Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)

C.J.E.A.B. ADVISORY OPINION 2008-05
(Finalized and effective September 10, 2008)

ISSUE PRESENTED

The requesting judge issued a ruling in the Fall of 2007 that generated a great deal of controversy and attracted significant local media attention as well as some national news coverage. The judge notes that the local newspaper has run in excess of seventy writings on the case, including articles, editorials, letters to the editor, and guest opinions. The judge describes the news coverage as generally being one-sided and critical of his ruling. In addition, at least three articles have been devoted to the subject of the judge standing for retention in November 2008. Although the local Judicial Performance Commission unanimously recommended that he be retained, the judge states that some of the local news coverage "attempted to spin what was a very positive recommendation for retention into a negative." In addition, several hundred anonymous comments have been posted on the newspaper's web site blog in response to the news coverage. The judge notes that some of the anonymous comments have alluded to him as a pedophile while others incite violence against him and his family.

In addition to the facts which the requesting judge provided, the Board has reviewed some of the news articles and some of the comments posted on the newspaper's website with the news articles. The Board notes that on the same webpage with a recent news article discussing the judge standing for retention this year, there are numerous comments urging voters to vote against retaining the judge. Some of these comments also discuss raising funds and creating an organization to campaign against the judge's retention.

The judge understands that he is ethically constrained from campaigning for his retention unless there is active opposition to his retention. He believes that such opposition exists, and that the local newspaper, the defendants in the case (through a website they launched about the case), and the defendants' supporters, are campaigning to defeat his retention. He asks for a determination that there is, in fact, active opposition to his retention, and for permission to engage in a campaign in support of his retention. May the judge campaign to retain his seat on the bench?

CONCLUSION

A great deal of media attention to a judge's ruling, even if it is critical of the ruling, does not, in itself, constitute active opposition to the judge's retention. However, if there is an organized campaign in opposition to the judge's retention or if there are individual comments opposed to the judge's retention that have been broadcast to a public audience, the judge may safely conclude that there is active opposition to the judge's retention. Here, the Board concludes that the numerous comments posted on the local newspaper's

website recommending non-retention of the judge amount to active opposition. Nevertheless, the Board cautions the judge that even though he may, ethically, campaign for retention, he should begin a campaign with great care, bearing in mind that our system strongly disfavors judicial campaigns.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 7B(2) provides that a judge who is a candidate for retention should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a judge, the judge may engage in certain enumerated activities, including speaking at public meetings; using advertising media, provided that the advertising is within the bounds of proper judicial decorum; and requesting that supporters organize a nonpartisan citizens' committee advocating the judge's retention.

DISCUSSION

As this Board recently noted in Opinion 2008-04, Colorado has deliberately removed its judicial selection and retention system from the political arena. One of the results of this choice is that Colorado judges are generally prohibited from campaigning to retain their positions as judges. Specifically, Canon 7 of the Code of Judicial Conduct prohibits a judge from any campaign activity in connection with the judge's own candidacy unless there is active opposition to the judge's retention in office.

Unfortunately, the Code does not define the term 'active opposition,' nor does it provide any guidance to a judge on how to make a determination as to whether such opposition to a judge's retention exists. This Board has not previously addressed this question[1], but committees in other jurisdictions have done so, providing us with instructive analyses on the issue. Other states have concluded that active opposition is that which is organized and/or broadcast to a public audience. *See* Utah Ad. Op. 00-5 at 2 (collecting opinions). We agree with and adopt this standard. For opposition to be active within the meaning of the Canon, it must either be the result of an orchestrated, organized campaign or, if it consists of statements of one or a few persons in opposition to the judge's retention, such statements must be communicated to the public through public media or through private publications that reach a large segment of the public.

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[1] Several judges on this Board were under the impression that judges in Colorado who believed that they faced active opposition were required to seek such a determination, and permission to campaign, from the Chief Justice. The Board, however, was unable to locate authority for this proposition. Even so, we suggest that it would be good practice for a judge who would like to campaign in support of his or her retention to seek the counsel of experienced judges, including his or her chief judge and the Chief Justice, as part of the process of determining whether to campaign.

