Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2016-08 (Emergency Staff Opinion issued June 29, 2016)
Appearance of Impropriety; Ex Parte Communications; Rules 1.2, 2.9 & 2.10

Facts: A Judicial Official conducted hearings on an application for a civil protection order. After hearing testimony, the Judicial Official dismissed the application and vacated an outstanding ex parte order. The Judicial Official found that, although the respondent had engaged in some inappropriate cell phone communications with the applicant while the ex parte "no contact" order was in effect, the applicant had failed to prove by a preponderance of the evidence that the respondent "knowingly" engaged in conduct that would put a reasonable person in fear for her physical safety or that a protection order was necessary to prevent future contact by the respondent. The Judicial Official concluded that the respondent's cell phone call while the ex parte "no contact" order was in effect was inadvertent and not intentional.

The cell phone call to the applicant has now become the subject of a criminal prosecution in which the respondent is being charged with a class D felony based on the alleged violation of the ex parte order. The Judicial Official also believes that certain information provided to the police in support of the arrest warrant is, in the Judicial Official's opinion, at best misleading and at worst false.

Issues: May a Judicial Official bring to the attention of a state's attorney the prior proceedings before the Judicial Official, his/her adjudication and the reasons therefor? May a Judicial Official communicate to the state's attorney the events of a prior hearing so that he/she may compare them with the statement in the arrest warrant (which the Judicial Official believes is misleading)? May a Judicial Official communicate his/her opinion of the statement in the arrest warrant?

Relevant Code Provisions: Rule 1.2 of the Code 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 2.9 (a) states, in relevant part, that a judge "shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows: …(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyer in an effort to settle matters pending before the judge."

Rule 2.10 (a) states that a judge "shall not make any public statement that might reasonably be expected to affect the outcome or to impair the fairness of a matter pending or impending in any court or make any non-public statement that might substantially interfere with a fair trial or hearing." Subsection (d) of this rule provides that "[n]otwithstanding the restrictions in subsection (a), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity."

Response: This inquiry was circulated to the Committee members and their input was solicited and received. In reaching its decision, the Committee considered whether judges are required to disclose potentially exculpatory information and considered the following advisory opinions from Florida: Florida Opinion 98-15 (majority found that judge may provide a voluntary statement to authorities in connection with a criminal investigation where the information may exculpate the target of the investigation only when properly subpoenaed. The minority, however, felt that there is a distinct difference between a judge appearing and giving testimony in a formal proceeding and simply cooperating with the authorities in which case a subpoena would not be required) and Florida Opinion 03-04 (obstruction of justice may result if judge who has relevant information refused to cooperate when requested to provide information).

The Committee also reviewed a recent judicial disciplinary case issued by the Supreme Court of Florida. In Inquiry Concerning a Judge No. 15-594 Re: Gregory Holder, No. SC16-970 (July 7, 2016), the Supreme Court commanded Judge Holder to appear before it to be reprimanded for engaging in ex parte communications with the Chief Assistant State Attorney on behalf of a defendant in veteran's court and for publicly committing to convert the defendant's remaining community control to probation prior to any hearing. The Court also ordered the judge to complete six CJE hours on topics related to ethics. The Court found that, by engaging in such conduct, Judge Holder failed to maintain the high standards of conduct necessary to preserve the integrity of the judiciary, and acted in a manner that could potentially undermine public confidence in the judiciary. Further, his conduct created the appearance of impropriety and partiality.

The Committee also considered the effects of commenting on a case pending before another judge. In "Commenting on Pending Cases," American Judicature Society (2001), p.13, Cynthia Gray writes:

> Comments about a case pending before another judge or jury in the same court or jurisdiction as the commenting judge can also be reasonably expected to affect its outcome or impair its fairness or at least create that appearance, and, therefore, falls within the proscription of the [Code]. A rule prohibiting such comments guards against the danger that a judge would feel pressured or would appear to feel pressured by the comments of a peer and colleague or that a jury would accord deference or would appear to accord deference to an opinion expressed by a judge. Moreover, such a rule ensures that proceedings remain immune from outside influences, even if such influences are not specially prejudicial. Finally, the prohibition guards against the creation of a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law. Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," *2 Georgetown Journal of Legal Ethics* 589 (1989); Matter of Benoit, 523 A.2d 1381 (Maine 1987).

It appears that the Judicial Official is seeking to provide unsolicited information to the State's Attorney about a pending case before another judge that may reasonably be expected to affect its outcome or may make the State's Attorney or another judge feel pressured by the Judicial Official. It also may appear as challenging or second guessing the probable cause determination of the Judicial Official who signed the warrant. Any facts found by the inquiring Judicial Official related to the adjudication of the protective order are not binding on any criminal court. Different factfinders can render inconsistent decisions. See *McCarthy* v. *McCarthy*, 55 Conn. App. 326 (1999). Even if the criminal court took judicial notice of the Judicial Official's oral decision, or allowed a jury to consider it, neither the court nor the jury would necessarily have to accept the Judicial Official's finds as conclusive and the State's Attorney might object. See CT Code of Evidence Rule 2-2 (b) and Commentary to Rule 2-1 (e). Based on the facts submitted, the Judicial Official was advised that he/she may send a signed copy of the court transcript to all counsel of record, as well as to any self-represented parties. The Judicial Official was advised that he/she should not engage in the contemplated activity unless he/she receives a request to cooperate with an investigation or a subpoena.

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