

DE 90-02 - January 11, 1990

**Campaign Activity of Judicial Candidates
Sections 105.011(2); 105.071; 105.09, F.S.**

To: Mr. Sheldon M. Schapiro, Post Office Box 24266, Fort Lauderdale, Florida 33307

Prepared by: Division of Elections

This is in reference to your request for an advisory opinion regarding prohibited campaign activity for a judicial candidate under Section 105.071, Florida Statutes. As you are a candidate for county court judge, the Division of Elections has authority under Section 106.23(2), Florida Statutes, to issue an advisory opinion to you relating to the Florida Election Code, Chapters 97-106, Florida Statutes.

Your letter sets forth five questions as to whether certain activities are prohibited by Sections 105.071 (1), (2), (3), (4), (6), and (11), Florida Statutes. Your specific questions are as follows:

1. Can a non-partisan judicial candidate provide a partisan elected official with his or her campaign badge, and permit said partisan public official to wear said judicial candidate's badge at public functions, and while wearing said judicial candidate's badge, allow said partisan elected official to actively campaign for said judicial candidate at partisan and non-partisan gatherings?
2. Can a judicial candidate purchase admittance tickets out of his own funds, as opposed to committee funds, and attend a partisan political function for a non-judicial candidate?
3. Can a judicial candidate attend a partisan political function, if the ticket for said function is paid for by some other person and is then given to the judicial candidate?
4. Can a judicial candidate's campaign committee, rather than the judicial candidate himself, purchase an advertisement in an advertisement book of a partisan political committee, which does not endorse judicial candidates?
5. Can a judicial candidate's campaign committee, rather than the judicial candidate himself, purchase an advertisement in an advertisement book of a partisan political committee, which does endorse judicial candidates?

The answer to your first question is yes. The answer to questions two and three is no. The answer to question four is yes, and the answer to question five is no.

Section 105.09, Florida Statutes, prohibits a political party or partisan political organization from endorsing, supporting, or assisting a candidate for judicial office, although the constitutionality of this section was clouded when the State Attorney for Dade County was enjoined from prosecuting the

Concerned Democrats of Florida or any of its members for any violations of Section 105.09, Florida Statutes. Concerned Democrats of Florida v. Reno, 458 F.Supp. 60 (S.D. Fla. 1978); reversed 634 F.2d 6291 (5th Cir. 1979), rehearing denied 638 F.2d 1234 (5th Cir. 1980), opinion issued 689 F.2d 1211 (5th Cir. 1981); cert. denied 102 S.Ct. 1426, 455 U.S. 938, 71 L.Ed.2d 647.

Members of Concerned Democrats filed suit asking the court to find Section 105.09, Florida Statutes, unconstitutional and to enjoin the State Attorney from enforcing this law. The court granted a preliminary injunction pending final determination on the merits.

In granting the preliminary injunction, the court found that Section 105.09, Florida Statutes, ran "afoul of the First Amendment in a significant or substantial manner" and that when this occurs, the courts "are obligated to invoke strict constitutional scrutiny." Id. at 64. The state must then show a compelling interest. Id. at 64. The court found that while Section 105.09, Florida Statutes, did promote a compelling state interest, the statute operated "against private citizens who wish to express their political preferences." Id. at 64, 65. The court concluded that the state could "achieve its goal of keeping judicial elections non-partisan by regulating the partisan activity of judges and judicial candidates" as accomplished by Section 105.071, Florida Statutes. Id. at 65.

In view of this case, this opinion will be limited to Sections 105.011(2) and 105.072(2), Florida Statutes.

The activities you describe in question number one appear to be simply campaigning. There is no prohibition against this in Section 105.071, Florida Statutes, as long as the judicial candidate does not participate in any of the prohibited political party activities such as campaigning as a party member or advertising himself as a member of any political party.

The activities set forth in questions two and three, however, would be prohibited under Section 105.071(1), Florida Statutes, whether the ticket was purchased from the candidate's own funds or those of another party. The only exception to this is set forth in DE 76-19 and DE 76-23, namely that a judicial candidate may accept an invitation to speak in behalf of his own candidacy.

Regarding your final two questions, the Florida Election Code does not differentiate between a candidate and a candidate's committee. The candidate is responsible for his committee's activities and what is prohibited for a candidate is also prohibited for a candidate's committee.

The Division of Elections addressed judicial candidates' advertisements in DE 87-05, where the Division opined that "a judicial candidate may purchase a non-partisan advertisement in a publication which is published by a political club if such advertising does not indicate that the judicial candidate is affiliated with a certain political party." The three reasons stated in the opinion were that even though the judicial candidate purchased advertising in a publication of what appears to be a partisan political organization, it does not appear that such organization endorsed, assisted, or supported the judicial candidate. The clubs indicated that they would sell advertisements to any person regardless of party affiliation. Second, the advertisement did not indicate any party affiliation, nor otherwise violate Section 105.071, Florida Statutes. Finally, the judicial candidate did not participate in partisan political

party activities since the club was not a political party.

The question of whether a judicial candidate may purchase a non-partisan advertisement in a publication which is published by a political party was not addressed in DE 87-05. However, Section 105.071, Florida Statutes, does not preclude a judicial candidate from purchasing advertising in an advertisement book of a partisan political committee as long as the committee does not endorse the candidate. The judicial candidate must exercise care, however, that the expenditure is, in fact, a purchase and not a contribution as Section 105.071(6), Florida Statutes, specifically prohibits a judicial candidate from making "contributions to political party funds."

This opinion does not address nor interpret the Code of Judicial Conduct or the Florida Judicial Qualifications Commission Rules, as such matters are outside the Division's jurisdiction.

SUMMARY

A non-partisan judicial candidate may provide a partisan elected official with his or her campaign badge, and permit said partisan public official to wear said judicial candidate's badge at public functions, provided the judicial candidate does not participate in any of the prohibited political party activities, campaign as a party member or advertise himself as a member of any political party. A judicial candidate may not attend a partisan political function, unless his attendance is to speak in behalf of his own candidacy. A judicial candidate may purchase an advertisement in an advertisement book of a partisan political committee as long as the committee does not endorse the candidate.