Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2018-04 (February 15, 2018)
Impartiality; Independent Research; Rules 2.2 & 2.9

Issue: A Judicial Official has the following inquiry: Is American Bar Association (ABA) Formal Opinion 478, which basically states that a Judge may not conduct independent factual research via the internet other than facts that may be properly judicially noticed, a proper interpretation of the comparable provisions in the Connecticut Code of Judicial Conduct?

Facts: ABA Formal Opinion 478 is summarized as follows:

> Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding. Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control.

Response: ABA Formal Opinion 478 is based upon the ABA Model Code of Judicial Conduct, as amended through August 2010 (hereinafter, Model Code). Both the Model Code and Connecticut's Code of Judicial Conduct state in Rule 2.2 that a judge shall "perform all duties of judicial office fairly and impartially".

Model Rule 2.9 (C) states "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed" while Connecticut's Rule 2.9 (c) states "A judge serving as a fact finder shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed." Comment 6 to the Model Rule 2.9 (C) states that the "prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." Connecticut's Comment 6 includes the same language.

Both Model Rule 2.9 (D) and Connecticut Code of Judicial Conduct Rule 2.9 (d) state "A judge shall make reasonable efforts, including providing appropriate supervision, to

ensure that this Rule in not violated by court staff, court officials, and others subject to the judge's direction and control."

In JE 2013-06, at issue was the propriety of a Judicial Official participating in an internet-based social networking site, such as Facebook. The Committee, while noting that "participating in social networking sites and other ESM clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions, the Code does not prohibit such participation." The Committee went on to unanimously determine that a Judicial Official could participate in electronic social media, including Facebook, subject to twelve (12) conditions. Condition (8) is relevant to the current inquiry, in that it stated "A Judicial Official should not view parties' or witnesses' pages on a social networking site and should not use such a site to obtain information regarding a matter before the judge. Rule 1.2" It should be noted that in addition to Rule 1.2, which requires a Judicial Official to act at all times in a manner that promotes public confidence in the impartiality of the judiciary, obtaining information from a litigant's or witness' social networking site would be an ex parte investigation in violation of Rule 2.9.

Even in situations where a Judicial Official is permitted to take judicial notice of adjudicative facts[1], the court normally should disclose that information and give the parties an opportunity to respond to the information judicially noticed. The Connecticut Code of Evidence, as adopted by the Supreme Court on December 14, 2017, states in section 2-2 (b) as follows:

> Sec. 2-2. Notice and Opportunity To Be Heard
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> …
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> (b) Court's initiative. The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned.

The Commentary to the above provision notes that the Supreme Court, in *Moore v Moore*, 173 Conn. 120, 121-22, 376 A.2d 105 (1977), suggested that "'it may be the better practice to give parties an opportunity to be heard' on the propriety of taking judicial notice of accurate and established facts"; however, it did not require that.

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[1] The Code of Evidence limits the application of Section 2 to judicial notice of adjudicative facts. The Code of Evidence states that adjudicative facts are "the facts of a particular case or those facts that relate to the activities or events giving rise to the particular controversy", whereas "legislative" facts are "facts that do not necessarily concern the parties in a particular case but that the court considers in determining the policy upon which the application of a common-law rule depends." [Citations omitted.] The Code leaves judicial notice of legislative facts to common law.

Given the virtually identical wording of the Model Code and the applicable provisions adopted in Connecticut, as well as the clear rationale behind the ABA Formal Opinion, the Committee unanimously determined that ABA Formal Opinion478, including the analysis of the five hypotheticals, is applicable to Judicial Officials in Connecticut based upon the Connecticut Code of Judicial Conduct.

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