

ADVISORY OPINION

Code of Judicial Conduct
Canon 4
Application Section

1-19

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

Canon 4 of the Code of Judicial Conduct states the general principle that judges and candidates for judicial office not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.¹ The purpose of this Advisory Opinion is to clarify the Commission's interpretation of the Code of Judicial Conduct as it pertains to political activities of judicial officers who are retiring and Senior Judges who are not running for judicial office. Specifically, the following queries have been posed:

- 1) May a retiring judge publicly endorse a successor candidate for the retiring judge's seat?
- 2) May a Senior Judge publicly endorse a candidate for public office? If so, is the Senior Judge permitted to use his or her judicial title and/or be pictured in a judicial robe for such endorsements?

The Commission's view is that a retiring judge who is a full-time judicial officer or a continuing part-time judicial officer may not publicly endorse any candidate for public office, as the retiring judge is not a candidate for judicial office. In contrast, because a Senior Judge is a part-time judge who serves only on a temporary basis, the Code of Judicial Conduct does not prohibit a Senior Judge from publicly endorsing candidates for public office. However, a Senior Judge may not use his or her judicial title or court resources (such as wearing a judicial robe) to bolster such endorsements.

ANALYSIS

Preserving both the appearance and actual presence of impartiality in the judiciary is one of the hallmarks underlying Indiana's Code of Judicial Conduct. The Preamble to the Code of Judicial Conduct concisely sets forth that, "An independent, fair and impartial judiciary is

¹ The four Canons in the Indiana Code of Judicial Conduct each espouse the aspirational goals (and guidance) for the judiciary regarding judicial ethics, and then the Rules contained within each Canon set forth a judge's obligations under the Code of Judicial Conduct.

indispensable to our system of justice. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.” Ind. Code of Jud. Conduct, Preamble, ¶1.

All provisions of the Code of Judicial Conduct apply to full-time judges; however, because part-time judges and temporary judges have a different status and often have other professional and civic duties apart from their limited judicial role, not all Rules apply to such judicial officers. *See* Ind. Jud. Cond. Application, I(B). The Application Section of the Code of Judicial Conduct categorizes the types of part-time and temporary judicial officers and sets forth which Rules they are exempted from. *See generally* Ind. Code of Jud. Conduct, Application, II-V.

Canon 4 applies in its entirety to full-time judicial officers, continuing part-time judges, and candidates seeking judicial office. Ind. Jud. Cond. Application, I(B), III. However, provisions of Canon 4 do not apply to periodic part-time judges (judges who serve on a part-time basis under separate appointments) or judges *pro tempore* (judges who serve sporadically on a part-time basis). Ind. Code of Jud. Conduct, Application, IV, V.

General Framework and Policies Underlying Canon 4

Although many judges throughout the State are selected in partisan elections, the role of judges differs from politicians. “Politicians are expected to be appropriately responsive to the preferences of their supporters. The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must ‘observe the utmost fairness,’ striving to be ‘perfectly and completely independent, with nothing to influence or controul him but God and his conscience.’” *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1667 (2015)(quoting Address of John Marshall in Proceedings and Debates of the Virginia State Convention of 1829-1830, p. 616 (1830)).

Given the manner which many trial court judges are selected for their positions, however, judges need to be afforded some latitude to participate in political activities, without impairing the obligation to maintain independence, integrity, and impartiality. Consistent with this proposition, the Rules contained within Canon 4 attempt to balance a judge’s or judicial candidate’s interest in speaking and acting in furtherance of his or her campaign with the public’s interest in preserving judicial independence and impartiality. Ind. Code of Jud. Conduct R. 4.1, Comments 1-4, 13. Rules 4.1(C) and (D) set forth the political activities which a partisan or non-partisan-selected judge or judicial candidate for such offices may engage in at any time (regardless of the election cycle). Rule 4.1(A) lists the political activities which judges and judicial candidates are generally prohibited from doing. Ind. Code of Jud. Conduct R. 4.1(A)(1)-(13). Then, Rules 4.2(B) and (C) set forth the additional political activities which a judicial candidate may engage in during his or her election cycle.

