

**American Judicature Society Comments on June 2005
Preliminary Report on Canon 5 of the
ABA Model Code of Judicial Conduct**

Submitted to the ABA Joint Commission to
Evaluate the Model Code of Judicial Conduct
July 2005

Below are AJS's suggested changes and additions to the Canon 5 proposed in the Joint Commission's preliminary report. AJS's explanations for its suggestions are interspersed with the provisions (in blue, bracketed, and italicized). AJS has two general comments:

- The Joint Commission's decision to include only "shall not" and "may" provisions in the canon misses the opportunity to impose "shall" requirements on judicial candidates that will increase the integrity of judicial election campaigns.
- AJS believes that each jurisdiction should adopt commentary as suggested by the Joint Commission. However, commentary is most helpful and accessible if it is succinct and does not simply restate what is already in the rule. Therefore, AJS suggests the deletion of repetitive commentary as noted below. Moreover, as the Preamble to the 1990 model code states, Commentary should "by explanation and example, provide[] guidance with respect to the purpose and meaning of the Canons and Sections" and not state additional rules. Therefore, some of the commentary announcing significant, specific standards should be moved to the text of the rule. Finally, some of the commentary intended to explain the rationale for rules is not convincing or does not rely on existing caselaw.

CANON 5

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

RULE 5.01: RESTRICTIONS ON POLITICAL ACTIVITIES OF JUDGES AND CANDIDATES FOR JUDICIAL OFFICE

A JUDGE or a CANDIDATE for judicial office may engage in political activity on behalf of measures to improve the legal system or the administration of justice.

[This is an important provision that should not be eliminated from the model code.]

Except as permitted by Rule 5.02 (partisan public elections), Rule 5.03 (non-partisan public elections), Rule 5.04 (retention elections), and Rule 5.05 (appointment to judicial office), a judge or a candidate for judicial office **shall not, directly or indirectly:**

[Explaining the responsibility to prohibit or require others from certain conduct on behalf of the judge or candidate (see AJS's proposed Rule 5.01(n), (o), and (p) is a clearer explanation of the restriction than a reference to "directly or indirectly."]

- (a) **shall not** act as a leader or hold an office in a political organization;
- (b) **shall not** make speeches on behalf of a political organization;
- (c) **shall not** publicly endorse or oppose a candidate for any public office;
- (d) **shall not** solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
- (e) **shall not attend events sponsored by a political organization purchase tickets for dinners or other events sponsored by a POLITICAL organization or a CANDIDATE for public office, unless the tickets are for the JUDGE or CANDIDATE'S personal use and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received by the JUDGE or CANDIDATE at the dinner or other event;**

[AJS assumes that the reason the Joint Commission is proposing to allow all judges to attend all political functions at any time is that the restriction in the 1990 model code puts incumbent judges at a disadvantage as potential opponents can attend political gatherings right up until the day they announce their candidacy. That justification, however, does not apply to judges who are appointed or subject to retention elections and, therefore, have no opponents. The restriction should remain with exceptions created for judges who have to be elected in the sections applicable only to them.]

(f) **shall not** publicly identify **himself or herself oneself** as a **member or** candidate of a POLITICAL ORGANIZATION;

[If a judge or candidate can identify himself or herself as a member of a political organization, prohibiting the judge or candidate from identifying himself or herself as a candidate of a political organization is a meaningless restriction.]

(g) **shall not be involved in a family member's political activity and shall require family members to take reasonable steps to avoid any suggestions that the judge endorses the family member's political activity.**

(g) **shall not** seek or use endorsements from a political organization;

(h) **shall not** personally solicit or personally accept campaign contributions **or serve as his or her campaign treasurer;**

(i) **shall not** use or permit the use of campaign contributions for the private benefit of the candidate or others;

(j) **shall not** KNOWINGLY **or with reckless disregard for the truth** make any false or misleading statement **regarding any CANDIDATE for judicial office;**

[Courts have held that states may prohibit reckless as well as knowing misrepresentations during a campaign without violating the First Amendment. See In re Chmura, 608 N.W.2d 31 (Michigan 2000); Weaver v. Bonner, 309 F.3d 1312 (11th Circuit 2002).]

