

JUDICIAL QUALIFICATIONS COMMISSION

PUBLIC COMMENT PERIOD FOR PROPOSED AMENDMENTS

The following memo details amendments to the Georgia Code of Judicial Conduct and the Rules of the Georgia Judicial Qualifications Commission that the Investigative Panel of the Commission is considering for proposal to the Supreme Court of Georgia. Before sending these proposed amendments to the Court, the Investigative Panel is seeking comments from the judiciary, members of the bar, and the public. If you wish to make a comment on any of the proposed amendments, please send commentary in Word or PDF format by email to max@gajqc.com no later than August 17, 2018. Questions may be directed to the Director of the Commission, Ben Easterlin.

JUDICIAL QUALIFICATIONS COMMISSION

AMENDMENT PROPOSAL

To: The Georgia Judiciary, Members of the State Bar, and the Public
From: The Investigative Panel of the Judicial Qualifications Commission
Date: July 26, 2018
Re: Proposed Amendments to the Georgia Code of Judicial Conduct (the “Code”) and the Rules of the Georgia Judicial Qualifications Commission

Introduction

Pursuant to Judicial Qualifications Commission Rule 3.E (1)(b), the Investigative Panel of the Commission has “the duty and authority to . . . propose amendments to the Georgia Code of Judicial Conduct and these [Commission] Rules, subject to review and adoption by the Supreme Court.” The Investigative Panel is considering amendments addressing three issues: (1) the Commission has jurisdiction over judges elect, (2) the Commission has no jurisdiction over the pre-candidacy conduct of judicial candidates, and (3) judicial candidates should be subject to the same provisions as judges pro tempore.

I. The Commission has jurisdiction over judges elect.

Several Commissioners and others have posed questions as to the Commission’s jurisdiction, including the extent to which the Commission may discipline judges elect. That is, those individuals who are duly elected or appointed to office but have not yet officially assumed office. The Code explicitly gives the Commission jurisdiction to discipline judicial candidates and sitting judges for misconduct. (See Code, Preamble ¶ 3; Application ¶ 1.) It does not, however, clearly speak to judges elect who are no longer judicial candidates but not yet sitting judges.

The Investigative Panel proposes amending the Code and Rules to explicitly make judges elect subject to the Commission’s jurisdiction. Such amendments prevent anomalous situations where a judge elect commits misconduct that would typically constitute grounds for discipline or removal, but the Commission could not formally act on that misconduct until the judge elect formally assumed office. For example, if a judge elect were to start making speeches for political organizations or publicly endorsing other candidates for public office in violation of Rule 4.1 (A), it is uncertain that the Commission has the power to act until the individual assumes judicial office

because the Code and Rules only speak to judges and judicial candidates. Likewise, a judge elect could commit a felony and remain beyond the Commission’s authority until assuming office. Amending the Code and Rules to specify that judges elect remain subject to the Code as “judicial candidates” removes that uncertainty.¹

The Supreme Court could make this amendment with the addition of a sentence in the Code and Rules noting that judges elect are still “judicial candidates” subject to the Code. This addition could be made in the definition of judicial candidate, which is identical in the Terminology sections of the Code and Rules.²

Terminology (Page 3 in Rules and Page 7 in the Code)

“Judicial candidate” is a person, including an incumbent judge, seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she: (i) appoints or forms a *campaign committee*, (ii) makes a public announcement of candidacy, (iii) declares, files or qualifies as a candidate with the election or appointment authority, or (iv) authorizes solicitation or acceptance of *contributions* or *support*. A person who is announced as the appointee to fill a judicial position by the Governor or other appointing authority, or who is declared elected to a judicial position, continues to be a *judicial candidate* until he or she is sworn into office. The term “judicial candidate” has the same meaning when applied to a judge seeking election or appointment to non-judicial office.

II. The Commission has no jurisdiction over the pre-candidacy conduct of judicial candidates.

The Code and the Commission’s Rules are at odds regarding jurisdiction over misconduct that occurs before an individual, who is not already a judge, becomes a judicial candidate.³ The Code provides for jurisdiction over “allegations of misconduct occurring **during** the individual’s service as a . . . judicial candidate.” (*Code Application*, Part D.) The Commission’s Rules, on the other hand, provide for jurisdiction over “allegations that misconduct occurred **before or during** service as a . . . judicial candidate.” (Rule 2.B (2).)

The Investigative Panel proposes amending the Commission’s Rules to accurately reflect its jurisdiction over allegations of misconduct that occur during an individual’s judicial campaign

¹ “Judicial Candidates” refers to both candidates and judges elect for the remainder of this proposal.

² Text that appears unaltered is the text presently, underlined text is a proposed addition, stricken text is a proposed deletion.

³ The Commission’s Hearing Panel recently issued proposed Formal Advisory Opinion 242, which found that the Code did not apply to such pre-candidacy conduct because that person was not a judicial candidate or exercising a judicial function at the time.

consistent with the Code and proposed Formal Advisory Opinion 242. The addition of a subsection under Commission Rule 2.B clarifies this point:

Rule 2.B. The Judicial Qualifications Commission

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B. Jurisdiction

- (1) Judges. The Commission has jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge and regarding allegations of incapacity during service as a judge.
- (2) Former Judges. The Commission has continuing jurisdiction over former judges regarding allegations that misconduct occurred before or during service as a judge ~~or judicial candidate~~ if a complaint is made within one year following service as a judge ~~or judicial candidate~~.
- (3) Judicial Candidates. The Commission has jurisdiction over judicial candidates regarding allegations that misconduct occurred during service as a judicial candidate, and continuing jurisdiction over former judicial candidates regarding the same allegations if a complaint is made within one year following service as a judicial candidate.

