

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 2320, COLUMBUS, OH 43215-6104
(614) 644-5800 (888) 664-8345 FAX: (614) 644-5804
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2002-3

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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]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: It is proper under Canon 2(A)(1) of the Ohio Code of Judicial Conduct for a judge to communicate to the public about a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, to explain the proposed amendment, to compare it to current law, and to describe its potential impact on the constitution, the law, and the operation of the courts. At all times during public communications, a judge must maintain the dignity appropriate to judicial office and abide by the high standards of speech in Canon 7. High standards of speech under Canon 7 include, Canon 7(B)(2)(c) prohibiting a judge from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; Canon 7(B)(2)(d) prohibiting a judge from making statements that commit or appear to commit a judge or judicial candidate with regard to cases or controversies that are likely to come before the court; and Canon 7(B)(2)(e) prohibiting a judge from commenting on any substantive matter relating to a specific pending case on the docket of a judge. A judge should consider the possibility that legal challenges may arise with regard to a proposed constitutional amendment. With regard to the proposed constitutional amendment as well as any other proposed constitutional amendment, Ohio voters have a right to a fair election. Under Canon 7(B)(2)(e) and Canon 3(B)(9), if legal action with regard to the proposed constitutional amendment is pending on the docket of *any* court, a judge must not comment on substantive matters relating to the pending case and must not make comments that might reasonably be expected to affect its outcome, impair fairness, or substantially interfere with a fair trial or hearing. In addition, a judge should not make comments that would cause questions as to a judge's impartiality and lead to a judge's disqualification under Canon 3(E)(1).

It is proper under Canon 2(A)(1) of the Ohio Code of Judicial Conduct for a judge to communicate to the public his or her views in support of or opposition to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, basing such support or opposition on the judge's understanding of the potential impact on the courts, the law, the legal system, and the administration of justice. Expression of views by a judge on disputed legal and political issues related to the law, the legal system, and the administration of justice is appropriate under Canon 2(A)(1) of the Ohio Code of Judicial Conduct, provided that the standards of speech within Canon 7 and Canon 3(B)(9) are not violated. Unfettered expression of personal views by a judge is improper and under Canon 3(E)(1) may lead to a judge's disqualification from proceedings. A judge should

avoid making comments that would lead to a judge's disqualification under Canon 3(E)(1).

The Ohio Code of Judicial Conduct does not prohibit a judge from communicating with the public regarding a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, through newspaper editorials, radio and television talk shows, presentations to civic, charitable, and professional organizations and through panel presentations with other elected and non-elected officials at a public meeting, provided that a judge maintains the dignity of the judicial office and heeds the high standards of speech within Canon 7 and Canon 3(B)(9).

It is proper under Canon 4(C)(1) of the Ohio Code of Judicial Conduct for a judge to meet with an executive or legislative body or official to discuss a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

The Ohio Code of Judicial Conduct does not bar a judge from contributing personal funds to a local or state coalition to support or oppose a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

It is proper under the Canon 2(A)(1) of the Ohio Code of Judicial Conduct for a judge, whether or not he or she is a member of the Ohio Judicial Conference Executive Committee, to publicly comment on the position of the Ohio Judicial Conference as outlined in a Resolution and supported by a Judicial Impact Statement, as to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

OPINION: This opinion addresses questions regarding a judge's communication with voters, legislators, and others about a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

1. Is it proper for a judge to communicate to the public about a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, to explain the proposed amendment, to compare it to current law, and to describe its potential impact on the constitution, the law, and the operation of the courts?
2. Is it proper for a judge to communicate to the public his or her views in support of or opposition to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, basing such support or opposition on the judge's understanding of the potential impact on the courts, the law, the legal system, and the administration of justice?
3. Is it proper for a judge to communicate to the public regarding a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, through newspaper editorials, radio and television talk shows, presentations to civic, charitable, and professional organizations

and through panel presentations with other elected and nonelected officials at a public meeting?

4. Is it proper for a judge to meet with an executive or legislative body or official to discuss a proposed state constitutional amendment regarding drug treatment in lieu of incarceration?
5. Is it proper for a judge to contribute personal funds to a local or state coalition to support or oppose a proposed state constitutional amendment regarding drug treatment in lieu of incarceration?
6. Is it proper for a judge, who is a member of the Ohio Judicial Executive Committee, to publicly comment on the position of the Ohio Judicial Conference as outlined in a Resolution and supported by a Judicial Impact Statement on a proposed state constitutional amendment regarding drug treatment in lieu of incarceration?

