



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

MEMORANDUM

TO: Members of the North Carolina Judiciary

FROM: Judge Wanda G. Bryant, Chair of the Judicial Standards Commission

DATE: 2 January 2020

RE: Political Conduct and the Code of Judicial Conduct

To assist you with compliance with the Code of Judicial Conduct during the 2020 election cycle, this memorandum addresses the specific prohibitions in the Code, as well as provides guidance on the most common questions. For specific questions, a judge or judicial candidate should contact the Commission for an informal advisory opinion by calling (919) 831-3630 or email Carolyn Dubay, cad@coa.nccourts.org or Jameson Marks, jmm@coa.nccourts.org.

This memorandum addresses the following issues:

- 1) Overview of the Code of Judicial Conduct as it Relates to Political Conduct
- 2) Soliciting Funds for Your Campaign or a Joint Judicial Campaign
- 3) Other Do's and Don'ts for Your Campaign
- 4) Assisting Other Candidates or Political Organizations
- 5) Disqualification Issues Relating to Campaign Conduct
- 6) Resign to Run Requirement
- 7) Campaign Misconduct By Candidates Who Are Not Judges

1. OVERVIEW OF THE CODE OF JUDICIAL CONDUCT AS IT RELATES TO POLITICAL CONDUCT

Canon 7 of the Code of Judicial Conduct governs political conduct and applies to judges and judicial candidates. The term “judge” also includes emergency judges and retired judges subject to recall, as well as commissioners and deputy commissioners of the North Carolina Industrial Commission. Family members are not bound by the restrictions in Canon 7 and may engage in personal political activities.

While each of these topics is treated in more detail in this memorandum, generally speaking, judges and judicial candidates **MAY NOT**:

- **Contribute** to any individual candidate or campaign committee;
- **Solicit** campaign funds or contributions for any candidate or political party/organization;
- **Endorse** any candidates for elected office (unless the judge is also a candidate);
- **Misrepresent** the judge’s identity or qualifications for office.

On the other hand, judges and judicial candidates **MAY**:

- **Identify** with a political party;
- **Contribute** to a political party/organization;
- **Attend and speak** at political events and campaign fundraisers for other candidates;
- **Be listed in publicity** for a political event or fundraiser (but not as a host or sponsor);
- **Personally solicit** contributions to his or her campaign or a joint judicial campaign.

Beyond Canon 7, campaign and political conduct of judges also implicates the following provisions of the Code: Canon 1 (duty to maintain the integrity and independence of the judiciary); Canon 2 (duty to avoid impropriety in all activities); Canon 3A (duty to remain “unswayed by partisan interests” and prohibition on comments about pending cases); Canon 3C (disqualification rules). As always, a judge’s core duties are to consistently ensure the integrity, impartiality and independence of the judiciary.

2. SOLICITING FUNDS FOR YOUR CAMPAIGN OR A JOINT JUDICIAL CAMPAIGN

Under Canon 7B(4), judges may **personally solicit** campaign funds and request public support for his or her own campaign. A judge may also manage and serve as treasurer of his or her own campaign, or form a campaign committee to solicit and manage the expenditure of campaign funds (see below on use of court staff as campaign volunteers). Judges should also contact the North Carolina State Board of Elections for advice on reporting requirements and carefully review applicable campaign finance and election regulations.

Although a judge may personally solicit campaign contributions, past advice from the Commission has identified some specific limitations on campaign solicitations based on the broader requirements of Canons 1, 2 and 3. As such, a judge **MAY NOT**:

- personally solicit campaign contributions and public support from parties and attorneys presently appearing before the judge;

- solicit any contributions, personally or otherwise, within the courthouse or while discharging official duties;
- use state resources for campaign purposes (this includes state computers, copiers, telephones, official email, official letterhead, or other state property).

