

Committee on Judicial Ethics
Teleconference
Thursday, June 18, 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 Martin R. Libbin, Secretary and Attorney Viviana L. Livesay, Assistant Secretary.

MINUTES

- I. With the above noted Committee members in attendance, Judge Keller called the meeting to order at 9:31 a.m. Although publicly noticed, no members of the public were present.
- II. The Committee members present, (with the exception of Judge Corradino who abstained), approved the minutes of the May 21, 2015 meeting.
- III. The Committee ratified **Emergency Staff Opinion JE 2015-12** concerning whether a Judicial Official may serve as a reference for an attorney seeking certification by the National Association of Counsel for Children (“NACC”).

The Judicial Official stated that he/she knows the attorney’s qualifications because the attorney appeared before the Judicial Official in the past (over 3 years ago) as a Guardian Ad Litem and as a member of the Juvenile Public Defenders panel, and has appeared before the Judicial Official twice as private counsel in the past year.

The mission of the NACC is to improve the lives of children and families by ensuring that juvenile proceedings produce justice. As a multidisciplinary membership organization, the NACC works to strengthen legal advocacy for children and families by: strengthening the delivery of legal services, enhancing the quality of legal services affecting children, improving courts and agencies, and advancing the rights and interests of children and families.

Section 2.4.1 (Collection of References by NACC) of the NACC Standards for Child Welfare Law Attorney Specialty Certification states:

NACC will solicit confidential statements from all persons listed as references and may solicit confidential statements of reference from other persons, familiar with the applicant's practice, not specifically named by the applicant. All reference statements received will be reviewed by the NACC to assess whether the applicant has demonstrated an appropriate level of skill and expertise.

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." Comment (2) to Rule 1.3 notes that a judge may provide a reference or recommendation for an individual based on the judge's personal knowledge.

Rule 2.1 states that the judicial duties of a judge take precedence over all of a judge's personal and extrajudicial activities. Rule 2.11 of the Code states that a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, when the judge has a personal bias or prejudice concerning a party's lawyer.

This Committee has issued a number of opinions concerning the propriety of a judge serving as a reference in various circumstances and for different organizations. In [JE 2009-15](#), the Committee advised a JO that he/she should decline to serve as an evaluator for the Child Protection Attorney because the process is not likely to remain confidential. Judges were advised, in [JE 2011-17](#), not to provide peer reviews for Martindale-Hubbell because changes to the evaluation system included the potential that the JO's identity could be ascertained. Similarly, in [JE 2014-20](#), the Committee unanimously determined that the JO should decline to complete an online survey, post-trial, rating a GAL or AMC's performance before the court because the process was not likely to remain confidential.

In contrast, in [JE 2012-16](#), a judge was permitted to complete a questionnaire about a lawyer who was being considered for inclusion in a highly selective international legal honorary society because there would be no public disclosure of the completed questionnaire and the lawyer would not be provided with information regarding the JO. The Committee

determined that completing the questionnaire was analogous to providing a letter of support for an attorney as authorized, subject to conditions, by [JE 2009-05](#) and was not analogous to completing a peer review for Martindale-Hubbell, which was prohibited in [JE 2011-17](#). The Committee determined that judges may complete references for Chambers and Partners, with conditions, in [JE 2013-40](#), because the references would remain anonymous and will not contain information that would reveal the identity of the judge.

Based on the facts presented, including that the NACC certification process includes collection of confidential references from persons familiar with the applicant's practice, the JO should be advised that he/she may provide the reference to NACC, subject to the following conditions:

