

# JUDICIAL ELECTIONS IN TENNESSEE

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# JUDICIAL ELECTIONS IN TENNESSEE

## ELECTION CODE REQUIREMENTS

### TRIAL JUDGES

- I. Qualification - Tenn. Code Ann. § 2-5-101(a):
  - A. Requires candidates to qualify by filing all nominating petitions, including any duplicate nominating petitions by qualifying deadline - February 17, 2022, by noon.
  - B. If no May primary is called, then deadline for filing is noon on April 7, 2022.
  - C. Primary Election Day - May 3, 2022  
General Election Day - August 4, 2022
- II. Petitions
  - A. Tenn. Code Ann. § 2-5-101(b) (1): nominating petition is signed by candidate and 25 or more registered voters eligible to vote to fill the office.
  - B. Tenn. Code Ann. § 2-5-101(b) (2): petition must include name, signature and address of each registered voter in order to be counted. *See also* Tenn. Code Ann. § 2-1-107.
  - C. Tenn. Code Ann. § 2-5-102: sets out the form of the nominating petition, requires judicial candidates to sign certifying that they are licensed to practice law in this state. *See also* Tenn. Code Ann. § 2-5-106.

- D. Tenn. Code Ann. § 2-5-102(b)(3): no original petition accepted where any of the items required by (b)(1) and (2) (name, date, and office) have been photocopied.
- E. Tenn. Code Ann. § 2-5-102(b)(4): nominating petitions are only issued by county election commission; petitions are not issued more than 60 days before the qualifying deadline; however, in any year in which reapportionment must occur, Coordinator of Elections shall determine earliest date.
- F. Tenn. Code Ann. § 2-5-104(a): requires nominating petition to be filed with administrator of County Election Commission in county in which candidate is a resident and file certified duplicates with the administrators of the County Election Commissions in all counties wholly or partially within the area (judicial district) served by the office which the candidate seeks.
- G. Tenn. Code Ann. § 2-13-203: governs the process when political parties nominate by method other than primary. Essentially it allows statewide and recognized minor parties to nominate candidates by any method permitted under party rules and requires Chairman of party to timely inform County Election Commission of the party's nominee.

### III. Withdrawal - Tenn. Code Ann. § 2-5-204(b)(1)

Request to withdraw must be filed no later than noon on the 7<sup>th</sup> day after the qualifying deadline.

### IV. Miscellaneous Provisions

#### A. Prohibitions - Tenn. Code Ann. § 2-5-101(f)

- Cannot qualify a candidate in primary election with more than 1 political party.
- Cannot qualify as an independent candidate and as a primary candidate for the same office.
- Cannot submit qualifying petition, or otherwise qualify and be nominated or appear on the ballot for more than one state office, constitutional county office or any other county-wide office in any election or primary.

#### B. Write-In Candidates - Tenn. Code Ann. § 2-7-133(i) and Tenn. Code Ann. § 2-8-113(c)

- Required to file notice in each county of the district no later than noon 50 days before primary or general election in order to have any write-in votes counted.
- To receive party nomination as a write-in candidate, must receive write-in votes equal to or greater than 5% of the total number of registered voters

of the district - unless there are candidate for the office listed on official ballot.

- Candidate defeated in primary election cannot run as a write-in candidate in general election

C. Ballot - Tenn. Code Ann. § 2-5-204(c)

- If 4 members of county election commission find that a candidate's name on the ballot would be confusing or misleading, can require further identifying information or can omit any confusing or misleading portion of the name. If candidate's name will appear on ballot in more than 1 county, state election commission shall make determination.
- No titles maybe printed with candidate's name.
- If candidate dies within 40 days before election, name shall remain on the ballot and if deceased candidate wins, then a vacancy exists.

## CAMPAIGN FINANCE REQUIREMENTS

I. Appointment of Political Treasurer

A. Tenn. Code Ann. § 2-10-105(e)(1): requires each candidate and each political campaign committee to certify name and address of candidate's or committee's political treasurer to Registry, before candidate or commission may receive a contribution or make an expenditure.

B. Statement must include office candidate is seeking and the year of the election.

C. If candidate appoints someone other than candidate to be political treasurer, candidate must co-sign any statements required to be filed under this Act.

D. Must notify Registry of any changes in Appointment of Political Treasurer.

II. Campaign Disclosure Reports

A. Tenn. Code Ann. § 2-10-105 - candidate for local public office file with local county election commission.

“Local Public Office” - defined as any state, county, municipal, school or other district or precinct officers or position, including general sessions judges and juvenile court judges, that is filled by the voters, with the exception of any “state public office” defined in subdivision (13)(B). Tenn. Code Ann. § 2-10-102(13)(A) and (B).

