance on the site, style, price, etc. as there is too much potential for a dispute to develop over whether the property was completed in accordance with the purchase agreement. If the venture is successful, the Judicial Official and the friend may seek to purchase and flip other properties. The Judicial Official and the friend would be responsible for financing the construction of the home. In addition to being a financial backer, the Judicial Official may provide some input on the construction. By way of example, the Judicial Official indicated that the friend might ask the Judicial Official for his or her opinion on lighting in a portion of the house. The Judicial Official would not be an officer, director, manager, general partner or advisor, but rather simply an investor.

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 of the Code 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 3.1 of the Code concerns extrajudicial activities and sets forth general limitations on such activities. Those limitations include 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, (4) appear to a reasonable person to be coercive or (5) make use of court premises, staff, stationery, or other resources, except for incidental use or for activities that concern the law, the legal system or the administration of justice or unless the additional use is permitted by law.

Rule 3.11 of the Code concerns financial and business activities. It provides as follows:

- (a) A judge may hold and manage investments of the judge and members of the judge's family.
- (b) A judge shall not serve as an officer, director, manager, general partner or advisor of any business entity except for:
  - (1) a business closely held by the judge or members of the judge's family; or
  - (2) a business entity primarily engaged in investments of the financial resources of the judge or members of the judge's family.
- (c) A judge shall not engage in financial activities permitted under subsections (a) and (b) if they will:
  - (1) interfere with the proper performance of judicial duties;
  - (2) lead to frequent disqualification of the judge;
  - (3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
  - (4) result in violation of other provisions of this Code.

Comment (1) to Rule 3.11 states as follows:

Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or to appear in judicial robes in business advertising, or to conduct his or her business or

financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

Our current Code of Judicial Conduct took effect on January 1, 2011. A discussion of the differences between the former and current Code notes the following with respect to permitted financial activities.

Rule 3.11: The new Code sets forth different provisions with respect to financial activities. For example, under the new Code a judge may not serve as an officer, director, manager, general manager or advisor of any business entity except for a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

The former Code permitted a judge to engage in any financial or business dealings provided that they did not tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

While the Connecticut Code is based upon the 2007 ABA Model Code, it is not identical to it. With respect to Rule 3.11, the ABA Model Code specifically stated that "A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity" whereas Connecticut includes real estate as an example in Comment (1). A more significant difference is that the ABA Model Code stated that "A judge shall not serve as an officer, director, manager, general partner, advisor or *employee* of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in: (a) a business closely held by the judge or members of the judge's family, or (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family." (Emphasis added.) Unlike the ABA Model Code, Rule 3.11 deleted the prohibition on being an *employee* of a business entity unless the entity was a closely held business or a business primarily engaged in investment of financial resources of the judge or members of the judge's family.

The question presented by the current inquiry is whether the Judicial Official can establish an LLC with a long-time friend, who is not an attorney, for purposes of investing in real estate development, where the Judicial Official would not hold any office or position other than as an investor in the business.

While not in the Connecticut Commentary to Rule 3.11, the Commentary to the ABA Model Code states as follows with respect to closely held businesses:

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve the misuse of the prestige of judicial office.

While the foregoing Commentary was not adopted in Connecticut, the ABA discussion of what qualifies as a closely-held business is hereby adopted. In particular, a Judicial Official only can be an officer, director, manager, general partner or advisor of a business entity if the owners of the closely-held business consist of the judge, members of the judge's family or a combination of the two. The foregoing interpretation is consistent with *Oklahoma Judicial Ethics Opinion 2003-4*. In particular, in that opinion, the question was whether a judge could serve on the Board of Directors of a closely held corporation engaged in the nursing home business. Members of six families owned the closely held corporation. The inquiring judge owned a few shares and the judge's family owned 1/6 of the stock. Although the Oklahoma Committee did not provide any discussion, they noted "It appears that Canon 4D(3)(a) refers strictly to a totally owned family corporation and not to a small closely held corporation in which the judge's family owns a minority interest." (Canon 4D(3)(a) stated "A judge should not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in: (a) a business closely held by the judge or members of the judge's family.") According to Cynthia Gray, Director of the Center for Judicial Ethics at the National Center for State Courts, the foregoing Oklahoma Advisory Opinion is the only opinion discussing what constitutes a closely held business and in particular if such a business only can be owned by a judicial official or his or her relatives or if there can be nonrelatives who are part owners of a closely held business. Ms. Gray was unable to find any opinions that discussed what constitutes an entity primarily engaged in the investment of the financial resources of a judge nor could she opine whether a partnership where the Judicial Official invested funds and the partner developed real estate was one "primarily engaged in the investment of the financial resources of the judge."

