



ADVISORY COMMITTEE
ON THE CODE OF JUDICIAL CONDUCT

Hon. Frank H. Allen, Jr., Chairman
Hon. Theresa M. Baca
Hon. Thomas A. Donnelly

June 4, 1991

Re: Judicial Advisory opinion 1991-2

In your letter of May 7, 1991, you have requested an Advisory Opinion on whether the Municipal, Magistrate and District Judges of the _____ Judicial District should publicly announce that they agreed to sentence all convicted DWI offenders to some jail sentence. The announcement would also include that the length of time that a judge would sentence a convicted DWI offender would be left to the individual judge's discretion depending on the facts and the law applicable to the DWI offense. No distinction is made in this proposed announcement between a true first offense and a subsequent offense.

Several sections of Canon 23-300 of the Code of Judicial Ethics are directly applicable to your inquiry: Canon 21-300 provides, in part:

A. ADJUDICATIVE RESPONSIBILITIES

(1) A judge shall be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interest, public clamor or fear of criticism.

(4) A judge shall accord to every person who is legally interested in a proceedings, or his lawyer, full right to be heard according to law.

(7) A judge should abstain from public comment about a pending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subparagraph does not

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

By making a public announcement regarding an agreement to sentence all DWI offenders to jail, whether a first offense or not, and by limiting this agreement to only DWI offenders, it would appear that public clamor and fear of criticism are swaying the judges of the _____ District, taking into account current publicity regarding this particular offense. It would also appear that all first offenders in the _____ District would have their full right to be heard according to law curtailed. Such an announcement, as couched in your letter, would also appear to be a public comment about all pending DWI proceedings.

People v. Glendenning, 127 Misc.2d 880, 487 N.Y.S.2d 952 (Sup. Ct. 1985), involved a prosecution for DWI in front of a trial judge who had announced a policy of rejecting plea bargains in DWI cases. The New York Supreme Court held that the trial judge's policy violated the New York Code of Judicial Conduct in three respects. First, it ran afoul of the requirement that a judge be "unswayed by partisan interests, public clamor, or fear of criticism." Canon 3(A)(1). Second, it violated the requirement that a judge "should abstain from public comment about a pending or impending proceeding in any court." Canon 3(A)(6). Finally, the court held that "'{t}he Code of Judicial Conduct is further violated when an 'announced policy' renders the Judge disqualified where his or her impartiality might reasonably be questioned." 127 Misc.2d at _____, 487 N.Y.S.2d at 955.

A number of federal cases have held that a criminal defendant is entitled to disqualify a judge who has announced a fixed opinion about the proper sentence for the crime with which the defendant is charged. See Annotation, Pretrial Comments Indicating Fixed View as to Proper Punishment for Particular Type of Crime as Basis for Judge's Disqualification Under 28 USCS. Sec 144, 29 A.L.R. Fed. 588 (1976). Under Canon 3(A)(1), the courts must fairly adjudicate each defendant's culpability on a case-by-case basis under the facts of each case. Although the New Mexico courts have not dealt with this particular problem, we conclude that the proposed public announcement would be contrary to the provisions of Canon 3(A)(1) and (6), and would create an appearance of impropriety. See Canon 21-200 ("A judge shall avoid impropriety and the appearance of impropriety in all his activities.") We also conclude that the proposed announcement may affect pending and future DWI prosecutions, creating grounds for argument that any judge subscribing to the announcement would be disqualified from hearing DWI cases.

Therefore, it is our opinion that such an announcement would be prohibited by the Canon. However, a public statement explaining the law as it stands in New Mexico would be allowed.

Very truly yours,

Frank H. Allen, Jr.
Chairman

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