

FILED

AUG 22 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY \_\_\_\_\_  
DEPUTY CLERK

STATE OF NEVADA

STANDING COMMITTEE ON  
JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: August 22, 2008

ADVISORY OPINION: JE08-009

PROPRIETY OF A CANDIDATE FOR ELECTION TO JUDICIAL OFFICE PLACING CAMPAIGN MATERIALS AT A BOOTH SPONSORED BY A POLITICAL PARTY WHEN THE CANDIDATE KNOWS THAT ONLY JUDICIAL CANDIDATES WHO ARE MEMBERS OF THAT POLITICAL PARTY MAY PLACE SUCH MATERIALS AT THE BOOTH; AND

PROPRIETY OF A CANDIDATE FOR JUDICIAL OFFICE ACCEPTING AN INVITATION TO SPEAK AT AN EVENT SPONSORED BY A POLITICAL PARTY WHEN THE INVITATION STATES THAT ONLY JUDICIAL CANDIDATES WHO ARE REGISTERED MEMBERS OF THAT POLITICAL PARTY WILL BE ALLOWED TO SPEAK.

ISSUES

1. May a candidate for election to judicial office place campaign materials at a booth sponsored by a political party when the candidate knows that only judicial candidates who are members of that political party will be allowed to do so?
2. May a candidate for election to judicial office accept an invitation to speak at an event sponsored by a political party when the invitation states that only judicial candidates who are registered members of that political party will be allowed to speak?

ANSWER

Yes, with respect to placing campaign materials at the booth of the political party, and no, with respect to accepting the invitation to speak.

FACTS

A candidate for election to judicial office asks whether the candidate may place campaign materials at a booth sponsored by a political party when the candidate knows that only judicial candidates who are members of that political party may place materials at the booth. The candidate also asks whether a candidate for judicial office may accept an invitation to speak at an event sponsored by a political party when the invitation to speak states that only judicial candidates who are members of that political party will be allowed to speak. Initially, an eight person panel of the Committee was evenly divided on the appropriate resolution of these questions. Thereafter, a panel of all available members of the Committee, (13), was assembled to rehear this request.

DISCUSSION

**A. Background.**

Since it was established in 1998, on a number of occasions, this Committee has had to address questions arising under Canon 5 and, more specifically, the extent to which a candidate for election to judicial



office may directly or indirectly identify himself or herself as a member of a political party. As a result of some of the conclusions reached by the Committee, specific sections of the Canon have been amended, and in addition, some new Commentary has been added. Questions arising under Canon 5 have been further complicated by the decision of the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

The structure of the Code is important in connection with these questions. In relevant part, the Preamble to the Code provides:

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Applications Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and

Sections. The Commentary is not intended as a statement of additional rules.

There is no specific rule which provides a clear answer to these two questions. Instead, the Committee must examine the broad statement applicable here, Canon 5, which provides that "a judge or judicial candidate shall refrain from inappropriate political activities." It must also consider specific rules which, although not directly applicable, in one way or another relate closely to the questions. The Committee must also look to relevant Commentary for guidance as to the purpose and meaning of the broad statement and specific rules. Finally, the Committee must harmonize the relevant Canon, rules and Commentary with the fact that judges in Nevada are to be chosen through nonpartisan elections.

There are a number of rules and Commentary relevant here. First, there is Section 5A(1)(c), which in relevant part provides:

(1) Except as authorized in Sections 5B(2) and 5C(1) a judge or a candidate for election or appointment to judicial office shall not:

\* \* \*

(c) make speeches on behalf of a political organization: . . . .

The Commentary to that Section includes the following statement:

Nothing in this canon prohibits a judge from speaking to a political organization. See Section 4B.

Also applicable here is Section 5C(1), which in relevant part provides:

(1) A judge or a candidate subject to public election may, except as prohibited by law:

(a) at any time:

\* \* \*

(ii) upon request, identify himself or herself as a member of a political party:

\* \* \*

(v) make a public speech or appearance or speak to gatherings on his or her own behalf;

\* \* \*

(b) when a candidate for election to a judicial office:

(i) seek, accept, or use endorsements or publicly stated support for his or her candidacy from any person or organization other than a partisan political organization; . . . .

