

Committee on Judicial Ethics
Teleconference
Thursday, September 17, 2015

Members present via teleconference: Judge Christine E. Keller, Chair, Judge Maureen D. Dennis, Vice Chair, Judge Barbara M. Quinn, Professor Sarah F. Russell and Judge Thomas J. Corradino, Alternate. Staff present: Attorney Viviana L. Livesay, Assistant Secretary.

MINUTES

- I. With the above noted Committee members in attendance, Judge Keller called the meeting to order at 9:32 a.m. Although publicly noticed, no members of the public were present.
- II. Judges Keller, Dennis and Corradino approved the minutes of the August 20, 2015 meeting. Judge Quinn and Professor Russell abstained.
- III. The Committee discussed **Informal JE 2015-16** concerning whether a Judicial Official may sign a letter in support of Lawyers for Children America (“LCA”).

According to a representative from Lawyers for Children America, LCA is a nonprofit organization that relies heavily on grants and organizational funding, and their caseload has decreased. It would be helpful to show their funding sources letters of support from the judges who preside over the courts in which they work. The inquiring Judicial Official notes that a number of judges are or will be receiving a similar letter asking that they provide letters of support.

According to the organization’s website, Lawyers for Children America is a lead child advocacy organization protecting the rights of children who are victims of abuse, abandonment and neglect by providing quality pro bono legal representation and collaborating for systematic change to improve the lives of children.

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 ... 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."

Last month, the Committee considered the issue of whether a judge may endorse or promote a particular program. At issue in [JE 2015-14](#) was whether a judge may sign a letter recommending co-parenting communication services. The facts seemed to suggest that the primary purpose of the letter was to market these services to the New York bench. The Committee unanimously determined that signing the letter would violate Rule 1.3 and its prohibition on lending the prestige of judicial office to advance the private interests of others. In reaching its conclusion, the Committee considered analogous ethics advisory opinions from New York and Florida.

The issue of whether a Judicial Official could provide a letter of support to a law-related organization for the organization to use in soliciting donations was considered in emergency staff opinion [JE 2011-28](#). The opinion, which was ratified by the Committee on November 23, 2011, noted that pursuant to Rule 3.7(a)(2), a judge can only solicit funds for an organization concerned with the law, the legal system or the administration of justice from a member of the judge's family or other judges over whom the inquiring judge does not exercise supervisory or appellate authority. With respect to Rule 3.7(a)(5), which allows a judge to make recommendations to a public or private fund-granting organization or entity in connection with its programs and activities, the Committee noted that this section of the rule has been viewed as applying in the context of the judge serving on the board of a fund-granting organization concerned with the law, the legal system of the administration of justice, as opposed to assisting in the fundraising activities of a potential grant recipient. The Judicial Official was advised not to provide the requested letter of support.

Based on the facts presented, including that the Judicial Official presides over cases in which volunteers from LCA appear, and consistent with this Committee's prior decisions (JE 2011-28 & JE 2015-14), the Committee unanimously determined that the Judicial Official should not provide the letter of support to the Lawyers for Children America because to do so would violate Rule 1.3's prohibition on lending the prestige of judicial office to advance the private interests of others and the restrictions on soliciting contributions in Rule 3.7.

- IV. The Committee discussed **Informal JE 2015-17**. The facts are as follows: A Judicial Official's adult child, who lives in the Judicial Official's home, has been hired by a law firm as a paralegal. The paralegal is paid a salary and receives no other economic benefit from the law firm for any cases that he or she is assigned to work on.

The Judicial Official intends to announce in court the facts of the relationship and will recuse himself or herself if there is an objection. The Judicial Official will continue to hear cases where the law firm has an appearance only if the adult child has not had any connection to the case before the Judicial Official.

Based upon the above, the Judicial Official inquires whether he or she can preside over cases in which the law firm has an appearance and:

1. The family member's law firm or its client appears in court but the other party, or counsel for the other party, has failed to appear in the case;
2. The other party, or counsel for the other party, appears in court but the family member's law firm or its client is not present in court; or
3. A nonarguable motion is submitted.

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 ... 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 2.4 states, in relevant part, that "(b) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment. (c) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge's judicial conduct or judgment."

