



# Indiana Judicial Nominating Commission Indiana Commission on Judicial Qualifications

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## ADVISORY OPINION

Code of Judicial Conduct  
Canon 7

#1-92

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

### PREAMBLE

This Advisory Opinion treats several issues concerning Canon 7 of the Code of Judicial Conduct. In reaching the conclusions of this opinion, the Commission was, of course, bound by the language of Canon 7; the sections of Canon 7 which might benefit from some modification are mentioned in the opinion. The Commission was bound also by its view of the spirit of Canon 7 which, it is recognized, inherently creates tensions for judges between their judicial duties and the political demands many of them encounter. In its approach, the Commission has endeavored to remain sensitive to these difficulties and, at the same time, mindful that the ideals of judicial independence, impartiality, and integrity must prevail over political exigencies.

### ISSUES

The issues are as follows:

1. What the distinctions are in the current version of Canon 7 between appointed judges and elected judges;
2. What the treatment is of judicial candidates in Canon 7;
3. What the role is of a judicial candidate's committee established pursuant to Canon 7B(2);
4. Whether a judge may contribute to a candidate or to a political party or organization and whether payments in the form of assessments, slating fees, or other mandatory political payments are proper;

5. Whether it is proper for a judge to authorize or allow automatic payroll deductions of contributions to political organizations;
6. Whether judges may attend political gatherings, including fund raisers for individual candidates; and,
7. Whether judges may participate as guests of honor at party fund-raising events.

#### ANALYSIS

1. In its present form, the Code of Judicial Conduct makes only one distinction among Indiana judges concerning the methods by which they take office; that is, election or appointment. Canon 7 refers first in 7A(1) to judges generally, then, specifically in 7A(2) to judges who hold office filled by public election between competing candidates. The language is as follows:

##### **A. Political Conduct in General.**

(1) A judge or a candidate for election to judicial office should not:

- (a) act as a leader or hold office in a political organization;
- (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
- (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election for re-election, identifying himself as a member of a political party, and contribute to a political party or organization. For purposes of this section a judge holding such office will be deemed to be a candidate for re-election during his entire term of office.

Thus, Canon 7A(1) pertains to all Indiana judges except judges who fall under Canon 7A(2), who are elected in public elections between competing candidates. Only judges who are so elected may engage in the activities specified in Canon 7A(2) -- they may attend political gatherings, speak on the judge's own behalf at those gatherings and identify themselves as members of political parties, and they may contribute to a party or organization. Under the current Code, judges who are appointed, even if their appointments depend upon political affiliation, fall under Canon 7A(1) and are not permitted to engage in those activities prohibited in that section, just as appointed judges who face uncontested retention elections are prohibited. The Code as it was adopted in Indiana, and as it is currently written, does not address the concerns of

judges such as the Marion County Municipal Court judges, who are not elected but who must identify themselves with political parties for purposes of gubernatorial appointment. This may be a deficiency in the Indiana Code of Judicial Conduct which could be addressed when the Code is reevaluated in light of the new 1990 ABA Model.

2. This issue pertains to the status of judicial candidates under Canon 7 of the Code of Judicial Conduct as adopted in Indiana in 1972 and is included here to clarify for the purposes of the rest of the opinion how the issues addressed apply to candidates.

Canon 7A(1) and Canon 7A(2) each apply equally to judges and to judicial candidates. Canon 7A(1) begins with the statement, "A judge or a candidate...should not...", and Canon 7A(2) states initially, "A judge holding an office filled by public election between competing candidates, or a candidate for such office may...". Therefore, the conclusions reached in this opinion about appropriate conduct under Canon 7 apply to judicial candidates as well. We note that the 1990 ABA Model Code of Judicial Conduct, in Model Canon 5B, does carve an exception for non-judge candidates for judicial appointment, allowing those candidates to engage in various political activities in which a judge may not engage. The current Canon 7 in Indiana's Code of Judicial Conduct, however, treats all judicial candidates as if they were judges.

3. This issue concerns the scope of permitted activities of a judge's campaign committee. Canon 7B(2) provides:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committee may solicit funds for his campaign no earlier than one hundred and twenty (120) days before a primary election and no later than ninety (90) days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

The reason for this provision in the 1972 Model was, apparently, to attempt to insulate the judicial candidate from the inherent threat to appearances of impartiality when a judge is conscious of who did and who did not support the candidacy. McFadden, Electing Justice: The Law and Ethics of Judicial Election Campaigns, AJS, 1990, p. 32. Of course, campaign finance disclosure laws render this insulating role meaningless, but the value of the committee requirement still is that it "prevents those unseemly situations in which candidates ask potential contributors directly for money. Such a request, especially from a sitting judge to a lawyer practicing before the judge's court, is especially hard to resist, and can lead to hard feelings on one side or the other, depending on the answer given". Id. at 33.

