

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105

(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 98-6

Issued June 5, 1998

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: A judge is not required to resign from judicial office to become a candidate for appointment by a county central committee to fill the office of prosecuting attorney when a vacancy occurs in that office. However, as a candidate for appointment, a judge's activities are limited by ethical restraints within the Ohio Code of Judicial Conduct. Making an announcement to the public and to the appointing authority regarding the intention to be a candidate for appointment to fill the vacancy in the office of prosecuting attorney is permitted. Seeking support or endorsement for the appointment from individuals or organizations that are involved in the making of the recommendation for appointment to the office is permitted. Personally participating in fundraising activities to support the candidacy for appointment is not permitted under Canon 2(B)(2). Conducting the activities of the candidacy must not interfere with the diligent and impartial performance of the judicial duties, for under Canon 3(A) "[t]he judicial duties of a judge take precedence over all the judge's other activities." A judge who is actually offered the appointment, should resign from judicial office before accepting the appointment, for a judge cannot practice law under Canon 4(F) and is prohibited under Article IV §6(B) of the Ohio Constitution and related statutes from holding any other office of profit or trust, under the authority of this state, or of the United States.

OPINION: This opinion addresses whether a sitting judge must resign from judicial office to become a candidate for appointment as county prosecuting attorney when a vacancy in that office occurs. In becoming a candidate, the judge proposes to make a public announcement of the intention to seek the position; to schedule speaking engagements to promote the candidacy; to lobby central committee persons for their support in the election; and to engage in fundraising activities to pay for the expenditures associated with the candidacy.

Is a judge required to resign from judicial office to become a candidate for appointment by a county central committee to fill the office of prosecuting attorney when a vacancy occurs in that office?

A vacancy in the office of prosecuting attorney is filled by the appointment process set forth in Section 305.02 of the Ohio Revised Code (Baldwin 1994). It is not filled through a primary, general, or special election.

Canon 7(B)(4) of the Ohio Code of Judicial Conduct requires a judge to resign from office when he or she becomes a *candidate in a primary or general election for a nonjudicial office*.

Canon 7(B)(4) A judge shall resign from office when he or she becomes a candidate in a primary or general election for a nonjudicial office. A judge may continue to hold judicial office while he or she is a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

There is no requirement in that rule that a judge resign from office when *seeking an appointment to another governmental office*. In addition, there is no other rule that prohibits a judge from *seeking an appointment* to another governmental office. Canon 4(C)(2) prohibits a judge from *accepting* “appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice.” Seeking appointment and accepting appointment are not the same. Canon 4(C)(2) does not govern *seeking* appointment. Canon 4(C)(2) is a prohibition against *accepting* governmental appointments concerned with issues other than the improvement of law, the legal system, and the administration of justice while one is serving as a judge.

The ABA Code of Judicial Conduct is instructive as to the issue raised. Like the Ohio Code of Judicial Conduct, the ABA Code of Judicial Conduct in Canon 5(A)(2) requires a judge to resign from office when he or she becomes a candidate in a primary or general election for a nonjudicial office. Unlike the Ohio Code of Judicial Conduct, the ABA Code includes another rule, Canon 5B, that expressly permits a judge to maintain the judicial office while seeking appointment to another governmental office.

ABA Code of Judicial Conduct Canon 5B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

- (1) A candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.
- (2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:
 - (a) such persons may:

- (i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;
 - (ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and
 - (iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;
- (b) (omitted).

Thus, under the ABA rule, seeking the appointment is permitted so long as the conduct comports with ethical requirements. The Board agrees with this approach and in the absence of any express restriction in the Ohio Code of Judicial Conduct advises accordingly.

In conclusion, the Board advises that a judge is not required to resign from judicial office to become a candidate for appointment by a county central committee to fill the office of prosecuting attorney when a vacancy occurs in that office. However, as a candidate for appointment, a judge's activities are limited by ethical restraints within the Ohio Code of Judicial Conduct. Making an announcement to the public and to the appointing authority regarding the intention to be a candidate for appointment to fill the vacancy in the office of prosecuting attorney is permitted. Seeking support or endorsement for the appointment from individuals or organizations that are involved in the making of the recommendation for appointment to the office is permitted. Personally participating in fundraising activities to support the candidacy for appointment is not permitted under Canon 2(B)(2). Conducting the activities of the candidacy must not interfere with the diligent and impartial performance of the judicial duties, for under Canon 3(A) "[t]he judicial duties of a judge take precedence over all of the judge's other activities." A judge who is actually offered the appointment should resign from judicial office before accepting the appointment, for a judge cannot practice law under Canon 4(F) and is prohibited under Article IV §6(B) of the Ohio Constitution and related statutes from holding any other office of profit or trust, under the authority of this state, or of the United States.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions

regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.