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STATE OF NEVADA

STANDING COMMITTEE ON  
JUDICIAL ETHICS AND ELECTION PRACTICES

**DATE ISSUED:** February 14, 2008

**OPINION:** JE08-002

PROPRIETY OF A CANDIDATE FOR ELECTION TO JUDICIAL OFFICE IDENTIFYING HIMSELF OR HERSELF AS A MEMBER OF A POLITICAL PARTY: (1) IN RESPONSE TO A REQUEST BY THE PRINT AND/OR BROADCAST MEDIA; (2) IN THE CANDIDATE'S CAMPAIGN LITERATURE.

**ISSUE**

May a candidate for election to judicial office identify himself or herself as a member of a political party: (i) in response to a request by the print media and/or broadcast media; (ii) in his or her campaign literature?

**ANSWER**

Yes, with respect to a request by the print or broadcast media, and no, with respect to his or her campaign literature.

**FACTS**

A candidate for election to judicial office asks a number of questions. The first question relates to whether the candidate may identify himself or herself as a member of a political party in response to a request from the print media or the broadcast media. The candidate notes that once a response is made to a request from the print media or the

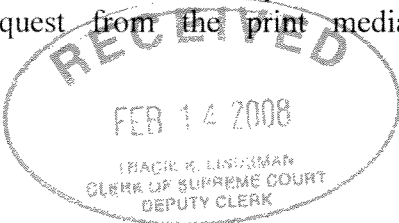
broadcast media, the response is potentially available to members of the public at large, who technically have not made a request directly to the candidate.

The candidate asks two additional questions, each of which are prefaced in a fashion that would require the Committee to express its views on the application of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), under facts not present in that case. For the reasons discussed below, the Committee declines to respond to those questions in that manner. However, the Committee did consider those questions without the preface concerning the *White* decision. Without that preface, the second question is whether the candidate's campaign literature may use a partisan political organization's platform statements so long as the statements are not attributed to the partisan political organization. The third question is whether the candidate's campaign literature may identify the candidate as a member of a political party.

**DISCUSSION**

**Question Number 1:** May a candidate for election to judicial office identify himself or herself as a member of a political party in response to a request by the print media and/or broadcast media.

Canon 5C(1)(a)(ii) of the Nevada Code of Judicial Conduct expressly allows



a judge or a candidate to at any time "upon request, identify himself or herself as a member of a political party." The Commentary to that Canon states:

Even though judges in Nevada are chosen by means of non-partisan 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 membership upon request.

The 2000 amendment resulted from and the interpretation noted in that Commentary is a reference to a 1998 election complaint decision, In Re: Complaint, Publicly Disclosing Political Party Affiliation During Race for Judicial Office - Violation Canon 5C1(a)(ii), No. 98-1. In that matter, two candidates disclosed their political party affiliations in response to specific questions during radio interviews which were broadcast to the public. The panel considering that matter concluded, based on the Canon as then written, that stating one's political party affiliation during an interview for a radio station broadcast was in violation of the Canon. It is clear that the 2000

amendment to Canon 5C(1)(a)(ii) and the accompanying Commentary were intended to change that outcome. It is, therefore, the Committee's opinion that a request from the broadcast media or from the print media for disclosure of a candidate's affiliation to a political party constitutes a "request" within the meaning of the Canon, and is permissible. The fact that the results of that "request" are published to persons who have not expressly made it, does not render the candidate's response to the initial request a violation of the Canon.

**The Committee's Reasons for Declining to Opine on the Scope of *Republican Party v. White***

Rule 5(4)(f) of the Rules of the Standing Committee on Judicial Ethics and Election Practices allows the Committee to decline to issue an opinion where the Committee has by a majority vote determined that it would be inadvisable to respond to the request. For purposes of this Advisory Opinion, all but one of the attorney members of the Committee, and three of the four judge members of the Committee, participated. The members who participated unanimously concluded that it is inadvisable for the Committee to issue advisory opinions which require the Committee to express its views on how the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), may be applied to facts not present in that case. The scope of that decision must be dealt with through future court decisions.

The extent to which *White* requires changes to the Code must be resolved through the process established for amendments to the Code. That has already occurred once. See, In Re Amendment to the Nevada Code of Judicial Conduct,

Administrative Docket No. 374, Sept. 13, 2004. A more comprehensive process has been underway for some time. On February 12, 2007, the House of Delegates of the American Bar Association adopted a Revised Model Code of Judicial Conduct based on the recommendations of the ABA Joint Commission to evaluate the Model Code of Judicial Conduct. The Nevada Supreme Court will, in due course, consider whether to adopt any or all of the proposed Model Code of Judicial Conduct. If revisions to the Code are needed, the revisions should occur through that process, and not through non-binding Advisory Opinions issued by this Committee concerning its views on the scope of *White*. For those reasons, the Committee declines to respond to the questions as submitted.

**Question No. 2:** May a candidate for election to judicial office identify himself or herself as a member of a political party in his or her campaign literature?

If this Committee were to respond to a request like this one, it would not have sufficient factual information concerning the content of the proposed campaign literature to issue an opinion. The Committee does note that the Commentary to Canon 5C(1) also states:

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.

Even if it had more information, the Committee unanimously declines to respond to this request pursuant to the Committee's Rule 5(4)(f). This Committee does not have the time or the resources, and even if it did, it would be inadvisable for it to review and act as a clearinghouse for the campaign literature of candidates for judicial office.

**Question No. 3:** May a candidate's campaign literature identify the candidate as a member of a political party?

The third question directly asks whether a candidate's campaign literature may identify the candidate as a member of a political party. The Committee unanimously concluded that such an identification would be a direct violation of Canon 5C(1)(a)(ii) because there is no request for such identification. See also, Nevada Advisory Opinion JE 06-016. The Committee reminds candidates that under Nevada law, judicial elections are non-partisan, and that the Commentary to Canon 5C(1) expressly notes that "it is impermissible in campaign materials for them to align themselves with a political party or to affiliate themselves with a political party."

### **CONCLUSION**

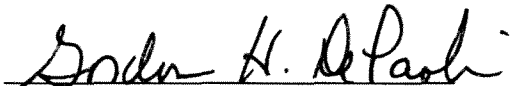
Therefore, it is the opinion of the Committee that under the facts as presented, a candidate for election to judicial office may identify himself or herself as a member of a political party upon request of the print media or the broadcast media. It is also the opinion of the Committee that a candidate for judicial office may not identify himself or herself as a member of a political party in the candidate's campaign literature.

## REFERENCES

Nevada Code of Judicial Conduct, Canon 5C(1), Canon 5C(1)(a)(ii); Rules of the Standing Committee on Judicial Ethics and Election Practices, Rule 5(4)(f); Nevada Advisory Opinion JE 06-016, In Re Amendment to the Nevada Code of Judicial Conduct, Administrative Docket No. 374, Sept. 13, 2004.

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*Committee Chairman*