

## MEMORANDUM

TO: Judicial law clerks and interns

FROM: Advisory Committee on Judicial Conduct

SUBJECT: Public statements, protests, and financial support concerning controversial causes

The Advisory Committee on Judicial Conduct recently received inquiries about what law clerks and interns may say and do about the pressing issues of the day, including police conduct and racial inequality. We offer the following advice, which reflects the Committee's views about the types of activities that are and are not consistent with the Code of Judicial Conduct.

Because of the sensitivity of these issues in these polarized times, we strongly encourage law clerks or interns to consult with the judge for whom they are working before they make a public statement relating to current controversies. We equally encourage law clerks and interns, as well as judges, to consult with members of the Advisory Committee about the advice in this memorandum.

### **General principles**

The basic principle is stated in our summary of ethical guidelines for law clerks contained in Appendix A (pages 46-48) of the Code of Judicial Conduct for the District of Columbia Courts: law clerks "should not take a public position on any controversial issue, whether or not the issue is likely to come before the court." See [2018 Edition of the Code of Judicial Conduct for the District of Columbia Courts, Appendix A](#).

This rule is based on the unique role and responsibilities of the judicial branch. The judiciary must be independent, fair, and impartial not only in fact but in appearance. Law clerks and interns have a duty to uphold the independence and integrity of the judiciary, whether they are on duty or off. Although law clerks and interns are not judges, and are not authorized to speak for the court, their words and actions may reflect on the court.

The rule is objective and narrowly tailored to maintain public trust in the court as a neutral arbiter of disputes. It does not completely bar law clerks and interns from the marketplace of ideas, nor does it proscribe all public speech about matters in public controversy. What it prohibits are public statements by law clerks and interns that may reasonably be perceived as "taking a side" in public controversies, where doing so reasonably could raise concerns about the clerk's or intern's independence and impartiality. This prohibition thus is not limited to public statements that are overtly political or partisan. And it should be borne in mind that, depending on the context and other circumstances, a particular statement on a matter in public controversy that a law clerk or intern reasonably believes should not be controversial nonetheless may reasonably be interpreted by others as implicitly conveying a controversial message or aligning the speaker with one side in a public controversy.

This rule is not based on the premise that all opinions about these issues are equally reasonable. Rather, it is rooted in the imperative that the court be impartial not only in fact but in

public perception. As a result, law clerks and interns may not take sides in these debates no matter how strongly the facts support the position that they advocate.

As we stated above, the rule against taking a public position on controversial issues applies whether or not the controversy is likely to arise in a case before the court. However, it is worth emphasizing that the issues recently in the forefront of public attention already have come or are likely to come before the Superior Court and other courts, which amplifies the importance of safeguarding the court's neutrality. The D.C. courts have criminal and civil cases involving the lawfulness of police conduct, destruction of property during alleged riots, and the lawfulness of the recent curfew and other measures relating to the protection of public health and safety. Public statements relating to issues that arise in pending and impending cases may raise genuine questions about the court's ability to be impartial.

Law clerks and interns may publicly affirm their commitment to core principles of equality and non-discrimination. These principles are codified in federal and state law, including the District of Columbia Human Rights Act. Likewise, they are embodied in the Code of Judicial Conduct: Rule 2.3 requires judges to perform their duties without bias or prejudice and Rule 2.6 requires the judiciary to ensure that everyone has the right to be heard according to law. No reasonable person can question the impartiality of a law clerk or intern who affirms these principles, and indeed a refusal to endorse these principles may raise questions about a law clerk's or intern's commitment to uphold them. However, law clerks and interns may not express their commitment to these principles in ways that reasonably may call into question their ability to address factual and legal issues in specific cases fairly and impartially. For an example of a permissible public statement, please see the videotaped message from Chief Judge Anna Blackburne-Rigsby, posted on the D.C. Courts website: [Message from Chief Judge Anna Blackburne-Rigsby on Ensuring Equal Access to Justice for All](#).

This rule applies to all speech available to the public, including on social media, and it applies even if law clerks or interns do not identify their association with the court. It is difficult, if not impossible, to control dissemination of statements on social media, nor can law clerks or interns safely assume that people will not know who they work for.

We emphasize four additional points about the limits of this rule.

First, this restriction lasts only for the duration of the law clerk or intern's employment by the court. Afterwards, law clerks and interns are free to express their opinions publicly, subject to the continuing obligation to maintain the confidentiality of information obtained in the course of their employment.

Second, law clerks and interns may express their position on current political and other hot-button issues to close family members and friends, with the understanding that they will not share publicly the law clerk's or intern's personal opinion.

Third, this restriction on involvement in political and controversial matters does not apply to spouses and other members of a law clerk or intern's family. The restriction is personal to the law clerk or intern.

Fourth, as discussed more fully below, law clerks and interns generally may participate in, and support through dues and contributions, professional activities and organizations that are not primarily devoted to advocacy for one side or another of any controversial or partisan issue.

### **Public statements**

The Advisory Committee has been asked specifically about the propriety under the Code of Judicial Conduct of public statements in support of the Black Lives Matter movement. The movement stands for the principle that treatment by the police should not turn on the color of a person's skin, and as we stated above, law clerks and interns may publicly endorse such core principles as the obligation of police not to discriminate on the basis of race. Law clerks and interns also may discuss in public statements a history of racism in police departments and in other public and private institutions, including the courts. However, the Black Lives Matter movement means different things to different people, and reasonable people can also view general support for the movement to mean support for major and controversial changes in police practices, governance, and funding. We therefore advise law clerks and interns not to publicly express opinions or positions on current controversies about the Black Lives Matter movement, police conduct in specific cases, systemic or institutional racism in current police practices, or the response of federal, state, or local governments to these issues. As we explained above, the Code of Judicial Conduct and corollary ethical rules for law clerks do not regulate what law clerks and interns think or discuss with close family members and friends, but they do prohibit law clerks from publicly taking sides in these matters of public controversy.

### **Participation in rallies and protests**

Consistent with the restriction on taking public positions, law clerks and interns should not attend rallies or protests concerning issues that have become the subject of intense public debate. A law clerk or intern's attendance can reasonably be interpreted to constitute endorsement of the messages conveyed in speeches, chants, and signs, and one cannot control what other participants in rallies and protests do or say.

### **Membership and financial contributions**

Law clerks and interns may not belong, or make a financial contribution, to an organization that is substantially involved in political activities or advocacy for one side of a matter of public controversy if membership or the contribution can reasonably be perceived as public endorsement of the organization's political or advocacy positions. However, law clerks and interns are not necessarily precluded from joining or donating to an organization solely because the organization made a public statement that they could not personally make or because the organization is involved in litigation or other activities in which they may not personally participate. Whether membership or a financial contribution is permissible must be determined on a case-by-case basis, taking into account the overall nature and activities of the organization. In response to the recent inquiries the Advisory Committee has received, we advise that law clerks and interns should refrain from joining or donating to those Black Lives Matter organizations or other organizations that are actively involved in politics, public advocacy, and litigation, just as they should not join or donate to organizations whose mission is to defend the police in current public controversies.