

Maryland Judicial Ethics Committee

Opinion Request Number: 1980-08

Date of Issue: August 29, 1980

■ Published Opinion Unpublished Opinion Unpublished Letter of Advice

Appellate Judge Running for Retention in Office May Engage in Same Political Activity as Similarly Situated Circuit Court Judge

Your have requested an opinion of the Ethics Committee as follows:

“In accordance with the Maryland Constitution, Art. IV, § 5A, ratified 2 November 1976, my name will appear on the 1980 general election ballot, without opposition, for continuance in office. As a result of the ratification of Art. IV, § 5A, an appellate court judge is no longer nominated and elected as a candidate of a political party. I am therefore requesting an opinion as to whether an appellate judge seeking continuance in office may solicit the support of political parties and candidates, attend or speak at political gatherings, and make contributions to the campaign funds of political parties or candidates, without violating the Canons and Rules of Judicial Ethics ...”

The provisions of the Canons and Rules relevant to your question is Canon XXVII, which provides as follows:

“While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another.

“He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

“Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.”

The third paragraph of the Canon, containing the exception, for a judge facing election, to the general restrictions on political activity set forth in paragraphs one and two, is worded in terms of nomination and election as a political party candidate. Thus, from a very literal viewpoint, it could be argued that the exception has no application to a judge seeking election but not nominated or elected as a candidate of a political party. However, being consistent and construing the entire Canon literally would also lead to a conclusion that the basic restrictions on political activity contained in paragraphs one and two only apply to involvement in political parties and partisan activities. Nevertheless, in [Opinion Request No. 1972-01], issued April 7, 1972, this Committee construed the paragraph one and two restrictions so as to prohibit a judge’s involvement in a “non-partisan” committee formed to promote the election of others. *See also* [Opinion Request No. 1978-07], issued January 16, 1979; [Opinion Request No. 1975-08], issued July 7, 1975; [Opinion Request No. 1974-05], issued July 22, 1974. If the restrictions in Canon XXVII are to be given a

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non-literal construction, so as to prohibit active involvement in non-partisan elections, then the exception to those restrictions should be given a similar non-literal construction.

The Canons of Judicial Ethics, adopted by the Court of Appeals in 1971, were drafted by the American Bar Association for nationwide application. Although the Canons were modified in some respects by a committee of the Maryland Judicial Conference to meet Maryland needs, the language of Canon XXVII still reflects the normal partisan election system prevailing throughout the country, whereby each of the two major political parties nominates its own candidate for an office. However, in Maryland, for many years we have had a largely non-partisan election system at the circuit court level, as well as the appellate court level prior to the 1976 change. This is because candidates for judicial office, regardless of their party affiliation, have been able to file in both the Republican and the Democratic primaries. In addition, the Election Code requires that candidates for judicial office at both the circuit court and appellate court levels “shall be placed on the ballots without any party label or other distinguishing mark or location which might directly or indirectly indicate the party affiliation of the candidate or judge.” Maryland Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.), Art. 33, § 16-5(e).^{*} Consequently, it is obvious that Canon XXVII cannot be given a literal construction. Instead, it must be construed in light of the nature of Maryland judicial elections, which are essentially non-partisan at the circuit and appellate levels.

Accordingly, this Committee has regularly given paragraph three of Canon XXVII, which permits political activity by judges seeking election, a construction designed to effectuate its purpose. In [Opinion Request No. 1978-07], *supra*, after pointing out that the Committee has interpreted the exception “broadly,” and after reviewing several prior opinions, the Committee stated:

“It is apparent that the purpose of the exception in Canon XXVII is to allow a judge, who must seek election, to advance his candidacy like other candidates for elective offices. Legitimate political activity that directly or even indirectly furthers one’s own candidacy is permitted under the Canon. Examples are attendance at political fund raisers of other political candidates ([Opinion Request No. 1978-02], *supra*), the joint judicial campaign of sitting judges ([Opinion Request No. 1974-03], issued April 25, 1974), and public appearances on behalf of other judges in a joint campaign ([Opinion Request No. 1974-05], *supra*). It is evident that the exception is sufficiently broad to permit most types of campaign activities designed to enhance one’s own possibilities for election”

And in [Opinion Request No. 1978-02], issued May 8, 1978, the Committee observed:

“The Canons of Judicial Ethics are not designed to impose handicaps on those judges forced to compete for their seats at the polls. The exception to Canon XXVII’s proscription is manifestly intended to make it possible for incumbent

^{*} As of the editing date [July 10, 2006], reworded and recodified as Maryland Code, Election Laws Article, § 9-210(g)(3).

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judges, seeking election, to compete against their opponents without disadvantage.”
See also [Opinion Request No. 1977-07 (unpublished)], issued November 28, 1977 (pointing out that the exception in Canon XXVII must be viewed “with the realities of political elections in mind”); [Opinion Request No. 1975-08], *supra* (stating that because of the exception, the restriction against political activity contained in Canon XXVII “does not apply to a judge who ... must stand for election”).

The 1976 constitutional amendment, under which an appointed appellate judge does not run in the primaries but stands for election in the general election with the vote being for or against the judge’s continuance in office, was designed to minimize the necessity for the judge’s having to engage in extensive political activity. However, nothing in the language of the amendment, or in its history, or in this Committee’s opinions applying Canon XXVII, would support the view that an appellate judge who is a candidate for a continuation in office election is prohibited from engaging in any political activity. Moreover, such a view would not be realistic. Although Maryland has not yet had much experience with the continuation in office election, in some other states having this system campaigns occasionally have been waged urging voters to cast ballots against the judge’s continuance in office. Even when no such active campaign is waged, a sizable number of negative votes may be cast against the judge’s continuance in office. This occurred in 1978 in Maryland with regard to the appellate judges on the ballot, although all of the appellate judges on the ballot at that time were elected by wide margins.

In sum, we conclude that the exception in Canon XXVII, permitting political activity by judges seeking election, is equally applicable to appellate judges in your situation. Neither the Canons nor the Rules of Judicial Ethics prohibit you from engaging in the type of political activity set forth in your letter.