

Maryland Judicial Ethics Committee

Opinion Request Number: 1985-04

Date of Issue: February 14, 1986

■ Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge Who Is Candidate for Election May Have His or Her Name on Ticket with Non-Judicial Candidates

A recently-appointed Circuit Court judge who will be a candidate for election to a full elective term in 1986 poses the following two questions:

1. Is it permissible for him to join a ticket with non-judicial candidates, specifically those for the offices of the Clerk of the Court and the Register of Wills?
2. If the judge is unopposed, can he lend his name to a ticket involving these non-judicial but court-related candidates?

As to the second question, the inquiring judge does not specify whether he is referring solely to a situation in which no one has filed against him at all or one in which his unopposed candidacy results from his prevailing in the primary elections of two major political parties. We shall deal here with both aspects of this second inquiry.

Canon XXVII, Partisan Politics, tells us that a judge “should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office, and participation in party conventions.” [Emphasis added.] The Canon provides this exception:

“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 reelection.”

These exceptions applying to judges who must be elected to remain in office merely list certain permitted activities which parallel those specifically forbidden by the Canon. They provide little guidance here because they omit reference to other types of political activity which might be involved in the setting of a judicial election.

The third paragraph of Canon XXIX, Candidacy for Office, comes closer to the questions before the Committee. It provides:

“If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power and prestige of his judicial position to promote his candidacy or the success of his party.”

The concluding paragraph supplements this.

“He should not knowingly permit others to do anything on behalf of his candidacy which would reasonably lead to such suspicion.”

By joining a ticket a judge receives the apparent assistance of others on the ticket and it is not unreasonable to believe that he is reciprocating by lending his aid to his running mates. This could be construed as “the public endorsement of candidates for political office” forbidden by Canon

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XXVII and not included among the exception for judges who have to run to keep their seats. Also, since candidates on most tickets are of the same party, a judge might also be subject to running afoul of Canon XXIX by “using the power and prestige of his judicial position” to promote not only his own candidacy, but also “the success of his party.”

[Opinion Request No. 1974-03], dated 25 April 1974, deals with the propriety of several judges who are engaged in a united campaign for retention in office speaking and working for the election of each other. The concluding paragraph of the Opinion sums up the considerations which led to the Committee’s opinion that a ticket of sitting judges was permissible.

“The evil which the Canon seeks to avoid is ‘the inevitable ... suspicion of being warped by political bias [which] will attach to a judge who becomes the active promoter of the interests of one political party as against another.’ It is difficult to perceive how endorsement by one judicial candidate of another or any similar cooperative effort within the bounds of Rule 9 [...] and Canon XXIX would give rise to suspicion of political bias. Furthermore, it has long been the custom where more than one judge in a jurisdiction is seeking election or reelection to judicial office to conduct a combined campaign usually as ‘sitting judges.’ The propriety of the sitting judge principle has been recognized by the Court of Appeals. Smith v. Higinbotham, 187 Md. 115. There is no evidence that the Maryland Judicial Conference which proposed the Canons of Ethics, or the Court of Appeals which promulgated Rule 1231 incorporating the Canons, intended to proscribe this long-standing practice. Of course, as you suggest, public endorsement of political candidates for other than judicial office would be improper.” [Emphasis added.]

In a related vein, [Opinion Request No. 1975-08], 7 July 1975, in answering a question as to whether a judge has the right to make campaign contributions in the support of a particular individual, whether or not the judge was a candidate for election, the Committee concluded that the “broad prohibition against political activity contained in Maryland Canon XXVII and the thrust of Maryland Rules 3, 4 and 9, which limits a judge’s political activity to the support of his own candidacy, preclude a judge from making contributions in support of the political candidacy of another, and from publicly endorsing a candidate for election to office, whether judicial or non-judicial.” [Emphasis added.]

But although the general thrust of Canon 7 of the American Bar Association Code of Judicial Conduct, adopted on 16 August 1972, is similar to that of our present Canons XXVII and XXIX, the commentary following ABA Canon 7.A(1)(c) says, “A candidate does not publicly endorse another candidate for public office by having his name appear on the same ticket.” This dispensation is in accord with the practice in some Maryland jurisdictions where it has long been customary for judicial candidates, be they sitting judges or candidates challenging sitting judges, to allow their names to be placed on tickets endorsed by political clubs and organizations.

It is unrealistic and unfair to shackle a judge who must stand for election to retain his office with prohibitions which do not apply to those seeking to unseat him. This principle was recognized in [Opinion Request Nos. 1977-07 (unpublished)], 28 November 1977, adopting a “rule of

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reasonableness” on the question of when a judge’s “immediate candidacy” for election or reelection occurs.

“We believe that the exception to the prohibition of political activity in Canon XXVII must have been written with the realities of political elections in mind. Thus, the Canon should be construed to allow incumbent judges to become active candidates for the offices at times which are reasonable under the particular circumstances of each case. ...”

Likewise, in [Opinion Request No. 1978-02], 8 May 1978, holding that it was permissible for judges to buy tickets for and attend fund-raising dinners intended to promote the candidacy of others, the Committee said:

“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 judges, seeking election, to compete against their opponents without disadvantage.”

Thus, there seems to be no reason why the inclusion of an incumbent judge’s name on the same ticket as that of another candidate for public office should not be permitted under the same “rule of reason” applied in [Opinion Request Nos. 1977-07 (unpublished), 1978-02], and originally stated in [Opinion Request No. 1975-08] (later disapproved as to the date at which a judge’s immediate candidacy commences).

As to the second question, that is, whether an unopposed judge can permit his name to appear on a ticket along with those of non-judicial candidates, [Opinion Request No. 1980-08], 29 August 1980, is instructive. In that opinion “[t]he Committee concluded that ‘the exception in Canon XXVII permitting political activity by judges seeking election, is equally applicable to appellate judges’ standing for retention in office under the non-competitive merit election procedures.’” There is no reason why the same principle should not also apply to Circuit Court judges who, though seemingly unopposed, remain subject to contested elections. There always exists the possibility, slim though it be, that a strong write-in campaign could emerge, particularly if the incumbent judge were to hand down an unpopular ruling shortly before a general election.

The views expressed here are confined to the specific questions raised by the inquiring judge and do not extend to activities beyond a judge’s permitting his or her name to appear on the same ticket as those of other candidates.