Any false statement a judicial candidate makes during a campaign undermines the integrity of the judiciary, not just those related to any candidate for judicial office. For example, if a candidate claimed that the district attorney agreed to more lenient plea bargains than any other district attorney in the states, and that if elected, the candidate would end this lax practice, that would not be a false statement about a candidate for judicial office, but, if false, should be a violation of Rule 5.01.]

(k) **shall not** make any comment that might reasonably be expected to affect the outcome or impair the fairness of a proceeding while it is pending or impending in any court;

(l) **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; or

(m) **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.

[Promises that are inconsistent with the faithful and impartial performance of the administrative duties of the office should also be prohibited.]

(n) **shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing (except that the candidate's campaign**

committee may solicit and accept campaign contributions as allowed by Rule 5.06).

(o) shall review the content of all campaign statements and materials prior to dissemination by his or her campaign committee;

(p) shall prohibit members of the candidate's family and, if an incumbent judge, court personnel from engaging in conduct on the candidate's behalf that the candidate is prohibited from doing under the Rules of this Canon.

[AJS suggests that the code include a definition of "prohibit" that is similar to the 1990 model code's definition of "require". Suggested language: "Prohibit." The rules requiring that a judge "prohibit" certain conduct by others are, like all of the rules in this Code, rules of reason. The use of the term "prohibit" in that context means a judge shall instruct those persons subject to the judge's direction and control about the applicable Rules and oversee their conduct, correcting it and admonishing them when necessary.]

(q) shall not use court staff, facilities, or other resources in the campaign.

COMMENT

General Considerations

[1] The state has a compelling interest in maintaining the integrity, independence, and impartiality of the judiciary, thus enhancing public confidence in the justice system. To further In furtherance of this interest, judges and candidates for judicial office should be and should appear to be as free from political influence as possible in light of, ~~taking into account~~ the ~~various~~ methods of selecting judges in the jurisdiction and the First Amendment constitutional provisions governing free speech and expressive association. In order to advance the state's compelling interest, Rule 5.01 imposes ~~certain~~ restrictions on the political and campaign activities of all sitting judges and all candidates for judicial office. Judges and candidates In all events, a candidate for judicial office should maintain the dignity appropriate to judicial office.

[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, also constitutes a violation of Rule 8.2(b) of the Rules of Professional Conduct and may subject the candidate to discipline by the judicial discipline or attorney discipline authorities even if the candidate was not a judge during the ~~period of candidacy~~ and even if the candidate lost the election. ~~An unsuccessful candidate who was a lawyer may be subject to discipline instead under the [name of jurisdiction] Rules of Professional Conduct, Rule [8.2(b)]. When a non-judge becomes a candidate for judicial office, Rule 5.01 is immediately applicable to his or her conduct.~~

[3] A non-judge is required to begin complying with Rule 5.01 immediately upon becoming a candidate for judicial office. ~~When a non-judge becomes a candidate for judicial office, Rule 5.01 attaches immediately.~~

~~[3] Many of the restrictions imposed by Rule 5.01 apply only with respect to “political organizations.” 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, one or more of the following Rules might apply: Rule 2.11 (Judicial Statements on Pending and Future Cases), Rule 2.12 (Disqualification), and Rule 4.04 (Civic or Charitable Activities).~~

~~[4] On assuming a judicial position, a judge is required to resign any elective public office or office in a political organization.~~

Participation in Political, Fund-Raising, 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 subject to political influence or perceived to be subject to political influence. Accordingly, sitting judges as well as all candidates for judicial office are prohibited by Rule 5.01(a) from assuming a leadership role in a political organization.~~

[5] Judges and ~~or~~ candidates may register to vote as a member of a political party.

~~[5] Rules 5.01(b) and 5.01(e) prohibit judges and candidates for judicial office from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office. These provisions 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(d) and 5.02(e), Rules 5.03(b) and 5.03(d), and Rules 5.04(b) and 5.04(d).~~

[6] Rule 5.01(c) does not prohibit judges or candidates for judicial office from privately expressing their views on candidates for any public office to close friends and family members.

[7] 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(e).~~ A judge may participate in a primary election if the primary is limited to members of a particular party but may not participate in a party caucus.