In her article entitled "Real Estate Investments by Judges", which is based upon the 1990 ABA Model Code of Judicial Conduct, Cynthia Gray wrote, in relevant part, the following with respect to managing real estate investments:

Although Canon 4D(2) allows a judge to manage real estate investments,

commentary to that provision indicates that it is limited to ‘investments owned solely by the judge, investments owned solely by members of the judge’s family, and investments owned jointly by the judge and members of the judge’s family.’ Moreover, advisory opinions prohibit a judge from personally and actively managing real estate. For example, the New York committee advised that a judge may continue to own commercial real estate as a tenant-in-common as long as the judge takes no active role in the management or operation of the property. *New York Advisory Opinion 89-108. Accord South Carolina Advisory Opinion 5-1985* (a judge should refrain from all managerial functions within a real estate partnership). That limitation is based on Canon 4D(3), which prohibits a judge from serving ‘as an officer, director, manager, general partner, advisor or employee of any business entity.’<sup>1</sup>

It has been suggested that the distinction between managing a real estate investment, permitted by Canon 4D(2), and managing a real estate business, prohibited by Canon 4D(3), is ‘that a judge may establish policy and participate in decisions, while actual management is left to others.... *In re Foster*, 318 A.2d 523 (Maryland 1974). Thus the advisory committee for federal judges, although noting that a judge may hold and manage investments, including real estate, advised that a judge should not personally manage or operate any business, including a farm or ranch. *U.S. Advisory Opinion 30* (1974). The committee explained that this limitation ‘would not preclude his participation in decisions with respect to the purchase, sale and use of land, the purchase of equipment and supplies, or the sale of farm produce or livestock from a farm or ranch he owns but is operated by a farm manager or hired man.’

What is proposed appears to be a business in which the Judicial Official’s sole involvement is limited to being an investor. As noted in Judicial Conduct and Ethics (4<sup>th</sup> Ed.), by James Alfini, Steven Lubet, Jeffrey Shaman and Charles Geyh, §§ 7.01B, 7.07A “the 1972 Model Code [which was the predecessor to the 1990 and 2007 ABA Model Codes] included an absolute prohibition against judges serving as officers, directors, managers, advisors, or employees of any business. In the words of the reporter to the committee that drafted the 1972 Code, ‘To sum it up succinctly, a judge should not engage in business.’ These provisions were intended to abolish the permissive approach of the old Canons, and to place rather severe restrictions on a judge’s business potentialities. ... The 1990 Model Code added two provisos that softened the ‘no business’ rule. Specifically, a judge may manage or participate in a business closely held by the judge or members of the judge’s family, or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family. The second proviso adds clarity, explaining that the management of personal

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<sup>1</sup> The 1990 Model Code, as well as Connecticut’s current Code of Judicial Conduct, include an exception that allows a judge to serve in such capacities for a business closely held by the judge or members of the judge’s family, or a business primarily engaged in the investment of the financial resources of the judge or members of the judge’s family.

investments is never prohibited, even if accomplished through a corporate or partnership structure.” The authors note that the Code appears to strike a balance between passive and active involvement, with the difficult issue being when does the permitted management of investments cross the line and become the forbidden involvement in a business. They go on to note that in most cases where judges have been disciplined for violating the per se rule against business involvement, the specific conduct also violated one of the substantive proscriptions found elsewhere in the Code. Examples of this include, but are not limited to, the use of chambers as a business office, use of one’s judicial position to gain a business advantage and interfering with the performance of judicial duties due to the time involved in the business.

