

Committee on Judicial Ethics
Teleconference
Friday, October 26, 2012

Members present via teleconference: Justice Barry R. Schaller, Chair, Judge Edward R. Karazin, Vice Chair, Professor Jeffrey A. Meyer, Judge Maureen D. Dennis and Judge Thomas J. Corradino, Alternate. Staff present: Attorney Martin R. Libbin, Secretary and Attorney Viviana L. Livesay, Assistant Secretary.

MINUTES

- I. With the above noted Committee members present, Justice Schaller called the meeting to order at 9:31 a.m. Although publicly noticed, no members of the public were in attendance.
- II. The Committee members present unanimously approved the Minutes of the October 17, 2012 meeting.
- III. The Committee discussed Informal JE 2012-32 concerning whether a Judicial Official may submit an op-ed article, for publication in a newspaper, concerning the importance of voting in the upcoming election. The Judicial Official identifies him or herself in the proposed article by position and notes that he/she has presided over cases in which one or two votes made a difference in a primary election. The article also notes that the two districts that were involved are substantially made up of Democrats and the winner of the Democratic primary typically is the winner of the general election, in which voter turnout is typically very low. The article further notes that elected officials make decisions on issues related to liberty, property, health, taxes, homeland security, and, for example, that elected officials may determine the identification required in order to vote and whether a college age child will be allowed to continue on a family health insurance plan until age 26. The article concludes that experience has shown that every vote matters and extols everyone to vote on November 6.

Prior to the Judicial Official's appointment to the bench, the Judicial Official did not hold any prominent partisan political position, such as party chair, state representative, counsel to the Governor, etc.

Rule 1.2 of the Code of Judicial Conduct states that a judge "should 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. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 2.10 prohibits judges from making any public statement that “might reasonably be expected to affect the outcome or to impair the fairness of a matter pending or impending in any court or make any non-public statement that might substantially interfere with a fair trial or hearing.”

Rule 2.11 of the Code requires disqualification of a judge in “any proceeding in which the judge’s impartiality might reasonably be questioned including, but not limited to, the following circumstances... (4) The judge has made a public statement, other than in a court proceeding, judicial decision, or opinion that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”

Rule 3.1 provides that “[a] judge may engage in extrajudicial activities except as prohibited by law” and that “[a] judge shall not: ... (3) participate in activities that would appear to a reasonable person to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

Rule 4.1(a) restricts a judge from participating in specific kinds of political activities (such as making speeches on behalf of a political organization or endorsing a political candidate), and Rule 4.1(c) provides that “[a] judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.” See also Canon 4 (prohibiting a judge from engaging in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary).

The Committee concluded preliminarily that it is permissible for a Judicial Official to write an op-ed article for publication in the news media on the general subject of the importance of voting, subject to the following conditions:

1. The Judicial Official does not give opinions that would cast doubt on the Judicial Official’s impartiality. Rule 3.1(3).
2. The Judicial Official’s written statements are factual and instructive about the subject matter but do not include comments about any pending or impending matters. Rule 2.10.
3. The Judicial Official is careful not to express opinions in a way that would indicate that the Judicial Official has a predisposition with respect to particular cases. Rule 2.11(a).
4. The Judicial Official does not comment on political issues in the article or otherwise engage in prohibited political activity under Rule 4.1.
5. The Judicial Official does not publish the op-ed article in a partisan publication.

The Committee further concluded, however, that the proposed op-ed article should not be submitted for publication because it contains

statements that (1) discuss specific election races and candidates, (2) suggest the Judicial Official's political priorities and views, and (3) draw attention to certain political issues/controversies important to the Judicial Official (such as taxes, homeland security, environmental quality standards, FDA standards, Voter ID laws and the Affordable Healthcare Act) which would be in violation of Rule 3.1(3) and Canon 4's proscriptions against engaging in extrajudicial, political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

IV. The meeting adjourned at 10:00 a.m.