

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

October 12, 2011
JEAC 2011-4

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: Request for Opinion Regarding the Shared Use of the Department of
Justice's LexisNexis Legal Research Services Agreement with the Judiciary

Dear [REDACTED]:

On behalf of the Chief Justice, you have requested an advisory opinion from the Judicial Ethics Advisory Committee (the "Committee") on whether it is appropriate, under the Delaware Judges' Code of Judicial Conduct, for the Administrative Office of the Courts ("AOC") to take advantage of an opportunity that would allow for access to LexisNexis electronic legal services for Delaware judges by sharing use with the Department of Justice ("DOJ").

You note in your September 19, 2011 letter that the Delaware Judiciary used to have access to electronic legal research services through both Westlaw and LexisNexis. However, as a result of budget issues starting several years ago, the AOC decided that Delaware courts needed to focus their resources on one electronic research service provider. After an appropriate purchasing process in 2008, the Delaware courts selected Westlaw Legal Research Services and eliminated access to LexisNexis services. You further note in your letter that there have been recent efforts to expand access to research services for the courts, including some level of access to LexisNexis. As a result of these efforts, an opportunity has arisen which would provide for limited access to LexisNexis research for the courts. This proposed access would permit a certain number of judicial users (32 in total – 1 for each judge in the Supreme Court, Court of Chancery and Superior Court, and 1 each for the presiding judge of Family Court, Court of Common Pleas, and Justice of the Peace Court) to have access to LexisNexis research services through the DOJ's existing legal research agreement with LexisNexis. The judges involved would be responsible for allowing access

through their password to those in their chambers or court as they deem would be appropriate.

Under this specific proposal, the AOC would be added as a joint party to the DOJ contract with LexisNexis. The anonymity of, and research performed by, a particular user would be protected through confidential passwords. The DOJ would not have access to information about court users' research or passwords. In addition, the State Solicitor has advised the AOC that the state procurement laws would permit this proposed "joint contract" and that such a contract is similar to the manner in which the State handles other contracts for services purchased across agencies/branches, including the judicial branch.¹

You have preliminarily reviewed the Delaware Judges' Code of Judicial Conduct rules relating to impartiality, fairness and *ex parte* communications and do not believe that this proposed joint contract would be violative or create ethical concerns, as long as there is a complete separation between users, research confidentiality is maintained, and the contract is paid out of state general funds. You indicate that Rule 2.5, which requires that judges perform their duties impartially and diligently, appears to support this proposal since the ability of a judge to readily access research materials may assist the judge in more expeditiously determining matters under submission.

Your preliminary analysis under Rule 3.13, the rule that prohibits judges from accepting gifts (with limited exceptions), reveals that this rule would not be applicable to the proposed joint contract because the AOC would serve as a party to the contract and the cost of the contract would be paid from state general funds. Your further note that any possible issues related to the administration of the contract by the AOC would in no way bear on the merits of any proceeding or litigation position.

Finally, you note that the State Solicitor has confirmed that cooperative agreements for procurement across agencies and branches of government are commonplace and specifically contemplated by the state procurement rules set forth in Title 29, Chapter 69 of the Delaware Code.

¹ You note in your letter, as well, that there is the possibility of exploring the establishment of a legal research state government contract which would cover state government justice system partners in the future, including the Delaware Department of Justice, the Office of the Public Defender, and the courts, among others. You further note that because the Delaware Department of Justice currently has unused user capacity in its LexisNexis research contract, the proposal to expand the contract on a limited basis to certain Delaware court users would not cause an increase in costs to the State of Delaware.

The Committee's Opinion

After review your September 19, 2011 letter and the relevant Canons of the Delaware Judges' Code of Judicial Conduct and comments thereto, the Committee believes that the shared use of the DOJ's LexisNexis Legal Research Services Agreement with the Judiciary under the terms and circumstances set forth in your letter would not violate the Delaware Judges' Code of Judicial Conduct.

The Applicable Canons of Judicial Conduct

Canon 1. A Judge Should Uphold the Integrity, Independence and Impartiality of the Judiciary

Rule 1.2 Promoting Confidence in the Judiciary

(A) A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety in all activities.

(B) An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards, so that the integrity, independence and impartiality of the judiciary may be preserved. The provisions of this Code should be applied to further that objective.

Canon 2. A Judge Should Perform the Duties of Judicial Office Impartially, Competently and Diligently

Rule 2.2 Impartiality and Fairness

A judge should be faithful to the law and maintain professional confidence in it.

Rule 2.3 Bias, Prejudice and Impropriety

(A) A judge should perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge should avoid impropriety and the appearance of impropriety in all activities.

Rule 2.4 External Influences on Judicial Conduct

(A) A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(B) A judge should not allow family, social, or other relationships to influence judicial conduct or judgment.

(C) A judge should not convey or permit others to convey the impression that they are in a special position to influence the judge.

Rule 2.5 Competence, Diligence and Cooperation

(A) A judge should perform the duties of the office impartially and diligently.

