

ADVISORY OPINION

**Code of Judicial Conduct
Canons 1, 2, 3, and 4**

1-20

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. 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. However, the Commission may withdraw any opinion. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues.

ISSUE

In light of recent events, a number of judicial officers have sought advice about whether, consistent with their ethical obligations under the Code of Judicial Conduct, they may attend and participate in marches, demonstrations, vigils, protests, and other public events aimed at addressing various social issues. The purpose of this Advisory Opinion is to provide judicial officers with guidance regarding the factors to consider when deciding whether to participate in such events.

ANALYSIS

When judicial officers seek to speak out publicly by participating in demonstrations, vigils, protests, or marches, two countervailing interests are at play: the First Amendment rights of the judge versus the state's interest in preserving the independence, integrity, and impartiality of the judiciary. As this Commission recognized in [*Public Admonition of Letsinger \(Ind. 1997\)*](#):

Judges are not forbidden from making public comments; in fact, they should be encouraged to engage in temperate and judicious speech on any subject, *so long as the speech does not compromise the high ethical standards by which judges, unlike other citizens, are held*. Judges do not lose entirely their rights to free speech, but it is well established that the preservation of the integrity and of the public perception of the judiciary justifies certain infringements on a judge's right to speak out (emphasis added).

Similarly, preservation of the independence and impartiality of the judiciary equally justifies certain infringements on a judge's right to speak out publicly. It is against this backdrop that the Commission considers the current request for advice, evaluating

pertinent Rules of the Indiana Code of Judicial Conduct and examining other advisory commissions' treatment of similar questions.

Code of Judicial Conduct Rules Pertaining to Extrajudicial Speech and Conduct

The following Rules in the Indiana Code of Judicial Conduct are relevant when evaluating the propriety of judges engaging in extrajudicial speech and conduct in support of public events aimed at addressing social issues:

- Rule 1.2 requires judges to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. Comments 4 and 6 to this Rule encourage judges to participate in activities that, among other things, promote access to justice for all and to engage in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.
- Rule 1.3 prohibits judges from using the prestige of office to advance the personal interests of the judge or others, or to allow others to do so.
- Rule 2.10(A) prohibits judges from making public statements that might reasonably be expected to affect the outcome or impair the fairness of a pending or impending matter in any court. Subsection (B) prohibits judges from making pledges, promises, or commitments that are inconsistent with the impartial performance of a judge's adjudicative duties in relation to cases, controversies, or issues likely to come before the court.
- Rule 2.11(A)(5) specifically requires judges to disqualify if they have 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 a proceeding or controversy. Further, Rule 2.11(A) generally requires judges to disqualify any time the judge's impartiality might reasonably be questioned.
- Rule 3.1 generally permits judges to engage in extrajudicial activities as long as participation: 1) will not interfere with the proper performance of judicial duties; 2) will not lead to frequent disqualification of the judge; 3) would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; 4) would not appear to a reasonable person to be coercive; and 5) does not involve the use of court premises or resources, except for incidental use.

- Rule 3.7(A)(4) prohibits judges from being the featured speaker or guest of honor at events sponsored by educational, religious, charitable, fraternal, or civic organizations if the event serves a fundraising purpose.
- Rule 4.1(A) prohibits judges from engaging in various political activities (i.e., endorsing or opposing candidates for public office) when not in their election cycle.

Common Concerns Regarding Extrajudicial Speech/Conduct on Controversial Issues

Advisory committees evaluating the ethical propriety of judicial officers participating in marches, vigils, protests, and demonstrations have weighed the following factors: who is sponsoring the event and what is the event’s primary purpose; how is the event being presented (time, place, and manner); and what are the expectations of the judge at the event.

Political Organizations

Advisory commissions have remarked that judges should not participate in social-issue marches sponsored by or affiliated with a political organization or in marches supporting or opposing a political party or candidate. See [Arizona Advisory Opinion 2018-6](#); [New York Advisory Opinion 2017-38](#). If the primary purpose of the event is aimed at influencing the actions of a political candidate or party—even when the activity is sponsored by a nonpartisan group—the judge should not participate. See, e.g., [Massachusetts CJE Opinion 2016-10](#) (A judge should not participate in the Women’s March on Washington scheduled the day after the presidential inauguration, as the public and media are “likely to focus on the timing of the event and the organizers’ announced desire to ‘send a message’ to the new President on his first day of office”).

Supporting or Protesting Matters in Active or Likely Litigation

Advisory committees also have warned judges about participating in marches or demonstrations about matters currently the subject of litigation (even if the matter is not in the judge’s court) or that are likely to become a subject of litigation before the judge. See [New York Advisory Opinion 2017-38](#) (A judge may not participate, even without speaking, in a local rally, march, or demonstration sponsored by a grassroots organization in opposition to the “Trump Muslim Ban,” noting that the event clearly “involves great public controversy, which is also the subject of litigation”); see also [Arizona Advisory Opinion 2018-6](#).

