Judicial Ethics Advisory Committee

MEMBERS:

Hon. Edwin Alderson
Municipal Judge Retired

Prof. Howard W. Brill

Hon. John Cole
Circuit Judge Retired

PRESS RELEASE

POINT OF CONTACT: DAVID J. SACHAR

501-682-1050

FOR IMMEDIATE RELEASE

February 6, 2014

The Arkansas Judicial Ethics Advisory Committee issued two Advisory Opinions. The Committee issued an opinion to Judge Gerald Kent Crow of Berryville, Arkansas and to Judge Bart Virden of Morrilton, Arkansas.

A copy of each opinion is attached.

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February 6, 2014

Honorable Gerald Kent Crow
Circuit Judge
124 North Main Street
Berryville, Arkansas 72616

Re: Advisory Opinion 2013-04

Dear Judge Crow:

You have requested an opinion of this committee concerning two questions:

1. If you respond to an attached letter to the editor of a local newspaper written by an attorney practicing in the district you represent, does it constitute retaliation against the attorney?
2. Does the attorney's comment in the letter constitute a violation of Rule 8.2 of the Rules of Professional Conduct prohibiting a lawyer from making a "statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge"

Your request contained several exhibits and consumed 60 plus pages.

In answer to the second question, this committee has no authority concerning the Rules of Professional Conduct. JEAC considers only the proposed conduct of judges under the Rules of Judicial Conduct. See Procedural Rules For The Arkansas Judicial Ethics Advisory Committee.

As to the first question: The letter to the editor written by the attorney concerns matters surrounding a DWI case in your court. The letter to the editor was written by an attorney actively involved in that case. It is your position that certain matters asserted therein are incorrect. Specifically, your request asserts the letter to the editor incorrectly stated you have disparaged one of the attorneys involved in the case; that the charge was DWI #1 in Boone County; and, that you conducted your own investigation.

Your letter outlines other matters which you believe are incorrect but which need not be detailed in this opinion.

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The Committee is of the opinion you should not comment on the letter to the editor. This is not because we conclude it would be retaliatory. No such conclusion could be made until your response or proposed response is known. On the other hand, our opinion is based on Rule 2.10(A) which states: "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 ....." While the committee does not know the status of the criminal case from which your request arose, it is clear that a complaint may be filed with the OPC concerning the conduct of members of the bar, creating an impending matter. Under the Arkansas Code of Judicial Conduct, Terminology, "impending matter" is a matter that is imminent or expected to occur in the near future. The ultimate authority presiding over such a complaint is the Supreme Court of Arkansas. Your public comments would doubtless be construed as intended to affect the outcome of any such complaint.

Moreover, Rule 1.2 requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary...". The Preamble to the Judicial Code sets forth that "An independent , fair and impartial judiciary is indispensable to our system of justice"....and...."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".

In situations such as this, judges, unlike other citizens, cannot tell their side of the story. On the other hand, the foremost concern of the judge should be to uphold the integrity of the judiciary and avoid all appearances of impropriety by accepting the restrictions on the judge's conduct.

Also, see Advisory Opinion 2000-02.

For the Committee

Judge John Cole (retired)

Judicial Ethics Advisory Committee

MEMBERS:

Hon. Edwin Alderson
Municipal Judge Retired

Prof. Howard W. Brill

Hon. John Cole
Circuit Judge Retired

February 6, 2014

Judge Bart F. Virden
P.O. Box 127
Morrilton, Ark. 72110

Dear Judge Virden:

Advisory Opinion 2014-01

You have inquired as to a possible disabling conflict with a law partner. You have been elected to serve as the part-time district judge for Conway County. As a continuing part-time judge under the Arkansas Code of Judicial Conduct of 2009, you are permitted to have a part-time practice. You practice with the firm of Gordon, Caruth & Virden. You have asked whether one of your law partners may serve a part-time deputy prosecutor for Conway County.

Discussion: Arkansas law permits a continuing part-time judge to engage in the private practice of law, and to do so with other attorneys. The Code offers general guidance for that situation. See Application, III (Continuing Part-Time Judge), Comments [2] and [3A].

This committee has previously stated: "An individual who accepts the position of a continuing part-time judge places the judicial office first in service and priority, and certain restrictions must follow." See JEAC Opinion 98-02. But our prior opinions asked whether a part-time judge could represent criminal defendants (Opinions 98-02; 98-03; 2002-04; 2005-04); could serve as a prosecutor (Opinion 2008-08); and was subject to other limitations on his private practice (Opinions 97-04; 99-02; 2005-03; 2008-01; 2004-07; 2008-04). We have not addressed activities of law partners of part-time judges.

The Code is silent as to the practice of your law partners. Accordingly, general principles of the Code must apply. For example, as a part-time continuing judge you are to recuse from certain matters. Rule 2.11. You are to avoid activities that might call for frequent disqualification. Rule 3.11. You must refrain from the appearance of impropriety. Rule 1.2.

You indicate that the Prosecuting Attorney will arrange the workload of his office so that your law partner does not appear before you representing the County; nor will your law partner handle any appeals from your court. Further limitations may be appropriate in other scenarios.

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Conclusion: Given the general arrangements that will be made, and given the part-time positions that are involved, we do not believe that an obvious conflict exists between your role as a district judge and your law partner's role as a deputy prosecutor. However, you should be alert to actual conflicts and should be prepared to recuse if necessary. In some instances disclosure to parties might be advisable. You should not share financially in the prosecutor's salary received by your law partner. You must take all necessary precautions to avoid abuse of the judicial office, and take all steps to uphold and promote the independence, integrity and impartiality of the office. Canon 1.

For the Committee,

Howard W. Brill