ADVISORY OPINION

Code of Judicial Conduct **#1-17**
Canon 2

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

Rule 2.17 of the Code of Judicial Conduct requires judges to prohibit the broadcast of court proceedings except under a narrow set of exceptions. Advances in technology and the means with which users can access data have raised questions about how to define the term "broadcast" within this rule. Specifically, the following queries[1] have been posed:

1) Does Rule 2.17's broadcast prohibition include activities like microblogging or 'live tweeting' of witness testimony?

2) Even if microblogging or tweeting is not considered broadcasting, is it ethically permissible for a judge to impose reasonable restrictions on the use of these mediums (and other electronic modes of communication) in the courtroom?

The Commission's view is that microblogging, tweeting, or electronically relaying a written message does not constitute broadcasting under Rule 2.17, unless the transmitted message contains video or audio of court proceedings or a link to videotaped court testimony. Nonetheless, while it is the Commission's view that most microblogging does not constitute broadcasting, the Commission also recognizes that valid policy considerations exist which may necessitate a judge placing reasonable restrictions on these activities in the courtroom if necessary to maintain order in the court or to ensure fairness in the proceedings.

ANALYSIS

A. Background of the Broadcasting Ban

At times, competing interests exist between the public's desire for transparency and immediate accessibility of court proceedings and the judiciary's obligation to maintain order and decorum in the court as well as to preserve fairness for all courtroom participants. Historically, the prohibition on the broadcast of courtroom proceedings began on a national level in 1937 when the American Bar Association (ABA), responding to the massive media coverage and "circus atmosphere" of the trial of Bruno Hauptmann (eventually convicted of the murder of aviator Charles Lindbergh's baby), adopted Canon 35, which prohibited broadcasting and photographic coverage of courtroom

[1] The Commission thanks and expresses its appreciation to the Hoosier State Press Association and the Community Relations Committee of the Judicial Conference of Indiana both for their interest and input on this issue.

proceedings. *See* Dona K. Broyles, *New Rules for Open Courts: Progress of Empty Promise*, 18 Tulsa L. J. 147, 148 (1982). All but two states – Texas and Colorado – gradually adopted the ABA ban. *Cameras in Court: Media Appeal for Easing Rule*, ABA Journal, Vol. 69 (1983).

Over time, with technological advances leading to less obtrusive media coverage of events, many states began to relax their court rules which prohibited the broadcast of any court proceedings, and, in 1982, the ABA withdrew its previous opposition to broadcasting proceedings. Broyles, *New Rules*, 18 Tulsa L.J. at 150. Instead, the ABA decided to support unobtrusive courtroom broadcasts so long as such broadcasts were conducted under carefully prescribed rules. *Id.*

Since 1982, many states (like Indiana) have experimented, both at the trial and appellate levels, with allowing court proceedings to be broadcast. *Id.; see also* Order in *Standards Governing Electronic Media, Still Photography, and Personal Computing Devices at Supreme Court Oral Arguments*, #49S00-1301-MS-61 (Jan. 23, 2013) at http://www.in.gov/judiciary/files/order-other-2013-49s00-1301-ms-61.pdf (listing background on Supreme Court's grant of permission to broadcast oral arguments) and Order in *In re Pilot Project for Electronic News Coverage in Indiana Trial Courts*, #94S00-0605-MS-166 (May 9, 2006) at http://www.in.gov/judiciary/opinions/pdf/05090601ad.pdf (authorizing pilot project for video and audio coverage of proceedings in certain Indiana trial courts). However, even those states which permit the broadcast of trial court proceedings struggle with balancing the public's interest in transparency (and freedom of the press) with the judiciary's requirement to maintain the order and dignity of proceedings and to protect the due process/fair trial rights of defendants. *See e.g. Estes v. Texas*, 381 U.S. 532 (1965); *Chandler v. Florida*, 449 U.S. 560 (1981); *see also Nebraska Press Ass'n v Stuart*, 427 U.S. 539, 547 (1976)(U.S. Supreme Court acknowledged that the tension between the First Amendment right to a free press and the Sixth Amendment right to a fair trial is "almost as old as the Republic.")

Currently, Indiana court rules and policies permit, within certain guidelines, the broadcast of Supreme Court and Court of Appeals oral arguments. The balancing of interests, however, arguably is different for trial court proceedings, and today's version of Rule 2.17 of the Indiana Code of Judicial Conduct sanctions the broadcast of trial court proceedings under a narrow set of exceptions and only with express permission of the Supreme Court.

B. Determining Whether New Technology Transmissions Constitute "Broadcasting"

It is against this historical backdrop that the Commission considers the question at hand. Two challenges face courts and judicial conduct commissions analyzing whether use of new means of disseminating information constitutes broadcasting. First, most court rules prohibiting broadcasting, including Rule 2.17 of the Indiana Code of Judicial Conduct, do not define the term, and definitions of "broadcast" in modern dictionaries are not particularly useful in courtroom applications. Traditionally, the term "broadcast" in state and federal statutes refers to use of radio or television to transmit coverage of courtroom proceedings. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978); *see generally* James K. Winnick, *A Tweet Is(n't) Worth a Thousand Words: The Dangers of Journalists' Use of Twitter to Send News Updates from the Courtroom*, 64 Syracuse L. Rev. 335 (2014). Some new applications, however, bear the same abilities as television and radio to live stream transmissions of courtroom proceedings, raising questions about whether such applications should be encompassed in the broadcasting ban.

