



Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2018-07 (August 16, 2018)¹

Supervisory Duties; Court Employees; Service on Board

Rules 1.2, 1.3, 2.12 & 4.1

Issue: Is it a violation of Rule 2.12 of the Code of Judicial Conduct for a judicial law clerk subject to the judicial official's direction and control to serve as a board member and/or Treasurer of the board of directors of a nonprofit organization dedicated to preserving, promoting, and restoring due process in the criminal justice system?² This request pertains specifically to service on the inaugural board of directors of two related, bi-partisan, non-profit organizations: the Due Process Institute and the Clause 40 Foundation. The Judicial Official affirms that, to the best of his/her information and belief, this issue is not presently pending before any court, agency, or commission.

Additional Facts:

Judicial Law Clerks:

Prior to or while working for the court, judicial law clerks routinely have accepted post-clerkship employment with law firms, advocacy groups, state/federal government, and other entities whose work may involve legal/political matters, and that in the rare case in which such employment gives rise to a potential conflict of interest, the law clerks disqualify themselves from that case.

The organizations:

The organizations are based in Washington, D.C. Both are devoted to the same mission: "to preserve, promote, and restore the principles of due process, or 'fairness,' in the criminal justice system – particularly those housed in the 4th, 5th, and 6th Amendments [to the federal constitution]." Because these are newly created organizations, the information below is not yet publically available.

The main organization, the Due Process Institute, will operate as a 501(c)(4). The Institute's primary means of achieving its mission will be through the creation and support of bipartisan policy solutions, seeking the input and participation of all stakeholders – defense advocates, prosecutors, judges – and through lobbying for legislative action. The Institute will produce analyses and scholarship and will conduct public outreach campaigns to build coalitions on these issues. The Institute will support strategic efforts in the courts, typically at the federal appellate level, through

¹ This opinion revises our prior opinion of April 19, 2018, which we have reconsidered at the request of the inquiring judicial official.

² The Committee rephrased the Judicial Official's original inquiry to better frame the issues presented.

the filing of amicus briefs (estimated at five per year). Support for state efforts would be a marginal aspect of the Institute's work.

The Institute views its mission as nonpartisan, which is reflected in its support from groups whose interests ranged from those labeled "conservative" to "progressive." To that end, the experiences of the staff and board members of the Institute will reflect a wide array of political views.

Examples of the types of policies and legislation that the Institute supports include: enactment of criminal laws that avoid vagueness and overbreadth concerns; elimination, or rational limitation, of Pinkerton criminal conspiracy liability and the "willful" blindness theory of criminal culpability; adoption of prosecutorial ethos valuing ethics, fairness, and restraint; improvements in the fairness and efficacy of criminal discovery practice; institution of grand jury reforms (such as ensuring that, absent a compelling reason, a transcript of the grand jury proceedings is made public after indictment and requiring that a prosecutor reveal known exculpatory evidence to grand jurors); and efforts to ensure the use of valid forensic science in criminal court proceedings.

The Institute's work will be supported, in part, by funds raised by the Clause 40 Foundation, which will operate as a 501(c)(3). The main goal of the Clause 40 Foundation will be to garner tax-exempt donations and to provide grant support for the non-lobbying activities of the Institute (and eventually non-lobbying activities of other individuals and organizations whose missions and activities coincide with the goals of the Foundation.)

Neither organization will engage in political campaign activity, i.e., supporting or opposing any candidate for public office.

Board Service:

Each of the organizations has a board of directors. Directors are chosen for their commitment to principles of due process, accomplishment in their fields, diversity, and willingness to promote the organizations' goals. While the organizations will be based in Washington, D.C., the boards will be comprised of members who live and work throughout the country. Directors are expected to attend meetings of their boards, held on a quarterly basis. Board members will have general oversight of the organization, but will not be involved in day-to-day management, nor will board members have any formal role in decisions relating to specific advocacy issues or litigation. Board services will be on an uncompensated, volunteer basis.

The main responsibility of the Treasurer will be to generally oversee the financial administration and reporting of the organizations. The Treasurer will assist the Board Chair and CEO in financial planning, ensure the respective boards approve budgets each year, ensure that legally-required documents are filed, and oversee periodic outside audits and communicate those results to the boards. The Treasurer will have no day-to-day responsibility and will not act as a chief financial officer. The organization will use a licensed CPA and a bookkeeper to address ongoing financial administration.

