

## Informal Opinion 16-02

April 27, 2016

**Question:** In response to [Informal Opinion 15-1](#), a judge has posed the following questions:

1. Is the concern of the committee with the substance/content of the positions taken or that those positions is [sic] could be construed as judicial statements, i.e., issued under the color of authority as a judge?
2. May a judge serve as president of such an organization if there were no references to the Judge's title or position on the website?
3. May a judge, personally or as an member or officer of an organization criticize or commend statements made by a candidate for political office if neither the judge nor the organization endorses or opposes the candidate?
4. May a judge, personally or as an member or officer of an organization criticize or commend statements made by a candidate for political office if neither the judge nor the organization endorses or opposes the candidate and if the candidate's statements involve matters personally affecting the judge or the judge's family??
5. May a judge, personally or as an member or officer of an organization criticize or commend statements made by a candidate for political office if neither the judge nor the organization endorses or opposes the candidate?<sup>1</sup>
6. May a judge, personally or as an member or officer of an organization criticize or commend statements made by a candidate for political office that neither endorses or opposes the candidate if the judge's statements are attributed to a nom de plume?
7. May a judge attend a community event at which funds are raised (but is not the primary purpose of the event) if the judge does not solicit any funds?
8. May a judge speak at a community event at which funds are raised (but is not the primary purpose of the event) if the judge does not solicit any funds?
9. May a judge thank people for attending a community event at which funds are raised (but is not the primary purpose of the event) if the judge does not solicit any funds?
10. May a judge oppose or endorse legislation that affects a judge's personal, economic or political interests or that of his/her family?

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<sup>1</sup> Some of the questions appear to be duplicates. The Committee nevertheless recites the questions as set forth by the judge.

11. May a judge comment on legislation that affects their personal or economic interests in reliance upon Comment 3 to Rule 3.2 ("In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens . . .")?

12. In [Informal Opinion 88-4](#), the committee previously opined that a judge may engage in civic and charitable activities as long as the organization is not likely to be engaged in adversary proceedings and the judge is not involved in the fund-raising activities of the organization and does not permit the use of the judicial office for that purpose. May a judge continue to rely upon this opinion when engaging in civic and charitable activities or is the committee overturning its prior opinion?

13. The opinion states in several places that a judge may not serve as president. Does that mean that a judge may serve in other offices?

14. While the organization has been critical of comments made by individuals, the organization did not oppose or endorse any person for any public office. Is the mere fact that a person is a candidate for public office make it impossible for a judge to ever comment on the statements made by that person? What if the comments affect the judge's personal legal/economic interests?

15. If legislation which affects a judge's legal and economic interests is open for public comment, may a judge speak to the legislation?

16. If legislation/litigation is not within the scope of matters that are within the jurisdiction of the judge's court, may a judge speak to their merits?

a. What if the legislation affects the judge's personal legal/political/economic interests?

b. May a judge explain the legal/political process by which the matter will be decided?

17. Can a judge make comments through press releases of a national organization if the judge not identified as a judge in the press release or on the organization's website?

18. What, if any, effect would the fact that a specific issue is both outside the jurisdiction of the judge's court and affects the judge's personal/legal/economic interests on the scope of permissible activity for a judge?

**Answer:** The Committee believes that many of these questions were adequately addressed in [Informal Opinion 15-1](#). The Committee nevertheless provides additional guidance through this opinion.

**Discussion:**

The 18 questions can be grouped into categories. The first category involves a judge's title and whether a judge may engage in certain private activities if the judge's title is not used. The next category involves statements made about political candidates. The third category involves a judge's fundraising activities. The final category involves parameters on a judge publically addressing issues that affect the judge's personal interests.

The Code of Judicial Conduct is divided into four canons. Canon 1 contains the general provisions that apply to a judge's activities both on and off the bench. Canon 2 governs a judge's conduct when specifically acting as a judge. Canon 3 addresses a judge's off-the-bench conduct. Canon 4 covers a judge's political activities, including conduct while acting as a judge and conduct in private life.

Canon 1 requires a judge to uphold the integrity of the judiciary. Rule 1.2 states that a judge "should act at all times in a manner that promotes – and shall not undermine – public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Comment 1 notes that the "principle applies to both the professional and personal conduct of a judge." A judge cannot avoid the limitations imposed by the Code of Judicial Conduct by acting or purporting to act as a private individual or when serving as a representative of an organization. In that vein, a judge may not use a *nom de plume* to avoid restrictions. The answers to questions 1, 2, 13, and 14 are therefore that it does not matter whether a judge's title is used. A judge may not engage in any activities, either as a judge or as a private citizen, that undermine public confidence in the independence and impartiality of the judiciary. The principle applies if the judge holds any office in an organization. The public could reasonably perceive all office holders as responsible for, or at least supporting, the statements and policies of the organization.

