

# JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

## NEWSLETTER

No. 3 Summer 2014

### *Message from the Chair*

We're a few weeks away from the 2014 general election at which time the Commonwealth's electorate will vote for our next Governor, members of Congress, all members of the State House and half of the State Senate. Since judges are precluded from partisan political activity, the election would not typically be a topic of discussion in a Newsletter directed to the Commonwealth's judiciary. But, under the New Code of Judicial Conduct which we highlighted in our Spring Newsletter, campaigning for judicial offices that will be on next year's ballot may begin on November 5, 2014, the day after the general election. This new start point for judicial electioneering was borrowed from the Rules Governing Standards of Conduct of Magisterial District Judges which were amended a number of years ago to establish this new start date. This year, the first day for campaigning will be the same for all judicial candidates; however, for 2014 only, the start date for fundraising will differ. Because the New Rules Governing Standards of Conduct of Magisterial District Judges do not go into effect until December 1, 2014, MDJ candidates must wait until that date to begin their fundraising efforts.

This is but one of the new changes brought about by the adoption of the New Code and New Rules Governing Standards of Conduct of Magisterial District Judges. There are several other important changes impacting campaign conduct, some of which will soon take effect for magisterial district judge candidates, including incumbents seeking reelection. These changes are discussed in an article, *Campaigning for Judicial Office*, authored by Board Chief Counsel Robert A. Graci.

Another timely topic for discussion results from the decision earlier this year by the federal district court declaring Pennsylvania's ban on same-sex marriages unconstitutional. This begs the question, must all judges officiate at such weddings if requested to do so. The rules binding all of the Commonwealth's judicial officers require that judges be and appear to be impartial. A decision to perform weddings ... or not to perform them ... may implicate the duty of impartiality. Board Deputy Counsel Elizabeth A. Flaherty addresses the conduct issues that may arise from a judge's decisions in this area in an article entitled, *Impartiality in Solemnizing Marriages*.

Finally, it is my honor to introduce the Bench to the Board's newest member: James C. Schwartzman, Esquire. Jim was appointed to the Board in August by the Supreme Court. Jim is a lawyer with Stevens & Lee with a background representing judges and lawyers in ethics matters.

As I have noted previously, I hope that the matters discussed in the Board's Newsletter are informative and helpful to you and that you will provide feedback to the information that we provide.

With best personal and professional regards, I am

Most respectfully,

**Anne**

Anne E. Lazarus

Chair, Judicial Conduct Board

## ***MEET THE BOARD'S NEWEST MEMBER***

By Order dated August 14, 2014, the Pennsylvania Supreme Court appointed James C. Schwartzman, Esquire, to a four year term on the Judicial Conduct Board commencing on August 16, 2014. Mr. Schwartzman will serve as one of the members of the bar appointed to the twelve-member Board. He is a Republican.

Jim is a shareholder in the Philadelphia office of Stevens & Lee where he chairs the Ethics and Professional Responsibility Group. He previously ran his own firm and was a named partner in Schwartzman & Hepps. Jim has extensive experience representing and counseling lawyers, law firms and judges on ethics-related issues. He has an active federal white collar criminal defense practice and extensive trial experience in both civil and criminal matters in most of the courts in southeastern Pennsylvania. He holds memberships in the Philadelphia and Pennsylvania Bar Associations, the Philadelphia and Pennsylvania Trial Lawyers Associations, and the Association of Professional Responsibility Lawyers.

Jim is a former Assistant U.S. Attorney for the Eastern District of Pennsylvania and was a law clerk for the Honorable J. William Ditter, Jr., United States District Judge for the Eastern District of Pennsylvania. He has been an instructor at the United States Attorney General's Advocacy Institute and Temple University School of Law. He has served by appointment of the Supreme Court on the Disciplinary Board, the Continuing Legal Education Board, and the Interest on Lawyers Trust Account (IOLTA) Board. He served each of these Boards as both Chair and Vice-Chair. Jim has been a member of the Southeast Pennsylvania Transportation Authority (SEPTA) Board of Directors since 1991 and served as Vice-Chair from 1999 until 2013. He has also been a member of the Independence Blue Cross Board of Directors since 1993 and serves on its Executive and Finance Committee.

Selected by his peers as among the top five percent of lawyers in the Commonwealth, Jim has been recognized as a Pennsylvania Super Lawyer from 2004 through 2014. He was named one of the top 100 Super Lawyers in Pennsylvania in 2009, 2010 and 2012, and one of the top 100 Super Lawyers in Philadelphia in 2010 and 2012. In addition, Jim has been selected by his peers as one of The Best Lawyers in America for his work in Malpractice Law and Ethics and Professional Responsibility Law, and he has been named Lawyer of the Year in the areas of Ethics and Professional Responsibility Law and Legal Malpractice Law.

It is a pleasure to welcome Jim Schwartzman to the Board.

## **CAMPAIGNING FOR JUDICIAL OFFICE**

**By**

**Robert A. Graci, Chief Counsel, Judicial Conduct Board**

This article will examine the provisions of the Code of Judicial Conduct<sup>1</sup> and the Rules Governing Standards of Conduct of Magisterial District Judges<sup>2</sup> applicable to campaigns for judicial office. It will discuss those rules applicable to all candidates, including incumbent judges seeking reelection or retention, for positions on the Philadelphia Municipal Court, the courts of common pleas, and the Superior, Commonwealth and Supreme Courts. It will note the changes made to Prior Code and Standard provisions, describe newly added provisions, and, where applicable, compare the Code provisions to those found in the Standards.

### **STRUCTURE OF THE NEW CODE AND NEW STANDARDS**

The New Code and New Standards now structurally resemble the Rules of Professional Conduct which govern the conduct of lawyers.<sup>3</sup> Like the Rules of Professional Conduct, the New Code and Standards contain a "Preamble," a section entitled "Terminology," and a section entitled "Application." The Old Code and Old Standards contained none of these divisions.

The Preambles explain that the New Code and New Standards are, for the judges to whom they apply, the "canon of ... judicial ethics" referred to in Article V, Section 17(b) of the Pennsylvania Constitution.<sup>4</sup> That section of the Constitution provides, in pertinent part, that justices and judges "shall not violate any canon of

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<sup>1</sup> The Code of Judicial Conduct, effective July 1, 2014, will generally be referred to in this article as the "New Code." The prior iteration of Code will be referred to as the "Old Code."

<sup>2</sup> By Order dated September 18, 2014, the Supreme Court rescinded Rules 1 through 15 and 23 of the existing Rules Governing Standards of Conduct of Magisterial District Judges and replaced them with Canons and Rules similar to those found in the New Code. These new provisions, and the rescission of the Standards, are effective December 1, 2014. The Standards subject to rescission on December 1, 2014, will be referred to as "Old Standards" and the new will be referred to as the "New Standards." Magisterial district judges seeking reelection and all candidates for magisterial district judge running for office in 2015 must be mindful that the rules contained in the New Standards are not effective until December 1, 2014. The Old Standards apply to the conduct of such candidates and their committees until November 30, 2014. Where the rules in the New Code and the New Standards are otherwise identical except for the substitution of the words "magisterial district judge" for "judge," they will simply be referred to as "New Rules."

<sup>3</sup> As will be explained in text, some of the provisions of the New Code and New Standards are based on the Code of Professional Conduct.

<sup>4</sup> New Code, Preamble [1].

... legal ethics prescribed by the Supreme Court.”<sup>5</sup> Therefore, a violation of a rule in the New Code or Standards could subject a judge or judicial candidate to investigation by the Judicial Conduct Board and sanction by the Court of Judicial Discipline.<sup>6</sup>

The Preambles provide rules of interpretation for the New Code and Standards. They note that the “Rules” set forth in the New Code and Standards “are rules of reason that should be applied consistently with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances.”<sup>7</sup> For the purpose of imposing discipline, the Preambles expound:

Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or *candidate* in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion. Moreover, it is not intended that disciplinary action would be appropriate for every violation of the Code’s provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.<sup>8</sup>

The necessary corollary to the use of the permissive terms “may” and “should” is that the use of the word “shall” which now appears regularly throughout the New Code and Standards (and often where the word “should” appeared in the Old Code), implies an obligation on the part of the judicial candidate<sup>9</sup> or judicial officer.

