

Committee on Judicial Ethics
Teleconference
Tuesday, August 9, 2011

Members present via teleconference: Justice Barry R. Schaller, Chair, Judge Linda K. Lager, Vice Chair, Professor Jeffrey A. Meyer, and Judge Thomas J. Corradino, Alternate. Staff present: Martin R. Libbin, Esq., Secretary and Viviana L. Livesay, Esq., Assistant Secretary.

MINUTES

- I. With the above noted members present, Justice Schaller called the meeting to order at 9:34 a.m. Although publicly noticed, no members of the public attended.
- II. Justice Schaller, Judge Lager and Professor Meyer approved the Minutes of the August 3, 2011 meeting.
- III. The Committee considered Judicial Ethics Informal Opinion 2011-17 concerning whether a Judicial Official may submit a Martindale-Hubbell “peer review” rating for a lawyer who has appeared before the Judicial Official in the past but is not likely to appear before the Judicial Official in the near future.

The lawyer who would be rated provided Martindale-Hubbell with the name of the Judicial Official. The reviewer is asked if the lawyer meets the “very high” criteria for “general ethical standards” and to rate the lawyer on a scale of 1 – 5 on legal knowledge, analytic capabilities, judgment, communication ability and legal experience in his or her area of practice. Martindale-Hubbell changed its peer review ratings in September, 2009, although the new system was initially phased in during 2008. According to the Martindale-Hubbell website, “[t]he changed Martindale-Hubbell Peer Review Ratings allow reviewers to provide Additional Feedback on the lawyer under review which provides qualitative depth and personality to the review. In an effort to showcase a lawyer’s sphere of influence with his peers through the Martindale-Hubbell Peer Review Ratings, LexisNexis Martindale-Hubbell will also now aggregate and display reviewers’ basic demographics, including general position and general geographic location.” “Examples of basic demographics are ‘private practice lawyer, senior partner, New York, USA.’” Martindale-Hubbell states that while “[all] Peer Review Ratings materials are treated as anonymous” and it “takes steps to protect anonymity . . . it is possible that [reviewers’] responses may contain sufficient information to allow the rated lawyer to ascertain [the identity of the reviewers].” While most peer reviews are initiated by Martindale-Hubbell, a lawyer may request such a review. In either instance, the reviewed lawyer can submit the names of references and Martindale-Hubbell will contact the references to request that they complete an online Peer Review.

Based on these facts, the Committee members in attendance unanimously determined that providing a peer review to Martindale-Hubbell is not permissible under the Code, whether or not the reviewed lawyer or Martindale-Hubbell initiated the review.

While recognizing that judicial ethics committees which have considered this issue in the past have determined that Judicial Officials could provide ratings of attorneys whose work they were familiar with, provided the evaluations remained confidential and did not create the impression that the Judicial Official endorsed a particular lawyer, the Committee noted that the prior opinions predated the changes to the evaluation system that were implemented in 2008 and 2009. The Committee also noted that New Jersey (New Jersey Guidelines on Extrajudicial Activities, Addendum A) and South Carolina (Advisory Committee on Standards of Judicial Conduct, Opinion No. 04-2004) had concluded, prior to the changes, that providing confidential ratings to Martindale-Hubbell, was inappropriate. The Committee agrees with the South Carolina Committee's observation that "[p]ublicized ratings which indicate that a judge believes one lawyer to be superior, in one way or another, to another lawyer, could certainly create the appearance of partiality...." Based upon the changes to the evaluation system, including the potential that the Judicial Official's identity could be ascertained, the Committee determined that providing a rating, even if anonymous to those reading the aggregated data as part of a review, would violate (1) Rule 1.2's requirement that a Judicial Official act at all times in a manner that promotes public confidence in the impartiality of the judiciary, (2) Rule 1.3's proscription on the use of the prestige of office to advance the personal or economic interests of others (both the rated lawyer who sought the JO's review, and Martindale-Hubbell, which is a private, commercial publisher of lawyer ratings), and (3) Rule 2.1's proscription that a Judicial Official's judicial duties take precedence over all of the Judicial Official's personal and extrajudicial activities. The Committee noted that providing a peer review to Martindale-Hubbell under its revised system is not analogous to providing a letter of recommendation or a letter of reference, both of which the Committee has approved subject to various restrictions. Unlike the general ratings at issue, which single out certain lawyers for general endorsements as to proficiency and integrity relative to other lawyers, letters of recommendation or reference comment on individuals' suitability for particular positions or purposes. See JE 2009-15 and opinions cited therein.

- IV. The Committee considered Judicial Ethics Informal Opinions 2011-18A and 2011-18B. The facts are as follows: A Judicial Official plans to retire in the near future from his/her position as a Judicial Official and enter the private practice of law. The retiring Judicial Official (JO#1) and another Judicial Official (JO#2) have worked together and have become close friends since their initial appointments. JO#2 wishes to assist JO#1 as he/she transitions into post-judicial employment. Both Judicial Officials have submitted related questions for the Committee's consideration.