Rule 2.11(a) states that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" One of the specifically identified circumstances requiring disqualification are when the judge knows that the judge's "spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is ... a person who has more than a de minimis interest that could be substantially affected by the proceeding." Rule 2.11 (a) (2) (C). An additional circumstance requiring disqualification occurs when the judge knows that the judge, "individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's

family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding." Rule 2.11 (a) (3). Comment (4) to Rule 2.11 states as follows: "The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under subsection (a) or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under subsection (a) (2) (C), the judge's disqualification is required."

Rule 2.11 (c) states that a judge subject to disqualification under this Rule, except for bias or prejudice under subsection (a)(1), "may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive the disqualification, provided that the judge shall disclose on the record the basis of such disqualification. If, following the disclosure, the parties and lawyers agree, either in writing or on the record before another judge, that the judge should not be disqualified, the judge may participate in the proceeding."

Based on the facts presented, the Committee unanimously determined that the Judicial Official is not disqualified from presiding over cases involving the family member's law firm, but agrees with the Judicial Official that disclosure of the relationship is recommended based on Rule 1.2's proscription with respect to avoiding the appearance of impropriety. At issue in the present inquiry is whether disclosure is called for when one or more of the parties do not appear in court. The Judicial Official describes three different scenarios and asks whether he or she may preside over cases in each situation. Based on Rule 2.11(c), the Committee concluded that disclosure must be made to the parties and their lawyers "on the record" (i.e., in open court). The scenarios, and the responses to each, are as follows:

1. The family member's law firm or its client appears in court but the other party, or counsel for the other party, has failed to appear in the case.

Response: The judge should not preside in this situation unless disclosure has been made on the record to the parties or their counsel.

2. The other party, or counsel for the other party, appears in court but the family member's law firm or its client is not present in court.

Response: The judge should not preside in this situation unless disclosure has been made on the record to the parties or their counsel.

3. A nonarguable motion is submitted.

Response: The judge should not rule on any nonarguable motion until disclosure is made on the record to the parties or their counsel.

In reaching its decision, the Committee reviewed the following opinions in which it considered the issue of disqualification when a family member is affiliated with a law firm: [JE 2012-03](#) (judge should disclose marital relationship and inquire whether spouse had any involvement in case), [JE 2013-48](#) (non-appellate level judge is not disqualified from presiding over case involving relative's law firm, subject to disclosure and other conditions) and [JE 2014-12](#) (appellate level judge is not disqualified from presiding over case in which relative's law firm appears, subject to conditions).

- V. The Committee discussed **Informal JE 2015-15** concerning whether a Judicial Official may participate in the Boy Scouts of America. Because the inquiries involved two different Judicial Officials, the Committee recommended that the inquiry be handled as two separate opinions: JE 2015-15A and JE 2015-15B.
- VI. The Committee discussed **Informal JE 2015-15A** concerning whether a Judicial Official may participate in the BSA by teaching ethics courses as a regional or higher level volunteer. The Judicial Official indicated that his/her participation with the BSA would involve teaching ethics courses to both scouts and adult leaders. The leaders receiving ethics training would be from both religious and non-religious unit organizations. As regional/high level volunteer, the Judicial Official does not vote on unit charter applications submitted by religious chartered organization nor does he/she vote on whether to give funds to religious chartered organizations.

On July 27, 2015, the Boy Scouts of America's National Executive Board adopted a resolution which no longer excludes individuals on the basis of sexual identity or orientation from adult leadership positions, with the exception that religious chartered organizations may continue to use religious beliefs as criteria for selecting adult leaders. However, it is not an option for nonreligious chartered organizations.

The Judicial Official contacted the BSA and obtained information about the policy change from its General Counsel. According to the BSA General Counsel, the resolution adopted by the board states that "[n]o adult applicant for registration as an employee or non-unit-serving volunteer, who otherwise meets the requirements of the Boy Scouts of America, may be denied registration on the basis of sexual orientation." With respect to volunteers serving at the unit level, the resolution reaffirmed the right of each religious chartered organization to "reach its own religious and moral conclusions" about how sexual relations between adults should be moral,

honorable, committed and respectful. The letter stated further that “the official position of the Boy Scouts of America is that nonreligious chartered organizations cannot discriminate in the selection of leaders based on sexual orientation.”

