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STANDING COMMITTEE ON JUDICIAL ETHICS

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A PROPOSED AMENDMENT TO THE NEVADA RULES OF PROFESSIONAL CONDUCT SET FORTH IN NRPC 6.1 TO 6.5 WHICH WOULD PERMIT JUDICIAL LAW CLERKS IN COUNTIES WITH A POPULATION IN EXCESS OF ONE HUNDRED THOUSAND TO PERFORM PRO BONO WORK WOULD POTENTIALLY VIOLATE THE NEVADA CODE OF JUDICIAL CONDUCT

ISSUE

Does a proposed amendment to the Nevada Rules of Professional Conduct set forth in NRPC 6.1 to 6.5 which would permit judicial law clerks in counties with a population in excess of one hundred thousand to perform pro bono work potentially violate the Nevada Code of Judicial Conduct?

ANSWER

Yes. The proposed amendment to the Nevada Rules of Professional Conduct set forth in Rules 6.1 to 6.5, as written and presented to the Standing Committee on Judicial Ethics, would potentially violate the Revised Nevada Code of Judicial Conduct. A judicial law clerk in a county which has a population of more than One Hundred Thousand may not volunteer to conduct pro bono public service while serving as the law clerk to a judge because such judges are prohibited from the practice of law themselves and are required to ensure that their staff likewise comply with this requirement.

FACTS

The Nevada Supreme Court has requested the Standing Committee to evaluate the propriety of a petition from a district court judge to amend the Nevada Rules of Professional Conduct, NRPC 6.1 to 6.5, effective May 1, 2006, by adding a provision which would permit judicial law clerks admitted to practice in counties with a population in excess of One Hundred Thousand to engage in pro bono public services under nine specific qualifying restrictions or reservations. The Supreme Court has not yet adopted the proposed amendment, but has established ADKT No. 0520 to consider the petition and amendatory rule provisions. The specific request from the Supreme Court was to consider whether the petition to amend NRPC by adding a section which permitted judicial law clerks to perform pro bono services would potentially violate any provisions of the Revised Nevada Code of Judicial Conduct.

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee on Judicial Ethics.* Accordingly, this opinion is limited by the authority granted in Rule 5.

This opinion was unique in at least one respect. The Committee which considered this request was composed of a stellar group of judicial officers, former judicial law clerks, and practicing lawyers who were all extremely intelligent, highly experienced, intuitive, and dedicated to



preservation of the integrity of not only the judiciary, but the legal profession generally. The Committee insisted the opinion include an expression of unqualified support for increased pro bono participation throughout all sectors of practice in Nevada. The Committee specifically found the intent, purpose, and goals which the proposed amendment sought to attain were extremely laudable and commendable. The Committee took special note the petition by the district court judge sought to honor the memory, legacy, and exceptional pro bono achievements of Melanie Kushnir, former Pro Bono Project Director for Legal Aid Center of Southern Nevada, by naming the proposed amendment to NRPC as "Melanie's Rule." Thus, this request for opinion was given the greatest latitude and careful consideration, as has been accorded to all opinion requests of this Committee.

There is not the slightest doubt that one of the most admirable traits of legal professionals is to provide access to justice for those less able to afford quality representation. The Committee was fully aware the demand for pro bono services far exceeds resources to meet that demand. That unfilled vacuum is ever-present within the borders of this great state. This is, unfortunately, not just a problem unique to Nevada, but one which exists throughout America generally. Almost every State Bar across our nation struggles with meeting the challenges of overwhelming demand for pro bono services at all levels.

The opinion which the Committee reached in this instance was not hastily reached or without recognition of why the proposed petition was filed with the Supreme Court. Mindful deliberation by the Committee was undertaken to give the most progressive construction to this opinion request and evaluate it against the

background of necessity for filling the void in pro bono services.

Nonetheless, the duty of the Committee is to examine the potential impact which the petition, as written and presented to the Committee, might have on the Code of Judicial Conduct. With those statutory limitations on the Committee's duties, this opinion was rendered.

Throughout the NCJC, one of the consistent themes is avoidance of the appearance of impropriety. Canon 1 establishes that concept: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. Rule 1.3 to Canon 1 explains: Avoiding Abuse of the Prestige of Judicial Office. A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

Canon 3 requires that a judge conduct personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office. Rule 3.10, Practice of Law, states with unmistakable clarity, in pertinent part: "Unless otherwise permitted by law, a judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family but is prohibited from serving as the family member's lawyer in any forum." This prohibition is consistent with NRS 3.120, which was first passed in 1865, which flatly states: "A district judge may not engage in the private practice of law."