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<sup>5</sup> Pa. Const., art. V, § 17(b).

<sup>6</sup> Pa. Const., art. V, § 18(d)(1)(a judicial officer may be disciplined for “a violation of section 17 of this article”).

<sup>7</sup> New Code, Preamble [5]; New Standards, Preamble [5]. The Rules of Professional Conduct use the “rules of reason” language. See Pa.R.P.C. Preamble [14].

<sup>8</sup> New Code, Preamble [6](emphasis added); New Standards, Preamble [6](emphasis added). Similar language is found in the Rules of Professional Conduct. See Pa.R.P.C. Preamble [14].

<sup>9</sup> As will be explained *infra*, Canon 4 of the New Code and the New Standards relating to campaign and political activity applies to judges and judicial candidates. Lawyers who become judicial candidates are subject to Canon 4 in either the New Code or the New Standards. A violation of Canon 4 by a lawyer candidate could subject the lawyer to discipline by virtue of Rule 8.2(b) of the Rules of Professional Conduct which provides: “[a] lawyer who becomes a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.” Pa.R.C.P. 8.2(b).

If a justice or judge violates such a proscription, he or she may be subject to disciplinary action.<sup>10</sup>

Like the Old Code and Old Standards, the New Code and the New Standards continue to the designation of the Ethics Committee of the Pennsylvania Conference of State Trial Judges and the Ethics and Professionalism Committee of the Special Court Judges Association of Pennsylvania as the approved bodies to render advisory opinions regarding ethical concerns involving judges, other judicial officers and judicial candidates subject to the New Code and Standards for purposes of the so-called "Rule of Reliance." The Rule of Reliance requires the Judicial Conduct Board, the Court of Judicial Discipline and the Supreme Court of Pennsylvania to take into account that a judge sought guidance on an ethical question and acted in reliance on that guidance in determining whether discipline should be recommended or imposed.<sup>11</sup>

The "Terminology" sections of the New Code and Standards are entirely new. They had no counterpart in the Old Code or Standards. Pertinent to political and campaign activities by judges and judicial candidates, the Terminology sections define the following terms contained in the Code: aggregate; contribution; domestic partner; impending matter; impropriety; independence; integrity; judicial candidate; knowingly, knowledge, known, and knows<sup>12</sup>; law; member of the candidate's family; member of the judge's family; member of the judge's family residing in the judge's household; nonpublic information; party; pending matter; personally solicit; political organization; public election; and third degree of relationship.<sup>13</sup> The inclusion of specific definitions will provide judges and judicial candidates with a clearer understanding of what is required and expected of them and will provide the Judicial Conduct Board and the Court of Judicial Discipline with better guidance as to what constitutes actionable misconduct.

The "Application" section of the New Code states that it applies to "all Supreme Court Justices; all Superior Court Judges; all Commonwealth Court Judges; all Common Pleas Court Judges; all judges of the Philadelphia Municipal

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<sup>10</sup> Though not expressed in the New Code or the New Standards, the Rules of Professional Conduct state: "Some of the Rules are imperatives, cast in terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline." Pa.R.P.C. Preamble [14].

<sup>11</sup> New Code, Preamble [8]; New Standards, Preamble [8]. This Rule of Reliance was previously set forth in an addendum to the Old Code following Old Canon 7 and in Rule 23 of the Old Standards. For magisterial district judges, as in the Old Standards, the New Standards allow magisterial district judges and candidates for that position to seek guidance from either the Ethics Committee of the State Trial Judges Conference or the Ethics and Professionalism Committee of the Special Court Judges Association of Pennsylvania. See New Standards, Preamble [8]. *Compare* Old Standards, R.G.S.C.M.D.J. No. 23.

<sup>12</sup> The definition of "knowingly, knowledge, known, and knows" is virtually identical to that found in the Rules of Professional Conduct. See Pa.R.P.C. No. 1.0(f).

<sup>13</sup> New Code, Terminology; New Standards, Terminology.

Court, except for Traffic Division; and all senior judges.”<sup>14</sup> The New Code also applies to all active senior judges and those eligible for recall to judicial service.<sup>15</sup> The Code does not apply to magisterial district judges or judges of the Traffic Division of the Philadelphia Municipal Court.<sup>16</sup> Those judges must adhere to the Old Standards until November 30, 2014,<sup>17</sup> including Rule 15 of the Standards relating to public office and political activity.<sup>18</sup> Thereafter, they are bound by Canon 4 of the New Standards.<sup>19</sup> These New Standards also apply to all active senior magisterial district judges and those eligible for recall to judicial service.<sup>20</sup>

The Application sections of the New Code and New Standards make it clear that Canon 4, relating to political and campaign activities, applies to all judicial candidates.<sup>21</sup> For lawyer candidates to judicial positions, this is consistent with Rule 8.2 of the Rules of Professional Conduct which provides that “[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.”<sup>22</sup>

#### **CANON 4 OF THE NEW CODE AND NEW STANDARDS**

Canon 4 of the New Code and the New Standards govern campaign and political activity by the Commonwealth’s judges and judicial candidates. Canon 4 of the Code states: “A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.”<sup>23</sup> The New Standard is identical except that it refers to “MAGISTERIAL DISTRICT JUDGE.”<sup>24</sup> The New Canons are in marked contrast from the language of Old Canon 7 and Old Standard 15 which they replaced.<sup>25</sup> Found in New Canon 4 are Rules applicable to

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<sup>14</sup> New Code, Application [2].

<sup>15</sup> New Code, Application [3].

<sup>16</sup> New Code, Application [5]. The Prior Code said that it applied to all judges except senior judges while serving extrajudicial appointments, magisterial district judges and judges of the Traffic Court of Philadelphia. See Addendum following Prior Canon 7.

<sup>17</sup> New Code, Application [5].

<sup>18</sup> Old Standards, R.G.S.C.M.D.J. No. 15.

<sup>19</sup> New Standards, Application [2].

<sup>20</sup> New Standards, Application [3].

<sup>21</sup> New Code, Application [4]; New Standards, Application [4]. Rule 15 of the Prior Standards likewise made it clear that the campaign conduct rules applied to all candidates for the position of magisterial district judge. Old Standards, R.G.S.C.M.D.J. No. 15(B)(2), (C) & (D).

<sup>22</sup> Pa.R.P.C. No. 8.2(b). See also New Code, Canon 4, Rule 4.1, cmt. [2] (“When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.”); New Standards, Canon 4, Rule 4.1, cmt. [2](same).

<sup>23</sup> New Code, Canon 4.

<sup>24</sup> New Standard, Canon 4.

<sup>25</sup> The Prior Canon stated: “Judges should refrain from political activity inappropriate to their judicial office.” Old Code, Canon 7. Old Rule 15 of the

judges and candidates for judicial office, as well as the campaign committees of judicial candidates. As with revisions set forth in the other New Canons in the New Code and Standards, many of the new rules found in the New Code and New Standards are reiterations of precepts previously found in the provisions of the Old Code and Standards.

