

AJS Comments on Final Draft Report

Submitted to the ABA Joint Commission to
Evaluate the Model Code of Judicial Conduct
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CANON 5

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY.

RULE 5.01: POLITICAL AND CAMPAIGN ACTIVITIES OF JUDGES AND CANDIDATES FOR JUDICIAL OFFICE*

(A) Except as permitted by Rule 5.02 (Permitted Political and Campaign Activities of Candidates for Judicial Office in Partisan Public Elections*), Rule 5.03 (Permitted Political and Campaign Activities of Candidates for Judicial Office in Non-Partisan Public Elections), Rule 5.04 (Permitted Political and Campaign Activities of Candidates for Judicial Office in Retention Elections), and Rule 5.05 (Permitted Activities of Candidates for Appointive Judicial Office), a judge or a candidate for judicial office:

- (1) shall not act as a leader in, or hold an office in, a political organization*;
- (2) shall not make speeches on behalf of a political organization;
- (3) shall not publicly endorse or oppose a candidate for any public office;
- (4) shall not solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;
- (5) shall not attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
- (6) shall not publicly identify himself or herself as a candidate of a political organization;
- (7) shall not seek or use endorsements from a political organization;
- (8) shall not personally solicit or personally accept campaign contributions;
- (9) shall not use or permit the use of campaign contributions for the private benefit of the candidate or others;
- (10) shall not use court staff, facilities, or other court resources in a campaign for judicial office;
- (11) shall not knowingly, or with reckless disregard for the truth, make any false or misleading statement;
- (12) shall not make any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; and
- (13) shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the faithful and impartial* performance of the adjudicative duties of the office.

[AJS supports a prohibition on campaign promises regarding issues and controversies as well as cases. A prohibition limited only to promising certain results in particular cases would be a completely ineffective measure for promoting judicial impartiality, independence, and integrity. Such a narrow restriction would allow a candidate to promise, for example, to declare unconstitutional any tort reform legislation passed by the legislature, casting serious doubts on the candidate's impartiality and open-mindedness even though the candidate could not identify the particular case that would raise the issue or even the particular future statute that might be challenged. Similarly, a candidate could promise to deny all motions to exclude evidence on 4th amendment grounds in criminal cases because that does not pledge a certain result in a case (the prosecution could still fail to win a guilty verdict) or identify a particular case, but criminal defendants would reasonably believe that the candidate would be biased against them as a judge and the public could reasonably believe that the candidate was not interested in affording defendants a fair trial.]

(14) shall not manifest bias or prejudice based upon a person's race, gender, religion, national origin, ethnicity, disability, age, marital status, parenthood, language, sexual orientation, or socioeconomic status.

(B) A candidate for judicial office:

- (1) shall take reasonable measures to ensure that other persons do not do on behalf of the candidate what the candidate is prohibited from doing by this Code, whether or not the other person is under the direction and control of the candidate;
- (2) shall maintain the dignity appropriate to judicial office, and act at all times in a manner consistent with the independence,* integrity,* and impartiality of the judiciary;
- (3) shall comply with all applicable election, election campaign, and election campaign fundraising laws* and regulations of [jurisdiction name]; and
- (4) shall review and approve the content of all campaign statements made and materials produced by the candidate or his or her campaign committee prior to their dissemination.

(C) A judge or candidate for judicial office:

- ~~(1) may publicly state or announce his or her views on legal, political, or other issues; and~~
- ~~(2) may engage in political activity in support of measures that concern the law, the legal system, or the administration of justice.~~

COMMENT

GENERAL CONSIDERATIONS

[1] The state has a compelling interest in maintaining the independence, integrity, and impartiality of the judiciary, thus enhancing public confidence in the justice system. In furtherance of this interest, judges and candidates for judicial office must be kept free, and must appear to be free, from ~~undue~~ political influence and ~~inappropriate~~ political pressure. Paragraphs (A) and (B) impose certain narrowly tailored restrictions on the political and campaign activities of all sitting judges and all candidates for judicial office,

taking into account both the various methods of selecting judges and constitutional provisions governing free speech and expressive association.

[There are no justified political influences or appropriate political pressures in judicial decision-making.]

