

Judicial Ethics Committee

Advisory Opinion 21-02

September 7, 2021

QUESTIONS:

The committee has received the following questions concerning the interplay between Rules 4.1 and 4.2¹ of the Code of Judicial Conduct (the “Code”), Tennessee Supreme Court Rule 10, Canon 4:

Question 1.

May a judge or judicial candidate contribute to a political party, a specific candidate’s campaign, or some other form of political organization?

Answer 1.

Yes. Although RJC 4.1(A)(4) generally prohibits a judge or judicial candidate from soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate, RJC 4.2(C)(3) provides a limited exception to this prohibition for judges or judicial candidates allowing a contribution to a political organization or candidate in an amount up to the limitations provided in Tenn. Code Ann. § 2-10-301 et seq.

Question 2.

May a judge or judicial candidate pay what amounts to an assessment to a political organization for the purpose of offsetting the costs of activities of that organization related to its endorsement of the judge or judicial candidate?

Answer 2.

No. RJC 4.1(A)(4) generally prohibits a judge or judicial candidate from paying an assessment to a political organization, and RJC 4.2 and 4.3 contain no exception for judges or judicial candidates.

¹ The Rules of the Code of Judicial Conduct will hereinafter be referred to by the designation “RJC” followed by the Rule number.

Question 3.

May a judge or judicial candidate pay what amounts to an assessment to a political organization in order to join the organization's balloting efforts, and may the judge or judicial candidate be included on a ballot with nonjudicial candidates?

Answer 3.

No. As with Question 2, RJC 4.1(A)(4) generally prohibits a judge or judicial candidate from paying an assessment to a political organization, and RJC 4.2 and 4.3 contain no exception for judges or judicial candidates. RJC 4.1(A)(3) generally prohibits a judge or judicial candidate from publicly endorsing a candidate for any public office. RJC 4.2(C)(4) provides a limited exception to this prohibition allowing judges or judicial candidates to publicly endorse or oppose judicial candidates in partisan, nonpartisan, or retention elections at any time. No such exception is made for the endorsement of non-judicial candidates, however. Appearing on the ballot with a non-judicial candidate might be perceived as an endorsement of that candidate by the judge or judicial candidate.

DISCUSSION:

The Code clearly makes a distinction between a judge or judicial candidate as an individual participating in the political process and what a judge or judicial candidate may do as a candidate for public office. While allowing both the individual and the candidate to participate in some political and campaign activities, the Code is clearly designed to ensure that "judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure." RJC 4.1, Comment 1; *see also* RJC 4.2, Comment 1.

While other Rules within the Code address the questions raised in this opinion, the main Rules relating to these questions are RJC 4.1(A)(3) and (4), and RJC 4.2 (C)(3) and (4). As discussed *infra*, the Code also addresses the actions of a judge's or judicial candidate's campaign committee, the sections directly addressed herein relate to the individual.

Rule of Judicial Conduct 4.1(A)(3), states that

(A) Except as permitted by law, or by RJC 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

...

(3) publicly endorse or oppose a candidate for any public office;

(4) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate for public office except that a judge or judicial candidate may solicit funds for a political organization or candidate for public office from a member of the judge's family or a member of the judicial candidate's family.

In contrast, RJC 4.2(C)(3) states, "A judge or judicial candidate may, except as prohibited by law, at any time . . . contribute to a political organization or a political candidate in an amount up to the limitations provided in Tenn. Code Ann. § 2-10-301 et seq." Additionally, judges and judicial candidates may "publicly endorse or oppose judges or judicial candidates in a partisan, nonpartisan, or retention election for any judicial office." RJC 4.2 (C)(4). As Comment [1] to RJC 4.2 explains, "Paragraphs (B), (C), and (D) permit judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by RJC 4.1."

