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STANDING COMMITTEE ON JUDICIAL ETHICS

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PROPRIETY OF A JUDGE
CAMPAIGNING AGAINST A RECALL
PETITION AND ACCEPTING
CAMPAIGN CONTRIBUTIONS TO
DEFEAT A RECALL ATTEMPT

ISSUE

May a sitting judge i) actively campaign against a recall petition that has been filed with the election officer; and ii) solicit or accept campaign contributions to defeat the recall petition and any subsequent special recall election?

ANSWER

Yes. A sitting judge may actively campaign against a recall petition and may solicit and accept campaign contributions after the filing of a notice of intent to circulate a recall petition, subject to the campaign and contribution restrictions otherwise set forth in Canon 4.

FACTS

A judge has presented a hypothetical question inquiring whether it is a violation of the Nevada Code of Judicial Conduct ("NCJC") for a judge to i) actively campaign against a recall petition that has been filed with the election officer; and ii) solicit or accept campaign contributions to defeat the recall petition and any subsequent special recall election? In the hypothetical, the campaign activity would commence upon the filing of the notice of intent to circulate a recall petition (filed pursuant to NRS 306.015) and would continue through

any special recall election, assuming the petition qualifies for the ballot under NRS Chapter 306.¹

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*. Rules 4.1, 4.2 and 4.4 generally govern the campaign and political activities of judicial candidates in the context of an election proceeding.

The NCJC does not expressly mention recall petitions or recall proceedings. However, the Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. *Nev. Code Jud. Conduct, Preamble[5]*.

¹ In the hypothetical, the judge did not indicate whether the recall effort included the circulation of a nominating petition for opposing candidates under NRS 306.040, or whether any special recall election would include on the ballot just the name of the judge subject to recall or names of opposing candidates. However, based on the conclusions of the Committee the outcome would be the same in either event.



Therefore, the Committee concludes that for purposes of construing the NCJC, recall petitions and recall elections are election proceedings, and the limitations imposed on judicial candidates with respect to political and campaign activities in typical election contests apply equally to recall petitions and recall elections. Although recall elections are not explicitly mentioned in Canon 4, sitting judges are subject to recall petition and election just as they are subject to regular elections, and therefore the Committee concludes that the provisions of Canon 4 and the protections to the judiciary created therein apply to recall petitions and elections and regulate the conduct of judicial candidates in recall petition and election procedures.

The purpose of recall proceedings is to elect or retain a candidate for public office. *See generally, Nev. Const. Art. 2, Sec. 9; NRS 306.* Recall petitions and elections are regulated by Nevada election laws, and are subject to many of the same campaign and finance laws and limitations as regular elections. *See generally, NRS 293, 294A and 306.* Committees organized to circulate recall petitions must register with election officers, and are subject to contribution reporting requirements. *NRS 294A.250-280.* Candidates nominated to appear on recall ballots are also subject to contribution reporting requirements. *NRS 294A.120.* Given the intent and purpose of recall procedures, the Committee concludes that the Canons applicable to campaign activities apply equally to recall procedures.

The Committee also concludes that a sitting judge who is the subject of a recall petition or recall election and a candidate nominated to appear on a ballot against a judge subject to recall are considered “judicial candidates” for purposes of construing the NCJC, including Canon 4. *See Rule 4.1, Comment [2]* (“Canon 4 applies to all incumbent judges and judicial

candidates”). 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.” *Nev. Code Jud. Conduct, Terminology.* A sitting judge opposing a recall effort is seeking retention in judicial office consistent with the purpose and intent of this definition. Similarly, any person seeking selection for judicial office as an opposing candidate on a recall election ballot would be considered a judicial candidate for purposes of construing the NCJC.

Having determined that Canon 4 applies to the activities of judicial candidates in recall proceedings, the Committee turns to the specific hypothetical presented.

A. May a Judge Campaign Against A Recall Petition?

“[T]he role of a judge is different than that of a legislator or executive branch official, . . . [and] campaigns for judicial office must be conducted differently from campaigns for other offices.” *See Nev. Code Jud. Conduct Comment 11, Rule 4.1.* 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.” *Nev. Code Jud. Conduct, Canon 4.* Rule 4.1 sets forth limitations on the campaign activities that a judicial candidate may engage in. The Committee concludes that the limitations in Rule 4.1 apply to campaign and political activities in recall proceedings.

No Canon or Rule in the NCJC prohibits a judge from campaigning against a recall petition seeking to remove that judge from public office. To the contrary, Rule 4.2(B)(2) authorizes a judicial candidate to “speak on behalf of his or her candidacy through any medium.” *See generally Williams-Yulee v. Florida Bar*, 575 U.S. ____ (2015)(discussing heightened

protections of political speech). Comment [8] and [9] to Rule 4.1 are also instructive as to the ability of a judge to respond to recall petition issue. Comment [8] provides:

“Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, 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 misleading allegations may be made that bear upon a candidate’s integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In addition, when an independent third party has made unwarranted attacks on a candidate’s opponent, the candidate may disavow the attacks, and request the third party to cease and desist.”