Soliciting campaign contributions from parties appearing before the judge is especially egregious because such conduct creates a public appearance tantamount to *quid pro quo* corruption and misuses state property for personal reasons, all in violation of Canons 1, 2A and 3A(1). The term “presently appearing before the judge” is to be read to clearly include those litigants and attorneys appearing before a judge in a courtroom. It is not to be read so broadly as to include attorneys or parties who may have a matter pending within the jurisdiction of the judge’s court but who currently have no hearings or appearances scheduled before that judge. Even when litigants or attorneys are not presently appearing before a judge, however, it is still improper to solicit them within the courthouse or during any functions associated with the judge’s official job duties.

Canon 7B(3) specifically allows a judge who is a candidate to conduct a “joint judicial campaign” with another judicial candidate. The term “joint judicial campaign” is not defined in the Code of Judicial Conduct. Past informal advisory opinions make it clear, however, that this rule is a narrow exception to the general rule that a judge may not contribute to other candidates for elected office. The exception for joint judicial campaigns is intended to allow joint campaign activity, such as joint events, shared campaign mailings, and the sharing of incidental judicial campaign costs, such as travel. The Commission advises that in order to participate in a joint judicial campaign, all participants must be active candidates for judicial office and currently engaged in campaign activity. Any shared expenses must be for the mutual benefit of all participants within the joint judicial campaign. Again, candidates should be mindful of any applicable reporting requirements under state election law and ensure that any joint judicial campaign activity is appropriately reported to the State Board of Elections.

3. OTHER DO’S AND DON’TS FOR YOUR CAMPAIGN

Court Personnel as Campaign Staff: Under Canons 1, 2 and 3B(2), a judge has a duty to ensure public confidence in the independence of the judiciary and that judicial decision-making is “unswayed by partisan interests.” For this reason, a judge must maintain a strict separation of any campaign activities from his or her official duties. In that regard, a judge **MAY NOT:**

- require his or her staff or other court employees to work on campaign related activities (although court personnel may volunteer to help after work or on personal time);
- request, encourage or allow public officials/employees subject to the judge's direction or control to engage in campaign activity while at their public employment.

Towards these ends, Senior Resident Superior Court Judges and Chief District Court Judges are encouraged to remind other public officials who work in our courthouses, including Magistrates, Clerks of Superior Court and other court personnel, that they may not engage in any political conduct in the courthouse environs, and particularly during court sessions. This includes wearing or displaying campaign paraphernalia. Such political activity in the courthouse diminishes the

dignity and appearance of impartiality of the administration of justice. Consistent guidance is provided by the AOC General Counsel's office to Clerks of Court and Assistant and Deputy Clerks. See

http://juno.nccourts.org/sites/default/files/Legal%20Memos/memo_election_activity_20180213.pdf.

Appropriate Campaign Ads and Materials: The Commission has received numerous inquiries and some complaints regarding the content of judicial campaign material. While judges and judicial candidates have broad latitude in the content of their campaign advertising, judges continue to be bound by Canons 1, 2 and 3 and 7C, which together require that all campaign materials are dignified, not intentionally misleading, and do not diminish public confidence in the integrity, impartiality and independence of the judiciary. Types of assertions or statements in campaign materials that can violate these rules include the following:

- Campaign materials that suggest a judge's bias or predisposition for or against certain litigants, or that would create a reasonable suggestion that a judge would show favor toward a particular side in a legal dispute;
- An intentional and knowingly false representation about an opponent;
- Posting or distributing campaign signs and literature in the courthouse or any other place where the judge is holding court or conducting official business;
- Language or images in campaign ads that are undignified, profane or offensive;
- Language suggesting the judge has previously been elected when he or she was appointed; e.g., do not use the language "re-elect" if you have never been elected; you may use the word "keep" or "elect" where appropriate;
- Language using the title "Judge" before the candidate's name if the candidate is not a sitting judge.

Use of Photos of the Judge Robed and in the Courtroom: Campaign photographs/videos may be taken of a judge in his or her courtroom and wearing his or her robe. However, such photographs/videos should only be taken when the courtroom is otherwise not in use and should not be taken while the judge is presiding in court. The Commission also advises against using any photographs or video from an actual session of court for political purposes. Any use of photographs of a judge in a robe or in a courtroom should be appropriate and tasteful in order to promote continued respect for the decorum of the judicial office and the courthouse. Courtrooms and courthouses must also be available for such use by all judicial candidates and cannot be limited solely to incumbent judges, although non-judges may not appear in robes.