New Rule 4.1 generally prohibits judges and judicial candidates from engaging in most political activity.<sup>26</sup> Under Rule 4.1(A)(7), judges or judicial candidates shall not “use court staff, facilities, or other court resources in a campaign for judicial office.”<sup>27</sup> Until the adoption of the Code, a Supreme Court Order prohibited employees of the unified judicial system from engaging in partisan political activity.<sup>28</sup> Judges who enlisted the aid of judicial employees in their campaign were subject to discipline for that activity despite the fact that it was not specifically reflected in the Old Code or Old Standards because they could be disciplined for violating both the Code and orders of the Supreme Court.<sup>29</sup> The New Code and Standards now make this prohibition explicit. They also prohibit the use of court facilities and resources (such as computers and office supplies) for campaign activity.<sup>30</sup>

Judges and candidates for judicial office are prohibited from making “any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending in any court.”<sup>31</sup> This precludes appearing as a so-called “talking head” on a television show that discusses an ongoing trial. It applies to a matter pending “in any court” and not just in the judge’s court or in a court in Pennsylvania if the statement “would reasonably be expected to affect the outcome or impair the fairness of a matter.” New Rule 4.1(A)(11), in language drawn from Old Canon 7B(1)(c), precludes judges or candidates from making pledges,

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Standards is entitled: “PUBLIC OFFICE AND POLITICAL ACTIVITY.” Old Standards, R.G.S.C.M.D.J. No. 15.

<sup>26</sup> New Rule 4.1(A)(9) allows judges or judicial candidates to engage in political activity “on behalf of measures to improve the law, the legal system, or the administration of justice.” New Code, Canon 4, Rule 4.1(A)(10).; New Standards, Canon 4, Rule 4.10(A)(10). The Old Code permitted also such activity. See Old Code, Canon 4. Magisterial district judges and candidates for that office were also permitted to engage in this type of political activity. Old Standards, R.G.S.C.M.D.J. No. 15 note.

<sup>27</sup> Code, Canon 4, Rule 4.1(A)(7).

<sup>28</sup> See *In re: Prohibited Political Activity by Court-Appointed Employees*, 201 Jud. Adm. Dkt. 1 (Pa. 1998)(reaffirming prior order of 1987); *In re: Prohibited Political Activity by Court-Appointed Employees*, 82 Jud. Admin. Dkt. 1 (Pa. 1987).

<sup>29</sup> The Pennsylvania Constitution allows a judge to be disciplined for violations of canons adopted or orders issued by the Supreme Court. See Pa. Const., art. V, §§ 17(b) and 18(d)(1).

<sup>30</sup> New Code, Canon 4, Rule 4.1(A)(7).

<sup>31</sup> New Code, Canon 4, Rule 4.1(A)(9); New Standards, Canon 4, Rule 4.1(A)(9). See also New Code, Canon 4, Rule 4.2(C)(4); and New Standards, Canon 4, Rule 4.2(C)(4).

promises, or commitments “in connection with cases, controversies or issues that are likely to come before the court ... that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”<sup>32</sup> This preclusion would appear to capture any “impending” matters as well as “pending” matters.<sup>33</sup>

The Comments to the Rules explicate their reach. To the extent that there is any question, Comment [1] clarifies that the new rule applies to all elections for judicial office, both contested and retention, as well as to those appointed or seeking appointment to judicial office.<sup>34</sup> It notes that “[t]his Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, *taking into account the various methods of selecting judges.*”<sup>35</sup>

Comment [2] explains that Rule 4.1 becomes applicable when a person becomes a judicial candidate.<sup>36</sup> For lawyers becoming judicial candidates, this Rule dovetails with Rule 8.2(b) of the Rules of Professional Conduct which provides that “[a] lawyer who becomes a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.”<sup>37</sup> The Terminology sections of the Code defines “judicial candidate” as “[a]ny person, including a sitting judge, who is seeking appointment, election or retention to judicial office.”<sup>38</sup> The definition further provides that “[a] person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the appointment or election authority, or where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for appointment or election to office.”<sup>39</sup>

The question of judges, magisterial district judges, and judicial candidates participating in the campaigns of family members is addressed in the Comments to new Rule 4.1. In unmistakable language, Comment [5] explains that such conduct is prohibited.

Although members of the families of judges and judicial candidates are free to engage in their own political activity, including

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<sup>32</sup> New Code, Canon 4, Rule 4.1(A)(11); New Standards, Canon 4, Rule 4.1(A)(11). Magisterial district judge candidates are presently subject to similar restrictions. See Old Standards, R.G.S.C.M.D.J. No. 15D(3).

<sup>33</sup> Compare New Code, Canon 2, Rule 2.10(A); New Standards, Canon 2, Rule 2.10(A).

<sup>34</sup> New Code, Canon 4, Rule 4.1 cmt. [1], New Standards, Canon 4, Rule 4.1 cmt. [1]. See also New Code, Terminology, “Judicial Candidate”; New Standards, Terminology, “Judicial Candidate.”

<sup>35</sup> New Code, Canon 4, Rule 4.1 cmt. [1](emphasis added).

<sup>36</sup> New Code, Canon 4, Rule 4.1 cmt. [2].

<sup>37</sup> Pa.R.P.C. 8.2(b).

<sup>38</sup> New Code, Terminology, “Judicial Candidate”; New Standards, Terminology, “Judicial Candidate.”

<sup>39</sup> *Id.*

becoming a candidate for public office, there is no “family exception” to the prohibition in Rule 4.1(A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member’s political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member’s candidacy or other political activity.<sup>40</sup>

The Comments to New Rule 4.1 provide several examples of the types of campaign conduct that is permitted, as well as that which is not permitted. Candidates are permitted to campaign on their own behalf and may endorse and oppose candidates for the same judicial office.<sup>41</sup> They may appear on the same ticket with other candidates for other offices, including non-judicial offices, without running afoul of the prohibition on endorsing candidates for public office.<sup>42</sup> While they may not make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office, judges’ and judicial candidates’ pledges, promises, or commitments “must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited.”<sup>43</sup> Moreover, without violating the “pledges, promises, or commitments” proscription, they “may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring.”<sup>44</sup> Additionally, judges and judicial candidates may respond to “questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues” without violating the “pledges, promises, or commitments” clause if the responders are careful in the wording of their responses so that they are not “viewed as pledges, promises, or commitments

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<sup>40</sup> New Code, Canon 4, Rule 4.1 cmt. [5]; New Standards, Canon 4, Rule 4.1 cmt. [5]. This is a clear break with the Old Standards (in effect until November 30, 2014) which allow a magisterial district judge, or a candidate for that office, to make political contributions to the campaigns of members of the judge’s or candidate’s immediate family at any time. See Old Standards, R.G.S.C.M.D.J. No. 15B(2)(b).

<sup>41</sup> New Code, Canon 4, Rule 4.1 cmt. [2]; New Standard, Canon 4, Rule 4.1 cmt. [2].

<sup>42</sup> *Id.* Judges or judicial candidates are otherwise prohibited from endorsing or opposing candidates for other public offices. See New Code, Canon 4, Rule 4.1(A)(3); New Standards, Canon 4, Rule 4.1(A)(3).

<sup>43</sup> New Code, Canon 4, Rule 4.1 cmt. [9]; New Standards, Canon 4, Rule 4.1 cmt. [9]. See Old Standards R.G.S.C.M.D.J. No. 15D(3) and *Commentary* for rules governing the conduct of magisterial district judge candidates, including incumbent judges, until November 30, 2014.

<sup>44</sup> New Code, Canon 4, Rule 4.1 cmt. [10]; New Standards, Canon 4, Rule 4.1 cmt [10].

to perform the adjudicative duties of office other than in an impartial way.”<sup>45</sup> To avoid violating this proscription, judges and judicial candidates are cautioned to “give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected.”<sup>46</sup>

New Rules 4.2, 4.3 and 4.4 act as exceptions to the general prohibitions contained in New Rule 4.1. New Rule 4.2 addresses political and campaign activities in public elections.<sup>47</sup> As retention elections are “public elections,” the Rules precepts apply to them.<sup>48</sup> Among the new requirements of the Rule are: 1) to act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;<sup>49</sup> 2) to comply with all elections laws and regulations, including those related to campaign financing;<sup>50</sup> and 3) to review and approve all materials prepared by the judicial candidate or the candidate’s committee before their dissemination.<sup>51</sup> Relying on a provision in the Old Standards, the Rule designates that a judicial candidate may begin campaigning the day after the General Election in the year before the calendar year in which the judicial election is to be held.<sup>52</sup>

In apparent recognition of political reality, a judicial candidate may now “publicly endorse or speak on behalf of candidates for any other elective judicial office appearing on the same ballot.”<sup>53</sup> They are no longer limited to only speaking on behalf of candidates for the same judicial office.

