

Extra-Judicial Private Practice Activities

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Overview

Section 3E and C.G.S. §§45a-25 and 26

- Due Process Concerns
- Judge's Own Court – *Section 3E(2)*
- Other Courts – *Section 3E(3)*
- Contested Matters – *C.G.S. §45a-25*
- Partners & Associates – *C.G.S. §45a-26*

Due Process Concerns

Caperton v. Massey Coal

The ethical rules that apply to Probate Judges are rooted in fundamental concerns about due process and so it is appropriate to consider some of the broad statements made by the United States Supreme Court in its June, 2009 5-4 opinion in *Caperton et al. v. A.T. Massey Coal Co., Inc., et al.*

Due Process Concerns

Case: Caperton v. Massey Coal

Case:

Don Blakenship, Massey's Chairman, supported the election bid of Brent Benjamin to become a Justice of the West Virginia Supreme Court of Appeals, which would decide Massey's appeal of a \$50 million lower court judgment in favor of entities controlled by Hugh Caperton.

Due Process Concerns

Case: Caperton v. Massey Coal

Case (cont.):

Blakeship's \$3 million in donations were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own election committee. In fact, Caperton contended that Blakeship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Due Process Concerns

Finding: Caperton v. Massey Coal

No one will contribute such extraordinary sums to a Connecticut Probate Judge's campaign, but the broad language of the Court's opinion reflects its increasingly strict attitude. This is what the Court said:

The court need not look to actual bias. Instead, the proper inquiry is "whether sitting on the case ... would offer a possible temptation to the average judge to ... lead him [or her] not to hold the balance nice, clear and true."

Judge's Own Court

3E(2)

Section 3E(2): no judge shall appear as an attorney or fiduciary in the court to which he or she was elected, notwithstanding the fact that another judge has been cited in to hear the matter.

■ The prohibition applies to both “attorney” and “fiduciary.”

■ Exception: acting as fiduciary for these six categories of the judge’s “Core Family” of:

- spouse
- child
- parent
- grandparent
- brother
- sister

Judge's Own Court

3E(2)

A judge acting in his or her own court under the core family fiduciary exception must disqualify himself or herself from acting as judge in the matter.

Other Courts

3E(3)

Section 3E(3): no judge of probate shall serve as a fiduciary or accept any appointment in any other probate court except when the judge serves as:

1. Fiduciary for 10 categories of relatives (the "Extended Family")
2. Executor or Conservator specifically named by a testator or conserved person
3. Conservator in two other situations
4. Other positions with unanimous consent

Other Courts

3E(3): Fiduciary for “Extended Family” Relatives

A judge may serve as a fiduciary in another court with respect to ten categories of relatives (the “Extended Family”):

spouse

child

parent

grandparent

brother

Sister

(these track 3E(2))

aunt

uncle

niece

nephew

(new to 3E(3))

Other Courts

3E(3): Executor under a Will or Conservator under specific appointment

A judge may serve as:

Executor: if designated as such by the terms of a will admitted to probate

Conservator: if specifically named in a designation of conservator.

Other Courts

3E(3): Conservator in Two Other Situations

A judge may serve as a conservator, if:

■ Voluntary Conservator:

- nominated as a voluntary conservator, and
- no interested party objects

■ Involuntary Conservator:

- if nominated in an application for involuntary conservatorship,
- all interested parties consent in writing, and
- the sitting judge concurs in the nomination

Other Courts

3E(3): Other Position with Unanimous Consent

A judge may serve in any other fiduciary position if all interested parties consent in writing.

“Fiduciary” includes such relationships as executor, conservator, trustee, and guardian.

Contested Matters

C.G.S. § 45a-25

- **C.G.S. § 45a-25:** A judge shall not appear as an attorney in a contested matter in any court of probate.
- “a matter before a court of probate is a contested matter when any party to such matter informs the court orally or in writing of any such objection or opposition in such matter, without regard to the apparent merit or lack of merit of such objection or opposition.”

The Judge's Dilemma

Legal Practice Specialty

The practice of law by full-time judges has long been prohibited in every American jurisdiction, whether or not it is conducted for compensation. *See* J. Shaman *et al.*, Judicial Conduct and Ethics, §7.08 (2007).

Connecticut probate judges, who serve on a part-time basis, are in a unique situation. Judges may practice law, but it is advisable to concentrate in areas other than probate law, since the attorney judge or his or her partners and associates may not practice in the judge's own court, and since the attorney judge may not be involved in contested matters in other courts.

The Judge's Dilemma

Feathering One's Practice Nest

A judge must be careful not to use his or her position as judge to influence his practice as an attorney.

"In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice where he utilizes his judicial position to further his professional success."

See J. Shaman *et al.*, Judicial Conduct and Ethics, *supra*, §7.08.

The Judge's Dilemma

Many Matters Could Become Contested

- Take caution in determining what matters to handle as an attorney judge.
 - All cases are potentially contested, and
 - some are innately contested by the nature of the application, such as an involuntary conservatorship.
- A judge acting as an attorney in another court should advise the parties in advance of the proceeding:
 - statutory prohibition on handling contested cases, and
 - prospect that he or she may be compelled to withdraw if the matter becomes contested.

The Judge's Dilemma

Attorney's Fees

Matters in which the fees of an attorney judge become disputed are especially difficult and may place the sitting judge in an awkward position.

- Written fee agreements are a must, as are timesheets. In the event of a dispute, consider using the Connecticut Bar Association mechanism for resolving fee disputes.
- If the matter must be decided in probate court, the attorney judge should engage counsel to avoid appearing in a contested matter.
- The sitting judge may also consider disqualifying himself or herself from the matter and asking probate administration to cite in a judge from another part of the state.

Partner or Associate of a Probate Judge – *C.G.S. § 45a-26*

- **C.G.S. § 45a-26:** “A partner or associate of a judge of probate shall not engage in the **practice of law** in the court of probate in which such judge holds office,” regardless of whether or not the judge disqualifies himself or herself.
- Clarification: the prohibition does not apply to acting in a **fiduciary capacity** for a member of the ten-category “**Extended Family.**”