B. Filing Deadlines (Tenn. Code Ann. § 2-10-105(c)):

1. Reports due in 2021:

- a. Mid-Year Supplemental - due July 15, 2021 - begins with the date of the first contribution or first expenditure, whichever occurred earlier, and extend through June 30, 2021)
- b. Year-end Supplemental - due January 31, 2022 - covers the period of July 1, 2021, through January 15, 2022

2. Reports due in 2022- Election Year:

- a. 1<sup>st</sup> Quarter - due April 11, 2022 - covers period of January 16, 2022 through March 31, 2022
- b. Pre-Primary - due April 26, 2022 - covers period of April 1 through April 23, 2026
- c. 2<sup>nd</sup> Quarter - due July 11, 2022 - covers period of April 24 through June 30, 2022
- d. Pre-General - due July 28, 2022 - covers period of July 1 through July 25, 2022 - only required if candidate in August general election
- e. 3<sup>rd</sup> Quarter - due October 11, 2022 - covers period of July 26 through September 30, 2022 - if a candidate in the August general election; Otherwise, covers period of July 1 through September 30, 2022
- f. 4<sup>th</sup> quarter - due January 25, 2023 - covers period of October 1 through December 31, 2022

3. Civil Penalties - Late Filings and Failure to File

- a. Class 1 Offense - late filing or any report or statement (not including 5-day grace period) - civil penalty of \$25.00 per day up to maximum of \$750.
- b. Class 2 Offense - failure to file report within 35 days after receipt of assessment letter - civil penalty of not more than \$10,000.

**NOTE:**

“If a civil penalty lawfully assessed and any lawfully assessed cost attendant to the penalty are not paid within thirty (30) days after the assessment becomes final, or by the qualifying deadline for election, whichever is earlier, the candidate owing such civil penalty shall be ineligible to qualify for election to any state or local public officer until such penalty and costs are paid.” Tenn. Code Ann. § 2-10-110(c)(2).

“A candidate for state or local public office who fails to file any statement or report required by this part shall be ineligible to qualify for election to any state or local public office until such statement or report is filed with either the registry or the appropriate county election commission, or both.” Tenn. Code Ann. § 2-10-110(d)

C. Filing Requirements - 10 days before Election - Tenn. Code Ann. § 2-10-105(h).

1. During period from 12:00 midnight of 10<sup>th</sup> day prior to election through 12:00 midnight of such election, each candidate or PAC shall, by telegram, fax, hand delivery or overnight mail, file report which contains full name and address of each person from whom contribution, loan or transfer of funds is received and date of receipt if amount is \$2500 or more.
2. If in-kind contribution, shall include brief description and valuation of such contribution.
3. If loan, shall contain name and address of lender, recipient of proceeds of loan and name of any person who makes any type of security agreement.
4. Report must be filed by end of next business day following day on which contribution to be reported as received (which means date when contribution was received by candidate, candidate's committee or treasurer).

D. Contents of Statements - Tenn. Code Ann. § 2-10-107

Disclosure statement shall include either: (1) statement that neither contributions received nor expenditures made during period exceeded \$1000; or (2) statement that includes the following:

1. List of all contributions received, including full name, address, occupation, and employer of each person who contributed total of more than \$100 and amount contributed during the reporting period.
2. *Required to show best efforts to obtain full name, address, occupation, and employer - which includes notifying contributor by first class mail that further information is required under state law or by including on written solicitation a clear request for this information and by accurately stating that such information is required by state law.*
3. Statement shall also include date of receipt of each contribution, i.e., the date when the contribution was received by the candidate, candidate's committee, or treasurer.
4. Statement shall list as a single item total amount of contributions of \$100 or less.

5. Statement shall include list of expenditures made, including full name and address of each person to whom total amount of more than \$100 was paid; total amount paid and purpose of payment which shall clearly identify that it is an allowable expenditure under § 2-10-114.
6. Credit card purchases to separate vendors disclosed as separate expenditures.
7. Payments to a person as reimbursement for expenditures made by person on behalf of candidate or committee shall be disclosed as payments to the vendor who provided the item or service - Tenn. Code Ann. § 2-10-107(f).

E. In-Kind Contributions - Tenn. Code Ann. § 2-10-107(c)

1. Contribution for which no monetary consideration is received - required to be listed separate and excluded from list of monetary contributions and expenditures.
2. In-kind contributions of value of \$100 or less can be listed together as single item.
3. In-kind contributions of value of more than \$100, shall list category of the contribution, name, address occupation and employer of each person who contributed it.
4. Requires similar “best efforts” to obtain information about contributor.
5. Statement shall also include date of receipt of in-kind contributions.
6. In-kind contribution deemed to be made and reportable when contribution is made or performed, not when cost is billed or paid. Actual cost of contribution is to be reported; if actual cost not known, then an estimate of the cost shall be reported. If actual cost is different from estimate costs, such amount shall be amended or adjusted on later report.
7. Registry required to promulgate rules enumerating a non-exclusive listing of examples of various categories of in-kind contributions; provide copy of such rules to each member of General Assembly and each qualified candidate for state office.

F. Statement required to list any unexpended balance and any continuing financial obligations of candidate, campaign, or committee - Tenn. Code Ann. § 2-10-107(e).

G. Tenn. Code Ann. § 2-10-106 - Supplemental semi-annual statements - if final statement shows unexpended balance, continuing debts and obligations or

expenditure deficit - required to file a supplemental semiannual statement until account shows no unexpended balance, continuing debts and obligations, expenditures or deficit.

- H. Closing Statement - any candidate who wants to close out a campaign account may do so at any time by filing statement to such effect as long as statement on its face shows that there is no unexpended balance, continuing debts or obligations or deficit.
- I. Funds maintained in campaign account are not deemed to be the personal property of any candidate or other individual and not subject to garnishment or execution to satisfy debts or obligations of any individual which are not campaign debts.
- J. Tenn. Code Ann. § 2-10-113 - Digital Currency
  - 1. Allowed to accept digital currency as a contribution - considered a monetary contribution with the value being the market value at the time the contribution is received.
  - 2. Any increase in value shall be reported as interest on statements.
  - 3. Candidate or committee must sell digital currency and deposit proceeds into campaign account before spending funds.

