

STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON JUDICIAL ETHICS

DOCKET NUMBER: 2022-ACJE-01

DATE ISSUED: March 10, 2022

QUESTION PRESENTED:

Can a judge communicate directly with an insurance company on behalf of a family member who has been involved in an automobile accident?

FACTS PRESENTED:

A New Hampshire judge's elderly mother was involved in an automobile accident that caused significant damage to her vehicle. The police officer wrote in his report that the other driver was at fault. The judge's mother was uncomfortable engaging in communications with her insurance company or the insurance company of the other driver and sought the judge's assistance. The mother provided both insurance companies with the judge's contact information and adjusters from both companies contacted the judge. The judge provided each adjuster with a copy of the police report and identified the auto repair shop where the car was located. The insurance companies were not informed of the judge's judicial status at any point in the discussions.

The judge requested an advisory opinion about whether he could take further action on his mother's behalf including providing legal advice to his mother and negotiating a satisfactory resolution with the insurance companies.

APPLICABLE PROVISIONS OF THE CODE OF JUDICIAL CONDUCT:

Rule 3.10 is entitled, Practice of Law, and provides that: “[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.”¹

¹ In noting that there is no all-inclusive definition of the practice of law, New Hampshire Supreme Court Rule 35 cites to the Ethical Consideration 3-5 of the former Code of Professional Responsibility which states “[f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of a lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client[.]”

A “[m]ember of the judge’s family” is defined in the Terminology section of the Code of Judicial Conduct as: “a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.”

The Comment to Rule 3.10 states that: “[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.”

“Judicial officers often must balance the obligations of professional life with the desire to assist family members when those individuals need legal assistance.” *Ind. Comm’n on Judicial Qualifications, Formal Op. 2-20, 2021 WL 1237233, at *1 (2021)*. Rule 3.10’s prohibition on a judge practicing law is based on the rationale 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.” *Id.* (quoting E. Wayne Thode, *Reporter’s Notes to the Code of Judicial Conduct* 90, 91 (ABA 1973)).

A judge is a trained legal professional and, as such, “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.” *Id.* at *3. Rule 3.10 prohibits a judge from appearing to act as an advocate outside of judicial settings with the only exception being for judges who represent themselves. See Arthur H. Garwin et al., *Annotated Model Code of Judicial Conduct* 432–33 (3d ed. 2016); Conn. Comm. on Judicial Ethics, *Informal Op. 2015-09, 2015 WL 1874083, at *2 (2015)* (advising that a judge may not attempt to settle case with hospital on behalf of minor child); Utah Judicial Ethics Advisory Comm., *Informal Op. 11-2, 2011 WL 7637772, at *1 (2011)* (opining that a judge may not conduct negotiations on behalf of siblings or father’s estate); Ariz. Sup. Ct. Judicial Ethics Advisory Comm., *Formal Op. 10-06, 2010 WL 5227172, at *1 (2010)* (suggesting that judge may not negotiate with insurance company on behalf of spouse involved in automobile accident); Ill. Judicial Ethics Comm., *Formal Op. 95-19, 1995 WL 619469, at *1 (1995)* (advising that a judge may not negotiate health benefits with his insurer on behalf of adult son).

Rule 3.10 does allow a judge to provide a family member with legal advice “behind-the-scenes”; however, a judge is prohibited from holding themselves out as a family member’s lawyer or advocate. Subject to the Rule 3.10’s prohibition on receiving compensation, and other ethical rules regarding conflict of interest (Rule 2.3) and abusing the prestige of judicial office (Rule 1.3), a judge could review legal documents for a family member, perform legal research, and/or draft letters for the family member’s signature. A judge can also attend a judicial or administrative proceeding with a family member but only in a supportive role.

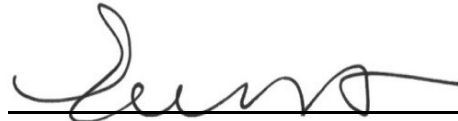
The Committee believes that, while Rule 3.10 allows a judge to give legal advice and draft or review documents for a family member, it does not allow direct discussions between a judge and third parties regarding the contractual and legal rights of a family member. This is because it is reasonably foreseeable that such communications could include some type of negotiation, in this context, regarding the expense and duration of a rental vehicle as well as the cost of repair and/or replacement. It is also foreseeable that a judge’s discussion with insurance representatives could result in his/her family member executing documents memorializing the discussions such as a release agreement and/or

endorsing a check. The Committee believes that such discussions on behalf of family members constitute the practice of law which is prohibited by Rule 3.10.

ADVISORY OPINION ON THE QUESTION PRESENTED:

The Code of Judicial Conduct allows a judge to give legal advice and draft or review documents for a family member in a “behind the scenes” role but a judge is prohibited from serving in an advocacy role with insurance companies on behalf of a family member. While there may be some basic communications with an insurance company that would not constitute advocacy, the Committee believes any such communications by a judge should be undertaken cautiously as any such discussion could evolve in a manner that implicates Rule 3.10.

THIS ADVISORY OPINION IS ISSUED BY UNANIMOUS CONCURRENCE OF ALL PARTICIPATING COMMITTEE MEMBERS.

A handwritten signature in black ink, appearing to read 'Elizabeth M. Leonard', is written over a horizontal line.

Elizabeth M. Leonard, Member

CAUTIONARY STATEMENT

This opinion is advisory only and not binding on the Judicial Conduct Committee, which may, in its discretion, consider compliance with an advisory opinion by the requesting individual as a good faith effort to comply with the Code of Judicial Conduct. Rule 38-A(4)(c).