

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2013-13<sup>1</sup>

**Date of Issue:** December 16, 2013

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

Orphans' Court Judge May Be Employed as a  
Video Producer Who Produces  
Commercials for Political Advertising

and

Orphans' Court Judge Seeking Re-election May Use  
Commercial Media for Political Advertising

**Issues:** 1. May an Orphans' Court judge be employed in the field of video production in which the job requirements include the production of commercials for political advertising?

2. May an Orphans' Court judge engage in political advertising for purposes of running for re-election to his/her seat on that court, through the media sources with which that judge is professionally affiliated?

**Answers:** Issues 1 and 2. Yes, subject to the qualifications set below.

**Facts:** The Requestor, an Orphans' Court judge, has been employed in video production since 1996. He/she became an Orphans' Court judge in 2010, and has registered to run for re-election in 2014. The Requestor's job requires video production for the Visitor's Channel.<sup>2</sup> The video productions air in seven regions, namely, Boston, MA, Baltimore, MD, Washington, DC, Savannah, GA, Naples, FL, Nashville, TN, and Talbot and Dorchester counties on Maryland's Eastern Shore.

The Requestor also produces political advertising commercials that air online, on Comcast cable and local cable stations. In the last election, the local cable channels aired political advertising commercials and 30-second spots for many political positions, including the Maryland Governor's race, County Council seats, and the Orphans' Court. In his/her 2010 campaign, the Requestor ran a series of 30-second campaign testimonials from members of his/her community. In 2014, the Requestor will produce political advertising for other candidates and intends to run political spots for his/her campaign on the local cable channels.

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<sup>1</sup> Judge Kehoe did not participate in this opinion.

<sup>2</sup> The Visitor's Channel shows videos looped on closed circuit television in hotel rooms, which showcase a city's attractions, such as dining, tourism and shopping.

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**Discussion:** Orphans' Court judges, as with candidates for that office, are subject to the Maryland Code of Judicial Conduct ("Code"), Maryland Rule 16-813, in addition to applicable election laws and regulations. With certain exceptions (*e.g.*, Montgomery and Harford counties), many counties have Orphans' Courts that are in session on a part-time basis, approximately 2-3 days per week.<sup>3</sup>

Rule 1.1 of the Code states that "[a] judge shall comply with the law, including this Code of Judicial Conduct." Rule 1.3 states that "[a] judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

As long as an Orphans' Court judge does not use the prestige of judicial office to gain favor in obtaining employment, he/she may be employed in a non-judicial position. In the present inquiry, the facts indicate that the Requestor has been employed as a video producer since 1996, well prior to becoming an Orphans' Court judge. With respect to obtaining *prospective* employment, however, it is important for an Orphans' Court judge to take precautions to ensure that the prestige of office is not used to gain favor, priority or special consideration.

Rule 1.2 states that "(a) [a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. (b) A judge shall avoid conduct that would create in reasonable minds a perception of impropriety." The Preamble to the Code states, in relevant part, that "[j]udges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." Rule 2.1, in turn, states that "[t]he duties of judicial office, as prescribed by law, shall take precedence over a judge's personal and extrajudicial activities."

In sum, the Requestor may have employment outside of the court as long as that employment does not interfere with the performance of judicial duties. Additionally, the Requestor should be mindful that his/her conduct while performing the job in video production should be consistent with the intent and purposes of the Code.

The Requestor also has asked for guidance as to an Orphans' Court judge's ability to engage in political advertising through the video production media with which the Requestor is professionally affiliated. Rule 4.1(c)(2)(B)(i) provides that an incumbent Orphans' Court judge becomes a "candidate for election" from "the earlier of ... the date two years prior to the general

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<sup>3</sup> See Maryland Annotated Code, Estates and Trusts Article § 2-106.

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election pertaining to that judge's re-election[.]” Rule 4.4, in turn, entitled, “Political Conduct of Candidate for Election” states, in relevant part:

A candidate for election:

(a) shall comply with all applicable election laws and regulations;

(b) shall act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary and maintain the dignity appropriate to judicial office;

\* \* \*

(3) may seek, accept, and use endorsements from any person or organization

\* \* \*

(d) As to statements and materials made or produced during a campaign, [a candidate for election]:

(d)(1) shall review, approve, and be responsible for the content of all campaign statements and materials produced by the candidate or by the candidate's campaign committee or other authorized agents;

(2) shall take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities that the candidate is prohibited from doing by this Rule;

(3) with respect to a case, controversy, or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office;

(4) shall not make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court;

(5) shall not knowingly, or with reckless disregard for the truth, misrepresent the candidate's identify or qualifications, the identity or qualifications of an opponent, or any other fact, or make any false or misleading statement;

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(6) may speak or write on behalf of the candidate's candidacy through any medium including advertisements, websites, or other campaign literature; and

(7) subject to paragraph (b) of this Rule, may respond to a personal attack or an attack on the candidate's record.

Comments [6] and [7] of Rule 4.4 provide further guidance as follows:

[6] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Rule 4.4(d)(5) obligates them to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading. Rule 4.4(d)(1) requires the candidate to review and approve the content of statements made by the candidate's campaign committee or other authorized agents and makes the candidate responsible for those statements.

[7] Candidates for election are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. As long as the candidate for election does not violate Rule 4.4(d), he or she may make a factually accurate public response, although it is preferable for someone else to respond if the allegations relate to a pending case. If an independent third party has made unwarranted attacks on a candidate for election's opponent, the candidate for election may disavow the attacks and request the third party to cease and desist.

Accordingly, the Requestor, pursuant to the qualifications discussed above, may be employed as a video producer who produces political advertising for other elective offices in the State, including the office of a judge of the Orphans' Court.<sup>4</sup> The Requestor also may use commercial media for his/her election campaign, such as advertisements, websites, or other campaign literature, pursuant to the qualifications as discussed in this opinion.

**Application:** The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the requestor described in this opinion, to the extent of the requestor's compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

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<sup>4</sup> While not specifically raised in the Requestor's inquiry, to the extent the Requestor's name appears in any "credits" for the political videos his/her business produces, the Committee cautions that such could be perceived as lending the prestige of the Requestor's office to his/her personal business.

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Additionally, this opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If you engage in a continuing course of conduct, you should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.