[Emphasis added]. The Commentary to that Section provides:

The Canon permits a candidate to make a public declaration of candidacy and to make public speeches and appearances at any time and, when a candidate for judicial office, to seek, accept, or use endorsements or publicly stated support from any source except partisan political organizations.

\* \* \*

Even though judges in Nevada are chosen by means of nonpartisan elections, judges and candidates for judicial office are occasionally asked at candidates' forums to identify their political party affiliations. An interpretation of the rule in effect prior to the 2000 amendment prohibited a public response to such inquiries. Adherence to that

interpretation creates the appearance that judges and candidates are being evasive or secretive. The 2000 amendment to Section 5C(1)(a)(ii) permits a judge or candidate to identify his or her political party membership upon request. While judges and candidates may now properly respond to questions regarding their party affiliation, it is impermissible in campaign materials for them to align themselves with a political party or to affiliate themselves with a political party. 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 particular political party.

It is useful to provide some history on the evolution of those Sections and that Commentary in relation to an election decision and advisory opinions issued by this Committee. In 1998, the Committee found it an unfair election practice to state political party affiliations in response to questions by an interviewer during a local radio broadcast. At that time, the relevant Canon allowed a judge or candidate only to "privately identify himself or herself as

a member of a political party." In its published decision, the Committee found a violation of Canon 5C(1)(a)(ii). See, Published Decision 98-1. In 2000, partly in response to that published decision, the Nevada Supreme Court amended Canon 5C(1)(a)(ii) to read as it reads today, and at the same time added the Commentary quoted above which relates to identification of party affiliation.

Also in 1998, the Committee issued Advisory Opinion JE98-005, where it concluded that it was improper and a violation of the Canon for a judicial candidate to place campaign literature at a booth purchased by a political party at the Nevada State Fair 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." Advisory Opinion: JE98-005, p. 2.

When the Nevada Supreme Court amended Canon 5C(1)(a)(ii) in 2000, it also added Commentary that "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 2006, the Committee issued Advisory Opinion JE06-006, where it concluded that a judge or judicial candidate could place his or her name on the website

of a political party for the purpose of providing a link to the website of the judge or judicial candidate, at which site the campaign materials of the judge or judicial candidate are located.

Also in 2006, the Committee issued Advisory Opinion JE06-016, where it concluded that a judge or judicial candidate could not participate in a parade as part of an entry sponsored by a political party, which entry was intended to represent that party's candidates for state and local office. The Committee reasoned that participation identifies the candidate as a member of a party without a request and "the participation in the parade under the facts, as stated, results in the candidate aligning with the particular political party."

In 2007, this Committee issued Advisory Opinion JE07-008, where it concluded that a recently elected judge could not continue as a member of, and continue to participate in, a club of a political party and the central committee of the political party. There, the Committee, relying in part on Section 5B which provides in part that "a judge shall not engage in any political activity except as authorized under any other Section of this Code," reasoned that Code sections which expressly cover the political activities of judges suggested that it would be inappropriate for judges to be a member of and to participate in such clubs and committees. The Committee referred to Section 5A(1). It also noted that such participation was the equivalent of a judge

identifying himself or herself as a member of a political party without a request.

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 that Advisory Opinion. 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 or contribute to a political organization."

Also in that Docket, the Court, by moving former Section 5C(1)(b)(i) to Section 5C(1)(a)(v), essentially allowed judges and judicial candidates to "make a

public speech or appearance or speak to gatherings on his or her own behalf" at any time and not just while a candidate for election. Finally, in that Docket, the Court added Section 5C(1)(b)(i), which provides that a judge or candidate when a candidate for election to judicial office to "seek, accept, or use endorsements or publicly stated support for his or her candidacy from any person or organization other than a partisan political organization." [Emphasis added].

It is against this background that the Committee issues this advisory opinion.

**B. Question No. 1:** May a candidate for election to judicial office place campaign materials at a booth of a political party when the candidate knows that only judicial candidates who are registered members of that party will be allowed to do so?

