

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: JUNE 21, 2022

ADVISORY OPINION 22-951

POLITICAL ACTIVITY: INVOLVING CANDIDATES FOR JUDICIAL OFFICE, DISTRICT ATTORNEY, AND SHERIFF

FACTS

A criminal judge asks whether he may publicly support (1) candidates for circuit judge and (2) candidates for district attorney and sheriff in the judge's circuit. The candidates for circuit judge include an assistant district attorney who practices in the inquiring judge's circuit, a court referee in the judge's circuit, and the judge's former law partner. The judge is assigned to hear only criminal cases.

ISSUE

1. May a criminal judge publicly support, including making contributions to, non-incumbent candidates in any judicial race under the Alabama Canons of Judicial Ethics? **Answer: The Alabama Canons of Judicial Ethics do not prohibit a judge from publicly supporting or making contributions to non-incumbent candidates for judicial office, subject to some limitations. However, this opinion does not address the permissibility of such support or contributions under Alabama statutes or ethics opinions.**

2. May a criminal judge publicly support, including making contributions to and attending fundraising events of, candidates for district attorney and sheriff in the judge's circuit under the Alabama Canons of Judicial Ethics? **Answer: A judge is strongly discouraged, but not prohibited, from making contributions to the candidates' campaigns, but should not publicly support either candidate.**

DISCUSSION

Although judges are generally required to conform their conduct to all Canons, Canon 7 addresses judges' political activities¹:

A. Political Conduct in General:

(1) A judge or a candidate for election to a judicial office should endeavor at all times to **refrain from political activities inappropriate to the judicial office that he or she holds or seeks.** It is desirable that a judge or a candidate for election to judicial office endeavor not to be

¹ Canon 7 does not apply to probate judges. *Compliance with the Canons of Judicial Ethics § C.*

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involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than a candidate for a judicial office and not be involved in political fund solicitations other than for himself or herself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his election or re-election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he or she at all times conduct himself or herself in such a manner as to prevent any political considerations, entanglements, or

influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

(Emphasis added.) While Canon 7A(1) discourages, but does not prohibit, political activity by judges, it does illustrate “the high standards of conduct to which the judges of this state should aspire in order to maintain the independence, impartiality and integrity of the judiciary of this state.” Ala. Adv. Op. 78-39. Therefore, the burden is on the judge to refrain from political activity that is inappropriate to his or her judicial office and to carefully consider whether the judge’s political activity, when considered in the totality of the circumstances, would violate either the letter or the spirit of Canon 7 or any other Canons, such as Canons 1 and 2. *Id.*

I.

The first question asks whether a judge may publicly support (1) an assistant district attorney, (2) a court referee, and (3) the judge’s former law partner, in their campaigns for a judicial office, including by making contributions. The Commission has previously advised that Canon 7 does not discourage or prohibit judges from making contributions to a candidate, or their campaign committee, for any office. Ala. Adv. Op. 78-39. Furthermore, Canon 7’s

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exception of candidates for judicial office from its general admonishment of political activity in connection with other candidates for political office makes clear that participation in activities connected with candidates for judicial office is not discouraged by Canon 7, without distinguishing between incumbent and non-incumbent candidates. Ala. Adv. Op. 82-162; *see also* Ala. Adv. Ops. 00-755 and 98-689. However, the Commission cautioned that a **judge should take care in ensuring that the manner or method of the contribution does not violate the letter or spirit of Canon 7 or other Canons.** Ala. Adv. Op. 78-39. The Commission has previously advised that allowing a judge's name to be used in a newspaper ad and other media supporting a candidate for a judicial office is permissible political activity. Ala. Adv. Op. 82-162. Moreover, the Commission, in concluding that a trial judge is not disqualified from a proceeding where the judge had donated to the sentencing judge's campaign, stated, "The donating judge has not become beholden to the recipient judge as a result of the contribution any more than the recipient judge becomes beholden due to his or her contributors." Ala. Adv. Op. 97-645; *see also* Ala. Adv. Op. 98-700. Because a mere contribution would not make the judge "beholden" to the recipient, there would be no appearance of impropriety and no reasonable question as to the judge's impartiality based on the

contribution. Therefore, it is the opinion of the Commission that a judge may publicly support and contribute to the campaigns of a court referee and the judge's former law partner, who are candidates for judicial office. It is also the opinion of the Commission that a judge may make contributions to the campaign of an assistant district attorney who is a candidate for judicial office. However, the judge should refrain from publicly supporting the assistant district attorney as a candidate if that assistant district attorney regularly appears before the judge.

This opinion does not address the permissibility of a judge's campaign contributions under Alabama statutes and ethics opinions. *See, e.g.*, Ala. Code § 17-5-15 (2013). The Commission urges the judge to seek advice from the appropriate agency as to Alabama statutes and ethics opinions.

II.

The second question asks whether a criminal division judge may openly support and/or contribute to candidates for the non-judicial offices of district attorney and sheriff. The Commission advised in Alabama Advisory Opinion 78-39 that Canon 7 generally does not discourage or prohibit judges from making contributions to a candidate or campaign committee. However, such activity by a judge may be prohibited by other Canons,

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depending on the circumstances of the specific contribution. *See Commentary*, Canon 2 (“A judge must avoid all impropriety and appearance of impropriety.”); Canon 2C (judges should not “convey or permit others to convey the impression that they are in a special position to influence [them]”); Canon 3C(1) (a judge is disqualified from any proceeding in which “his [or her] impartiality might reasonably be questioned”).