### III. Use of Campaign Funds

- A. Tenn. Code Ann. § 2-10-114(a): Allocation of *unexpended* campaign funds
  - 1. May be retained or transferred to any campaign fund
  - 2. May be returned to contributors, in accordance with a formula or plan specified in disclosure of allocation
  - 3. May be distributed to executive committee of candidate's political party
  - 4. May be deposited in volunteer public education trust fund established under title 49, chapter 3, part 4
  - 5. May be distributed to organization described in 26 USC § 170(c) (state, political subdivision, "non-profit" corporation, trust, community chest fund or foundation, post or organization of war veterans, or any auxiliary unit, society, trust or foundation of such post or organization, domestic fraternal society order, association or lodge, or "non-profit" cemetery company)
  - 6. May be distributed to a 501(c)(3) or (c)(4) organization

7. May be used to defray any ordinary and necessary expenses incurred in connection with the office of the officeholder - may include but not limited to cost of advertisements, membership fees and donations to community causes
8. May be distribution to any institution of public or private education in the state for purpose of supplement funds of an existing scholarship trust or program.

B. Personal use prohibited

1. Tenn. Code Ann. § 2-10-114(b)(1): “Except as otherwise provided in subsection (a), no candidate for public office shall use any campaign funds for any other purpose other than a contribution or expenditure as defined by this part.”
2. “Personal use” - defined as any use by which the candidate for public office or elected public official would be required to treat the amount of the expenditure as gross income under 26 USC § 61
3. Expenditures specifically prohibited:
  - a. Any residential or household items, supplies or expenditures, including mortgage, rent or utility payments for any part of any personal residence of candidate or officeholder or a member of candidate or officeholders’ family
  - b. Mortgage, rent or utility payments for any part of any nonresidential property that is owned by a candidate or officeholder or a member of candidate or officeholders’ family and used for campaign purposes to extent payments exceed fair market value of property usage
  - c. Funeral, cremation, or burial expenses related to deaths within a candidate’s or officeholder’s family
  - d. Clothing, other than items of de minimis value that are used in the campaign
  - e. Tuition payments within a candidate’s or officeholders’ family other than those associated with training campaign staff or associated with an officeholder’s duties



- f. Due, fees or gratuities at a country club, health club, or recreational facility unless they are part of a specific fundraising event that takes place on the organization's premises
- g. Salary payments to a member of a candidate's family unless member is provided bona fide services to the campaign. Any salary payment in excess of fair market value of services provided is a prohibited use.
- h. Admission to a sporting event, concert, theater, activity, charitable event or other form of entertainment unless an expense associated with legitimate campaign or officeholder activity where tickets to such event are provided to students attending schools, guests or constituents of candidate or officeholder or persons involved in candidate's or officeholders' campaign
- i. Payments for grooming or enhancing one's personal appearance unrelated to campaign activities
- j. Payment of any fines, fees or penalties assessed pursuant to chapter 10 or title 3 chapter 6

4. Violation is a Class 2 offense

#### C. Tenn. Code Ann. § 2-10-131 - Investment of Campaign Funds

- 1. Campaign funds must be deposited and maintained in FDIC insured institution or NCUA insured credit union.
- 2. Any interest, dividends or income earned must be reported on disclosure report.
- 3. Any campaign contribution received in non-monetary form may be held in that form until contribution is to be used to pay expenditures - funds then must be deposited in accordance with statute.
- 4. Any other investment of campaign funds is prohibited - and violation is subject to maximum civil penalty of not more than \$10,000 or 115% of the amount invested, whichever is greater.

#### IV. Contribution Limits - Tenn. Code Ann. § 2-10-302

A. Individual - \$1,600

B. Multicandidate PAC - \$8,300

C. Candidates

1. No candidate for state or local office shall accept in aggregate more than \$126,600 from multicandidate PACs.
2. Contributions made by committee controlled by political party on national, state, or local level or by caucus of such political party established by members of either house of General Assembly not included in determining aggregate - \$33,900 total contribution amount from political party PACs.

D. Indirect Contributions - PACs - Tenn. Code Ann. 2-10-303

1. Contributions made to PAC authorized by candidate to accept contributions on candidate's behalf considered to be contributions to candidate.
2. Contributions made by PAC authorized by candidate to make expenditures on candidate's behalf considered contributions made by candidate
3. Contributions made by a person, directly or indirectly, on behalf of particular candidate, including contributions in any way earmarked or otherwise directed through an intermediary or conduit to candidate, shall be treated as contributions from such person to candidate. Intermediary or conduit required to report original source and intended recipient of contribution
4. All contributions made by affiliated PACs considered to have been made by single committee.
5. Expenditures made in cooperation, consultation, or concert with, or at request or suggestion of candidate, candidate's political campaign committee or their agents, shall be considered to be contribution to candidate. Note: financing of dissemination, distribution or republication in whole or in part of any broadcast or any written, graphic or other form of campaign materials prepared by candidate, candidate's political campaign committee or authorized agents shall be considered an expenditure.
6. Corporate Contributions -there are no prohibitions against direct contributions from corporations.

