

South Dakota
Special
Committee on
Judicial Election
Campaign
Intervention

500 East Capitol Avenue
Pierre, SD 57501-5070



March 22, 2006

OPINION #06-01

[REDACTED]

Dear [REDACTED]

Your inquiry raised the following issues for the Special Committee on Judicial Election Campaign Intervention:

- 1) Is it permissible for a sitting judge to appear in campaign materials wearing a judicial robe?
- 2) Is it permissible for a candidate for judicial election to appear in a courtroom in campaign materials?

The Committee answers both questions in the affirmative.

In 1998, the predecessor to this committee determined that judicial robes should not be worn to promote an incumbent judge's candidacy. Opinion #98-07. At the time of that decision, SDCL Ch. 12-9 Appendix provided:

No campaign material of any kind should depict the candidate in a judicial context, i.e., appearing in a courtroom or other location relating to the administration of justice inasmuch as such depiction may tend towards sensationalism and lack of dignity and may also arouse suspicion that the candidate is using the power and prestige of his judicial office to promote his candidacy.

As set forth above, the use of a courtroom in campaign materials was categorically prohibited.

On December 1, 2005, the above language (and the entire Appendix to Chapter 12-9) was stricken by the South Dakota Supreme Court. "All jurisdictions that have addressed the question agree that an incumbent judge may be pictured in his or her robe in campaign materials, so long as the picture is not misleading." Shaman, Judicial Conduct and Ethics, (3rd ed. 2004) (string citations omitted). Courts addressing this issue have reasoned that such "photographs do not falsely depict [the candidate's]

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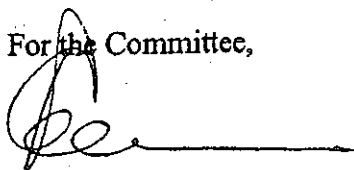
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identity nor his present position. As a matter of fact, if it is an informed electorate we are interested in then a photograph of the candidate which can quickly inform the elector who sees it what the candidate's job is, should be encouraged." Discipline of Miller, 759 A2d 455, 463 (Penn 2000); Saefke v. Vande Walle, 279 NW2d 415, 417 (ND 1979).

For these same reasons, given the removal of the prohibition from appearing in a courtroom in campaign materials, it is the Committee's opinion that campaign materials depicting any candidate (whether a judge or attorney) in the courtroom setting is permissible under the Code of Judicial Conduct. However, the Committee would caution any candidate for judicial office that campaign materials should not be false, deceptive or misleading.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

The Committee is a non-partisan group dedicated to preserving the dignity and integrity of this state's judicial system. We believe judicial candidates should aspire to the highest ethical standards to promote public trust and confidence in the fairness and impartiality of this state's courts. We do not endorse candidates, and this opinion is not intended to announce support for, or opposition to, any candidate. Instead, we strive to educate the candidates, the media, and the public about judicial campaign conduct.

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March 22, 2006

OPINION #06-02

[REDACTED]

Dear [REDACTED]

You have submitted the following questions to the Special Committee on Judicial Election Campaign Intervention:

- 1) Whether a sitting judge may endorse a judicial candidate.
- 2) Whether the following phrases may be used on campaign advertisements: "Ask any lawyer. Ask your lawyer. Ask law enforcement. Ask the Clerk of Court. Ask a Court Services Officer."

Concerning the first inquiry, Canon 5(C)(1)(b)(iii) specifically indicates that a judge or candidate subject to a public election may "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." In addition, as the Preamble to the Canons recognize, the Canons should be interpreted to promote a judge or candidate's rights to freedom of speech and association. The ability to endorse other candidates or solicit others for endorsements would fall within the judge or candidate's protected speech.

Concerning the proposed phrases in campaign advertisements, the Committee believes that the first three statements relating to lawyers and law enforcement are acceptable. In essence, these statements are asking the public to seek out endorsements from these individuals concerning a candidate's qualifications. Canon 5(C)(2) provides that judges or candidates may solicit "publicly stated support from individuals and organizations other than political parties." As previously mentioned, the Canons are to be construed to protect a judge or candidate's free speech rights.

However, concerning the last two statements referencing the Clerk of Court or a Court Services Worker, the analysis is slightly changed because these are employees of the Unified Judicial System (UJS). As such, under the UJS employment policies they are prohibited from participating in judicial campaign activities, taking part in any campaigns involving judicial office, soliciting money for any candidate for judicial office and displaying any campaign literature as conditions of their employment.

