

Wyoming Supreme Court Judicial Ethics Advisory Committee
W.S.C.J.E.A.C. Advisory Opinion 2011-01

QUESTION PRESENTED:

May a judge “contribute” his or her “views on matters intended to improve the judicial system.” In particular, the requesting judge would like to be able to make it publically known that the requesting judge believes, based on the requesting judge’s experience as a judge, that the maximum period of incarceration for a fourth or subsequent DUI (as provided in W. S. § 31-6-323(c)), should be extended from two to five years.

APPLICABLE PROVISIONS OF THE WYOMING CODE OF JUDICIAL CONDUCT:

Canon 1. A Judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 1.1. *Compliance with the Law.*

A judge shall comply with the law, including the Code of Judicial Conduct.

Rule 1.2. *Promoting 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 knowingly allow others to do so.

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:

* * *

(C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;

Rule 3.2. *Appearances before Governmental Bodies and Consultation with Government Officials.*

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law, the legal system, or the administration of justice;

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Rule 4.1 *Political and Campaign Activities of Judges and Judicial Candidates in General.*

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(6) engage in any other political activity except on behalf of measures to improve the law, legal system or the administration of justice or except as permitted under the sections of this Canon.

* * *

Preamble.

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

* * *

Terminology.

“**Impartial,**” “**impartiality,**” and “**impartially**” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, and 4.2.

“**Independence**” means a judge’s freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

“**Integrity**” means probity, fairness, honesty, uprightness, and soundness of character. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

DISCUSSION:

The Wyoming Code of Judicial Conduct ("the Code") begins with a Preamble, which sets forth general principles for judges. The first paragraph of the Preamble lays the foundation for what is to follow, and, in the Committee's view, establishes the framework within which questions of judicial conduct should be evaluated:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.

The second paragraph of the Preamble sets forth the standard against which judicial conduct should be measured: "Judges should . . . aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." The question, therefore, is whether a judge making his or her beliefs known about the provisions of a statute will "ensure[] the greatest possible public confidence in [the judiciary's] independence, impartiality, integrity, and competence."

After several introductory sections, the Code begins with Canon 1. "A Judge shall uphold and promote the independence,¹ integrity,² impartiality³ of the judiciary, and shall avoid impropriety⁴ and the appearance of impropriety."⁵ As noted above, this Canon is not binding. Rather, Canons "state overarching principles of judicial ethics that all judges must observe . . ."⁶

The rule which follows, 1.1, specifies the behavior which will achieve the goals of the Canon. "A judge shall comply with the law, including the Code of Judicial Conduct."⁷ Not only

¹ "Independence" means "a judge's freedom from influence or controls other than those established by law." WYOMING CODE OF JUDICIAL CONDUCT, Terminology (LexisNexis 2010).

² "Integrity" means "probity, fairness, honesty, uprightness, and soundness of character." *Id.*

³ "Impartiality" means the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." *Id.*

⁴ "Impropriety includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." *Id.*

⁵ *Id.* at Canon 1.

⁶ *Id.* at Scope [2].

⁷ *Id.* at Rule 1.1.

should a judge comply with the law, it should appear that the judge's decisions are not unduly influenced by any source other than the law. "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."⁸ The importance of appearances is explained in the commentary. "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."⁹

Were a judge to publicly make known his or her position on whether the maximum period of incarceration for a crime should be extended (or shortened), he or she would be engaging in extrajudicial activity (any activity which is not part of the judge's judicial duties). The Code addresses such conduct.

Rule 3.1 specifically regulates judges' extra judicial activities. "[A] judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."¹⁰ The issue is the same as discussed previously. That is, would a judge publicly expressing his or her position about a current or proposed statute "undermine the judge's independence, integrity or impartiality"? As part of that analysis, one must consider the appearance it would create.

The ultimate manifestation of a proposal to change a statute would be the introduction of legislation to amend, modify or repeal the statute. The legislative process necessarily involves legislative hearings at which a judge might be asked to testify. Rule 3.2 regulates judges' appearances before legislative or executive bodies. "A judge shall not appear voluntarily . . . consult with, an executive or a legislative body or official, except . . . in connection with matters concerning the law, the legal system, or the administration of justice."¹¹

The foregoing provision could be read to permit testimony about a change in law. It is the Committee's opinion, however, that Rule 3.2 applies to general matters, such as the budget

⁸ *Id.* at Rule 1.2.

⁹ *Id.* at Rule 1.2, cmt. [1].

¹⁰ *Id.* at Rule 3.1(C).

¹¹ *Id.* at Rule 3.2(A).

for a court or court system, not specific proposals about statutory changes.¹² Further, Rule 3.2 should be read in the context of the Code. In all their activities, professional or personal, judges should “aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”¹³

Judges’ political activities are subject to Canon 4. Rule 4.1 says: “a judge . . . shall not . . . engage in any other political activity except on behalf of measures to improve the law, legal system or the administration of justice or except as permitted under the sections of this Canon.” Again, one may argue that speaking or otherwise making a judge’s beliefs known about a particular statute relates to “the administration of justice.” Once again, however, the Committee interprets the language of Rule 4.1 to apply to generic matters, such as the need for an increase in a court’s budget, and not specific legislative proposals.