E. Loans - limitations do not apply to loans that meet following requirements (Tenn. Code Ann. § 2-10-304):

1. Made in accordance with applicable law and in ordinary course of business.
2. Made on basis reasonably designed to assure repayment, evidenced by a written instrument and subject to payment due date or amortization schedule.
3. Bears usual and customary interest rate of lending institution.
4. Any endorsement or guaranty of loan shall be considered a contribution in amount of endorsement or guaranty and subject to limitations. If written instrument does not specify portion of loan for which endorser or guarantor is liable, each is considered to have made a contribution in that proportion of unpaid balance that each bears to total number of endorsers or guarantors.

F. Contributions by PACs controlled by political parties - Tenn. Code Ann. § 2-10-306

1. Contributions shall not exceed \$33,900 per election to any candidate for any other state or local election
2. Contributions does not include the following:
  - a. Payment of costs of preparation, display or mailing or other distribution of printed slate cards, sample ballot or other printed listing of 3 or more candidates who are opposed for election (but does not include listings made on broadcasting stations or in newspapers, magazines, and similar types of general public political advertising such as billboards);
  - b. Payment of costs of voter registration and get-out-the-vote activities unless made on behalf of clearly identified candidate and payment can be directly attributed to that candidate.
  - c. Expenditures for rent, personnel, overhead, general administrative, fundraising and other day-to-day costs of party committee, unless made on behalf of clearly identified candidate and payment can be directly attributed to that candidate.

d. Expenditures for education campaign seminars and training of campaign workers unless made on behalf of clearly identified candidate and payment can be directly attributed to that candidate.

#### G. Limitations on Cash Contributions - Tenn. Code Ann. § 2-10-311

1. No person can make cash contributions to any candidate, in the aggregate, that exceed \$50.
2. No political campaign committee or multicandidate political campaign committee can make cash contributions to any candidate with respect to any election.

#### H. Violations

1. No candidate or PAC shall accept any contribution or make any expenditure in violation of Act; no officer or employee of PAC shall accept contribution made for benefit or use of candidate or make expenditure on behalf of candidate in violation of limitation provisions.
2. Contribution made or accepted in excess of limits shall not be a violation if candidate or PAC returns or refunds contribution within 60 days of candidate's or committee's receipt of contribution.
3. Civil Penalties - Registry can impose maximum penalty of not more than \$10,000 or 115% of amount of all contributions made or accepted in excess of limitation whichever is greater.

## CONTESTED ELECTIONS

- Tenn. Code Ann. § 2-17-105 - deadline for filing election contest is 5 days after certification of election results (which is to be done by the third Monday after the election).
- Tenn. Code Ann. § 2-17-106 - trial of election contest is to be held not less than 15 nor more than 50 days from the day the complaint is filed and not less than 10 days after the complaint is served on the defendant.
- Tenn. Code Ann. § 2-17-110(b) - total votes shown on voting machines shall be conclusive unless court finds reason to believe that the vote shown on the machine is not accurate.

- Tenn. Code Ann. § 2-17-112(a) - after hearing the case, the court shall give judgment either:
  - ❖ Confirming the election
  - ❖ Declaring the election void
  - ❖ Declaring a tie between persons who have the same number of votes if it appears that two or more persons who have the same number of votes have, or would have had if the ballots intended for them and illegally rejected had been received, the highest number of votes for the office; or
  - ❖ Declaring a person duly elected if it appears that such person received or would have received the highest number of votes had the ballots intended for such person and illegally rejected been received.
- Tenn. Code Ann. § 2-17-115 - costs and attorneys' fees shall be assessed against contestant or appellant if contest or appeal if maliciously or frivolously prosecuted.

## **CODE OF JUDICIAL CONDUCT REQUIREMENTS (Tenn. Sup. Ct. R. 10)**

- I. Rule 4.1 - except as otherwise permitted, a judge or judicial candidate shall not:
  - Act as a leader in, or hold an office in, a political organization
  - Make speeches on behalf of a political organization
  - Publicly endorse or oppose a candidate for any public office
  - Solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate for public office except from the judge's or judicial candidate's family
  - Personally solicit or accept campaign contributions other than through a campaign committee authorized by RJC 4.4
  - Use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others
  - Use court staff, facilities, or other court resources in a campaign for judicial office

- Knowingly or with reckless disregard for the truth, make any false or misleading statement
- Make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or
- In connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

A judge or judicial candidate shall also take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any of these prohibited activities.

II. Rule 4.2 - A judge or judicial candidate in a partisan, nonpartisan, or retention public election shall:

- Act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary
- Comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction
- Review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by RJC 4.4, before their dissemination, and
- Take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in RJC 4.4, that the candidate is prohibited from doing by RJC 4.1

Candidates for elective judicial office may, unless prohibited by law, and not earlier than 365 days before the first applicable primary election, caucus, or general or retention election:

- Establish a campaign committee pursuant to RJC 4.4
- Speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature

- Seek, accept, or use endorsements from any person or organization

Judge or judicial candidate may, except as prohibited by law, at any time:

- Purchase tickets for and attend political gatherings, subject to the limitations in Tenn. Code Ann. § 2-10-301, *et seq.*
- Identify himself or herself as a member of a political party
- 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.*; and
- Publicly endorse or oppose judges or judicial candidates in a partisan, nonpartisan, or retention election for any judicial office

Judges and judicial candidates 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.

### III. Rule 4.3 - Activities of Candidates for Appointive Judicial Office

Candidates for appointment to judicial office may:

- A. communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and
- B. seek endorsements for the appointment from any person or organization.