Such an advertisement would place these employees in a tenuous position if the public did in fact ask them about a judge or candidate's qualifications for judicial office as this advertisement would invite them to do. The identification of court personnel to support a judicial candidate's bid for judicial office could also compromise public confidence in the integrity and independence of the judicial employees. See Canon 1; Canon 3(C)(2) ("A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties."). As a result, the Committee recommends that such phrases not be used in campaign materials.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

The Committee is a non-partisan group dedicated to preserving the dignity and integrity of this state's judicial system. We believe judicial candidates should aspire to the highest ethical standards to promote public trust and confidence in the fairness and impartiality of this state's courts. We do not endorse candidates, and this opinion is not intended to announce support for, or opposition to, any candidate. Instead, we strive to educate the candidates, the media, and the public about judicial campaign conduct.

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March 28, 2006

OPINION #06-03

Dear [REDACTED]

Your inquiry raised the following issue for the Special Committee on Judicial Election Campaign Intervention:

Whether a magistrate judge may wear a judicial robe in campaign material for a circuit judge position.

The Committee answers the question in the affirmative.

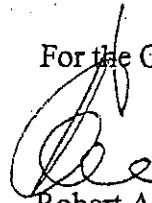
In Opinion 06-01 the Committee advised that it was permissible for a circuit judge to appear in campaign materials wearing a judicial robe. In doing so, the Committee indicated that such representations accurately depicted an incumbent judge candidate's identity, present position and helped inform the electorate of the candidate's job. In addition, the Committee cautioned that "campaign materials should not be false, deceptive or misleading." Applying these same principles to the question submitted, it is the Committee's opinion that a magistrate judge candidate for a circuit court position may appear in their judicial robes so long as that depiction clearly and unequivocally identifies the candidate as a magistrate judge and not a circuit judge.

Canon 5A(3)(d)(ii) requires that a judge or candidate "not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent." A magistrate judge is a judge as defined by the Code of Judicial Conduct. See Application of the Code of Judicial Conduct, Section A. Moreover, it is common practice for magistrate judge's within this state to appear in judicial robes while exercising the functions of that office. To appear in judicial robes does not misrepresent the "identity, qualifications, present position or other fact" concerning the magistrate judge.

The Committee recommends that to guard against the possibility that voter's will perceive the magistrate as an incumbent circuit judge, a magistrate's should take adequate steps to insure that they are accurately identified as a magistrate judge when appearing in judicial robes. See OH Adv. Op. 2003-8 (a magistrate who is a judicial candidate may appear in

judicial robes in campaign advertising if the photograph has an accurate label identifying the candidate as a magistrate). *See also* State of Nevada Commission on Judicial Discipline Decision 02-03 (finding a judge pro tem's campaign materials that depicted the candidate in judicial robes without accurate identifying information indicating his actual position was falsely calculated to give voters the impression the candidate was a full-time judge in violation of the Canons); New Mexico Judicial Ethics Handbook, 12-831 (indicating a probate judge running for magistrate court should specify the court on which the judge currently serves in campaign literature).

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

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May 19, 2006

OPINION #06-04

Dear [REDACTED]

Your inquiry raised the following issues for the Special Committee on Judicial Elections Campaign Intervention:

- 1) Whether a proposed campaign advertisement could be considered false, deceptive or misleading.
- 2) Whether use of the statement "not accepting campaign contributions from anyone" may be used on campaign advertisements.

The advertisement submitted depicts a gavel with the name [REDACTED] and the phrase "Elect Circuit Court Judge." It is the Committee's opinion that this advertisement is not false, deceptive or misleading in violation of Canon 5A(3)(d)(ii). However, with that said the Committee would offer one suggestion. Given the juxtaposition of the name and the words "Circuit Court Judge" an argument could be made that the advertisement identifies you as an incumbent circuit court judge. The use of the word "for" inserted before "Circuit Court Judge" would clarify that you are a candidate for circuit court judge and not currently a sitting judge.

The Committee would also point out that the advertisement as submitted does not contain the disclaimer required by SDCL 12-25-4.1. This could be explained by the fact that you have represented that this is a proof from a graphic artist. However, we would remind you that this disclaimer must be placed on all printed campaign literature.