The Committee stated in [Informal Opinion 15-1](#) that a "judge may not make any public statements that can be viewed as opposing or supporting a political candidate." The Committee determined that the statements referenced in that opinion "can be viewed as opposition to those presidential candidates." Rule 4.1(A)(3), which states that a judge shall not "publicly endorse or oppose a candidate for any public office," would ultimately be of little value if it were limited to circumstances in which judges expressly endorse or oppose a candidate. In [Informal Opinion 15-1](#), the Committee determined that the Code prohibits any statement that can be viewed as supporting or opposing a candidate. When an individual is running for public office, a judge's public comments either praising or criticizing that individual can be reasonably viewed as support or opposition. A judge should frankly avoid any public statements about candidates for office, whether made on the bench, as a private citizen, or as an officer of an organization.

Therefore, in response to questions 3, 4, 5, and 6, a judge's comments commending or criticizing a political candidate, such as those in [Informal Opinion 15-1](#), can reasonably be viewed as endorsing or opposing the candidate.

The Committee has addressed the fundraising activities of judges in several opinions. In [Informal Opinion 88-4](#), the Committee determined that a judge may be a member of an organization's board of directors if the "judge has separated himself from the fundraising aspect of [the] organization and does not himself solicit funds nor permit the judicial office to be used for that purpose." After evaluating the facts submitted in that opinion request, the Committee noted that the "fundraising literature and press announcements do not identify individual board members." The Committee is not retreating from [Informal Opinion 88-4](#). The judge in that opinion did not make statements about the fundraising activities and the judge's name was not associated with the fundraising activities.

In [Informal Opinion 89-8](#), the Committee determined that a judge may not participate in a "dunking booth" when the funds were to be used for drug prevention programs. The Committee determined that, even though the judge would not be directly soliciting funds, the judge's visible participation in the dunking booth constituted participation in fundraising.

It does not matter whether an event has fundraising as its primary purpose or fundraising is simply one part of the event. A fundraiser is a fundraiser and a judge may not participate. A judge may attend a fundraiser, but a judge may not speak at the event, be identified on materials announcing or promoting the fundraiser, or be publicly connected to the fundraising efforts. The simple act of a judge publicly thanking individuals for attending an event at which fundraising occurred may create the appearance that the judge participated in the fundraising efforts. There is no reason for a judge to publicly thank individuals when certainly there are others in the organization who may act in that capacity. These conclusions resolve questions 7, 8, 9, and 12.

In response to questions 10, 11, 14, 15, 16, and 18, the Committee expressly stated in [Informal Opinion 15-1](#) that a judge may "act pro se on matters involving the judge's legal or economic interests." A judge may speak on issues when the judge is personally affected. However, this provision must be read narrowly and applies only when the personal interest is significant and there is a direct impact on that interest. In a broad sense, many pieces of legislation have the potential to affect a judge's interests. However, the interest or the impact usually will not be sufficiently significant and direct as to permit public statements by the judge.

In [Informal Opinion 99-3](#), the Committee provided guidance on what might constitute a sufficient personal interest to allow a judge to publically speak on an issue. The judge in that opinion had a family member who suffered from a serious mental illness. The judge wanted to engage in discussions with the judge's insurance carrier about the merits of giving insurance coverage to mental illnesses, particularly in relation to the coverage given to serious physical disorders. The discussions were related to legislation requiring parity in insurance coverage. The Committee noted that the "financial implications of additional insurance coverage would be

significant to the judge.” The Committee stated that the judge could speak with the insurance carrier because of the direct and significant impact on a personal interest. The judge that has requested this opinion has not given specific examples of anticipated conduct.<sup>2</sup> The Committee can therefore state only that a judge may publicly speak on issues directly affecting the judge’s personal interests when the impact may be significant.

In conclusion, the Code of Judicial Conduct applies to a judge’s off-the-bench activities and applies whether or not a judge’s title is used. By accepting a nomination to the bench, a judge accepts restrictions that are not placed on other members of society. As stated in Comment 2 to Rule 1.2, “a judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.” These requirements ensure a fair, independent, and impartial judiciary.

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<sup>2</sup> The judge asked whether a judge may publicly speak on issues affecting the judge’s political interests. The judge did not provide specifics. The Committee cannot conceive of any circumstance in which a judge would have a sufficient personal political interest that might justify public statements, particularly considering that a judge must maintain political neutrality at all times.