Ethics Opinion No. 85-1

Applicability of Canon 7 of Code of Judicial Conduct to Candidates for Judicial Appointment.

The Ethics Committee has been asked whether the political contribution proscriptions set forth in Canon 7, Section A, of the Code of Judicial Conduct, apply to candidates for judicial appointment under the Alaskan system used for the appointment of state judges. In response to this request, the Alaska Bar Association Ethics Committee requested an opinion from the American Bar Association. On April 27, 1985, the American Bar Association issued Informal Opinion No. 85-1513.

American Bar Association Informal Opinion 85-1513 holds that the provisions of Canon 7, Section A, of the Code of Judicial Conduct, apply to a candidate for judicial office by gubernatorial appointment pursuant to a merit selection plan. Accordingly, candidates for appointment may not participate in political fund-raising events. The opinion further holds that the candidate becomes subject to the provisions of Canon 7, Section A(1) when the candidate submits an initial application for the judicial position to the Alaska Judicial Council.

American Bar Association Informal Opinion 85-1513 is adopted as the opinion of the Alaska Bar Association Ethics Committee. Additionally, Canon 7, Section B(1) is also applicable to candidates for judicial appointment, from the time of the filing of the initial application with the Alaska Judicial Council.

<u>The political activity proscriptions of Section A of Canon 7 of the Code of Judicial Conduct apply to candidates for judicial appointment under a merit selection plan.</u>

When a state court judicial vacancy occurs in the State of X, the State Judicial Council advertises the vacancy and solicits applications from qualified attorneys. The State Judicial Council then circulates the names of the candidates on a poll to the members of the Bar Association and some law enforcement agencies, soliciting comments and ratings on the candidates' qualifications for the vacancy sought. The Council also seeks comments from the public. After the poll is completed and comments received, the Judicial Council then publishes the result of the poll, interviews all candidates, and submits the names of some of the candidates to the Governor of the State for potential appointment. The Governor then makes the final appointment to the judicial vacancy. There is no requirement for legislative or other confirmation of the Governor's appointment. The name of the new judge is then placed on the ballot at the first general election held more than three years after the appointment. The question asked is whether the judge should be retained in

office. Thereafter, each judge is subject to approval or rejection in a like manner at times which vary depending upon the level of court involved.

This opinion is based on the Model Rules of Professional Conduct and to the extent indicated the former Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

A lawyer in State X applied for an initial appointment to a then-existing judicial vacancy. The lawyer was solicited to attend a "Governor's Birthday Party" which, the Committee is informed, is in effect a political party fund-raising event. The lawyer asks whether Canon 7 of the Code of Judicial Conduct prohibits attendance.

Canon 7, subsection A(1) provides in part: "A judge or a candidate for election to judicial office should not . . . (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)."

Subsection A(2) provides: "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 or re-election, identify himself as a member of a political party, and contribute to a political party or organization."

The inquiring lawyer is not a judge. If the lawyer is not, in the words of subsection A(1)(c), a candidate for election to a judicial office, the prohibition against contributions and ticket purchases for political party dinners, as well as the prohibitions against serving as an officer of a political organization, speaking for candidates and publicly endorsing candidates, would not apply to any lawyer-applicant for *appointment* to judicial office. That interpretation would, however, be inconsistent with the underlying purpose of Canon 7 which is to ensure both judicial impartiality and the appearance of judicial impartiality by placing limitations upon the political conduct of judges and candidates for judicial office.

This Committee stated in its Informal Opinion 1468: "The essential thrust of the Code of Judicial Conduct is to disfavor activities of judges which would tend to reduce public confidence in the integrity and impartiality of the judiciary. Accordingly, judges are asked to accept restrictions on their public conduct that do not apply to other citizens." To ensure that the conduct of lawyers who are candidates for judicial office is equally free from questionable

political overtones, both the ABA Model Rules of Professional Conduct (Rule 8.2(b)) and the former ABA Model Code of Professional Responsibility (DR 8-103) require a lawyer-candidate for judicial office to comply with Canon 7 of the Code of Judicial Conduct.

This purpose would not be given full effect if the provisions of Section A of Canon 7 were inapplicable to candidates under merit selection plans. For example, if Section A were not applicable, the candidate could make direct political contributions to the Governor who will select the successful candidate as judge. An examination of the language of Sections A and B persuades the Committee that this was not the intent of the drafters of the Code of Judicial Conduct.

Section A governs "Conduct in General" by distinguishing between a "candidate for election to judicial office" in subsection A(1) and a candidate for a judicial "office filled by public election between competing candidates" in subsection A(2), the drafters clearly recognized that "election" includes a selection process other than a "public election between competing candidates." Similarly, in Section B which governs "Campaign Conduct," specifically subsection B(1), there is reference to judicial office "filled either by public election between competing candidates or on the basis of a merit system *election*" (emphasis supplied). That section not only distinguishes between the two systems but uses "election" specifically to refer to the merit selection process. Subsection B(2) further makes this distinction; in recognition of the political realities involved in public elections between competing candidates, it permits certain activities by candidates in such elections not permitted candidates in merit system elections.

This interpretation of "election" is consistent with the following statement of Professor E. Wayne Thode, Reporter to the ABA Special Committee on Standards of Judicial Conduct, which was responsible for the current revision of the Code of Judicial Conduct:

> Section A of Canon 7 prescribes general standards of political conduct for all judges and *all candidates for judicial office* [emphasis supplied]. Section B, applying to public elections between competing candidates and to merit system elections, sets the campaign standards for judges and challengers who are running for elective judicial office. (endnote 1)

This interpretation of "election" to include merit selection is consistent with its accepted meaning. While in its most common usage, "election" normally implies a choosing by an electorate, the *Oxford English Dictionary* defines it simply as: "the action of choosing . . ." and lists as the first meaning: "1. The formal choosing of a person for an office, dignity or position of any kind: *usually* by the votes of a constituent body" (emphasis supplied).

This conclusion is consistent with Formal Opinion 312 which interpreted Canons 28 and 30 of the Canons of Judicial Ethics in effect prior to the adoption of the Code of Judicial Conduct in 1972. That Opinion set forth a list of proscriptions of political activity of judges. It concluded that all of those proscriptions applied to candidates for appointment as well as election to judicial office.

Accordingly, the Committee's opinion is that the provisions of Canon 7, Section A do apply to a candidate for judicial office by gubernatorial appointment pursuant to a merit selection plan and prohibit participation by the applicant in political fund raising events.

A difficult question remains: whether the lawyer-applicant becomes subject to the provisions of Section A(1) when his/her name is submitted to the Governor of the State or when the lawyer submits his/her name to the Judicial Council for consideration. The Committee believes that the latter conclusion represents sounder policy. If the underlying purpose of Canon 7 is to ensure the preservation of the independence and impartiality of the judiciary, and the appearance of the same, then it seems to us important to impose upon all those who serve or would serve in judicial office these restrictions upon their political activities. And if the restrictions are uniformly applied, then all lawyer-applicants will accept them knowingly and voluntarily, understanding that others similarly situated will be similarly bound. Likewise, by making this position clear to persons in political office, the discomfort, even the embarrassment, attendant upon the refusal of lawyer-applicants to become politically involved should be avoided.

Adopted by the Alaska Bar Association Ethics Committee on August 8, 1985.

Approved By The Board Of Governors On August 23, 1985

Endnotes:

1. Thode, E. Wayne, *Reporter's Notes to Code of Judicial Conduct*, 95 (1973).