

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE AMENDMENT)
SDCL Ch. 16-2 APPENDIX, SOUTH) RULE 13-08
DAKOTA CODE OF JUDICIAL CONDUCT,)
CANON 5.)
)

A hearing was held on February 13, 2013, at Pierre,
South Dakota, relating to the amendment of SDCL Ch. 16-2
Appendix, South Dakota Code of Judicial Conduct, Canon 5 and the
Court having considered the proposed amendment and being fully
advised in the premises, now, therefore, it is

ORDERED that SDCL Ch. 16-2 be and it is hereby
amended to read in its entirety as follows:

SDCL Ch. 16-2 Appendix, South Dakota Code of Judicial
Conduct, Canon 5.

CANON 5

A Judge or Judicial Candidate Shall Refrain from Inappropriate
Political Activity

A. All Judges and Candidates

- (1) Except as authorized in Sections 5B(2), 5C(1), 5C(2) and
5C(3), a judge or a candidate* for election or appointment to
judicial office shall not:
- (a) hold an office in a political organization;*
 - (b) publicly endorse or publicly oppose another candidate for
public office;
 - (c) make speeches on behalf of a political organization;*
 - (d) solicit funds for a political organization* or candidate;* or
 - (e) personally solicit or accept campaign contributions other than
through a campaign committee authorized by Section 5C(2).

COMMENTARY

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

- (2) A judge shall resign from judicial office upon becoming a candidate* for a nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate* for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law* to do so.

COMMENTARY

This section applies regardless of whether the office sought is partisan or nonpartisan.

- (3) A candidate* for a judicial office:

- (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity, impartiality,* and independence of the judiciary, and shall encourage members of the candidate's family* to adhere to the same standards of political conduct in support of the candidate* as apply to candidate;*

COMMENTARY

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

- (b) shall prohibit employees and officials who serve at the pleasure of the candidate,* and shall discourage other employees

and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate* is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly* permit any other person to do for the candidate what the candidate* is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) with respect to 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 the office; or

(ii) knowingly* misrepresent the identity, qualifications, present position or other fact concerning the candidate* or an opponent;

COMMENTARY

Section 5A(3)(d) prohibits a candidate for judicial office from making pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office regarding cases, controversies or issues that are likely to come before the court. A candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Sections 3B(9) and (10), the general rules on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also South Dakota Rule of Professional Conduct 8.2. The promises and commitments clause must be narrowly construed and cautiously applied to campaign speech.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may, unless otherwise prohibited by law:*

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office.

(b) a nonjudge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law:*

(i) retain an office in a political organization, *

(ii) attend political gatherings, and

<Section 5B(2)(b)(iii) effective until the effective date of the repeal of § 12-9-2>

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization* or candidate and purchase tickets for political party* dinners or other functions.

<Section 5B(2)(b)(iii) effective upon the effective date of the repeal of § 12-9-2>

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization* or candidate and purchase tickets for political party dinners or other functions.

COMMENTARY

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section 5B(2) nonjudge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5B(1), 5B(2)(a), 5E and Application Section.

C. Judges and Candidates Subject to Public Election.

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

(a) at any time

(i) purchase tickets for and attend political gatherings:

<Section 5C(1)(a)(ii) effective until the effective date of the repeal of § 12-9-2>

(ii) identify himself or herself as a member of a political party;*

<Section 5C(1)(a)(ii) effective upon the effective date of the repeal of § 12-9-2>

(ii) identify himself or herself as a member of a political party;

(iii) contribute to a political organization* or candidate and,

(iv) speak to gatherings on his or her own behalf;

(b) when a candidate for election

(i) appear in newspaper, television and other media advertisements supporting his or her candidacy:

(ii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running;

(iv) establish a campaign committee pursuant to the provisions of Section 5C(2); and

<Section 5C(1)(a)(v) effective until the effective date of the repeal of § 12-9-2>

(v) seek, accept, or use endorsements from any person or organization other than a political party*.

<Section 5C(1)(a)(v) effective upon the effective date of the repeal of § 12-9-2>

(v) seek, accept, or use endorsements from any person or organization.

COMMENTARY

Section 5C(1) permits judges subject to election to be involved in certain political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity. The conduct of a judicial campaign and the manner of presentation of any material in connection with a campaign for judicial office should comport with the dignity and integrity required of that office.

(2) A judicial candidate subject to public election

(a) may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.

