

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 06-05  
(October 11, 2006)

**Responding to Political Surveys and Making Public Statements  
About Disputed Political and Legal Issues**

**Issues**

1. May a judge standing for retention or election respond to a political interest group questionnaire seeking the candidate's views on disputed political and legal issues or judicial philosophy?

**Answer:** Yes, provided the responses conform to the requirements of Canon 5B(1)(d)(i).

2. May a judicial candidate publicly discuss an initiative measure to amend the Arizona Constitution also appearing on the ballot?

**Answer:** Yes, provided any public comments conform to the requirements of Canon 5B(1)(d)(i).

3. May a sitting judge not campaigning for election or retention publicly express his or her views on disputed political or legal issues under the Code of Judicial Conduct?

**Answer:** No.

4. At what point must a newly elected or appointed judge refrain from making public political comments?

**Answer:** When an elected judge becomes constitutionally entitled to hold office or on the effective date of a judge's appointment.

**Facts**

A superior court judge standing for retention has received a questionnaire from a political interest group that seeks information about her judicial influences and views. In addition, a candidate for justice of the peace, as part of his own campaign, would like to comment publicly on an initiative measure to amend the constitution appearing on the ballot. The candidate also asks if he can continue to publicly make such comments if and after he is elected.

## Advisory Opinion 06-05

### Discussion

#### Issue 1

A candidate for judicial retention or election may respond to a political interest questionnaire under the provisions of Canon 5, although the candidate is not required to. In the past, responding to similar questionnaires was prohibited, *see* Advisory Opinion 96-11; however, the canon was amended following the United States Supreme Court's decision in *Republican Party v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002), holding that the First Amendment permits judicial candidates to inform the electorate by expressing the candidates' views on disputed political or legal issues. Thus, after *White*, Opinion 96-11 is no longer valid and is hereby withdrawn.

#### Issue 2

A judicial candidate may publicly discuss his or her personal opinion of an initiative measure or other political subject under Canon 5A(2), and consistent with Canon 5B(1)(d)(i), because a candidate may express views on any disputed issue. *See White*. Moreover, any campaign statements by a candidate that are consistent with Canon 5B(1)(d)(i) cannot be prohibited under another section of Canon 5 or any other provision of the Code. Thus, to the extent Advisory Opinion 97-05, addressing judicial candidates' comments in an educational context, is inconsistent with this opinion, Opinion 97-05 is hereby superseded.

It is important to note, however, that Canon 5B(1)(d)(i) states: “[A] candidate . . . shall not: . . . with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” The commentary to this canon cautions that the candidate “should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.” Should a candidate choose to make public statements about issues that later come before the court, the candidate may be required to disqualify himself or herself from cases involving those issues. Canon 5B(1)(a) also requires judicial candidates to “act in a manner consistent with the impartiality, integrity and independence of the judiciary” and should be considered when formulating such public statements.

#### Issue 3

Outside the realm of campaign conduct, however, a judge’s political activity is governed by Canon 5A, which prohibits a judge from “mak[ing] speeches for a political organization or candidate” and “actively tak[ing] part in any political campaign other than his or her own election, reelection or retention in office.” Canon 5A(1)(b), (d). Canon 5A(5) states: “Except as otherwise permitted in this code, a judge shall not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.” *See also* Advisory Opinion 96-08. Although restrictions on judges’ public discourse were substantially reduced by *White*, that case was limited to campaign speech and did not address the behavior of judges who were not campaigning for election or retention.

## Advisory Opinion 06-05

“We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.” *White*, 536 U.S. at 782, 122 S. Ct. at 2538.

While Canon 5B permits the public expression of personal views in the context of a judicial campaign, taking a public position on a disputed issue is inappropriate for a noncampaigning judge because political activity by sitting judges does not serve the important function of informing voters about their reelection campaigns. At the same time, such activity impairs the independence and integrity of courts by suggesting bias and predetermination of issues. See Comment to Canon 5A (“The judge is not required to surrender his or her rights or opinions as a citizen, but should avoid political activity which may give rise to a suspicion of political bias or impropriety.”). “Because a judgeship is in the nature of a public trust, it is unreasonable to permit a judge to subjugate that trust to his or her personal desire to actively participate in the political process.” *In re Dunleavey*, 838 A.2d 338, 354 (Me. 2003) (Levy, J., concurring). Additionally, expression of an opinion on a matter that subsequently comes before a judge may require disqualification from hearing the matter and consequently render the judge unable to perform the judicial duties in that matter that the public and the court rely upon the judge to perform. See Comment to Canon 5B(1)(d).

### Issue 4

A related question arises about the point at which a newly elected or appointed judge may no longer make public political comments. Article 6, § 12 of the Arizona Constitution provides that judges elected at a general election shall hold office “from and after the first Monday in January next succeeding their election.” As noted in Advisory Opinion 00-07, “[i]t would appear, therefore, that an ‘elected judge’ does not become a judge subject to the code until he or she is entitled to ‘hold office’ as specified in the constitution.” If a judge is appointed rather than elected to office, a person becomes a judge subject to the code on the effective date of his or her appointment. *Id.* As a practical matter, a readily identifiable transition point might be when a new judge officially assumes the responsibilities of the judicial position by executing the mandatory oath of office required by Article 6, § 26 of the constitution. See also A.R.S. § 38-231(B) (no entitlement to compensation until prescribed oath is taken). Our supreme court, however, has said that “‘election’ is not synonymous with the administration of the oath.” *Jennings v. Woods*, 194 Ariz. 314, 323 n.11, 982 P.2d 274, 283 n.11, (1999). Thus, if the constitutionally specified date or effective date of appointment are not contemporaneous with the taking of the oath, the former should control. We note that, because this issue is not squarely before us, we need not attempt to delineate precise boundaries at this time.

Finally, it should be noted that, as stated in the commentary to Canons 5A and 5B and explained in Opinion 96-08, a judge may speak to political or other types of organizations on behalf of measures to improve the administration of justice. A judge may also speak publicly on other subjects without expressing views on disputed political or legal issues.

Advisory Opinion 06-05

**Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 5A(1)(b), 5A(1)(d), 5A(2), 5A(5), 5B(1)(a), and 5B(1)(d)(i) (2004).

**Other References**

Arizona Constitution, Article 6, § 12; Article 6, § 26.

Arizona Judicial Ethics Advisory Committee, Opinions 00-07 (Dec. 20, 2000), 96-11 (Oct. 3, 1996), 96-08 (Aug. 15, 1996), and 97-05 (May 12, 1997).

*Republican Party v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002).

*Jennings v. Woods*, 194 Ariz. 314, 982 P.2d 274 (1999).

*In re Dunleavey*, 838 A.2d 338 (Me. 2003).