October 21, 2020

JIC ADVISORY OPINION 2020-25

Rule 2.13(c) of the Rules of Judicial Disciplinary Procedure gives the Judicial Investigation Commission the authority to promulgate advisory opinions on ethical issues pertaining to the Code of Judicial Conduct. The Rule provides that "[t]he Commission may render in writing such advisory opinion as it may deem appropriate. *Id.*

This advisory opinion concentrates on the question of whether a judge may voluntarily write letters of support on behalf of litigants in any civil or criminal matter. To address the question, the Commission has reviewed Rules 1.3, 2.10 and 3.3 of the Code of Judicial Conduct which state:

Rule 1.3 – Avoiding Abuse of the Prestige of Judicial Office

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.

Rule 2.10 – Judicial Statements on Pending and Impending Cases

A. A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

B. A judge shall not, in connection with cases, controversies or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

C. A judge shall require court staff, court officials and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

D. Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures and may comment on any proceeding in which the judge is a litigant in a personal capacity.

E.   Subject to the requirements of paragraph (A), a judge may respond directly or indirectly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

Rule 3.3 – Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or **otherwise vouch for the character of a person in a legal proceeding, except when subpoenaed to testify.**

(emphasis added).

Comment [1] to Rule 1.3 provides:

> It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

Comment [1] to Rule 2.10 states that the "restrictions on judicial speech are essential to the maintenance of the independence, integrity and impartiality of the judiciary. Comment [2] notes that the rule "does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. . . . In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly."

The Supreme Court of Appeals of West Virginia addressed a similar issue in *In re Rice*, 200 W. Va. 401, 489 S.E.2d 783 (1997). A magistrate was charged, in part, with violating the former equivalent of Rule 1.3 for contacting the arresting officer and the prosecutor's office about misdemeanor public intoxication and simple possession charges pending against his son-in-law without divulging the relationship. Specifically, the magistrate asked the officer if he could "help" the defendant. In turn, the officer asked an assistant prosecutor to dismiss the charges. The magistrate also called the assistant prosecutor and asked about the validity of the police search. Thereafter, the charges against the defendant were dismissed with a note in the assistant prosecutor's file in which stated, "dismissed per officer's agreement per Magistrate Rice."

Following a hearing, the Judicial Hearing Board ("JHB") found that the magistrate had violated the Code by contacting the officer and the prosecuting attorney reasoning that "the mere fact that contact was made presents the appearance that Mr. Rice attempted to utilize the prestige of his office to gain favor for a member of his family." *Id.* at 403, 489

S.E.2d at 785. The JHB recommended that Magistrate Rice be admonished. In adopting the recommendations of the JHB, the Supreme Court stated:

> [I]t is improper for a judge to take advantage of his position to reap a personal benefit – or even to appear to do so . . . . [A] judge, whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions. Achievement of this goal demands that a judge, in a sense, behave as though he is always on the bench

Id. at 404, 489 S.E.2d at 786 (citations omitted).

Based upon the foregoing, the Commission is of the opinion that it would be improper for any judge to voluntarily write a letter of support on behalf of any litigants in any civil or criminal matter pending or impending in any court or administrative venue. This would also include but not be limited to any disciplinary proceeding involving judges or lawyers as respondents. At all times judges should strive to remember that the standard for what constitutes abuse of power rests not with the final outcome but with the level of coercion acceptable to humankind. In other words, if it raises a hint of suspicion the conduct should be avoided at all cost.

Sincerely,

The Honorable Alan D. Moats, Chairperson
Judicial Investigation Commission

AMD/tat