

STATE OF WASHINGTON
ETHICS ADVISORY COMMITTEE
ETHICS OPINION 19-03

Question

Can a judge's full-time staff member, who is a licensed member of the federal bar in good standing, engage in pro bono legal representation restricted to federal issues before federal tribunals, provided that the staff member's legal representation does not interfere with the judge's duties and responsibilities or involve use of court resources?

Does it make a difference if the representation is through an established organization, such as the Ninth Circuit's Pro Bono Program, <https://www.ca9.uscourts.gov/probono/>, the Veterans Consortium, <https://www.vetsprobono.org/helpavet/>, or the Northwest Immigrant Rights Project, <https://www.nwirp.org/join-us/volunteer/>?

Answer

The Ethics Advisory Committee has authority to express its opinion on proper judicial conduct with respect to the provisions of the code. It does not have authority to express its opinion on personnel policies and procedures for any employee of the respective courts including staff attorneys, law clerks, or any other employee who may have a license to practice law.

Washington State does not have a separate code of conduct for court employees. However, court employees are subject to the Washington Code of Judicial Conduct (CJC) via CJC 2.12(A), which places the burden on judges to require court staff, court officials, and others who are subject to a judge's direction and control to act with fidelity and in a diligent manner consistent with a judge's obligations under the Code. Therefore, the scope of this answer is limited to a review of the CJC to assist the judge in determining the issues related to staff participation in outside activities and how it affects compliance with the CJC. The court employees licensed to practice law in Washington should consult the Rules of Professional Conduct (RPCs) or the Washington State Bar Association to determine how participation in activities involving legal representation will affect their professional conduct compliance.

Although court employees who are licensed members of a bar association are not generally prohibited from participating in *pro bono publico* service, as encouraged by the RPC 6.1, it is important to look at an appropriate level of participation based on a number of factors. These factors include, whether the court has a policy related to outside employment or volunteer work, the nature of the court employee's role with the court, the nature of participation in the *pro bono publico* service, whether participation in an the activity will lead to frequent disqualification of a judicial officer, and whether participating in such activities may convey the impression that they are in a position to influence the judge or are expressing the views of the judge on pending or impending cases.

- I. Whether the court has a policy related to outside employment or *pro bono publico* service by court employees.

While the Code of Judicial Conduct does not have a clear prohibition on the outside practice of law by a court employee who is a licensed attorney, courts often have policies or rules prohibiting the outside practice of law by a court employee. These policies reflect an effort by the court to remain beyond reproach. By prohibiting court employees with access to confidential information from the practice of law, a court can avoid appearances of impropriety and conflicts of interest that may arise when a court employee assisting a judge engages in the practice of law.

For example, the Washington State Supreme Court Judicial Law Clerk Manual allows a law clerk, with the permission of their justice, to engage in certain volunteer legal services activities that do not involve representation of a client or the practice of law. Consistent with the duty to cooperate with other judges and court officials in the administration of court business under CJC 2.5, the court's internal and personnel policies should be reviewed to determine any restraints on outside employment or engaging in *pro bono publico* service.

- II. Nature of the staff member's employment.

The term "full-time staff member" can encompass many different kinds of employment within the court. For purposes of this question, the committee does not assume the nature of the employment in which the court employee serves, but will caution that the nature of employment may affect the analysis. For example, a law clerk enjoys a close

and confidential relationship with the judge and often has direct input on the judge's opinions. This type of employment may implicate the court employee's ability to influence the judge or the appearance of impartiality to a higher degree. Also, a bailiff may not be directly involved with the judge's opinions but may be considered an extension of the court by virtue of their visibility in the judge's courtroom.

In any capacity, court employees should uphold the integrity and independence and impartiality of the judiciary and of the court, and should avoid impropriety and the appearance of impropriety in carrying out their official duties. Also, court employees should avoid the risk of conflict with their official duties.

III. Nature of participation in *pro bono publico* service.

With the exception of the practice of law pursuant to national or state military service, full-time judges are prohibited from practicing law in any court, unless it is to pursue their own personal or family affairs. CJC 3.10. There is no similar provision against court employees engaging in any *pro bono publico* service. However, as referenced in RPC 6.1, *pro bono publico* service could include services that do not require direct client representation such as training other attorneys, screening services, or providing support for various activities.

IV. Participation in *pro bono publico* service should not lead to frequent disqualification of the judge nor should it convey the impression that the court employee is in a position to influence the judge.

The Code of Judicial Conduct requires further constraints when engaging in *pro bono publico* service. CJC 3.1(B) requires that judges may not participate in extrajudicial activities that lead to frequent disqualification and CJC 2.4 requires that a judge not convey or authorize others to convey the impression they are in a position to influence a judge. By extension, CJC 2.12(A) requires judges to require court staff to act with fidelity and in a diligent manner consistent with the judge's obligations.