The second challenge is that some modes of communication, such as Twitter, have the capacity to publish video of courtroom proceedings or a link to videotaped testimony. However, for the most part, the transmitted messages are merely subjective written interpretations of the user's impressions of what has occurred in the courtroom.[2] On the one hand, Twitter has some elements of traditional modes of broadcasting in that users can provide a widespread audience with videotaped proceedings and real-time updates about trials. On the other hand, Twitter in many respects is similar to a reporter taking notes during a trial and then phoning those observations during a break to an editor for a news story; the only difference with Twitter is that the user can post his/her observations in real time using an electronic device in the courtroom.

Given these challenges, it is not surprising that courts asked to address the issue have reached different conclusions. In *United States v. Shelnutt*, 2009 WL 3681827, at #1 (M.D. Ga. Nov. 2, 2009), the U.S. District Court Judge for the Middle District of Georgia, Columbia Division, citing Webster Dictionary's definition of "broadcast" (which includes "'casting or scattering in all directions' and 'the act of making widely known'") and concluded that Twitter should be considered broadcasting because Twitter transmits information to the general public, and it has the effect of making information "widely known." This interpretation was shared by a Baltimore City Circuit Court Administrative Law Judge, who issued an administrative order in January 2010 barring the use of Twitter in the courtroom because Twitter and similar social networks are able "to provide up to the minute details of any action or occurrence, and that the news media now uses these types of systems regularly to report on news…." Balt. City Cir. Ct., *Addendum to Administrative Order on Use of Cell Phones and Other Communication Devices* (Jan. 5, 2010). In contrast, in *State of Connecticut v. Komisarjevsky*, 2011 WL 1032111 (Conn. Sup. Ct., Feb. 22, 2011), a Superior Court Judge held that Connecticut's statute prohibiting broadcasting during sexual abuse trials did not include the use of Twitter. That judge reasoned:

> [The restriction on broadcasting] is plainly to spare a victim from the indignity of having his or her ordeal vividly conveyed to the world by the use of actual voices and photographic or televised images projected from the courtroom. This interest is a powerful one, but – absent the unusual case of a closed courtroom and sealed transcript – it cannot sensibly extend beyond voices and photographic or televised images to the actual words spoken in court of courtroom events.

2011 WL 1032111 at *3.

Although the *Komisarjevsky* decision is an unpublished opinion, the Commission finds the analysis in this decision compelling and agrees that transmitting a person's actual voice and image is qualitatively different, in terms of privacy, security, and reputation, than another person's report of a witness' testimony and mannerisms. This Commission likewise is reluctant to extend the prohibition of broadcasting to use of Twitter and similar applications. This conclusion is further bolstered by the Commission's evaluation of the typical use of Twitter by most individuals (including the media), the weighing of the policy considerations behind the broadcasting ban, and a review of the Supreme Court's decisions to webcast appellate oral arguments and to permit the

[2] Twitter allows users to send "tweets" or 140-character-long messages (which may include photos, video, or links) to a subscribed list of persons who "follow" the user's account or to the public. *See* Winnick, *A Tweet Is(n't) Worth a Thousand Words*, 64 Syracuse L. Rev. at 336 and New User FAQs, Twitter, https://support.twitter.com/articles/13920# (last visited Nov. 18, 2016).

broadcast of trial court proceedings in certain other limited circumstances. Accordingly, it is the Commission's opinion that the use of Twitter and similar communication mediums or avenues is not broadcasting under Rule 2.17, unless the message contains video or audio of trial court proceedings or a link to videotaped testimony.

C. Imposing Reasonable Restrictions on Courtroom Use of New Technologies

Nonetheless, although the Commission does not find that electronically relaying a written message, such as through Twitter, constitutes broadcasting under Rule 2.17, the Commission acknowledges that trial courts are obligated to maintain order and decorum in the courtroom (*see* Rule 2.8(A) of the Code of Judicial Conduct) and to maintain an environment that ensures fair trials for litigants. Certainly, the Commission can envision situations when a particular individual's use of Twitter (or another electronic means of communication) in the courtroom has been abused or when the general use of a medium such as Twitter in the courtroom will be distracting or may taint the juror pool for a particular trial.[3]

It is, therefore, the Commission's position that it is ethically permissible for a judge to impose reasonable restrictions on the use of Twitter and similar mediums in the courtroom. This view is consistent with other states, which have permitted broadcasting in the courtroom "if executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected." *See* Cal. R. Ct. 1.150(a); *see also* N.Y.R. Chief J. § 29.1(a) (broadcast of proceedings permitted so long as certain conditions are met, including that "there will be no detraction from the dignity and decorum of the courtroom or courthouse.") The Commission leaves it to the trial courts and Supreme Court committees tasked with advising on media/community relations to devise guidance on what constitutes reasonable restrictions.

CONCLUSION

Differing, but equally valid, interests exist between the public's desire for transparency and immediate information about court proceedings and the judiciary's obligation to maintain order and decorum in the court as well as to preserve fairness for all courtroom participants. Recognizing the challenge that new technologies bring regarding the transmission of court proceedings, the Commission believes that it is imperative that this delicate balance be preserved so that neither side's legitimate interests are wholly disregarded.

The Commission's view is the use of electronic means of instant communication, such as Twitter or microblogging, in the courtroom is not considered broadcasting under Rule 2.17 of the Code of Judicial Conduct, except in those limited situations when a user transmits video or audio of court proceedings or a link to videotaped court testimony. Further, it is the Commission's view that a judge continues to act within the spirit of the Code of Judicial Conduct if he or she imposes reasonable restrictions on how and when an individual may use Twitter or other electronic communication tools during courtroom proceedings.

[3] The Commission also recognizes that, in some cases, a judge may decide to impose restrictions on the use of electronics in the courtroom to adequately preserve a separation-of-witnesses order.