Use of State Seal on Campaign Literature: The use of the state seal, or any court seal, is not expressly prohibited under the Code of Judicial Conduct and may be appropriate to use in certain circumstances. However, in order to prevent confusion and to avoid the appearance of misuse of state property, any such materials bearing a seal or indicia of your office should include a clear and visible statement that the materials are not printed or mailed at government expense. The perception that government resources are being used for campaign purposes undermines public

faith and confidence in the integrity and impartiality of the judiciary. It is the responsibility of the judge to take reasonable steps to prevent such confusion.

Use of Official Email and State Computers for Campaign Conduct: A judge should not use any court resources, equipment or supplies for campaign conduct. This prohibition includes use of a state email account or state computer for campaign purposes. Just as a judge should not use state resources for his or her own political purposes, a judge should facilitate the compliance of other judges and court officials with this standard. Where possible a judge should not send campaign emails to other judicial officials at their state email addresses. However, the Commission acknowledges that sometimes campaigns rely on mass email communications sent to large distribution lists, such as the list of all licensed attorneys sold by the State Bar, or membership lists of certain bar groups. Where a judge has listed his or her state email address as contact address for that group's purposes, a judicial candidate may inadvertently send materials to that address. Such incidents would not be viewed as misconduct, however candidates should be cautioned that political mail sent to a state email address may not be well-received by the recipient.

Social Media Use in Campaigns: Campaign communications disseminated through social media are subject to the same standards as other written communications. In other words, the statements should be truthful, dignified and professional and not undermine public confidence in the integrity, impartiality and independence of the courts. As a best practice, judges and candidates should also monitor comments on social media by followers and connections and remove offensive or profane comments on the judge's public campaign page. Although the Commission has never concluded that a connection to a person on social media alone is sufficient to justify disqualification, public and open communications and discussions on social media with followers/connections could later result in a motion for disqualification if that follower/connection appears before you and thus should be avoided.

Answering Questions in Surveys/Debates/Media Interviews: Judicial candidates are often asked to respond to surveys from special interest groups and to participate in media interviews and judicial debates. Generally, a judge should not respond to any question in a manner that undermines public confidence in the integrity, independence and impartiality of the judiciary or conveys the impression that the judge favors a particular group. The judge should also refrain from discussing the merits of any pending federal or state cases if the case implicates North Carolina law or the case or controversy arose in North Carolina (Canon 3A(6)).

Although the United States Supreme Court ruled in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), that judicial candidates cannot be absolutely restricted from expressing their views on disputed issues of law or policy, any such comments should continue to be made in a professional and civil manner and with due regard to ensuring public confidence in the impartiality and fairness of our courts. For example, a judge or judicial candidate should not state or forecast how he or she would rule in a particular case that is currently pending as such statements suggest pre-determination of issues to be presented in court and would undermine the appearance of fairness and impartiality.

Positions on Pending Legislation v. Pending Cases: Canon 3A(6) prohibits judges from publicly commenting on the merits of pending state and federal cases arising under North Carolina law or

dealing with a case or controversy arising in North Carolina. As such, judges in all campaign statements should avoid such comments. On the other hand, Canon 4B allows judges to appear before public bodies to comment on issues affecting the administration of justice or the legal, economic, educational, or governmental system. The Commission has interpreted this provision as allowing judges to make comments on the impact of pending legislation on the administration of justice. As in any public statements, however, such comments should be dignified and professional, and should not suggest bias or lack of impartiality of the judge in cases that would normally come before him or her.

4. ASSISTING OTHER CANDIDATES OR POLITICAL ORGANIZATIONS

Canon 7 sets forth the parameters of the permissible political activity of judges in order to maintain public confidence in the impartiality and independence of the judiciary. Canon 7 respects the First Amendment rights of judges who are required to engage in the political process as candidates for judicial office. At the same time, Canon 7 more strictly limits the political conduct of judges when they are trying to assist other candidates or political organizations. The primary restrictions in Canon 7 as to other candidates and political parties relate to endorsements, contributions, and assistance with fundraising.

