

**Wyoming Supreme Court Judicial Ethics Advisory Committee**  
**W.S.C.J.E.A.C. Advisory Opinion 2010-01**

**QUESTION PRESENTED:**

During the retention election of 2006, the requesting judge was faced with what can be reasonably categorized as “active opposition.” Said opposition took many forms, some in the public media, some by public circulation, and others by way of malicious rumor and innuendo. The requesting judge was retained despite the efforts of the “active opposition.” However, the rumors and innuendos persist.

The requesting judge understands the ethical constraints from political activity of the *Wyoming Code of Judicial Conduct, Rule 4.2(B)*, unless there is “active opposition” to the judge’s retention. The judge believes that there will be active opposition again in the retention election of 2010.

The requesting judge would like a determination as to whether rumors and innuendos, combined with active opposition in a *previous* judicial retention election, can constitute “active opposition” in the current retention election such that the judge may campaign against said opposition.

**APPLICABLE CANON OF THE WYOMING CODE OF JUDICIAL CONDUCT:**

The Wyoming Code of Judicial Conduct Rule 4.2(B) provides in part:

A judge who is a candidate for retention in office shall abstain from any campaign activity in connection with the judge’s own candidacy unless there is active opposition to his or her retention in office.

*Id.*

**DISCUSSION:**

In responding to this request for advisory opinion, the Committee believes it important to address the following issues:

1. What is “active opposition”?
2. If there is a reasonable belief that there will be “active opposition” to a judge’s retention, are there political activities in which a judge may engage, in anticipation of “active opposition”?
3. Is there presently “active opposition” against the retention of the requesting judge?

The Code of Judicial Conduct does not define “active opposition.” However, in its Comment to Rule 4.2, the Code states that the term is to be broadly construed and to include any form of public opposition. This Committee realizes that “active opposition” is a subjective matter and may vary from county to county within the state. With this in mind, the Committee has adopted the definition of “active opposition” given by the Colorado Judicial Ethics Advisory Board as follows:

For opposition to be active within the meaning of the Canon, it must be the result of an orchestrated, organized campaign or, if it consists of statements of one or a few persons in opposition of the judge’s retention, such statements must be communicated to the public through public media or through private publication that reaches a large segment of the public.

The Committee understands and appreciates that a strict application of Rule 4.2(B) may place a judge standing for retention in an extremely awkward position if the judge must have actual proof of an “active opposition” before being allowed to act within the Canons. Therefore, the Committee believes that a judge may prepare under Rule 4.2(B) if the judge has information and reasonably determines that “active opposition” is imminent during the retention election.

In the event that a judge reasonably determines that “active opposition” is imminent, then the Committee believes the following activities to be reasonable:

1. The formation of a nonpartisan citizen’s committee or committees advocating the judge’s retention in office by others, either on their own initiative or at the request of the judge as referenced in Rule 4.2(B)(3).
2. The nonpartisan citizen’s committee may raise funds for the judge’s retention election campaign, but the judge shall not solicit funds personally or accept any funds as referenced in Rule 4.2 (B) (4).
3. The nonpartisan citizen’s committee shall not spend any of said funds raised until there is “active opposition” as defined in this opinion.

Wyoming’s system of retention strongly disfavors political activity by a judge. It should be noted that it is difficult to maintain judicial independence, integrity, and impartiality when a judge becomes involved in political activity. Therefore, the Committee cautions the judge that just because the judge is permitted to campaign for retention under these circumstances does not mean that the judge should campaign for retention.

Lastly, the Committee is asked whether, in its opinion, there is presently “active opposition” against the judge’s retention given the persisting rumors and innuendos from the last retention election. In answering this query the Committee is not answering the

question as to whether there is a reasonable likelihood that active opposition will be lodged against the judge.

Under the definition of “active opposition” that has been adopted by the Committee, there must be an organized campaign and/or a public broadcasting to rise to the level of active opposition. The question of active opposition must be determined on a case-by-case basis. The Committee has reviewed all of the documents submitted to determine if it is of the opinion there exists a current active opposition. The Committee believes that before an opposition can be active it must occur during the period of the judge’s current candidacy for retention. The Committee believes that period to be from the date of the judge’s filing of his or her declaration to stand for retention to the date of the election. In the case at hand, the rumors and innuendos are largely reminiscent of the last retention election. The Committee, in applying the logic and definition of “active opposition,” has determined that, as to the current retention election, with only evidence of unsubstantiated rumors and innuendos and nothing more, there is no “active opposition” at this time.

**FINALIZED AND EFFECTIVE** this 26th day of August, 2010 by the Wyoming Supreme Court Judicial Ethics Advisory Committee.