Public Events Sponsored by Frequent Litigants or Advocacy Groups

When an event is sponsored or held by an organization that regularly appears before the judge or that holds an advocacy role within the courts, advisory committees have reached contrary results when interpreting Rules 3.1 and 1.2. Some committees have advised

against attending, reasoning that attendance at these events may lead to frequent requests for disqualification as “the judge’s presence and participation ‘create[s] an appearance of particular sympathy toward one side in court’ and necessarily cast[s] doubt on the judge’s ability to be impartial.” [New York Advisory Opinion 2017-108](#) (A judge may not participate in a “Call to Service and Compassion Workshop” to honor child abuse victims and survivors hosted by a local child advocacy center); *see also* [New York Advisory Opinions 2010-59](#) and [2004-91](#) (advising judges against appearing at candlelight vigils for those affected by domestic violence and on behalf of victims of crime); *see also* [New Jersey Advisory Opinion 2008-1](#) (Judges may not participate in a candlelight vigil celebrating the one millionth child served by CASA programs across the country).

Other advisory commissions have taken a more permissive approach, advising judges that they may attend public events sponsored by an advocacy group, if the event serves a nonadvocacy purpose and the judge behaves at the event in a manner that does not cast doubt upon the judge’s impartiality. *See* [Washington Advisory Opinion 1996-16](#) (A judge may attend a “Day of Remembrance” ceremony to honor victims of domestic violence, but should take care that his or her mannerisms, actions, or speech do not cast doubt upon the judge’s impartiality and should not act as an advocate or in any manner that indicates a predisposition as to how he or she might rule in a domestic violence case); [Florida Advisory Opinion 1995-41](#) (A judge may attend a Mothers Against Drunk Driving candlelight vigil because the event merely recognizes the victims of impaired drivers and does not call for changes in the law); [Florida Advisory Opinion 1992-34](#) (A judge may attend ceremonies held by law enforcement agencies to honor officers killed in the line of duty); *see also* [Massachusetts CJE Opinion 2016-06](#) (A judge may serve as a guest speaker at a Community Family Day event held by a neighborhood civic association even though a large number of law enforcement agencies are sponsors, but commission set forth several cautions “designed to prevent [the judge] from unintentionally conveying to the public any erosion or blurring of the line of demarcation between law enforcement agencies and the judiciary”).

Conduct Highlighting Judge

Advisory commissions also have warned judges to consider what role the judge is expected to play at an event. The Arizona Advisory Committee cautioned that, “Unless an event is directly related to the law, the legal system, or the administration of justice, judges should refrain from publicizing their affiliation with the judicial branch when participating.” [Arizona Advisory Opinion 2018-6](#).

A recent advisory opinion issued from Connecticut highlights concerns when a judge is asked to take a featured role in a protest or demonstration. [Connecticut Informal Opinion 2020-3](#). A judicial official from Connecticut sought advice on whether he could participate in “A Silent March of Black Female Attorneys of Connecticut” by meeting the marchers at the steps of the Connecticut Supreme Court and reading Article First, Sec. 2 of the

Connecticut Constitution (which sets forth that all political power is inherent in the people) if he is not introduced at the event, does not identify himself by name or title or wear court-affiliated attire, does not permit his name or title to be used in any advertising, does not interpret the constitutional provision he is reading, and does not speak with the media. The invitation to the event indicated that protest signs in support of the cause are welcome, supporters would be distributing “We Can’t Breathe” buttons and voter registrations cards at the event, and marchers are strongly urged to wear all black with black sunglasses to lend support to the message.

The Connecticut Advisory Committee opined that, given the specific facts, the judicial official should not participate in the event because: 1) the judicial official’s participation would unnecessarily insert him into a public controversy in violation of Rule 1.2; 2) although the judicial official’s name and title would not be used, his identity likely could be ascertained since he would be the only male supporter speaking on the steps of the Connecticut Supreme Court and, thus, could undermine the public’s confidence in the independence and impartiality of the judiciary; and 3) the judicial official might be called upon to rule on claims of police brutality or abuse, and his participation in the event might appear to reasonable persons to undermine his independence and impartiality in violation of Rule 3.1.