Identifying with a Political Party: Regardless of whether judicial elections are partisan or non-partisan, and regardless of whether a judge is currently a candidate for judicial office, a judge may identify with and join a political party. See Canon 7B(3).

Attending and Speaking at Political Events: A judge may “attend, preside over, and speak at any political party gathering, meeting or other convocation,” including fundraisers for other candidates and political parties, and may also be listed or noted as a speaker within any publicity relating to such an event. See Canon 7B(1). Because attendance at a candidate’s campaign event or fundraiser is explicitly permitted and may be noted in the event publicity, mere attendance and the notation of it in the event publicity will not be construed as an endorsement of that candidate. If the event is a fundraiser, however, the event publicity should not list a judge as a host or sponsor (see below on solicitations and fundraising). In addition, if a judge is a speaker at the event, he or she should be careful not to (1) solicit contributions/financial support from the audience for the organization or a candidate or (2) endorse a candidate **unless** the judge is eligible to endorse candidates. More information on soliciting and endorsing is provided below. Finally, if the event is ticketed, the judge must be careful to ensure that the ticket proceeds are not considered prohibited “campaign contributions” (see below on contributions).

Endorsing Other Candidates: Judges are generally prohibited from endorsing other candidates for elected office unless the judge is also a candidate for judicial office. Canon 7B(2), 7C(2). A judge who is entitled to endorse may do so regardless of whether he/she has any election opposition. Because emergency judges and retired judges subject to recall are not elected, they may not endorse other candidates. Special superior court judges, who are appointed, also may not endorse unless they become a candidate for an elected judicial office. A judge can become a “candidate” for judicial office in one of four ways: (1) making a public declaration of candidacy; (2); declaring or filing as a candidate with the appropriate election authority; (3) authorizing solicitation or acceptance of contributions or public support; or (4) sending a letter of intent to the

Chair of the Judicial Standards Commission. Canon 7A(1). As a best practice, the Commission would prefer a judge who intends to become a candidate to send a letter of intent to the office of the Judicial Standards Commission indicating the year in which the judge will be facing election and the office for which the judge will be campaigning. Please do not email letters of intent – we prefer that they be mailed to the Commission’s office.

The definition of “endorse” is “to knowingly and expressly request, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in that person’s efforts to be elected to public office.” Canon 7A(3). The Commission has not treated recommendations to the Governor for judicial appointments as “endorsements.” On the other hand, in past informal advice, the Commission has found that if a judge personally and publicly invites people to a reception for a candidate, the invitation constitutes a public endorsement and request for public support of that candidate.

Soliciting Funds for Candidates or Political Parties/Organizations: Judges and judicial candidates may not solicit funds for a “political party, organization, or an individual (other than himself/herself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter” Canon 7C(1). Judges who are candidates may of course raise money for their own campaigns and for joint judicial campaigns as permitted in Canon 7B(2). The word “solicit” in the Code is defined very broadly to mean “to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written . . . that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual’s efforts to be elected to public office.” Canon 7A(2). Solicitation can occur whether done personally “or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials”

Judges should beware of common scenarios that could be considered active assistance in fundraising for other candidates or political parties:

- Avoid being listed as a “host” or “sponsor” of a fundraising event for a political party or candidate. See [Formal Advisory Opinion 2010-07](#).
- Do not sell tickets or ask people to buy tickets to a fundraiser for a candidate, political party or political organization.

Contributing to Political Organizations or Other Campaigns: A judge may make contributions to a political party or organization, but may not “personally make financial contributions or loans to any individual seeking election to any office” Canon 7B(3). This prohibition includes contributions and loans to candidates who are family members of the judge. Please note that while a judge is permitted to make contributions to a “political party or organization” under Canon 7B(3), this does not mean that a judge can bypass the restriction on contributing to candidates by giving the contribution to the candidate’s campaign committee. The North Carolina Supreme Court in *In re Wright*, 313 N.C. 495 (1985) held that a candidate’s campaign committee is not a “political organization” but is the “alter ego of the candidate.”

