

ADVISORY OPINION

**Code of Judicial Conduct
Canon 3**

2-20

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

Rule 3.10 of the Code Judicial Conduct sets forth the ethical obligations of judicial officers regarding the practice of law. Generally, a full-time judicial officer may not practice law, except in limited circumstances involving self-representation, military service, or assisting family members. Recently, a number of questions have arisen regarding what type of assistance a judicial officer ethically may provide to a family member:

1. May a judicial officer attend a court or administrative hearing with a family member who is a party or witness in a proceeding?
2. May a judicial officer attend and participate in a settlement conference or interview of a family member on a matter that is likely to be litigated?
3. May a judicial officer speak with law enforcement, prosecutors, or court personnel on a family member's behalf when the family member is under investigation or charged with a criminal offense?

The Commission's view is that a full-time judicial officer may attend a court or administrative hearing with a family member but only in a supportive role and not as a legal advocate for the family member. A full-time judicial officer also may attend a settlement conference with a family member in a support role and privately may provide legal advice to the family member but should take precautions to not give any impression that the judicial officer is serving as an attorney for the family member. Similarly, a judicial officer may provide behind-the-scenes legal advice to a family member who is under investigation but should take no actions which would give the impression that the judicial officer is acting as the family member's attorney or attempting to trade on the prestige of judicial office to benefit the family member.

ANALYSIS

Judicial officers often must balance the obligations of professional life with the desire to assist family members when those individuals need legal assistance. Rule 3.10 of the Code of Judicial

Conduct generally prohibits the practice of law for full-time judicial officers and defines the ambit of permissible practice in limited situations. The rationale behind the general prohibition is that the “likelihood of conflicts of interest, the appearance of impropriety, and the appearance of a lack of impartiality – all have their greatest potential in the practice of law by a full-time judge.” E. Wayne Thode, *Reporter’s Notes to the Code of Judicial Conduct* 90, 91 (ABA 1973).

With respect to family members, an exception exists under Rule 3.10 which permits judges “to give legal advice to and draft or review documents for a member of the judge’s family” under the following conditions:

- The judicial officer may not receive compensation from the family member(s)¹;
- The judicial officer may not serve as the family member’s lawyer before a tribunal;
and
- The judicial officer may not sign any pleadings or settlements.

While Rule 3.10 allows judicial officers to provide some legal advice to family members, the exception is narrow and essentially only allows judicial officers to give behind-the-scenes assistance. This exception comfortably would allow a judicial officer to draft a will or trust agreement or review documents incidental to a real estate transaction for a family member, conduct legal research for the family member’s use, or draft letters for the family member’s signature.

The exception, however, does not abrogate the general rule against practicing law if the activity requires more than privately dispensing legal advice or if all conditions of the exception are not met. For instance, the exception does not authorize a judicial officer to hold oneself out to third parties as the family member’s lawyer or to appear as the family member’s advocate before a tribunal. Although “tribunal” is not defined in the Indiana Code of Judicial Conduct, the Indiana Rules of Professional Conduct apply the term to “a court, an arbitrator, or any other neutral body or neutral individual making a decision, based on evidence presented and the law applicable to that evidence, which decision is binding on the parties involved.” Prof. Cond. R. 1.0(m), Terminology. At a minimum, in addition to courts of record, tribunal includes city and town courts, administrative law boards and commissions, and arbitrators.

Judicial officers also need to be mindful of their other ethical responsibilities under the Code of Judicial Conduct when providing legal support for family members, including the duty to avoid abusing the prestige of judicial office. Jud. Cond. R. 1.3.

Attending a Hearing with a Family Member

Although Rule 3.10 prohibits a judicial officer from acting as a family member’s attorney at a court or administrative hearing, questions have emerged about whether a judicial officer ethically may attend a hearing with the family member for nonadvocacy purposes. Over a decade ago, the Massachusetts Committee on Judicial Ethics acknowledged that two opposing considerations are at play in this situation. On one hand, a judicial officer understandably wants to “lend moral

¹ For Rule 3.10 purposes, “family member” is defined as “a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.” Ind. Code of Jud. Conduct, Terminology.

support to a family member under emotionally trying circumstances.” [Massachusetts Committee on Judicial Ethics Advisory Opinion 2008-4](#). However, the countervailing consideration is that members of the public may see a judicial officer’s attendance at the hearing as an attempt “to signal to the presiding judge [the judicial officer’s] relationship to a litigant in the matter pending . . . in the hope that that relationship may play a positive role in the litigation’s outcome.” *Id.* The Indiana Commission on Judicial Qualifications agrees with the Massachusetts Committee about the importance of both these considerations but believes an appropriate balance can be achieved which would allow a judicial officer to attend a hearing in a support role² if certain precautions are taken.