[Caucuses are very public gatherings sponsored by a partisan political party at which participants discuss positions that the party will take and elect delegates to attend the party convention at which candidates are chosen; therefore, participation by a judge or judicial candidate is inappropriate. In contrast, primary elections are conducted by the state board of elections and are relatively

private. See Utah Formal Advisory Opinion 02-1, Virginia Advisory Opinion 99-6, and Washington Advisory Opinion 92-4.]

~~[8] Political organizations and candidates running for public office often use ticket sales for dinners or other public events as methods for fund raising. Judges and candidates for judicial office may generally attend dinners and other public events sponsored by political organizations or candidates running for public office, but are prohibited by Rule 5.01(e) from purchasing tickets to such events to the extent that the purchase includes a fund raising aspect.~~

Soliciting or Accepting Campaign Contributions and Other Public Support

~~[9] Candidates for judicial office are prohibited from identifying themselves as candidates of a particular political organization and from seeking or using political organization endorsements, except when running in a partisan public election; see Rules 5.02(a) and 5.02(b).~~

~~[10] Although candidates for judicial office are prohibited from personally soliciting or personally accepting campaign contributions for their own campaigns, see Rule 5.01(h), candidates running in partisan, non-partisan or retention elections are permitted to form campaign committees for the purpose of soliciting and accepting contributions, subject to the regulations contained in Rule 5.06 and [insert applicable provisions of law].~~

~~[11] Candidates for judicial office are permitted to solicit public support and to seek or use endorsements from individuals or organizations other than political organizations. See Rule 5.01(g).~~

~~[1] Members of a candidate's family and court personnel are prohibited by this Rule from personally soliciting or accepting campaign funds and from serving on the candidate's campaign committee.~~

Statements and Comments Made During a Campaign for Judicial Office

~~[12] Candidates for judicial office are sometimes the subject of unfair or unjust 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 unjust allegations may be made that bear upon a candidate's integrity or fitness for judicial office. To mitigate the effects of these attacks, and to avoid escalation of the situation, a As long as the candidate does not violate Rules 5.01(j), 5.01(k), 5.01(l), and 5.01(m), a candidate for judicial office is permitted to ~~may~~ make a measured and dignified public response, ~~but only if the response does not itself violate Rule 5.01(j); to~~ false, misleading, or unfair statements made by an opposing candidate and his or her campaign and supporters, a political party or other third party, or the media. If the unfair allegations relate to a pending case, ~~[13] Although candidates for judicial office are permitted to respond directly to unfair or unjust allegations made against them during a~~~~

~~campaign,~~ it is often preferable for someone else, such as a bar association or a bar association committee, to utilize established mechanisms to make the response.

[If the unfair attack on the candidate does not involve a pending case (for example, if it accuses the candidate of having a poor attendance record or having been a draft dodger), there is no reason for the candidate to refrain from responding.]

Pledges, Promises or Commitments Inconsistent with Impartial Performance of the Adjudicative Duties of Judicial Office

~~[14] A judge's obligation to avoid prejudgment is well established. Under the First Amendment and in light of the voters' right to have information about an elective candidate's views, judicial ethics rules may not prohibit judicial candidates from announcing their views on disputed legal and political issues. Rule 5.01(m), which applied the relevant prohibitions of Rule 2.11 to all candidates for judicial office, The prohibition in Rule 5.01(m) on making pledges, promises, or commitments does not proscribe a candidate's public expression of personal views on disputed issues. However, a candidate should emphasize that if elected he or she will ~~their duty to~~ uphold the law regardless of his or her ~~their~~ personal views to ensure that voters understand a judge's duty to uphold the United States Constitution, the state constitution, and laws of [name of state jurisdiction] even if where the law differs from ~~their~~ the candidate's personal belief.~~

[15] Some ~~speech~~ restrictions on judicial campaign speech are indispensable to maintaining advancing the state's compelling interest in the integrity, impartiality and independence of the judiciary. ~~The state has a compelling interest in enforcing these limited restrictions.~~ Thus, under this Rule it is remains improper for a judicial candidate to make pledges, promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific propositions of law that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases within the scope of the pledge, promise or commitment. ~~To fall within the proscription of this Rule the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to perform impartially the adjudicative duties of office.~~

[Judicial candidates should not be encouraged to make promises on issues that are unlikely to come before the court they are running for. A promise to lower taxes for the elderly, for example, would fall within this exception but precisely because it the type of issue not relegated to the judicial branch, judicial candidates should not make promises regarding it as such promises are misleading to voters.]