Proposed State Constitutional Amendment

An amendment to the Ohio Constitution is being proposed by the “Ohio Campaign for New Drug Policies.” The Initiative Petition is referred to as the “Ohio Drug Treatment Initiative.”

The subject matter of the proposed state constitutional amendment is drug treatment in lieu of incarceration. The purpose of the proposed amendment is described and summarized in the Initiative Petition as follows:

Title

To amend Art. IV of the Ohio Constitution by adding a Section 24 to provide for treatment in lieu of incarceration for persons charged with or convicted of illegal possession or use of a controlled substance in certain limited circumstances.

Summary

The amendment would amend the Ohio Constitution to establish a comprehensive program to provide an opportunity for treatment instead of incarceration for individuals charged with or convicted of illegal possession or use of a controlled substance, and, in some cases, additional non-violent offenses. Treatment can last up to twelve to eighteen months, but the Amendment limits incarceration to a maximum of ninety days for any qualifying drug offense. Notwithstanding an existing provision of the Ohio constitution limiting appropriations to two years, the Amendment provides for direct funding of its treatment and rehabilitation programs for seven fiscal years, through 2009.

Applicable Rules

Canon 1 of the Ohio Code of Judicial Conduct calls for high standards of conduct by judges in order to preserve the integrity and independence of the judiciary.

Canon 1. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and personally shall observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 7 requires that at all times judges maintain the dignity appropriate to judicial office and sets forth the high standards of conduct for judicial speech.

Canon 7(B)(1) A judge or judicial candidate shall maintain the dignity appropriate to judicial office.

Canon 7(B)(2) A judge or judicial candidate shall not do any of the following:

(a and b) [omitted];

(c) Make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(d) Make statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court.

(e) Comment on any substantive matter relating to a specific pending case on the docket of a judge;

(f and g) [omitted].

Canon 2(A)(1) broadly authorizes a judge to speak regarding the law, the legal system, and the administration of justice.

Canon 2(A) Activities to improve the law

A judge may engage in activities to improve the law, the legal system, and the administration of justice, provided those activities do not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties.

- (1) A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.
- (2) Subject to the restrictions of Canon 4(C)(1), a judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and otherwise may consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

Canon 3(B)(9) limits a judge's comments with regard to pending or impending proceedings in any court and directs a judge to require similar abstention by court personnel.

Canon 3(B)(9) While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. Division (B)(9) of this canon does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. Division (B)(9) of this canon does not apply to proceedings in which the judge is a litigant in a personal capacity.

Canon 4(C)(1) limits a judge's public appearances before or consultations with executive or legislative bodies or officials to only matters concerning the law, the legal system, and the administration of justice.

Canon 4(C)(1) A judge shall not appear at a public hearing before or otherwise consult with an executive or legislative body or official except on matters concerning the law, the legal system, or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests.

Question 1

Is it proper for a judge to communicate to the public about a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, to explain the proposed amendment, to compare it to current law, and to describe its potential impact on the constitution, the law, and the operation of the courts?

Canon 2(A)(1) authorizes a judge to speak on matters relating to the law, the legal system, and the administration of justice. The subject matter of the proposed constitutional amendment, drug treatment in lieu of incarceration, is a matter involving the law, the legal system, and the administration of justice.

The Commentary to Canon 2(A) encourages judges to contribute to the improvement of the law, the legal system and the administration of justice.

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent the time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

Thus, under Canon 2(A)(1) and Commentary thereto, a judge is permitted to speak about the proposed constitutional amendment regarding drug treatment in lieu of incarceration because it is a matter involving the law, the legal system, and the administration of justice. But, in speaking under Canon 2(A)(1), the high standards of conduct in judicial speech under Canon 7 must be heeded.

Canon 7(B)(2)(c) prohibits a judge from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office. Canon 7(B)(2)(d) prohibits a judge from making statements that commit or appear to commit a judge or judicial candidate with regard to cases or controversies that are likely to come before the court. A judge, speaking to voters regarding a proposed state constitutional amendment, explaining the proposed amendment, comparing it to current law, or describing its potential impact on the constitution, the law, and the operation of the courts, does not violate the high standards of speech set forth in Canon 7(B)(2)(c) and (d). Such speech is neither the making of statements that commit or appear to commit a judge or judicial candidate with respect to cases or controversies nor a pledge or promise of conduct in office.

