

Canon 4 governing political and campaign activities of judicial candidates provides “[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. See Nev. Code Jud. Conduct, Canon 4. NCJC Rule 4.1 states “[e]xcept as permitted by law, or by Rules 4.2 and 4.4, a judge or a judicial candidate **shall not . . . publicly endorse** or oppose a candidate for any public office . . . [or] **solicit funds** for a political organization or a candidate for public office. See Nev. Code Jud. Conduct, Canon 4, Rule 4.1(A)(3) & (4)(emphasis added).

A comment to Rule 4.1(A)(3) explains that this rule is intended to:

[P]rohibit judges and judicial candidates from . . . publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for the same judicial office for which they are running. See Rules 4.2(B)(2) and 4.2(B)(3). A judge or judicial candidate’s donation to a candidate or political organization that is otherwise permitted by state or federal law is not considered a public endorsement of a candidate for public office.

See Comment [4] to Nev. Code Jud. Conduct, Canon 4, Rule 4.1(A)(3).

Rule 4.2 states in relevant part:

(A) A judicial candidate in a public election shall:

(1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;

....

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities that the candidate is prohibited from doing by Rule 4.1.

See Nev. Code Jud. Conduct, Canon 4, Rule 4.2(A)(3) & (4). Comments to Rule 4.2 indicate that even though judicial candidates may not run “on a ticket or slate associated with a political organization, they may group themselves into slates or **other alliances** to conduct their campaigns more effectively.” See Comment [7] to Nev. Code Jud. Conduct, Canon 4, Rule 4.2(A)(emphasis added).

The Standing Committee, therefore, has previously opined that a group of judges may issue joint invitations to a public event promoting the re-election of the jurists to their current judicial offices. See *Advisory Opinion JE07-013* (December 26, 2007)(majority opinion). That advisory opinion was rendered prior to the adoption of the current version of the NCJC under the then existing and more restrictive public endorsement rules that predated the decision of the Supreme Court of the United States in

Minnesota v. White, 536 U.S. 765 (2002). Comment 7 to Rule 4.2 is consistent with the conclusion of the majority in our 2007 advisory opinion, which determined that judicial ethics standards are not undermined by allowing candidates for judicial office to form groups that conduct joint campaign functions provided the participating candidates do not explicitly endorse one another.

The invitation described here for our review does not contain an express endorsement by the candidates of one another. The language of the invitation identifying the candidates as “magnificent,” “highly qualified,” and “experienced” comes short of a statement that the collective judicial candidates advocate the election of the entire group. Although less hyperbole might be viewed by some as more consistent with the decorum appropriate to persons pursuing judicial office, the group invitation was no more an endorsement than would have been outright campaign contributions among the candidates which is permitted. See Comment [4] to Nev. Code Jud. Conduct, Canon 4, Rule 4.1(A) (“A judge or judicial candidate’s donation to a candidate or political organization that is otherwise permitted by state or federal law is not considered a public endorsement of a candidate for public office.”). Based on our 2007 opinion and given the guidance by the Nevada Supreme Court in Comment 7, the Committee concludes that a group invitation to a joint campaign event for judicial candidates is permissible under Rule 4.1(A)(3) provided the invitation does not contain a statement or statements of explicit endorsement taken in the totality.

A majority of the Committee, however, concludes that the invitation here has a different deficiency. Rule 4.1(A)(4) mandates that “a judicial candidate shall not

... solicit funds for a political organization or a candidate for public office.” The group invitation solicits funds payable to a political action committee. The NCJC defines “political organization” as either “a political party” or a “group sponsored by or affiliated with a political party or candidate the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate’s campaign committee created as authorized by Rule 4.4.” Nev. Code Jud. Conduct, *Terminology* (“Political organization defined). The solicitation of campaign contributions payable to the political action committee may have violated Rule 4.1(A)(4) depending on whether that committee is the campaign committee for all eleven judicial candidates, a fact not provided to or known to the Standing Committee.

That said, there is no doubt the form of invitation presented for our review also is a solicitation by each of the eleven participating judicial candidates of a campaign contribution for themselves and for the other ten candidates for judicial office. By jointly soliciting a \$250.00 minimum donation amount, each judicial candidate was requesting the invitees to contribute to each and all of the candidates and this was an explicit solicitation of funds for another candidate for public office which is impermissible under Rule 4.1(A)(4). As noted above, the purpose of Rule 4.1(A) is to prevent judges and judicial candidates “from abusing the prestige of judicial office to advance the interests of others.” Unquestionably, the group solicitation of campaign contributions here presented involves at least one judge seeking reelection and thus allows a judge to use the prestige of judicial office to advance another’s interest. On a more practical

basis, even if a group campaign solicitation did not include a current judge, this process allows some candidates to leverage their campaign fund-raising activities on the reputations, contacts or offices of other candidates in the same group. This appears wholly inconsistent for the stated reason for the rule.

The Committee's opinion on the latter issue was not unanimous. A minority of the Committee concluded that given the guidance by the Nevada Supreme Court in Comment 7, Rule 4.1(A)(4) should allow judicial candidates to group themselves into *alliances* to solicit campaign contributions. The minority reasons that if the purpose of allowing group action is to make judicial campaigns more effective or efficient, that same reasoning extends to the critical function of campaign finance activities. The majority of the Committee does not disagree with the minority's interpretation of Comment 7, but instead concludes that the invitation here reviewed is not properly crafted to accomplish the narrower permissible objective consistent with the requirements of Rule 4.1(A)(4). Simply stated, in the majority view, compliance with the prohibition on soliciting campaign contributions for others under Rule 4.1(A)(4) is not mutually exclusive with permissible concerted action on campaign funding by a group of judicial candidates

The Committee observes that the issues presented by this request for advisory opinion are of first impression under the revisions to the NCJC. There is an ongoing debate in other jurisdictions regarding the constitutionality of the endorsement clause contained in Rule 4.1(A)(3). See *Wersal v. Sexton, et. al.*, 613 F.3d 821, 2010 WL 2945171, (8th Cir., 2010). To the extent such issues may arise in the future under Nevada's Revised Code of Judicial Conduct,

the Committee believes such constitutional questions are best addressed by courts of appropriate jurisdiction.

CONCLUSION

Candidates for election or retention to Nevada judicial offices may participate in group campaign events without offending the provisions of Rule 4.1(A)(3) provided the invitation, as well as other published materials and statements do not explicitly endorse one another. Judicial candidates, however, may not request in such invitations, materials or statements that campaign contributions be paid collectively to each and all of the candidates within the group, which is an explicit solicitation of funds for another candidate for public office which is impermissible under Rule 4.1(A)(4).

REFERENCES

Rule 5 Governing the Standing Committee On Judicial Ethics & Election Practices; Nev. Code Jud. Conduct, Canon 4, Rule 4.1(A)(3), Rule 4.1(A)(4), Rule 4.2(A)(3) and Rule 4.2(A)(4); Comment [4] to Nev. Code Jud. Conduct, Canon 4, Rule 4.1(A)(3); Comment [7] to Nev. Code Jud. Conduct, Canon 4, Rule 4.2(A); *Advisory Opinion JE07-013* (December 26, 2007); *Minnesota v. White*, 536 U.S. 765 (2002); Nev. Code Jud. Conduct, *Terminology* ("Political organization defined"); *Wersal v. Sexton, et. al.*, 613 F.3d 821, 2010 WL 2945171, (8th Cir., 2010).

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