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

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

Rule 2.12 (a) of the Code states that a judge “shall take reasonable measures to ensure that court staff, court officials, and others subject to the judge’s direction and control act in a manner that is consistent with the judge’s obligations under this Code.” Section (1) of the commentary states that a judge “is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.”

Rule 4.1 states: "(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; (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office; (6) seek, accept, or use endorsements from a political organization; (7) knowingly, or with reckless disregard for the truth, make any false or misleading statement in connection with the appointment or reappointment process; (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.

(b) A judge shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge, any activities prohibited under subsection (a).

(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.”

Law Clerks’ Oath:

The oath administered to judicial law clerks contains the following provisions:

"As a law clerk, I promise to conduct myself uprightly, avoiding even the appearance of impropriety in my activities. During my terms of service, I will not accept nomination for public office, nor participate by way of legal consultation or assistance to a party or attorney in any case which may come before the court, nor will I engage in the outside practice of law without express permission from the court."

"I pledge on my honor that I will maintain undivided loyalty to the [court] and to the [judges] thereof and that both during and after my term of service I will keep their trust

and not divulge any conversations or information regarding the business of the court, nor reveal the context of judicial opinions, discussions, memoranda, or other writings, nor disclose unannounced decisions of the court, nor keep any documents or other papers without the court's permission and approval."

Judicial Branch Policies:

Judicial Branch Policy No. 601 (and numerous collective bargaining agreements), permits employees—outside of court time—to engage in numerous political activities that are forbidden to judges, including making contributions of time and money, running for public office and serving as a member or officer of a political party or club.

The court of which the Judicial Official is a member has a policy entitled "Political Activity" that provides as follows:

"Recognizing that a...law clerk is often, through no fault of his/her own, identified with a specific [Judicial Official] or with the court as a whole, a law clerk should refrain from political activity that could lead to perceived or actual inappropriate conduct. Examples of such inappropriate conduct are:

1. Using his/her official authority or influence, directly or indirectly, for the purpose of, or what reasonably could be expected to result in, interfering with or affecting the result of an election or a nomination for office;
2. Directly or indirectly coercing, attempting to coerce, commanding or advising a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes;
3. Engaging in any political activity during working hours;
4. Using state funds, supplies, vehicles, or facilities to secure support for or oppose any candidate, party, or issue in a political partisan election.

A...law clerk should also be mindful of Canon 4 of the Code of Judicial Conduct...by which the [Judicial Officials] are bound, and should consult with the [Judicial Officials] to whom the law clerk reports when considering undertaking an otherwise authorized political activity described therein."

In addition, the Judicial Official's court has a policy that prohibits law clerks from engaging in the practice of law "either pro bono or for financial gain, other than as a matter of self-representation." The policy does, however, permit law clerks to "participate in other legal activities that do not involve the practice of law, such as teaching, writing, and lecturing, provided that such activities are not scheduled during regular working hours."

Discussion: Pursuant to Rule 2.12(a), a judge must take reasonable measures to ensure that court staff, court officials, and others subject to the judge's direction and control act in a manner consistent with the judge's obligations under the Code. The Code does not define "staff," but the term has been extended to all those who are employed by the judiciary, including court clerks, law clerks, bailiffs, secretaries, as well as staff attorneys and appellate court mediators. See Annotated ABA Model Code of Judicial Conduct, Third Edition (2016), p. 338. Under the existing supervisory structure, the extent to which judicial officials have "direction and control" over staff outside of the business of the court is not at all clear.

A judge violates this provision by encouraging or directing a staff member to engage in activities that would violate the Code by raising the appearance of impropriety with the perception that the law clerk is acting at the request of or on behalf of the judge. In this case, no appearance of impropriety is raised merely by the law clerk becoming a board member and/or Treasurer of these organizations.

This Committee has considered the propriety of a judicial official participating in the activities of law-related organizations in several opinions. For example, in [JE 2013-31](#), the Committee determined that a Judicial Official may not serve on the board of a law-related professional organization because the organization had received payments from the Judicial Branch and because it was likely that members of the organization would frequently be engaged in adversary proceedings in the court of which the Judicial Official is a member. In [JE 2013-26](#), the Committee advised a Judicial Official that he/she may not assist with the organizational effort to establish Connecticut's first Family Justice Center because the organization appeared to be heavily one-sided in nature (with a victim-centered focus) and had the potential for advocacy.

