



## *Judicial Ethics Advisory Committee*

### MEMBERS:

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### **Advisory Opinion 2009-04**

In 1995 this committee issued an advisory opinion that was intended to cover issues likely to arise in judicial campaigns. JEAC 95-04. Since that time this committee has issued additional opinions; the Canon on judicial elections was revised following the adoption of Amendment 80 in 2000; judicial opinions have altered the constitutional framework; and, effective July 1, 2009, Arkansas has a new Arkansas Code of Judicial Conduct. Accordingly we take this opportunity to address again issues likely to arise.

Our power is limited to issuing our advisory opinions on the Code itself. In doing so, we consider the Canons, the Rules, and the Comments adopted by the Court. When appropriate, we look to the Task Force of the Arkansas Bar Association and the two memoranda it submitted to the Court, as well as legislative history from the American Bar Association. As we have said before, we do not have the authority to address constitutional issues (JEAC 2006-02), possible conflicts with statutes (JEAC 93-04), or the wisdom of the provisions.

When appropriate we will incorporate prior opinions that we believe are still controlling.

1) **The timing of judicial campaigns:** Candidates for judicial office are permitted to announce their intention to run 365 days before the first election in which they will appear. Rule 4.2(B). Prior to that time, those intending to seek judicial office are not to indicate publicly their intent, to distribute mass or general letters, to issue press releases, and to engage in similar activities. They are, of course, free to indicate privately and individually their possible plans.

2) **Formation of the committee:** The judicial campaign committee cannot be publicly announced prior to the 365 days. Rule 4.2(B)(1). However, prior to that time the potential candidate may approach possible supporters and seek to enlist them to serve on a committee.

**3) Candidate's responsibility for the Committee:** The candidate is responsible for the activities of the committee. Comment 2 to Rule 4.4. The candidate is responsible to ensure that the committee complies with the Code and with governing state law. Rule 4.4(A). It is the duty of the candidate to take reasonable measures to ensure that the committee and others do not undertake any prohibited activities. Rule 4.1(B).

The candidate has an obligation to ensure that the committee understands that judicial elections are conducted differently from campaigns for other offices. Comment 11 to Rule 4.1. Judicial campaign have restrictions that are not present in other political races. The candidate has a personal responsibility to review and approve the content of all campaign statements and material produced by the committee and to ensure they are consistent with the Code. Rule 4.2(A)(3).

**4) Candidate's responsibility for independent supporters:** Rule 4.2(A)(4) states that a candidate is to take reasonable measures to ensure that other persons do not undertake prohibited activities on behalf of the candidate. For example, a candidate may not stand by and do nothing if an independent supporter is placing false or misleading advertisements on behalf of the candidate.

**5) Expressions of public support:** Earlier provisions of the Code had prohibited a candidate from personally seeking expressions of public support. Those provisions (and advisory opinions JEAC 95-04 and JEAC 2002-02) no longer govern. Now a candidate may approach individuals and ask for their public support. That public support may be in the form of yard signs, bumper stickers, letters to voters, names in newspaper advertisements, statements of support, and similar expressions. Candidates may contact voters, organizations, the media, public officials, prominent individuals and others, and seek their public support. However, those requests are distinct from requests for contributions of money or other financial support, which are expressly prohibited.

**6) Campaign fund-raising:** Only the campaign committee may engage in fund-raising. Rule 4.4. The candidate is to direct the committee to comply with all applicable statutory laws on fund-raising and reporting. Rule 4.4(B).

**7) The Candidate and fund-raising:** The candidate can neither personally solicit nor accept campaign contributions. Rule 4.1(A)(8). The candidate is not to ask individuals for contributions, nor call them with similar requests, nor write or sign letters seeking funds.

Obviously a candidate will know the identities of prominent and public supporters; the candidate is permitted to personally request or solicit the support of individuals and organizations; further, state law requires that the identities of donors above a dollar amount be publicly disclosed. However, the spirit of the Code is that the candidate be isolated from the details of the campaign

finances. Comment [3A] to Rule 4.4 states: "To reduce potential disqualification and to avoid the appearance of impropriety, judicial candidates should, as much as possible, not be aware of those who have contributed to the campaign." Comment [4A] to Rule 2.11 indicates that in some instances it may be necessary for a judge to recuse when a party or litigant appearing before him or her is or was a campaign supporter.

8) **Use of campaign contributions:** A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others. Rule 4.1(A)(9).

9) **Time Limits for Fund-raising:** Fund-raising by the committee may begin 180 days before the first contested election, and may continue for 45 days after the last contested election in which the candidate appears. Rule 4.4(B)(2). For example, if three candidates compete in the May election, and a single victor emerges, the three committees (for either the victorious or defeated candidates) may raise funds for only an additional 45 days. If, on the other hand, two candidates survive till a November run-off election, those two campaign committees may continue to raise funds through the November election and for 45 days after. Comment [2A] to Rule 4.4.

Funds received by the committee prior to the 180 day or after the 45 day period are to be returned to the contributor.

The 45 day post-election restriction applies also to non-contested elections. Comment [2A] to Rule 4.4. This committee had previously concluded that when a candidate is unopposed, the committee may solicit contributions for 45 days after the filing deadline for candidates. JEAC 96-02.

10) **Excess campaign funds:** Excess campaign funds are to be returned to the contributors or to the State Treasurer. Rule 4.4(C). Those cannot be retained for future elections nor given to other candidates or organizations. See JEAC 93-04 and 93-07.