Another significant change from the Old Code is found in Rule 4.2(B)(4). Under the Old Code and Standards, candidates were prohibited from personally seeking statements of public support for their candidacies. They had to rely on

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<sup>45</sup> New Code, Canon 4, Rule 4.1 cmt. [11]; New Standards, Canon 4, Rule 4.1 cmt [11].

<sup>46</sup> *Id.* It would appear that the same would be true for an appointee. See New Code, Canon 4, Rule 4.3 cmt. (referring to Rule 4.1(A)(11)); New Standards, Canon 4, Rule 4.3 cmt. (same).

<sup>47</sup> New Code, Canon 4, Rule 4.2; New Standards, Canon 4, Rule 4.2.

<sup>48</sup> Magisterial district judges are not subject to retention elections.

<sup>49</sup> New Code, Canon 4, Rule 4.2(A)(1); New Standards, Canon 4, Rule 4.2(A)(1).

<sup>50</sup> New Code, Canon 4, Rule 4.2(A)(2); New Standards, Canon 4, Rule (A)(2).

<sup>51</sup> New Code, Canon 4, Rule 4.2(A)(3); New Standards, Canon 4, Rule 4.2(A)(3).

<sup>52</sup> New Code, Canon 4, Rule 4.2(B); New Standards, Canon 4, Rule 4.2(B). *Compare* Old Standards, R.G.S.C.M.D.J. No. 15C. Under the new Rule, a judicial candidate may form a campaign committee, speak on behalf of his or her candidacy and may purchase advertising, and may publicly endorse or oppose other candidates for the same judicial office for which he or she is a candidate. New Code, Canon 4, Rule 4.2(B)(1)-(3); New Standards, Canon 4, Rule 4.2(B)(1)-(3).

<sup>53</sup> New Code, Canon 4, Rule 4.2(B)(2); New Standards, Rule 4.2(B)(2). The Old Standards do not have a counterpart to this Rule. Until the New Standards become effective on December 1, 2014, candidates for magisterial district judge, including incumbents, must comply with the Old Standards.

their campaign committees to do so.<sup>54</sup> Under the New Code and Standards, judicial candidates for all positions may “seek, accept, or use endorsements from any person or organization.”<sup>55</sup>

Despite the prohibition of New Rule 4.1(A)(7) against using court facilities for campaign purposes, New Rule 4.2(B)(8) allows candidates to “use court facilities for the purpose of taking photographs, videos, or other visuals for campaign purposes to the extent such facilities are available on an equal basis to other candidates for such office.”<sup>56</sup>

New Rule 4.2 contains a number of “thou shalt nots” for judicial candidates, some of which are reiterations of prior prohibitions and some of which are new. Judges who are candidates for elective judicial office are not permitted to use campaign funds for private purposes.<sup>57</sup> Nor may they make statements “that would

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<sup>54</sup> Old Code, Canon 7B(2); Prior Standards, R.G.S.C.M.D.J. No. 15D(4)..

<sup>55</sup> New Code, Canon 4, Rule 4.2(B)(5). Until December 1, 2014, magisterial district judge candidates, including incumbents, are still prohibited from personally soliciting public statements of support for their candidacies. They must still rely on their campaign committees to do so. See R.G.S.C.M.D.J. No. 15D(4).

<sup>56</sup> New Code, Canon 4, Rule 4.2(B)(8). The Prior Standards in effect until November 30, 2014, do not address this point for magisterial district judge candidates.

<sup>57</sup> New Code, Canon 4, Rule 4.2(C)(1); New Standards, Canon 4, Rule 4.2(C)(1). Until December 1, 2014, magisterial district judge candidates, including incumbent judges, are prohibited from personally soliciting or accepting funds and from using such funds for their own benefit or the private benefit of their families. See Prior Standards, R.G.S.C.M.D.J. No. 15D(4). As written, this section of New Rule 4.2 appears to apply only to judges who are candidates and not to all candidates for elective judicial office like the rest of Canon 4. Compare New Code, Application [4] (“Canon 4 (governing political and campaign activities) applies to all judicial candidates”); New Standards, Application [4](same). As originally promulgated by the Supreme Court, Rule 4.2(C)(1) of the New Code prohibited judges who were candidates for elective judicial office from personally soliciting or accepting campaign contributions other than through a campaign committee as authorized by the rules. At the same time, the comment to New Rule 4.4 stated: “Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.2(C)(1).” New Code, Canon 4, Rule 4.4 cmt. [1](amended by Order of September 18, 2014). Without explanation, by Order of September 18, 2014, the Supreme Court deleted the original version of Rule 4.2(C)(1) and renumbered the succeeding subsections of that section of the New Rule. See *In re: Amendments of Rules 4.2 and 4.4 of the Code of Judicial Conduct*, No. 427 Judicial Administration Docket. In the same order, the Supreme Court deleted the reference to Rule 4.2(C)(1) from Comment [1] to Rule 4.4. *Id.* It kept the language that preceded that reference, however. The Comment now simply states: “Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions.” New Code, Canon 4, Rule 4.4 cmt. On the same day, the Supreme Court issued its Order adopting the New Standards. See *In re: Adoption of New*

reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”<sup>58</sup>

Judicial candidates and their committees are forbidden from “knowingly or with reckless disregard for the truth, mak[ing], or permit[ing] or encourag[ing] his or her campaign committee to make, any false or misleading statement.”<sup>59</sup> This language replaces earlier language suggesting that candidates “should not ... misrepresent their identity, qualifications, present position, or other fact.”<sup>60</sup> Where a candidate is the subject of false, misleading or unfair allegations, the candidate or the candidate’s committee may respond. In making any response, care must be

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Rules Governing the Standards of Conduct of Magisterial District Judges, No. 376 Magisterial Rules Docket. Rule 4.2(C)(1) and the comment to Rule 4.4 of the New Standards are identical to the newly amended Rule 4.2(C)(1) and the newly amended Comment to Rule 4.4 of the New Code. See New Code, Canon 4, Rules 4.2 (C)(1) and 4.4 cmt. [1] (as amended September 18, 2014); *compare* New Standards, Canon 4, Rules 4.2 (C)(1) and 4.4 cmt. [1]. In the Old Code and the Old Standards, judges and judicial candidates were absolutely precluded from personally soliciting and accepting campaign contributions. They had to do so through committees. See Old Code, Canon 7B(2); Old Standard, R.G.S.C.M.D.J. No. 15D(4). Though not clear in the New Rules and Standards themselves, it appears from the continued reference in the Comment to Rule 4.4 that the Supreme Court intended to continue the long-standing prohibition on judges and judicial candidates personally soliciting and accepting campaign contributions. This conclusion finds support in the text of Rule 4.4(B)(1) of the New Code (which was not amended or otherwise affected by the amendments to Rule 4.2(C)(1) or the Comment to Rule 4.4) which continues to place the responsibility for soliciting and accepting campaign contributions on campaign committees. New Code, Canon 4, Rule 4.4(B)(1); New Standards, Canon 4, Rule 4.4(B)(1). Nowhere do the New Code or the New Standards specifically allow judges or judicial candidates at any level to personally solicit or accept campaign contributions. It is hoped that the Supreme Court will further address this prohibition and make its continuation express in order to avoid any confusion.

<sup>58</sup> New Code, Canon 4, Rule 4.2(C)(4). Note that in this Rule, the prohibition includes “impending” matters. See New Code, Canon 2, Rule 2.10(A)(including the word “impending”); *compare* New Code, Canon 4, Rule 4.1(A)(9)(removing the word “impending”).