Here, the recipients of the judge’s contributions would frequently be involved in litigation before the judge, assuming each recipient wins their respective elections. Additionally, the judge’s contributions to these candidates would be subject to disclosure on the candidates’ campaign finance reports. *See Ala. Code* § 17-5-8 (2015). While these circumstances alone are not sufficient to prohibit a judge from making the proposed contributions *per se*, additional circumstances could create a reasonable question as to the judge’s impartiality. Under such additional circumstances, the judge would be required to disqualify from all cases in which those candidates would appear. Given that the inquiring judge hears only criminal cases, this would require the judge’s disqualification in a significant number of cases. Furthermore, such additional circumstances could potentially diminish the public’s confidence in the independence of the judiciary, or

at least create an appearance thereof. *See Canon 1.*

Therefore, it is the opinion of the Commission that a judge is strongly discouraged, but not prohibited, from contributing to the campaigns of a district attorney and sheriff in the judge’s circuit. Should a judge decide to make such contributions, the judge must take care to ensure that the manner and method of the contribution would not create a reasonable question as to his impartiality, so as to cause his frequent disqualification from cases in which those officials would appear.

The same concern is present in the context of a judge’s open support or endorsement of a candidate for non-judicial office. The Commission has previously advised:

[Canon 7A(1)] stops short of prohibiting all activity on behalf of a candidate for non-judicial statewide office, stating that political involvement with the campaigns of non-judicial candidates is discouraged, but recognizing that there may be instances where such activity may be engaged in out of necessity due to the nature of the political process. However, if

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such conduct is undertaken, this Canon places a heavy burden on the judge/candidate for judicial office to “conduct himself or herself in a manner as to prevent any political considerations, entanglements, or influences from ever becoming involved in *or from ever appearing to be involved in* any judicial decision or in the judicial process.” In addition, the judge or judicial candidate must endeavor at all times to refrain from specific political activities that are inappropriate to the judicial office that he or she holds or seeks.

Ala. Adv. Op. 06-869 (emphasis in original). Thus, even though it is not prohibited, a judge is discouraged from engaging in campaign activities in connection with a political candidate other than one for judicial office. Ala. Adv. Op. 78-39. In the event that the judge decides to engage in political activity, the Commission has continuously cautioned judges that they should ensure that any political entanglements or activities do not involve or appear to become involved in the judicial decision-making process. *E.g.*, Ala. Adv. Op. 06-869.

Although Canon 7 does not expressly prohibit judges from endorsing candidates for other political offices, other Canons may prohibit such activity. *Id.* (“In determining whether an activity is inappropriate to the judicial office, other provisions in the Canons may be instructive.”). Canon 2C prohibits judges from lending the prestige of their office to advance the private interests of others or from allowing the impression that others are in a position to influence him or her. *Contra* Ala. Adv. Op. 18-937 (allowing judge’s family photograph to be used in family member’s campaign for non-judicial office where there was no indication of or reference to the judge’s judicial office or title). Moreover, endorsements of candidates may potentially give the appearance that the candidate has some power to influence the judge. In upholding restrictions on endorsements by judges, federal courts have recognized, “When a judge or judicial candidate endorses another candidate, it creates a risk of partiality toward the endorsed party and his or her supporters, as well as a risk of partiality against other candidates opposing the endorsed party.” *Wersal v. Sexton*, 674 F.3d 1010, 1025 (8th Cir. 2012), *cert. denied*, 568 U.S. 823 (2012). Thus, a judge may be disqualified in cases where his or her impartiality may reasonably be questioned based on an endorsement of a candidate for public office. *See* Canon 3C(1).

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The Commission expresses overwhelming concern when addressing criminal judges' endorsements of candidates for district attorney and sheriff. By endorsing candidates for district attorney and sheriff, a criminal judge might allow the appearance that those candidates are in a position to influence the judge. Moreover, a reasonable person, knowing all of the facts known to the judge, could reasonably question the judge's impartiality in cases in which the candidates, should they be elected to those offices, appear based on the judge's endorsement. *See* Canon 3C(1); *In re Sheffield*, 465 So. 2d 350, 356 (Ala. 1984). As a criminal judge, the district attorney and sheriff are parties who will be regularly involved in litigation before the judge, potentially leading to the disqualification of the judge in every case in which the party that was endorsed appears. *Accord Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), *reh'g en banc denied*, 619 F.3d 776 (7th Cir. 2010), *cert. denied*, 563 U.S. 983 (2011).

The same concern is potentially present when judges attend fundraising events for non-judicial candidates as well, depending on the circumstances. Even so, the Commission has previously advised that a judge may attend a fundraising dinner for a candidate. Ala. Adv. Op. 82-144. Questions about attendance at a specific event should be

submitted to the Commission, along with the extent of the judge's proposed participation, for advice as to whether the judge's participation would violate any of the Canons.

REFERENCES

Alabama Advisory Opinions 78-39, 82-144, 82-162, 97-645, 98-689, 98-700, 00-755, 06-869, 18-937.

Alabama Canons of Judicial Ethics 1, 2, 2C, 3C(1), 7A(1).

Ala. Code § 17-5-8 (2015).

Ala. Code § 17-5-15 (2013).

In re Sheffield, 465 So. 2d 350 (Ala. 1984).

Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010)

Wersal v. Sexton, 674 F.3d 1010 (8th Cir. 2012).

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Alabama Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P.O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; email: jic@jic.alabama.gov.