Also relevant to the questions posed are the definitions of certain terms used within these Rules. The Code defines a "political organization" as:

a political party or other 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. "Political organization" includes but is not limited to an affiliated political campaign committee as defined by Tennessee Code Annotated section 2-10-102(1), a multi-candidate political campaign committee as defined in Tennessee Code Annotated section 2-10-102(9) and a political campaign committee as defined in Tennessee Code Annotated section 2-10-102(12). For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by RJC 4.4. *See* RJC 4.1 and 4.2.

Tenn. Sup. Ct. R. 10, Terminology. The Code defines "contribution" as:

both financial and in-kind contributions, such as goods, professional services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. “Contribution” includes but is not limited to a contribution as defined by Tennessee Code Annotated section 2-10-102(4). *See* RJC’s 2.11, 2.13, 3.7, 4.1, and 4.4.

The Code, however, does not provide a definition of “assessment” or explain the difference between an “assessment” and a “contribution.”² Tennessee Code Annotated, specifically the election statutes cited in the Code, also does not provide a definition of “assessment.” Therefore, we turn to other sources, such as Black’s Law Dictionary, for an applicable definition. According to Black’s Law Dictionary, a “political assessment is a charge levied on officeholders and political candidates by a political party to defray the expenses for a political canvass.”³ Black’s Law Dictionary (11th ed. 2019).

Question 1: (Contributions)

The first question is whether a judge or judicial candidate may contribute to a political party, a specific campaign, or some other political organization. This question is directly addressed by the Code.

As discussed *supra*, the Code is designed to allow a judge or judicial candidate to participate in some political and campaign activities while keeping in mind that “judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.” RJC 4.1, Comment 1; *see also* RJC 4.2, Comment 1. Although RJC 4.1(A)(4) generally prohibits a judge or judicial candidate from contributing to a political organization or candidate, RJC 4.2(C)(3) provides a limited exception to this prohibition for judges or judicial candidates to make such contributions at any time. Therefore, the Code clearly allows a judge or judicial candidate, acting as an individual citizen, to participate in the political process by contributing, within the limits set by Federal and State election

² We note that the Model Code of Judicial Conduct, which is the framework for the Tennessee Code of Judicial Conduct, also does not define the term “assessment.”

³ Canvass as used here is defined as “a personal solicitation of votes or survey of public opinion” or “to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.marriam-webster.com/dictionary/canvass> (last visited July 29, 2021).

laws, to any organization or person that qualifies under the Code's definition of political organization or candidate for public office.

Question 2: (Assessments)

The second question concerns a scenario in which an organization contacts a judge or judicial candidate to inform the individual that the organization intends to endorse the judge or judicial candidate and will be sending out a mailer or canvassing the polling locations with their endorsements. Routinely, the organization contemplated in this scenario is a city, county, or state organization representing a specific political party or a political action committee which advocates for certain issues. The organization then asks the judge or judicial candidate to contribute to the organization to help offset these costs.

This scenario implicates RJC's 4.1 and 4.2. As noted, the former contains a general prohibition against the payment of assessments and the making of contributions. The latter, however, contains only a limited exception for the making of contributions and no exception for the soliciting of funds or the payment of assessments. Thus, at no point may a judge or judicial candidate solicit funds for or pay an assessment to a political organization or candidate for public office; however, he or she may contribute to a political organization or candidate for public office. Based on the previously discussed definitions of contributions and assessments, it appears that the Code allows a general payment or in-kind gift to a political organization or candidate for general support of the organization or candidate. However, the Code precludes a judge or judicial candidate from paying a fee to a political organization or candidate for the purpose of obtaining support of the organization or candidate as part of its canvassing efforts.