Based upon the information provided, the participating Committee members unanimously concluded that the answers to the questions submitted by the two Judicial Officials are as follows:

2011-18A - JO#1's Questions:

(1) May JO#1 seek court appointments to represent clients in the types of cases over which JO#1 previously presided?

Once JO#1 has officially retired from his/her judicial position, he/she is not prohibited by the Code of Judicial Conduct from seeking court appointments to represent clients in the types of cases over which JO#1 previously presided. However, seeking or taking steps to secure any such court appointments prior to retirement would violate proscriptions in Rules 1.2 and 1.3 against avoiding the appearance of impropriety and using the prestige of office to advance JO#1's personal or economic interests.

The Committee noted that, after retirement, JO#1 would be well-advised not to seek court appointments from judges with whom he/she has a close personal relationship. While JO#1 may seek court appointments from judicial officials with whom he/she worked or had close professional relationships, the appointing judicial officials would be bound to consider whether making the appointment would create a reasonable perception that Rule 1.2 or 1.3 has been violated.

(2) JO#1 would like to seek "letters of recommendation" regarding his/her performance as a Judicial Official from other Judicial Officials with knowledge of JO#1's work. May JO#1 do so either while still employed as a Judicial Official or immediately after leaving that position?

JO#1 may do so but should wait until his/her departure from the bench before asking for references. Requesting letters of recommendations prior to retirement would violate Rule 1.3's proscription against using the prestige of office to advance JO#1's personal or economic interests.

JO#1 submitted two additional questions which implicate threshold questions of the scope of the Committee's jurisdiction to address issues involving the ethical obligations of judicial officials who have not sought the Committee's guidance.¹ As these questions implicate directly the nature and identity of Judicial Officials from whom JO#1 may properly seek appointments or recommendations, a majority of the Committee concluded that it had jurisdiction to address these questions in a general manner in light of prior

¹ Under Section 4(b) of the Committee's Policy and Rules, the Committee may render opinions only regarding proposed conduct of an inquiring Judicial Official, a person subject to the Judicial Official's direction and control, a person over whom the Judicial Official exercises supervisory responsibilities, or the spouse of the Judicial Official.

opinions of the Committee and due to the specific facts and circumstances of this inquiry. These questions are as follows:

(3) May Judicial Officials with knowledge of JO#1's work provide letters of recommendation?

A majority of the Committee concluded that, consistent with the Committee's prior opinions in [JE2009-05](#), [JE 2009-08](#), [JE 2009-13](#), [JE 2009-15](#), and [JE 2011-01](#) and Rules 1.2 and 1.3, Judicial Officials may provide references or recommendations, subject to the following conditions: (1) a Judicial Official's recommendation should be based on the Judicial Official's personal knowledge of the candidate's qualifications (see Rule 1.3 comment 2); (2) JO#1 is not a relative within the meaning of the Code or C.G.S. § 51-39a; (3) if a Judicial Official's recommendation is furnished in writing on official letterhead, the Judicial Official should indicate that the recommendation constitutes the Judicial Official's personal opinion of JO#1's qualifications (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; and (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.

(4) If the answer to question (1) is yes, does an appointing Judicial Official have any duty to disclose that JO#1 sought the appointment and is a former Judicial Official with whom the appointing Judicial Official worked?

A majority of the Committee concluded that an appointing Judicial Official in such circumstances has a duty to disclose JO#1's seeking of the appointment and the nature of his/her prior and current relationships with JO#1. The appointing Judicial Official should also consider whether to disqualify himself or herself based on their close personal friendship, subject to remittal. (Rules 1.2 & 2.11 concerning disclosure and recusal).

2011-18B - JO#2's questions:

(1) May JO#2 appoint JO#1 to positions over which they both presided, e.g., Guardian Ad Litem and court-appointed attorney positions?

Due to the close personal relationship between JO#1 and JO#2, JO#2 should not appoint JO#1 to such positions, based on the proscriptions of Rule 1.2 which requires a judge to avoid any appearance of impropriety and Rule 2.13(A) which provides that, "[i]n making or facilitating administrative appointments, a judge: (1) shall act impartially and on the basis of merit; and (2) shall avoid nepotism, favoritism, and unnecessary appointments."

(2) Does JO#2 have a duty to disclose his/her prior work relationship and current friendship with JO#1 if JO#1 appears before him/her in court?

Consistent with Rule 1.2, which requires Judicial Officials to act at all times in a manner that promotes public confidence in the impartiality of the judiciary and sets forth the test for “appearance of impropriety,” and with Rule 2.11(A), which requires a judge to disqualify himself or herself “in any proceeding in which the judge’s impartiality might reasonably be questioned,” JO#2 has a duty to disclose to all parties his/her prior work relationship and current close personal friendship with JO#1. Further, the Committee noted that if JO#1 appears before JO #2, JO#2 should consider whether to disqualify himself or herself based on their close personal friendship. Rule 2.11(C).

V. The meeting adjourned at 9:55 a.m.