This Committee has also considered whether a judge may engage in advocacy. In [JE 2012-14](#), the Committee determined that a Judicial Official, who has written about a subject of public policy involving concerns about the welfare of a particular category of Americans, may engage in non-partisan public advocacy that concerned the law, the legal system and the administration of justice, in part. The advocacy involved urging the establishment of a governmental commission to make recommendations concerning the criminal justice system.

In [JE 2012-07](#), this Committee considered the propriety of fundraising on behalf of a non-profit law-related organization. The Committee concluded that the Judicial Official may continue to serve on the board of the law-related organization and may participate in certain fund-raising activities:

1. The Judicial Official may assist the organization in planning related to fund-raising and may participate in the management and investment of its funds. Rule 3.7(a)(1).
2. The Judicial Official may solicit contributions for the organization, but only from members of the Judicial Official's family (as that term is defined in the Code) or from Judicial Officials over whom the soliciting Judicial Official does not exercise supervisory or appellate authority. The Judicial Official may not

engage in a general solicitation of funds on behalf of the organization. Rule 3.7(a)(2).

3. The Judicial Official may solicit membership, even though the membership dues or fees generated may be used to support the objectives of the organization. Rule 3.7(a)(3).
4. The Judicial Official may appear or speak at, be featured on the program of, and permit his/her title to be used in connection with an organization event, even if it serves a fund-raising purpose. Rule 3.7(a)(4).
5. The Judicial Official may make recommendations to the organization in connection with its programs and activities. Rule 3.7(a)(5).

The Committee also noted that the Judicial Official should (1) regularly reexamine the activities of the Board to determine if it is proper to continue his or her relationship with the Board (Rule 1.2) and (2) resign from the Board if such service would require him or her to be involved in frequent transactions with lawyers or persons likely to come before the court on which he or she serves (Rules 3.1 & 3.7 (a)(6)).

According to the facts presented, both organizations are devoted to the same mission: “to preserve, promote, and restore the principles of due process, or ‘fairness,’ in the criminal justice system.” As such, both DC-based entities qualify as organizations concerned with the law, the legal system, or the administration of justice. Both are nonprofit organizations and bi-partisan in nature, as evidenced by the fact that they will seek the input and participation of all stakeholders (defense advocates, prosecutors, and judges). Although the Institute will be engaged in advocacy, board members will have no formal role in decisions relating to specific advocacy issues or litigation. The main role of the Foundation is to raise funds to support the Institute. Board members and the Treasurer will serve on an uncompensated, volunteer basis and will have general oversight of the organization, but will not be involved in day-to-day management. The main responsibility of the Treasurer will be to generally oversee the financial administration and reporting of the organizations and will not act as a chief financial officer.

The commentary to Rule 2.12 focuses on the conduct of court staff when those persons are acting at the judge’s direction or control, particularly on the judicial official’s behalf. We decline to interpret the text of Rule 2.12 so broadly as to require that a judicial official examine and approve all extrajudicial activities undertaken by any staff member, who, while at work, is subject to the judge’s direction and control. In this instance, the Judicial Official is not instructing or directing a law clerk to serve on the boards, nor does the judicial official, under the existing supervisory structure, have any control over the law clerk’s involvement in these activities unless it comes to the judicial official’s attention that the clerk’s participation creates an appearance that the judge may be exerting some influence over that participation in a manner that violates the Code of Judicial Conduct or that the law clerk is exploiting his or her employment with the court. Based on the foregoing facts and prior advisory opinions, the Committee concluded that it is not a violation of Rule 2.12 for a judicial law clerk to serve as a board member and/or Treasurer of the board of directors of these nonprofit organizations so long as the law clerk ensures that his/her board-related activities are conducted in a manner that is consistent with: (1) the judicial official’s obligations under the Code of Judicial Conduct, and (2) the law clerk’s obligations under any

additional condition or limitation imposed by any applicable employee code of conduct, oath or policy, including any disqualification policy.

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