

Committee on Judicial Ethics
Teleconference
Thursday, July 21, 2016

Committee members present via teleconference: Judge Christine E. Keller (Chair), Judge Maureen D. Dennis (Vice Chair), Judge Barbara Quinn, Professor Sarah F. Russell and Judge Thomas J. Corradino (Alternate). Staff present: Attorney Martin R. Libbin (Secretary) and Attorney Viviana L. Livesay (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 approved the minutes of the June 16, 2016 meeting.
- III. The Committee ratified **Emergency Staff Opinion JE 2016-08**. The facts are as follows: A Judicial Official conducted hearings on an application for a civil protection order. After hearing testimony, the Judicial Official dismissed the application and vacated an outstanding ex parte order. The Judicial Official found that, although the respondent had engaged in some inappropriate cell phone communications with the applicant while the ex parte "no contact" order was in effect, the applicant had failed to prove by a preponderance of the evidence that the respondent "knowingly" engaged in conduct that would put a reasonable person in fear for her physical safety or that a protection order was necessary to prevent future contact by the respondent. The Judicial Official concluded that the respondent's cell phone call while the ex parte "no contact" order was in effect was inadvertent and not intentional.

The cell phone call to the applicant has now become the subject of a criminal prosecution in which the respondent is being charged with a class D felony based on the alleged violation of the ex parte order. The Judicial Official also believes that certain information provided to the police in support of the arrest warrant is, in the Judicial Official's opinion, at best misleading and at worst false.

The Judicial Official submitted the following questions: (1) May a Judicial Official bring to the attention of a state's attorney the prior proceedings before the Judicial Official, his/her adjudication and the reasons therefor? (2) May a Judicial Official communicate to the state's attorney the events of a prior hearing so that he/she may compare them with the statement in the arrest warrant (which the Judicial Official believes is misleading)? (3) May a Judicial Official communicate his/her opinion of the statement in the arrest warrant?

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 2.9 (a) states, in relevant part, that a judge “shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows: ... (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyer in an effort to settle matters pending before the judge.”

Rule 2.10 (a) states that a judge “shall 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.” Subsection (d) of this rule provides that “[n]otwithstanding 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.”

This inquiry was circulated to the Committee members and their input was solicited and received. In reaching its decision, the Committee considered whether judges are required to disclose potentially exculpatory information and considered the following advisory opinions from Florida: Florida Opinion 98-15 (majority found that judge may provide a voluntary statement to authorities in connection with a criminal investigation where the information may exculpate the target of the investigation only when properly subpoenaed. The minority, however, felt that there is a distinct difference between a judge appearing and giving testimony in a formal proceeding and simply cooperating with the authorities in which case a subpoena would not be required) and Florida Opinion 03-04 (obstruction of justice may result if judge who has relevant information refused to cooperate when requested to provide information).

The Committee also reviewed a recent judicial disciplinary case issued by the Supreme Court of Florida. In [Inquiry Concerning a Judge No. 15-594 Re: Gregory Holder, No. SC16-970 \(July 7, 2016\)](#), the Supreme Court commanded Judge Holder to appear before it to be reprimanded for engaging in ex parte communications with the Chief Assistant State Attorney on behalf of a defendant in veteran’s court and for publicly committing to convert the defendant’s remaining community control to probation prior to any hearing. The Court also ordered the judge to complete six CJE hours on topics related to ethics. The Court found that, by engaging in such conduct, Judge Holder failed to maintain

the high standards of conduct necessary to preserve the integrity of the judiciary, and acted in a manner that could potentially undermine public confidence in the judiciary. Further, his conduct created the appearance of impropriety and partiality.

The Committee also considered the effects of commenting on a case pending before another judge. In "Commenting on Pending Cases," American Judicature Society (2001), p.13, Cynthia Gray writes:

Comments about a case pending before another judge or jury in the same court or jurisdiction as the commenting judge can also be reasonably expected to affect its outcome or impair its fairness or at least create that appearance, and, therefore, falls within the proscription of the [Code]. A rule prohibiting such comments guards against the danger that a judge would feel pressured or would appear to feel pressured by the comments of a peer and colleague or that a jury would accord deference or would appear to accord deference to an opinion expressed by a judge. Moreover, such a rule ensures that proceedings remain immune from outside influences, even if such influences are not specially prejudicial. Finally, the prohibition guards against the creation of a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law. Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589 (1989); *Matter of Benoit*, 523 A.2d 1381 (Maine 1987).

It appears that the Judicial Official is seeking to provide unsolicited information to the State's Attorney about a pending case before another judge that may reasonably be expected to affect its outcome or may make the State's Attorney or another judge feel pressured by the Judicial Official. It also may appear as challenging or second guessing the probable cause determination of the Judicial Official who signed the warrant. Any facts found by the inquiring Judicial Official related to the adjudication of the protective order are not binding on any criminal court. Different factfinders can render inconsistent decisions. See *McCarthy v. McCarthy*, 55 Conn. App. 326 (1999). Even if the criminal court took judicial notice of the Judicial Official's oral decision, or allowed a jury to consider it, neither the court nor the jury would necessarily have to accept the Judicial Official's finds as conclusive and the State's Attorney might object. See CT Code of Evidence Rule 2-2 (b) and Commentary to Rule 2-1 (e). Based on the facts submitted, the Judicial Official was advised that he/she may send a signed copy of the court transcript to all counsel of record, as well as to any self-represented parties. The Judicial Official was advised that he/she should not engage in the contemplated activity unless he/she receives a request to cooperate with an investigation or a subpoena.