The requesting judge provided information that the local newspaper and one of the parties in the controversial case are actively campaigning to defeat his retention. In addition, the Board has viewed numerous comments posted on the local newspaper's website recommending that the judge not be retained. Thus, the Board will consider whether this constitutes active opposition under either prong of the standard: by way of an organized campaign or by way of individual statements in opposition broadcast to a public audience.

As to the first prong, the Board defines 'organized campaign' as requiring that a group has registered with the Secretary of State. Although there are indications in this case suggesting that there is an effort to solicit funds to begin an organized campaign, there are no facts submitted to the Board that would establish that any group has, indeed, registered with the Secretary of State. Accordingly, the Board proceeds to the second prong of the active opposition standard, that of active opposition shown by individual statements in opposition broadcast to a public audience.

In this regard, the Board notes that intensive and even critical news coverage concerning one or more of the judge's decisions would not be sufficient to meet the active opposition standard. Judges are frequently discussed in news articles, and often they are criticized. Generally, judges cannot and should not respond to such stories because the Code prohibits comment on pending cases, even when the story coincides with the judge's retention election. *Id.* Coverage of an ongoing, controversial case, even if critical of the judge, rarely will be sufficient to amount to active opposition. Only if such news stories appear timed to a judge's retention election and raise facts and qualification issues that are not immediately relevant to a news-making case, could such news coverage be classified as active opposition to the judge's retention.

On the other hand, an editorial, letters to the editor or paid advertisements urging that a judge not be retained would amount to active opposition because they are statements in opposition to the judge's retention that are published in the public news media. Similarly, "private" publications such as lawn signs advocating the judge's non-retention or privately published newsletters urging the judge's defeat would be sufficient to meet the requirement of active opposition if they are broadcast to a large audience of potential voters. Private conversations or watercooler-type discussions in which an individual recommends that a judge not be retained, however, would not meet this standard. *See id.*

The current request also raises the issue of whether messages in the electronic realm can amount to active opposition to a judge's retention. Whether posts on a particular website or blog, or comments posted on those sites by individuals other than the website operator or blogger, amount to active opposition must be assessed on a case-by-case basis. When a website is an arm of a public news outlet, such as a newspaper, posts on that website that are accessible to all members of the public would seem to have the same force as letters to the editor. In contrast, when a website is a private publication of an individual, it is more difficult to assess whether a large segment of the public is reviewing the contents of the website. The Board suggests that a judge will have to evaluate such

websites on a case-by-case basis to determine whether they amount to active opposition to the judge's retention.

Finally, before opposition to a judge's retention can be classified as active opposition, it must coincide with the period of the judge's candidacy. Critical public commentary calling for the judge's non-retention, if stale or remote in time to the election, cannot be considered active opposition to the judge's retention under the Code. The Board believes that the appropriate time period should be measured from the time the judge files his or her declaration to stand for retention with the Secretary of State up to the date of the election.

To determine whether there is 'active opposition' under the facts of the current request, the Board has focused its analysis on the public statements and publications made since the judge filed his declaration to stand for retention with the Secretary of State. Within the news articles, letters to the editor, editorials, guest opinions, and other comments that have been published after the judge filed his declaration, the Board has disregarded those that are simply discussions of the controversial case. However, as the Board noted above, quite recently there have been numerous comments posted on the local newspaper's website, *i.e.* a public news outlet, that recommend that the judge not be retained. The Board concludes that these web-postings constitute active opposition to the judge's retention.

Because there is active opposition to his retention, the Code permits the judge to engage in various forms of campaign activity. The Board, however, would caution the judge that just because the judge is permitted to campaign for retention does not mean that the judge should campaign for retention. Our merit selection and retention system strongly disfavors judicial campaigns. Colorado's judiciary is regarded as a national model in large measure thanks to this state's decision to elevate and separate judicial selection and retention from the political realm. Recent movements to politicize the judicial branch and choose its judges through a partisan election process have been animated, in part, by the criticism that, at bottom, judges are just as political as their counterparts in the other branches of government. By mounting a retention campaign, a judge may add fuel to this argument. Moreover, a judge should be mindful of the fact that such campaigns often are ill-advised, and frequently serve to focus attention on the bases for the public criticism of the judge.

FINALIZED AND EFFECTIVE this 10th day of September, 2008 by the Colorado Judicial Ethics Advisory Board.