

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 18-06
(Issued December 14, 2018)

**JUDGES' AND JUDICIAL EMPLOYEES' PARTICIPATION IN MARCHES,
RALLIES, AND PROTESTS**

ISSUE

Judicial employees have inquired about the propriety of participating in marches, rallies, and protests. By way of example, they mention the "Women's Marches" held nationwide for the past few years and a recent "March for Science." Because the Judicial Ethics Advisory Committee ("JEAC") periodically receives similar inquiries from judges, the committee deems it appropriate to address both judges' and judicial employees' participation in such activities under the Arizona Code of Judicial Conduct ("Judicial Code") and the Arizona Code of Conduct for Judicial Employees ("Employee Code").

DISCUSSION

The Judicial Code and the Employee Code encourage judges and judicial employees to participate in appropriate extrajudicial activities. *See* Judicial Code, Rule 3.1 & cmts 1 & 2; Employee Code, Rule 3.5 cmt. Both codes, though, include restrictions on such activities. They also make clear that judges and judicial employees "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed" by their respective codes of conduct. *See* Judicial Code, Rule 1.2, cmt 2; Employee Code, Rule 1.2, cmt 3.

Judges are required to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and must avoid both impropriety and the appearance of impropriety in their professional and personal lives. Judicial Code Preamble; Rule 1.2. Similarly, judicial employees are required to maintain the dignity of the judiciary, avoid impropriety and the appearance of impropriety, and "aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." Employee Code, "Purpose and intent."

As the following discussion reflects, the propriety of participating in a march, rally, or protest is a fact-intensive inquiry that ultimately must be decided on a case-by-

case basis. There are, however, some overarching ethical principles that judges and judicial employees should consider before engaging in such activities.

I. JUDGES

Rule 3.1 of the Judicial Code addresses judges' extrajudicial activities. It states:

A judge may engage in extrajudicial activities, except as prohibited by law or this code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality or demean the judicial office;
- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

A judge should evaluate all of the factors enumerated in Rule 3.1 before engaging in extrajudicial activities. Subparagraph (C) is of particular relevance to the pending inquiry. Before attending a march, rally, or protest, a judge must consider whether participation "would appear to a reasonable person" to undermine the judge's "independence, integrity, or impartiality or demean the judicial office." Rule 3.1(C). An objective standard applies. It is not sufficient that the judge personally is convinced of his or her abiding independence and impartiality. In making this assessment, judges should assume their participation will be scrutinized and publicized, and they must consider the public perception should they be depicted in reports of the event, including in press coverage or on social media.

In assessing the propriety of participation, judges should examine not only the official title of an event, but also its stated mission, as well as its sponsors and organizers. This type of contextual evaluation led the Massachusetts Supreme Judicial Court to

advise against judges' participation in the 2017 "Women's March on Washington." *See* Massachusetts Supreme Judicial Court CJE Opinion No. 2016-10. The Massachusetts opinion cited the "unmistakable" political overtones of the event, as well as public statements by organizers of the march suggesting the event's purpose was to "send a bold message to [the] new administration on their first day in office." *Id.*; *see also* New York Advisory Opinion 2017-38 (concluding judges should not attend a "March for Science" if "its organizers become involved in or suggest they will become involved in litigation related to the March's agenda, advocate for or against the election or appointment of specific individuals to public office, or become the subject of public controversy.").

Participation in marches, rallies, or protests can also create disqualification issues. The Judicial Code requires recusal from "any proceeding in which the judge's impartiality might reasonably be questioned," Rule 2.11(A), unless the judge follows the remittal of disqualification procedure set forth in Rule 2.11(C). If a judge participates in a march, rally, or protest focused on social, legal, or political issues that may become the subject of litigation, a reasonable person may well have cause to question the judge's independence and impartiality when making decisions about those issues in subsequent cases. The same is true of events sponsored or organized by individuals or entities who regularly appear in state court proceedings. If participation in an extrajudicial activity will necessitate frequent disqualification, a judge should not undertake that activity. *See* Rule 3.1(B) (prohibiting extrajudicial activities "that will lead to frequent disqualification of the judge.").

Rule 2.4 -- which addresses external influences on judicial conduct -- is also relevant to the analysis. It states:

- (A) A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

If taking part in a march, rally, or protest would cause an objective observer to believe that people, organizations, or movements associated with the event are in a position to influence the judge's decision-making, a judge should not participate. Judges must also scrupulously avoid any extrajudicial activity tied to an organization that practices invidious discrimination. *See* Judicial Code, Rule 3.1, cmt 3; Rule 3.6.