Comment [1] to Rule 3.10 explains: "A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or

other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3."

Additionally, in clarifying the duties of a judge as it pertains to judicial staff, Rule 2.12 (A), Supervisory Duties, states: "A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." Comment [1] to Rule 2.12 (A) provides relevant guidance on this supervisory obligation: "A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court staff, court officials, and others subject to the judge's direction and control to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge."

It is of particular relevance that Rule 2.12(A) and Comment [1] to Rule 2.12(A) instructs a judge to not permit court staff, which would include judicial law clerks, to engage in conduct "which would violate the Code if undertaken by the judge." The obvious implications of that duty would embrace the prohibition against the practice of law by judges in Rule 3.10. Further, Rule 1.3 instructs: "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." [Emphasis added.] This is imperative language. It is mandatory for a judge to supervise his or her staff so that the staff does not engage in conduct which is prohibited for the judge. Specifically, it means a judge may not allow judicial employees to practice law.

Rule 3.1 does have provisions which encourage judges to engage in extrajudicial activities which concern the law, the legal system, administration of justice, and to engage in activities at educational, religious, charitable, fraternal, or civic organizations on a not-for-profit basis. While such community involvement is fostered to enhance the perception of the judiciary and legal profession, those undertakings must not interfere with proper performance of judicial duties or compromise judicial impartiality. See, Comment [1] to Rule 3.1. Comment [2] to Rule 3.1 recognizes extrajudicial participation in both law-related and other civic-minded activities "...helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system."

Prior to the adoption of the Revised Nevada Code of Judicial Conduct by the Supreme Court effective in 2010, now Chief District Court Judge Elizabeth Gonzalez of the Eighth Judicial District, wrote an article for the July 2007 issue of *Nevada Lawyer*, pages 22 through 24, titled "How Can Judges Perform Pro Bono Activities and Assist In Recruitment of Attorneys to Provide Pro Bono Services?" Judge Gonzales listed activities which judges might properly undertake to satisfy their own pro bono requirements and ethically promote recruitment of lawyers for pro bono. While acknowledging that "judges cannot perform direct legal services," Judge Gonzalez outlined functions such as presenting CLE programs for pro bono; serving on the board of access to justice organizations; attend legal service events; speak about benefits of pro bono, and calling law firms to accept pro bono cases. Noticeably absent from the listing was any mention of allowing pro bono service by judicial law clerks.

The degree of participation in community activities and events by judicial officials is expanded in Rule 3.7 (A): Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities: [Listing of examples omitted for brevity]

Interestingly, Rule 3.7 (B) separately addresses the issue of pro bono services in restrictive terms: “A judge may encourage lawyers to provide pro bono publico legal services.” This language was obviously carefully crafted by the ABA Model Code drafters and evaluated by the Nevada Supreme Court when the Revised Nevada Code of Judicial Conduct was adopted on December 17, 2009 as ADKT 427, which became effective on January 19, 2010. The only conduct which judges are permitted to engage in related to pro bono by other lawyers is to “encourage lawyers to provide” such services. That does not include expansion into supervision over law clerks providing pro bono services; making special accommodations; providing sequestered blocks of time for law clerks; granting permission for pro bono services by law clerks; or ascertaining whether a law clerk’s pro bono activities might create an unforeseen conflict with the supervising judge; or an infinite number of unforeseen issues which may arise.

Then, Comment [5] to Rule 3.7, permits judges to appoint lawyers for indigents in “individual cases,” and “promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so

the judge does not employ coercion, or abuse the prestige of judicial office.” Comment [6] to Rule 3.7 grants greater latitude to judges to recruit lawyers or law firms to provide pro bono services, as long as those efforts are not coercive. Specifically, any such recruitment is not deemed membership solicitation. However, missing from this supposed expansion on the ability to encourage greater pro bono participation is any suggestion that judges may permit judicial law clerks to directly participate in pro bono activities while employed full time by a supervising judge.