Rule 1.2 of Connecticut’s Code of Judicial Conduct states that a judge shall 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(3) states that judges must ensure that their extrajudicial activities do not “appear to a reasonable person to undermine the judge’s independence, integrity or impartiality.” The rule’s commentary encourages judges to engage in appropriate extrajudicial activities, to the extent that “judicial independence and impartiality are not compromised.” The commentary provides further that judges are encouraged to engage in “educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.” Rule 3.1, cmt.(1).

Rule 3.6(a) specifically prohibits a judge’s membership “in any organization that practices unlawful discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, physical or mental disability, or sexual orientation.”

The issue of whether a judge can be affiliated with the Boy Scouts of America was considered by this Committee previously. In [JE 2014-01](#), this Committee unanimously concluded that a Judicial Official should not participate as a BSA adult volunteer in any of the four leadership positions being considered by the Judicial Official because the positions would be denied to gay candidates by policy of the BSA. In light of the fact that the four leadership positions being considered by the Judicial Official were positions that would be denied to gay candidates by policy of the BSA, the Committee determined that participation was not permissible because it might appear to a reasonable person to undermine the Judicial Official’s independence, integrity or impartiality in violation of Rule 3.1(3).

Under the facts of this inquiry, the BSA policy at issue in JE 2014-01 is no longer in force. The newly adopted official position of the Boy Scouts of America is that “nonreligious chartered organizations cannot discriminate in the selection of adult leaders based upon sexual orientation.”

In order to determine whether participation of the Judicial Official as a BSA regional or high level volunteer, as an ethics instructor, is permitted in light of the new resolution, this Committee should conduct the same two-prong analysis used in its prior opinion: (1) Whether the BSA engages in unlawful discrimination, and (2) Whether the Judicial Official's contemplated participation as an adult volunteer at the regional or higher level creates the appearance of impropriety or would appear to undermine the Judicial Official's impartiality.

The response to the first prong of the inquiry has not changed. Even under the pre-July 27th policy excluding gay adult leaders, the Committee determined that, under *Dale*, the Judicial Official's proposed volunteer work does not appear to be specifically prohibited under Rule 3.6, which only reaches organizations engaged in "unlawful discrimination."

With respect to the issue of whether participation as a BSA adult volunteer creates an appearance of impropriety or would appear to undermine the Judicial Official's impartiality, the Committee considered Connecticut's public policy against discrimination on the basis of sexual orientation and concluded that gay persons have a protected status under our state constitution and statutes. Given that judges are charged with enforcing Connecticut's laws prohibiting discrimination based on sexual orientation, the Committee determined that it would appear to undermine a Judicial Official's impartiality if the Official were to accept a position with an organization that the organization would, by policy, deny to another candidate on the basis of sexual orientation. Under the facts of the current inquiry, however, the Judicial Official is seeking leadership positions that are now available to gay candidates. Since there is no longer a ban on gay adults from holding these leadership positions, the prior concerns about a Judicial Official's impartiality are eliminated.

Based on the facts presented, the Committee unanimously determined that the Judicial Official may participate in the Boy Scouts of America by teaching ethics courses as a regional or high level volunteer.

- VII. The Committee discussed **Informal JE 2015-15B** concerning whether a Judicial Official may participate in the Boy Scouts of America by serving on the executive board of a regional council and on the Archdiocese of Hartford's Catholic Committee on Scouting. Staff was asked to obtain additional information from the inquiring Judicial Official. The Committee submitted the following questions:
- (1) As an executive board member, does the Judicial Official vote on the appointment of volunteers or hires?
 - (2) If the Judicial Official is responsible for approving volunteers and hires, how will the Judicial Official reconcile the Catholic Church's position on

gay adult volunteers/employees with votes the Judicial Official may be asked to take in connection with gay volunteers/employees?

- (3) Does the Catholic Committee on Scouting have a position on the inclusion of gay Boy Scouts in its troops?

If additional discussion was needed, the matter would be added to the October meeting agenda.

- VIII. The next meeting of the Committee is scheduled for October 15, 2015.
- IX. The meeting adjourned at 10:03 a.m.