1. The Judicial Official has personal knowledge of the attorney's qualifications that are relevant for the NACC specialty certification. Rule 1.3, cmt. (2);
 2. The attorney is not a relative of the Judicial Official within the meaning of the Code or C.G.S. § 51-39a;
 3. The Judicial Official indicates that the opinions expressed represent the personal opinions of the Judicial Official. Rule 1.3, cmt. (2);
 4. Neither the attorney seeking certification nor members of his or her law firm have cases pending or appearances before the Judicial Official at the time the reference is provided or for a reasonable period of time, under the circumstances, before or after the submission of the reference. For appearances after the reference is provided, the Judicial Official may disclose that he or she provided a reference, and in accordance with Rule 2.11(c), request the parties and their lawyers to consider, outside the presence of the Judicial Official and court personnel, whether to waive disqualification. The above limitation with respect to members of the applicant's law firm[s] does not apply to large public employers, such as the Division of Criminal Justice, the Public Defender Services Commission and the Office of the Attorney General; 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 agree to provide the reference. Rule 2.1.
- IV. The Committee discussed **Informal JE 2015-13** concerning whether a Judicial Official may leave accumulated funds in a retirement plan set up by the Judicial Official's former law firm.

The following additional facts were provided: the retirement plan is managed by an independent, nationally recognized investment firm; the success of the plan is in no way tied to the profitability of the firm; neither

the Judicial Official nor the former law firm will make further contributions to the plan; the Judicial Official will be responsible for paying any management fees; and the existing retirement account may be transferred to another account without substantial loss.

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Rule 2.11 of the Code states that a judge “shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”

Rule 3.11 of the Code states that a judge shall not engage in financial activities permitted under the Code if they will: (c)(1) interfere with the proper performance of judicial duties; (2) lead to frequent disqualification of the judge; (3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or (4) result in violation of other provisions of this Code. Comment (2) states that “[a]s soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.”

The “Application” section of the Code, which sets forth the time for compliance in section II, states:

A person to whom this Code becomes applicable shall comply immediately with its provision except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.

The Comment to the foregoing “Application” provisions states, in relevant part, as follows:

...[I]f engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

The “Terminology” section of the Code defines “Economic interest” as “ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include: (1) an interest in the individual holdings within a mutual or common investment fund,…”

In American Judicature Society’s *Ethical Issues for New Judges* (Updated 7/03), Cynthia Gray writes that “whether a new judge may retain his/her retirement account in a former firm’s plan depends on a number of factors.” Some of the factors noted include: whether the law firm or judge pays management fees; whether the pension fund is unfunded and, therefore, dependent on the viability of the firm; whether the law firm or judge directs investments; whether the law firm or judge makes additional contributions to the plan; whether account can be transferred without substantial loss; etc.

In reaching its decision, the Committee considered advisory opinions from several different jurisdictions. In 2001, the U.S. committee advised that a judge should remove her retirement account from her former law firm’s profit-sharing trust where members of the firm appeared regularly before the judge (*U.S. Compendium of Selected Opinions* §5.2-4(a)), but allowed a judge to retain his/her interest in a former firm’s pension fund because recusal would be required in any event because the judge’s spouse was a partner in the firm (*U.S. Compendium of Selected Opinions* §5.2-4(b-1)).

In *Alabama Advisory Opinion 91-417*, the ethics committee stated that a judge may leave accumulated funds in a KEOUGH retirement plan set up by his old law firm where the partners in the law firm direct the bank trustee as to the investments of the funds if the judge sets up a sub-account for which the judge pays all management fees and has investment authority and provided the firm makes no further contributions on the judge’s behalf. The Alabama ethics committee also considered, in *Alabama Advisory Opinion 95-583*, whether a judge may leave the accumulated amount in his profit sharing account with his old law firm. The committee advised that the judge should withdraw the accumulated funds in a profit sharing account and not continue to receive earnings on the investments where a three-person executive committee from the firm directs how funds are invested.

The Minnesota Board of Judicial Standards stated in its 2014 Summary of Advisory Opinions, at p. 20, that:

-2001, Upon assuming the bench, a judge should divest herself or himself from all financial interests and other economic ties to their

former law firms in the shortest possible time. A judge has a duty to preside over as many types of cases as possible and has a related duty to minimize the burdens created on the judicial system by frequent disqualification. But, unless the account can be transferred to another plan without substantial loss and there is no other reasonable alternative, it is appropriate for a recently appointed judge to maintain a pension and profit-sharing account with his former law firm for a reasonable period of time not to exceed three years.

