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STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

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ADVISORY OPINION: JE12-005

PROPRIETY OF A JUDICIAL CANDIDATE
SOLICITING OR ACCEPTING CAMPAIGN
CONTRIBUTIONS DURING NOMINATING
PETITION PROCESS

ISSUE

May a judicial candidate solicit or accept campaign contributions during the period that the candidate circulates a nominating petition for the judicial office pursuant to NRS 293.165?

ANSWER

No. A candidate for judicial office may not solicit or accept contributions for the candidate's campaign unless the candidate becomes opposed, which for purposes of the nominating petition process occurs upon the close of filing period for submitting nominating petitions and filing or accepting declarations of candidacy in accordance with NRS 293.165.

FACTS

On February 16, 2012, the Secretary of State issued an opinion regarding whether a judicial vacancy arising after the 2012 filing deadline should proceed to the 2012 general election ballot, and if so, what procedures apply to candidates seeking to qualify for such ballot. *See Secretary of State Interpretation Number 122901 (Feb. 16, 2012)*. The Secretary of State has opined that if such a judicial vacancy occurs before April 10, 2012, the "vacancy will

appear on the proceeding [sic] general election ballot and candidates are nominated via nominating petitions." *Id. (citing NRS 293.165(2))*. NRS 293.165(2) provides that a vacancy "in a nonpartisan nomination . . . must be filled by filing a nominating petition" that must be signed by not less than 1 percent of the persons who voted for the office at the last preceding general election. Names of candidates nominated pursuant to NRS 293.165 appear only on the ballot at the ensuing general election. *Id.*

A judicial candidate has presented a hypothetical question inquiring whether it is a violation of the Nevada Code of Judicial Conduct ("NCJC") for a judicial candidate to solicit or accept campaign contributions during the period that the candidate circulates a nominating petition pursuant to NRS 293.165. The judicial office described in the hypothetical became vacant effective March 3, 2012, but such vacancy has not yet been filled by the Governor. To the extent the inquiry implicates unsettled questions of law regarding applicable procedures for filling judicial vacancies, the Committee believes such questions are best addressed by courts of appropriate jurisdiction. For purposes of this opinion, the Committee has presumed Interpretation No. 122901 accurately describes the process for filling judicial vacancies under Nevada law.¹

¹ The Nevada Constitution provides that the Governor shall appoint a judge from among three nominees selected by the Commission on Judicial Selection to fill a

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DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

Canon 4 states “[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.*

vacancy in a district judge’s office. *Nev. Const. art. 6, § 20(1)* (“the Governor shall appoint a justice or judge”); *see Lueck v. Teuton*, 125 Nev. 674, 676 (2009) (“the Governor may appoint an individual to temporarily fill the office”). The Governor’s appointees serve only until “the first Monday of January following the next general election,” thereby allowing the office to be filled by vote of the people at the next ensuing general election. *Nev. Const. art. 6, § 20(2)*; *Lueck*, 125 Nev. at 676-683. While the timing of the Governor’s appointment will dictate whether the vacancy at issue in this hypothetical appears on the 2012 or 2014 ballot, the Committee has assumed for purposes of this opinion that the judicial vacancy at issue will be filled in sufficient time to permit election of the judicial office in the 2012 general election. *See Lueck*, 125 Nev. at 685 (recognizing that because Governor’s appointment occurred after ballot deadline but before 2008 general election, term of appointee expired on January 1, 2009 and Governor was required to fill new vacancy in 2009); *NRS 293.165(4)* (fixing deadline for submitting names on general election ballot); *Secretary of State Interpretation No. 122901*.

Specific to the inquiry presented, Rule 4.2(C) provides:

A candidate who is not opposed in an election must not solicit or accept contributions for the candidate’s campaign, either personally or through a candidate’s committee, at any time.