Additionally, you have inquired about the propriety of using a statement to the effect that you are "not accepting campaign contributions from anyone." You have further explained that it "would not indicate there is anything wrong where candidates are accepting campaign contributions but only a statement that I have elected not to do so." It is the Committee's opinion that such a statement is acceptable so long as you do not actually accept campaign contributions from anyone. It is entirely acceptable for a

candidate to self-finance their own campaign. See Canon 5C(2). In addition, the Code of Judicial Conduct is not to be construed to limit a judge or candidate's right to freedom of speech. See Preamble, Code of Judicial Conduct.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

The Committee is a non-partisan group dedicated to preserving the dignity and integrity of this state's judicial system. We believe judicial candidates should aspire to the highest ethical standards to promote public trust and confidence in the fairness and impartiality of this state's courts. We do not endorse candidates, and this opinion is not intended to announce support for, or opposition to, any candidate. Instead, we strive to educate the candidates, the media, and the public about judicial campaign conduct.

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May 19, 2006

OPINION #06-05

[REDACTED]

Dear [REDACTED]

You have submitted the following question to the Special Committee on Judicial Election Campaign Intervention:

Whether a candidate may respond to a written questionnaire.

A candidate is permitted to answer such a questionnaire if they choose to do so. See *North Dakota Family Alliance v. Bader*, 361 FSupp2d 1021 (D.N.D. 2005). However, a candidate should be mindful of Canon 5A(3)(d)(i) requiring that a candidate not "make pledges promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." Likewise, a candidate should not knowingly misrepresent their "identity, qualifications, present position or other fact concerning the candidate or an opponent." Canon 5A(3)(d)(ii). As the Commentary to Canon 5A(3)(d) explains, "[a] candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views." The Committee would also note that "[t]he promises and commitments clause must be narrowly construed and cautiously applied to campaign speech." Canon 5A(3)(d) Commentary.

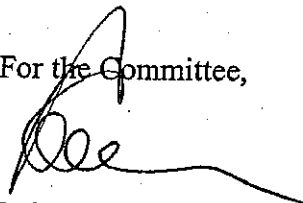
As specifically stated in the Commentary to Canon 3E(1)(e):

Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations, seeking to learn their views on disputed or controversial legal or political issues. Expressing such views may require a judge's recusal or disqualification. Candidates are generally not prohibited from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the

questions and the format provided for answering, a candidate's responses might constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. In order to avoid violating Canon 3, therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views. If elected, such candidates shall be recused from cases where a candidate's responses constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way.¹

All candidates should also be aware that Canon 3E(3) requires that any candidate who answers a questionnaire file a copy of any response with the Clerk of the Supreme Court within ten days of the submission of the response.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

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¹ An excellent law review article discussing questionnaires is *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, Barbara Reed, 56 Mercer L. Rev. 971 (2005).

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May 19, 2006

OPINION #06-06

[REDACTED]

Dear [REDACTED]

You have submitted the following question to the Special Committee on Judicial Election Campaign Intervention:

Whether an incumbent circuit court judge not involved in a contested election may endorse a judicial candidate.

In Formal Opinion 06-02 the Special Committee opined that:

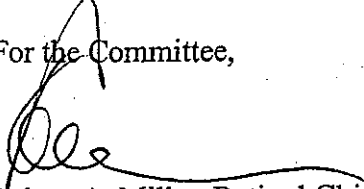
Canon 5C(1)(b)(iii) specifically indicates that a judge or candidate subject to public election may 'publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.' In addition, as the Preamble to the Canons recognize, the Canons should be interpreted to promote a judge or candidate's rights to freedom of speech and association. The ability to endorse other candidates or solicit others for endorsements would fall within the judge or candidate's protected speech."

As the Commentary to that Canon recognizes, "Section 5C(1) permits judges subject to election to be involved in certain political activity." Your inquiry centers on the phrase "judge or candidate subject to public election." "Public Election" is defined as "primary and general elections; it includes partisan elections, nonpartisan elections and retention elections." Terminology Section, Code of Judicial Conduct. Although you are not involved in a contested race it is the Committee's opinion that you remain a

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May 19, 2006
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candidate "subject to public election" and may therefore endorse circuit court candidates for judicial office.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

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May 22, 2006

OPINION #06-07

[REDACTED]

Dear [REDACTED]

You have submitted the following question to the Special Committee on Judicial Election Campaign Intervention:

Whether judicial candidates are required to comply with SDCL 12-25-4.1.

The Committee answers the question in the affirmative.