### IV. Rule 4.4 - Campaign Committees

- A. Judicial candidates subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with application provisions of the Code and other applicable law.
- B. A judicial candidate subject to public election shall direct his or her campaign committee:

1. To solicit and accept only such campaign contributions allowable by law
2. Not to solicit or accept contributions for a candidate's current campaign more than 365 days before an election, nor more than 90 days after the last election in which the candidate participates; and
3. To comply with all applicable requirements for disclosure and divestiture of campaign contributions as required by law.

#### V. Rule 4.5 - Judges and Candidates Seeking Nonjudicial Office

- A. Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office unless permitted by law to continue to hold judicial office.
- B. Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office provided the judge complies with the other provisions of the Code.
- C. No judicial candidate may also simultaneously be a candidate for an elected nonjudicial position.

### RECENT DECISIONS INVOLVING JUDICIAL CANONS

- *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015)

Supreme Court upheld the Florida Judicial Canon's ban on the personal solicitation of campaign funds by judicial candidates. In doing so, the Court noted that public perception of judicial integrity is "a state interest of the highest order," and found that Canon 7C(1) was neither underinclusive because it applies evenhandedly to all judges and judicial candidates, nor was it overinclusive because it only restricts a narrow slice of speech.

- *Winter v. Wolnitzek*, 834 F.3d 681 (6<sup>th</sup> Cir. 2016)

Judicial candidates asserted facial and as-applied challenges to a number of provisions in the Kentucky Code of Judicial Conduct.

- Canon 5(A)(1) "campaigning clause": "Except as permitted by law, a judge or a candidate for election to judicial office shall not [ ] campaign as a



member of a political organization.” Kentucky Supreme Court held that this clause prohibits candidates from “portray[ing] themselves, either directly or by implication, as the official nominee of a political party.” Sixth Circuit found that it was vague and unconstitutionally overbroad because it is “unclear when candidates go from permissibly affiliating with a party to illegally implying that they are the nominee of a party.”

- Canon 5(A)(1)(c) “speeches clause”: Bans judicial candidates from “mak[ing] speeches for or against a political organization or candidate.” Sixth Circuit found that this clause was facially invalid because it “does too much in one sense and too little in another.”
- Canon 5(A)(1)(d) “contributions clause”: prohibits judicial candidates from “mak[ing] a contribution to a political organization or candidate.” Sixth Circuit upheld facial constitutionality of Canon, noting that a “contribution to a political organization or a candidate in a different campaign ‘is less a judge’ communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political power broker.”
- Canon 5(A)(1)(c) “endorsements clause”: prohibits judicial candidates from “publicly endors[ing] or oppos[ing] a candidate for public office.” Sixth Circuit upheld this Canon finding that it “narrowly addresses Kentucky’s compelling interest in keeping its judges above the partisan fray of trading political favors.”
- Canon 5(A)(1)(b) “acting as a leader clause”: prohibits a judge from “act[ing] as a leader or hold[ing] any office in a political organization.” Sixth Circuit found that this Canon was facially valid, and also found that this Canon, as-applied to judicial candidates hosting political fundraisers, did not impermissibly infringe on judicial candidate’s free-speech rights.
- Canon 5(B)(1)(c) “false statements clause”: prohibits a judge or judicial candidate from “knowingly” or “with reckless disregard for the truth” making any “false [ ] statements” during a campaign. The Kentucky Supreme Court interpreted this Canon to prohibit “untrue utterance[s] that are material [ ]” to a campaign. In light of this interpretation requiring “materiality” to the false statement, the Sixth Circuit held that the statute was facially unconstitutional.
- Canon 5(B)(1)(c) “misleading statements clause: Sixth Circuit held was facially unconstitutional, noting that only a ban on conscious falsehoods satisfies strict scrutiny.
- Canon 5(B)(1)(c) “commits clause”: provides that judicial candidates may not “in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of

judicial office.” Sixth Circuit remanded case to the district court which would allow the State to “obtain authority to remove the “issues” language; to adopt “an acceptable narrowing construction of the “issues” language along with modification to the commentary, or to suggest certification to the Kentucky Supreme Court.

NOTE: The prior version of this clause was challenged in *Carey v. Wolnitzek*, 614 F.3d 189 (6<sup>th</sup> Cir. 2010). In that case, the “commits clause” provided that “A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court . . . .”

The Sixth Circuit found that the State had a compelling interest in prohibiting candidates from promising to rule a certain way on cases and that this clause narrowly advanced that interest, at least with respect to “cases” or “controversies.” However, with respect to the “issue” part of the clause, the Sixth Circuit noted that the district court had not explored the clause’s applicability to “issues” and that the case should be remanded to allow the State to clarify its position on the construction of the “issues” part of the clause.

- *Platt v. Board of Commissioners on Grievances and Discipline of Ohio Supreme Court*, 894 F.3d 235 (6<sup>th</sup> Cir. 2018)

Judicial candidate challenged constitutionality of six provisions in Canon 4 of the Ohio Code of Judicial Conduct:

- Rule 4.1(A)(2), which prohibits a candidate from making speeches on behalf of a political party or another candidate for public office.
- Rule 4.1(A)(3), which prohibits a candidate from publicly endorsing or opposing a candidate for another public office.
- Rule 4.4(A), which, prohibits a judicial candidate from personally soliciting campaign contributions (except for 3 exceptions).
- Rule 4.4(E), which creates a permissible window for soliciting and receiving campaign contributions, starting 120 days before the primary and ending 120 days after the general election.