(b) A judicial candidate subject to public election shall direct his or her campaign committee:

(i) to solicit and accept only such campaign contributions as are reasonable, in any event not to exceed one-thousand dollars (\$1,000) in the election year per individual or organization;

(ii) not to solicit contributions for the candidates campaign earlier than January 1 of the election year and no later than December 31 of the election year;

(iii) that in addition to complying with all applicable statutory requirements for disclosure of campaign contributions, candidates* or candidates' campaign committees shall comply with all applicable statutory campaign reporting requirements;

(iv) not to use or permit the use of campaign contributions for the private benefit of the candidate* or others; and

(v) not to disclose to the candidate the identity of campaign contributors nor to disclose to the candidate the identity of those who were solicited for contribution and refused such solicitation. The candidate may be advised of aggregate contribution information in a manner that does not reveal the source(s) of the contributions.

(c) A judicial candidate subject to public election may personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority.

COMMENTARY

Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions except to the extent allowed by Section 5C(2)(c). See Section 5A(1)(e). Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees. For instance, under current law candidates should advise their campaign committee to follow the reporting requirements contained in SDCL §§ 12-27-22 and SDCL 12-27-24 thru 28. Such reports must be filed with the Secretary of State on the dates specified. The candidates* or candidates' campaign committees shall also comply with SDCL § 12-27-15. At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, but not to exceed one-thousand dollars in the election year per individual or organization. The candidate must also instruct the campaign committee to comply with all applicable requirements of Section 5C(2).

Candidates' campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible. Contributions for a campaign for judicial office should not be knowingly solicited or accepted from a party, or one employed by, affiliated with or a member of the immediate family of a party, to litigation that (a) is before the candidate, (b) may reasonably be expected to come before the candidate if elected, or (c) has come before the candidate so recently that the knowing solicitation or acceptance of funds may give the appearance of improper use of the power or prestige of judicial office. Similarly, contributions may not be knowingly solicited or accepted from any firm, corporation or other organization that has as one of its purposes the promotion of one side of a legal issue which may reasonably be expected to come before the candidate if elected. Contributions may be solicited and accepted from lawyers (including lawyers having cases before, or which may come before, the candidate), provided that the solicitation makes

no reference, direct or indirect, to any particular pending or potential litigation.

The following commentary paragraph is repealed effective upon the effective date of the repeal of § 12-9-2

With regard to the issue of solicitation of contributions or publicly stated support from political parties, candidates or candidates' campaign committees are directed to review SDCL § 12-9-2, making it a class 2 misdemeanor for any political party to endorse or nominate any candidate for judicial office.

(3) Except as prohibited by law,*a candidate* for judicial office in a public election may permit the candidate's* name:

(a) to be listed on election materials along with the names of other candidates* for elective public office, and

(b) to appear in promotions of his or her candidacy.

COMMENTARY

Section 5C(3) provides a limited exception to the restrictions imposed by Section 5A(1).

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law,* the legal system or the administration of justice, or (iii) as expressly authorized by law.

COMMENTARY

Neither Section 5D nor any other Section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

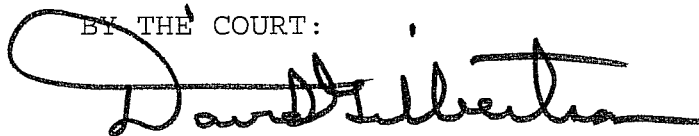
E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates.* A successful candidate,* whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate* who is a lawyer is subject to lawyer discipline for his or her campaign conduct.

A lawyer who is a candidate* for judicial office is subject to Rule 8.2(b) of the South Dakota Model Rules of Professional Conduct.

IT IS FURTHER ORDERED that the rule shall become effective July 1, 2013.

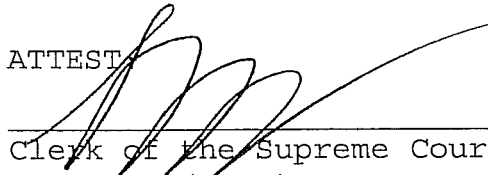
DATED at Pierre, South Dakota, this 26th day of March, 2013.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST


Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

MAR 26 2013


Clerk

STATE OF SOUTH DAKOTA

In the Supreme Court

I, Shirley A. Jameson-Fargel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this

26th day of March, 20 13


Clerk of Supreme Court

Deputy