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STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

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ADVISORY OPINION: JE12-003

PROPRIETY OF A JUDICIAL
CANDIDATE SIGNING A CAMPAIGN
PLEDGE AND RESPONDING TO A
CAMPAIGN QUESTIONNAIRE

FACTS

A judicial candidate has presented a hypothetical question inquiring whether it is a violation of the Nevada Code of Judicial Conduct (“NCJC”) for a judicial candidate, in connection with seeking an endorsement from a politically active organization, to sign a campaign pledge and respond to a candidate questionnaire form. In the hypothetical, the pledge asks candidates to “pledge” to actively support “rights of workers to collectively bargain,” to “help workers form Unions,” to speak to employers and urge them to “respect the legal right to collectively bargain,” to publicly support the policies that benefit the educational system, to “aid in holding lending institutions accountable for predatory lending,” to assist maintaining homeowners in their homes, to collaborate in the development of future progressive policies, and to maintain “regular contact” with members and leaders of the organization.

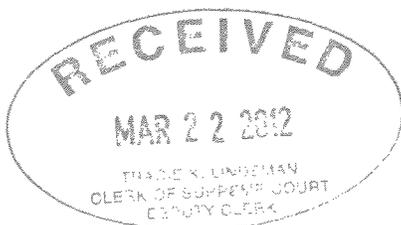
ISSUE

May a judicial candidate, in connection with seeking an endorsement from a politically active group, sign a campaign pledge to actively support certain legal positions and respond to a questionnaire on the candidate’s qualifications and opinions on legal issues?

ANSWER

The Committee believes that, based on the wording and format of the commitments sought in the pledge in this hypothetical, a judicial candidate would be prohibited by Rule 4.1(A)(13) from making the promises, commitments and pledges contained therein. The Committee also concludes that the propriety of responding to questions in the hypothetical questionnaire depends on the wording and format of such questions, and that candidates are not *per se* barred from responding to questions which seek statements about the candidate’s personal views on legal, political or other issues, but candidates are prohibited from responding to questions which seek commitments to perform adjudicative duties of office other than in an impartial way and undermine the candidate’s independence and impartiality.

In the hypothetical, the questionnaire asks the candidate to respond to questions about the candidate’s qualifications for office and opinions on certain matters, including opinions on the fairness of the legal system, specific election laws, constitutional provisions and judicial precedents. It also asks the candidate to “commit” to provide access, seek input on policy matters, and work with the organization to develop policies, to describe how the candidate has handled labor related issues in the past, and how the candidate



would connect with the community and organization members.

The judicial candidate inquires whether it would be a violation of the NCJC to sign the pledge form and/or respond to the questions in the questionnaire.

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

“[T]he role of a judge is different than that of a legislator or executive branch official, . . . [and] campaigns for judicial office must be conducted differently from campaigns for other offices.” *See Nev. Code Jud. Conduct Comment 11, Rule 4.1*. Canon 4 states “[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” *See Nev. Code Jud. Conduct, Canon 4*. Rule 4.1(A)(3) states in pertinent part:

(A) Except as permitted by law, or by Rules 4.2 and 4.4, a judge or a judicial candidate shall not:

(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Comments [14] and [15] to Rule 4.1 provide further insight on the scope of these restrictions, recognizing that judicial candidates may pledge to take action outside the courtroom or make campaign promises related to judicial organization and administration. Comment [15] acknowledges that Rule (A)(13) does not specifically address a judicial candidate’s responses to questionnaires from issue advocacy or community organizations, but advises:

Depending upon the wording and format of such questionnaires, candidates’ responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate’s independence or impartiality, or that it might lead to frequent disqualification. *See Rule 2.11*

Rule 2.11 requires a judge to disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including in circumstances where the judge, “while a judge or a judicial candidate, has made a public statement . . . that commits or appears to commit the judge to reach a particular

result or rule in a particular way in the proceeding or controversy.” See *NCJC Rule 2.11(5)*.

The Committee believes the pledge in this hypothetical is contrary to the principles set forth in Rule 4.1(A) and Rule 2.11. The pledge asks judicial candidates to explicitly commit to actively support specific policies and legal rights of one select group of individuals. The pledge goes well beyond simply inquiring into the candidate’s opinion on legal or political issues, and instead represents an affirmative commitment to support specific policies and positions upon taking the bench. Signing the pledge would likely require disqualification of the judge in proceedings involving labor issues, worker’s rights, predatory lending, education and collective bargaining, and it demonstrates an active commitment by the judicial candidate to reach a particular result or rule in favor of a specific group of individuals, all of which creates circumstances in which the judge’s impartiality might reasonably be questioned. The nature and scope of the pledge involved in this hypothetical appears inconsistent with the impartial performance of the judicial office, and would likely erode public confidence in the independence, integrity and impartiality of the judiciary. See *NCJC Rule 1.2*.

