

California Judges Association

OPINION NO. 57

(Issued: September 29, 2006)

MEDIA APPEARANCES AND INTERVIEWS (Augments Opinions 10 and 28)

I. Introduction

Due to the proliferation of television programs about the court system, the Ethics Committee has received an increasing number of inquiries from judges who have been asked to appear on or be interviewed for media programming, including television, radio and print. This Opinion addresses the ethical issues raised by these inquiries and augments the advice given in Formal Opinions 10 (appearance on weekly commercial television program “Traffic Court”) and 28 (appearance on public television program).

II. Applicable Authority

Canon 2B(2): “A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others.”

Canon 3B(9): “A judge shall not make any public comment about a pending or impending proceeding in any court . . . This Canon does not prohibit judges from . . . explaining for public information the procedures of the court . . . Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.”

Canon 4A: “A judge shall conduct all of the judge’s extrajudicial activities so that they do not (1) cast reasonable doubt on the judge’s capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” Advisory Committee Commentary to Canon 4A: “Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.”

Canon 4B: “A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code.” Advisory Committee Commentary to Canon 4B: “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice It may be necessary to promote legal education programs and materials by identifying authors and speakers by judicial title. Judges are not precluded by their office from engaging in other social, community, and intellectual endeavors so long as they do not interfere with the obligations under Canons 2C and 4A.”

Canon 4D(2): “A judge shall not participate in, nor permit the judge’s name to be used in connection with, any business venture or commercial advertising that indicates the judge’s title or affiliation with the judiciary or otherwise lend the power or prestige of his or her office to promote a business or any commercial venture.”

Canon 5: “Judges shall . . . avoid political activity that may create the appearance of political bias or impropriety.” Canon 5A: “Judges and candidates for judicial office shall not . . . (2) make speeches

for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office.”

Standards of Judicial Administration § 39: “Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice.”

Ryan v. Commission (1988) 45 Cal. 3d 518, 542-44.

California Judges Association Formal Ethics Opinions: No. 10 (1958), No. 28 (1983)

David M. Rothman, *California Judicial Conduct Handbook* (1999) §§ 5.34, 10.05

Commission on Judicial Performance Inquiry Concerning Judge Kevin A. Ross, No. 174, Decision and Order (Nov. 16, 2005)

III. Discussion

A. Legal subject matters.

As persons who are “specially learned in the law,” judges are *encouraged* to speak, write and teach about the law, improvements in the law and the administration of justice, and they may do so on television, radio or in print interviews. This freedom is subject to many qualifications, however. A judge may not participate in media programming if participation would cast doubt on the judge’s impartiality, require the judge to comment on pending or impending cases or engage in inappropriate political activity, demean the judicial office, or interfere with the performance of judicial duties. In addition, certain media appearances must be avoided if they would lend the prestige of judicial office to a business or commercial venture.

1. Impairment of impartiality. Regardless of a program’s educational value, a judge may not appear or be interviewed for media programming that casts doubt on his/her impartiality. Situations in which the Ethics Committee has advised against media appearances or interviews for this reason include:

- A judge should not be interviewed on television or radio programs about the judge’s views on the unfairness of the Three Strikes law because the judge’s comments would create an appearance of partiality about future Three-Strikes cases that might come before the judge;
- A judge should not appear as a regular consultant on a television series based on actual criminal cases, produced by a veteran police officer and expert on the use of force, because of the program’s likely pro-law enforcement bias; and
- A judge should not appear as the only guest on a local television program that primarily features crime prevention and other police issues, as the judge’s participation would suggest that law enforcement agencies have special access to the judge.

2. Comment on pending or impending cases. A media appearance is necessarily a “public” appearance. Therefore, judges may not comment on pending or impending cases during such appearances. Canon 3B(9). For example, a judge was advised not to appear as part of a national television network panel to comment on the opening statements in the O.J. Simpson case. A judge should not write an op-ed piece for a major newspaper criticizing a U.S. Supreme Court Justice for not recusing himself in a pending case. The prohibition against commenting on pending cases extends to comments that are not directly about a pending case but, because of the circumstances, might reasonably be construed to be about a pending case. For example, a judge should not be interviewed about the challenges of handling high profile cases when the judge is currently presiding over a high-profile case because any comment the judge might make would likely be interpreted as being about the particular

pending case. Before judges agree to such interviews, the Ethics Committee recommends that they inquire about the identity of any other interviewees and request a list of proposed questions.

Canon 3B(9) does not prohibit judges from explaining for public information the procedures of the court. This exception to the public comment rule “permits a judge to publicly provide such information even in cases pending in the judge’s court.” Rothman, *California Judicial Conduct Handbook* (1999) §5.34. However, Judge Rothman reminds us that “[j]udges . . . almost never make such comments out of the concern that procedural matters could be seen as involving substance and/or that a comment might be repeated inaccurately.” *Id.* This concern is a serious one, as public comment has resulted in serious discipline for judges, including removal. The Commission on Judicial Performance removed a judge from judicial office in part for making comments on pending cases on a television talk show.¹ The Commission made clear that the legal education exemption in Canon 3B(9) refers to education of legal professionals, not the public at large. This limited exemption permits a judge to discuss pending appellate cases and issues, other than cases in which the judge has personally participated, in legal education programs and materials. The exemption does *not* extend to general public outreach activities by a judge. Because of the grave repercussions that may flow from commenting publicly on pending or impending cases, judges are strongly cautioned to avoid participation in media programming that may give rise to such comments.