The committee has previously advised that court bailiffs should not accept employment to supervise in domestic cases (00-04), court clerks should not accept employment with a city prosecutor that files in a separate division of the court (02-23), and a court employee should not own a medical marijuana business in violation of federal law (15-

02). The committee has also advised that an appellate court judicial officer may permit a part-time law clerk to sit as a pro tempore judge or court commissioner in a court of limited jurisdiction (03-12).

In the instant question, the judge asks whether his full-time court employee may engage in pro bono legal representation in the Ninth Circuit's Pro Bono Program,¹ The Veterans Consortium Pro Bono Program,² and the Northwest Immigrant Rights Project.³ Each program offers the opportunity to engage in a representative capacity. Based on the discussion above, a court employee may volunteer his or her services to a program as long as such service can be completed outside of regular hours of employment, avoids the appearance of impropriety, does not lead to frequent disqualification of the judge, and does not convey the impression they are in a position to influence the judge or are expressing the views of the judge on pending or impending cases. The committee encourages the judge to take all of the listed factors into consideration before deciding to allow the court employee to participate in any *pro bono publico* service.

¹ <https://www.ca9.uscourts.gov/probono/> last accessed April 15, 2019.

² <https://www.vetsprobono.org/helpavet/> last accessed April 24, 2019.

³ <https://www.nwirp.org/join-us/volunteer/> last accessed April 30, 2019.

Relevant Portions of the Code of Judicial Conduct

Canon 1 – A judge shall comply with the law, including the Code of Judicial Conduct.

CJC 1.2 – provides that a judge shall 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.*

CJC 1.3 – provides that 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 2 - A judge should perform the duties of judicial office impartially, competently, and diligently.

CJC 2.12(A) provides that a judge shall require court staff, court officials, and others subject to the judge's direction and control to act with fidelity and in a diligent manner consistent with the judge's obligations under this Code.

CJC 2.11(A) provides that a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances: The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

CJC 3.10 prohibits a judge from practicing law unless he or she is acting pro se on behalf of the marital community or domestic partnership 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 adjudicative forum.

Relevant Ethics Advisory Opinions – Washington

[Opinion 03-12](#) – A part-time judicial law clerk, who is licensed to practice law in Washington may serve as a pro tem in a limited jurisdiction courts an average of three times a month as long as there is a mechanism in place in the clerk's office to screen cases that the law clerk has worked on and ensure that the service does not interfere with the law clerk's duties.

[Opinion 96-13](#) - A full-time law clerk may engage in political and community activities outside of work such as serving on the executive board of a legislative district political party organization, serving on a chamber of commerce, or serving as a political party precinct officer as long as the law clerk does not use the prestige of office to advance the group's interests, nor uses any public resources. If the outside activities interfere with the law clerk's job performance because of frequent conflicts, the clerk may have to cease in the outside activities.

[Opinion 00-04](#) - a superior court judge may not permit a court bailiff to accept employment to supervise visitation in domestic cases where "supervised visitation" has been either ordered by the court or agreed to by the parties because doing so would run afoul of several of these provisions. Such as if the bailiff were to appear as a witness in a case before the same bench where he or she is employed, it could compromise the integrity of the judiciary, give rise to an appearance of partiality or impropriety, or give the appearance that the bailiff is in a position to influence the judicial officer.

[Opinion 02-23](#) - A judicial officer may not permit a court clerk to engage in outside part-time employment when that employment would be for a city prosecutor who files cases in one of the divisions of the county district court. It does not matter if those cases are filed in the division in which the court clerk is employed or in another division of that county district court. Because the court employee has access to the judicial information system and other court information, it creates an appearance of partiality toward the city attorney's office and undermines the integrity and public confidence in the independence of the judiciary.

Resources

United States Courts for the Ninth Circuit Pro Bono Program:

<https://www.ca9.uscourts.gov/probono/>

Pro Bono Handbook:

<http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf>

"Cases selected for inclusion in the program include a broad range of legal issues. While a significant percentage of the cases are prisoner civil rights appeals or immigration petitions, many other civil cases are included, such as labor and

employment cases, discrimination, bankruptcy, social security, Indian law, mining law, contract and civil forfeiture appeals” p. 2.

The program’s procedures for appointing counsel are included on p. 4. Counsel is appointed and are appointed as counsel or record and establishes a briefing schedule. P.4. The scope of appointment includes the handling of the appeal, the drafting of a petition for rehearing where appropriate, but does not include the preparation and filing of a petition for certiorari in the Supreme Court or any other proceedings unless agreed upon between the attorney and client.

The Veterans Consortium Pro Bono Program:

<https://www.vetsprobono.org/helpavet/>

They provide training free of charge to attorneys who agree to counsel and/or represent a veteran/VA claimant or family member before the Veterans Court. As well as receiving the day-long training, attorneys who participate are assigned a case that has been screened for merit and provided a screening memo outlining the issues in the case. Volunteers are also assigned a mentor (a practicing veterans' law lawyer or practitioner) to give advice and share sample pleadings. Attorneys also receive the Veterans Benefits Manual (VBM) and other resource materials.

