

Committee on Judicial Ethics
Teleconference
Thursday, April 19, 2018

Committee members present via teleconference: Judge Maureen D. Dennis (Chair), Judge Christine E. Keller, Professor Sarah F. Russell, Judge Robert B. Shapiro and Judge James T. Graham (Alternate) (at 9:34 AM). Staff present: Attorney Adam P. Mauriello, Assistant Secretary. Also present was Attorney Joseph J. Del Ciampo.

MINUTES

- I. Judge Dennis called the meeting to order at 9:33 a.m. Although publicly noticed, no members of the public were present.
- II. Judge Dennis, Judge Keller, Judge Shapiro and Professor Russell approved the minutes of the March 15, 2018 regular meeting with minor revisions.
- III. The Committee discussed **Informal JE 2018-07** concerning whether it permissible under Rule 2.12 of the Code of Judicial Conduct for a judge to allow a judicial law clerk subject to the judge's supervision 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. 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.

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 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 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.

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.

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 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.”

Pursuant to Rule 2.12(a), a judge must require court staff, court officials, and others subject to their control to 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.

A judge violates this provision by encouraging or permitting a staff member to engage in activities that would violate the Code. This, therefore, raises the question as to whether it would be permissible under the Code for the Judicial Official to serve as a board member or Treasurer of these organizations. If the Committee determines that the Judicial Official is not prohibited from serving in this capacity, the law clerk would not be prohibited either. This Committee has considered the propriety of 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.

Although 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 on the judge's behalf, the text of Rule 2.12 is broader and states that judges shall take reasonable measures to ensure that court staff act in a manner that is consistent with the Code. In this instance, the Judicial Official is not instructing or directing staff to act, but rather evaluating whether the clerk's outside professional activities are consistent with the Code. Based on the foregoing facts and prior advisory opinions, I believe that it is permissible under Rule 2.12 for a judge to allow a judicial law clerk subject to the judge's supervision to serve as a board member and/or Treasurer of the board of directors of a nonprofit organization, subject to the following reasonable limitations that the Judicial Official should impose on the law clerk:

1. Board-related activities shall not interfere with the performance of the law clerk's official duties or adversely reflect on the operation and dignity of the court;
2. The law clerk shall not exploit his/her government position;
3. The law clerk shall not make use of court premises, staff, stationery, equipment or other resources for tasks associated with outside activities;
4. The law clerk shall not use, or permit anyone else to use, the prestige of his/her position with the court in any fund-raising efforts;
5. The law clerk shall not solicit funds from lawyers or persons likely to come before the court, nor shall he/she solicit funds from subordinates or other court personnel;
6. The law clerk shall not engage in the practice law on behalf of the organizations;
7. The law clerk's board-related activities shall not be inconsistent with the Code of Judicial Conduct or any additional condition or limitation imposed by the an employee code of conduct, including any disqualification policy;
8. The law clerk shall refrain from any political activity that could lead to perceived or actual inappropriate conduct consistent with the Code of Judicial Conduct and any employee code of conduct; and
9. The law clerk should regularly reexamine the activities of the Board of each organization to determine if it is proper to continue his or her relationship with the Boards.

- IV. The Committee discussed **Informal JE 2018-08** regarding whether a Judicial Official may serve as a member of the Board of Trustees of a local university (hereinafter the "University").

The University is a private, independent, non-profit, non-sectarian educational institution with a litany of undergraduate and graduate programs. It has a comprehensive nondiscrimination policy that prohibits discrimination in admissions and employment on the basis of a number of protected classes in accordance with Connecticut and federal law, and further represents that it is compliant with federal Title IX regarding sex discrimination in educational programs that receive federal assistance. The University's Board of Trustees, which at present has seven officers and twenty-three board members, is responsible for the general governance and administration of the University. The Judicial Official indicated that he/she will not participate in fundraising activities and that his/her service will not interfere with the performance of his/her judicial duties. A search of the Judicial Branch's online case lookup revealed seven cases filed in the past six years in which the University is a party, three of which remain pending.

Rule 1.2 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. 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 of the Code deals specifically with participation in educational, religious, charitable, fraternal and civic organizations and activities. It provides that, subject to the general requirements in Rule 3.1, a judge may participate in activities sponsored by or on behalf of organizations not conducted for profit including, but not limited to (a)(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority; (a)(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity but only if the organization or entity is

concerned with the law, the legal system, or the administration of justice ... (a)(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 Committee considered two similar requests in [JE 2012-28](#) and [JE 2014-22](#), which involved service on the boards of non-law related, non-profit, higher education institutions. In both cases, the Committee members unanimously concluded that the Judicial Official may serve on the boards subject to various conditions. Also relevant are the Committee's opinions in [JE 2015-22](#) (Judicial Official could serve on the Board of Directors of a nonprofit educational institution consisting of public charter schools, subject to several conditions) and [JE 2014-24](#) (same for service on an advisory board for a particular program of studies at a nonprofit educational institution). Outside of the education context, the Committee generally has approved of service on the governing boards of non-law related, non-profit institutions, subject to similar conditions. See, e.g., [JE 2018-05](#).

Based upon the foregoing, including that the University is a non-profit institution not concerned with the law, the legal system or the administration of justice and that service on the Board will not interfere with the judicial responsibilities of the Judicial Official, the Committee concluded that the Judicial Official may serve on the Board of Trustees of the University, subject to the following conditions drawn from the above-cited opinions:

1. The Judicial Official should 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;
2. The Judicial Official may not use Judicial Branch resources for activities that concern the board. Rule 3.1(5);
3. The Judicial Official may not continue to serve on the board if the University participates in activities that lead to frequent disqualification of the Judicial Official or otherwise becomes frequently engaged in adversary proceedings in the court on which the Judicial Official serves. Rules 3.1 & 3.7(a)(6);
4. The Judicial Official may assist the University in planning related to fundraising and may participate in the management and investment of its funds. Rule 3.7(a)(1);
5. The Judicial Official may not engage in a general solicitation of funds on behalf of the University. Rule 3.7(a)(2). The Judicial Official only may solicit contributions for the University 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. Rule 3.7(a)(2);

6. 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 a University event, but not if the event serves a fund-raising purpose. Rule 3.7(a)(4);

7. The Judicial Official may permit his/her name and position with the University to appear on letterhead used by the organization for fund-raising or membership solicitation but may permit his/her judicial title to appear on such letterhead only if comparable designations are used for other persons. Rule 3.7, cmt (4);

8. Service on the board may not interfere with the proper performance of judicial duties. Rule 3.1(1); and

9. The Judicial Official may not solicit students to attend the University, as that is the functional equivalent of soliciting membership in an organization that is not concerned with the law, the legal system or the administration of justice. Rule 3.7(a)(3).

V. The meeting adjourned at 9:49 a.m.