

BEFORE THE JUDICIAL HEARING BOARD OF WEST VIRGINIA

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IN THE MATTER OF	
THE HONORABLE MARYCLAIRE AKERS, JUDGE OF THE 8 TH JUDICIAL CIRCUIT	SUPREME COURT NO. 25-483 JIC COMPLAINT NO. 35-2025

ORDER

Upon consideration of a JDC Motion in Limine Regarding Respondent's Expert Witness, the Motion is hereby GRANTED.

In the Expert's report, she states, "I have been asked by Thomas Ryan on behalf of Judge Maryclaire Akers to give my opinion regarding her alleged violation of certain provisions of the Code of Judicial Conduct ... it is my opinion that Judge Akers' actions in court and in the interview at issue in this disciplinary case did not constitute any ethical violation ... Based on these provisions, it is my conclusion that Judge Akers did not violate any provision of the Code of Judicial Conduct." The Expert's report concludes, "It is my opinion that Judge Akers did not violate the Code of Judicial Conduct."

Our Supreme Court has stated as follows:

As a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute . . . or case law . . . or the meaning of terms in a statute . . . or the legality of conduct. 32 C.J.S. *Evidence* § 634, at 503-04 (1996) (footnotes omitted). See also John W. Strong, MCCORMICK ON EVIDENCE, Vol. 1 § 12, p. 53 (1999) (stating that "[r]egardless of the rule concerning admissibility of opinion upon ultimate facts, at common law[,] courts do not allow opinion on a question of law, unless the issue concerns foreign law." (Footnotes omitted.)).

Jackson v. State Farm Mut. Auto. Ins. Co., 215 W. Va. 634, 643, 600 S.E.2d 346, 355 (2004) (emphasis supplied); see also Syl. pt. 10, *France v. Southern Equipment Company*, 225 W. Va. 1, 689 S.E.2d 1 (2010).

Under Rule 3.11 of the Rules of Judicial Disciplinary Procedure, “The Board shall have the authority to ... conduct hearings on formal complaints filed by the Judicial Investigation Commission and make recommendations to the Supreme Court of Appeals regarding disposition of those complaints ...” Rule 3.12 provides, “The Judicial Hearing Board may recommend ... the discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct.” Rule 4.8 provides, “Within sixty days after the final hearing or the filing of post-hearing briefs ... the Judicial Hearing Board shall file a written recommended decision with the Clerk of the Supreme Court of Appeals. ... The decision shall contain findings of fact, conclusions of law, and a recommended disposition.” “Under Rule III(C)(13) ... the Judicial Hearing Board is limited to making a ‘written recommendation, which shall contain findings of fact, conclusions of law and proposed disposition’ ...” Syl. pt. 3, *In re Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992).

Courts have held that expert opinions regarding the existence or non-existence of attorney or judicial ethical violations are inadmissible. See, e.g., *In re Disciplinary Action Against McKenchie*, 656 N.W.2d 661, 666 (N.D. 2003) (“expert testimony regarding the interpretation of the rules of professional conduct and whether a rule has been violated is inappropriate in a disciplinary proceeding”); *Hawkins v. Commission for Lawyer Discipline*, 988 S.W.2d 927, 936 (Tex. App. 1999), *cert. denied*, 529 U.S. 1022 (2000) (“interpretation of the Rules [of Professional Conduct], like interpretations of statutes, is a matter of law for the court”); *In re Disciplinary Action Against Howe*, 2001 ND 7, PP6-7, 621 N.W.2d 361 (“in determining if the professional conduct rules have been violated, expert testimony is unnecessary if it will not assist the disciplinary hearing panel in understanding the evidence or in deciding a fact in issue”); *Disciplinary Counsel v. Gaul*, 936 N.E.2d 28 (2010) (“Citing Evid. R. 702, the panel found that the expert testimony would not have provided information that was beyond the panel’s understanding and knowledge of the Code of Judicial Conduct. In *Disciplinary Counsel v. Karto* (2002), 94 Ohio St.3d, 109, 113, 760 N.E.2d 412, 23 held that expert testimony was properly excluded because the panel was qualified to determine whether a judge had abused his contempt power. In this case, it was not an abuse of discretion to exclude the expert testimony because the panel was capable of interpreting and applying the Code of Judicial Conduct without an expert’s opinion.”).

The Respondent cites *Lawyer Disciplinary Bd. v. Moore*, 214 W. Va. 780, 591 S.E.2d 338 (2003) [Response at 4], but that was not a lawyer disciplinary proceeding and no one offered an

opinion regarding whether the lawyer, West Virginia's former governor, Arch Moore, Jr., had violated the ethics rules. The lawyer had been previously disbarred after entering a guilty plea to a five-count federal indictment charging him with mail fraud, filing false tax returns, extortion, and obstruction of justice. Moreover, relative to expert testimony, the Respondent's statement that the Supreme Court "apparently seeing no difficulty admitting the testimony and assigning it the weight they deemed fit" [Response at 4] is incorrect. Nowhere in the Supreme Court's opinion does it reference any expert testimony. Instead, no mention of expert testimony is found until Justice Davis's concurring opinion as follows:

The final point I have to make involves "the list of well-respected members of the West Virginia Bar . . . who have lent their names to the petition for reinstatement[.]" **I find it rather disheartening to know that among the supporters for Mr. Moore's reinstatement was a member of the Bar who proclaims to be an expert in ethics.** Although I understand our legal system is comprised so that a party can obtain a "hired gun" to say anything in litigation, **lawyer disciplinary proceedings have no place for this type of advocacy.**

In a letter to this Court supporting Mr. Moore's reinstatement, the expert stated that "Governor Moore has accepted responsibility for the actions which resulted in the loss of his law license ..." Additionally, the expert explained my experience as a teacher of legal ethics, a frequent lecturer on the subject for CLE organizations throughout the country, and as an expert witness in legal ethics cases in West Virginia and a dozen other states leads me to the firm conclusion that, in this case, reinstatement to the practice of law is not only appropriate but highly desirable.