<sup>59</sup> New Code, Canon 4, Rule 4.2(C)(3); New Standards, Canon 4, Rule 4.2(C)(3). See *also* New Code, Canon 4, Rule 4.1(A)(8)(same prohibition pertaining to judges as well as judicial candidates); New Standards, Canon 4, Rule 4.1(A)(8)(same). This “knowingly or with reckless disregard for the truth” limitation is an apparent recognition of the First Amendment implications of limitations on speech in the context of judicial campaigns. See *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Until December 1, 2014, Rule 15D(3) prohibits magisterial district judges from misrepresenting any fact. Old Standards, R.G.S.C.M.D.J. No. 15D(3).

<sup>60</sup> Old Code, Canon 7B(1)(c). This is still the rule for magisterial district judge candidates until December 1, 2014. Old Standards, R.G.S.C.M.D.J. No. 15D(3).

taken not to violate these rules in the same fashion as those statements to which the candidate or committee is responding.<sup>61</sup>

New Rule 4.3 addresses a topic not previously addressed in the Code or the Standards: activities of candidates for appointive judicial office.<sup>62</sup> Such candidates may communicate with the Governor (“the appointing authority”) and the Senate (“the confirming authority”), as well as any screening or nominating commissions.<sup>63</sup> They may personally seek endorsements for the appointment “from any person or organization.”<sup>64</sup> The Comment to this Rule clarifies that a candidate for appointment is bound by Rule 4.1(A)(11) and “must not make any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”<sup>65</sup>

Rule 4.4 governs the activities of campaign committees. By use of the phrase “subject to public election,” the new Rule encompasses contested elections and reelections and retention bids.<sup>66</sup> It clarifies that campaign fundraising may commence “immediately after the General Election in the year prior to the calendar year in which a person may become a candidate for such office,” tracking the language of new Rule 4.2(B) for the beginning of campaigning generally.<sup>67</sup>

New to the Code and Standards are provisions requiring all campaign committees to “comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions.”<sup>68</sup> These rules require the filing of campaign

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<sup>61</sup> New Code, Canon 4, Rule 4.2 cmts. [7] & [8] (noting that it is preferable for someone else to respond “if the allegations relate to a pending case”); New Standards, Canon 4, Rule 4.2 cmts. [7] & [8] (same).

<sup>62</sup> New Code, Canon 4, Rule 4.3; New Standards, Canon 4, Rule 4.3.

<sup>63</sup> New Code, Canon 4, Rule 4.3(A); New Standards, Canon 4, Rule 4.3(A).

<sup>64</sup> New Code, Canon 4, Rule 4.3(B); New Standards, Canon 4, Rule 4.3(B).

<sup>65</sup> New Code, Canon 4, Rule 4.3 cmt.; New Standards, Canon 4, Rule 4.3 cmt.

<sup>66</sup> New Code, Canon 4, Rule 4.4(A). Magisterial district judges are not subject to retention elections.

<sup>67</sup> New Code, Canon 4, Rule 4.4(B)(2); New Standards, Canon 4, Rule 4.4(B)(2). This is a significant change from the prior canons which restricted judges’ and judicial candidates’ campaign committees to soliciting campaign funds “no earlier than thirty days prior to the first day for filing nominating petitions or the last day for filing a declaration of intention to seek reelection on a retention basis.” Old Code, Canon 7(B)(2). See also Old Standard R.G.S.C.M.D.J. No. 15D(4). Because Old Rule 15 is not rescinded until December 1, 2014, that will be the first day that committees for magisterial district judge candidates, including incumbents, may solicit and accept funds for their candidates for the 2015 election cycle. Thereafter, all judges’ committees will be able to solicit and accept funds on or after the day after the general election of the year preceding the year of the judicial election under Rule 4.4(B)(2).

<sup>68</sup> New Code, Canon 4, Rule 4.4(B)(3); New Standards, Canon 4, Rule 4.4(B)(3). Though not expressed in the New Code or New Standards, judges who are judicial candidates also have obligations under the Election Code. Failure to comply with

finance reports with the Secretary of the Commonwealth in language that approximates the requirements of section 1626 of the Election Code.<sup>69</sup> Committees must provide a listing of “the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding \$250 and the name and address of each person who has made campaign contributions to the committee in an aggregate value exceeding \$50.”<sup>70</sup>

Rule 4.4 also requires that the campaign finance reports “be filed not later than thirty days following an election, or within such other period as is provided by law.”<sup>71</sup> The Election Code requires the filing of these reports periodically during and after the election season.<sup>72</sup> Therefore, the time frames set forth in the statute, and not those in the Rule, will prevail since that is “such other period as is provided by law.”

The Old Standards make no mention of compliance with the statutory requirements for campaign contributions. Magisterial district judges are required to comply with the law, however.<sup>73</sup> Accordingly, they must comply with the Election Code and could be subject to discipline for violating it.

Concerning campaign contributions from lawyers and others who might appear before a successful judicial candidate, a comment to New Rule 4.4 suggests that campaign committees should be cautious in accepting such contributions, “so they do not create grounds for disqualification or recusal if the candidate is elected to judicial office.”<sup>74</sup> The comment directs the candidate to “[s]ee Rule 2.11 [relating to disqualification].”<sup>75</sup> Rule 2.11(A)(4) requires disqualification if a judge “knows or learns that a party, a party’s lawyer, or the law firm of a party’s lawyer has made a direct or indirect contribution(s) to the judge’s campaign” where the amount would raise a “reasonable concern” about whether the judge could be fair and impartial.<sup>76</sup>

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those statutory requirements could subject a judge to discipline for violating the general requirement that judges “comply with the law.” See Pa. Const., art. V, § 17(b) (“Justices and judges shall not engage in any activity prohibited by law”); New Code, Canon 1, Rule 1.1; New Standards, Canon 1, Rule 1.1.

<sup>69</sup> 25 P.S. § 3246(b)(1), (2).

<sup>70</sup> New Code, Canon 4, Rule 4.4(B)(3); New Standards, Canon 4, Rule 4.4(B)(3). Compare 25 P.S. § 3246(b)(1), (2).

<sup>71</sup> New Code, Canon 4, Rule 4.4(B)(3).

<sup>72</sup> 25 P.S. § 3246(d), (e).

<sup>73</sup> See Old Standards, R.G.S.C.M.D.J. No. 2A. See also *In re Carney*, 79 A.3d 490 (Pa. 2013)(judge can be disciplined based on violation of the law not related to judge’s adjudicative responsibilities).

<sup>74</sup> New Code, Canon 4, Rule 4.4 cmt. [3]; New Standards, Canon 4, Rule 4.4 cmt. [3].

<sup>75</sup> *Id.*

<sup>76</sup> New Code, Canon 2, Rule 2.11(A)(4); New Standards, Canon 2, Rule 2.11(A)(4). By Order dated June 26, 2014, immediately before the New Code was to go into effect, the Supreme Court amended the Comment to Rule 2.11 explaining:

Rule 2.11 provides for a rebuttable presumption that disqualification is not required when a campaign contribution or reimbursement for travel expenses (food, lodging, transportation, or other expense) is less than or equal to what a judge would be required to report as a gift in the judge's Statement of Financial Interest.<sup>77</sup> Currently, judges must report gifts of at least \$250.00 in value.<sup>78</sup> Though the judicial candidate is required to establish a committee to engage in

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Rule 2.11(A)(4) represents a first inroad into complex issues associated with the financing of judicial campaigns in the scheme prescribed by the Pennsylvania Constitution, per which judicial officers are elected by the citizenry. See Pa. Const. art. V, §13. For example, the rule presently does not address a number of circumstances which have arisen in the context of public judicial elections, including the involvement of political action committees ("PACs"). Under the direction of an independent board of directors, such entities may aggregate then distribute individual contributions among judicial campaigns, political campaigns, their own operating expenses, and other expenditures. There is no attempt, under the present rule, to require disqualification on account of individual contributions made to a PAC, so long as the organization does not serve as the alter-ego of a specific donor or donors. Rulemaking, in this regard, would require further study and deliberation in order to appropriately balance all respective interests involved. Thus, the Court has reserved any treatment to a later time.