A judge should consider the possibility that legal challenges may arise with regard to a proposed constitutional amendment. Canon 7(B)(2)(e) prohibits a judge from commenting on any substantive matter relating to a pending case on the docket of a judge. Also, while a proceeding is pending or impending in any court, a judge is prohibited by Canon 3(B)(9) from making public comment that might reasonably be expected to affect its outcome or impair its fairness or making any nonpublic comment that might substantially interfere with a fair trial or hearing. A judge is directed by Canon 3(B)(9) to require similar abstention by court personnel subject to the judge's

direction or control. Thus, if legal action with regard to the proposed constitutional amendment is pending on the docket of *any* court, a judge must not comment on substantive matters relating to the pending case and must not make comments that might reasonably be expected to affect its outcome, impair fairness, or substantially interfere with a fair trial or hearing. With regard to the proposed constitutional amendment as well as any other proposed constitutional amendment, Ohio voters have a right to a fair election.

In addition, Canon 3(E)(1) requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” A judge should avoid making comments that would lead to a judge’s disqualification under Canon 3(E)(1).

Thus the Board advises that it is proper under the Ohio Code of Judicial Conduct for a judge to communicate to the public about a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, to explain the proposed amendment, to compare it to current law, and to describe its potential impact on the constitution, the law, and the operation of the courts. At all times during public communications, a judge must maintain the dignity appropriate to judicial office and abide by the high standards of speech in Canon 7. High standards of speech under Canon 7 include, Canon 7(B)(2)(c) prohibiting a judge from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; Canon 7(B)(2)(d) prohibiting a judge from making statements that commit or appear to commit a judge or judicial candidate with regard to cases or controversies that are likely to come before the court; and Canon 7(B)(2)(e) prohibiting a judge from commenting on any substantive matter relating to a specific pending case on the docket of a judge. A judge should consider the possibility that legal challenges may arise with regard to a proposed constitutional amendment. With regard to the proposed constitutional amendment as well as any other proposed constitutional amendment, Ohio voters have a right to a fair election. Under Canon 7(B)(2)(e) and Canon 3(B)(9), if legal action with regard to the proposed constitutional amendment is pending on the docket of *any* court, a judge must not comment on substantive matters relating to the pending case and must not make comments that might reasonably be expected to affect its outcome, impair fairness, or substantially interfere with a fair trial or hearing. In addition, a judge should not make comments that would cause questions as to a judge’s impartiality and lead to a judge’s disqualification under Canon 3(E)(1).

Question 2

Is it proper for a judge to communicate to the public his or her views in support of or opposition to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, basing such support or opposition on the judge’s understanding of the potential impact on the courts, the law, the legal system, and the administration of justice?

In Op. 87-044, this Board advised that a judge may ethically express an opinion “regarding a county sales tax to finance needed improvements to the county jail and courthouse, the merit selection plan, and any other issue pertaining to the improvement of the law, the legal system and the administration of justice.” The Board’s advice was based on what was then Canon 7(A)(4), a rule stating “[a] judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system and the administration of justice.” That language was deleted from the Ohio Code of Judicial Conduct, by amendment, effective May 1, 1997, but even without that supporting language, the advice within Op. 87-044 stands. Canon 2(A)(1) and Commentary thereto encourage judges to speak on the law, the legal system and the administration of justice.

Expression of views by a judge on disputed legal and political issues related to the law, the legal system, and the administration of justice is appropriate under Canon 2(A)(1) of the Ohio Code of Judicial Conduct, provided that the standards of speech within Canon 7 are not violated. Support for expressing views on matters related to the law, the legal system, and the administration of justice is buttressed by the May 1, 1997 amendments to Canon 7, that deleted from Canon 7(B)(1)(c) the prohibitory language on a judge announcing views on disputed legal or political issues. [The prohibitory language had been part of the Code since its adoption by the Supreme Court of Ohio of December 20, 1973].

Yet, the unfettered expression of personal views by a judge is improper. Judges are prohibited from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office under Canon 7(B)(2)(c). Judges are prohibited from making statements that commit or appear to commit a judge or judicial candidate with respect to cases or controversies that are likely to come before the court under Canon 7(B)(2)(d). Judges are prohibited from commenting on any substantive matter relating to a specific pending case on the docket of a judge under Canon 7(B)(2)(e). Unfettered expression of personal views could compromise a judge’s ability to preside over proceedings for judges are required to disqualify themselves under Canon 3(E)(1) from proceedings in which the judge’s impartiality might reasonably be questioned. The expression of a judge’s views should focus upon his or her understanding of the potential impact on the courts, the law, the legal system, and the administration of justice.