[2] A successful candidate for judicial office may be subject to discipline under this Code for violation of any of the Rules set forth in Canon 5, even if the candidate was not a judge during the period of candidacy. An unsuccessful candidate who was a lawyer may be subject to discipline instead under Rule [] of the [] Rules of Professional Conduct. When a non-judge becomes a candidate for judicial office Rule 5.01 immediately becomes applicable to his or her conduct.

[3] Many of the restrictions imposed by paragraphs (A) and (B) apply only with respect to political organizations, as defined in the Terminology Section. Engagement with other organizations might be improper under a different Rule, however. For example, if an organization frequently litigates in the courts, or has matters pending or impending in the court on which the judge sits, or in the court that a candidate is seeking to join, other Rules may be applicable. See, for example, Rule 2.11 (Judicial Statements on Pending and Future Cases), Rule 2.12 (Disqualification), and Rule 4.04 (Participation in Civic or Charitable Activities).

PARTICIPATION IN POLITICAL, FUNDRAISING, AND CAMPAIGN ACTIVITIES OF POLITICAL ORGANIZATIONS AND CANDIDATES

[4] Public confidence in the independence and impartiality of the judiciary is eroded if judges or candidates for judicial office are perceived to be subject to political influence. Accordingly, although sitting judges and candidates for judicial office may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming a leadership role in a political organization.

[5] Paragraphs (A)(2) and (A)(3) prohibit judges and candidates for judicial office from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, in order to prevent them from misusing the prestige of judicial office to advance the interests of others; see Rule 3.01. These Rules do not prohibit candidates from campaigning on their own behalf, however, or from endorsing or opposing candidates for a position on the same court for which they are running. See Rules 5.02(E) and (F), Rules 5.03(C) and (D), and Rules 5.04(C) and (D).

[6] Members of the families of judges or candidates for judicial office are free to engage in political activity of their own, including running for public office. The prohibition in paragraph (A)(3) against publicly endorsing candidates for public office, however, does not include an exception for family members. Accordingly, a judge or candidate for judicial office must not become involved in or publicly associated with a family member's political activity or campaign for public office. To avoid public misunderstanding, moreover, a judge or candidate for judicial office must take, and must

require the family member to take, reasonable steps to avoid any implication that the judge endorses the family member's candidacy or other political activity.

[7] Paragraph (A)(3) does not prohibit judges or candidates for judicial office from privately expressing their views on candidates for any public office.

[8] Sitting judges and candidates for judicial office retain the right to participate in the political process as voters ~~, in both primary and general elections. Participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and therefore is not prohibited by Rules 5.01(b) or 5.01(c).~~ A judge may participate in a primary election even if the primary is limited to members of a particular party but may not participate in a party caucus.

[9] Political organizations and candidates running for public office often use ticketed events as a method of fundraising. In general, judges and candidates for judicial office may neither attend dinners and other public events sponsored by political organizations nor candidates running for public office, or purchase tickets to such events; see paragraph (A)(5). Candidates for judicial office who are running in partisan public elections, however, may attend and may purchase tickets for their personal use or that of a spouse, domestic partner, or other guest, so long as the cost of the tickets does not include a significant fundraising aspect; see Rule 5.02(C).

STATEMENTS AND COMMENTS MADE DURING A CAMPAIGN FOR JUDICIAL OFFICE

[10] In order to enhance public confidence in the integrity of the judiciary, candidates for judicial office must be scrupulously fair and accurate in all statements made by the candidate and his or her campaign committee. A candidate, or a campaign committee on behalf of a candidate, must not make statements that are false or misleading, or that omit a fact necessary to make the communication considered as a whole not materially misleading.

[11] Candidates for judicial office are sometimes the subject of false, misleading, or unfair allegations made by an opposing candidate, a third party, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. So long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), he or she may make a measured and dignified public response.

[12] Although candidates for judicial office are permitted to respond directly to false, misleading, or unfair allegations made against them during a campaign, it is often preferable for someone else to make the response if the allegations relate to a pending case.

[13] All candidates for judicial office, including candidates who are currently sitting judges, are prohibited from making comments that might affect the outcome or impair the fairness of pending or impending proceedings. This prohibition does not extend, however, to situations in which comments are appropriately designed to affect the outcome of a proceeding, such as argument to the court or summation to the jury by a lawyer representing a client, or instructions or rulings from the bench by a judge.