- Rule 4.4(F), which limits the solicitation and receipt of contributions for candidates defeated before the general election, until the earlier of 120 days after the primary election or until the candidate pays off his/her campaign-related debts.
- Rule 4.4(G), which regulates the solicitation and receipt of contributions for candidates who die or withdraw from the election, until the earlier of 120 days after death or withdrawal or until the candidate pays off his/her campaign-related debts.

Sixth Circuit affirmed the District Court's decision finding that the rules were not unconstitutionally vague, nor did they violate the First and Fourteenth Amendments.

## RECENT JUDICIAL ETHICS ADVISORY OPINIONS

- A judicial candidate's campaign committee may maintain a Facebook page and post on the candidate's behalf communications written in the first-person about, for example, campaign events, candidate appearances, public speeches, and the candidate's qualifications provided the first-person communications do not seek or solicit financial support or public statements of support. *Florida Advisory Opinion 2020-10*.
- Judicial candidates may include on campaign websites or social media pages a video of the candidate personally describing their experience, qualifications, and similar subjects; an invitation to potential followers to watch the campaign website for updates and to submit questions to the candidate; and personal requests for support in both English and Spanish as long as the candidate does not ask for donations or other financial support and the candidate's answers to voters' questions do not constitute promises of future conduct or other prohibited statements. *Florida Advisory Opinion 2020-13*.
- A judicial candidate may post a message asking for votes and support in social media groups that are composed of politically active individuals but that do not appear to be sponsored by any particular political organization. *Florida Advisory Opinion 2020-16*.
- A judge or judicial candidate may not participate in fundraising activities for a candidate for office. The Code permits only limited political and campaign activities in order to preserve the independence, integrity, and impartiality of the judiciary. RJC, Comment 1. RJC 4.1(A) sets out activities that are prohibited for judges and judicial candidates, such as acting as a leader, holding an office, making speeches, soliciting funds (except from family members), for a political organization; or knowingly, or with reckless disregard, making a false or

misleading statement. RJC 4.1(A)(8) does not permit a judge or judicial candidate to “personally solicit or accept campaign contributions other than through a campaign committee authorized by RJC 4.4.” In accordance with that section, judicial candidates are prohibited from personally fundraising for themselves or another candidate for office but may direct their campaign committee to solicit and accept contributions on the candidate's behalf. Tenn. Judicial Ethics Committee Advisory Opinion No. 18-01 (March 16, 2018).

## RECENT ETHICS DECISIONS INVOLVING JUDICIAL ELECTIONS/CAMPAIGNS

- *Stanton v. State*, 613 S.W.3d 368 (Ark. 2020). Reversing a conviction for first-degree murder and remanding for a new trial, the Arkansas Supreme Court held that a prosecutor’s improper campaigning for judicial office in the courthouse during the trial created the appearance of impropriety and was “per se improper in the context of the fair and impartial administration of justice.”

Marvin Stanton stood trial three times for first-degree murder. Stanton’s third trial was prosecuted by Stephanie Barrett and was held while she was seeking signatures so that she could be placed on the ballot for the Arkansas Court of Appeals. On the first day of trial, Barrett’s aunt solicited signatures on her behalf in the courthouse from prospective jurors and others. Campaign materials with Barrett’s photograph and her qualifications were on the bailiff’s security station through which jurors and the public walked by each time they entered the courtroom and went through security. Of nine signatures collected, four belonged to prospective jurors, including one juror who was ultimately selected.

The trial judge denied Stanton’s motion for a mistrial and his subsequent motion for a new trial. On appeal, the Arkansas Supreme Court held that a mistrial should have been granted, explaining that jurors “became a captive audience bombarded with election petitions from Barrett and at least two other sitting circuit judges. This is an abuse and exploitation of the judicial system and the fundamental civic responsibility of jury service.” The Court also concluded that “this abuse was furthered by the presence of Barrett’s campaign materials on the bailiff’s security table,” creating “an apparent endorsement by the circuit court” because the bailiff is a member of the court’s security staff and subject to the court’s control. The Court stated “this kind of conduct has no place in the administration of justice and should not have been permitted. . . . Disturbingly, solicitation of signatures from prospective jurors for political purposes is apparently a common practice for some sitting judges. Our concerns with Barrett’s conduct apply with equal force to the same conduct taken by sitting judges.”

- *In Re Staggs* (Arizona Commission on Judicial Conduct, Nov. 17, 2020). The Arizona Commission on Judicial Conduct publicly reprimanded Judge Bruce Staggs for, among other things, keeping campaign materials in his judicial office and distributing fingernail files that stated “Bruce Staggs - Justice of the Peace”

during court hours. He also referred to female employees as “woman” and made a comment about zippers to a female employee.

The judge kept two binders in his judicial office with the Republican and Democrat “walking lists” or voter registration lists for his court precinct. The lists included notes on his personal interactions with the individuals and whether they had assisted him with his campaign, for example, “whether campaign materials were left with them, and/or whether they expressed a willingness to vote for him, and/or whether they allowed him to put a sign in their yard.” The judge also kept in his office the nominating petitions for his re-election campaign, a binder containing political endorsements, and other promotional campaign materials. During court hours, the judge distributed nail files that stated “Bruce Staggs - Justice of the Peace.” The Commission found that “keeping political and campaign material in a judicial office gives an appearance of impropriety.”