Based on the information provided, including but not limited to the fact that the Judicial Official will limit his or her role to an investor and will not serve as an officer, director, manager, general partner or advisor to the business, the Committee determined that the Judicial Official may invest in the business since that is comparable to the Judicial Official purchasing shares of stock in any other business; however, the Judicial Official should not provide any advice with respect to the business so as to avoid his or her involvement rising to the level of an “advisor”.

- IV. The Committee discussed **Informal JE 2020-02** concerning a matter that was filed as a joint inquiry by two Judicial Officials. For ease in understanding, the discussion set out below refers to “Judicial Official”, singular.

The issue presented is as follows. If it comes to the Judicial Official’s attention that an attorney has been formally charged with a crime, is the Judicial Official under any ethical obligation to do any of the following?

- a. Inquire in chambers of counsel whether he/she has informed the client that he/she has been formally charged;
- b. Inquire whether the attorney asked the client whether he/she still wishes to be represented by the attorney in light of his/her arrest on this formal charge;
- c. Inquire of the client on the record whether he/she was informed of these charges by the attorney and whether the client still wishes to be represented by the attorney; and
- d. Inquire whether the attorney has obtained the client’s written informed consent to continued representation in light of the disclosure of these facts.

In addition to the above questions, and because the Judicial Official has determined that the charge against the attorney would qualify as a “serious crime” as defined in Connecticut Practice Book Section 2-40, the Judicial Official also seeks advice as to whether his or her obligation to do any of the above hinges on the type of crime with which the attorney has been charged.

The specific situation the Judicial Official is currently facing involves an attorney formally charged with witness tampering. The attorney's case is currently pending in a different Judicial District than the one in which the Judicial Official is assigned. The attorney appears as counsel of record for numerous clients in the Judicial Official's Judicial District, as well as in many others throughout the state. The Judicial Official appears to lack any first-hand knowledge of the charged criminal activity.

Rule 1.2 of the Code of Judicial Conduct 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. 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 2.11 (a) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned...."

Subsection (d) of Rule 2.15 provides:

(d) 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.

In relevant part, Comment (2) to Rule 2.15 explains that "[a] judge who does not have actual knowledge that ... a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under [subsection (d)] ...."

Comment (3) to Rule 2.15 provides that "actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct" may include, but are not limited to, "communicating directly with the lawyer who may have committed the violation or reporting the suspected violation to the appropriate authority or other agency or body."

So, in sum, where the Judicial Official received information about the lawyer's conduct, but does not have actual knowledge of the conduct, the Judicial Official must consider whether there is a "substantial likelihood" that the lawyer committed a violation of the Rules of Professional Conduct. If there is a substantial likelihood of a violation, the judge must take "appropriate action."

Rule 1.1 of the Rules of Professional Conduct provides that a "lawyer shall provide competent representation to the client. Competent representation requires the legal

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 1.3 of the Rules of Professional Conduct provides that a “lawyer shall act with reasonable diligence and promptness in representing a client.”

Rule 8.4 of the Rules of Professional Conduct states, in relevant part, that it is professional misconduct for a lawyer to:

- (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;...

Connecticut Practice Book Section 2-40 provides that:

(a) The term “serious crime,” as used herein, shall mean any felony, any larceny, any crime where the attorney was or will be sentenced to a term of incarceration, or any other crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or any crime, a necessary element of which, as determined by the statutory or commonlaw definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, wilful failure to file tax returns, violations involving criminal drug offenses, or any attempt, conspiracy or solicitation of another to commit a “serious crime.”

...