- IV. The Committee discussed **Informal Opinion JE 2016-11** concerning whether a Judicial Official may reach out to a current courthouse employee and suggest that he or she send a résumé to the Judicial Official's friend, a partner in a large out-of-state law firm, who is hiring staff for the firm's Connecticut office.

Prior to the recent Judicial Branch layoffs, several courthouse staff members spoke with various Judicial Officials and inquired whether the Judicial Officials would serve as references for the staff. One such Judicial Official has known an attorney for many years and socialized with the attorney both before and subsequent to the Judicial Official's appointment as a judge. During a recent social engagement, the attorney, who is a partner in a large out-of-state law firm, lamented about the competence of the staff in the firm's Connecticut office and said he wished they had someone who was knowledgeable about pleadings. The Judicial Official stated that is what the staff in the courthouse do and, after briefly thinking about the courthouse employees who had spoken with the Judicial Official about references, stated that he or she knew one person who had that skill set. The attorney then asked the Judicial Official if he or she could get that individual to send the attorney a résumé. The Judicial Official has inquired whether he or she may reach out to the current employee that the Judicial Official had in mind (an assistant clerk who has served as a courtroom clerk in the Judicial Official's courtroom) and suggest that he or she send a résumé to the Judicial Official's friend.

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 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." The Commentary to Rule 1.3 states, in relevant part, as follows:

(2) A Judge may provide a reference or recommendation for an individual based on the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if the use of the letterhead would not reasonably be perceived as an attempt to exert pressure by reason of judicial office.

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

The propriety of furnishing letters of recommendations or serving as a reference for employment purposes has been addressed by this Committee in a number of its prior opinions. In general, this Committee has concluded that a Judicial Official may provide references or recommendation subject to the conditions articulated in [JE 2013-32](#):

- (1) The recommendation should be based on personal knowledge of the applicant's qualifications (see Rule 1.3 comment 2);
- (2) The applicant is not a relative within the meaning of the Code or General Statutes § 51-39a;
- (3) If the recommendation is furnished in writing on official letterhead, the Judicial Official should indicate that the recommendation constitutes the Judicial Official's personal opinion (see Rule 1.3 comment 2);
- (4) Persons/entities receiving the recommendation do not have cases pending before the Judicial Official at the time the recommendation is provided or for a reasonable period of time after the submission of the letter of recommendation; however, in JE 2012-27, the Judicial Official was permitted to provide a letter of recommendation for an applicant for a supervisory position in the Office of Public Defender Services even though the Public Defenders appeared before the Judicial Official, although the applicant did not appear and was not likely to appear if he or she received the new position;
- (5) If the Judicial Official believes that recusal would be required in order to comply with condition (4) because his or her fairness would be impaired, and that recusal is likely to be frequent, the Judicial Official should not provide the letter of recommendation;
- (6) The letter should be specific to the position being sought (see [JE 2008-26](#));
- (7) The Judicial Official may not provide a recommendation in adversarial proceedings (see [JE 2008-15](#));
- (8) The Judicial Official may not provide a recommendation in connection with government employment that might suggest inappropriate political activity, but may be listed as a reference (see [JE 2009-13](#) & [JE 2011-19](#)).

The propriety of furnishing a referral was addressed in [JE 2008-17](#), wherein this Committee stated that "a Judicial Official may recommend an attorney to an individual provided that the individual given the recommendation has a sufficiently close relationship to the Judicial Official that the Judicial Official would automatically recuse himself or herself from a case involving that person

independent of whether the Judicial Official provides a recommendation. If a Judicial Official provides a recommendation, he/she should recommend multiple names of counsel.” This opinion was cited and followed in later opinions: [JE 2012-02](#); [JE 2013-17](#) (condition 3) and [JE 2013-18](#) (condition 3).

Based upon the information provided, the Committee unanimously determined that the Judicial Official may reach out to the court employee and suggest that the employee send a résumé to the Judicial Official’s friend, subject to the following:

- (1) All referrals/recommendations given on behalf of an individual shall be based upon personal knowledge of the individual’s qualifications. (See Rule 1.3 comment 2);
- (2) No individual referred/recommended shall be a relative within the meaning of the Code or General Statutes § 51-39a;
- (3) If the individual referred (i.e., the court employee) does not have a sufficiently close relationship to the Judicial Official that would automatically require recusal from a case involving that person independent of the referral and that person appears before the Judicial Official, the Judicial Official should disclose the referral relationship for a reasonable period of time, which is not less than two years from the date of the referral.

V. New Business

The Committee asked staff to review the legislative history of Conn. Gen. Stat. §51-39a and requested that this item be placed on the agenda of a future meeting for discussion.

The Chair announced upcoming changes to the membership of the Committee. On July 31, 2016, the terms of Judges Quinn and Corradino are set to expire and two new judges have been appointed by the Chief Justice. The Chair thanked Judge Quinn and Judge Corradino for their many years of dedicated service. The two new members will begin their terms on August 1, 2016.

VI. The meeting adjourned at 9:57 a.m.