Injudicious Remarks

Even when judges have spoken on appropriate matters of public concern, advisory commissions have cautioned judges to be circumspect in their remarks; and judicial conduct commissions have pursued discipline when judges have made injudicious remarks that undermine the independence, integrity, and impartiality of the judiciary. See [*Public Admonition of Letsinger \(Ind. 1997\)*](#) (judge admonished for intemperate remarks about investigation into missing probation funds); *Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So.2d 1006 (Miss. 2004) (judge disciplined for anti-homosexual remarks he made to newspaper when commenting on states that had extended right to sue for homosexual partners); *Disciplinary Counsel v. Ferrari*, 710 N.E.2d 1107 (Ohio 1999) (judge disciplined for derogatory remarks made in newspaper about juvenile detention center staff and judicial officials); *In re Conduct of Schenck*, 870 P.2d. 185 (Oregon 1994) (judge disciplined for writing letters to newspaper criticizing district attorney); *But cf. In re Inquiry Concerning Gridley*, 417 So. 2d 950 (Fla. 1982) (judge’s letters to editor expressing views against capital punishment protected by First Amendment).

Recommendations for Judges Who Wish to Participate in Public Events Aimed at Addressing Social Issues

After reviewing and considering all pertinent materials, including opinions from other ethics advisory committees, the Indiana Commission on Judicial Qualifications is of the opinion that, pursuant to Rule 3.1 of the Code of Judicial Conduct, a judge may participate in many public events aimed at addressing social issues if the judge can do so in a manner that does not impinge upon the independence, integrity, and impartiality of the judiciary. When deciding whether attendance and participation at a particular event may impair the judge's independence, integrity, or impartiality, the Commission notes that the determination often will be fact sensitive and encourages judges to consult with Commission staff to evaluate the wisdom of participating in certain events. Nonetheless, there are several guiding principles/factors that a judge should consider in his/her evaluation:

- The title of the event – The more provocative or advocacy-oriented the title of the event is in promotional materials, the more likely the judge should abstain. *See* Rules 1.2, 3.1(C).
- The purpose of the event – If the event primarily serves an advocacy or political purpose or is a fundraiser (and the judge is a featured speaker), the judge should not participate due to concerns regarding frequent subsequent disqualification requests of the judge and concerns about the appearance of partiality. *See* Rules 1.2, 3.1(B), (C), 3.7(A)(4), and 4.1(A). Also, if the event touches upon a pending matter currently before the judge, then the judge should not attend (i.e., the protest/march is aimed at raising awareness about police practices, and the judge currently has a civil lawsuit on his/her docket regarding the city's response to excessive force incidents). *See* Rule 2.10(A), (B).
- The organizers and sponsors of the event – If the event primarily is sponsored or affiliated with a political party or candidate or seeks to influence the actions of a particular political official, the judge should not participate due to impartiality and independence concerns. *See* Rule 4.1(A). If the event is held by an advocacy group or a frequent litigant in the judge's court, the judge should carefully weigh the purpose of the event. If it is for a nonadvocacy purpose and the judge can participate in a manner that will not raise public concern about the judge's impartiality, then the judge may participate. *See* Rule 3.1. For instance, a judge could attend a march raising awareness about issues with the death penalty (as long as the judge maintains his/her ability to follow the law), but posing in a coffin for the media as part of an

anti-death penalty protest¹ would raise concerns about the judge's ability to remain impartial in future cases. *See* Rules 1.2, 2.10(A), 2.11(A)(5), and 3.1(C).

- The details about the event – If the event is being held in a time, place, or manner where participants likely will violate the law (i.e., by not following imposed curfews or by becoming violent), then a judge should not participate. *See* Rule 1.2. For instance, if there has been a past history of violent eruptions at an event, a judge would be well advised to avoid attendance.
- The potential role of the judge at the event – If a judge is requested to be a featured speaker or guest of honor at an event, the judge should carefully review all invitational materials to determine whether his/her featured presence may cause frequent disqualification or might subject the judge to concerns that the judge is improperly using the prestige of judicial office to further the organization's goals. *See* Rules 1.3, 3.1(C). If the matter does not specifically involve matters concerning the law, the legal system, or the administration of justice, the judge should not allow his/her legal title to be referenced during the event and should not wear any clothing identifying him/her with the judiciary.

If a judge determines after reviewing invitational/promotional materials that attendance at the event will not impair the independence, integrity, or impartiality of the judiciary, the judge should still consider the following while at the event:

- Change in circumstances – If circumstances change at the event that cause the judge to believe the judge's integrity or the impartiality of the judiciary might later be questioned (i.e., the majority of protesters are carrying signs supporting/opposing a political candidate), then the judge should be prepared to immediately leave the event.
- Temperate and judicious conduct – The judge should be careful to act at all times at the event in a manner that is temperate and judicious.

CONCLUSION

A judge may participate in public events aimed at addressing social issues if the judge can do so in a manner that does not impinge upon the independence, integrity, and impartiality of the judiciary. Judges are encouraged to consult with Commission staff to seek guidance on the wisdom of attending and participating in specific events.

¹This specific example (along with pictures of the event) was given at a recent judicial ethics session, "Judges as Citizens and Reformers," presented at the October 2018 National College on Judicial Conduct and Ethics.