



JUDICIAL INVESTIGATION COMMISSION

WV Judicial Tower - Suite 700 A
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Charleston, West Virginia 25304
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October 20, 2023

Re: JIC Advisory Opinion 2023-23

Dear Judge :

Your request for an advisory opinion to Counsel was reviewed by the Judicial Investigation Commission at its October 13, 2023 meeting. The factual scenario giving rise to your request is as follows:

Beginning in August 2023, you have been asked on three separate occasions to appear on a national television news program. You actually appeared on the show two times – in August and September 2023 but declined the third appearance on October 13, 2023. The first story involved the FBI Highway Serial Killings Initiative which is investigating murders of multiple victims found near U.S. Highways and a possible link to one or more serial killers. Many of those murders remain unsolved. The host said he didn't realize that there were so many deaths along the highways. In your response you stated that "We've known that for a long time actually in the law enforcement community that is." After having been contacted by our counsel, you acknowledged that as a judge you must remain neutral and detached and that you cannot comment on behalf of law enforcement because then it could appear, however wrong it may be, that you are biased in favor of law enforcement.

Your second appearance involved a case in Nevada where two juveniles were charged with the murder of a bicyclist. In that story you were asked what you thought about a comment made by the prosecutor that it was too early to tell whether the teens would be charged with the death penalty. The host called the prosecutor's comment "weird" and that she "couldn't make sense of it" in light of the fact that juveniles

generally cannot face the death penalty or receive an automatic life sentence for murder. Your response was that you had the same understanding as the host unless there was some nuance in Nevada law that you were not aware of but that “I agree with you on that. The Supreme Court has been very clear that juveniles are not to be executed. In 2015, Nevada actually enacted legislation that bars life without parole for juveniles as well. So, I’m not quite sure either, I saw that in reports and thought the same thing.” The host replied, “Weird. Weird.”

The show’s third contact involved a request for you to appear to discuss media reports about an Oklahoma judge who was facing disciplinary action for multiple texts she made to the bailiff in her courtroom allegedly making fun of attorneys, jurors and witnesses appearing in a first-degree murder case that the judge was presiding over. The judge is also alleged to have demonstrated bias in favor of the defense and against the prosecutor during the trial. At the time you declined the interview you did not know what the host would ask you about the matter. However, you assumed it would relate generally to Oklahoma’s judicial disciplinary process.

In your request for a formal opinion, you want to know if it is permissible for you to appear on television to address such matters if you limit your remarks strictly to the procedural aspects of the case like you say you did for the September 2023 interview. To address your question, the Commission has reviewed Rules 1.2, 1.3, 2.2, 2.10(A), (C) and (D) and 3.1(A), (B), (C) and (E) of the Code of Judicial Conduct which state:

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.

Rule 2.2 – Impartiality and Fairness

A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.

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. . . .
- (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.

Rule 3.1 -- Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) Participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) Participate in activities that will lead to frequent disqualification of the judge;
- (C) Participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity or impartiality;
- (E) make use of court premises . . . equipment or other resources except for incidental use for activities that concern the law, the legal system or the administration of justice unless such additional use is permitted by law.

The Comments to the various Rules provide some instruction to the issues at hand. The Comments to Rule 1.2 state:

- [1] Public 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.

- [2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.
- [3] Conduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary. . . .
- [4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.
- [5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is 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 honesty, impartiality, temperament, or fitness to serve as a judge.

Comment [4] to Rule 1.3 notes that “[s]pecial considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law.” Importantly, the comment states that “[a] judge should not permit anyone associated with the publication of such materials to exploit the judge’s office in a manner that violates this Rule or other applicable law.” Comment 2 to Rule 2.2 provides that “[a]lthough each judge comes to the bench with a unique background and personal philosophy a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.” Comment [1] to Rule 2.10 states that “[t]his Rules restrictions on judicial speech are essential to the maintenance of the independence, integrity and impartiality of the judiciary.”