New Code, Canon 2, Rule 2.11 cmt. [6]. See also New Standards, Canon 2, Rule 2.11 cmt. [7]. Accordingly, how candidates and their committees will be required to account for contributions from litigants, lawyers and law firms, including contributions from political action committees, and when or if those contributions must be aggregated with other contributions for purposes of this rule, are open questions subject to further refinement. For a definition of "aggregate" as it relates to direct and indirect campaign contributions, see New Code, Terminology; New Standards, Terminology. For the due process implications of large campaign contributions to any judicial candidate and recusal, see *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

<sup>77</sup> Every judge is required by Supreme Court order to annually file a Statement of Financial Interest. See *In re: Financial Disclosure and Reporting Requirements for Judicial Officers*, 47 Jud. Adm. Dkt. 1 (Pa. 1984). This reporting requirement is now embodied in the New Code and Standards. See New Code, Canon 3, Rule 3.15; New Standards, Canon 3, Rule 3.15. Under the Public Official and Employee Ethics Act, all candidates for judicial office must file a similar financial interest statement with their petitions to appear on the ballot. See 65 Pa.C.S.A. § 1104(b).

<sup>78</sup> This New Rule provides a procedure for the parties and their counsel to waive disqualification and incorporate such an agreement into the record. New Code, Canon 2, Rule 2.11(C); New Standards, Canon 2, Rule 2.11(C). This is similar to Rule 9A of the Old Standards. Old Standards, R.G.S.C.M.D.J. No. 9A.

fundraising<sup>79</sup>, the candidate must police the contributions in order to determine if disqualification is required after the candidate is elected.<sup>80</sup> This new disqualification rule requires judges to determine the aggregate amount of contributions, both direct and indirect, made by all the lawyers of a law firm in order to assess whether the amount raises a reasonable concern about the judge's ability to be fair and impartial. This may pose a problem for contributions from lawyers from firms having a large number of lawyers or different offices.<sup>81</sup>

Also related to campaign contributions, Rule 2.13(B) prohibits a judge from appointing a lawyer to a court job if the lawyer or the lawyer's spouse or domestic partner was a "major donor" to the judge's campaign within the prior two years to the judge's election campaign.<sup>82</sup> The rule provides some limited exceptions, however, including where the position is "substantially uncompensated."<sup>83</sup>

Finally, New Rule 4.5 addresses what is required of judges who become candidates for nonjudicial office. A judge who becomes a candidate for a nonjudicial elective office must resign from the bench.<sup>84</sup> As the Comment to the Rule explains, "[t]he 'resign to run' rule set forth in [New Rule 4.5](A) is required by Article V, Section 18(d)(4) of the Pennsylvania Constitution, which states: "A justice, judge or justice of the peace who files for nomination for or election to any public office other than a judicial office shall forfeit automatically his judicial office." A resignation is not required of a judge seeking a nonjudicial appointive office.<sup>85</sup> A judge in that position is still required to abide by all of the other provisions of the New Code and Standards.<sup>86</sup> Judges are not required to resign if they seek election to or serve as a delegate to a state constitutional convention.<sup>87</sup>

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<sup>79</sup> See New Code, Canon 4, Rule 4.4(B)(1); New Standards, Canon 4, Rule 4.4(B)(1).

<sup>80</sup> New Code, Canon 2, Rule 2.11(A)(4); New Standards, Canon 2, Rule 2.11(A)(4).

<sup>81</sup> *Id.*

<sup>82</sup> New Code, Canon 2, Rule 2.13(B). Like the phrase "reasonable concern" used in new Rule 2.11(A)(4) relating to disqualification based on political contributions, the phrase "major donor" used in this rule is undefined. The phrases imply a measure of discretion and allow for different results based on different circumstances. What constitutes a "reasonable concern" or a "major donor" in a major metropolitan area is, in all likelihood, different from how those phrases would be interpreted in a more rural, less populous area.

<sup>83</sup> New Code, Canon 2, Rule 2.13(B)(1)-(3). There is no counterpart to this Rule in the New Standards.

<sup>84</sup> New Code, Canon 4, Rule 4.5(A); New Standards, Canon 4, Rule 4.5(A).

<sup>85</sup> New Code, Canon 4, Rule 4.5(B); New Standards, Canon 4, Rule 4.5(B).

<sup>86</sup> *Id.*

<sup>87</sup> New Code, Canon 4, Rule 4.5(C); New Standards, Canon 4, Rule 4.5(C).

## CONCLUSION

The New Code and Standards refine the rules of conduct for the judicial officers at every level of the Commonwealth's judiciary. In many regards, they continue long-standing principals. In some, they establish new requirements. In the areas of political and campaign activity, they generally make uniform the rules for all judges and candidates for judicial office. Those rules make the candidates, including incumbent judges seeking reelection or retention or election to higher judicial office, responsible for the activities of persons acting on behalf of the judge or judicial candidate, including the responsibility to "take reasonable measures to ensure that other persons do not undertake, on behalf of the judge [magisterial district judge] or judicial candidate, any activities prohibited" by the judge or candidate personally.<sup>88</sup> Judicial candidates are also responsible for the activities of their campaign committees, including seeing to it that the committee complies with the election laws and the campaign fundraising rules and for ensuring the accuracy and truthfulness of their campaign advertisements.<sup>89</sup> All who enter the political arena as judicial candidates are well advised to be familiar with the special rules embodied in the New Code and Standards for election or appointment to these special positions of trust.

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<sup>88</sup> New Code, Canon 4, Rule 4.1(B); New Standards, Canon 4, Rule 4.1(B).

<sup>89</sup> See, *generally*, New Code, Canon 4, Rules 4.2(C) and 4.4(B); New Standards, Canon 4, Rules 4.2(C) and 4.4(B).

## ***Impartiality in Solemnizing Marriages***

**By**

**Elizabeth A. Flaherty, Deputy Counsel, Judicial Conduct Board**

On May 20, 2014, Federal District Court Judge John E. Jones III held that Pennsylvania laws banning same-sex marriage “violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.” *Whitewood v. Wolf*, 992 F.Supp.2d 410, 431 (M.D. Pa. 2014). The following day, Pennsylvania Governor Thomas W. Corbett announced that he would not appeal the decision. Accordingly, the Commonwealth must permit same-sex couples to marry and must recognize prior same-sex marriages as legal. *Id.*

In response to the new ruling, a few Pennsylvania judicial officers have spoken out publicly, stating that they are not willing to perform same-sex weddings because of their personal or religious beliefs. The purpose of this article is to examine the judicial conduct issues that may arise when a judge declines to perform some or all wedding ceremonies.

As a preliminary matter, in Pennsylvania, there is no statutory requirement that judges perform wedding ceremonies. The Domestic Relations Code provides that justices, judges, magisterial district judges (MDJs) and other enumerated persons “are authorized to solemnize marriages between persons that produce a marriage license.” 42 Pa.C.S.A. § 1503(a)(1). The jurisdiction of these members of the judiciary is set forth in the Judicial Code (42 Pa.C.S.A. § 101 *et seq.*), yet the performance of wedding ceremonies is not listed as a jurisdictional matter. *See, e.g.*, 42 Pa.C.S.A. § 1515(a)(list of jurisdictional matters for MDJs does not include solemnizing marriages). Therefore, the authorization for judges to solemnize marriages is permissive and not mandatory.