First, the judicial officer must avoid referring to his or her judicial status and should make efforts to keep others from referring to the judicial officer as “judge” (or “magistrate,” “commissioner,” or “referee”) while in the courtroom or its environs immediately prior to and during the family member’s hearing. This would also include not wearing any items of clothing to the hearing that are court related (*i.e.* judicial robe or casual shirt with the court logo). Any mention of or reference to judicial status may give an impression to those present that the judicial officer is attempting to garner favor for the family member by relying on the prestige of judicial office. Further, it may cause members of the public to speculate that any leniency the family member receives from the presiding judge is solely due to the individual’s relationship with the judicial officer in attendance.

Second, the judicial officer should not interact with others in the courtroom and in areas immediately adjacent to it in a manner that conveys that the judicial officer has special influence or the status of a “court insider.” This would include actions such as visiting the presiding judge’s chambers prior to or immediately after the hearing, socializing with court staff in the courtroom or court offices, and interacting in an informal manner with prosecutorial or investigative staff.

Third, prior to attending the hearing, the judicial officer should carefully evaluate whether he or she can maintain composure during the hearing. Just as a hearing may be emotionally charged for the family member, it may produce intense emotions in the judicial officer as well. When deciding whether to attend such hearings, a judicial officer should remember that he or she is still expected to behave in a manner which promotes public confidence in the integrity, independence, and impartiality of the judiciary. *See* Jud. Cond. R. 1.2.

Assuming that these precautions are adhered to, a judicial officer may attend a hearing with a family member in a support role without violating the Code of Judicial Conduct.

Attending Settlement Conferences/Investigation Interviews

Prior to a legal matter being filed or litigated in court, family members may seek a judicial officer’s advice when facing investigative interviews or settlement conferences (*i.e.* to resolve an insurance claim after an auto accident or to clear up disputed credit issues). Some judicial officers have asked whether they may participate in these interviews and negotiations.

² This advice only covers instances when a judicial officer is asked to attend a hearing as a support person. When a judicial officer is requested to testify at the family member’s hearing, the judicial officer should contact Commission staff to discuss any ethical considerations implicated by this situation.

With respect to settlement conferences and investigative interviews, the first point to consider is whether a judicial officer engages in the “practice of law” by asking questions of the examiner, advising the family member how to respond, negotiating resolutions with the opposing representative, or informing the representative that he or she is acting as the family member’s attorney. In Indiana, the practice of law includes “making it one’s business to act for others in legal formalities, negotiations, or proceedings.” *State ex rel Indiana State Bar Assn. v. Diaz*, 838 N.E.2d 433, 444 (Ind. 2005). Further, merely holding oneself out as another’s attorney in person or in correspondence implicates the practice of law. See *Matter of Mitterer*, 693 N.E.2d 555, 558 (Ind. 1998); *Matter of Lustina*, 683 N.E.2d 236 (Ind.1997); *Matter of Anonymous*, 646 N.E.2d 666 (Ind.1995). The Commission’s view is that, as a trained legal professional, a judicial officer engages in the practice of law when the judicial officer actively attempts to navigate the direction or resolution of settlement discussions or investigative interviews through questioning, advice, or representations.

The next component to evaluate is whether these activities fit into the family advice exception of Rule 3.10. As noted earlier, this exception is limited to behind-the-scenes assistance. If a judicial officer informs third parties that he or she is serving as the family member’s attorney, this action goes beyond the defined “legal advice” which is permitted under Rule 3.10, as the judicial officer has assumed a representative role.