A volunteer attorney commits to: Attorneys who participate receive free training in exchange for a commitment to handle at least one appeal that is before the Veterans Court. Attorneys with little or no prior veterans' law experience are generally able to capably represent an appellant before the Veterans Court provided they attend the training seminar and maintain contact with their mentor. Most cases can be completed in 50 to 60 hours; many cases may require fewer hours. A typical case lasts about 1 year from the time that the attorney enters the case. Some cases may be resolved more quickly and some may take longer.

Northwest Immigrant Rights Project:

<https://www.nwirp.org/join-us/volunteer/>

NWIRP directly represents many clients in legal proceedings, but the demand for services is greater than our staff can address. A client's chance of avoiding removal from the U.S. is highly dependent on whether or not he or she has legal representation. As a result, NWIRP places great emphasis on training others, in order to stretch its resources as far as they can go. One of NWIRP's great successes is our pro bono panel

of attorneys, who are instrumental in sharing the workload of directly representing immigrants.

Federal Code of Conduct for Judicial Employees:

[Federal Code of Conduct for Judicial Employees](#) – Restricts the practice of law when providing pro bono legal services to such work that is (a) 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 standards and provisions of the code. See Canon 4(D) of *Code of Conduct for Judicial Employees*.

[Ethics Advisory Opinions Outside of Washington](#)

[NE.Jud.Eth.Comm 08-2](#) – Although the committee advised that the Nebraska Code of Judicial Conduct does not prohibit judicial staff attorneys from proving legal representation for individual clients outside their regular employment by a court but, the if the court or judge permits such outside employment by staff, the judge should consider, at a minimum: (1) the outside employment is not with an entity that regularly appears in court or conducts business with the court system and it does not require the court employee to have frequent contact with attorneys who regularly appear in the court system; (2) the work is capable of being fulfilled outside normal working hours, without court resources and is not incompatible with the performance of the court employee’s duties and responsibilities; (3) it does not require disclosure of confidential information acquired in the course of official duties; (4) where a conflict of interest exists or may reasonably appear to exist or where the outside employment may reflect adversely on the integrity of the court, the employee must inform the judge prior to accepting the outside employment.

[South Carolina Advisory Committee on Standards of Judicial Conduct Opinion No. 20-1997](#). A judicial law clerk may volunteer his or her time with a county juvenile arbitration program; however, he or she is prohibited from performing any services in a representative capacity.

[AZ Jud. Adv. Op. 91-3 1991](#). A law clerk may engage in *pro bono* legal activities with constraints. The committee emphasized the requirement that as part of a “judicial

family,” expectations of an impeccable appearance extends to the judge’s law clerks and secretaries. Additionally, the law clerk’s official time and expertise is a resource of the state to be employed for the benefit of the state and therefore the judge may not donate the law clerk’s official time and services to outside parties or agencies nor may the resources of judicial office be permitted to advance the private interests of others. The committee advised that a law clerk may perform certain *pro bono* legal services such as drafting an immigration training manual for use by *pro bono* lawyers, or assisting needy clients in finding an attorney when Legal Aid has a conflict.

[NY Jud. Adv. Op. 96-135 \(1997\)](#) - A Supreme Court Justice may not allow the judge’s law clerk to serve as an arbitrator under a local trial lawyers association’s arbitration program because service by the law clerk as an arbitrator would result in appearance of impropriety. The status of the law clerk as an arbitrator selected by the attorneys practicing in the judge’s court suffices to create a perception that could impair “public confidence in the integrity and impartiality of the judiciary.” The committee distinguished this situation from an earlier opinion in which the committee had advised that a Supreme Court justice’s law clerk could serve as an uncompensated arbitrator in Small Claims Court because the position was sufficiently attenuated from duties in the Supreme Court and therefore did not present direct conflict. N.Y. Jud. Adv. Op. 89-33 (1989).

[Fl. Jud. Eth. Adv. Comm. 1987-18](#) – a law clerk is not prohibited from serving as a volunteer for an organization that is a screening service for subsequent attorney referral. Three members of the committee had the opinion that the activities are not appropriate because of their reflections on the judicial office itself. They recommend that the clerk who performed services should disqualify him or herself and the entire judicial suite of the particular aide.

[Ohio Bd.Com.Griev. Disp 97-4 \(1997\)](#) – Is it proper for a full-time law clerk to concurrently engage in the part-time private practice of law? The outside private practice of law by a judicial law clerk is not prohibited under the Ohio Code of Professional Responsibility, Ohio Ethics Law, or the Ohio Code of Judicial Conduct. It is primarily an issue for each court to decide. Some courts have a clear policy prohibiting the outside practice of law by a court employee who is an attorney. The Board opined that a judicial law clerk may not privately represent a client on any matter pending before the judge he or she serves, may not privately represent clients through court

appearance of legal work performed outside the courtroom on any matter pending before other judges in the same division as the judge he or she serves, and should not practice law in matter pending before the judge he or she serves or before other judges in the same division of the court.