

# STATE OF NEW HAMPSHIRE

## SUPREME COURT

### ADVISORY COMMITTEE ON JUDICIAL ETHICS

**DOCKET NUMBER:** 2017-ACJE-01

**DATE ISSUED:** June 19, 2017

#### **QUESTION PRESENTED:**

Does the Code of Judicial Conduct prohibit judges from hosting podcasts or radio shows devoted to sports or other matters that have little to do with the courts, the law or the legal profession?

#### **FACTS PRESENTED:**

The judge has been asked to host a podcast, devoted to professional football, the New England Patriots and predictions for the games ahead. The podcast will be sponsored by a local commercial radio station. Although the podcast will not ordinarily touch on legal issues, there may be some discussion about NFL rulings, calls on the field and disciplinary actions.

The judge would not be compensated for hosting the podcast. The judge would not say or do anything to promote the sponsoring radio station, except for identifying the station during the podcast itself. The judge would not identify him/herself as a judge and, in fact, is not planning on using his/her last name.

As presently envisioned, the podcast would be recorded and later published over the internet. However, in the future the program might also be played on the radio station.

#### **APPLICABLE PROVISIONS OF THE CODE OF JUDICIAL CONDUCT:**

The question implicates the following provisions of the Code of Judicial Conduct (listed in the order in which they are discussed below):

- Rule 3.1 (extra-judicial activities);
- Rule 1.2 (promoting confidence in the judiciary);
- Rule 2.10 (judicial statements on pending and impending cases); and
- Rule 1.3 (abuse of the prestige of judicial office).

Rule 3.1: The Code of Judicial Conduct encourages judges to be active members of society. Rule 3.1(A) of the Code provides, “A judge may engage in extrajudicial activities, except as prohibited by law or this Code.” Comment 1 to the Rule states, “To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities[,]” including activities that do not involve the law. Comment 2 to the Rule notes, “Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.”

Rule 3.1(A) does, however, contain five express prohibitions:

[W]hen engaging in extrajudicial activities, a judge shall not:

(1) participate in activities that will interfere with the proper performance of the judge’s judicial duties;

(2) participate in activities that will lead to frequent disqualification of the judge;

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

(4) engage in conduct that would appear to a reasonable person to be coercive; or

(5) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice.

Rule 1.2: Rule 3.1(A)(3) above is a specific illustration of the general obligation under Rule 1.2 that 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.” Comment 2 to Rule 1.2 reminds judges that their conduct on and off the bench will be scrutinized by the public and restricted by the Rules to a degree that might be burdensome if applied to other citizens. Comment 1 to the Rule makes clear that the “appearance of impropriety” standard applies to “both the professional and personal conduct of a judge.” Comment 3 to the Rule notes that it is impossible to list all of the possible conduct that “compromises or appears to compromise the independence, integrity, and impartiality of a judge....”

Rule 2.10: Rule 2.10(A) prohibits judges from making “public statement[s] that might reasonably be expected to affect the outcome or impair the fairness of

a matter pending or impending in any court” (emphasis added). Comment 1 to the Rule notes, “This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.” See generally, Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (discussing, and to some extent limiting, state restrictions on extra-judicial speech); Williams-Yulee v. Florida Bar, 575 U.S. \_\_\_\_; 135 S. Ct. 1656 (2015).

Rule 1.3: Finally, Rule 1.3 provides, “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 so.” Comment 4 to this Rule speaks to a situation that is analogous to this case:

Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. 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. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

#### **ADVISORY OPINION ON THE QUESTION PRESENTED:**

##### **A. Rules 3.1 and 1.2**

Rules 3.1 and 1.2 do not create a categorical bar to hosting a podcast about professional sports. Making public statements about sports teams and events does not, in and of itself, trigger any of the five exclusionary provisions of Rule 3.1 or the more general exclusionary language in Rule 1.2. This is so because:

- Preparing for and hosting the podcast is not likely to take so much time that it will interfere with the judge's judicial duties. (However, if the podcast were to balloon into a daily broadcast involving substantial preparation, this aspect of Rule 3.1 could then become implicated.)
- The topics that are likely to be discussed will not lead to the frequent disqualification of the judge. New Hampshire courts hear few cases involving professional sports teams and, subject to the cautions below, it is doubtful that the judge will say anything that will require recusal.
- Also subject to the cautions below, hosting the podcast would not cause a reasonable person to doubt the judge's independence, integrity, or impartiality. Following professional sports is a

wholesome pastime enjoyed by a large portion of society. Commenting on professional sports as an avocation is equally wholesome. Nothing about the topic, in and of itself, is likely to raise a concern about impartiality or independence. (To be sure, it would be unseemly, and therefore detrimental to the appearance of integrity, if the judge identified himself/herself as a judge on the podcast or in any promotion for the podcast. However, the judge indicated that he/she would be identified only by first name.)