Typically, when a couple requests that a Pennsylvania judicial officer officiate at their wedding, it is a MDJ who performs the ceremony. Some judges and justices officiate at weddings on a less frequent basis. It has been suggested that the existence of a statutorily imposed “cost to be charged” by a MDJ for the performance of a wedding (42 Pa.C.S.A. § 1725.1(c)(2)), coupled with the absence of a statutorily imposed cost to be charged by justices and judges, is proof that MDJs are obligated to officiate at wedding ceremonies upon the request of a betrothed couple. However, the mere existence of a cost assigned to a ceremony performed by a MDJ does not transform the authorization to solemnize weddings into a requirement.<sup>1</sup>

Persuasively, in Washington State, judges are authorized by statute to solemnize weddings (RCW 26.04.050) and may charge a fee. For example, the Seattle Municipal Court posts its fee schedule for the performance of a wedding

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<sup>1</sup> As will be expressed below, it does not matter if the performance of wedding ceremonies is mandatory or permissive because in either case a judge who acts in a discriminatory matter toward a same sex couple, who requests that the judge perform their wedding ceremony, could be subject to discipline.

ceremony by a judge. <http://www.seattle.gov/courts/judgemag/marriage.htm>. Yet, the Commission on Judicial Conduct of the State of Washington determined in a recent case, submitted by stipulation, that judicial officers are not required to perform wedding ceremonies. *In Re the Matter of: The Honorable Gary Tabor*, CJC No. 7251-F-158 (Wash. Comm. on Judicial Conduct 2013). So too under Pennsylvania law, it appears that justices, judges and MDJs have discretion as to whether they choose to perform wedding ceremonies.

This discussion refers to the New Code of Judicial Conduct (New Code), effective July 1, 2014 and the New Rules Governing Standards of Conduct for Magisterial District Judges (New MDJ Rules), effective December 1, 2014. Additionally, the analogous Rules from the current MDJ Rules (Old MDJ Rules) are cited in the footnotes as a reminder that those Rules govern and similarly restrict a MDJ's conduct concerning the performance of same-sex marriages at the present time and up to the December 1, 2014 effective date of the New MDJ Rules.

The pertinent issues include the following:

1. Whether a judge may perform wedding ceremonies for opposite-sex couples but refuse to officiate at wedding ceremonies for same-sex couples?
2. Whether, a judge who stopped performing all wedding ceremonies after *Whitewood*, because of personal or religious beliefs, may officiate at future opposite-sex weddings of family or friends that the judge committed to prior to *Whitewood*?
3. Whether, after *Whitewood*, a judge's decision to stop performing all wedding ceremonies provides the basis for disqualification or recusal of the judge from deciding the legal matters of a gay or lesbian litigant who appears before the judge?

The questions implicate Canon 1, Rules 1.1 and 1.2, Canon 2, Rules 2.3, 2.7 and 2.11, and Canon 3, Rule 3.1(C) of both the New Code and the New MDJ Rules. For purposes of simplicity, this article quotes the Rules from the New Code but also includes bracketed words to indicate where the New MDJ Rules differ slightly from the New Code.

In accord with Canon 1, Rule 1.2 of the New Code, a judge who decides not to perform wedding ceremonies for same-sex couples must opt out of officiating at *all* wedding ceremonies.

### **Rule 1.2 Promoting Confidence in the Judiciary**

Rule 1.2 provides:

A judge [magisterial district judge] shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

New Code, Canon 1, Rule 1.2.<sup>2</sup> Impartiality is defined as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties.” New Code, Terminology, “Impartial, impartiality, impartially.” If a judge agrees to officiate at weddings of opposite-sex couples, but declines to officiate at weddings of same-sex couples, then the judge is *not* impartial because s/he acts in favor of a “class of parties,” heterosexuals, and against another “class of parties,” homosexuals. It is irrelevant that the engaged couple is not a “party” appearing in court because Rule 1.2 controls a judge’s conduct “at all times.”

By demonstrating partiality for opposite-sex couples and against gay and lesbian couples seeking to marry, a judge’s conduct is necessarily improper and gives the appearance of impropriety in violation of Canon 1, Rule 1.2.<sup>3</sup> Impropriety includes “conduct that undermines a judge’s independence, integrity, or impartiality.” New Code, Terminology, “Impropriety.” Appearance of impropriety is evident when a judge’s conduct “create[s] in reasonable minds a perception that the judge [magisterial district judge] violated this Code [these Conduct Rules] or engaged in other conduct that reflects adversely on the judge’s [magisterial district judge’s] honesty, impartiality, temperament, or fitness to serve as a judge [magisterial district judge].” New Code, Canon 1, Rule 1.2 cmt. [5].

In this same hypothetical, the preferential treatment of heterosexual couples versus homosexual couples is improper and gives the appearance of impropriety which, under the New Code, is a chargeable offense, even if the misconduct did not violate another part of the New Code. Such conduct undermines the public confidence of the judiciary in violation of Canon 1, Rule 1.2 and may subject the judge to sanction by the Court of Judicial Discipline.

An example of a similar set of facts occurred in Washington soon after the December 6, 2012 legalization of same sex marriage in that state. Judge Gary Tabor publicly announced that he would refuse to perform same-sex wedding ceremonies based on his religious beliefs, but continue to officiate at opposite-sex weddings. *In Re the Matter of: The Honorable Gary Tabor*, CJC No. 7251-F-158. When the Commission on Judicial Conduct of the State of Washington contacted Judge Tabor about his announcement, he ceased voluntarily the performance of all wedding ceremonies. Following investigation, the Commission determined that the judge’s conduct of refusing to perform same-sex weddings, while still solemnizing opposite-sex marriages, gave the appearance of impropriety and adversely reflected on the impartiality of the judiciary in violation of Canon 1, Rules 1.1 and 1.2 and Canon 3, Rule 3.1(C) of the Washington Code of Judicial Conduct. *Id.* Ultimately, the Commission admonished Judge Tabor for his misconduct. *Id.*

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<sup>2</sup> Old MDJ Rule No. 2A provides: “Magisterial district judges shall . . . conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

<sup>3</sup> The Note to Old MDJ Rule 2 states: “Magisterial district judges must avoid all impropriety and the appearance of impropriety. They must expect to be the subject of constant public scrutiny. They must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”

After *Whitewood*, the conduct of a Pennsylvania judge who declines to perform wedding ceremonies for same-sex couples, but continues to perform them for opposite-sex couples, may violate other Rules. When a judge chooses to conduct a wedding ceremony, s/he acts in an official judicial capacity, authorized by statute. 42 Pa.C.S.A. § 1503(a)(1). However, it is unclear if the unrequired but agreed to performance of the ceremony is a judicial duty or an extrajudicial activity. If it is viewed as a judicial duty, then Canon 2, Rule 2.3(B) of the New Code applies.

### **Rule 2.3 *Bias, Prejudice, and Harassment***

Rule 2.3 (B) provides:

A judge [magisterial district judge] shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status . . . .

Comment [2] states:

A judge [magisterial district judge] must avoid conduct that may reasonably be perceived as prejudiced or biased.

New Code, Canon 2, Rule 2.3(B) & cmt. [2].<sup>4</sup> Whereas, if the performance of a wedding ceremony is viewed as an extrajudicial activity, the judge who refuses to solemnize same-sex marriages but continues to do so for opposite-sex couples is still in violation of the New Code under Canon 3, Rule 3.1(C).

### **Rule 3.1(C) *Extrajudicial Activities in General***

Rule 3.1(C) provides:

Judges [magisterial district judges] shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all the provisions of this Canon. However, a judge [magisterial district judge] shall not:

(C) Participate in activities that would reasonably appear to undermine the judge's [magisterial district judge's] independence, integrity, or impartiality.

Comment [3] states:

Discriminatory actions and expressions of bias or prejudice by a judge [magisterial district judge], even outside of the judge's [magisterial district judge's] official or judicial actions, are likely to appear to a reasonable person to call into question the judge's [magisterial district judge's] integrity and impartiality.

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<sup>4</sup> Old MDJ Rule No. 8A(1) refers to bias or prejudice as a basis for disqualification.

New Code, Canon 3, Rule 3.1(C) & cmt. [3].<sup>5</sup>

Both Rules prohibit discriminatory conduct by a judge. A reasonable person is likely to perceive that a judge who agrees to perform wedding ceremonies for one particular class of people, heterosexual individuals, and refuses to do the same for another class of people, gay and lesbian individuals, may be acting out of prejudice or bias based on sexual orientation.