PLEDGES, PROMISES, OR COMMITMENTS INCONSISTENT WITH IMPARTIAL PERFORMANCE OF THE ADJUDICATIVE DUTIES OF JUDICIAL OFFICE

[14] The state has a compelling interest in assuring the impartiality of its judges. Because a judge must keep an open mind with respect to issues that may come before him or her, it would be incompatible with the judicial function for a judge to make pledges, promises, or commitments to rule so as to reach a predetermined result in a specific case or class of cases. Similarly, it would be unacceptable for a judge to make a pledge, promise, or commitment to treat specific litigants or classes of litigants more or less favorably than the facts or law applicable to their cases require. See Rule 2.11(B).

[15] The judicial role is different from the role of legislators and executive branch officials, even where the judges are subject to public election. Accordingly, campaigns for judicial office must be conducted differently from campaigns for other offices. Citizens have a due process right to judges who will make decisions based on the evidence, the law, and the arguments of the parties, regardless of the personal views of the judge. Thus, because it would be no less destructive of the judicial system for a candidate to gain judicial office on the basis of improper pledges, promises, or commitments than it would be for a sitting judge to engage in the same impropriety, paragraph (A)(13) extends the prohibition of Rule 2.11(C) to all candidates for judicial office.

[16] The necessary restrictions on the political and campaign activities of candidates for judicial office set forth in paragraphs (A) and (B), including restrictions on campaign speech, do not preclude candidates from conducting meaningful campaigns that provide voters with sufficient information to permit them to distinguish between candidates and to make informed electoral choices. Indeed, because paragraph (A)(13) restricts candidates for judicial office only with respect to pledges, promises, and commitments regarding the adjudicative duties of the office, it would not be inappropriate for a candidate to make specific campaign promises with respect to judicial organization, administration, and court management, such as disposing of a backlog of cases, starting court sessions on time, or avoiding favoritism in appointments and hiring. Candidates may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or lobbying for more funds to improve the physical plant and amenities of the courthouse.

[17] Although some restrictions on the campaign speech of candidates for judicial office are indispensable to advancing the state's compelling interest in the independence,

integrity, and impartiality of the judiciary, the prohibition against making improper pledges, promises, or commitments set out in paragraph (A)(13) does not extend to the announcement or statement by candidates of their personal views on legal, political, or other issues. See paragraph (C)(1). Such statements should always make clear, however, a judicial officer's obligation to apply and uphold the law, without regard to his or her personal views.

[18] Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations, seeking to learn their views on disputed or controversial legal or political issues. Paragraph (A)(13) does not prohibit candidates from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a candidate's responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, and carrying out adjudicative duties faithfully and impartially.

INDIRECT PARTICIPATION IN POLITICAL AND CAMPAIGN ACTIVITY

[19] A candidate for judicial office, including a sitting judge, must take reasonable steps to ensure, to the extent practicable, that members of the candidate's family adhere to the same standards of political and campaign conduct [in support of the candidate](#) as apply to the candidate. Candidates must also require court personnel and other employees under their direction and control to refrain from doing on the candidate's behalf what the candidate is prohibited by this Code from doing.

[20] This Code applies only to judges and candidates for judicial office. Accordingly, nothing in this Code should be construed to limit the political or campaign activities of anyone else, so long as those activities are conducted separately, and without explicit or implied encouragement by the judge or candidate for judicial office.

RULE 5.02: PERMITTED POLITICAL AND CAMPAIGN ACTIVITIES OF CANDIDATES FOR JUDICIAL OFFICE* IN PARTISAN PUBLIC ELECTIONS*

Notwithstanding any restrictions set forth in Rule 5.01, candidates for judicial office in a partisan public election:

(A) may identify themselves as candidates of a political organization;*

(B) may seek or use endorsements from any individual or organization, including a political organization;

(C) may attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office, so long as the tickets are for their personal use or a spouse,* domestic partner,* or other guest, and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received;

(D) may establish a campaign committee pursuant to the provisions of Rule 5.06;

(E) may communicate with the public by speaking on their own behalf, through any medium, including, but not limited to, advertisements, websites, or other campaign literature; and

(F) may publicly endorse or oppose other candidates for a position on the same court for which they are running.

