

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 89-33

Issued October 26, 1989

[Withdrawn- by Opinion 2002-8 on August 9, 2002]

SYLLABUS: A candidate for judicial office may not announce his or her views on disputed legal or political issues. Therefore, judges and judicial candidates may not announce their personal views on the issue of abortion or how they would decide abortion issues coming before them.

OPINION: We have before us your request for an opinion on whether judicial candidates may comment on the issue of "abortion".

There are several provisions in the Code of Judicial Conduct that apply here. Canon 3A(6) requires judges to abstain from public comment about a pending or impending proceeding in any court. Canon 7B(1)(c) specifically states:

[a] candidate, including an incumbent judge, for a judicial office should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office [or] announce his views on disputed legal or political issues . . .

Because of the fundamental need for impartiality and the appearance of impartiality, Canon 7 places limitations on the political conduct of judges and judicial candidates. Thode, Reporter's Notes to the Code of Judicial Conduct, 95 (1973).

In addition, judges must conduct themselves in a manner that promotes public confidence in their impartiality. Code of Judicial Conduct, Canon 2A. A judge must also be unswayed by partisan interest, public clamor or fear of criticism. Code of Judicial Conduct, Canon 3A(1).

Finally, the commentary to Canon 2 indicates that judges must expect to be the subject of constant public scrutiny and must

willingly accept restrictions on their conduct that may be considered burdensome by the ordinary citizen. Code of Judicial Conduct, Canon 2 commentary. Moreover, a judicial position is one of public trust which demands an even greater degree of responsibility and an even higher and more specialized standard of conduct than that demanded of a practicing attorney. Mahoning County Bar Association v. Franko, 168 Ohio St. 17, 24 (1958).

Since the beginning of this century both the Ohio Constitution and a long line of cases including Franko have established that the judicial branch of government has always policed and regulated the conduct of lawyers and judges. This regulation is now accomplished through the Code of Judicial conduct.

As this Board noted in Opinion 87-30, all candidates for judicial office must comply with the campaign restrictions of the Code. Board of Commissioners, Informal Op. 87-30 (1987). Judicial candidates are not permitted to make the same kind of particularized pledges and predetermined commitments that are commonly made in legislative or executive campaigns. Berger v. Supreme Court of Ohio, 598 F. Supp. 69, 76 (S.D. Ohio 1984). The federal district court in Berger found that the Canon 7B(1)(c) regulations are "necessary to achieve a compelling state interest . . . in assuring . . . that judicial campaigns are run in a manner so as not to damage the actual or perceived integrity of state judges . . ." Id. at 75.

The abortion issue is one that will undoubtedly come before the various courts in this state. The recent U.S. Supreme Court case on abortion may result in further state legislation governing abortion. Webster v. Reproductive Health Services, 57 L.W. 5023 (1989). Cases in which abortion is a subject of judicial dispute may involve the state constitution, challenges to a state law regulating abortion, criminal prosecutions, the right to privacy, the right of parental consent or notification, or health, safety and welfare regulations.

Furthermore, abortion is arguably "the most politically divisive domestic legal issue of our time." Webster v. Reproductive Health Services, 57 L.W. 5023, 5041 (1989). Therefore, judges simply cannot be permitted to give their views on such a highly charged and controversial issue as abortion. The American Bar Association (ABA), in a 1982 opinion, held that it would be ethically improper for a judge to answer a bar association survey eliciting judicial candidates' views on controversial issues. ABA Committee on Ethics and Professional Responsibility, Informal Op. 1487 (1982).

In summary, Canon 7B (1)(c), *supra*, prohibits judges from announcing their views on disputed legal or political issues. The abortion issue is just such a disputed legal and political issue. Therefore, judges and judicial candidates may not announce their views on the issue of abortion.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Judicial Conduct.

FOR IMMEDIATE RELEASE

October 26, 1989

The Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court in a unanimous opinion issued today, prohibited candidates for judicial office from announcing their views on the issue of abortion.

Attorney John G. Mattimoe of Toledo, Chairperson, explained that judicial candidates have long been required to abstain from public comment about issues that may, in any fashion, come before the court. "In our legislative, administrative, and judicial scheme it is absolutely essential that the judiciary be independent," he said. "The judge's high duty is to decide every case based upon the law, as passed by the legislature and approved by the governor, within the confines of the Ohio and U.S. Constitution."

Judges are bound by the Code of Judicial Conduct adopted, in Ohio, by the Supreme Court in 1973. One of the Canons provides that a judge should abstain from public comment about a pending or impending proceeding in any court. Mattimoe noted that Canon 1 of the Code states "An independent and honorable judiciary is indispensable to justice in our society."

The Board is composed of 28 members, appointed by the Supreme Court. Four are nonlawyers. This board answers ethical questions concerning conduct of judges and attorneys, and also hears complaints of lawyer or judicial violations of the Canons. It makes disciplinary recommendations to the Supreme Court.

J. Warren Bettis, Disciplinary Counsel to the Supreme Court, requested the specific opinion. Bettis explained that he has been getting questions from judicial candidates all over the state as to their professional responsibility when confronted with questions about abortion.

Judge John R. Milligan, a member of the Board and Administrative Judge of the Fifth District Court of Appeals, said, "There are no courts where issues involved in this heated controversy will not be raised. The U.S. Supreme Court has spelled out the limits of U.S. constitutional authority and relegated to the legislatures of the states the power to act according to the public will, within the confines of the Constitution. The judiciary of Ohio must not be allowed to become embroiled in the controversy as to what the law ought to be. Judges must remain independent so that the public, with

confidence, can be assured that they will hear cases fairly according to the law and Constitution, without the influence of passion, prejudice, or preconceived opinion."

Chairman Mattimoe added that if judges are permitted to declare their views, then no party feels a trial is fair and potentially all judges would be excused as having prejudged a case or controversy. "Immediately the appearance of justice and fairness suffers. To preserve the rule of law and ends of justice, we must have judges who are not pledged or committed to a predetermined outcome."

Disciplinary Counsel Bettis stated that the disciplinary authorities will be ready to respond to any complaints of a violation of the Canons during the course of judicial campaigns.