**Canon 3. A Judge Should Regulate Extra-Judicial Activities
to Minimize the Risk of Conflict with Judicial Duties**

**Rule 3.13 Acceptance and Reporting of Gifts, Loans, Bequest, Benefits,
or Other
Things of Value**

(A) Neither a judge nor a member of the judge's family residing in the judge's household should solicit or accept a gift, bequest, favor, or loan from anyone except for:

(1) a gift incident to a public testimonial to the judge, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and a family member or guest to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(2) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or domestic partner or other family member of a judge residing in the judge's household, including gifts,

awards and benefits for the use of both the spouse or domestic partner or other family member and the judge (as spouse or domestic partner or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(3) ordinary social hospitality;

(4) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(5) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require that the judge take no official action with respect to the case;

(6) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(7) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(8) any other gift, bequest, favor or loan, only if:

(i) the donor has not sought and is not seeking to do business with the court or other entity served by the judge; or

(ii) the donor is not a party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or nonperformance of his or her official duties.

(B) A judge is not required by this Code to make financial disclosures except as provided by the Supreme Court.

Analysis

With respect to Rule 1.2, the test for appearance of impropriety is whether the conduct will create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the

judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See comment to Rule 1.2. The Committee does not believe that the shared use of the DOJ LexisNexis Legal Services Agreement with the judiciary, under the terms that are set forth in your letter, would violate this rule. First, it is the Administrative Office of the Courts that would be added as a joint party to the DOJ contract, not a specific court; second, the anonymity of, and research performed by, a particular user would be protected through confidential passwords; third, the DOJ would not have access to information about court users' research or passwords; fourth, the Legislature envisioned such cooperative agreements for procurement across agencies and branches of government as illustrated by the state procurement rules set forth in Title 29, Chapter 69 of the Code; and fifth, the contract is paid out of state general funds. It is the Committee's view that this joint contract, given all the particular circumstances attendant to it, would not create a perception in reasonable minds upon reasonable inquiry that any judge's ability to carry out judicial responsibilities with integrity, impartiality, or competence would be impaired by the AOC taking advantage of the DOJ's unused user capacity.

With respect to Rule 2.2, the Committee believes that the ability of judges to utilize the LexisNexis research database would actually enhance their ability to be faithful to the law and maintain professional competence. Indeed, in order to abide by Rule 2.2, judges have an ethical and legal obligation to "make factual determinations and supply a legal rationale for a judicial decision as a matter of law." See *Holden v. State*, 23 A.3d 843, 846 (Del. 2011) (citing *Cannon v. Miller*, 412 A.2d 946, 947 (Del. 1980)). Put another way, judges have an adjudicative responsibility to "state the reasons for his action, no matter how briefly." *Id.* at 846-47 (quoting *Ademski v. Ruth*, 229 A.2d 837 at n. 1 (Del. 1967)). In this instance, access to information from more than one database would only serve to increase a judge's ability to comply with Rule 2.2.

With respect to Rule 2.3, similar to the Committee's analysis under Rule 1.2, the Committee finds no impropriety or appearance of impropriety created by the proposed arrangement, given all the relevant circumstances. This is so because the DOJ will have no access to the type or substance of research conducted by court users, nor will they have access to court users' passwords. The only "sharing" in this arrangement will be the AOC sharing in the contract.

With respect to Rule 2.4, the Committee does not find that the proposed arrangement would constitute in any way an external influence on judicial conduct or judgment.

With respect to Rule 2.5, the Committee believes that the proposal would actually enhance the judge's ability to perform the duties of his or her office impartially and diligently by making an additional legal database available to the judge and his or her clerk for legal research. As noted in a comment to Rule 2.5:

Prompt disposition of the court's business requires a judge to devote adequate time to the judge's duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

With the benefit of the LexisNexis database, in addition to the current Westlaw database, the Committee believes that the expanded research capability will enhance judges' ability to be "expeditious in determining matters under submission." The Committee also finds that the enhanced research ability through the addition of the LexisNexis database will "better enable the judge to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary...to all the judges activities including the discharge of the judges' adjudicative...responsibilities." See comment to Rule 2.5 (B). The joint contract would also enhance the judge's ability to comply with Rule 2.5 (C) which mandates a judge to dispose promptly of the business of the court. Access to a larger database of legal opinions would enable the judge to dispose of matters more promptly, efficiently and fairly which is consistent with the comment to Rule 2.5 (C).

With respect to Rule 3.13 because the AOC would serve as a joint party to the contract and the cost of the contract would be paid from state general funds, entry into the joint contract by AOC would not run afoul of Rule 3.13 regulating acceptance of gifts. The access through the DOJ contract via AOC does not constitute a "gift."

Conclusion

In conclusion, our review indicates that the proposed addition of the AOC to the DOJ's existing research contract, under the circumstances presented, is not violative of the Delaware Judges' Code of Judicial Conduct.



The Hon. Jan R. Jurden
For the Committee



The Hon. Kenneth M. Millman
Chair, Judicial Ethics Advisory Committee

cc: The Hon. Kenneth M. Millman
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