Based upon the manner in which the language of Section 5C(1)(a)(ii) and the relevant Commentary have evolved, it was the unanimous opinion of the Committee that the Commentary to that Section in effect states that the Canons should be interpreted to allow, and were intended by the Nevada Supreme Court to allow, judicial candidates to so place their materials even when the political party will not allow nonmembers of that party who are judicial candidates to place their materials at the political party's booth.

**C. Question No. 2:** May a candidate for judicial office accept an invitation to speak at an event sponsored by a political party when the invitation to speak states that only judicial candidates who are registered members of that political party will be allowed to speak?

This question presented a much more difficult issue for the Committee, with the Committee's response coming on a 7-6 vote. All members of the Committee agree that there are difficult and substantial questions here concerning how the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) applies. However, as the Committee has indicated previously, the scope of that decision must be dealt with through future court decisions, and the extent to which it requires changes to the Code must be resolved through the process established for amendments to the Code. See, Amended Opinion JE08-002, February 21, 2008.

From a review of the language of the Canon, the relevant Sections and the Commentary, it is clear that there are two related, but slightly different, purposes involved. One of the issues is a judge's or judicial candidate's political activities in general. That purpose is addressed in Section 5A(1) and the relevant Commentary. That purpose was the subject of the changes the Court made in 2007 in Administrative Docket No. 413. That purpose is not the issue here. The second purpose, which is at issue here, relates to judicial elections and the intent to preserve

such elections in Nevada as non-partisan elections, while at the same time allowing candidates who must stand for election appropriate opportunities to state their case for election. Thus, the Committee must harmonize Section 5C(1)(a)(v), which expressly allows a candidate at any time to speak to gatherings on his or her own behalf, with Section 5C(1)(a)(ii), which requires a request to identify oneself as a member of a political party, and also with Section 5C(1)(b)(i), which prohibits a candidate from seeking, accepting or using endorsements or publicly stated support from a partisan political organization.

A substantial minority of the Committee is of the opinion that Section 5C(1)(a)(v) is controlling here and allows the candidate to speak, regardless of who cannot speak. However, a narrow majority of the Committee is of the opinion that Sections 5C(1)(a)(ii) and 5C(1)(b)(i) must be harmonized in light of the Commentary which states that candidates should not, at least in campaign materials, align or affiliate themselves with a political party.

Here, it was the opinion of a majority of the Committee that appearing to speak at such an event, when the invitation expressly requires that the candidate be a member of the political party not only results in identification of party affiliation without a request, it also results in the candidate aligning and affiliating with the political party. The minority of the Committee was of the view that the words "alignment" and

"affiliation" should be construed narrowly so as to be limited to situations where a candidate expressly adopts the platform and philosophy of the political party. However, the majority concluded that there would be little left to the notion of nonpartisan judicial elections by such a narrow construction. Thus, the majority of the Committee harmonizes Sections 5C(1)(a)(ii), 5C(1)(a)(v) and 5C(1)(b)(i) to require the candidate to decline the invitation because the circumstances here suggest alignment and affiliation with a political party, as well as an appearance of seeking publicly stated support of a partisan political organization.

#### CONCLUSION

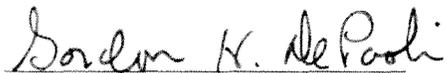
Therefore, it is the opinion of the Committee that, under the facts as presented, a candidate for election to judicial office may place campaign materials at a booth of a political party even when the candidate knows that only candidates for election to judicial office who are registered as members of that party may do so. It is also the opinion of the Committee that a candidate for judicial office should not speak at an event sponsored by a political party where the invitation to speak expressly provides that only candidates for judicial office who are registered members of that political party will be allowed to speak.

#### REFERENCES

Code of Judicial Conduct, Canon 5A(1), Canon 5B(2), Canon 5C(1), Canon

5C(1)(a)(ii), Canon 5C(1)(a)(iii), Canon 5C(1)(a)(v), Canon 5C(1)(b)(i), Advisory Opinion Published Decision 98-1, Advisory Opinion JE98-005, Advisory Opinion JE06-006, Advisory Opinion JE06-016, Advisory Opinion JE07-008, Amended Opinion JE08-002

*This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding on 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 requesting the opinion.*



**Gordon H. DePaoli, Esq.**  
*Committee Chairman*