The restrictions on campaign speech in these Rules do not prevent judicial candidates from running effective campaigns that provide voters with information that helps them distinguish between candidate and is relevant in making their electoral choices. Under

the Rules, judicial candidates may and should promise to faithfully and impartially perform the duties of the office by discussing specific matters relating to judicial organization, administration, and court management. For example, as long as they do not create unjustified expectations that mislead the voters, candidates may pledge to dispose of a backlog of cases, to avoid favoritism in appointments and hiring, to start court on time, to improve conditions for jurors, and to increase efficiency. Candidates may also discuss matters such as what they would do outside the courtroom to improve the justice system, how to improve public confidence in the courts, and how to implement the recommendations of racial and gender bias task forces, for example.

Judges, even elected ones, differ from legislators and executive officials, and, therefore, judicial campaigns should be run differently than campaigns for other offices. Judges serve voters when they are parties and persons affected by cases, and citizens have a due process right to expect that judges will make decisions based on the evidence, the law, and the arguments of the parties regardless of the personal views of the judge or a position taken while a candidate to win votes.

[16] 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. Rule 5.01(m) does not **generally** 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 constitute pledges, promises or commitments to perform the **adjudicative** duties of office other than in an impartial way. ~~In order to~~To avoid violating Rule 5.01(m), therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views.

A candidate should not answer questions that ask the candidate to make prospective rulings or call for responses that reasonably give the impression that the candidate is committed to ruling in a certain way. Moreover, checking the "yes," "no," "agree," "disagree," or "undecided" boxes on a questionnaire may not adequately answer questions that address complex legal or political issues. Instead, the candidate should provide a thoughtfully drafted explanation or elaboration that includes, in reasonable detail, the legal analysis and judicial philosophy underlying the responses and affirms that the candidate is expressing a personal opinion and will be bound by and follow the law.

[17] ~~Rule 5.01(m) does not prohibit a~~ A candidate for judicial official may make from making public statements concerning improvements to the legal system or to the administration of justice.

[5] Ignorance of the contents of statements issued by the candidate's campaign committee will not be a defense to a complaint for violation of these Rules.

Indirect Participation in Political and Campaign Activity

[18] ~~A candidate for judicial office should encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate and should not authorize or knowingly permit any other person, other than members of the candidate's campaign committee, to do for the candidate what the candidate is prohibited from doing under the Rules of this Canon.~~ Although a judicial candidate (including an incumbent judge) must require ~~eneourage~~ members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity including holding an office in a political organization, running for elective office, and supporting candidates for political office as long as the judge is kept from separate from those activities.

[There are a great many advisory opinions responding to inquiries from judges about the political conduct of their family members (see attached paper "Political Activities by Members of Judge's Family"). Therefore, as much guidance as possible should be given in the code on this issue to avoid confusion and uncertainty by judges and their relatives.]

RULE 5.02: PERMITTED POLITICAL 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 may:

- (a) publicly identify themselves as candidates of a political organization;
 - (b) seek or use endorsements from any individual or organization, including a political organization;
 - (c) establish a campaign committee pursuant to the provisions of Rule 5.06;
 - (d) communicate with the public by speaking on their own behalf, or through any media, including, but not limited to, advertisements, websites, ~~and or~~ campaign literature;
 - (e) publicly endorse or publicly oppose other candidates for a position on the same court for which they are running.
- (e) purchase tickets for dinners or other events sponsored by a POLITICAL organization or a CANDIDATE for public office, if the tickets are for the JUDGE or CANDIDATE'S personal use and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received by the JUDGE or CANDIDATE at the dinner or other event;

COMMENT

~~[1] In partisan public elections for a judicial office, candidates may be nominated by, affiliated with, or otherwise publicly identified or associated with a particular political organization. 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 activities that would otherwise be prohibited by Rule 5.01. Nevertheless, candidates must be mindful of the prohibition of Rule 5.01(m) relating to the making of promises, pledges and commitments.~~

[3] For purposes of Rule 5.02(e), 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 on campaign speech that apply to his or her own campaign and take care not to suggest that he or she will not be able to work with a candidate he or she opposes if that candidate is elected to the court.

