

No. 19770 --In the Matter of John Hey, Judge of the Thirteenth
Judicial Circuit

Neely, J. concurring in part and dissenting in part:

Although I dissent to the severity of the punishment, I join with the majority in their attempt to imbue the judicial disciplinary process with equity and justice and, therefore, concur in all syllabi.

Although the majority has worked arduously to strike a proper balance, I nonetheless believe that the Board's severe treatment of Judge Hey was motivated, in part, by the unpopular position advocated by Judge Hey in his public statement. Members of the judiciary are required by the Judicial Code of Ethics [1976] to refrain from commenting on a pending proceeding (Canon 3A(6)) and "to contribute to the improvement of the law, the legal system, and the administration of justice. . . ." Commentary, Canon 4. The canons, especially for an elected judiciary, create a narrow path that is similar to the Straits of Messina. If a judge's comments stray to a specific case, the snarling dogs of Scylla await; if a judge fails to maintain a public image, the whirlpool of Charybdis awaits.

In appearing on nationwide television, Judge Hey was attempting to make a public statement (Slip op. note 3); however,

he strayed to the merits of a pending case. Because of Judge Hey's politically incorrect position¹, the majority's dearth of judicial sympathy results in a severe sanction. If Judge Hey, while attempting to make a statement supporting recycling (or any other currently politically correct position), had strayed into the merits of a case, I believe that the sanction would reflect substantial judicial sympathy because of the tensions inherent in an elected judiciary.²

Because the sanction of a public censure is imposed to regulate the content of Judge Hey's speech, I dissent. If Judge Hey had spoken "correctly" to condemn a child rapist, the sanction, at most, would have been an admonishment. Accordingly, I believe the penalty too harsh.

¹See Judith R. v. Hey, 185 W. Va. 117, 125, 405 S.E.2d 447, 455 (1990) (Brotherton, J., concurring, in part and dissenting, in part) ("The majority is clearly wrong in permitting the fourteen-year-old child, Melissa R., to remain in the custody of her mother, Judith R., while she is openly co-habiting with a man and his family.")

²See, Judicial Inquiry Comm'n. of W. Va. v. McGraw, 171 W. Va. 441, 442, 299 S.E.2d 872, 873 (1983) for an example of the substantial judicial sympathy extended to Justice McGraw's "public statements regarding the judiciary's independent budget-making power under the West Virginia Constitution. (Footnote omitted)."