As you point out, Canon 5C(2) specifically requires that candidates for judicial election comply with SDCL 12-25-4.1. That statute provides:

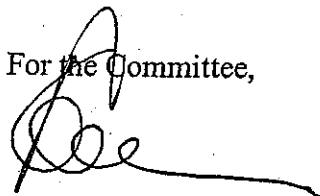
All printed campaign literature and paid print or television advertisements shall include a disclaimer with the full name, title and address of the person authorizing the literature or advertisement and the name, title and address of the person paying for such literature or advertisement if other than the person authorizing such literature and advertisement. All radio or television advertising time provided at no cost or at a reduced cost to a candidate committee or ballot issue committee shall include a disclaimer indicating that such time was provided at no cost or at a reduced cost to the committee. All paid radio advertisements shall include a disclaimer with the full name and title of the person authorizing the advertisement and the name and title of the person paying for such advertisement if other than the person authorizing such advertisement. The name, title and address of such persons shall be supplied to, and kept on file

with, the radio station. The radio station shall keep such information in a readily accessible form and permit the public reasonable access to such information. If such person is acting on behalf of a committee, the name of such committee shall be included in the disclaimer. A violation of this section is a Class 2 misdemeanor.

Prior to the enactment of Supreme Court Rule 05-13 there was no requirement for disclaimers in judicial campaign advertisements. This was because SDCL 12-25-6.1 specifically exempted judicial candidates from the provisions of SDCL Ch. 12-25.

It is important to note that the Committee is not empowered to render a decision on the disputed application of an existing law to a judicial candidate. Rather, the Committee may only issue an advisory opinion to candidates concerning the construction or application of the Code of Judicial Conduct. The Supreme Court is the ultimate regulatory authority for judicial election campaign conduct and is specifically granted rulemaking authority for the members of the bar. *See* South Dakota Const. Art. V., § 9, § 12. Although the Legislature has exempted judicial candidates from the disclaimer requirement, our Supreme Court has specifically incorporated that provision into the Code of Judicial Conduct. Consequently, the Committee has no authority to indicate whatsoever that candidates are free from complying with this provision. Rather, the Code of Judicial Conduct should be followed in all campaigns for judicial office.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

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May 26, 2006

OPINION #06-08

[REDACTED]

Dear [REDACTED]

Your complaint has raised the following issue for the Special Committee on Judicial Election Campaign Intervention:

Whether a flyer distributed without the requisite disclaimer and prior to the filing of a nominating petition that was neither paid for or authorized by that candidate constitutes a violation of the Code of Judicial Conduct.

The Committee answers this question in the negative.

As the Committee has recognized, Supreme Court Rule 05-13 specifically incorporates the requirements of SDCL 12-25-4.1. See Formal Opinion 06-07. That statute requires that all printed campaign advertisements include a disclaimer with the name and address of the person authorizing and paying for such advertisement.

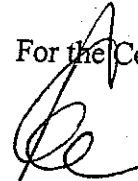
A copy of the flyer provided demonstrates that the disclaimer required by SDCL 12-25-4.1 was not included. However, the complained of candidate has responded that this flyer was not paid for or authorized by that candidate. In addition, at the time it was distributed that candidate was still collecting signatures for the nominating petition and had not yet filed as a judicial candidate.

Based on the candidate's response it does not appear the requirements of SDCL 12-25-4.1 were triggered in this situation. The complained of conduct occurred on March 17 and 18, prior to the filing of the candidate's nominating petition and the candidate represents the flyer was pulled at their request for reasons not specifically indicated. The Committee would also point out that no prior complaints have been made on this issue concerning this candidate and as of the date of your complaint the Special Committee had not issued Formal Opinion 06-07 clarifying

the applicability of SDCL 12-25-4.1. The candidate has also indicated: "I am fully aware that, as a candidate, my campaign literature and advertising must include the required disclaimers and I am happy to comply with those requirements."

The allegations of the complaint do not indicate a violation of the Code of Judicial Conduct warranting intervention and the Committee hereby dismisses the complaint. Because this matter raises issues of general importance the Committee has decided to issue a redacted version of this correspondence to all candidates in order to provide guidance to those candidates as the Committee anticipates this issue may re-occur in the future.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

The Committee is a non-partisan group dedicated to preserving the dignity and integrity of this state's judicial system. We believe judicial candidates should aspire to the highest ethical standards to promote public trust and confidence in the fairness and impartiality of this state's courts. We do not endorse candidates, and this opinion is not intended to announce support for, or opposition to, any candidate. Instead, we strive to educate the candidates, the media, and the public about judicial campaign conduct.

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July 17, 2006

OPINION #06-09

[REDACTED]
[REDACTED]
[REDACTED]
Dear [REDACTED]

You have submitted the following question to the Special Committee on Judicial Election Campaign Intervention:

Whether it is permissible to use the phrase "VOTE TO RETAIN CIRCUIT COURT JUDGE [REDACTED]" in campaign advertisements.