Although the Code prohibits the paying of an assessment in order to obtain an endorsement or aid in the canvassing relating to an endorsement, the Code does not preclude the judge or judicial candidate from accepting the endorsement or from being included on a sample ballot or other canvassing materials or efforts. Furthermore, the Code does not prohibit a judge or judicial candidate from making a general, non-specific contribution to the political organization. However, we remind judges and judicial candidates that the Code *does* preclude them from publicly endorsing a candidate for public office other than in judicial contests. RJC 4.1(A)(3). Though a judge or judicial candidate cannot always help when and with whom he or she is included in a political mailer or other political communication, especially when not notified

prior to publication, being included in such materials that also include non-judicial candidates, might be viewed as an endorsement by the judge or judicial candidate of the non-judicial candidate(s). Therefore, a judge or judicial candidate should request that the endorsing political organization include a disclaimer in its materials noting that the inclusion of the judge or judicial candidate is not an endorsement by him or her of any other candidate(s) for nonjudicial public office, keeping in mind that judges and judicial candidates “shall take reasonable measures to ensure other persons do not undertake on behalf of the judge or judicial candidate, any activities prohibited under [RJC 4.1(A)].” RJC 4.1(B); *see also* RJC 4.2(A)(3) and (4).

Question 3: (Assessments and Endorsements of Non-judicial Candidates)

The third question concerns a specific scenario similar to, and yet having critical distinctions from, that in Question 2. Under the final scenario, a “Club” has invited judges and judicial candidates to join their balloting efforts. Based on the limited information provided to the Committee, it appears that the Club’s sole purpose is to provide an endorsement as well as extensive canvassing and mailing efforts to the judge or judicial candidate. In furtherance of this purpose, the Club has provided each judge or judicial candidate with an agreement outlining the terms between the Club and the judge or judicial candidate. At issue is language in the agreement stating, in part:

The time is now to start the process of winning by inviting you to participate with ____ 2022 primary and general election ballot. By joining our ballot, you receive the backing of the Club; become a part of 40,000 household ballot mail out county wide. Additionally, 60,000 ballots will be printed to be handed out to cover canvassing, early voting, and Election Day. Transportation to the polls will be provided by the Club. Also, the Club covers 11 early voting sites and fifty-six polling sites.

Assuming this or similar clubs meet the definition of a political organization pursuant to the Code, a fact on which we will not opine based on the limited information provided to the Committee, the language employed raises similar concerns to those previously addressed in the analysis of Question 2. First, the language suggests that the judge or judicial candidate will only be included on the Club’s ballot if he or she pays an assessment to the Club for the endorsement. The language falls squarely within the definition of

an “assessment” which, as discussed, is precluded by RJC 4.1(A)(4) and not exempted by RJC 4.2(C)(3). Second, though not expressly addressed, the language referenced and the information provided to the Committee suggests that the Club’s ballot is not limited to judges and judicial candidates. While “[j]udges and judicial candidates running for judicial office in a partisan, nonpartisan, or retention election may group themselves into slates or other alliances to conduct their campaigns more effectively, including the establishment of a joint campaign committee pursuant to RJC 4.4,” *see* RJC 4.2(D), we note again, however, that being included with other non-judicial candidates for public office, especially if one has made a contribution to the organization, might be seen as a public endorsement of the non-judicial candidate, and therefore, is prohibited under RJC 4.1(A)(3). Absent the language in question and the prohibition of paying an assessment, the Committee notes that should the Club meet the definition of a political organization, the Code does not preclude a judge or judicial candidate from making a general, non-specific contribution to the organization.

The Committee is not of the opinion that judges and judicial candidates are precluded from being included on sample ballots, mailings, and canvassing materials, or in efforts by political organizations. However, judges and judicial candidates should ensure that their inclusion in these materials complies with the Code. Additionally, the Code allows a judge or judicial candidate to form a campaign committee, *see* RJC 4.2(B)(1) and 4.4, and it does not prohibit a judge or judicial candidate from hiring a public relations firm or other such person or firm to aid in their campaign efforts. However, we again remind judges and judicial candidates that they “shall take reasonable measures to ensure other persons do not undertake on behalf of the judge or judicial candidate, any activities prohibited under [Rule 4.1(A)].” RJC 4.1(B); *see also* RJC 4.2(A)(3) and (4).

FOR THE COMMITTEE:



J. Ross Dyer, Judge

CONCUR:

Judge Angelita Blackshear Dalton
Judge Tammy Harrington

Judge Deana Hood
Judge Timothy E. Irwin
Judge Betty Thomas Moore
Judge Jerry Stokes