Advisory Committee on the Code of Judicial Conduct

August 2, 2012

[redacted]

Re: Judicial Advisory Opinion No. 12-08

Dear [redacted]

You are a candidate for your position as district judge and, with your campaign committee, are planning fund-raising events. You have asked the Advisory Committee on the Code of Judicial Conduct whether your campaign is permitted under the Code of Judicial Conduct to advertise an event by stating amounts for suggested contributions and adding that "contributions gratefully accepted but not required." Your campaign committee intends to invite attorneys to these events, and you intend to attend.

As a judicial candidate in a partisan election, you may engage in campaign activities as set forth in Rule 21-402 NMRA. The rule permits you to engage in campaign fund-raising activity provided that it does not raise an appearance of impropriety. Rule 21-402(B). The rule specifically addresses contributions by attorneys and permits a judge's campaign committee to solicit campaign from attorneys. Rule 21-402(E). It prohibits the campaign committee from disclosing the identity of contributing attorneys to the judge. *Id.*

Your question highlights the difficulty of judges conducting election campaigns in which they must engage in fund-raising activities. As a practical matter, attorneys have the most knowledge of the quality of judicial candidates and tend to be the most likely group of campaign contributors. However, campaign contributions to judges by attorneys have the potential of raising the appearance that the candidate judge may not be impartial when hearing a case involving a contributing attorney.

The Code of Judicial Conduct addresses this issue by insulating the judge from the knowledge of the identity of attorney contributors. Rule 21-402(E). In the circumstances you describe, although a judge may attend a fund-raising event at which attorneys are present, the judge does not know if an attending attorney has made a contribution if a contribution is not required.

Thus, the Committee believes that the type of invitation to a fund-raising event that suggests a contribution or levels of contribution but specifies that a contribution is not required to attend is permissible under the rule. The Committee also directs your attention to Comment 3 to Rule 21-402 (stating that "campaign committees should exercise particular vigilance when accepting contributions from lawyers whose firm has a pending case) and Judicial Advisory Opinion No. 12-03, dated February 20, 2012 (redacted version attached) in which the Committee addressed similar questions concerning endorsements of a candidate judge by attorneys.

Very truly yours,

James J. Wechsler
Chair

JJW:ow

cc: Hon. Kevin L. Fitzwater
Hon. Freddie J. Romero
Paul L. Biderman
Professor Robert L. Schwartz

Advisory Committee on the Code of Judicial Conduct

February 20, 2012

[redacted]

Re: Judicial Advisory Opinion No. 12-03

Dear [redacted]

You have requested from the Advisory Committee on the Code of Judicial Conduct guidance in the interpretation and application of Comment 17 of the Committee Commentary to Rule 21-402 NMRA 2012 of the revised Code of Judicial Conduct that became effective January 1, 2012. That comment reads:

> Candidates for judicial offices may, through a campaign committee, solicit endorsements of support, including endorsements from attorneys. The judicial candidate may not solicit endorsements and should not be informed about the identity of individual attorney supporters.

Your inquiry specifically raises two questions. The first focuses on the meaning of the word "should" in the second sentence, and the second focuses on the remainder of the second sentence concerning a judicial candidate's information about the identity of attorney supporters.

With respect to your first question, you point out that in the Scope of the Code there are two provisions that have bearing on the intended meaning of the word

"should" and you believe that they are inconsistent. Paragraph 2 of the Scope states

> When a rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

Paragraph 4 of the Scope provides that

> the comments [to the Code] identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the canons, judges should strive to exceed the standards of conduct established by the rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

The Committee does not believe that the two paragraphs are inconsistent. Paragraph 2 discusses the structure of the Code, which consists of the canons and the rules. It explains that the "canons" are the "overarching principles of judicial ethics that all judges must observe." It then explains that a "rule" provides the basis for discipline if violated, but the "canons" guide the interpretation of the "rules." Paragraph 2 then discusses the language in question by explaining that permissive language in the rules, such as "should" commits conduct to the "personal and professional discretion" of the judge or judicial candidate. Paragraph 4 (and paragraph 3) of the Scope, on the other hand, discusses the "comments" to the rules. By explaining that "the comments identify aspirational goals," paragraph 4 sets standards to which judges "should strive," particularly in the exercise of their discretion. However, comments are not rules and are not of themselves binding and enforceable. *See* Scope, paragraph 3 ("Comments neither add to nor subtract from the binding obligations set forth in the rules.")

The application of these paragraphs may be explained with reference to your second question concerning a judge's or judicial candidate's knowledge of the identity of individual attorney supporters. In this regard, you state that you are concerned because

> [a]s a practical matter, attorneys are inherently involved in judicial races in one form or another. They may serve on campaign finance committees; campaign organizational committees; may host fundraisers; may attend fundraisers (by virtue of their appearance it can be implied that they support you, whether of not they actually donate money); support candidates in literature or advertisements (i.e. Bar Bulletin). In these situations, it would be unrealistic for a judicial candidate not to know the attorney's identity.

Canon 4 states the "overarching principles of judicial ethics," Scope, paragraph 2, that a judge or judicial candidate "shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." Rule 21-400 NMRA 2012. Rules 21-401 through 21-405 NMRA 2012 set forth the standards of conduct required by the Code. *See* Scope, paragraph 2 (stating that "a judge may be disciplined only for violating a rule"). The Code recognizes that Canon 4 must allow political activity by judges who are candidates in a partisan, non-partisan, or retention election. *See* Rule 21-402 (establishing rules allowing certain political activity by judicial candidates). In particular with respect to your inquiry, Rule 21-402(A)(1)(e) requires a judicial candidate intending to raise or expend more that $1000 to form a campaign committee. In addition, Rule 21-402(E) prohibits a judicial candidate from soliciting or receiving campaign funds from an attorney, and further prohibits a campaign committee from disclosing to the judicial candidate "the identity or source of any funds raised by the committee."

Comment 17 to Rule 21-402 provides guidance to the rule. It addresses "endorsements of support" from attorneys and others and permits campaign committees, not judicial candidates, to solicit such endorsements. By further stating that judicial candidates "should not be informed about the identity of individual attorney supporters," it means that the campaign committee should not inform the judicial candidate of the attorneys from whom the committee has obtained endorsements.

Paragraph 4 of the Scope of the Code describes as aspirational the comments to the Code, including Comment 17 to Rule 21-402. It expresses the overall goal that judges not only meet the standards established by the rules, but strive to exceed them in order to enhance the dignity of judicial office. In the context of Comment 17 to Rule 21-402, such effort on the part of a judge may include refusing to review the

names of attorney supporters that will or do appear in an advertisement on behalf of the judge.

Your inquiry tangentially raises the additional question concerning the knowledge of a judge or judicial candidate of the identity of attorneys who support the campaign committee in ways other than endorsements. As you point out, "attorneys are inherently involved in judicial races in one form or another." Indeed, attorneys are generally the persons who are most interested in judicial campaigns. The Committee believes that the Code takes this practicality into account. And, if the judge believes that he or she has developed a personal bias concerning an attorney as a result of knowledge received that the attorney has supported the judge in the judge's campaign that might reasonably affect the judge's impartiality, the judge shall disqualify himself or herself in a proceeding involving the attorney. Rule 21-211(A)(1) NMRA 2012.

Very truly yours,

James J. Wechsler
Chair

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