



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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Charleston, West Virginia 25304
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January 21, 2021

Re: JIC Advisory Opinion 2021-02

Dear Judge _____ :

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows:

You sentenced a defendant in a criminal case to the penitentiary. A few days later, you received a message on Facebook from a third party alerting you to various posts allegedly made by the defendant after the hearing. The posts did not contain any threats, but the author made negative comments about and/or engaged in the name calling of the victim, the victim's relative who spoke at the sentencing hearing and/or you. This is not the first time this has happened. You want to know if you are permitted to: (1) send the information you received to counsel and place a copy in the court file; and (2) discuss this issue with the Commissioner of the Division of Corrections and Rehabilitation ("Corrections").

To address your questions, the Commission has reviewed 1.2, 1.3 and 2.9 of the Code of Judicial Conduct which provide:

Rule 1.2 Confidence in the Judiciary

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

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 2.9 Ex Parte Communications

- (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter. . . .
- (B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
- (C) A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Comment [1] to Rule 1.2 states that “[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge. Comment [2] notes that “[a] judge should expect to be the subject of public scrutiny that might be viewed as a burdensome if applied to other citizens and must accept the restrictions imposed by the Code.” Comment [3] provides that “[c]onduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary.” Comment [5] sets forth the test for appearance of impropriety as “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s . . . impartiality . . . to serve as a judge.

Comment [1] to Rule 1.3 states that “[i]t 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.” Comment [1] to Rule 2.9 provides that “[t]o the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.” Importantly, Comment [6] states:

The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. Importantly, this provision is not intended to refer to routine court records available from the bench, as long as the records are disclosed to and subject to review by both parties.

Based upon the foregoing, you should not review or consider any Facebook posts about the subject of a pending or impending case that are referred to you by a third party. Any similar ex parte communication that you receive should immediately be referred to both the prosecutor and defense attorney to investigate its truthfulness and to take any further action that they may deem appropriate. You should not contact Corrections and alert them to the situation since you do not know if and you cannot investigate whether the defendant in fact posted the comments. Additionally, by doing so, you would create an appearance, however incorrect it might be, that you are trying to use your position to effectuate the outcome of a parole hearing.

The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat