

## Maryland Judicial Ethics Committee

**Opinion Request Numbers:** 2018-14

**Date of Issue:** May 31, 2018

■ Published Opinion   □ Unpublished Opinion   □ Unpublished Letter of Advice

### **The Obligations of a Non-Candidate Judge or Judicial Appointee Whose Spouse Wishes to Engage in Partisan Political Activity**

**Issue:** What are the obligations of judges and judicial appointees who are not themselves candidates for election when their spouses engage in partisan political activity on behalf of candidates for judicial and non-judicial office?

**Answer:** The Code of Judicial Conduct (the “Code”) and the Code of Conduct for Judicial Appointees do not restrict the rights of spouses to engage in partisan political activity. However, judges should take reasonable steps to avoid the appearance that the prestige of their judicial office is being used to advance the interests of a candidate or political organization.

**Facts:** The Requestor a judge who is not a candidate for election in this election cycle. The Requestor’s spouse wishes to support political candidates for judicial and non-judicial offices by traditional activities such as sign waving, door-to-door canvassing, poll working, and attending rallies and similar partisan political events. Requestor also asks if the spouse may post signs supporting candidates in the yard of their residence, which is jointly-owned by them.

**Discussion:** Responding to this request requires the Committee to balance specific provisions of the Code<sup>1</sup> with the spouse’s rights of free expression guaranteed by the First Amendment to the United States Constitution. In undertaking this task, we bear in mind that “[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, . . . . But no one denies that it is genuine and compelling.” *Williams-Yulee v. Florida Bar*, 575 U. S. \_\_\_, 135 S. Ct. 1656, 1667 (2015).

We will start with some general principles, and then turn to the specifics.

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<sup>1</sup> As regards the issues raised by this inquiry, the provisions of the Maryland Code of Judicial Conduct, respectively Chapter 1 and 2 of Title 18 of the Maryland Rules, are substantively identical.

Published Opinion    Unpublished Opinion    Unpublished Letter of Advice  
Page 2 of 6

*First*, the rules in the Code are rules of reason and judicial conduct is generally interpreted through a reasonable person standard.<sup>2</sup> *Second*, the Code significantly limits the ability of judges to engage in partisan political activity. (What the precise limitations are depends upon whether the judge or judicial appointee is, or is not, a “candidate for election,” which is a term of art in the Codes.<sup>3</sup>) *Third*, the restrictions in the Code as to political activities by judges do not generally apply to their spouses, unless those spouses are themselves either judges, judicial appointees, or candidates for judicial office. *See* JEC Opinion 2016-23 (“The Code . . . does not apply to a judge’s spouse solely because of the marital relationship.”); JEC Opinion 2015-47 (The Code of Judicial Conduct does not apply to a spouse who is seeking election to a non-judicial office.) *Fourth*, a judge is

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<sup>2</sup> *See* Md. Rule 18-100(b)(3) (“The Rules in this Code are rules of reason. . . .”); Md. Rule 18-101.2(b) (A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.).

<sup>3</sup> Rule 18-104.1(c) states in pertinent part:

- (1) “Candidate for election” means an individual who:
  - (A) seeks initial election to a circuit court or an Orphans’ Court;
  - (B) is an incumbent judge of a circuit court or Orphans’ Court and seeks to retain that office through an election conducted pursuant to Article IV, § 3, 5, or 40 of the Maryland Constitution; or
  - (C) is an incumbent judge of the Court of Appeals or Court of Special Appeals and seeks to retain that office through a retention election conducted pursuant to Article IV, § 5A of the Maryland Constitution.
- (2) An individual becomes a candidate for election:
  - (A) if the individual is a newly appointed judge, from the date the judge takes the oath of office;
  - (B) if the individual is any other incumbent judge, from the earlier of:
    - (i) the date two years prior to the general election pertaining to that judge’s re-election or subsequent retention; or
    - (ii) the date on which a newly appointed judge to that court becomes a candidate in the same general election.

\* \* \*

- (3) An individual who becomes a candidate under section (c) of this Rule remains a candidate until the general election for the office unless, prior to that time, the individual files a formal withdrawal of candidacy in accordance with Maryland election laws.

In the Code of Conduct for Judicial Appointees, Rule 18-204.(b)(1) defines a “candidate for election” as “a judicial appointee who seeks initial election to a circuit court or an Orphans’ Court.”

Published Opinion    Unpublished Opinion    Unpublished Letter of Advice  
Page 3 of 6

required at all times to act in a manner that promotes public confidence in the judiciary.<sup>4</sup> *Finally*, and most pertinent to the Requestor’s inquiry, “[a] judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” Rule 18-101.3.<sup>5</sup> We now turn to the specifics of Requestor’s inquiry.

The Requestor is not a “candidate for election” as the term is defined in the Code. *See* Rules 18-104.1(c). The Code prohibits partisan activity by judges who are not candidates. Rule 18-104.2(a).<sup>6</sup>

However, although the Code does not restrict the rights of a judge’s spouse to engage in political activities, care must be taken to make it clear that the judge is not allowing others to use the prestige of his/her judicial office to support a candidate or political party. *See, e.g.*, Opinion No. 2016-23 (A judge’s spouse may make political contributions but should do so from an account to which the judge is not a party.).

We will divide Requestor’s specific inquiries into two categories because the provisions of the Code that we have previously summarized are particularly pertinent in the sign context. Our analysis and conclusions are the same whether the spouse’s efforts are in support of a candidate for election to a judicial or a non-judicial office.

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<sup>4</sup> Rule 18-101.2 states:

- (a) Promoting Public Confidence. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
- (b) Avoiding Perception of Impropriety. A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

The corresponding provision of the Code of Conduct for Judicial Appointees is substantively identical. *See* Md. Rule 18-201.2.

<sup>5</sup> The corresponding provision of the Code of Conduct for Judicial Appointees is substantively identical. *See* Md. Rule 18-201.3.

<sup>6</sup> Rule 18-104.2 states (emphasis added).

- (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.

The corresponding provision of the Code of Conduct for Judicial Appointees is substantively identical. *See* Md. Rule 18-204.2.

### **A. Campaign Activities**

The Requestor's spouse proposes to engage in a number of traditional campaign activities, such as door-to-door canvassing for candidates of the spouse's party, sign waving, poll working, and attending rallies.

The Committee believes that, in contemporary society, reasonable people understand that an individual's political views are not necessarily shared by his or her spouse. As the Committee explained in Opinion No. 2015-47, the Code prohibits Requestor from joining the spouse in any of these activities. The Requestor should ask his/her spouse to refrain from any statement or action that would imply that the Requestor is endorsing a candidate or political party. In light of the facts presented by the Requestor, the Code does not require any additional action on the Requestor's part in light of the spouse's proposed activities in the upcoming elections.<sup>7</sup>

In conclusion, the Code does not restrict the spouse's right to participate in the aforementioned partisan activities. The Requestor will satisfy the Code's requirements by asking the spouse to avoid making statements or otherwise implying that the Requestor is endorsing a candidate or party. Because the Requestor is not a "candidate for election," he/she may not engage in partisan political activity.

### **B. Signs**

The Requestor also asks if the spouse may post a political sign on their jointly-owned property. Doing so would create significant, and in the Committee's mind, insolvable, problems for the Requestor. Rule 18-101.2(b) requires judges to "avoid conduct that would create in reasonable minds a perception of impropriety." "Impropriety" in the context of Rule 18-104.4 includes violating a provision of the Code of Judicial Conduct. A reasonable person might conclude that the sign at Requestor's residence constitutes his/her endorsement of the candidate identified in the sign. Additionally, placing a sign

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<sup>7</sup> The Requestor's spouse does not propose to engage in fund-raising for candidates or political organizations, and we are not addressing that issue in this Opinion.

on Requestor's property could be viewed by a reasonable person as lending the prestige of Requestor's office to the candidate. *See* Rule 18-101.3.<sup>8</sup>

Of course it is the Requestor's spouse, and not Requestor, who proposes to place a sign on their property. The Code does not apply to the spouse and, in any event, the spouse has the right to express his/her support of a candidate for elective office. But this doesn't change the fact the Requestor is prohibited both from endorsing candidates, and from allowing the prestige of the Requestor's office to be used for the benefit of another.

Reconciling the obligations of the Requestor under the Code and the rights of his/her spouse is no easy matter. In the Committee's view, Requestor must discuss with the spouse the serious ethical dilemma that a political sign would present to the Requestor and ask the spouse if he/she will agree to refrain from placing signs endorsing candidates on their jointly-owned property. If the spouse agrees to refrain from placing such signs on their jointly-owned property, then the problem is solved. If the spouse nonetheless wishes to install such signs, then Requestor is confronted with a problem which this Committee cannot resolve.

The Committee has considered various ways in which a sign might be placed on jointly-owned property while complying with the spirit and letter of the Code. However, any such scenario would require the Requestor to make it clear that he or she isn't endorsing the candidate or political organization. All of the possible solutions considered by the Committee would: (1) be impractical, (2) unlikely to be effective, (3) compromise the safety of the Requestor's and his or her family, and/or (4) infringe upon the spouse's rights of free speech.

In conclusion, posting a partisan political sign on property owned by a judge creates significant problems for the judge, even if the property is jointly-owned, and even if the impetus for posting the sign comes solely from the other owner. If such a sign is posted, the judge must take step to make it clear that he or she is not endorsing the candidate or organization in question. For the reasons set out in the previous paragraph, the Committee is unable to recommend specific action on the judge's part to accomplish this goal.

**Application:** The Maryland Judicial Ethics Committee cautions that this opinion is applicable only prospectively, only to the conduct of the Requestor described in this

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Maryland Judicial Ethics Committee

Opinion Request Number: 2018-14

Date of Issue: May 31, 2018

Published Opinion    Unpublished Opinion    Unpublished Letter of Advice

Page 6 of 6

opinion, and only to the extent of the Requestor's compliance with this opinion. 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 amendments 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 you engage in a continuing course of conduct, you 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.