5.03: PERMITTED POLITICAL 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 may:

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

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

(c) communicate with the public by speaking on their own behalf, or through any media, including, but not limited to, advertisements, websites, ~~and~~ ~~or~~ campaign literature;

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

(f) attend and speak on his or her own behalf at events sponsored by political organizations and purchase tickets for dinners or other events sponsored by a POLITICAL organization or a CANDIDATE for public office, if the tickets are for the JUDGE or CANDIDATE'S personal use and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received by the JUDGE or CANDIDATE at the dinner or other event;

COMMENT

[1] In non-partisan public elections for judicial office, candidates may not accept nominations by a particular political organization. Most of the restrictions on political activities set forth in Rule 5.01 continue to apply to candidates for judicial office running in non-partisan elections.

[2] Rule 5.03(a) ~~would operate to~~ prohibits a non-partisan candidate 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 Rule 5.03(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.

5.04: PERMITTED POLITICAL 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 may:

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

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

(c) communicate with the public by speaking on their own behalf, or through any media, including, but not limited to, advertisements, websites, ~~and or~~ campaign literature;

(d) publicly endorse or publicly 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.

[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 should 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(k) and 5.01(m).

RULE 5.06. CAMPAIGN FUND-RAISING COMMITTEES.

(a) CANDIDATES for judicial office subject to public elections may, subject to the regulations contained in this Rule, may establish campaign committees to conduct campaigns for the CANDIDATE including soliciting and accepting reasonable campaign contributions and expending funds. ~~, subject to the regulations contained in this Rule. A judicial candidate shall require the candidate's campaign committee to comply. The CANDIDATE is responsible for ensuring that the committee complies with these Rules regulations,~~ and with other applicable LAW.

[“Require” is a defined term; “is responsible for ensuring” is not.]

(b) A judicial candidate shall prohibit the candidate's campaign committee from soliciting or accepting contributions that do not confirm with governing law, are not reasonable in amount, or are otherwise inappropriate under the circumstances.

(1) Campaign committees ~~shall not may~~ solicit or ~~and~~ accept reasonable campaign contributions ~~that, not to~~ exceed, in the aggregate, [\$ ___] from any individual or [\$ ___] from any entity or organization. ~~Such committees may also manage the campaign, including the expenditure of funds.~~

(2) The campaign committee of an incumbent judge shall not solicit a lawyer or litigant with a case currently pending before the judge-candidate for a

contribution to the judge's campaign for re-election or for higher judicial office.

[This is a new, very important restriction on campaign fund-raising that should not be tucked away in commentary where it could be easily overlooked.]

(c) A judicial candidate shall prohibit the candidate's campaign committee from shall solicit~~ing~~ or accept~~ing~~ contributions for a CANDIDATE'S current campaign more than [one year] prior to a scheduled election, nor more than [90] days after the last election in which the CANDIDATE participated.

(d) In addition to complying with all applicable statutory requirements for disclosure of campaign contributions, a campaign committee established by a CANDIDATE for judicial office shall 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 required by LAW.

(e) A judicial candidate shall require the candidate's campaign committee to comply with relevant laws regarding divesting unused campaign funds or, in the absence of a statutory requirement, shall divest any unused campaign funds by pro rata refund to campaign contributors not later than six months after any judicial election in which a judge or judicial candidate participated as a contestant.

[Several states have express provisions that address disposition of unexpended campaign funds although not all are as restrictive as that proposed by AJS (see attached article from the Judicial Conduct Reporter). Allowing a candidate to keep unexpended funds to use in a subsequent campaign allows a candidate a head start and an unfair advantage over other candidates who, under the rules, cannot raise funds more than a year prior to an election. Moreover, allowing a candidate to use funds left over from one campaign in a subsequent campaign may be contrary to the intentions of the donors because it cannot be presumed that the donor would support the candidate for a higher office or, even if the office sought is the same, that the donor still supports the candidate if there is a different opponent or intervening events changed the donor's mind.]