Comment [9] states, in relevant part, that “Subject to paragraph (A)(12), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign.” Similarly, Comment [4] provides that the “Rules do not prohibit candidates from campaigning on their own behalf.”

A sitting judge may respond to recall allegations to protect both the judge and the integrity of the judicial office. Considering the applicable provisions of Rule 4.1 and 4.2, and in light of the commentary to Rule 4.1, the Committee concludes a sitting judge subject to a recall petition may campaign against the recall petition, subject to the limitations on campaign activities set forth in Canon 4, including Rules 4.1 and 4.2.

B. May a Judge Accept Campaign Contributions to Defeat a Recall Attempt?²

Rules 4.1, 4.2 and 4.4 generally regulate a judicial candidate’s ability to solicit campaign contributions. Rule 4.2 (B) authorizes a candidate for judicial office to “solicit and accept campaign contributions, either personally or through a campaign committee” in accordance with Rule 4.2(C), 4.2(D) and other applicable law.

The critical issue presented by the hypothetical is the extent to which the contribution restrictions in Rule 4.2(C) apply in recall proceedings. 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). Subsection (1) provides that 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).* As Rule 4.2(C) applies to recall petition and elections, the question is whether a recall is considered a contested election for purposes of determining whether a sitting judge is “opposed” under Rule 4.2(C), and if so, when is that judge deemed to have become “opposed” for purposes of soliciting and accepting contributions?

² The United States Supreme Court recently upheld constitutionality of personal solicitation bans in Canon 7(C)(1) of Florida Code of Judicial Conduct against first amendment challenge, recognizing the compelling state interest in preserving public perception of judicial integrity. *Williams-Yulee v. Florida Bar*, 575 U.S. ____ (2015).

The limitations in Rule 4.2(C) on the timing of when a judicial candidate may solicit or accept contributions arose as a result of statutory changes in 2007 which advanced the filing date for judicial candidates in regular elections from May to January. *Rule 4.1, Comment [3]; JE 08-005*. 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 purpose of the limitation in Rule 4.2(C) is to avoid the appearance of impropriety or coercion which may arise if a judicial candidate, who has no opposition to office and needs only one vote to win their election, engaged in fundraising for a campaign that is essentially not necessary.

The Committee concludes that for purposes of applying Canon 4, a recall petition and recall election constitute an opposed contested election because the outcome of which will determine whether the judge *retains* his or her elected public office. Unlike an uncontested regular election where a judicial candidate has no opposition and need only one vote to win, a judge subject to a recall petition is opposed by a recall committee and petitioners, and must receive a majority of votes at a recall election in order to retain the seat. In a recall election, the ballot may list just the name of the judge subject to recall or it may also include the names of other candidates who have qualified for the ballot through a nominating procedure. NRS 306.040. Even if no other candidate’s names appear on the ballot, however, a sitting judge may still lose the election and the public office by majority vote and therefore is subject to an outcome equivalent to a contested regular election.

With respect to the timing of when such “opposition” arises, it does not appear that the process of recall elections was

specifically contemplated by the procedures to determine when “opposition” arises under subsections (1) through (3) of Rule 4.2(C)³. 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 a sitting judge is subject to a recall petition pursuant to NRS Chapter 306. However, the Code should be construed as “rules of reason” consistent with constitutional and statutory requirements, and “with due regard for all circumstances, and given that construction the Committee believes the “close of filing” deadline can be applied consistently to the recall petition process. *See JE 12-005* (construing when “opposition” arose under Rule 4.2(C) in a nominating procedure to fill a judicial vacancy).

The Committee concludes that for purposes of Rule 4.2(C), a judicial candidate in a recall proceeding becomes “opposed” when the notice of intent to circulate the recall petition is filed with the clerk. NRS 306.015(1). It is at this point that the election process and campaign against the judge has commenced, and opposition has been identified in terms of the recall committee and statutory procedure to initiate the removal of the judge from office. The Committee believes that for purposes of construing Rule 4.2(C), the recall petition itself functions as opposition, creating a contested election and warranting application of contribution and solicitation limitations otherwise applicable to campaign and political activity under Canon 4. As a result, the Committee concludes that in the recall petition process, the close of filing

³ Given the absence of direction on recall petitions, the Committee believes additional clarification from the Supreme Court on the application of Rule 4.2(C) to recall procedures would be beneficial.

equivalent is the date the notice of intent to circulate the petition is filed with the election officer under NRS 306.015.

CONCLUSION

The Committee concludes that Canon 4 applies to recall petitions and election proceedings, and that a sitting judge subject to recall may campaign against such recall efforts as well as solicit and accept contributions to campaign against a recall petition, subject to and as otherwise permitted by Canon 4. For purposes of Rule 4.2(C), the Committee concludes that in the recall petition process, the close of filing equivalent is the date the notice of intent to circulate the petition is filed with the election officer under NRS 306.015.

REFERENCES

Nev. Code Jud. Conduct, Canon 4; Rule 4.1, 4.2 and 4.4; Nev. Code Jud. Conduct, Terminology; *Commentary [8] and [9]* to Rule 4.2; *Rule 5 Governing the Standing Committee On Judicial Ethics*; NRS 306.040; 306.015; JE 12-005; 08-005.

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.



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