Judges should be aware of the following common scenarios that can get judges into trouble for improper contributions to candidates:

- *Contributions from a Spouse Made from a Joint Checking Account:* A judge's spouse and other family members are permitted to engage in political activity under Canon 7D. However, if a judge's family member would like to make a financial contribution to an individual's campaign, the judge should make sure the family member does so in a way that makes clear that the contribution comes from the family member and not the judge. If the judge and family member share a joint checking account, the family member should cross out the judge's name on the check to avoid any confusion. The family member may want to confer with the candidate's campaign treasurer as well to make sure the contribution is appropriately attributed to the family member and not the judge.
- *Buying Tickets to Campaign Fundraisers:* If paying to attend a ticketed political fundraiser for a specific candidate or group of candidates, beware that a judge should only contribute the reasonable cost of any food and beverage provided. Paying more than the cost of the food and beverage could be considered a contribution to the campaign and is prohibited. Some judges attend such events and reimburse the host/hostess for the cost of the meal. The Commission advises that the best practice for a judge reimbursing a host for the costs of attending a campaign fundraiser is to make payment directly to the host or caterer of the event, rather than to the candidate's campaign committee. Too often such reimbursements may be reported by the committee as "contributions" and therefore appear as violations of the Code, even though they are otherwise allowable expenses. If the event is free to attend and not ticketed, and food is offered as part of the hospitality, a judge is not expected to pay for the cost of the food.
- *Buying Tickets to Other Political Events:* If a judge wishes to attend a ticketed event for a fundraiser for a political party or organization, the restrictions are more relaxed so long as the proceeds of the tickets are not being directed towards a specific candidate. A judge may attend such an event and may purchase tickets to such an event. A judge may also purchase tickets and give them to others. There is no Code provision prohibiting such an expense, especially if the judge is himself/herself a candidate and the tickets are part of the judge's campaign expenses. There is no limitation against a judge receiving extra tickets or other benefits (such as an advertisement in a program) in exchange for a contribution of a certain size. Again, this is limited to political events that are not fundraisers for specific candidates.

5. DISQUALIFICATION ISSUES RELATING TO CAMPAIGN CONDUCT

Canon 3C and 3D govern disqualification and remittal. Generally, a judge should disqualify himself/herself in any proceeding in which the judge's impartiality may be reasonably questioned. If the conflict is immaterial or insubstantial, it may be remitted (or waived) by written consent of the parties entered into the record. Campaigning for judicial office creates four common scenarios involving disqualification. As all disqualification issues are very fact specific, if there are unique circumstances in the judge's case, he or she are welcome to contact the Commission staff for an informal advisory opinion on the issue. For all of the scenarios below, the Commission recommends a disqualification period to continue for an additional six months after the election, although a longer period may be recommended depending on the circumstances.

Judge's Own Campaign Staff: A judge who is a candidate should disqualify himself/herself from hearing matters involving his or her campaign manager, treasurer and others who play a significant role in the judge's own campaign regardless of whether a motion is made for disqualification. An alternative would be to strictly follow the remittal of disqualification procedures set forth in Canon 3D. With respect to employers of campaign staff, the Commission generally does not consider conflicts with campaign staff to be imputed to other colleagues or supervisors. Nevertheless, disqualification issues are very fact specific, and disqualification could be required depending on the size of the law office, the involvement of colleagues in the campaign and other factors. Judges and candidates are encouraged to contact the Commission if a disqualification issue arises.

Campaign Opponent & Opponent's Campaign Staff: A judge who is a candidate should disqualify himself/herself from hearing matters involving the judge's campaign opponent regardless of whether a motion is made for disqualification. When an opponent works as an assistant district attorney or assistant public defender, a judge should work with the scheduling judge and elected District Attorney or appointed Public Defender to mitigate possible calendar conflicts that could be created by such disqualification. A judge is not obligated to disqualify himself/herself from hearing matters involving other members of the opponent's law firm (or other public defenders or assistant district attorneys, if the opponent works for one of those institutions) should such a motion be made. There is no presumption of conflict. However, if the judge questions his or her own impartiality toward the individual, or believes that there could be a reasonable perception of bias based on the campaign, the judge may opt to disqualify himself or herself in such a situation.