Pursuant to Canon 7B(2), the committee's role is limited to the solicitation and management of campaign funds and the solicitation of publicly stated support. The committees may solicit funds and support from lawyers. These activities may not be engaged in by the judge personally, and the committee may solicit funds only during the specified time period. A question before the Commission is whether the judge's committee may make a contribution to a political party or organization if the Code permits the judge to make such a contribution. (Issue #4 below). We believe, again, that Canon 7B(2) sets out the full scope of permitted committee activities and that the committee is not permitted to act in the judge's stead for other purposes. Although Indiana election laws would permit a candidate's committee to make a contribution to a political party (or to a candidate), (I.C. 3-9-3-4(2)), it appears to the Commission inappropriate as a matter of judicial ethics, primarily because of the Canon 2 restrictions against use of the office for others' interests, for a judge's committee to receive contributions in support of the judicial candidate and to then forward those contributions as the committee chooses. Also, the Canon 7A(4) prohibition against "any other political activity" should prevent the candidate's committee from using contributions to support other political interests.

4. The issue is whether a judge may contribute financially to a political candidate, party, or organization and whether payments in the form of assessments, slating fees, or other mandatory political payments are proper.

Judges may not contribute to candidates, regardless of the method by which the judges take office. Canon 7A(1)(c). Pursuant to Canon 7A(2), a judge who holds office filled by public election between competing candidates may contribute to a party or organization. A political organization, according to the Terminology section of the 1990 ABA Model, "denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office." This meaning of political organization, however, does not include a candidate's committee. Were it to be so construed, the clear prohibitions against contributions to candidates would be senseless because a candidate may take contributions only through a committee.

The next question is the propriety of judges making mandatory political payments; the Code prohibits assessments but permits party contributions by elected judges. It is the opinion of the Commission members that, in ordinary parlance, the word "contribution" implies the voluntariness of a donation, whereas an "assessment" appears to involve a fee or obligation, the amount and timing of which is imposed, in this context, by the political party. In Indiana, some party organizations require the payment of "slating fees", which are not only assessments, but are prerequisites to party support. In fact, a slating fee often bears no relationship to the actual cost of supporting the candidate and, as such, represents a far greater demand than a true assessment, which, according to Black's Law Dictionary, is ascertained based upon the benefit received by the payor.

Again, the Code clearly prohibits the payment of assessments by any judge. While the literature is scarce pertaining to the reasons the drafters of the Code prohibited assessments but allowed contributions, a fair presumption is

that the decision was based upon concerns that the independence and public perception of the judiciary would be impaired if judges and their parties were so beholden to one another that the judges were, in effect, billed for the parties' support and the parties' coffers were enhanced by forced payments from judges. "Judges play a role in our government different from other elected officials, a role often inconsistent with the high finance and hurly-burly of political campaigns. Conduct acceptable in ordinary political races for the statehouse may not be acceptable for candidates who are later charged with deciding impartially all cases that come before them.". McFadden, Electing Justice: The Law and Ethics of Judicial Election Campaigns, American Judicature Society, 1990, xiv.

Clearly, political organizations are more likely to support active and contributing party members, and, obviously, it is reasonable and necessary for them to expect their candidates to contribute their fair share of the cost of the support. This must be accomplished on a voluntary basis.

5. A somewhat related issue is the propriety of judges authorizing or allowing automatic deductions from court employees' paychecks to support political parties. The Commission members believe that this, too, is inappropriate judicial conduct and that, to the extent a judge has any control over whether such deductions occur, the judge must forbid it.

If a judge is requiring his or her employees to donate part of their paychecks to a political party, the judge is engaging in political activity for which Canon 7 makes no allowances. After setting out very specifically the permitted activities, Canon 7 then provides, "A judge should not engage in any other political activity except on behalf of measure to improve the law, the legal system, or the administration of justice". Canon 7A(4). Such conduct would also constitute of violation of Canon 2B which prohibits the use of office to advance the interests of others. Even where a judge merely acquiesces in this type of automatic deduction plan for employees under the judge's supervision, the judge acts contrary to Commission advice in Opinion #1-90, wherein we stated in the conclusion, "No employee shall engage in any political activity during scheduled work hours, or when using government...equipment, or on court property." Advisory Opinion #1-90, Indiana Commission on Judicial Qualifications. Neither the judge nor the employees under the judge's control may make political contributions through payroll deductions.

6. This issue is whether judges may attend political gatherings. Judges who are not elected by public election between competing candidates may not, see Canon 7A(1)(c), but elected judges may do so. See Canon 7A(2). And, the Indiana Supreme Court has advised the Commission of its position that, although it is not expressly stated in the Code of Judicial Conduct, a judge who may attend a political gathering may purchase a ticket to the gathering for the judge and the judge's guest.

The question arises as to the definition of a "political gathering". It appears to the Commission members that not every gathering is appropriate for judicial attendance. In Canon 7A(2), where it is stated that an elected judge may attend political gatherings, the context is clearly one concerning

political activity necessary for an elected judge to remain in the political mainstream for the good of his or her own candidacy. Judges are not free to engage in any and all types of political activity, as is illustrated in the language of Canon 7A(4) which provides, "A judge should not engage in any other political activity except...to improve the law, the legal system, or the administration of justice." As we stated in Advisory Opinion #2-91, judges' political activities must remain reasonably related to their own election interests. Advisory Opinion #2-91, Indiana Commission on Judicial Qualifications.