The Committee has similar concerns with some, but not all, of the questions presented in the questionnaire. In this regard, the wording and format of the questions is critical. Questions asking judicial candidates to “commit,” if elected, to actively seek input from, and work directly with, members of the sponsoring organization on policies and procedures that affect their members raise the same issues under Rule 4.1(A)(13) discussed above. The wording and format of these questions might

be reasonably viewed as a pledge, promise or commitment to perform adjudicative duties other than impartially. Other questions in the hypothetical appear irrelevant to qualifications or performance of judicial duties, and seem to relate more to duties that would fall upon political candidates for legislative office. Examples include questions which ask how the judicial candidate would “advocate for working people” or “connect with the community” and the organization’s members.

By contrast, other questions asking for statements or announcements of the candidate’s personal views on legal, political or other issues, or how the candidate would improve the judicial organization or administration of the court system, are permissible in the Committee’s opinion. See *Rule 4.1(A), Comment [13] and [14]*. The Committee notes that, should a candidate elect to respond to such questions, the judicial candidate should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views, and the obligation to follow binding legal precedent anywhere it exists.

The Committee observes that the issues presented by this request for advisory opinion are of first impression under the revisions to the NCJC, and it is critical to recognize there is an ongoing debate in other jurisdictions regarding the constitutionality of the promise clause contained in Rule 4.1(A)(13). See *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974, *rehearing denied* 619 F.3d 776 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 2872, 179 L.Ed.2d 1203 (2011); *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 2872, 179 L.Ed.2d 1187 (2011); *Wersal v. Sexton, et. al*, 613 F.3d 821, *rehearing en banc granted* (Oct. 15, 2010), 2010 WL 2945171, (8th

Cir., 2010). The Committee notes that the promise clause was also discussed by the Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), but the Court took no position on its constitutionality.

While the Committee acknowledges the ongoing constitutional debate, as an administrative body created by the Court, the Committee is limited in its jurisdiction to interpretation and enforcement of the Canons. Our jurisdiction does not extend to setting aside a Canon or Rule duly adopted by the Court. Moreover, the Committee notes that the NCJC is entitled to a presumption of constitutionality, and the specific Canon and Rules were recently adopted by the Nevada Supreme Court consistent with the relevant jurisprudence, including *White*, and vetted in promulgation of the American Bar Associations 2007 Model Code of Judicial Conduct. *ABA Center for Prof. Resp. 2007 Edition Model Code of Judicial Conduct 142-161 (Am. Bar Assoc. 2007)*. To the extent such issues may arise in the future under Nevada's Revised Code of Judicial Conduct, the Committee believes such constitutional questions are best addressed by courts of appropriate jurisdiction

The Committee notes that this opinion is limited to the facts presented, and recognizes a different analysis may apply depending on the wording, format and scope of the pledge or questionnaire involved.

CONCLUSION

The Committee believes that, based on the wording and format of the commitments sought in the pledge in this hypothetical, a judicial candidate would be prohibited by Rule 4.1(A)(13) from making the promises, commitments and pledges

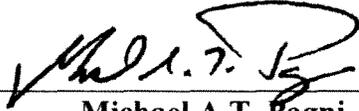
contained therein, because they appear to involve commitments to perform adjudicative duties of office other than in an impartial way and undermine the candidate's independence and impartiality. The Committee also concludes that the propriety of responding to questions in the hypothetical questionnaire depend on the wording and format of such questions. Candidates are not *per se* barred from responding to questionnaires which seek statements about the candidates personal views on legal, political or other issues, but candidates that do respond should give assurances that they will keep an open mind and carry out judicial duties faithfully and impartially. The Committee also cautions candidates to be mindful of the wording and format of questionnaires, to avoid questions or responses which might reasonably be viewed as pledges, promises, or commitments to perform adjudicative duties other than in an impartial way. The Committee further notes that, in accordance with Comment [15], candidates who do not respond to pledges or questionnaires may state their reasons for not responding, "such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification."

REFERENCES

Nev. Code Jud. Conduct, Canon 4; Rule 1.2, Rule 2.11 & Rule 4.1; *Commentary [13], [14] and [15] to Rule 4.1; Rule 5 Governing the Standing Committee On Judicial Ethics Rule 5 Governing the Standing Committee On Judicial Ethics; Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *See Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974, *rehearing denied* 619 F.3d 776 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 2872, 179

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This opinion is issued by the Standing Committee on Judicial Ethics. 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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