The Washington Commission on Judicial Conduct considered the act of solemnizing a marriage to be an extrajudicial activity. *In Re the Matter of: The Honorable Gary Tabor*, CJC No. 7251-F-158. Pennsylvania has yet to determine if the act of performing a wedding ceremony is a judicial duty or an extrajudicial activity. Regardless of the classification of the act of solemnizing a marriage, a judge may not act in a discriminatory, biased and prejudiced manner toward a same-sex couple regarding the solemnization of a wedding ceremony. If substantiated, such conduct would be a violation of either Canon 2, Rule 2.3(B) or Canon 3, Rule 3.1(C) and subject the judge to the disciplinary process before the Judicial Conduct Board and the Court of Judicial Discipline.

The second issue concerns whether a judge, who stopped performing all wedding ceremonies after the legalization of same-sex marriage, is permitted to officiate at the post-*Whitewood* weddings of friends who scheduled their weddings prior to the change in law. Neither the scheduling of the wedding nor the relationship between the judge and his or her friends alter the duty of the judge to be impartial in the performance of all wedding ceremonies. For example, on May 19, 2014, a judge's friend and her fiancé, an opposite-sex couple, ask the judge to perform their wedding ceremony on November 1, 2014. The judge agrees to officiate and marks the commitment on the court calendar. On May 20, 2014, Judge Jones issued his opinion in *Whitewood* and legalized same-sex marriage. Subsequently, the judge in this hypothetical announces that s/he is not comfortable performing same-sex marriages and, in an effort to avoid misconduct, stops performing all wedding ceremonies.

If that same judge makes an exception for his friend and her fiancé and presides over their November 1, 2014 wedding, the judge's solemnization of that opposite-sex marriage may trigger a complaint that the judge failed to act impartially and that his conduct was improper and gave the appearance of impropriety in violation of Canon 1, Rules 1.2 and Canon 2, Rule 2.3 as set forth above. Importantly, it is not the timing of the request for and scheduling of the wedding, but the actual performance of the ceremony in relation to the *Whitewood* decision that matters. After *Whitewood*, a judge, who demonstrates preferential treatment to an opposite-sex couple, and denies equal treatment to a same-sex couple, runs the risk of violating the Canons and Rules. Such conduct could result in a complaint before the Judicial Conduct Board and, if proven by clear and convincing evidence, possible sanction by the Court of Judicial Discipline.

The third issue is whether, after *Whitewood*, a judge's decision to stop performing all wedding ceremonies provides the basis for disqualification or recusal

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<sup>5</sup> Although Canon 3 of the Old Code encompassed extrajudicial activities, the Old MDJ Rules did not specifically address this issue.

of the judge from deciding the legal matters of a gay or lesbian litigant who appears before the judge. The Rules that govern this issue are Canon 2, Rules 2.7 and 2.11.

### **Rule 2.7 Responsibility to Decide**

Rule 2.7 states:

A judge [magisterial district judge] shall hear and decide matters assigned to the judge [magisterial district judge], except where the judge [magisterial district judge] has recused himself or herself or when disqualification is required by Rule 2.11 or other law.

### **Rule 2.11 Disqualification**

Rule 2.11 (A)(1) provides:

(A) A judge [magisterial district judge] shall disqualify himself or herself in any proceeding in which the judge's [magisterial district judge's] impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge [magisterial district judge] has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

New Code, Canon 2, Rules 2.7<sup>6</sup> & 2.11(A)(1).<sup>7</sup> A gay or lesbian litigant may suspect that a judge is acting out of bias and prejudice against homosexuals, based on their sexual orientation, if s/he is aware that the judge previously performed wedding ceremonies for heterosexual couples but stopped officiating at all wedding ceremonies after *Whitewood*. This suspicion may cause that same litigant to question the ability of the judge to decide impartially the litigant's substantive case because of perceived bias or prejudice against gays and lesbians generally. As a result, the gay or lesbian litigant or his or her counsel may decide to make a motion for the judge's recusal or for a change in venue.

In the alternative, if a judge, who announced publicly that s/he will not perform wedding ceremonies for same-sex couples, knows for a fact that a litigant is gay or lesbian, then the judge should disclose from the bench his or her decision not to officiate at all weddings. Comment [3] to Rule 2.7 provides:

A judge [magisterial district judge] should disclose information that the judge [magisterial district judge] believes the parties or their

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<sup>6</sup> Old MDJ Rule No. 9A provides: "Magisterial district judges disqualified by Rule 8A(3) or (4) may, instead of withdrawing from the proceeding, disclose the basis for disqualification."

<sup>7</sup> Old MDJ Rule No. 8A(1) states: "Magisterial district judges shall disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where: (1) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge [magisterial district judge] believes there is no proper basis for disqualification or recusal.

New Code, Canon 2, Rule 2.7 cmt. [3]. For instance, when a judge knows that the landlord appearing before him in a landlord and tenant matter is gay or lesbian, and the judge publicly declared his views about solemnizing weddings, the judge has an affirmative duty to disclose his change in position about performing wedding ceremonies because it may be perceived as relevant to the judge's ability to rule impartially on those cases. The burden then shifts to the gay or lesbian litigant, or his or her counsel, to seek clarification about the judge's ability to adjudicate the case without bias or prejudice.

The judge should then explain to the gay or lesbian party and his or her attorney that the judge's discomfort about solemnizing same-sex marriages arises solely from religious beliefs, not out of animus based on sexual orientation. If the judge believes that s/he can decide the landlord and tenant matter impartially, free of personal bias and prejudice, then the judge should make a statement to that effect.<sup>8</sup> Still, the litigant may proceed to make a motion for disqualification or recusal. At that point, the judge must decide whether the requested disqualification or recusal is necessary.

Finally, whenever a judge violates a Rule within the New Code, the judge necessarily violates Canon 1, Rule 1.1.

### **Rule 1.1 *Compliance with the Law***

A judge [magisterial district judge] shall comply with the law, including the Code of Judicial Conduct [Rules Governing Standards of Conduct of Magisterial District Judges].

New Code, Canon 1, Rule 1.1.<sup>9</sup> Therefore, if the Court of Judicial Discipline determines that a judge violated any of the Rules, the Court may also find, as an

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<sup>8</sup> In those instances where a court reporter is transcribing the proceedings, the judge should make a disclosure statement on the record. Neither PA district courts nor appellate courts are courts of record. Therefore, the disclosure statement should be memorialized in a writing.

<sup>9</sup> Old MDJ Rule No. 2A provides: "Magisterial district judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Since the October 30, 2013 Pennsylvania Supreme Court decision in *Carney*, a justice, judge or magisterial district judge whose conduct fails to comply with the law is subject to discipline, whether or not such conduct implicates the judicial decision making process. *In re Carney* 79 A3d. 490 (Pa. 2013). See Robert A. Graci & Elizabeth A. Flaherty, *Judges Must "Respect and Comply with the Law"*, Judicial Conduct Board of Pennsylvania Newsletter No. 1 (Winter 2014).

automatic derivative, that the judge violated Rule 1.1 by failing to comply with the New Code of Judicial Conduct or the New MDJ Rules.

In sum, same-sex marriage and the recognition of prior same-sex marriages is now the law in Pennsylvania. As a result, justices, judges and MDJs must carefully weigh their individual decisions about whether or not to perform wedding ceremonies for opposite-sex and same-sex couples. To steer clear of claims of judicial misconduct involving impartiality, bias and prejudice, a judge may decide to stop officiating at all weddings. Even if a judge decides not to perform any weddings, the judge's change in conduct may be interpreted by some individuals as an indication of bias and prejudice against homosexuals as a class. Furthermore, following a judge's decision to stop presiding at weddings, disqualification and recusal problems may arise in substantive cases involving gay and lesbian parties who appear before the judge. The New Code, the Old MDJ Rules and the New MDJ Rules, specifically provide for each of these issues and serve as a guide to judges who must now consider the importance of impartiality in the solemnization of marriages.

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