Even more rigorous restrictions apply to judges' participation in marches, rallies, or protests supporting or opposing candidates for public office. Canon 4 imposes substantial restraints on such activities because judges "must, to the greatest extent possible, be free and appear to be free from political influence and political pressure." Rule 4.1, cmt 1. Among other things, a judge may not:

- Make speeches on behalf of a political organization or another candidate for public office
- Publicly endorse or oppose another candidate for any public office
- Actively take part in any political campaign other than his or her own campaign for election, reelection, or retention in office
- In connection with 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 judicial office

Rule 4.1(A). Consistent with Rule 4.1, judges should not participate in a march, rally, or protest if such participation could reasonably be viewed as supporting or opposing another candidate for public office or as speaking publicly on behalf of a political organization. *But see* Opinion 08-01 (permitting certain political activities and associations by judicial candidates).

Judges generally have more leeway when it comes to extrajudicial activities that are related to the law, the legal system, or the administration of justice. *See, e.g.*, Judicial Code, Rule 3.1, cmt 1; Rule 3.2(A); Rule 3.7(A), Rule 4.1(C). But merely identifying an event or activity as one related to the law, the legal system, or the administration of justice does not end the inquiry. Even if a march, rally, or protest relates to the law, the legal system, or the administration of justice, there are potential ethical pitfalls. *See* Rule 3.7, cmt 2 (even with law-related activities, a judge must consider whether the "purposes of the organization" or participation therein would conflict with the obligation "to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.").

For example, a recent "Immigration March" in Phoenix bore at least some connection to "the law, the legal system, or the administration of justice." But one of the event's organizers was an entity that frequently appears in state court litigation. And

although substantive immigration law is largely federal in nature, state court judges are also called upon to address immigration issues. Could a judge's participation in such a march lead a reasonable person to question that judge's impartiality when presiding over a state court proceeding involving an individual's immigration status or other immigration-related issues? And how would the independence of the judicial branch be perceived should a photograph of a participating judge appear in the newspaper alongside protesters carrying signs supporting or opposing political candidates or organizations? These are the types of fact-based inquiries a judge must consider when deciding whether to participate in a given event – even one with ostensible ties to the law, the legal system, or the administration of justice.

Two final considerations merit mention. First, even assuming attendance at a march, rally, or protest is appropriate in the first instance, a judge must remain vigilant and should be prepared to leave if the event proves problematic under the Judicial Code. *See* New York Advisory Opinion 2017-38 (“The Committee . . . trusts that a judge will exercise discretion and leave the area on the day of the March if the judge finds that political signs unexpectedly dominate the occasion.”). Second, unless an event is directly related to the law, the legal system, or the administration of justice, judges should refrain from publicizing their affiliation with the judicial branch when participating in a march, rally, or protest. *See* Judicial Code, Rule 1.3 (judges may not abuse the prestige of judicial office to advance the interests of others).

II. JUDICIAL EMPLOYEES

The Employee Code broadly defines a “judicial employee” as:

[A]ny person other than a judge who performs duties in the judicial department of this state, as it is defined in Az. Const. Art. 6, § 1 as a full-time employee, a part-time employee or a volunteer.

Employee Code, “Terminology.”

Judicial employees are required to conduct their outside activities “so as to avoid a negative effect on the court or the ability to perform court duties.” Employee Code, Rule 3.1(A). They must also avoid activities that place them “in a position of conflict with the judicial employee’s official role in the judicial department.” Employee Code, Rule 3.1(B)(3); *see also* Rule 2.11(A) (“A judicial employee shall manage personal and business matters so as to avoid situations that may lead to conflict, or the appearance of conflict, in the performance of the judicial employee’s employment.”).

A judicial employee who wishes to participate in a march, rally, or protest must first determine his or her status within the judicial branch. Such an assessment is

necessary because judges' personal staff members, courtroom clerks, and court managers have more significant restrictions on certain extrajudicial activities than other judicial employees.

"Personal staff," "Courtroom clerks," and "Court managers" are defined in the Employee Code as follows:

"Personal staff" means assistants, secretaries, law clerks, bailiffs, and court reporters appointed by, assigned regularly to, or reporting directly to a judge.

"Courtroom clerks" mean a staff person of the elected clerk of court, the chief clerk or a judge of a justice or municipal court, who works regularly the courtroom with a judge.

"Court managers" means high-level administrative staff who work in such close proximity to judges that their actions, decisions or conduct might be viewed as the official acts or positions of the judiciary. In the superior, municipal and justice courts, court managers include court administrators, chief probation officers, juvenile court directors, and any other similar staff designated by the clerk of the superior court, presiding judge, chief judge or chief justice of each court, but not the elected clerks of court themselves. In the appellate courts, court managers include clerks of the court, chief staff attorneys, the administrative director, deputy director, division directors and other staff designated by the chief justice or chief judges.