In *In the Matter of Hey*, 188 W. Va.545, 425 S.E.2d 221 (1992) (“Hey I”) the West Virginia Supreme Court of Appeals publicly censured a judge for violating former Code of Judicial Ethics Canon 3A(6)¹ for going on a national television program and making comments about a case over which he presided that was still pending before the

¹ Canon 3A(6) states:

A judge shall abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public

high court. The judge gave specifics of the case and made negative comments in a custody case about the child's educational performance, the child's church attendance and the mother's fitness and character as a custodial parent. *Id.* The Judge argued that he only technically violated the Rule because the matter was no longer pending in his court. *Id.* The Court disagreed and said that because his comments involved a matter that was pending or impending in "any court" he violated the Code. *Id.*

The Court also took issue with the Judicial Hearing Board's ("JHB") recommended finding that the judge's conduct occurred outside his official duties and that the comments "were not offered to explain for public information the procedures of the Court." In Syllabus point 2, the Court stated that "a judge's public statements shall be in 'the course of their official duties' when the statement is part of an official duty, or related to an official duty, or is sought from or given by the judge because of his or her official position." *Id.* The Court found that the only reason the judge was invited to appear on the program was because he was the presiding judge. *Id.* The Court also stated that his "comments were directly related to his official position and thus arose in the course of his official duties." *Id.* at 549, 425 S.E.2d at 225. Nonetheless, the Court still found that he violated the Canon and ordered him disciplined. Therefore, *Hey I* also stands for the proposition that a judge may meet the exceptions but still violate the Canon or rule.

The day after the judge was disciplined in *Hey I* he went on the radio and discussed his censure and the behavior of a member of the Judicial Hearing Board ("JHB") who he said walked out while the first interview was playing and "[d]idn't even view 15 minutes of it so I'm not done with her yet. I want her to understand that. I hope she or one of her friends are listening." In *the Matter of Hey*, 192 W. Va. 221, 452 S.E.2d 24 (1994) ("*Hey II*"). Taking the judge's comment as a threat, the JHB member filed a complaint and the JIC charged him, in part, with violating Canon 3A(6) of the Judicial Code of Ethics. *Id.* At the conclusion of the hearing, the JHB found there was insufficient evidence to find any violation and recommended that the charges be dismissed. *Id.* The Supreme Court agreed stating in its Syllabus points:

2. The State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests.
3. The State's interest in maintaining and enforcing the judicial canons against judge's speech are sufficiently served by their specific prohibitions so that the general prohibitions in Canons 1,

statements in the course of their official duties or from explaining for public information the procedures of the court.

2, and 3 of the Judicial code of Ethics (and now the Code of Judicial Conduct) may not be used to punish judges for their public remarks that do not concern a pending or impending matter and that do not violate either a specific prohibition or some other law.

4. A judge may not be disciplined consistent with the First Amendment . . . for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel and stated his intention to take some reactive and lawful measure against the panel member.

Id. Thus, the judge was not disciplined because he was commenting on a proceeding in which the judge is a litigant in a personal capacity which is an exception to Rule 2.10.

In *In the Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993), the State Supreme Court declined to discipline a magistrate for violating Canon 3(A)(6) of the Judicial Code of Ethics. The magistrate's wife was running for circuit judge and her opponent was an assistant prosecutor in another county. *Id.* During the race, someone ran an ad against the assistant prosecutor in a local newspaper criticizing his decision not to prosecute a coal truck driver involved in a fatal crash. *Id.* The magistrate was heavily involved in his wife's campaign. *Id.* In dismissing the Canon 3(A)(6) charge against the magistrate,² the Court stated:

However, because the [JHB] failed to prove, by clear and convincing evidence that [the Magistrate] caused the advertisement to be published, we cannot find a violation of Canon 3A(6). Moreover, the classification of the fatal accident as a "pending or impending proceeding" is at best dubious because by the 1992 primary, the charges in the fatal accident had been dismissed for almost two years. (The charges were dropped on June 27, 1990).

Id. at 373-374, 438 S.E.2d at 553-54. Accordingly, the Court clearly indicated another exception to the Rule where the matter is not pending or impending before any Court.

Court procedures is another exception but it appears that those are limited to judicial court activities. Charging a defendant in a criminal case is the function of the prosecutor and/or law enforcement and not a judicial function or court procedure.

² The magistrate was publicly censured for having violated Canons 2 and 7B(1) of the former Code of Judicial Ethics. *Id.*

Therefore, commenting about charges implemented by a prosecutor outside of a pleading or hearing would not be proper for a judge.