(e) Upon receipt of proof of the finding of guilt, the disciplinary counsel shall determine whether the crime for which the attorney was found guilty is a serious crime, as defined herein. If so, disciplinary counsel shall, pursuant to Section 2-47, file a presentment against the attorney predicated upon the finding of guilt. A certified copy of the finding of guilt shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based upon the finding of guilt. No entry fee shall be required for proceedings hereunder.

...

(g) Immediately upon receipt of proof of the finding of guilt of an attorney of a serious crime, as defined herein, the disciplinary counsel may also apply to the court for an order of interim suspension. If the attorney was or will be sentenced to a term of incarceration, disciplinary counsel shall seek a suspension during the term of incarceration. The court may, in its discretion, enter an order immediately placing the attorney on interim suspension pending final disposition of a presentment filed pursuant to this section. Thereafter, for good cause



shown, the court may, in the interests of justice, set aside or modify the interim suspension.

Practice Book Section 2-42 provides:

(a) If there is a disciplinary proceeding pending against a lawyer, ... and the grievance panel, the reviewing committee, the Statewide Grievance Committee or the disciplinary counsel believes that the lawyer poses a substantial threat of irreparable harm to his or her clients or to prospective clients, ... the panel or committee shall so advise the disciplinary counsel. The disciplinary counsel shall, upon being so advised or upon his or her own belief, apply to the court for an order of interim suspension. The disciplinary counsel shall provide the lawyer with notice that an application for interim suspension has been filed and that a hearing will be held on such application.

(b) The court, after hearing, pending final disposition of the disciplinary proceeding, may, if it finds that the lawyer poses a substantial threat of irreparable harm to his or her clients or to prospective clients, enter an order of interim suspension, or may order such other interim action as deemed appropriate. Thereafter, upon good cause shown, the court may, in the interest of justice, set aside or modify the interim suspension or other order entered pursuant hereto. Whenever the court enters an interim suspension order pursuant hereto, the court may appoint a trustee, pursuant to Section 2-64, to protect the clients' and the suspended attorney's interests.

In [JE 2015-01](#), this Committee discussed the nature of a Judicial Official's obligation when he or she receives information that an attorney may have committed a violation of the Rules of Professional Conduct. In reaching its decision that the matter under consideration should be reported to the appropriate authority pursuant to subsection (d) of Rule 2.15, the Committee considered New York Judicial Ethics Advisory Opinions 10-36, 10-85, [10-122](#), 12-180, 13-118 and 14-88 and *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn 2007).

In [JE 2015-01](#), "the Committee considered the approach of New York Rule 100.3 (D) (2) of New York's Rules of Judicial Conduct [which] provides that '[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.' New York's Advisory Committee on Judicial Ethics has explained that it is ordinarily left to the judge's discretion to determine the 'appropriate action.' However, New York's Committee has concluded that where there is a substantial likelihood of misconduct that clearly calls into question the lawyer's honesty, trustworthiness, or fitness as a lawyer, then the only appropriate action is to report the lawyer to the grievance committee. See New York Judicial Ethics Advisory Opinions [14-88](#) (noting that there had been several instances 'where conduct described in an inquiry to this Committee, if true,

demonstrated a substantial likelihood of a substantial violation that clearly called into question an attorney's honesty, trustworthiness or fitness as a lawyer and, therefore, at the very least, warranted an investigation by the attorney grievance committee'" (judge learns an attorney appearing before him or her *pro se* testified under oath that the attorney used a fictitious bank account to shield the attorney's law firm income from court-ordered child support payments).

In [JE 2015-01](#), the Committee also adopted the position followed in New York that a judge is under no ethical obligation to conduct an investigation to determine how serious or minor any misconduct may be.

In New York Judicial Ethics Advisory Opinions [10-122](#), a judge was informed by the testimony of a witness in his or her court that the defendant's prior attorney had been involved in activities amounting to witness tampering. The prosecutor advised the judge that the prosecutor's office had already reported the attorney in question to the attorney grievance committee. The judge asked whether he or she must take any action regarding the attorney.

