

**Judicial Ethics Committee  
State of Vermont**

Opinion Number 2827-9

Date: May 17, 2004

The issue you presented to the Judicial Ethics Committee has been researched and reviewed. The following is the Opinion of the Committee on your inquiry.

**Question Presented:**

May a judge publicly endorse a non-partisan bond issue in the judge's home town?

**Short Answer:**

Yes, based on a balancing of the judge's first amendment right of free expression and the State's interest in maintaining an independent and impartial judiciary.

**Analysis:**

"Judges do not forfeit the right to freedom of speech when they assume office." In the Matter of the Disciplinary Proceeding Against Sanders, 955 P.2d 369, 370 (Wash. 1998), *quoted in* opinion Number 2827-6 of the Judicial Ethics Committee, dated March 12, 2003. Thus, any restrictions which burden this fundamental right, particularly on the basis of content, face strict scrutiny. See Republican Party of Minnesota v. White, 536 U.S. 765, 774 (2002). In other words, they must be narrowly tailored to advance a compelling state interest. *Id.* at 774-75.<sup>1</sup>

Against this backdrop we view the limitations on a judge's political activity imposed in Canon 5 of the Vermont Code of Judicial Conduct: "A judge ... shall refrain from inappropriate political activity." Canon 5(a) lists specific activities a judge should not engage in and then goes

White, like most of the cases involving the free speech rights of judges, addressed restrictions on speech in the context of a judicial election. Strict scrutiny should apply to a restriction that burdens the fundamental right of free speech even if it is not in the context of a judicial election campaign, however. The main distinction, as noted in Sanders, is that the judicial candidate "has an additional attribute of free expression to weigh in the balance - that of the electorate's right to be informed." 955 P.2d at 374. But the basic balancing analysis (i.e., weighing the first amendment rights against the State's interest in an independent and impartial judiciary under all the circumstances), should be the same.

on to establish a general prohibition on engaging in "any other political activity."<sup>2</sup> Arguably, this language is broad enough to cover any extra-judicial public statement a judge might make on any public issue. To preserve the constitutionality of Canon 5, however, and consistent with the reference in the subheading of Canon 5 to "*inappropriate*" political activity, the prohibition on "any other political activity" should be limited to *inappropriate* political activity, with *inappropriate* defined as political activity which, under all the circumstances, so heavily implicates the judge's impartiality that it outweighs the judge's first amendment right to free expression. See Reporter's Notes to Canon 5 (stating that purpose of prohibiting political activity by judges is to prevent appearance of political partiality in judicial actions). As the Washington Supreme Court stated in Sanders, 955 P.2d at 374, we need "to balance a judge's right to free expression against the public's interest in having judges impartially decide cases in accordance with the law." Only by incorporating this balancing test will the prohibition be narrowly tailored to advance a compelling state interest; Cf. White, 536 U.S. at 775-76 (implicitly assuming that preserving impartiality and appearance of impartiality would be compelling state interest, but concluding that restriction on judicial candidates' ability to "announce" their views on any public issues was not a narrowly tailored way to serve that interest).

Although the balancing analysis is necessarily situation-specific, some general guidelines are possible. On the one hand, taking a partisan stand aligns a judge with a broad group of people with positions on a broad range of issues, any number of which are likely to be involved in lawsuits before the judge. Thus, the negative implications for impartiality and the appearance of impartiality are likely to be relatively weighty. On the other hand, articulating a particular stand on a narrow, specific non-partisan issue does not align the judge with any group beyond that narrow issue, and is therefore not likely to implicate the judge's impartiality unless that narrow issue ends up in the judge's court. To the extent that the judge's stand does align the judge with a group that is involved with a broader range of issues, or to the extent that the specific issue on which the judge expresses an opinion is likely to end up in the judge's court, the balancing would have to reflect these circumstances.

There is one other consideration, based on the secondary purpose of Canon 5's prohibition on political activities as stated in the Reporter's Notes: "to prevent the appearance of judicial influence on political activity." In light of this concern, when a judge concludes that it is appropriate to take a stand on a narrow public issue, it is probably a good idea to take that stand in a way that does not unduly emphasize the judge's position, to make it clear that the judge is taking the stand as an individual member of the community rather than as judge.

<sup>2</sup>There is an exception for political activity on behalf of measures to improve the law, the legal system, or the administration of justice; but this exception does not apply here.

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