The judge admitted occasionally addressing female employees with the generic term of “woman,” such as, “Get to work woman!” and “Let’s go woman!” He claimed his use was inadvertent because he referred to his wife as “woman.” The judge told a clerk, “you’re unzipped,” referring to the zippers on the ankle/calf of her pants. The judge also commented that he “wondered if he would get the same reaction if he were unzipped.”

- *Gentry v. Judicial Conduct Commission*, 612 S.W.3d 832 (Ky. 2020). Affirming the decision of the Judicial Conduct Commission, the Kentucky Supreme Court upheld the removal of Judge Dawn Gentry for, among other things: (1) coercing members of her guardian ad litem panel to donate the maximum amount to her campaign and to use personal time to campaign on her behalf; (2) using court staff to work on her campaign during work hours; (3) retaliating against an attorney for failing to campaign on her behalf by removing him from the guardian ad litem panel; (4) permitting staff members to store and consume alcoholic beverages in court offices; (5) referring to a school liaison officer as a “b\*\*\*h” and refusing to recuse from her cases; (6) making inappropriate sexual advances toward an attorney; and (7) appointing personal friends who supported her campaign to represent individuals seeking custodian status without requiring those individuals to come to court to receive the appointments.
- *Halverson v. Harada*, 461 P.3d 869 (Mont. 2020). The Montana Supreme Court suspended Judge Ashley Harada for 30 days without pay for, among other things: (1) publicly endorsing candidates for nonjudicial offices on her personal Facebook page; (2) having endorsements from candidates and a political organization on her campaign Facebook page; (3) contributing to a partisan candidate; and (4) during her campaign, claiming experience under the student practice rules as two years of law experience and giving herself credit for approximately 80 jury trials while she was a law clerk for a federal judge.

On her personal Facebook page, Judge Harada publicly endorsed the Republican candidate for county commissioner and the Republican incumbent

candidate for the county attorney. The judge admitted the violation but noted that she had maintained privacy settings on that page to ensure that her personal views did not become public. She also failed to remove from her Facebook page endorsements from the county Republican Party, a Republican candidate for the state house of representatives, and a Libertarian candidate for the U.S. House.

- *In the Matter of Almase* (Nevada Commission on Judicial Discipline Oct. 22, 2018). The Nevada Commission on Judicial Discipline publicly reprimanded Judge Heidi Almase for her campaign's posting of a photoshopped picture of herself in her judicial robe next to an actor on her campaign Facebook page, misleading the public into believing that Dwayne "the Rock" Johnson had endorsed her re-election. The caption read, "It just makes sense: Re-Elect Judge Heidi Almase." Later that evening, the judge commented on the Rock post: "I'm 'almost' taller than him. Almost." The campaign did not have permission to use the Rock's image. The Commission found that the post improperly misled the public into believing that the Rock had endorsed the judge's campaign and that the judge's comment was "an improper confirmation and ratification of the earlier false Rock post, thereby further misleading the public."

The Commission also found that the judge had not taken reasonable measures to ensure that her campaign representatives complied with the Code of Judicial Conduct, providing her campaign manager and her graphic artist, "in essence, carte blanche and unsupervised access to her campaign Facebook page." The Commission reminded judicial candidates that "campaign-related social media platforms, such as Facebook, maintained by a campaign committee or others, do not insulate them from the strictures of the Code."

- *In the Matter of VanWoeart* (New York Commission on Judicial Conduct March 31, 2020). A New York judge, Michelle VanWoeart, was publicly censured after she reacted on her campaign Facebook page to others' posts about her opponent, Judge Norm Miller. Specifically, Judge VanWoeart "liked" a post stating "time to take out the trash!!" in reference to Judge Miller. She also replied "thank you" to a comment on her campaign Facebook page which described her opponent as "Dirt Bag Norm" and "this SH\*T HE\*D". In addition, she "liked" a comment on her campaign Facebook page that stated, "I'd like to shove [campaign] flyers up Norm's butt!"

The New York Commission on Judicial Conduct concluded that Judge VanWoeart "failed to meet [high judicial standards] when she responded favorably to crude social media comments about her judicial opponent. By her conduct, respondent undermined the dignity and integrity of the judiciary."

- *Warning Re Campaign Advertisements* (Tennessee Board of Judicial Conduct 2020). The Board issued a "reminder about the importance of ensuring that campaign materials are in no way misleading. Campaign materials that mislead the public implicate Tenn. Sup. Ct. R. 10, RJC 4.1(A)(11) (a candidate for judicial

office shall not knowingly or with reckless disregard for the truth make false or misleading statements) and RJC 4.2(A)(1) (a judicial candidate shall act at all times in a manner consistent with the integrity of the judiciary). The comments to the rules explain that “judicial candidates must be scrupulously fair and accurate in all statements” and must “refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.” RJC 4.1, cmt. 7.

- *State v. Griffin*, 610 S.W.3d 752 (Tenn. 2020). The trial judge served as a deputy district attorney general in Knox County at the time the defendants were indicted for, among other things, first-degree murder. After a subsequent appointment to serve as a judge on the Knox County Criminal Court, the judge was assigned the defendants’ cases. The defendants moved for recusal, arguing that the judge had supervisory authority over their cases as a prosecutor. The judge denied the motions. In determining that recusal was not required, the Tennessee Supreme Court stated:

Although we conclude in this particular instance . . . that recusal is not required in this case, we also use this opportunity to caution applicants and candidates for judicial positions about potential adverse consequences arising from statements in applications or campaigns. Applicants and candidates must carefully refrain from overstating past experiences and responsibilities. Such actions can have significant unintended consequences. Our decision today in no way should be construed as condoning the use of overstatements in judicial applications or campaigns.