Even if the judicial officer does not make that announcement, negotiating on a family member’s behalf or instructing the family member not to answer certain questions during interviews necessitates that the judicial officer assume an active role in the family member’s legal dispute and may give the impression to others that the judicial officer represents the family member. Such activity tips the balance of interests underlying the family advice exception. See, e.g. [Connecticut Committee on Judicial Ethics Advisory Opinion 2009-12](#) and [2015-09](#) (A judge may attend settlement conferences with a family member for the purpose of answering questions that the family member may have but “should not act as a legal advisor to the family member or engage in any potential settlement discussions”); [Utah Judicial Ethics Informal Opinion 11-02](#) (a judge may privately advise family members regarding claims to an estate but may not negotiate on their behalf with the potential creditor).

It is, therefore, the Commission’s opinion that any time (absent military service) a full-time judicial officer announces to third parties that he or she is serving as another person’s lawyer, the judicial officer is acting inconsistent with Rule 3.10. Further, a judicial officer should avoid engaging in activities in the presence of third parties which give the appearance that the judicial officer is acting as the family member’s lawyer. Negotiating with third parties on a family member’s dispute or publicly directing a family member’s responses would fall into this category.

However, this is not to say that a judicial officer is prohibited from attending settlement conferences or investigative interviews with a family member. As with court hearings, the judicial officer may attend settlement conferences/investigative interviews to provide emotional support for a family member. Additionally, consistent with the family advice exception in Rule 3.10, a judicial officer, during a break in the settlement conference or interview, may answer the family member’s questions, assist the family member in evaluating the strengths and weaknesses of certain positions, and provide informal, common sense input.

Communicating with Law Enforcement, Prosecutor’s Office Personnel, or Court Personnel

Judicial officers are held to a high standard of conduct and “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens.” Jud. Cond. R. 1.2, Comment 1. At all times, a judicial officer is required to act in a manner promoting public confidence in the independence, integrity, and impartiality of the judiciary and to avoid even the appearance of impropriety. This responsibility becomes paramount when a judicial officer’s family member is the subject of a criminal investigation or prosecution. A judicial officer must be scrupulous to avoid any actions which may give the perception to others that the judicial officer is seeking leniency or favor for the family member due to the judicial officer’s status.

A judicial officer should weigh these considerations carefully when a family member asks the judicial officer to communicate with law enforcement, prosecutor’s office staff, or court personnel on the family member’s behalf. Even when the judicial officer merely seeks general information, there is a risk (especially if the listener knows the judicial officer) that the listener will interpret the judge’s communication as a request for special treatment. The Commission believes that the more cautious approach is for a judicial officer to avoid such contacts and, instead, to advise the family member what questions to ask or what information to relay.

In unusual circumstances, when a family member is unable to adequately communicate on his or her own behalf with third parties (*i.e.* a minor child), and there is not another responsible adult available, the judicial officer should be cautious if he or she decides to communicate with investigative, prosecutorial, or court personnel. At no time should the judicial officer refer to his or her judicial status³, imply that the judicial officer is acting as the family member’s attorney, or suggest that the family member receive special consideration. Jud. Cond. R. 1.3, R. 3.10. Additionally, the judicial officer should not use any court resources, such as an email dedicated to the court system, to communicate with third parties about the family member’s legal matter. Jud. Cond. R. 1.3, R. 3.1(E).

Conclusion

A full-time judicial officer may attend a court or administrative hearing, settlement conference, or investigative interview with a family member but only in a supportive role and not as a legal advocate. A judicial officer also privately may give legal advice to the family member during a settlement conference or investigative interview but should take precautions to not give any impression that the judicial officer is serving as the family member’s attorney. Similarly, a judicial officer may provide behind-the-scenes legal advice to a family member who is under investigation but should take no actions which would give the impression that the judicial officer is acting as the family member’s attorney or attempting to trade on the prestige of judicial office to benefit the family member.

³ Even without an explicit request for special consideration based on judicial office or a professed lack of intent to create influence, a judge’s invocation of judicial status changes the dynamics of an investigation, which may constitute an abuse of the prestige of judicial office. *See, e.g. Matter of Palmer*, [Order](#) and [Presentment](#), (N.J., Nov. 7, 2018); [Matter of Michels](#), Determination (N.Y., Dec. 27, 2018); [Matter of Werner](#), Determination, (N.Y., Oct. 1, 2002).