

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 05-03
(October 26, 2005)

**Campaigning and Fund Raising in Retention Elections
(Partial Revocation of Opinion 78-01)**

Issues

1. May judges subject to retention elections campaign and raise money in the absence of active opposition?

Answer: Yes.

2. If so, when may judges organize a campaign committee and begin to raise funds?

Answer: See discussion.

Facts

Arizona has a hybrid judicial selection system in which judges are selected for office by one of three methods. All appellate court judges in the state and all superior court judges in Maricopa and Pima Counties are nominated for judicial office by a process commonly referred to as merit selection and retention. Applicants are initially screened by nominating commissions that submit a short list of qualified candidates to the governor, who then makes a final selection. After an initial term on the bench, merit-selected judges run unopposed in retention elections. All other superior court judges and justices of the peace must campaign for office in partisan or contested elections. Municipal court judges, with one exception, are appointed to office by city and town councils and are subject to periodic reappointment in the same fashion.

Because they appear on the ballot unopposed, judges who run for office in retention elections normally do not need to campaign in the traditional sense. However, some candidates in retention elections may be opposed by groups that run ads just before the election urging voters to cast ballots in opposition to targeted judges for their decisions in specific cases. For this reason, judges who anticipate active opposition may wish to organize campaign committees and raise funds early in the election cycle. Although the advisory committee considered this issue many years ago, subsequent changes in the Code of Judicial Conduct have created some uncertainty about restrictions on campaigning in retention elections.

Discussion

The appropriate time to begin campaigning in retention elections was the subject of an early opinion prepared by the advisory committee in 1978. In Opinion 78-01, Issue 1, the committee stated:

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There should be no campaigning for office unless the judge reasonably believes that he or she has or will have substantial active opposition, which may be defined generally as “substantial public opposition to a judge’s retention in office or re-election competing against another candidate.” The opposition should be in the form which advocates that the judge should not be retained in office or re-elected to office. If the judge reasonably believes that he or she has or will have substantial active opposition, then he or she may start campaigning regardless of how early it may be.

Although the opinion does not cite any authority for this conclusion, it apparently relies on the analysis contained in a set of guidelines prepared by the committee for the 1978 elections. In this undated document, the advisory committee concluded that the merit selection process approved in the 1974 general election was intended to restrict the political activity of justices and judges of courts of record. Citing the argument contained in the secretary of state’s publicity pamphlet on merit selection, the committee noted that, “This proposal will prohibit judges from political activity. No longer will it be necessary for them to solicit or accept campaign contributions for their own use. They will be completely free of political influence and obligation.” Judicial Ethics Advisory Committee, *Guidelines—1978 Primary and General Elections*.

The advisory committee bolstered its reasoning by referring to Canon 7B(3) of the 1975 Arizona Code of Judicial Conduct that supposedly was based on a similar canon in the American Bar Association’s 1972 Model Code of Judicial Conduct. Canon 7B(3) of the model code states that,

An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and *whose candidacy has drawn active opposition*, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2.)”

(Emphasis added.) The committee also referred to the reporter’s notes on this section of the model code for guidance on how judges running for retention or reelection against a competing candidate should conduct themselves.

As a result of its investigation into the problems that arise in elections for judicial office, the [ABA] Committee concluded that some aspects of merit system elections require separate treatment. The merit system election, an election in which the candidate (an incumbent judge) runs against his [or her] record instead of against another candidate, is becoming more widespread each year.

In theory the merit system election removes a judge from politics and from the rigors of the campaign trail, but in a significant number of instances the theory fails. The Committee nevertheless accepted the theory as sound

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for the purpose of establishing a general standard in merit system elections. Ordinarily candidates in such elections may campaign for office within the limitations imposed by Canon 7B(1) but are not authorized to seek outside funding or publicly stated support. If, however, a candidate draws active opposition, subsection B(3) permits him [or her] to campaign in response to the opposition and to seek outside funding and publicly stated support in the manner provided in subsection B(2). In thus authorizing a response analogous to self-defense, the Code allows a merit system candidate with active opposition to campaign under the same standard that is applicable to a candidate who is competing against another candidate for judicial office.

E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 100 (1973).

The advisory committee's reliance on the reporter's analysis was misplaced, however, since Arizona chose *not* to adopt the original language in Canon 7B(3) of the ABA model code and instead opted for the following language:

An incumbent judge who is a candidate for retention in or re-election to office may campaign for retention or re-election to office; may obtain publicly stated support; and in the manner provided in subsection B(2) may obtain campaign funds.

Arizona Code of Judicial Conduct, Canon 7B(3) (1975). The difference between the two versions of the code is significant. The Arizona provision contains no restrictive language. There is no reference to active opposition as a prerequisite to campaigning, and all incumbent judges are placed on the same footing.

The recognition that all judges should be able to campaign for office became official ABA policy in 1990 when it adopted a new model code in which Canon 7B(3) was dropped in its entirety and a new provision, Canon 5C(3), was adopted in its place. (The canons were also renumbered.) The reporter's note to the new canon provides insight to the ABA committee's intent:

New Section 5C(3) was added to permit basic campaign publicity by judicial candidates in public elections. An alternate that was provided in the Midyear Draft for adoption in jurisdictions wishing to prohibit such conduct in retention campaigns was deleted by Committee Amendment, because, as noted earlier, the Committee *could find no basis for treating retention elections differently from other public elections.*

(Emphasis added.) Lisa L. Milord, *The Development of the ABA Judicial Code* 55 (1992). In arriving at this conclusion, the drafters observed that "in many judicial campaigns, . . . fund-raising is a necessary evil, particularly where a candidate must respond to an unforeseen, last-minute onslaught by the opposing candidate . . ." *Id* at 54.

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When the Arizona Supreme Court adopted its version of the model code in 1993, it did not alter the language of Canon 5B(3) and did not place any restrictions on when incumbent judges running for retention or for reelection are allowed to form campaign committees and raise money. In light of the specific language in this canon and the history of its development, we can only conclude that judges running in retention elections may campaign for office in the same manner and under the same conditions as judges who run in partisan or contested elections.

Issue 2

Judges running for retention may choose to actively campaign for judicial office with or without active opposition. If they decide to campaign, then they will be subject to the same ethical standards (Canon 5) and election laws (e.g., A.R.S. § 16-901 et seq.) as all other candidates. While the advisory committee may interpret the provisions of Canon 5, any attempt to explain the legal requirements of the relevant statutes would be outside the scope of its authority. Judges running for office in retention and partisan elections are advised to consult with legal counsel or election authorities to determine the applicable law.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 5B(3) (1993).

Arizona Code of Judicial Conduct, Canon 7B(3) (1975).

American Bar Association, Model Code of Judicial Conduct, Canons 7B(1), 7B(2) and 7B(3) (1972).

American Bar Association, Model Code of Judicial Conduct, Canon 5C(3) (1990).

Other References

A.R.S. § 16-901 et seq.

Arizona Judicial Ethics Advisory Committee, Opinion [78-01](#) (March 2, 1978).

Arizona Judicial Ethics Advisory Committee, *Guidelines—1978 Primary and General Elections*.

Lisa L. Milord, *The Development of the ABA Judicial Code* 54-55 (1992).

E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 100 (1973).