Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2018-03 (Emergency Staff Opinion Issued January 30, 2018)
Ex Parte Communications; Attorneys; Reporting Misconduct
Rules 1.2, 1.3, 2.9 & 2.15

Facts & Issues: A Judicial Official received two letters from an out-of-state attorney seeking responses to questions concerning the granting of a criminal defendant's application for the Accelerated Rehabilitation Program (AR). The Judicial Official presided at the hearing on the AR application and granted the program to [of a criminal case against] an out-of-state police officer charged with assault. The case is still pending, as the AR program is still in effect.

The police department that employs the defendant police officer and its municipality hired the out-of-state attorney to prosecute a civil employment disciplinary case against the defendant police officer. The out-of-state attorney alleges that the police officer's counsel made untruthful representations to the Judicial Official regarding the defendant officer's past police department history. The out-of-state attorney would like the Judicial Official to answer the following questions for purposes of obtaining testimony from the Judicial Official for the upcoming disciplinary trial:

> (1) Did you expect [the defendant] and his counsel to provide full, truthful and accurate information about his work history so as to formulate your discretionary decision to grant or deny him the Accelerated Rehabilitation Program?
>
> (2) Had you been truthfully informed that [defendant] did indeed have a [town] Police Department disciplinary history, how would that have impacted your decision-making rationale to grant him the Accelerated Rehabilitation Program?

The Judicial Official would like the Committee's advice: (1) on how to respond to the letters, (2) whether s/he is ethically required to notify the parties of the communication and (3) whether s/he needs to take any action regarding any potential lawyer misconduct on the part of the attorney representing the defendant police officer.

Relevant Code of Judicial Conduct Provisions: 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 1.3 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.”

Rule 2.9 (a) states that “[a] judge shall not initiate, permit, or consider ex parte communication or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter,…”

Rule 2.9 (b) states that “[i]f a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of the matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

Rule 2.15 (b) states that “[a] judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall take appropriate action including informing the appropriate authority.”

Rule 2.15 (d) states that “[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.”

Responses: The questions raised in this inquiry were circulated to the members of the Committee and their input was solicited and received.

Question (1): How should Judicial Official respond to the letters? With respect to any testimony, judges may not be compelled to testify as a witness with respect to facts or conduct relating to their judicial activities absent extraordinary circumstances or a showing of compelling need. “It is true that an examination of the mental processes of a judge in arriving at a judicial decision should not be permitted. *United States* v. *Morgan,* 313 U.S. 409, 422, 61 S.Ct. 999, 85 L. Ed. 1429 (1941); *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982)(en banc), rev’d on other grounds, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984); *Henderson v. Department of Motor Vehicles*, 202 Conn. 453, 521 A.2d 1040 (1987).” *Gold v. Warden*, 222 Conn. 312, 319, footnote 11 (1992). Such protection, rooted in the constitution, ensures that judges have the freedom to do the critical work of their office free from the threat of harassment or interference with the performance of their duties. *United States v. Ianello*, 740 F. Supp. 171, 189 (S.D.N.Y 1990).

Even in an extraordinary situation, where there is a compelling need for the judge to testify, any inquiry into the basis of a judge’s decision that invades the mental processes of a judge is prohibited. In the instant matter, the out-of-state attorney is seeking factual testimony from the Judicial Official about his/her mental processes in arriving at the decision to grant the request for Accelerated Rehabilitation. Any testimony by a judge that would involve the judge’s deliberative processes and mental impressions in conducting a judicial proceeding is “clearly barred by the doctrine of

judicial immunity." *Statewide Grievance Committee v. Burton*, 299 Conn. 405, 415 (2011).

Based on the foregoing, the Committee agreed that the Judicial Official should respond to the attorney by notifying him that, pursuant to the Code of Judicial Conduct, judges are prohibited from engaging in any ex parte communications regarding an ongoing case and that communications received will be disclosed to the parties in the case. In addition, the Committee stated that the attorney should be reminded that judges are barred by the doctrine of judicial immunity from providing testimony about the judge's deliberative processes and mental impressions in conducting a judicial proceeding. The Committee also recommended that instead of responding to the attorney personally, the Judicial Official should ask someone (such as a clerk) to respond to the attorney on his/her behalf.

Question (2): Is the Judicial Official ethically required to notify the parties of the communication? The Judicial Official was advised that he/she should notify the parties of the substance of the communication and provide the parties with an opportunity to respond pursuant to Rule 2.9 (b).

Question (3): Does the Judicial Official need to take any action regarding any potential lawyer misconduct? Under Rule 2.15, a judge must have knowledge that a lawyer committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyers' honesty, trustworthiness and fitness before taking appropriate action. The Committee agreed that the allegations contained in the two letters from the out-of-state attorney do not satisfy the "knowledge" requirement because the Judicial Official did not have enough information to conclude that the defendant's counsel misrepresented the defendant officer's past police department history at the AR hearing. In addition, the allegations do not qualify as "information indicating a substantial likelihood that a lawyer has committed a violation" under Rule 2.15 (d). As such, the Committee concluded that the Judicial Official does not need take any action regarding any potential lawyer misconduct.