Thus, this Board advises that it is proper under Canon 2(A)(1) for a judge to communicate to the public his or her view in support of or opposition to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, basing such support or opposition on the judge’s understanding of the potential impact on the courts, the law, the legal system, and the administration of justice. Expression of views by a judge on disputed legal and political issues related to the law, the legal system, and the administration of justice is appropriate under Canon 2(A)(1) of the Ohio Code of Judicial Conduct, provided that the standards of speech within Canon 7 and Canon 3(B)(9) are not violated. Unfettered expression of personal views by a judge is improper and under Canon 3(E)(1) may lead to a judge’s disqualification from proceedings. A judge should

avoid making comments that would lead to a judge's disqualification under Canon 3(E)(1).

Question 3

Is it proper for a judge to communicate with the public regarding a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, through newspaper editorials, radio and television talk shows, presentations to civic, charitable, and professional organizations and through panel presentations with other elected and non-elected officials at a public meeting?

No rule within the Ohio Code of Judicial Conduct, provides a list appropriate forums for judicial speech. No rule within the Ohio Code of Judicial Conduct prohibits a judge from sitting on a panel at a public meeting at which panel members will express views for or against a proposed state constitutional amendment regarding drug treatment in lieu of incarceration. A judge must exercise his or her discretion regarding appropriate forums for speaking to the public regarding the law, the legal system, and the administration of justice. At all times during participation in any community or professional forum, a judge must maintain the dignity appropriate to judicial office and the high standards of speech as required by Canon 7 and Canon 3(B)(9).

Thus, the Board advises that the Ohio Code of Judicial Conduct does not prohibit a judge from communicating with the public regarding a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, through newspaper editorials, radio and television talk shows, presentations to civic, charitable, and professional organizations and through panel presentations with other elected and non-elected officials at a public meeting, provided that a judge maintains the dignity of the judicial office and heeds the high standards of speech within Canon 7 and Canon 3(B)(9).

Question 4

Is it proper for a judge to meet with an executive or legislative body or official to discuss a proposed state constitutional amendment regarding drug treatment in lieu of incarceration?

Drug treatment in lieu of incarceration is an issue related to the law, the legal system, and the administration of justice. Canon 4(C)(1) permits a judge to appear at a public hearing before or otherwise consult with an executive or legislative body or official on matters concerning the law, the legal system, or the administration of justice. Thus, the Board advises that it is proper under Canon 4(C)(1) of the Ohio Code of Judicial Conduct for a judge to meet with an executive or legislative body or official to discuss a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

Question 5

Is it proper for a judge to contribute personal funds to a local or state coalition to support or oppose a proposed state constitutional amendment regarding drug treatment in lieu of incarceration?

The Ohio Code of Judicial Conduct does not specifically regulate a judge's use of his or her personal funds. Nevertheless, in the use of personal funds, as in all other activities, a judge must exhibit high standards of conduct in order to preserve the integrity and independence of the judiciary as required under Canon 1 and must maintain the dignity of judicial office under Canon 7(B)(1).

Thus, the Board advises that the Ohio Code of Judicial Conduct does not bar a judge from contributing personal funds to a local or state coalition to support or oppose a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

Question 6

Is it proper for a judge, who is a member of the Ohio Judicial Executive Committee, to publicly comment on the position of the Ohio Judicial Conference as outlined in a Resolution and supported by a Judicial Impact Statement on a proposed state constitutional amendment regarding drug treatment in lieu of incarceration?

Canon 2(A)(1) permits a judge to speak regarding the law, the legal system, and the administration of justice. Canon 2(B) states "[a] judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice." The Ohio Judicial Conference is a governmental agency devoted to the law, the legal system, and the administration of justice. A Resolution and Judicial Impact Statement regarding drug treatment in lieu of incarceration relates to the law, the legal system, and the administration of justice.

Thus, the Board advises that it is proper under Canon 2(A)(1) of the Ohio Code of Judicial Conduct for a judge, whether or not he or she is a member of the Ohio Judicial Conference Executive Committee, to publicly comment on the position of the Ohio Judicial Conference as outlined in a Resolution and supported by a Judicial Impact Statement, as to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration.

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.