Whether a particular gathering is a meeting, a debate, a dinner, a cocktail party, or a rally is not important; the meaningful distinction, we believe, in determining whether elected judges may attend a gathering involves the purpose of the function, and we believe that if the event is a fund-raising occasion not involving the judge's own campaign, that the judge may attend only if funds are being raised for the party generally or for an entire ticket or slate. Where a candidate or candidates who do not comprise together an entire ticket are being honored for the purpose of fund raising, the judge's attendance becomes less a function of participation in the party organization and takes on the trappings of an endorsement in violation of Canon 7A(1)(b). While this is not a line clearly drawn in the language of the Code, it is a distinction the Commission members believe is reasonably made in its attempt to ascertain and abide by the spirit of the Code of Judicial Conduct.

7. Another issue relating to political gatherings and fund raisers is the propriety of judges participating as guests of honor at party fund-raising events which are not related to the judges' own fund raising. In Indiana, some party organizations hold annually what they call judicial receptions, which honor a group of judges affiliated with the party. Lawyers are solicited to purchase tickets and to attend for the purpose of paying tribute to the judges, and the considerable profits go to the political party.

The only issue addressed here is the propriety of the judges' participation in these judicial receptions during those periods of time in which their committees may not raise funds for the judges' own campaigns. Pursuant to Canon 7B(2), a judicial candidate's committee may solicit funds for the judge's campaign from one hundred twenty days before the primary to ninety days after the general election, and the Commission does not believe it is inappropriate for a judge to participate as a guest of honor at a judicial reception for the benefit of the party during the judge's own fund-raising period.

However, the Commission members are of the opinion that judges should not be guests of honor at these receptions except during that fund-raising period. It is clear from the reception announcements and from the practice that these judges' names and offices are being used for the purpose of raising money from lawyers for the political parties. Because this practice, other than in a judicial election year, is completely unrelated to the judges' own campaigns, it constitutes an improper use of the judicial office under Canon 2(B) which states, "a judge may not lend the prestige of his office to advance the private interests of others". As was stated in Advisory Opinion #2-91, a judge's political activity must remain reasonably related to the judge's own election interests; participating as a guest of honor at a party fund-raiser

when not actively campaigning violates not only Canon 2(B) as stated above, but Canon 7 which, after specifying appropriate activities, goes on to state, "A judge should not engage in any other political activity...." Canon 7A(4), Code of Judicial Conduct.

Again, during the time the judge's committee is allowed to hold fund raisers for the judge, a fund raiser for the party which features the judicial candidate is reasonably related to the judge's own campaign activities; any profit to the party can be seen as a contribution from the judge and, in answer to a question posed to the Commission by one of the organizers of these receptions, the Commission would take no position as to how the profits from the judicial receptions are spent by the party. Yet, although an elected judge may contribute to the party at any time, the Commission would not approve as an appropriate contribution this obvious use of judicial prestige to fill the party coffers except when the judge is of necessity engaged in these types of activities for his or her own campaign.

#### CONCLUSIONS

1. Issue 1 concerned the distinctions in the current version of Canon 7 between appointed judges and elected judges. Canon 7 as it currently is written makes only one distinction between appointed and elected judges. Only judges holding office filled by public election between competing candidates may engage in the political activities specified in Canon 7A(2).

2. Issue 2 involved the treatment of judicial candidates in Canon 7. Canon 7 as it currently is written applies to judicial candidates as if they were judges.

3. Issue 3 pertained to the role of a judicial candidate's committee established pursuant to Canon 7B(2); The role of a candidate's committee formed pursuant to Canon 7B(2) is limited to the solicitation of publicly stated support and the solicitation and management of funds, which may come from attorneys. A committee may not contribute to a candidate, party, or political organization.

4. Issue 4 was whether a judge may contribute to a candidate or to a political party or organization and whether payments in the form of assessments, slating fees, or other mandatory political payments are proper; Judges may not contribute to political candidates, but judges who are elected in public elections with competing candidates may contribute to political parties and organizations. No judge may pay an assessment, slating fee, or similar mandatory political payment.

5. Issue 5 was whether it is proper for a judge to authorize or allow automatic payroll deductions of contributions to political organizations. Judges may not participate in or authorize or allow their employees to participate in payroll deductions as political contributions.

6. Issue 6 was whether judges may attend political gatherings, including fund raisers for individual candidates. Judges who are elected in public elections with competing candidates may attend political gatherings, including fund raisers for political parties, organizations, or candidates who comprise an

entire ticket or slate, but they may not attend fund raisers for individual candidates or for candidates not comprising an entire ticket or slate. A judge who may attend a political gathering may purchase a ticket to the gathering for the judge and the judge's guest.

7. Issue 7 was whether judges may participate as guests of honor at party fund-raising events. A judges may participate as a guest of honor at a party fund-raising event only during the period of time the judge's committee would be authorized under Canon 7B(2) to solicit funds for the judge's campaign.