Comments:

~~[1] This Rule sets up a mechanism whereby judicial candidates who must run for elective office may raise campaign funds through a campaign committee. No judicial candidates~~

~~may personally solicit or personally accept campaign contributions. (see Rule 5.01(h)) The committee is, thus, the only way for judicial candidates to raise and accept campaign funds (other than those states that provide for public financing of judicial campaigns). In addition to soliciting and accepting campaign contributions, campaign committees manage the expenditure of the funds and generally conduct the campaign. Although some states have procedures that do not require the candidate to know the identities and/or amounts of contributors and contributions, the candidate is, nevertheless, ultimately responsible for the actions of the candidate's committee, including compliance with this Code and with the requirements of the laws of the jurisdiction in which the election occurs. Among the candidate's responsibilities is to ensure that the committee solicits and accepts only such contributions as are reasonable in amount and otherwise appropriate under the circumstances. For example, it would not be appropriate to solicit a lawyer or litigant with cases currently pending or impending before a judge candidate for a contribution to the judge's campaign for re-election or for higher judicial office.~~

~~[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 governing 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. Compare Rule 2.12.~~

Other circumstances that may make a contribution inappropriate under this Rule include whether the contribution is the maximum amount allowed by this Rule or applicable statute, whether the contribution would be a relatively large or small portion of the total amount contributed to the candidate's, whether a member of the contributor's immediate family or law firm also makes a comparable contribution, whether the contributor further assists the candidate's campaign by soliciting funds on behalf of the candidate, and whether the contributor's interests have come or are likely to come before the candidate while a judge.

[See Pierce v. Pierce, 39 P.3d 791 (Oklahoma 2001).]

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 may:

- (a) communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency;
- (b) seek or use endorsements for the appointment from any individual or organization other than a political 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 such funds, see Rule 5.01(h), but they 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, Comments [15] and [16].

RULE 5.07: ACTIVITY 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, except that the JUDGE may continue to hold judicial office while being a candidate for election to, or serving as a delegate in, a state constitutional convention if the JUDGE is otherwise permitted by LAW to do so.~~

~~(b) Upon becoming a CANDIDATE for a non-judicial appointive office, a JUDGE is not required to resign from judicial office and is permitted to engage in the activities permitted for candidates for appointive judicial office by Rule 5.05.~~

[Better placed in a comment.]

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 combination of the potential for abuse of the judicial office on one hand, and the political promises that the judge would be compelled to make in the course of campaigning for non-judicial elective office on the other, dictates that a judge who wishes to run for such office must resign upon becoming a candidate.~~

[1] The “resign to run” rule contained in Rule 5.07 ensures that a judge cannot use or appear to use the judicial office to promote his or her candidacy for a non-judicial office and prevents post-campaign abuse or its appearance.

[AJS’s substitute comment tracks the rationale for the rule enunciated in Morial v. Judiciary Commission of Louisiana, 565 F.2d 295 (5th Cir. 1977), which upheld the constitutionality of the resign-to-run rule.]

[2] This Rule does not require a judge to resign before making a preliminary survey of financial and voter support for the judge’s candidacy for a non-judicial office or before discussing with political party members or leaders the possibility of becoming a candidate for non-judicial office. However, before publicly announcing an intention to run, filing with the relevant election official, soliciting campaign contributions, forming a campaign committee, seeking public endorsements, issuing a press release, or similar conduct, a judge must resign from office.

[AJS’s proposed comment explains the activities that do and do not trigger the resign-to-run rule, which has been the subject of inquiries to judicial ethics advisory committees. See Florida Advisory Opinion 94-20; Kentucky Formal Opinion JE-23; Kentucky Informal Opinion JE-18; Louisiana Advisory Opinion 35; New York Advisory Opinion 97-65; New York Advisory Opinion 91-44; New York Advisory Opinion 93-55; Pennsylvania Formal Opinion 88-2.]

[3] A judge may continue to hold judicial office while a candidate for election to, or serving as a delegate in, a state constitutional convention if the JUDGE is otherwise permitted by LAW to do so

[4] A judge is not required to resign upon becoming ~~who wishes to become~~ a candidate for an appointive non-judicial office, ~~where for which~~ no election campaign will be conducted, ~~need not resign from judicial office in order to be considered for appointment.~~