In addition to the decisions noted above, the New York Advisory Committee on Judicial Ethics, concluded that "a judge, who is satisfied that an attorney's alleged misconduct has actually been previously reported, is not required to take any further action." If the judge is uncertain whether a report has been made, the judge should "simply report the attorney." New York Judicial Ethics Advisory Opinions [13-77](#) and [15-180](#). See also New York Judicial Ethics Advisory Opinions [09-49](#) and [10-122](#).

Once the Judicial Official reports the attorney, the Judicial Official must disqualify himself or herself from all cases in which the attorney appears either as a party or an attorney, both during the pendency of the disciplinary matter, and for a period of two years after the disciplinary matter is fully resolved. Remittal is not available unless the attorney waives his or her right to confidentiality both during the disciplinary proceeding and after it is resolved in his or her favor or unless the grievance committee issues a public disciplinary decision. See [JE 2015-01](#).

In New York Judicial Ethics Advisory Opinions [14-39](#) a judge learned from an attorney who was appearing before the judge that the attorney was under indictment. The judge asked whether he or she must disclose that fact to the other attorneys on the case, and similarly whether the attorney has a duty to disclose that fact to his or her client. In that matter, the Committee stated that "individuals under criminal investigation or indictment 'are presumed innocent of such charges until proven guilty in a court of law.'" (Internal citations omitted.) The Committee decided that:

- (1) A judge, having learned that an attorney on a case is under indictment, but having no personal knowledge of the underlying circumstances, is not required to report the attorney to the attorney disciplinary authority.

(2) As the judge has concluded he/she can decide the case before him/her without reference to this information, the judge need not make any disclosure to other attorneys on the case.

In that matter, the Committee refused to comment on the attorney's legal or ethical obligations, if any, to advise his or her client that he or she is under indictment.

In New York Judicial Ethics Advisory Opinions [10-86](#), a judge in the course of his or her duties, reviewed a criminal complaint that charged a lawyer with grand larceny in the third degree. That judge had no personal knowledge of the alleged conduct, the lawyer had not been indicted, and the judge was unaware of any corroborating evidence. The Committee in that matter held that "[a] judge who believes that the charges in a criminal complaint against a lawyer would, if proved, constitute a substantial violation of the Rules of Professional Conduct is not required to take any action unless he/she concludes there is a substantial likelihood that the charges are true."

Based on the facts presented, and after consideration of the authorities outlined above, only if the Judicial Official has actual knowledge that the attorney has committed misconduct that raises a substantial question regarding his or her honesty, trustworthiness, or fitness as an attorney in other respects, or if the Judicial Official receives information indicating a substantial likelihood that the attorney committed misconduct, must the Judicial Official take any action that he or she deems appropriate. Merely accessing unproven, uncorroborated information through media sources or other sources does not, without more, require the Judicial Official to act.

Additionally, regardless of whether action is taken in response to the attorney's conduct, there is no obligation on the part of the Judicial Official to delve into the attorney-client relationship as would be the case were the Judicial Official to interpose himself or herself into the situation by inquiring of the attorney and/or client as suggested. Once alleged misconduct has been reported, the structure of the grievance system must be relied upon to reach a proper resolution, including protection of the interests of affected individuals. Regardless of the possible misconduct, the attorney is obligated to provide competent representation to the client, and must act with reasonable diligence and promptness in representing a client. As such, answers to the specific questions posed by the Judicial Official are not required.

This opinion is not intended to in any way diminish the Judicial Official's exercise of the inherent power of the court to regulate the conduct of lawyers. If, an emergency situation presents itself, such as when a lawyer is incarcerated or otherwise unable to protect the interests of his or her clients, a Judicial Official may be justified in exercising the inherent power of the court to regulate a lawyer's conduct in order to protect the interests of affected clients.

- V. New business – Judge Shapiro and Judge Oliver reported that they will not be able to attend the March 19, 2020 regular meeting. Staff will notify Judge Goodrow (Alternate).
- VI. The meeting adjourned at 10:33 a.m.