In *Commonwealth of Virginia Judicial Ethics Advisory Committee Opinion 01-3*, the committee determined that a judge may leave accumulated funds in a 401(k) plan with his or her former law firm if the judge creates a self-directed sub-account for which the judge pays all management fees and into which the firm makes no further contributions. Although participation in the plan under the facts presented did not require recusal, the committee concluded that the judge should disclose to counsel and to the parties the judge's participation in the plan when members of the judge's law firm appear before the judge.

The Delaware Judicial Ethics Advisory Committee examined the financial arrangements entered into between a judge and the judge's former law firm in *Delaware JEAC 2004-2*. The committee approved the judge's decision to roll over his/her interest in a 401(k) account established by his/her former firm into a separate IRA account in the judge's name and administered at the judge's expense. In the committee's view, "where the terms of a former firm's retirement plan permit the new judge to withdraw assets held for the judge's account from the plan, the new judge should do so."

At issue in *Illinois Opinion 2007-02* was whether the receipt of pension benefits from a former law firm was a financial activity that tends to reflect adversely on a judge's impartiality, thus requiring disqualification. Under the facts of the inquiry, the pension liability was unfunded and payments were dependent on the continued viability of the firm. The Illinois Judges Association determined that the judge's continued receipt of funds from the former law firm's unfunded pension plan required recusal, but could be remitted after complete disclosure of the financial arrangement. The association also concluded that:

If the retirement benefits are solely within the control of the judge and the former firm makes no financial contribution either to the fund or for administrative expenses neither disqualification nor disclosure is required. Judges should exercise their best efforts to sever all financial ties with a former law firm or colleague with

whom the judge associated in the practice of law within the three years provided by Rule 63C(1)(c) [of] the Code of Judicial Conduct.

In *Nebraska Judicial Ethics Advisory Opinion 92-5*, the committee considered whether a judge may continue to participate in his former firm's retirement plan, of which the law firm is the plan administrator. The committee advised the judge not to hear any cases in which his former firm is involved as long as he remains a participant in the firm's retirement plan. The committee stated:

Canon 2A requires that judges behave in a way that promotes public confidence in the impartiality of the judiciary. There is no escape from the fact that the judge is still a participant in his former law firm's retirement plan. It would be very difficult to explain to the public that the judge's continuing link to his former firm is far more formal than real.

However, the California judicial ethics committee stated that a judge is not required to recuse when his former firm appears even though the judge retains an interest in the firm's pension plan where the plan assets fluctuate daily and the judge has neither knowledge of those assets nor management authority over them. The committee also concluded that the judge need not disclose his continuing interest in the plan but must disclose his prior relationship with the firm. *California Advisory Opinion 45 (1997)*, p. 6.

Consistent with Rule 1.2 and based on the facts presented, including that the retirement plan is managed by an independent investment firm, the success of the plan is in no way tied to the profitability of the firm, neither the judge nor the former law firm will make further contributions to the plan, the judge will be responsible for paying any management fees, and the existing account can be transferred without substantial loss, the Committee unanimously determined that the Judicial Official may maintain the retirement account with his/her former law firm for a reasonable period of time, but in no event later than one year after taking the oath of office. Furthermore, the Judicial Official should not hear any cases in which his/her former firm is involved as long as he/she remains a participant in the firm's retirement plan.

If, however, the Judicial Official is able to create a self-directed sub-account for which the Judicial Official directs all investments, pays all fees and into which the firm makes no further contributions, the Judicial Official may maintain the account and need not transfer the account to another plan, but must disclose to counsel and to parties the Judicial Official's participation in the plan when members of the former law firm appear

before the Judicial Official. (See *Commonwealth of Virginia Judicial Ethics Advisory Opinion 01-3*).

- V. The meeting adjourned at 9:42 a.m.