

Informal Opinion 20-2

June 4, 2020

Question: A judge has asked whether she can be involved in efforts to encourage the Utah State Legislature to ratify the Equal Rights Amendment.

Answer: A judge may not be involved in those efforts.

Discussion:

The Equal Rights Amendment has received renewed interest nationwide. A few states are considering whether to ratify the amendment. Utah has not ratified the amendment and, according to the judge who requested the opinion, there will be efforts by various groups and individuals to encourage state officials to act on the proposed amendment. The judge asks whether she can participate in any of those efforts. The committee has not been provided with specific examples of those efforts, but the committee has a general idea of what might be involved. The committee determines the judge may not be involved.

In asking whether a judge may be involved, the judge suggests the Equal Rights Amendment effort is “not a partisan issue per se.” The judge notes the Utah Constitution already provides for equal voting and political rights for both men and women and therefore the efforts will involve encouraging state officials to support adding similar language to the United States Constitution. The questions for the committee are whether the efforts supporting ratification of the Equal Rights Amendment involve political issues, and if they involve political issues, whether they are the type of issues about which judges may publicly express an opinion.

There are several rules in the Utah Code of Judicial Conduct that are relevant to this request. Rule 3.2 permits judges to communicate with government officials and entities on issues that involve the law, the legal system, or the administration of justice. Although judges may speak to government officials on those issues, judges must ensure the interactions comply with other provisions of the Code of Judicial Conduct. For example, under rule 1.2, judges must ensure any activities or comments do not undermine public confidence in the independence and impartiality of the judiciary. Rule 3.1 permits judges to engage in extrajudicial activities except those activities that “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” And rule 4.1 prohibits judges from attending events sponsored by a political organization. These rules lead to the conclusion that judges may not publicly support or otherwise publicly address the merits of the proposed Equal Rights Amendment.

The process for amending the United States Constitution involves state legislatures. The members of a legislature debate and vote on whether to ratify a proposed constitutional amendment. The process is thus political. In order for Utah to vote on ratification, the members

of the Utah Legislature would be required to engage in a political process. The question then is whether this is the type of political issue about which judges may publicly express an opinion.

The committee stated in Informal Opinion 98-11 that although rule 3.2 permits judges to communicate with other government officials or entities about the administration of justice, judges may speak only on issues that have a direct and primary impact on the judiciary. In Informal Opinion 01-1, the committee succinctly stated that “the issues on which judges can speak must have a connection to the regular judicial or administrative activities of a judge.” In Informal Opinion 88-7, the committee stated that a “judge is entitled to entertain his personal view of political questions, but should not directly or indirectly participate in partisan political activities.” In Informal Opinion 91-1, the committee extended this conclusion, stating that a judge may not take “a public position on a non-partisan political issue [if it] would jeopardize the confidence of the public in the impartiality of the judicial system.” Thus, whether the issue is partisan or non-partisan, in order to promote public confidence in the judiciary, a judge may speak only on political issues that directly involve the judiciary.

The judiciary is certainly concerned about equality and fairness. The mission statement of the judiciary is to “provide an open, fair, efficient, and independent system for the advancement of justice under the law.” Any law that promotes equality is consistent with the judiciary’s objectives. There are certainly many activities involving equality and fairness that involve the regular judicial or administrative activities of a judge, but engaging in efforts to promote passage of the proposed Equal Rights Amendment is not one of them.

The committee has previously discussed the types of political issues about which judges may not offer public comments. In Informal Opinion 15-1, the Ethics Advisory Committee answered the question of whether a judge may serve as president of an organization that took public positions on certain legislation. For example, the organization had issued press releases on the Voting Rights Advancement Act and the Justice for Victims of Trafficking Act. Those proposed laws had very laudable goals directed toward equality and human rights. But the committee determined the judge could not serve as president because the organization “publically express[ed] views on legislation and political issues that [are] not directly connected to the activities of a judge or the judicial system.” As president, the public perception would be that the judge initiated or approved the positions.

The proposed Equal Rights Amendment is similar to those laws in its focus on equality and human rights. But similar to those laws, the proposed Equal Rights Amendment does not have a direct and primary impact on the administration of justice. The proposed Equal Rights Amendment may affect the judicial system, but the efforts are not directed toward the judicial system. The amendment would impact countless organizations, including private and public entities.

A judge thus may not express public support for or opposition to the proposed Equal Rights Amendment. A public expression of support would include verbal support as well as participating in activities aimed at promoting passage of the Equal Rights Amendment, such as attendance at a rally organized for the purpose of encouraging support for the amendment. A

judge also may not attend any event at which the Equal Rights Amendment is discussed if the event is sponsored by a political organization.

The committee recognizes that the proposed Equal Rights Amendment has an important objective. The judiciary wholeheartedly supports efforts that promote equality and fairness. A judge may participate in efforts that promote diversity on the bench, for the judiciary as a whole, and among members of the bar, but other efforts are generally prohibited. Although a judge may not publicly express support for the Equal Rights Amendment the committee supports and encourages judges to participate in activities that promote equality and fairness in the legal system.