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STATE OF NEVADA

STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: December 26, 2007

OPINION: JE07-013

PROPRIETY OF A GROUP OF JUDGES JOINTLY ISSUING INVITATIONS TO POTENTIAL SUPPORTERS TO ATTEND A JOINT FUNCTION CONCERNING THEIR CANDIDACY FOR ELECTION TO THEIR CURRENT JUDICIAL POSITIONS.

support for the judges in the upcoming election. For purposes of this opinion, the Committee has assumed that this listing will be separate for each of the judges who participated. No contributions will be solicited or accepted.

ISSUE

May a group of judges issue joint invitations to potential supporters to attend a joint function concerning their candidacy for election to their current positions?

DISCUSSION

In part, Canon 5A(1)(b) provides that "a judge or a candidate for election ... to judicial office shall not: ... (b) publicly endorse or publicly oppose another candidate for public office" The Committee's opinion in connection with this request turns on whether, under the facts presented here, each participating judge is by implication "publicly" endorsing the other participating judges. It is important to place this advisory opinion in the context of recent changes to the Nevada Code of Judicial Conduct made by the Nevada Supreme Court both to relevant Canons and to the Commentary to those Canons. It is also important to place it in the context of prior opinions of the Committee which relied on what might be perceived from certain conduct to find implied violations of relevant Canons and the Nevada Supreme Court's changes to the Canons and Commentary to, in effect, clarify that the conduct described in those opinions was consistent with the relevant Canons.

ANSWER

Yes, as qualified herein.

FACTS

A judge asks whether a group of judges serving in multiple departments of the same court may jointly issue invitations to potential supporters to attend a joint function concerning their candidacy for election to their current positions. The judges will send the invitations for a joint function on or around the first date allowed for filing for candidacy. However, the function will take place before the period for filing closes. Invitations will go to all members of the local bar association. There will be some materials available at the function which lists individuals who have expressed

Prior to November 1, 2007, Canon 5 did not expressly state when one could

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declare candidacy for election to judicial office. Moreover, prior to that time, Canon 5C(2) provided that a candidate could solicit "public support for the candidate's campaign no earlier than 240 days before the primary election." In addition, until 2008, the filing period for candidates for judicial office, other than municipal court, was the first Monday in May to the second Friday after the first Monday in May. In 2007, the Nevada Legislature amended N.R.S. § 293.1771 to advance the filing period for candidates for judicial offices, other than municipal court, to the first Monday in January to the second Friday after the first Monday in January. See, 2007 Nev. Stat. Chapter 784 § 1. As a result of that change in the filing period, and after a hearing in June of 2007, the Nevada Supreme Court amended Canon 5C(1) and Canon 5C(2).

Canon 5C(1)(a) was amended to expressly state that a judge could make a public declaration of candidacy at any time. Canon 5C(1)(b) was amended to allow a judge when a candidate for election to judicial office "to seek, accept or use endorsements or publicly stated support." The new Commentary to Canon 5C(1) notes that a candidate may make a public declaration of candidacy at any time, and, when a candidate for judicial office, seek, accept or use endorsements or publicly stated support from any source except partisan political organizations. See, Commentary to Canon 5C(1). At the same time, the Nevada Supreme Court added a new subsection (3) to Canon 5C. The new subsection is concerned with when judges or their campaign committees may solicit or accept contributions for their campaigns. That new subsection in part provides that candidates who are not opposed in an election must not solicit or accept contributions for the candidate's

campaign. In addition, a candidate who is opposed cannot solicit or accept contributions until after the period for filing closes.

As a result of these changes, it is now clear, if it was not before, that judges may become a "candidate for judicial office" at any time. A judge becomes a "candidate" by simply making a public announcement of candidacy. See, Nevada Code of Judicial Conduct, Terminology. Once a candidate, a judge may seek, accept or use endorsements or publicly stated support. Here, the judges will be soliciting public support, and apparently using publicly stated support at and through this joint function. Thus, when the invitations are sent, each participating judge should have publicly declared his or her candidacy for election. It is the Committee's view that that public declaration may occur through the invitation itself. It is also clear, under these changes, that prior to the closing of the filing period, contributions may not be solicited or accepted, and then only if the judge is opposed. The inquiry by the judge here specifically states that contributions will not be solicited or accepted.

In the past, in similar situations where the Committee has been concerned with whether a judge's conduct might create in reasonable minds a perception that an activity is in violation of an express provision of the Canons, the Committee has considered Canon 2, which requires a judge to "avoid impropriety and the appearance of impropriety in all of the judge's activities." The Commentary to that Canon states that "a judge must expect to be the subject of constant public scrutiny," and "must therefore expect restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen, and should do so freely and willingly." The

Committee has also relied on Canon 2B, which in relevant part provides that a judge "shall not lend the prestige of judicial office to advance the private interests of the judge or others."

Even before the United States Supreme Court's decision in *Minnesota v. White*, 536 U.S. 765 (2002), in matters related to judicial campaigns, the Nevada Supreme Court began to limit the potential for finding implied violations of relevant Canons where there was no direct violation of them. For example, in 1998, the Committee issued Opinion JE98-005. In that opinion the Committee found that it was improper and a violation of the Canons for a judicial candidate to place campaign literature at a booth purchased by a political party at the Nevada State Fair. In that opinion, the Committee found Canon 5C(1)(a)(ii) violated because "placing brochures at the booth of a particular political party creates a danger that members of the public will associate the judge with the philosophy of that political party, and assume that the judge is publicly identifying himself or herself as a member of that political organization. This danger exists even if the judge or candidate supplies the same written materials to all political parties." Advisory Opinion: JE98-005, p.2. When our Court amended Canon 5C(1)(a)(ii) in 2000, it also added commentary overruling that Opinion. The commentary states: "nonetheless, judges and candidates may place their campaign materials on a table designated for the distribution of literature at any gathering regardless of whether the table is sponsored by a political party."