In the final analysis, while the Committee believes that it is possible to read selected provisions of the Code to permit a judge to make his or her beliefs about a particular statute known, it is more appropriate to read the Code as a whole. Accordingly, a judge should consider the perspective of a litigant who will be appearing before that court, hoping for and believing that justice will be done. If the litigant knows or has reason to know that the judge before whom the litigant is appearing has publicly taken a position on whether a sentence should be increased (or decreased), the party is likely to perceive that the judge has a predisposition one way or the other. Such a perception flies in the face of Canon 1 of the Code, which declares that: “A Judge shall . . . avoid impropriety and the appearance of impropriety.” After all, as the Code also notes, “[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.”¹⁴ Undermining public confidence in the judiciary, therefore, and not supporting or endorsing a particular change in a law, should be a judge’s primary concern.

The answer to the question is “no.” A judge should not make known his or her opinion about whether the maximum sentence for a 4th or subsequent DUI should be increased (or decreased or left alone).

The committee does not want to discourage judges from being involved in efforts, particularly community or group efforts, to improve the administration of justice. So long as a judge does not take a public position on a particular issue, such activities do not create an

¹² See *Id.* at Rule 3.2, cmt. [2] (“These rules [in the Code] should not be construed to prohibit a judge from contacting and/or consulting with legislative and/or executive officials concerning judicial budgets, compensation and benefits as a whole.”)

¹³ *Id.* at Preamble [2].

¹⁴ *Id.* at Rule 1.2, cmt. [3].

appearance of impropriety. On the contrary, judges can and should be visible participants in efforts to improve the administration of justice.¹⁵

Judges are in a unique position to know and understand the effects of laws or other matters which come before them. Judges should use that knowledge and understanding to help educate others, including legislators, other government officials or employees, the media or the public, about the effects of such matters, including, for example, the result of the current two-year maximum period of incarceration for a fourth or subsequent DUI. Judges may, and should, respond to inquiries with empirical or anecdotal evidence about their experiences with the law or matter in question. Such information can play a vital role in educating others. Education, not advocating for a particular result, is both ethically permissible and will improve the administration of justice.

FINALIZED AND EFFECTIVE this 21st day of January, 2011 by the Wyoming Supreme Court Judicial Ethics Advisory Committee.

¹⁵ See *Id.* at Rule 4.2, cmt. [3] (“A judge is encouraged to educate the public about the role of the judiciary and the process of judicial selection. Any such educational efforts are not campaign activities.”)

PRICE, District Judge, dissenting.

I respectfully dissent with the decision of the committee because I believe its approach is too conservative. The committee seems to base its decision on how an attorney practicing before a judge or his client would interpret the judge's actions were the judge to publicly state he believes the maximum period of incarceration for a fourth or subsequent DUI should be extended from two to five years. I do not believe that a judge stating his opinion on this matter or others like it leads to the appearance of impropriety as suggested by the committee's opinion, but rather that a judicial officer has an ethical duty to speak on matters concerning the law and the administration of justice as allowed by WCJC Rule 3.2(a). Furthermore, while Rule 4.1(a)(6) prohibits political activities, it specifically provides that a judge may engage in political activity to "improve the law, legal system or the administration of justice."

Looking to the ethics opinions of several other states, I believe that it is appropriate for a judge to draw attention to areas of the law that need improvement. Texas specifically allows judges to draft legislation and consult with legislators and executive officers on matters which would improve the law, the legal system and the administration of justice. Texas Ethics Advisory Opinion 76 (1985). An advisory opinion from Washington states "[a] judge may comment on the effectiveness of legislation and/or an initiative measure which relate[s] to the law, the legal system, and the administration of justice." Washington Ethics Advisory Opinion 89-11. Arizona has said:

Judges are, in fact, encouraged to speak and write about the law, the legal system, and the administration of justice. As the commentary to Canon 4B points out, a judge is in a unique position to contribute to the improvement of the law by recommending revisions of "substantive and procedural law and improvement of criminal and juvenile justice." However, the code does not permit a judge to act as a spokesperson and advocate for others.

Arizona Supreme Court Judicial Ethics Advisory Committee Advisory Opinion 96-09 (August 15, 1996).

I believe that the WCJC rules were drafted the way they were to provide for situations such as this. No one is in a better position to comment on the effectiveness of the laws of this state than the judges who see the same defendant coming back time and time again for the same offense. Furthermore, by taking such a conservative approach to Rule 3.2, stating it only applies to matters "such as the budget for a court or court system, not specific proposals about statutory changes," the committee is limiting the ability of a judge to comment on the law. Are judges now prohibited from writing law review articles? Articles for the state bar journal? The opinion states that the "committee does not want to discourage judges from being involved in efforts, particularly community or group efforts, to improve the administration of justice," but that is exactly what this opinion does. While I agree there is a line that should be drawn between publicly discussing an issue and advocating for a change in legislation, the decision made by the committee in this opinion limits a judge from making any comment on legal issues for which they have an ethical duty to discuss.

The answer to the first question: “May a judge ‘contribute’ his or her views intended to improve the judicial system?” should be “Yes.”

The answer to the second question: “May a judge make it publically known that, based on the judge’s experience as a judge, that the maximum period of incarceration for a fourth or subsequent DUI (as provided in W.S. §31-6-323(c)), should be extended from two to five years?” should also be “Yes,” so long as the intent or purpose is to “improve the law, legal system or the administration of justice.” In this particular matter, extension of the maximum period of incarceration is proper considering the seriousness of the offense, the effect on victims, and most importantly, the rehabilitation of the offender.¹⁶

¹⁶ § 15. Penal code to be humane. The penal code shall be framed on the humane principles of reformation and prevention.