11) **Partisan political activities:** Judges and candidates may not publicly identify themselves as members of a political party, speak on behalf of a party, or lend their names to a party. Rule 4.1(A)(1,2,6). Nor can the candidate seek, accept or use the endorsement of a partisan political organization. Rule 4.2(B)(5). Note that candidates may seek and accept endorsements from individuals and other organizations.

12) **Events or Activities supported by a political organization:** Judicial candidates are permitted to attend events sponsored by a political organization; they may purchase tickets to such events. JEAC 2009-03; Comment [6A] to Rule 4.1. For example, the judge or judicial candidate may attend the Greene County Democratic Party Fish Fry or the Fort Smith Republican

Women's luncheon. Nothing prohibits the candidate from speaking at the event; nothing prohibits the candidate from urging individuals to support himself or herself. However, the candidate cannot endorse another candidate, nor the party itself. Rule 4.1(A)(2,3).

A political organization can be a political party or an organization created to support the election of candidates. For example, an organization might exist solely or primarily to support candidates for political office that it deems to be pro-environment. A judge may attend or purchase a ticket from that organization.

**13) Events and Activities sponsored by other political candidate:** In contrast with the preceding paragraph, judges and judicial candidates are not to attend events or activities sponsored by or on behalf of a political candidate. Judges and judicial candidates may not purchase tickets, nor attend, events such as "Clinton for President Rally", "Beebe for Governor Luncheon", and "Boozman for Congress Fish Fry." JEAC 2009-03. The appearance of the judge or judicial candidate at such an event would suggest support or endorsement of the candidate.

**14) Participation in other campaigns:** Arkansas judges and judicial candidates are not permitted to publicly endorse or oppose candidates for any political office, whether judicial or non-judicial; whether federal, state or local. Rule 4.1(A)(3). For example, the Code prohibits a judge or judicial candidate from publicly supporting a candidate for governor, from wearing a campaign button for a candidate for the General Assembly, or from displaying a yard sign for a school board candidate.

**15) Political contributions:** Judges and candidates cannot make contribution to the campaigns of candidates, whether federal, state or local, with the exception of their own campaigns. Rule 4.1(A)(4). Nor can they contribute to political organizations.

**16) Use of "Judge" in campaign materials:** A sitting judge may describe himself or herself as "Judge". A part-time district judge may use the title and the phrase, "Elect Judge Judy Smith." A part-time judge, even if appointed, may use the title "Judge" in campaign advertising when running for the position of a full time judge. JEAC 2002-03. However, a former judge or a person who has served as a special judge is not permitted to use the title. JEAC 2005-08. Such usage has been deemed to be false or misleading. Rule 4.11(A)(11). Similarly a judicial candidate who is not an incumbent judge should not be pictured in a judge's robe or seated at a judge's bench in campaign materials. JEAC 2006-04.

**17) Campaign speech:** Rule 4.1 places three restrictions on the statements that judicial candidates may make: a) false or misleading statements are forbidden; b) statements that might reasonably be expected to affect the outcome or impair the fairness of a matter pending in any

court are barred; and c) in connection with cases or controversies likely to come before the court, the candidate may not make pledges, promises or commitments that are inconsistent with the impartial performance of judicial duties. Rule 4.1(A)(11,12,13). Comments [11-15] distinguish the prior "announce" clause, which was held unconstitutional, from the "pledges, promises and commitments" language, which is retained in the current Code.

In contrast with prior law, judicial candidates are not barred from speaking on social or political issues. However, Comment [13A] to Rule 4.1 provides:

Before speaking or announcing personal views on social or political topics in a judicial campaign, candidates should consider the impact of their statements. Such statements may suggest that the judge lacks impartiality. See Rule 1.2. They may create the impression that a judge has or manifests bias or prejudice toward individuals with contrary social or political views. See Rule 2.3. Public comments may require the judge to disqualify himself or herself when litigation involving those issues come before the judge. See Rule 2.11. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

**18) Campaign dignity:** The new Code also removes the prior requirement that candidates conduct judicial campaigns "with dignity appropriate to judicial office." However, that deletion merely removes the possibility of judicial discipline. It is the strong advice of this committee that judicial campaigns be conducted with the civility and fairness that is expected of those aspiring to the bench. In particular, Rule 4.2(A)(1) provides that a judicial candidate shall "act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary."

**19) Political activity of family members:** Family members of a judge or a candidate are free to engage in their own political activity and may run for office. Comment [5] to Rule 4.1. JEAC 2002-06 (spouse may be volunteer or employee in statewide campaign). However a judge or candidate cannot become involved in another's campaign. The judge or candidate must take reasonable steps to avoid the suggestion or implication that he or she endorse the family member's candidacy or political activity. Comment [5] to Rule 4.1. For instance, the spouse of a judge may endorse a political candidate, but may not place a yard sign on property owned jointly with the judge. JEAC 2006-03.

**20) Resign to Run:** Rule 4.5 requires a judge to resign the judicial position "upon becoming a candidate for a nonjudicial elective office." The "resign to run" rule is intended to prevent the candidate from using the judicial office to promote his candidacy, and to guard against post-election retaliation if the judge loses the election. Comment 2 to Rule 4.5. The Rule is also

applicable to part-time judges. JEAC 2008-01.

21) **Enforcement:** The prior Code had expressly stated, as of December 2001, that the judicial election rules applied to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her candidate conduct. An unsuccessful candidate, who is an attorney, is subject to lawyer discipline under Rule 8.2(b) of the Arkansas Rules of Professional Conduct, for his or her campaign conduct. Although not expressly stated, enforcement is the same under the new Code. See Comment [2] to Rule 4.1 (rules are applicable once a candidate announces).

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Edwin Alderson and John Cole concur.