Examining the interplay between these Rules with respect to public endorsements, the Commission notes that Rule 4.1(A)(3) prohibits a judge or judicial candidate from publicly endorsing or opposing a candidate for any public office. When a judge or judicial candidate is within his or her election cycle (one year before the primary or general election in which the

individual is running), Rule 4.2(B)(3) provides a limited exception to Rule 4.1(A) and permits a candidate for partisan elective judicial office to publicly endorse and contribute to candidates for election to public office running in the same election cycle. For a candidate for nonpartisan elective judicial office who is within his or her election cycle, Rule 4.2(C)(3) permits the candidate to publicly endorse, contribute to, and attend functions for other candidates running for the judicial office for which he or she is running (are on the same ballot).

Retiring Judges

A retiring judge who is asked to provide a public endorsement for a candidate for public office, including a potential successor, does not fit within the situation which triggers the exceptions of Rules 4.2(B)(3) or (C)(3) because the retiring judge is not running for office. Unlike the public endorsement from a candidate running for judicial office, a public endorsement from a retiring judge is not speech in support of his or her campaign but rather may be perceived as an attempt to trade on the judge's opinion or prestige of office to further the interests of another.² Since the judge regularly continues to preside over cases, this may cause members of the public to question the judge's independence or impartiality because the endorsement (or opposition of a candidate) could be perceived as a bias in favor of or against the candidate's views when those issues come before the judge. Even more problematic, there is a danger that members of the public may perceive that the retiring judge has "assume[d] a role as political powerbroker." See *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010). It is the Commission's view that these dangers are too great and that the Code of Judicial Conduct simply does not permit a retiring judge who is still on the bench to publicly endorse candidates for public office.

Senior Judges

A Senior Judge who is asked to provide a public endorsement of a candidate for public office presents a different situation, as a Senior Judge is a periodic part-time judge who serves each time under a separate appointment. See Ind. Code of Jud. Conduct, Application, II, IV. As a temporary judge, a Senior Judge appears more akin to the lawyer who occasionally presides as a judge *pro tempore* than the full-time judge who has been elected or appointed to serve.

Moreover, many Senior Judges also have law, arbitration, or mediation practice which the Senior Judge dedicates time to. Rather than trading on the prestige of judicial office, endorsements and other political activity may be in furtherance of the Senior Judge's activities in other professional realms (e.g. the Senior Judge's law firm may perform legal work for a local entity or candidate and want to support that candidate). Accounting for the different status that a Senior Judge plays in Indiana's judiciary, the Application Section of the Code of Judicial Conduct does not require a Senior Judge to comply with Rule 4.1 of the Code of Judicial Conduct. Ind. Code of Jud. Conduct, Application, IV(A)(2).

² As the Seventh Circuit noted in *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010), "When judges are speaking as judges, and trading on the prestige of their office to advance other political ends, a state has an obligation to regulate their behavior." The *Siefert* Court further recognized that, "the state's interest in the endorsement regulation is a weighty one. Due process requires both fairness and the appearance of fairness in the tribunal. '[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Id.* at 985-86 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)(citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

While the Code of Judicial Conduct does not prohibit a Senior Judge from publicly endorsing (or opposing) a candidate for public office, the Commission nonetheless encourages Senior Judges to exercise discretion and wisdom regarding whether to provide such endorsements. Further, the Commission cautions Senior Judges that they remain subject to other portions of the Code of Judicial Conduct which would prohibit them from using their judicial titles and court resources to bolster such endorsements. For example, Rule 1.3 of the Code of Judicial Conduct prohibits judges, including Senior Judges, from abusing the prestige of judicial office to advance the personal interests of the judge or others. When a Senior Judge appears in a political candidate's campaign advertisement in a judicial robe and is referred to by his or her "Senior Judge" title, it is difficult to counter the public perception that the Senior Judge is speaking as a judge and trading on the prestige of that office to advance the political ends of the person the Senior Judge is endorsing.³

Conclusion

A retiring judge who is a full-time or continuing part-time judicial officer may not publicly endorse any candidate for public office, as the retiring judge is not a candidate for judicial office. Because a Senior Judge serves only on a temporary basis, the Code of Judicial Conduct does not prohibit a Senior Judge from publicly endorsing candidates for public office. However, a Senior Judge may not use his or her judicial title or court resources (such as wearing a judicial robe) to boost such endorsements.

³ Unlike a judge who is running for re-election who has an interest in speaking in support of his or own qualifications (i.e. the candidate is the incumbent and already has served as a judge) which justifies use of his or her judicial title and appearing in a judicial robe in campaign materials, a Senior Judge who offers a public endorsement is not speaking in furtherance of his or her own qualifications for judicial selection.