The addition of subsection (3) clarifies an important point about Commission jurisdiction over pre-candidacy conduct. The Commission has a duty to investigate the misconduct of judges or former judges whether it occurred before or during the individual’s candidacy or judgeship. In fact, the Constitution explicitly gives the Commission this duty in cases involving the indictment of a judge, regardless of when the conduct underlying the indictment occurred. (GA. CONST. Art. VI, § VII. Para. VII.) Likewise, the Commission has a public interest in addressing the campaign misconduct of judicial candidates or former candidates. However, Commission jurisdiction over the misconduct of a judicial candidate that occurs prior to his or her candidacy, if the candidate does not become a judge, is another matter. That issue is properly suited for the voters to consider during a judicial campaign, and likely fodder for the candidate’s opposition and the press. Thus, subsection (3) protects the interest of the Commission in ensuring an ethical judiciary while keeping the Commission out of unnecessary political issues.

Relatedly, the Investigative Panel proposes amending Application Section D of the Code as follows to reflect this Rule change.

D. Ongoing Disciplinary Authority

In addition to the foregoing, the appropriate authority for judicial discipline shall have continuing jurisdiction over individuals to whom this Code is applicable regarding allegations of misconduct occurring before or during the individual’s service as a judge, or during the individual’s service as a judicial candidate, ~~judicial candidate, or an officer of a judicial system,~~ if a complaint is filed no later than one

year following that service.

This addition makes the Code and Rules consistent with commission jurisdiction as specified in the Rule 2.B proposal above. The deletion of the term “officer of a judicial system” is proper because that term appears nowhere else and is a remnant of the old Code.

III. Judicial candidates should be subject to the same Code provisions as judges pro tempore.

In looking at the Commission’s jurisdiction with respect to judges elect, the question arose as to what provisions of the Code apply to judicial candidates as opposed to judges. The Code’s application provides that “[a]nyone, whether or not a lawyer, who performs judicial functions under the Constitution and laws of Georgia, including an associate judge, senior judge, special master, magistrate, or municipal judge, or any person who is a judicial candidate for any such office, is a judge for the purpose of this Code.” On the other hand, only Canon 4 of the Code—governing political activity and campaign conduct—explicitly mentions its application to judicial candidates. These two provisions appear at odds because the application section instructs the Commission to treat judicial candidates as “judges” under the Code while only Canon 4 explicitly applies to judicial candidates.

Furthermore, properly determining what Code sections apply to judges as opposed to judicial candidates is of great practical importance. For example, Canon 3 prohibits “judges” from acting as arbitrators or mediators for compensation or from practicing law. Prohibiting judicial candidates from such activities would impose an undue financial hardship on many and is inconsistent with how this Commission has enforced and interpreted the Code. On the other hand, only applying Canon 4 to judicial candidates leaves too much misconduct beyond the purview of the Code. For example, a judicial candidate who wins an election should not trade on the prestige of his or her future judicial office for private gain. If only Canon 4 applied to judicial candidates, this may be permissible conduct. (See Rule 1.1 (requiring judges to act in a manner that promotes the public confidence in the independence, integrity, and impartiality of the judiciary); Rule 1.3 (prohibiting judges from lending the prestige of their office to advance the private interests of the judge or others).)

The Investigative Panel proposes applying the same Code provisions to judicial candidates as judges pro tempore. This strikes a proper balance between upholding the integrity of the

judiciary and ensuring that judicial candidates are not unduly burdened by the full Code. The Code's application provides that judges pro tempore are not required to comply with the following rules of the Code,

- Rule 3.4 [extra-judicial appointments],
- Rule 3.8 [fiduciary activities],
- Rule 3.9 [arbitration and mediation],
- Rule 3.10 [practice of law],
- Rule 3.11 [financial activities], and
- Rule 3.15 (A)(1) [annual financial reporting of quasi-judicial and extra-judicial compensation].

Exempting judicial candidates from these strictures of Canon 3 ensures that candidates do not face undue hardship when seeking judicial office by allowing them to practice law, serve in extra-judicial roles, and serve as mediators or arbitrators for pay among other things. In other words, engage in business related to the practice of law. At the same time, Canons 1 and 2, which protect the impartiality and integrity of the judiciary, remain in force. Accordingly, the Investigative Panel proposes adding a sentence to the end of the definition of judicial candidate specifying that such candidates are subject to the same Code provisions as judges pro tempore.

Terminology (Page 3 in Rules and Page 7 in the Code)

“Judicial candidate” is a person, including an incumbent judge, seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she: (i) appoints or forms a *campaign committee*, (ii) makes a public announcement of candidacy, (iii) declares, files or qualifies as a candidate with the election or appointment authority, or (iv) authorizes solicitation or acceptance of *contributions* or *support*. A person who is announced as the appointee to fill a judicial position by the Governor or other appointing authority, or who is declared elected to a judicial position, continues to be a *judicial candidate* until he or she is sworn into office. The term “judicial candidate” has the same meaning when applied to a judge seeking election or appointment to non-judicial office. Judicial candidates who do not currently hold judicial office are subject to the same Code provisions as judges pro tempore.

Additionally, the Investigative Panel proposes adding a second paragraph to the commentary section under the definition of judges pro tempore to reference the change above.

Commentary:

[1] These Rules contemplate . . . infrequent periods of time.

[2] Judicial candidates who do not currently hold judicial office are subject to the same Code provisions as judges pro tempore. See Terminology Section, definition of *judicial candidate*.

Conclusion

For these reasons, the Investigative Panel is considering these proposed amendments to the Georgia Code of Judicial Conduct and the Rules of the Georgia Judicial Qualifications Commission. The Investigative Panel is now soliciting public comments on these proposed amendments before sending the proposal to the Supreme Court of Georgia.