An examination of the purportedly expansive language of Comment 5 includes the terms “promote broader access; appoint lawyers for indigents; provide lists of programs; training lawyers to do pro bono; participate in events recognizing lawyers who perform pro bono; provide a legal aid organization with general endorsements; request attorneys to accept pro bono appointments in cases before the judge.” None of those descriptive terms encompass allowing a full time law clerk to engage in pro bono services while employed by a judge. In Comment [4] to Rule 3.7, may be found a limitation on the activities of court staff pertaining to solicitation of funds even for charitable or civic organizations. “... [A] judge must also make reasonable efforts to ensure that the judge’s staff, court officials, and others subject to the judge’s direction and control do not solicit funds on the judge’s behalf for any purpose, law-related or otherwise.” Clearly, Comment [4] was meant to convey the principle that court staff may not engage in conduct which would be prohibited for the judge under the NCJC.

Extensive research into this opinion request was conducted on state and national levels. There is no consensus opinion and no prevailing trend which could be discerned. What was revealed was a huge diversity of

rulings, opinions, and observations on this subject. For instance, according to Nebraska Judicial Ethics Opinion 08-2, the Nebraska Code of Judicial Conduct does not prohibit judicial staff attorneys from taking a case from the Nebraska Volunteer Lawyer Project or providing legal representation for individual clients outside their regular employment by a court.

Then, an entirely opposite ruling came from Texas Ethics Opinion 283. There, an attorney employed at a state intermediate appellate court was not permitted to perform pro bono work on a federal appeal, even when the issue appealed involved only a federal issue and no state, Texas or otherwise, has concurrent jurisdiction. The Texas Ethics Commission wrote that "Canon 3B (6), (8), (10) and 3C (2) require that appellant staff court attorneys are subject to the same ethical standards as the judge for whom they work." Therefore, because Canon 4G prohibits a judge from practicing law, staff attorneys should also be prohibited.

In February of 2007, the ABA House of Delegates approved Rule 3.7 of the New Model Code of Judicial Conduct, which was adopted in the October 31, 2006 Code. The provision for pro bono service was captured in RULE 3.7, Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities. "(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including the following activities:... (B) A judge may encourage lawyers to provide pro bono publico legal services." This was very similar to the provisions of Rule 3.7 (B) of

the NCJC adopted by the Nevada Supreme Court effective in 2010.

According to the *Model Code of Conduct for Judicial Employees in the State of Nevada*, prepared by the Judicial Council of the State of Nevada, full-time judicial employees who are otherwise qualified to practice law in the State of Nevada, shall not engage in the practice of law for outside compensation. They may, however; (1) act pro se; (2) perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family; or (3) provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves. Further restrictions include:

...

- (3) In the case of pro bono legal services, such work:
 - (a) Is done without compensation;
 - (b) Does not involve the entry of an appearance in any federal, state, or local court or administrative agency;
 - (c) Does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state, or local government; and
 - (d) Is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and other provisions of the Code.

The Committee considered this non-statutory publication in its evaluation of this

opinion. Regardless of the permissive language of the *Model Code of Conduct for Judicial Employees*, it was the unanimous opinion of the Committee that this publication did not fully weigh the crystal clear prohibitions of Rule 3.10 along with the mandatory language of Rule 2.12(A) and Comment [1] to Rule 2.12(A). Reading those prohibitions in harmony with one another leads to no other reasonable conclusion than judicial law clerks should be prohibited from participating in pro bono activities while in service to a judge. Additionally, it was the consensus of the Committee that Rule 1.3 to Canon 1 and Rule 3.10 to Canon 3 cannot be interpreted to dispel the principle that judges are forbidden to practice law except under very narrow exceptions, none of which apply to the issue before this Committee. That principle then applies with equal weight to judicial law clerks, who are under the supervision of judges. Comment [1] to Rule 2.12 (A).

Despite the apparently permissive language of the *Model Code of Conduct for Judicial Employees*, the Committee concluded the restrictive conditions applicable to pro bono service would eliminate most opportunities on a practical basis. Although the petition pending before the Supreme Court does not restrict law clerks from appearing in courts other than the supervising court, the *Model Code of Conduct for Judicial Employees* does exclude appearances “in any federal, state, or local court or administrative agency.” Other provisions eliminate the court in which the law clerk serves; matters of public controversy; litigation against federal, state or local governments; no work to be done in judicial employee’s workplace or during regular work hours; and the overarching principle that the service not create an appearance of impropriety. After applying all these exclusions, the vast majority of

potential services would be eliminated. However, the potential for creating a conflict with the court system within which the law clerk is employed is probable. That potentiality is what must be avoided. Pro bono service is not restricted to making appearances in various courts or administrative agencies. It may entail legal advice or counsel which may subsequently be the subject of review or appeal.

