

Maryland Judicial Ethics Committee

Opinion Request Number: 2016-08

Date of Issue: March 23, 2016

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Issue: May a judicial candidate host a reception for other judicial candidates seeking election to or retention on another court?

Answer: No.

Facts: The Requestor is a “candidate” as defined in The Maryland Code of Judicial Conduct, Rule 4.1 (the “Code”). “Candidate” includes a “candidate for election” and a “District Court candidate for retention.” Rule 4.1(b). A “candidate for election” means a person who seeks initial election to a circuit court or orphans’ court; an incumbent judge of a circuit court or orphans’ court who seeks to retain that office through an election; and an incumbent judge of the Court of Appeals or the Court of Special Appeals who seeks to retain that office through a retention election. Rule 4.1(c). A “District Court candidate for retention” means an incumbent judge of the District Court who seeks to retain that office. Rule 4.1(d).

The Requestor asks: (1) whether he/she can host a reception for candidates seeking election to or retention on another court and (2) whether his/her name can be listed on a program or invitation as “featured guests” for a fundraiser hosted by candidates for another court.

Analysis: The Maryland Code of Judicial Conduct, Section 4 governs political activity of judges. The starting premise is contained in Rule 4.2 which provides:

- (a) A judge who is not a **candidate** shall not engage in any partisan political activity.
- (b) A judge shall resign when the judge becomes a **candidate** for a non-judicial office, except that a judge may continue to hold judicial office while a **candidate for election** as a delegate to a Maryland Constitutional Convention.

(Emphasis in original).

As noted above, the Code distinguishes between a “candidate for election” and a “District Court candidate for retention.” The term “candidate” includes both. Rule 4.1(b), (c), and (d). Rule 4.4 governs a “candidate for election,” and Rule 4.5 governs a “District Court candidate for retention.”

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Rule 4.4 provides:

A candidate for election:

(a) shall comply with all applicable election laws and regulations;

(b) shall act at all times in a manner consistent with the **independence**, integrity, and **impartiality** of the judiciary and maintain the dignity appropriate to judicial office;

(c) subject to the other provisions of this Rule, may engage in partisan political activity allowed by law with respect to such candidacy, and, in that regard;

(1) may publicly endorse or oppose **candidates** for the same judicial office;

(2) may attend or purchase tickets for dinners or other events sponsored by a **political organization** or a **candidate** for public office; and

(3) may seek, accept, and use endorsements from any person or organization; but

(4) shall not act as a leader in or hold office in a **political organization**, make a speech for a **candidate** or **political organization**, or publicly endorse a **candidate** for non-judicial office.

(d) As to statements and materials made or produced during a campaign:

(1) shall review, approve, and be responsible for the content of all campaign statements and materials produced by the **candidate** or by the **candidate's** campaign committee or other authorized agents;

(2) shall take reasonable measures to ensure that other persons do not undertake on behalf of the **candidate** activities that the **candidate** is prohibited from doing by this Rule;

(3) with respect to a case, controversy, or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the **impartial** performance of the adjudicative duties of the office;

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- (4) shall not make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court;
- (5) shall not **knowingly**, or with reckless disregard for the truth, misrepresent the **candidate's** identity or qualifications, the identity or qualifications of an opponent, or any other fact, or make any false or misleading statement;
- (6) may speak or write on behalf of the candidate's candidacy through any medium, including advertisements, websites, or other campaign literature; and
- (7) subject to paragraph (b) of this Rule, may respond to a personal attack or an attack on the **candidate's** record.

(Emphasis in original).

Rule 4.5 provides:

A. District Court candidate for retention:

- (a) may contact and communicate with the Governor and members of the State Senate regarding the **candidate's** reconfirmation;
- (b) may seek, accept, and use endorsements from any person or organization;
- (c) shall act at all times in a manner consistent with the **independence**, integrity, and **impartiality** of the judiciary and maintain the dignity appropriate to judicial office;
- (d) subject to paragraph (c) of this Rule, may respond to a personal attack or an attack on the **candidate's** record;
- (e) with respect to a case, controversy, or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the **impartial** performance of the adjudicative duties of the office; and

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(f) shall not **knowingly** or with reckless disregard for the truth misrepresent the **candidate's** identity or qualifications or any other fact.

(Emphasis in original).

The Code addresses incumbent District Court judges separately because those judges do not have to run in an election.¹ Consequently, the political activity that is permitted is more limited than for a judge facing an election. An incumbent District Court judge is limited to communications with the Governor and members of the State Senate, and seeking, accepting, and using endorsements. The general constraints in subsections (c)-(f) of Rule 4.5 are applicable even to this activity.

Turning to Rule 4.4 and elections, we note that a “candidate for election” must comply with applicable election laws and regulations. Subject to that requirement and the limitations contained in the Code, the candidate may engage in partisan political activity. The general constraints are contained in subsections (b) (maintaining independence, integrity, impartiality, and dignity); (d)(3), (4) (avoiding commitments or statements on issues pending or likely to come before the court); and (d)(5) (not misrepresenting facts).