Employee Code, "Terminology."

Judges' personal staff, courtroom clerks, and court managers have the same restrictions on their political activities as judges. See Employee Code, Rule 4.2. Employees in these three categories should therefore refer to the discussion *supra* regarding judges' participation in marches, rallies, or protests involving candidates for public office or events reasonably viewed as speaking publicly on behalf of a political organization.

Although not flatly prohibited, judicial employees who are members of judges' personal staff, courtroom clerks, or court managers must also be careful about participating in marches, rallies, or protests that relate to legal, social, or political issues likely to come before the employee's court. The rationale for the heightened restrictions on these employees is the notion that they work so closely with judges that their

“decisions or conduct might be viewed as the official acts or positions of the judiciary.” Employee Code, Terminology, “Court managers.” As such, it is prudent for members of judges’ personal staff, courtroom clerks, and court managers to abide by the same standards as judges in this area, even though disqualification from subsequent cases tends to be less disruptive for judicial employees than for judges.

Judicial employees who do not fall within these three categories may generally “participate in any political activities that do not give the impression the judiciary itself endorses political candidates or supports political causes.” Employee Code, Rule 4.1. In other words, employees other than judges’ personal staff, courtroom clerks, and court managers may participate in political marches, rallies, and protests as long as they do not suggest that the judiciary itself supports their activity. Employee Code, Rule 4.1, cmts 1 & 2. A judicial employee “can best avoid the impression political activity is on behalf of the judiciary by not identifying himself or herself as a court employee while engaging in political activities or, if asked, explaining that he or she is simply participating as a concerned citizen.” Employee Code, Rule 4.1, cmt 3.

If a march, rally, or protest is unrelated to issues likely to come before the employee’s court and cannot reasonably be perceived as publicly supporting or opposing a political candidate or organization, judicial employees generally may participate in the event. Even in this context, though, the best practice is not to publicize an employee’s affiliation with the judicial branch unless the event is one directly related to the law, the legal system, or the administration of justice. *See* Employee Code, Rule 4.1 (authorizing employees to speak on behalf of the judicial branch “when assigned to do so regarding measures to improve the law, the legal system, or the administration of justice.”).

Finally, if a judicial employee has engaged in an extrajudicial activity that may give rise to an appearance of impropriety in a proceeding before the court, the employee should discuss the issue with his or her judge or supervisor. *See* Employee Code, Rule 2.11. Depending on the circumstances, it may be necessary to screen the employee from participation in the matter. *Id.*

CONCLUSION

Judges and judicial employees who wish to participate in marches, rallies, or protests should review the foregoing discussion in its entirety. The following non-exclusive principles apply to such extrajudicial activities:

Judges should not participate in a march, rally, or protest if: (1) participation could reasonably be viewed as supporting or opposing another candidate for public office or as speaking publicly on behalf of a political organization; (2) the event relates to issues or causes likely to be litigated in the judge’s court unless the event is tied to the law, the legal system, or the administration of justice; (3) the event is organized or sponsored by

individuals or entities who frequently appear in the judge's court; (4) attendance would cause a reasonable person to question the judge's independence, integrity, impartiality, or dignity; (5) the event has ties to an individual or organization that practices invidious discrimination; or (6) participation will interfere with the proper performance of judicial duties or will lead to frequent disqualification. Unless a march, rally, or protest relates to the law, the legal system, or the administration of justice, judges should avoid publicizing their affiliation with the judicial branch when participating in such activities.

Employees who are members of judges' personal staff, courtroom clerks, or court managers should not take part in a march, rally, or protest if participation could reasonably be viewed as supporting or opposing a candidate for public office or as speaking publicly on behalf of a political organization. Although not flatly prohibited, judicial employees in these three categories should also exercise caution before participating in events that are related to issues or causes likely to be litigated in the employee's court or in activities organized or sponsored by individuals or entities that frequently appear in the employee's court. Unless a march, rally, or protest relates to the law, the legal system, or the administration of justice, such employees should avoid publicizing their affiliation with the judicial branch when participating in these activities.

Judicial employees who are not members of judges' personal staff, courtroom clerks, or court managers may generally participate in marches, rallies, or protests, including events tied to political candidates and organizations. Such judicial employees should not publicize their affiliation with the judicial branch when participating in extrajudicial activities that are unrelated to the law, the legal system, or the administration of justice, and they may not suggest that the judicial branch supports any of their political activities.

If judges or judicial employees are uncertain about the propriety of participating in a specific event, they may seek advice regarding their own prospective conduct from the JEAC. *See Arizona Supreme Court Rule 82(d).*