Over the years, the JIC has issued several opinions on the subject. In JIC Advisory Opinion 2022-21, the Commission stated that a judge could not concurrently serve as a West Virginia Judge and a television judge on a national Judge Judy type television show. In JIC 2019-21, the Commission told a judge that he/she could not appear on the nationally televised Nancy Grace show to discuss cold cases from other states since those matters could one day come before a court. In JIC 2019-16, the Commission told a judge that he could not speak to the media outside of court about a DHHR backlog since a rule to show cause was currently pending about the matter before the judge. In JIC Advisory Opinion 1992-17, we told an individual who was about to be sworn in as a judge that upon taking office, he/she could no longer serve as a television legal correspondent since it would be “fraught with potential dangers for a sitting judge.”

In *In re Broadbelt*, 683 A.2d 543 (N.J. 1996), a New Jersey Supreme Court considered whether it was appropriate for a well-respected municipal judge to continue to appear on national television as a guest commentator on high profile cases. *Id.* At the time, the judge had made over 50 appearances on Court TV and CNBC and had commented on cases like the O.J. Simpson trial. *Id.* The New Jersey Supreme Court said the equivalent to our Rule 2.10 covered cases even in out of state jurisdictions since it said, “in any court.” The Court also stated that the judge should not have served as a television commentator. *Id.* The Court found that to do so violated the State’s equivalent to our Rule 1.3. *Id.* The Court noted that though the judge himself received no payment, his regular identification with certain programs lent them the prestige of his judicial office. *Id.*

The Court rejected the Judge’s First Amendment arguments. *Id.* The Court stated that the judge’s speech may be restricted if the Rule furthered a substantial governmental interest. *Id.* The Court found that the interest included preserving the integrity of the judiciary and the ability to maintain the public’s confidence in the same. *Id.*

The leading treatise on judicial ethics stated with respect to *Broadbelt*:

The New Jersey Supreme Court did not spell out in detail how comments such as [the Judge’s] might erode public confidence. Although he spoke about the merits of pending cases, he did not address cases from within his own jurisdiction. Nonetheless, it seems clear that regularly acting as a television commentator can have a negative impact on the public perception of judges. The problem is not only that the judge’s statements concerning pending cases might influence outcomes in another state, although that

possibility cannot be completely disregarded. The greater danger is that the judge's own work will be influenced (or appear to be influenced) by a desire to maintain the status of a televised expert. Will the networks want a tough-as-nails judge, a flamboyant judge, an innovative judge, a weeping and compassionate judge, or perhaps even a poetic judge? What in-court persona might the judge adopt (or appear to adopt) in order to maintain media visibility? No matter; the very concept of judging is distorted once judges actually become performers (as opposed to speakers or educators) for outside audiences. That is the threat of the integrity of the judiciary.

Charles Gardner Geyh et al., *Judicial Conduct and Ethics* §10.06[5] at 10-52 (5th ed. 2013).

In *United States v. Microsoft Corp.*, 253 F.3d.34 (D.C. Cir. 2001), a judge's comments to the press while the case was still pending required his disqualification from the case. The judge held secret interviews with certain reporters before the case concluded. The judge discussed the credibility of certain witnesses, whether certain legal theories were valid, the level of defendant's fault, and remedies. *Id.* The higher court found that the judge violated Canon 3(A)(6). Specifically, they found that the judge's comments were made with the knowledge that it "would eventually receive widespread dissemination." The Court said if the judge's intent was to educate the public he "could have held his tongue until all appeals were concluded." With respect to the appearance of impartiality, the Court held:

The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge's impartiality. Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges secretly share their thoughts about the merits of pending cases with the press. Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. Discreet and limited public comments may not compromise a judge's apparent impartiality, but we have little doubt that the District Judge's conduct had that effect. Appearance may be all there is, but that is enough to invoke the Canons. . . . Judge Learned Hand spoke of 'this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire.' Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regard as the 'cold neutrality of an impartial judge.' Cold or not, . . . judges must maintain the appearance

of impartiality. What was true two centuries ago is true today: ‘Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges . . . Members of the public may reasonably question whether the District Judge’s desire for press coverage influenced his judgments, indeed, whether a publicity seeking judge might consciously or subconsciously seek the publicity-maximizing outcome. We believe, therefore that the District Judge’s interviews with reporters created an appearance that he was not acting impartially.

Id. at 115 (citations omitted).

Based upon the foregoing, the Commission is of the opinion that a judge cannot go on television or other media and comment when the topic involves a pending or impending case before any Court. A judge may appear to address Court procedures if the subject of the interview is about general court procedures and not tied to any specific pending or impending matters. 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