- The remaining prohibitions in Rule 3.1 are not applicable or relevant to the analysis.

As noted above, there are some cautions that should be observed:

First, the judge should obtain from the radio station, in writing, the ability to veto (a) any promotion for the podcast or (b) any commercial sponsorship or (c) any advertisement that either identifies the judge as a judge or otherwise calls the judge's integrity, independence or impartiality into question. (Imagine, for example, the radio station wanting to run advertisements on the podcast for a law firm that frequently appears in the judge's court.)

Second, although the judge may certainly prognosticate about the outcome of future sporting events, the judge should refrain from giving advice on sports wagering. Cf: RSA Chapter 647:2 (gambling offenses); see generally, In Re Advisory Letter No. 3-11, 215 N.J. 495, 515 (N.J. 2013) (sitting judge could not perform as a comedian and actor under a stage name when the substance of his performances created an appearance of impropriety).

Third, the judge must be mindful that even a moderately successful podcast may lead to the creation of an online community. While the judge did not ask for guidance with respect to such a possibility, it should nonetheless be noted as a matter of concern. Podcasts are typically stored on webpages that allow comments and responses from the hosts. Additionally, podcast listeners often interact with the podcast, its hosts and other listeners via social media. Thus, the judge must have written authority from the radio station to veto and delete any social media content sponsored or within the control of the radio station. A full discussion of the potential pitfalls inherent in a judge's use of social media is beyond the scope of this advisory opinion.

Fourth, as explained in more detail below, the judge should exercise great care and discernment when making public statements on the podcast that relate to legal issues, such as player/owner contractual disputes, owner/municipality disputes and player entanglements with the criminal law.

## B. Rule 2.10

Rule 2.10 does not prohibit a judge from making public statements about professional sports. However, media coverage of professional sports often includes discussion of legal disputes. These include not only occasional criminal prosecutions of players for off-field behavior, but also contract disputes and negotiations between players and owners, and financial negotiations between owners and municipalities. A judge's public statements about these matters would transgress Rule 2.10 if the statements are "reasonably ... expected to affect the outcome or impair the fairness of a matter pending or impending in any court."

Obviously, the judge could not comment on any matter pending or impending in his/her court. However, Rule 2.10's prohibition applies more broadly to matters that are pending or impending in any court, including courts in distant states. Because podcasts are available to anybody with an internet connection anywhere in the world, a podcast host's statements may be heard, and indeed amplified, in the jurisdiction where a matter is pending or impending. Therefore, the judge must refrain from making public statements that violate Rule 2.10 regarding matters that are or could become the subject of litigation. See generally In re Inquiry of Broadbelt, 683 A.2d 543 (N.J. 1996) (holding that neither the New Jersey Code of Judicial Conduct nor the First Amendment permitted a sitting judge to appear as guest commentator on Court TV).

If the podcast accepts live listener calls (i.e. calls made to the podcast while it is being recorded or streamed), the judge must be prepared for comments or questions that implicate Rule 2.10.

If the podcast has more than one host, the judge must be careful to avoid a situation in which his/her silence might be construed by listeners as adopting the public statements of a co-host.

If the podcast gives rise to a social media presence, the judge must ensure that nothing attributable to the judge transgresses Rule 2.10.

## C. Rule 1.3

The podcast does raise some concerns under Rule 1.3, but these concerns can likely be resolved. The podcast will be hosted by a radio station. Although the radio station serves an important public role, and may be a fixture in the community, it is also a for-profit enterprise. Even if the judge is not receiving any compensation for the podcast, the radio station may generate advertising income or may use the podcast to promote itself.

As the commentary to Rule 1.3 suggests, the judge's participation in the podcast must be conditioned on taking several steps to ensure that the radio

station and its advertisers do not presently, or in the future, exploit the judge's position. Thus:

- The judge should not be identified as a judge on the podcast, in any promotions for the podcast or in any commercial advertisements on the podcast;
- The judge should obtain the radio station's written agreement that it will not allow advertisements or promotions that identify him/her as a judge.
- Because some listeners might nonetheless learn the judge's identity, the judge should also obtain the radio station's written agreement that it will not allow advertisements that the judge believes could exploit his/her judicial office.

**THIS ADVISORY OPINION IS ISSUED BY UNANIMOUS CONCURRENCE OF ALL PARTICIPATING COMMITTEE MEMBERS. MEMBER KIMBERLY KIRKLAND DID NOT PARTICIPATE.**

/s/ Andrew R. Schulman  
Andrew R. Schulman, Member

#### **CAUTIONARY STATEMENT**

This opinion is advisory only and not binding on the judicial conduct committee, which may, in its discretion, consider compliance with an advisory opinion by the requesting individual as a good faith effort to comply with the Code of Judicial Conduct. Rule 38-A(4)(c).