

Committee on Judicial Ethics
Regular Meeting
Thursday, January 21, 2021

Committee members present via teleconference: Judge James T. Graham (Chair), Judge Robert B. Shapiro, Judge Vernon D. Oliver, Professor Carolyn W. Kaas, Judge Michael P. Kamp, and Judge Karen Goodrow (alternate). Staff present: Attorney Viviana L. Livesay.

MINUTES

- I. Judge Graham called the meeting to order at 9:32 a.m. Although publicly noticed, no members of the public were present.
- II. The minutes of the September 28, 2020 Special Meeting and the December 14, 2020 Special Meeting were unanimously approved.
- III. The Committee discussed **Informal JE 2021-21** concerning whether a Judicial Official may serve as an alternative health care agent/health care representative for the Judicial Official's best friend. The Judicial Official and the individual have been best friends for more than 45 years. The Judicial Official's friend does not appear before the Judicial Official in any proceeding.

Rule 3.8 (a) of the Code of Judicial Conduct states that a judge "shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties."

Under the "Terminology" section of the Code, the following definitions apply:

"Fiduciary" includes relationships such as executor, administrator, trustee or guardian. See Rules 2.11, 3.2, and 3.8.

"Member of the judge's family" means any relative of a judge related by consanguinity within the third degree as determined by the common law, a spouse or domestic partner or an individual related to a spouse or domestic partner within the third degree as so determined, including an individual in an adoptive relationship within the third degree. See Rules 3.5, 3.7, 3.8, 3.10, and 3.11.

The first question presented in this inquiry is whether serving as a health care agent/health care representative is a "fiduciary" activity governed by Rule 3.8.

According to information provided by the Attorney General's Office concerning health care law in a document entitled [Your Rights to Make Health Care Decisions: A Summary of Connecticut Law](#), a health care representative is described as:

[A] person whom you authorize in writing to make any and all health care decisions on your behalf including the decision whether to withhold or withdraw life support systems. A health care representative does not act unless you are unable to make or communicate your decisions about your medical care. The health care representative will make decisions on your behalf based on your wishes, as stated in a living will or as otherwise known to your health care representative. In the event your wishes are not clear or a situation arises that you did not anticipate, your health care representative will make a decision in your best interests, based upon what is known of your wishes.

Under the "Terminology" section of the Code of Judicial Conduct, the word "fiduciary" is a defined term, which "includes relationships such as executor, administrator, trustee or guardian." The list of "fiduciary" relationships in the Code is not an exclusive or exhaustive list; it merely provides illustrative examples of such relationships. The Committee concluded, based on the facts provided, that service as the friend's health care representative is a fiduciary type activity in that it places the inquiring Judicial Official in a position of trust and confidence with respect to a friend who is incapacitated, much like a guardian.

The next issue is whether the inquiring Judicial Official can serve as a health care representative for a close friend under Rule 3.8. The inquiring Judicial Official submitted two advisory opinions depicting contradictory opinions: [Delaware JEAC 1996-3](#) and [New York Opinion 13-141](#).

In [JEAC 1996-3](#), the Delaware Advisory Committee considered whether a judge may serve as a successor trustee for the trust that the judge's friends created for their children, as well as an alternate patient advocate. The committee examined the nature of the relationship between the parties and concluded that the relationship with the friends justified the judge's service as trustee and alternate patient advocate. It is important to note, however, that the Delaware Canons in effect at that time contained a broader definition of "member of the judge's family." The definition included, not only relatives related by blood, adoption, or marriage, but also persons "with whom the judge maintains a close familial relationship."

In contrast, the New York Advisory Committee concluded in [Opinion 13-141](#) that a full-time judge must not serve as a friend's health care agent unless he/she obtains the Chief Administrative Judge's approval. Under the New York Rules concerning fiduciary activities, a full-time judge may serve as a fiduciary "for the estate, trust or person of a

member of the judge's family, or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such services will not interfere with the proper performance of judicial duties."

These opinions resulted in different outcomes because the rules governing fiduciary activities adopted in each jurisdiction were different. Research has revealed jurisdictional differences in, not only the fiduciary rules, but also in terminology. In Alabama, for example, [Canon 5D](#) prohibits judges from serving as a fiduciary and provides no exceptions. In contrast, [Rule 3.8](#) of the Minnesota Code of Judicial Conduct allows judges to serve in fiduciary positions for the estate, trust, or person of a member of the judge's family, a person with whom the judge has an intimate relationship, or a member of the judge's household and then only if such service will not interfere with the proper performance of judicial duties.

Jurisdictions have also defined the term "member of the judge's family" differently. A large majority of states (such as Alaska, Arizona, California, Colorado, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming) include not only relatives within their definition of "member of the judge's family," but also persons with whom the judge maintains "a close familial relationship." Seven other jurisdictions (Alabama, D.C., Florida, Georgia, Kansas, Texas, and Virginia), adopted definitions that include relatives and persons "treated by the judge as a member of the judge's family," provided these individuals reside in the judge's household.

At least four jurisdictions (Connecticut, Delaware, North Carolina and Oregon) have adopted definitions that vary from the majority in that they exclude persons with whom the judge maintains a family-like relationship:

- Connecticut's Code defines "member of the judge's family" as "any relative of a judge related by consanguinity within the third degree as determined by the common law, a spouse or domestic partner or an individual related to a spouse or domestic partner within the third degree as so determined, including an individual in an adoptive relationship within the third degree."
- Delaware's [Code of Judicial Conduct](#) defines "member of the judge's family" as "persons related to the judge or the judge's spouse or domestic partner within the third degree of relationship calculated according to the civil law system, *and any other relatives* with whom the judge or the judge's spouse or domestic partner maintains a close familial relationship, and the spouse or domestic partner of any of the foregoing." (Emphasis supplied.)

- North Carolina’s [Code of Judicial Conduct](#) (Canon 5D) defines “member of the judge’s family” as “a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage.”
- Oregon’s [Code of Judicial Conduct](#) defines “judge's family member” as “[t]he judge's spouse or domestic partner or a person within the third degree of relationship to them.”

Based on the definition of “member of the judge’s family” contained in the “Terminology” section of Connecticut’s Code of Judicial Conduct, which excludes from its definition persons with whom the judge maintains a familial relationship, the Committee unanimously concluded that the Judicial Official should not serve as the best friend’s alternative health care representative.

In light of this opinion, the Committee directed Attorney Livesay or staff to draft a letter to the Chair of the Rules Committee to alert him that Connecticut follows a minority position on this issue and to propose potential rule changes.

- IV. New business – The Chair asked the members of the Committee to review the draft 2020 Annual Report to the Chief Justice and to submit any proposed changes to Attorney Livesay. The Chair will be mailing the annual report to the CJ on Tuesday, January 26, 2021.
- V. The meeting adjourned at 9:54 a.m.