COMMENT

[1] In partisan public elections for judicial office, candidates may be nominated by, affiliated with, or otherwise publicly identified or associated with a particular political organization, including a political party. Typically, this association is maintained throughout the period of the public campaign, and includes use of political party or similar designations on campaign literature and on the ballot.

[2] Rule 5.02 permits partisan public election candidates, including sitting judges who have become candidates, to engage in some political and campaign activities that would otherwise be prohibited by Rule 5.01, such as seeking or using political party endorsements. At the same time, candidates remain subject to many other provisions of Rule 5.01. For example, candidates in partisan public elections are still prohibited from knowingly making false or misleading statements during a campaign, or making improper promises, pledges, or commitments with respect to their adjudicative duties, but may still state or announce their personal views on public issues. Compare Rules 5.01(A)(11) and (13) with Rule 5.01(C)(1).

[3] Judges and candidates participating in partisan public elections for judicial office are permitted to attend dinners and other events sponsored by political organizations, and are also permitted to purchase tickets for their personal use and that of a spouse, domestic partner, or other guest. In order to avoid assisting in the organization's fundraising effort, however, judges and candidates for judicial office must not purchase more tickets than they will personally use, and must ascertain that the price they pay for tickets does not include an amount that is significantly higher than is needed to defray the costs of the event.

[4] For purposes of paragraph (F), candidates are considered to be running for a position on the same court if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election. In endorsing or opposing another candidate for a position on the same court, a judge or candidate must abide by the same rules governing campaign conduct and speech as apply to his or her own campaign.

RULE 5.03: PERMITTED POLITICAL AND CAMPAIGN ACTIVITIES OF CANDIDATES FOR JUDICIAL OFFICE* IN NON-PARTISAN PUBLIC ELECTIONS*

Notwithstanding any restrictions set forth in Rule 5.01, candidates for judicial office in a non-partisan public election:

(A) may seek or use endorsements from any individual or organization, other than a political organization;*

(B) may establish a campaign committee pursuant to the provisions of Rule 5.06;

(C) may communicate with the public by speaking on their own behalf, through any medium, including, but not limited to, advertisements, websites, or other campaign literature; and

(D) may publicly endorse or oppose other candidates for a position on the same court for which they are running.

COMMENT

[1] In non-partisan public elections for judicial office, candidates may not seek or accept nominations or endorsements by a particular political organization. Most of the restrictions on political and campaign activities set forth in Rules 5.01(A) and (B) continue to apply to candidates for judicial office running in non-partisan elections. Regarding the distinction between making improper promises, pledges, or commitments with respect to adjudicative duties, however, and properly announcing personal views on public issues, see Rule 5.02, Comment [2].

[2] Paragraph (A) prohibits a non-partisan candidate for judicial office from filling out a questionnaire if he or she knows, or has reason to know, that the purpose of the questionnaire is for a political organization to decide whom to endorse in a non-partisan judicial election.

[3] Although candidates in non-partisan public elections for judicial office are prohibited from running on a ticket or slate associated with a political organization, individual candidates may group themselves into slates or other alliances in order to conduct their campaigns more effectively. For purposes of paragraph (D), candidates who have grouped themselves together in this fashion are considered to be running for a position on the same court if they are competing for a single judgeship, or if several judgeships on the same court are to be filled as a result of the election.

RULE 5.04: PERMITTED POLITICAL AND CAMPAIGN ACTIVITIES OF CANDIDATES FOR JUDICIAL OFFICE* IN RETENTION ELECTIONS

Notwithstanding any restrictions set forth in Rule 5.01, candidates for judicial office in a retention election:

(A) may seek or use endorsements from any individual or organization, other than a political organization;*

(B) may establish a campaign committee pursuant to the provisions of Rule 5.06;

(C) may communicate with the public by speaking on their own behalf, through any medium, including, but not limited to, advertisements, websites, or other campaign literature; and

(D) may publicly endorse or oppose other candidates for a position on the same court for which they are running.

COMMENT

[1] Candidates for judicial office who are subject to retention election are sometimes publicly supported or opposed by individuals or organizations, including political organizations. Retention election candidates are not permitted to seek endorsements from political organizations, however, or to use such endorsements to further their campaigns. The Rules governing retention elections are therefore essentially the same as those governing non-partisan public elections. Compare Rule 5.03 and accompanying Comments.