- *Public Warning of Cox* (Texas Commission on Judicial Conduct Dec. 4, 2020). The Texas Commission on Judicial Conduct publicly admonished Judge Lonnie Cox for publicly endorsing a candidate for county tax assessor-collector. Judge Cox attended a fundraiser hosted by Galveston County Tax Assessor Cheryl Johnson in support of her re-election campaign. The judge introduced Johnson to those in attendance, stating:

She’s the best damn tax assessor collector that we have in this country. And so you’d be making a huge mistake . . . if you even give any attention to anybody else that runs for that office. So I encourage you, don’t waste your vote. Don’t vote for someone who will not be watching your back. That’s one thing I like about Cheryl, she watches my back . . . . I try to watch her back, that’s what we do.

A member of Johnson’s campaign staff recorded the judge’s remarks on her cell phone and streamed it live on Facebook. At the judge’s request, the video was taken down the next day.

- *Public Warning of Molberg* (Texas Commission on Judicial Conduct Dec. 3, 2020). The Texas Commission on Judicial Conduct publicly warned Judge Ken

Molberg for allowing a PAC to use his name, title, and likeness in materials that supported the campaigns of other Democratic candidates for public office as well as his own.

During his campaign for the Court of Appeals, Judge Molberg's name, judicial title, and likeness appeared on a door hanger advertising his campaign and the campaigns of four other candidates from the Democratic Party who were running for non-judicial public offices. The door hanger was produced and distributed by the Democratic Unity Campaign of Dallas County, a political action committee, and featured pictures of and bios about each of the candidates and contact information for their individual campaigns. Judge Molberg was elected and, in his appearance before the Commission, testified that he gave money to the PAC to support its "get out the vote" campaign on behalf of Democratic candidates and authorized the PAC to use his name, title, bio, and likeness on printed materials promoting same. He said he gave the PAC "free rein" and exercised no control over how his name, title, and/or likeness would be used, including with respect to the individual campaigns of other candidates. He further indicated he did not review any of the information produced by the PAC before it was disseminated, and he expressed his belief that the door hanger did not violate any ethical rules because, where political campaigns are concerned, judges can promote themselves, their political party, and their political party can promote judges.

The Commission concluded that Judge Molberg should be publicly warned for lending the prestige of his judicial office to advance the private interests of other candidates for non-judicial public office featured on joint political campaign advertisements, as well as for authorizing the use of his name endorsing such non-judicial candidates' campaigns and by authorizing the PAC to use his name, bio and likeness in such manner without any oversight on his part.

- *Public Admonition of Metzger* (Texas Commission on Judicial Conduct Nov. 12, 2020). Texas Judge Bill Metzger was publicly admonished for removing a campaign sign from his neighbor's property and his interview with the media regarding the incident and for failing to timely submit a response to the Commission. The Dallas ABC affiliate published on its website an article entitled, "Caught on camera: Candidate said judge destroyed campaign sign," which linked to a YouTube video that purportedly showed the judge removing from his neighbor's property the campaign sign of a candidate for the Texas House of Representatives, Jim Phaup. Phaup said the person shown removing the sign is "very recognizable. It's Judge Bill Metzger." When interviewed in his courtroom by the media, the judge stated, "It doesn't look like . . . I can't tell to be honest," and "I haven't knocked it down. I have taken signs down prior that were placed illegally."

In his written responses to the Commission, the judge said that he was "unable to be sure" if he was the person shown removing the sign and expressed his opinion that the incident did not cast public discredit upon the judiciary. During an appearance before the Commission, the judge indicated for the first time that it



was him on the video but claimed that he had not “improperly” removed the sign from his neighbor’s property but properly removed it from his own property. The Commission found that the judge’s testimony that the sign was placed close to or inside the property line of his property was not credible.

Despite numerous opportunities to do so, the judge did not timely respond to the Commission’s written inquiries regarding the matter. The Commission explained that the judge’s admonishment was in part for his failure to cooperate with the Commission’s investigation.

- *Public Warning of Woodard and Order of Additional Education* (Texas Commission on Judicial Conduct Oct. 28, 2020).

The Texas Commission on Judicial Conduct publicly warned Judge Lisa Woodard for her Facebook activities in support of a friend’s campaign for city council and a court clerk’s acceptance of a donation to her campaign at the courthouse.

The judge was personal friends with Fort Worth City Councilwoman Kelly Gray. During Gray’s re-election campaign, the judge shared a post and photograph of Gray on her Facebook page and posted “#teamkelly!” with the photograph, which was a hashtag used by Gray’s supporters. On election day, the judge “liked” a Facebook post that tagged Gray’s Facebook page, included a photograph of someone with Gray’s campaign signs, and stated “re-elect Kelly Allen Gray! Fort Worth City Council, -District 8. #teamkelly.”

During her appearance before the Commission, the judge stated that she had not intended to endorse Gray but to show her support as a friend during a difficult time for Gray unrelated to Gray’s election campaign. The judge recognized that people could have thought the post was an endorsement.