On a federal level, the Federal Judicial Center has published a text entitled *Maintaining the Public Trust / Ethics for Federal Judicial Law Clerks*, Second Edition (2011). The basic premise of the publication is “**During your clerkship, you may not practice law.** [Emphasis added by author] The rules permit only a few narrow exceptions: you may appear pro se; you may perform routine legal work concerning the management of your own affairs or those of a family member (although you may not enter an appearance in federal court); and you may act pro bono in certain civil cases (although you may not enter an appearance in any state or federal court or administrative agency).” Just as with almost every jurisdiction which has pondered pro bono service by law clerks, federal judicial law clerks are only permitted to volunteer for civil pro bono cases, but are strictly forbidden from appearances in any “state or federal court or administrative agency.” The restrictions on federal law clerks serve to eliminate any practical opportunity for pro bono.

There are no previous opinions of this Committee which bear directly on the issue presented. In JE 06-018, the request concerned whether a district court staff attorney, who also functioned as a law clerk for a judge, could properly act as a temporary Family Court Master. The Master’s findings and recommendations would be reviewed by the supervising judge

who oversaw the staff attorney/law clerk. The Committee opinion, filed November 13, 2006, answered that question in the negative. The Committee determined the potential for conflict created a perception the judicial responsibilities of both the judge and law clerk would be impaired by the supervisory position of the judge over the Master, who was required to submit reports to the judge. This perception of inability to remain impartial was untenable under the Code of Judicial Ethics which existed at that time. Although not entirely applicable to the issue before this Committee, it does provide general guidance on the relationship between a judge and a staff attorney/law clerk which must be considered in the perception of conflict.

In JE 14-005, filed October 1, 2014, the request was to determine if a justice of the peace [justice] in a township with a population less than Sixty Thousand, could properly represent a petitioner in a *habeas corpus* proceeding outside the jurisdiction in which the justice presided. The Committee answered that request in the affirmative, although with significant caveats and conditions. The justice presided in a township with a population less than Sixty Thousand, which allowed the justice to maintain a part-time practice under NRS 4.215, which prohibited private practice in townships with a population over Seventy Five Thousand. That opinion is confined to its unique facts. The Committee assumed for its opinion a township of less than Sixty Thousand; the practice must occur in a judicial district outside that in which the justice presided; and the *habeas* practice must not impair the ability of the justice to perform her/his judicial obligations. The Committee directed the justice to be cognizant of Rules 1.2, 1.3, 3.1, and 4.1(A).

The same result would not obtain in a township with a population in excess of

Seventy Five Thousand, where justices of the peace are not permitted any legal practice. It is critical that the petition to amend NRPC which was filed in the Supreme Court in the opinion request under consideration limits its application to pro bono service by law clerks in a county in which the population exceeds One Hundred Thousand, as provided in NRS 3.0105. Thus, JE 14-005 has extremely limited application to this pending request because it only concerned justices of the peace in a township with a population less than Seventy Five Thousand. *See*, NRS 4.215: "A justice of the peace in a township whose population is more than 75,000 may not act as attorney or counsel in any court except in an action or proceeding to which the justice of the peace is a party on the record."

CONCLUSION

The proposed amendment to the Nevada Rules of Professional Conduct set forth in Rules 6.1 to 6.5, as written and presented to the Standing Committee would potentially violate the Nevada Code of Judicial Conduct. A judicial law clerk in a county which has a population of more than One Hundred Thousand may not volunteer to conduct pro bono public service while serving as a full time law clerk to a judge because such judges are prohibited from the practice of law themselves.

REFERENCES

Rule 5 Governing the Standing Committee On Judicial Ethics; Nevada Code of Judicial Conduct Canon 1; Rule 1.3 to Canon 1; Canon 3; Rule 3.10; Comment [1] to Rule 3.10; Rule 2.12(A); Comment [1] to Rule 2.12; Rule 3.7; Comments [5] and [6] to Rule 3.7; NRS 3.0105; NRS 3.120; NRS 4.215; *Model Code of Conduct for Judicial Employees in the State of Nevada; Maintaining the Public Trust / Ethics for Federal Judicial Law Clerks*, Second

Edition (2011); JE 06-018; JE 14-005; American Bar Association, *New Model Code of Judicial Conduct*, Rule 3.7 (February 2007); Nebraska Judicial Ethics Opinion 08-2; Texas Ethics Opinion 283; *Nevada Lawyer*, July 2007, pp 22-24.

This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.



Bill C. Hammer, Chairman