[2] Candidates running in retention elections are by definition sitting as judges during the period of their candidacies. Moreover, opposition to a candidate for retention sometimes focuses on particular decisions that the candidate has made as a judge, or even on cases that are pending before the judge during the campaign period. In the course of their campaigns, therefore, retention election candidates must be especially mindful of their obligations not to make comments that might affect the outcome or impair the fairness of a proceeding and not to make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rules 5.01(A)(12) and (13).

RULE 5.05: PERMITTED ACTIVITIES OF CANDIDATES FOR APPOINTIVE JUDICIAL OFFICE*

Notwithstanding any restrictions set forth in Rule 5.01, candidates for appointment to judicial office:

(A) may communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and

(B) may seek or use endorsements for the appointment from any individual or organization.

COMMENT

[1] Candidates for appointive judicial office have no need to raise or spend campaign funds. Accordingly, they are not only prohibited from personally soliciting or personally accepting campaign contributions, see Rule 5.01(A)(8), but are also prohibited from establishing campaign committees for this purpose.

[2] When seeking support or endorsement from others, or when communicating directly with an appointing or confirming authority, candidates for appointive judicial office must not make any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rule 5.01(A)(13) and Comments [14] through [18].

RULE 5.06: CAMPAIGN COMMITTEES

(A) Candidates for judicial office* subject to public elections* may establish campaign committees to manage and conduct campaigns for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with these provisions and with other applicable law.*

(B) Candidates for judicial office subject to public elections shall direct their campaign committees to solicit and accept only such campaign contributions* as are reasonable, in any event not to exceed, in the aggregate,* \$[] from any individual or \$[] from any entity or organization.

(C) Candidates for judicial office subject to public elections shall direct their campaign committees not to solicit or accept contributions for a candidate's current campaign more than one year prior to a scheduled election, nor more than 180 days after the last election in which the candidate participated.

(D) Candidates for judicial office subject to public elections shall direct their campaign committees to comply with all applicable statutory requirements for disclosure of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding \$[]. The report must be filed within [] days following an election, or within such other period as is provided by law.

(E) Candidates for judicial office subject to public election shall divest themselves of, and shall direct their campaign committees to divest themselves of, unused campaign funds no later than 180 days after any election in which the candidate participated, in a manner that is not inconsistent with applicable law.

COMMENT

[1] Candidates for judicial office are prohibited from personally soliciting or personally accepting campaign contributions; see Rule 5.01(A)(8). Nonetheless, this Rule accommodates the fact that in many jurisdictions candidates for judicial office must raise campaign funds to support their candidacies, and therefore permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions.

[2] Campaign committees established by candidates for judicial office not only solicit and accept campaign contributions, but manage the expenditure of campaign funds and generally conduct the campaign. Candidates, however, are ultimately responsible for the actions of their campaign committees, including compliance with this Code and with the requirements of election law and other applicable law.

[3] At the start of a campaign, candidates must instruct their campaign committees to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, candidates should instruct their campaign committees to be especially cautious with respect to such contributions, lest they create grounds for disqualification. See also Rule 2.12.

RULE 5.07: ACTIVITIES OF JUDGES WHO BECOME CANDIDATES FOR NON-JUDICIAL OFFICE

(A) Upon becoming a candidate for a non-judicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.

(B) Upon becoming a candidate for a non-judicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

COMMENT

[1] In most, if not all, campaigns for non-judicial elective public office, candidates make pledges, promises, or commitments as to positions they would take and ways they would act if elected to office. Although appropriate in non-judicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the

political promises that the judge would be compelled to make in the course of campaigning for non-judicial elective office, together dictate that a judge who wishes to run for such an office must step down from the bench upon becoming a candidate. This “resign to run” rule ensures that a judge cannot use or appear to use the judicial office to promote his or her candidacy for non-judicial office, and prevents post-campaign retaliation in the event that the judge is defeated in the election.

[2] A judge who becomes a candidate for a non-judicial appointive, as opposed to elective, office is not required to resign from judicial office in order to be considered for the appointment. Where no public election campaign will be conducted the dangers necessitating the “resign to run” rule are not present.