In 2002, relying on the provisions of Canon 5A(1)(b), the Committee concluded in Advisory Opinion No. JE02-005 that a judge could not contribute to

judicial and non-judicial candidates, if the amount contributed had to be reported by the candidate receiving the contribution, and thus became potentially available for public review. In that opinion, the Committee concluded that if a contribution was large enough to require reporting, the contribution was the equivalent of a public endorsement of another candidate for public office which was and still is prohibited by Canon 5A(1)(b). However, in that same opinion, the Committee acknowledged that members of the judiciary and judicial candidates attend political gatherings hosted by their judicial colleagues. The Committee concluded that the mere attendance at such gatherings did not violate the prohibition against public endorsement because such gatherings allowed judicial candidates to campaign on their own behalf. On December 22, 2006, the Nevada Supreme Court issued an order amending the Commentary to Canon 5A(1) of the Nevada Code of Judicial Conduct in Administrative Docket No. 403, which expressly overruled the Committee's principal conclusion in Advisory Opinion JE02-0005. The Commentary added at that time states:

A judge or judicial candidate's donation to a candidate or political organization that is otherwise permitted by state or federal law is not considered a public endorsement of a candidate for political office.

Although the Court added that language to the Commentary, it did not change the substance of Canon 5A(1)(b) itself.

Even more recently, by Order dated September 19, 2007, in Administrative

Docket No. 413, the Nevada Supreme Court also added new Commentary and language to Canon 5 in response to this Committee's Advisory Opinion JE07-008. In that Advisory Opinion, the Committee concluded that a judge could not participate in and continue to be a member of a club or committee affiliated with a political party. In part, that Advisory Opinion was based upon the provisions of Canon 5C(1)(a)(ii), which provides that a judge may at any time "upon request, identify himself or herself as a member of a political party." [Emphasis added]. It was the Committee's conclusion that a judge's participation or membership in clubs and committees of a political party were the equivalent of the judge's identifying himself or herself as a member of the political party without a request for such an identification. In Administrative Docket No. 413, the Court stated:

This Court has determined that the Standing Committee's view of the Code of Judicial Conduct unduly restrains a judge's political activities, and therefore has determined to amend Canon 5 and the Commentary to Canon 5 to clarify that a judge may participate in and be a member of clubs and committees affiliated with the political party.

In furtherance of that objective, the Court amended the Commentary to Canon 5A(1) to state that a judge or candidate for judicial office retains the right to "be a member of a political organization." In addition, the Court amended Canon 5C(1)(a)(iii) to state that a judge, at any time, may "be a member of" a political

organization. Although the Court in its order expressly states that it intends that a judge may participate in and be a member of clubs and committees affiliated with a political party, it did not change Canon 5C(1)(a)(ii), which does not allow a judge or a candidate to identify himself or herself as a member of a political party, except upon request.

It is against that background that the Committee issues this advisory opinion. The Committee's conclusion on this issue was not unanimous. The conclusion of the majority, in substantial part, was influenced by the foregoing changes which the Nevada Supreme Court has made through Commentary, through Canon changes, or both. Those changes suggest that, in matters related to judicial campaigns where there is no direct violation of a relevant Canon, as is the case here, the Committee should be reluctant to conclude that otherwise permissible conduct is an implied violation of the relevant Canon. Here, the majority also recognized that in light of recent changes concerning solicitation of campaign contributions, there are reasons why a judge might proceed with joint invitations and a joint function which are unrelated to public endorsement of the other judges. At the time that the invitations for this function will be sent, and at the time the function will be held, the judges may solicit support, but they may not solicit or accept contributions. Moreover, if it turns out that these judges are not opposed, they will be prohibited from soliciting or accepting contributions at any time during this election cycle. Thus, by sending joint invitations and holding a joint function, the judges are minimizing expenses which ultimately may have to be paid out of personal funds. In addition, the Committee's opinion in Advisory Opinion JE02-005 expressly stated that the mere

attendance by judges at functions hosted by judicial colleagues did not violate the prohibition against public endorsement because such public gatherings allow judicial candidates to campaign on their own behalf. That clearly can occur here.

However, a significant minority of the Committee was of the opinion that what is proposed here will "appear" to reasonable minds as if the judges are endorsing each other. In the opinion of the minority, appearances and perception are matters of significant concern in the Canons and to the promotion of public confidence in the judiciary. See, Canon 2.

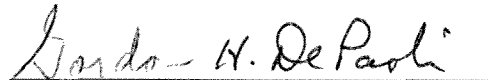
CONCLUSION

It is the opinion of a majority of the Committee that the relevant Canons, including Canon 5A(1)(b), are not violated here, provided that the judges exercise appropriate caution to ensure that the manner in which invitations are given, the function is advertised, and collateral material is made available, avoids to the maximum extent possible any suggestion of any endorsement by each judge of the other participating judges.

REFERENCES

Nevada Code of Judicial Conduct, Canon 2; Canon 2B; Canon 5; Canon 5A(1); Canon 5A(1)(b); Canon 5C(1); Canon 5C(1)(a); Canon 5C(1)(a)(ii); Canon 5C(1)(a)(iii); Canon 5C(1)(b); Canon 5C(2); Canon 5C(3); Commentary to Canon 5A(1); *Minnesota v White*, 536 US 765 (2002); N.R.S. § 293.1771; 2007 Nev. Stat. Chapter 784 § 1; Nevada Code of Judicial Conduct, Terminology; Advisory Opinion JE98-005; Advisory Opinion JE02-005; Advisory Opinion JE07-008.

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.



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