Nev. Code Jud. Conduct Rule 4.2(C). A candidate “becomes opposed when, at the close of filing, another candidate has filed a declaration of candidacy or acceptance of candidacy for the same judicial office.” *Rule 4.2(C)(1)*. Based on these deadlines, Rule 4.2 provides that a “candidate who is opposed and/or the candidate’s committees may solicit or accept contributions for the candidate’s campaign no earlier than 5:00 p.m. on the last day for filing a declaration of candidacy for judicial office” *Rule 4.2(C)(3)*. As recognized in the Commentary, “[o]ne of the reasons for this restriction is that unopposed candidates for all judicial offices only need one vote to win their election.” *Rule 4.2, Comment [3]*.

The Committee concludes that a person whose name appears on a nominating petition for a judicial office is a judicial candidate for purposes of the Nevada Code of Judicial Conduct. The Code defines a “judicial candidate” as “any person, including a sitting judge, who is seeking selection for or retention in judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election to office.” *NCJC, Terminology*. Thus, the limitations set forth in Rule 4.2(C) apply to judicial candidates during the period that nominating petitions are circulated, and such candidates will not

be permitted to solicit or accept campaign contributions until they are opposed.

While Rule 4.2 is clear that judicial candidates cannot be deemed opposed until the “close of filing”, the Rule does not explicitly address the timing of when such opposition occurs when all judicial candidates are nominated pursuant to NRS 293.165. However, the Committee believes the “close of filing” deadline can be applied consistently to the nominating petition process.

NRS 293.165 provides that a nominating petition must be verified by the county clerk pursuant to NRS 293.1276 to 293.1279 before a candidate may file a declaration of candidacy and qualify for the general election ballot. *NRS 293.165(2)*. In this process, the timely submission and verification of a nominating petition is the act required to qualify a candidate for the ballot. *Id.* Thus, the determination of whether a candidate is opposed cannot be made until a nominating petition is submitted and verified, and the candidate files a declaration or acceptance of candidacy. *Id.* As a result, the Committee concludes that in the nominating petition process, the close of filing equivalent is the deadline for submitting a nominating petition to the county clerk for verification.

In accordance with the Secretary of State’s Interpretation, the deadline for submitting a nominating petition for verification will be established either by NRS 293.165(2) or regulations of the Secretary of State. In this hypothetical, the deadline for submitting a nominating petition for this judicial office and the date on which a judicial candidate can be deemed opposed for purposes of Rule 4.2(C) is April 24, 2012. See *Secretary of State Interpretation 122901, p.2*.

CONCLUSION

For purposes of Rule 4.2(C), the Committee concludes the deadline for submitting a nominating petition for verification is the equivalent of the “close of filing” referenced in Rule 4.2(C)(1) for establishing whether a judicial candidate is opposed. Accordingly, the Committee concludes that where a nominating petition is applicable, a judicial candidate becomes opposed for purposes of Rule 4.2(C) when, at the close of the deadline for submitting a nominating petition for verification to the county clerk, another candidate has submitted a verified petition and filed a declaration of candidacy or acceptance of candidacy for the same judicial office. The Committee further concludes that a candidate who is opposed and/or the candidate’s committees may solicit or accept contributions for the candidate’s campaign no earlier than 5:00 p.m. on the last day for submitting a nominating petition for verification pursuant to NRS 293.165(2) or applicable Secretary of State regulations.

REFERENCES

Nev. Code Jud. Conduct, Canon 4; Rule 4.2; Nev. Code Jud. Conduct, Terminology; *Commentary [3] to Rule 4.2; Rule 5 Governing the Standing Committee On Judicial Ethics; Nev. Const. art. 6, § 20(1) and (2); NRS 293.165; Lueck v. Teuton, 124 Nev. 674 (2009); Nevada Secretary of State Interpretation 122901.*

This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory

responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.

A handwritten signature in black ink, appearing to read "Michael A.T. Pagni", written over a horizontal line.

Michael A.T. Pagni
Chairman