Subject to other constraints in the Code generally and section 4 specifically, a “candidate for election” “may publicly endorse or oppose candidates for the same judicial office.” The phrase “same judicial office” is not defined in the Code. Preliminarily, it seems clear that appellate courts, circuit courts, the District Court, and orphans’ courts, as compared to each other, are separate courts. With respect to appellate courts, the Court of Appeals and Court of Special Appeals are each statewide courts with distinct structures and subject matter jurisdiction. The District Court is a statewide court with its own structure and subject matter jurisdiction. Thus, a candidate for judicial office in the Court of Appeals, a candidate for judicial office in the Court of Special Appeals, a candidate for judicial office in any circuit court, a candidate for judicial office in any Orphans’ Court, or a candidate for judicial office in the District Court, would not be “candidate[s] for the same judicial office.” The tougher question is whether a candidate for judicial office in a circuit court in one county and a candidate for judicial office in a circuit court in another county or a candidate for judicial office in an orphans’ court in one county and a candidate for judicial office in an orphans’ court in another county are

¹ A person seeking appointment to judicial office is an “applicant.” “Applicants” are governed by Rules 4.1 and 4.3.

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“candidates for the same judicial office.”

General Provision A-102 of the Code, effective July 1, 2010, states that it is based in large part on the American Bar Association 2007 Model Code of Judicial Conduct (2007 ABA Code). With respect to political activity, A-102 explains that the Code reorganized the political activity provisions in the 2007 ABA Code and “conform[ed] them to the different manners in which judges are selected and retained in Maryland and to requirements enacted by the Maryland General Assembly or adopted by the Court of Appeals.” Consequently, Rule 4.1, the definitions section, is new. It reflects the ways in which Maryland judges are selected and retained.

The Comment to Rule 4.4 of the Code states that it is derived in part from former Maryland Code of Judicial Conduct Canon 5B and the 2007 ABA Code. Former Canon 5 contained a general prohibition against political activity by judges with the exceptions contained in 5B. The exceptions were similar to those that exist today. The phrase “same judicial office” did not appear, however. The phrase does appear in Rule 4.2 (B)(3) of the 2007 ABA Code. The 2007 ABA Code provides that a candidate for elective judicial office may “publicly endorse or oppose candidates for the same judicial office for which he or she is running.” Comment (6), in pertinent part, provides: “For purposes of paragraph (B)(3), candidates are considered to be running for the same judicial office if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election.” Comment (7), although less relevant, provides that judicial candidates “may group themselves into slates or other alliances to conduct their campaigns more effectively.” It further provides that “Candidates who have grouped themselves together are considered to be running for the same judicial office if they satisfy the conditions described in Comment (6).”

The 2007 ABA Code made changes to the ABA’s 1990 Code. The Reporter’s explanation of changes made by the 2007 ABA Code includes a statement that the 2007 ABA Code retained “the traditional exception that permits campaigning for other judicial candidates who are effectively running in the same race.” (Emphasis omitted.)

Our review of the “Report to the Court of Appeals of the Maryland Committee to Review the 2007 Model Code of Judicial Conduct proposed by the ABA,” dated June 18, 2009, which resulted in the adoption of the Code, effective July 1, 2010, produced no additional information relevant to the meaning of “same judicial office.”

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In Maryland, there is a circuit court in each county and in Baltimore City. Maryland Constitution, Art. IV, Section 20(a). The judges of the circuit courts in Montgomery and Harford Counties sit as orphans' courts in their respective counties. *Id.*, Art. IV, Section 20(b). In the remaining counties and in Baltimore City, an orphans' court exists in each jurisdiction. *Id.*, Section 40. Notably, a circuit court or orphans' court judge holds judicial office only in that judge's political jurisdiction. It is noteworthy that, historically, candidates who have grouped themselves have not crossed political subdivision lines.

We conclude that "same judicial office" means the orphans' court or circuit court in each political subdivision. Thus, a "candidate for election" in a circuit court or an orphans' court may publicly endorse or oppose only those candidates who are candidates in the same orphans' or circuit court. A "candidate for election" may (1) attend events sponsored by a political organization or a candidate for public office, including a "candidate for election" in another court, Rule 4.4A(c)(2). Although attendance is permitted, "candidates for election" to a court in one political subdivision may not host "candidates for election" to a court in another political subdivision. Similarly, "candidates for election" in one political subdivision may not endorse or otherwise feature or promote "candidates for election" in another political subdivision. Consequently, because appearing as a "featured guest" is an endorsement, a judge in one jurisdiction may not be a "featured guest" at a fundraiser for judges running for election in another jurisdiction.

Application: This Opinion is applicable only prospectively and only to the conduct of the requestor described herein, to the extent of the requestor's compliance with this letter. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

Additionally, this Opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.