A judge who is a candidate should also disqualify himself/herself from hearing matters involving his or her opponent's campaign manager, treasurer and others who play a significant role in the opponent's campaign regardless of whether a motion is made for disqualification. An alternative would be to disclose the conflict and strictly follow the remittal of disqualification procedures set forth in Canon 3D.

Campaign Contributors, Endorsers and Supporters: An endorsement or standard campaign contribution standing alone does not create a presumed conflict that would require a judge to disqualify himself or herself from hearing a matter involving the endorser or contributor. If an otherwise unremarkable campaign contribution or public support for a judicial candidate was presumed to create a conflict of interest justifying recusal, the potential for abuse and "judge shopping" – in which attorneys or litigants send token contributions to certain judges or simply publicly endorse the candidate - would impair the effective administration of justice. On the other hand, in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the United States Supreme Court held that there are circumstances when it becomes a due process violation for a judge to preside over a case involving a campaign contributor. The Court adopted an objective standard focusing on the risk of actual bias even if the judge subjectively believes he or she can be fair and impartial in the case.

In response to *Caperton*, the Commission has not adopted a specific contribution amount that would require disqualification if the contributor appears before the judge. Even so, where the size and timing of financial support to a judge creates a reasonable presumption of influence, a judge

should disqualify from matters involving that contributor. In determining whether it is reasonable to presume a conflict of interest from the contribution, a judge should weigh the amount of the contribution relative to other contributors, the range of allowable contributions and the candidate's total budget, the timing of the contribution as it regards proximity in time to any past or pending legal action, and whether an individual is responsible for raising funds above and beyond those personally given to the judge, such as when someone organizes and hosts a fundraiser for the judge, especially if those efforts result in a significant amount of the judge's total campaign contributions.

Disqualification Based on Campaign Statements: Judges should be mindful that whenever they make public statements, whether in the campaign context or otherwise, there is a potential that those statements can be used as a basis for a disqualification motion if the statements show a bias in a particular case or towards a particular class of litigants. In all campaign statements, therefore, judges should use the same caution and professionalism as they would in other contexts to ensure continued public confidence in the impartiality, integrity and independence of the courts, and to avoid reasonable questions as to the judge's impartiality in the cases over which he or she presides.

6. RESIGN TO RUN REQUIREMENT

Although Canon 7B(5) permits judges to become a candidate in a primary or a general election for a judicial office, a judge is required to resign his or her position to run for election to a "non-judicial office." The Code does not define "non-judicial office" but the Commission has issued two formal advisory opinions on the issue.

- *Clerk of Court:* See [Formal Advisory Opinion 2009-05](#) (a judge is not required to resign his or her position as a judge prior to becoming a candidate for Clerk of Court).
- *District Attorney:* See [Formal Advisory Opinion 2017-01](#) (a judge must resign his or her position prior to becoming a candidate for District Attorney).

7. CAMPAIGN MISCONDUCT BY CANDIDATES WHO ARE NOT JUDGES

The Commission frequently receives inquiries concerning alleged misconduct by judicial candidates who are not judges. While all judicial candidates are required to comply with Canon 7 of the North Carolina Code of Judicial Conduct, the Judicial Standards Commission has no authority or jurisdiction over the conduct of attorneys who are not currently judges. Instead, attorneys who are judicial candidates, but not yet judges, are under the jurisdiction of the North Carolina State Bar. Rule of Professional Conduct 8.2(b) requires that a lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct. Therefore, any violations of Canon 7 by judicial candidates who are not judges should be reported to the North Carolina State Bar for appropriate review. A judge has the authority to take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct which the judge may become aware, although this authority should be exercised cautiously if attempting to discipline a campaign opponent. Canon 3B(3), The Commission recommends as a best practice that the judge contact the State Bar for guidance on attorney misconduct issues during a judicial campaign.