The majority opinion in this case has aptly demonstrated that Mr. Moore has not accepted responsibility for his unlawful actions that led to his disbarment. Thus, in order to support Moore's reinstatement, this ethics "expert" had to ignore not only the true and well documented facts of this case, but also the established law of this jurisdiction. *See, e.g.,* Syl. pts. 1, 2 & 3, *In re Brown*, 166 W. Va. 226, 273 S.E.2d 567 (1980) (establishing standards for reinstatement) ... To borrow from the comments of a former West Virginia Law School Professor of Ethics, I am certain Mr. Moore's expert would not relish trying "to explain [his position in] this case to a roomful of law students." Jack Bowman, Contingent Fee Case Defied Explanation, *The State Journal*, October 24, 2003, at 39.

The integrity of our legal system simply cannot tolerate "hired gun" advocacy in lawyer disciplinary proceedings. The position taken by Mr. Moore, in his quest for reinstatement, tramples upon fundamental principles of ethics. In spite of the clear ethical flaw in Mr. Moore's position, he successfully found a purported ethics expert to support his position. This is troubling to me. This Court has an

uncompromising duty to make certain that honest and morally upright persons are representing the legal affairs of the public. To that end, “hired gun” proponents have no place in lawyer disciplinary proceedings.¹

Accordingly, it is confusing how the Respondent contends that the *Moore* case supports the admission of her Expert’s testimony in this case when (1) the majority opinion makes absolutely no reference to Mr. Moore’s expert and (2) the concurring opinion makes clear that experts “have no place in lawyer disciplinary proceedings.” If anything, the *Moore* decision supports excluding the testimony of the Respondent’s Expert, not its admission.²

R. Evid. 702 provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,³ a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” (emphasis supplied). Although R. Evid. 704 provides, “Testimony in

¹ *Lawyer Disciplinary Bd. v. Moore*, *supra* at 799, 591 S.E.2d at 357 (Davis, J., concurring) (emphasis supplied).

² The Respondent also argues, “Attorney Tarr’s testimony is likely to go a step further and espouse specific legal conclusions, not mere opinions ‘couched in legal terms.’ As such, it would be fundamentally unfair to permit Attorney Tarr’s testimony while excluding that of Justice Workman and, therefore, the Board should deny the Commission’s Motion.” [Response at 4-5] First, the Respondent has not filed a motion in limine to preclude Ms. Tarr’s opinion testimony, and, if she does so, it can be addressed by the Board. Second, the Respondent initially sought and apparently now intends to pursue further Ms. Tarr’s factual testimony through a deposition, not her opinions, relative to informal ethics advice given by Ms. Tarr to the Respondent, which is the only reason Ms. Tarr is disqualified, as she would not be disqualified for making legal arguments in her role as Judicial Disciplinary Counsel.

³ The Respondent makes an alternative argument that “Additionally, Justice Workman will testify about purely factual issues regarding the West Virginia child protective services and juvenile justice systems and the current state of affairs of those systems. These issues are relevant because the Commission has specifically taken issue with Judge Akers’ statement that ‘abuse and neglect is the entry point into this system for a lot of people,’ which the Commission treats as indicative of bias. However, former Justice Workman will testify that this statement is not opinion (and, therefore, not bias) but ‘a troubling yet accurate fact.’ Expert Report, Ex. 1 to Motion, at 6–7. Specifically, she will testify that ‘it is a common *fact* that a large and outsized proportion of adult criminal defendants adjudicated have had previous contact with the judicial system as subjects of abuse and neglect and/or juvenile proceedings, which is also supported by empirical research.’ *Id.* at 7 (emphasis added).” [Response at 5-6] None of these facts—that abuse and neglect proceedings are an entry point into the justice system, including the adult criminal justice system—are either contested or relevant to these proceedings. The issue is not whether these statements were factually accurate, but whether publicly making these statements during the pendency of judicial oversight proceedings violated the Code of Judicial Conduct. Accordingly, the Expert’s testimony will not assist the Board in determining any facts at issue, which are limited to the public statements made, the context of those public statements during pending or impending judicial proceedings, and whether those public statements “might reasonably be expected to affect the outcome or impair the fairness of a matter.” Rule 2.10(A).

the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact” (emphasis supplied), such rule relates solely to factual issues, not opinions regarding questions of law: “[A]n expert’s testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury’s understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.” *France, supra* at 14, 689 S.E.2d at 14 (emphasis supplied).

The Respondent’s Expert is an esteemed jurist with an incomparable record of advocating and defending the rights of children, but the legal opinions she would proffer regarding whether the Respondent’s conduct constituted a violation of the Code of Judicial Conduct would not assist the Board “to understand the evidence or determine a fact in issue” under Rule 702. Instead, it would constitute opinions on questions of law, including the interpretation and application of the Code of Judicial Conduct, like the “legality of conduct” expressly prohibited under *Jenkins* and *France*.

WHEREFORE, the Judicial Hearing Board GRANTS the JDC’s Motion in Limine excluding the testimony of the Respondent’s Expert.

Counsel to the Judicial Hearing Board is hereby directed to file a copy of this ORDER with the Clerk of the Supreme Court of Appeals and to serve a copy on the members of the Judicial Hearing Board and counsel of record upon its entry.

Entered this 12 day of January 2026.



Hon. Michael D. Lorensen, Chairperson
Judicial Hearing Board