3. Lending the prestige of judicial office to personal or business interests. A more complex question is posed by Canon 2B(2)’s prohibition of lending the prestige of judicial office to advance the pecuniary or personal interest of the judge or others. “The purpose of the limitation . . . is to prevent a judge’s name and/or his office from being directly or indirectly used as an instrument for attracting public attention to a sponsor, his business or his product.” Formal Ethics Opinion No. 10 (1958) p. 3. In Opinion 10, the Ethics Committee found that a judge’s participation in a weekly half-hour television show entitled “Traffic Court,” sponsored by an automobile dealers’ association, “justifie[d] a reasonable suspicion that the power and prestige of the judicial office is being utilized to promote a commercial product.” Among the factors that led to the Committee’s conclusion were: the judge’s regular weekly appearances on the show, the use of the judge’s name, official title, and judicial robes, and the prominence given the judge’s judicial office in the role on which the show is built. The danger that the program would give viewers “a fair reason to believe that there is at least a tacit official judicial approval of the reliability of the sponsor and the quality of his product” greatly outweighed its educational benefit.² Opinion 10 would prohibit a sitting judge from appearing as the judge on any of the commercially sponsored programs that purport to depict judges in courtroom settings.

When these factors do not predominate, however, there is little reason to find that a judge’s media appearance or interview “lends the prestige of judicial office” to an enterprise simply because the program is being aired for commercial profit. This is particularly the case if the media appearance or interview has solid educational content.

In situations in which teaching, speaking, and writing is permissible, there is no prohibition on the judge allowing the organization to use the judge’s title and photograph to promote the program. Judges are permitted . . . to speak, write, and lecture on the law. Although it can be argued that use of the judge’s name and title lends ‘the prestige of judicial office to advance the pecuniary or personal interests of the judge or others,’ the importance of the ability of judges to ‘contribute to

¹ Inquiry Concerning Judge Kevin A. Ross, No. 174, Decision and Order (Nov. 16, 2005), pp. 45, 57. *See also Ryan v. Commission* (1988) 45 Cal. 3d 518, 542-44.

² The opposite is true of appearances on public television programs, even those funded by grants from commercial sponsors. “[T]he public benefit” to be derived from “sparking interest in the law” and “presenting the law in a dignified and professional setting . . . far outweighs any remote possibility . . . that the judge will be perceived as a salesman for those making the grant.” Formal Ethics Opinion No. 28 (1983) p. 2.

the improvement of the law, legal system, and the administration of justice' far outweighs that concern. Rothman, *California Judicial Conduct Handbook* (1999) §10.05

Therefore, judges may ethically be interviewed for articles that someone will profit from, such as a Los Angeles Times series on trial judges. Likewise, judges may publish books for commercial publishers on appropriate topics even though book sales will personally benefit the judge. As applied to television, a media appearance is not automatically forbidden just because there are commercials on the program or it is underwritten by a commercial sponsor. No one would reasonably believe that the judge's one-time appearance on the program is an endorsement for the commercial sponsor. However, regular appearances on the program could erode this conclusion because the judge's regular involvement might promote the success of the program, whereas a single appearance would not have this effect.

4. Political activity. Because media appearances or interviews are necessarily public in nature, judges must take care in such settings not to endorse candidates for nonjudicial office or make statements that create the appearance of political bias:

- A judge who was formerly the District Attorney may not comment on the announced candidacy for that office of a former colleague; and
- A judge may not write a letter to the editor of the local newspaper stating the judge's views on the U.S. Government's stated rationale for the Iraq war because U.S. involvement in the war is a controversial political issue that does not relate to the law or the legal system.

A judge may, however, appear on a local TV program sponsored by a political party to discuss the evolution in the law relating to free speech as long as no participants are identified by political affiliation. A judge may also be the moderator of a candidates' forum as long as the judge merely introduces the candidates and is careful to maintain neutrality.

5. The media appearance must not demean the judicial office. Media programming on legal matters rarely creates a risk of demeaning the judicial office. As discussed below, this issue is much more likely to arise where the judge is participating in programming not related to the law.

B. Nonlegal subject matters.

Judges may also make some limited types of media appearances that are not related to the law, subject to the same qualifications discussed in the preceding section. Thus, a judge may:

- be interviewed for a magazine article about woman achievers;
- appear on House and Garden television to talk about the judge's garden; and
- be interviewed about an upcoming football game on a local television sports program.

However, judges should be wary of programming that is not tethered to a legal theme. Programs that seek to embarrass participants or make them the butt of humor should be avoided because of the risk that participation will demean the judicial office. Therefore, a judge should not apply to participate in "Survivor," "Meet the Parents" or dating shows. Judges should also question the purpose of invitations to participate in non-educational commercial programming. Programming that has little or no educational content creates a greater appearance of lending "the prestige of judicial office to advance the pecuniary or personal interests of the judge or others." For that reason, although a judge may ethically participate in media programming on nonlegal as well as legal subjects, judges who choose to do so are advised not to identify themselves as judges. This warning should cause a judge to avoid appearing on game shows where contestants must identify their occupations and talk about their work. As is the case with programs involving legal subject matters, judges should not make repeated appearances on commercial programs as that may be perceived as promoting the commercial success of the program or its commercial sponsor.

IV. Conclusion

As persons who are “specially learned in the law,” judges are encouraged to speak, write and teach about the law, improvements in the law and the administration of justice, and they may do so on television, radio or in print interviews. Judges may also make media appearances concerning nonlegal subject matters. A judge may not, however, engage in any of these activities, legal or nonlegal, if participation would cast doubt on the judge’s impartiality, require the judge to comment on pending or impending cases or engage in inappropriate political activity, demean the judicial office, or interfere with the performance of judicial duties. In addition, certain media appearances must be avoided if they would lend the prestige of judicial office to a business or commercial venture.

2005/06 Judicial Ethics Committee

September 29, 2006