The Committee answers the question in the affirmative.

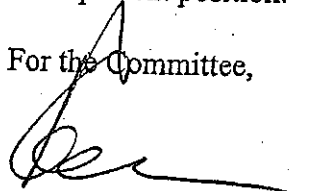
As you point out, you were not previously elected, but rather appointed, and therefore the use of the word "reelect" in your campaign materials could be misleading. The concern that you have asked the Committee to address is whether the use of the word "retain" could cause undue confusion to the voters or be misleading in light of the fact that Supreme Court Justices are "retained" under their merit selection system. See South Dakota Constitution, Article V, § 7.

Canon 5A(3)(d)(ii) provides that a "candidate for judicial office shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent." In this situation, given your position as an incumbent circuit court judge, it is the Committee's opinion that the use of the word "retain" provides an accurate and informative statement to the voters in order to identify your present position and your candidacy to continue as a circuit court judge.

The suggested language clearly identifies you as a circuit court judge and not a justice of the Supreme Court. In its general sense, the word retain indicates: "To keep or hold in a particular place, condition or position." American Heritage Dictionary, 1164 (3rd Ed 1997). This is the meaning the term is used in common parlance and it is the Committee's opinion that it conveys an acceptable campaign message to the voters. The

suggested campaign advertisement could not reasonably be construed to misrepresent or confuse voters as to your identity, qualification or present position.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

The Committee is a non-partisan group dedicated to preserving the dignity and integrity of this state's judicial system. We believe judicial candidates should aspire to the highest ethical standards to promote public trust and confidence in the fairness and impartiality of this state's courts. We do not endorse candidates, and this opinion is not intended to announce support for, or opposition to, any candidate. Instead, we strive to educate the candidates, the media, and the public about judicial campaign conduct.

**South Dakota
Special
Committee on
Judicial Election
Campaign
Intervention**

500 East Capitol Avenue
Pierre, SD 57501-5070



Committee Members:

Retired Chief Justice
Robert A. Miller (Chair)

Pierre, South Dakota

Bob Miller (Vice-Chair)

Pierre, South Dakota

Retired Circuit Judge

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Berdeen, South Dakota

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505/773-4874

August 16, 2006

OPINION #06-10

[REDACTED]

Dear [REDACTED]

You have submitted the following question to the Special Committee on Judicial Election Campaign Intervention:

Whether an attorney is prohibited from writing a letter to the editor in support of your candidacy for circuit court judge and, if not, is the disclaimer provided in SDCL 12-25-4.1 required in this situation.

The Committee answers both questions in the negative.

Candidates are permitted to solicit and accept publicly stated support from individuals and organizations, including attorneys. Canon 5C(2) ("Such candidates or candidate's campaign committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers."). As a result, a letter to the editor endorsement by an attorney is not prohibited under the Code of Judicial Conduct.

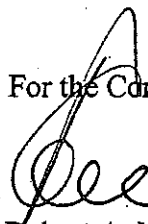
Concerning the campaign disclaimer, SDCL 12-25-4.1 provides:

All printed campaign literature and paid print or television advertisements shall include a disclaimer with the full name, title and address of the person authorizing the literature or advertisement and the name, title and address of the person paying for such literature or advertisement if other than the person authorizing such literature and advertisement. All radio or television advertising time provided at no cost or at a reduced cost to a candidate committee or ballot issue committee shall include a disclaimer indicating that such time was provided at no cost or at a reduced cost to the committee. All paid radio advertisements shall include a disclaimer with the full name and title

of the person authorizing the advertisement and the name and title of the person paying for such advertisement if other than the person authorizing such advertisement. The name, title and address of such persons shall be supplied to, and kept on file with, the radio station. The radio station shall keep such information in a readily accessible form and permit the public reasonable access to such information. If such person is acting on behalf of a committee, the name of such committee shall be included in the disclaimer. A violation of this section is a Class 2 misdemeanor.

(Emphasis added). In the Committee's opinion, a letter to the editor would not fall within the provisions of SDCL 12-25-4.1 because it is not "printed campaign literature" or a "paid print" advertisement. Rather, a letter to the editor is attributed to a citizen and is offered as their perspective on an issue or, in this case, a candidate.¹

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

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This interpretation is consistent with the position taken by the Secretary of State's Office on this issue.

*South Dakota
Special
Committee on
Judicial Election
Campaign
Intervention*

500 East Capitol Avenue
Pierre, SD 57501-5070



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October 10, 2006

OPINION #06-11

Dear [REDACTED]

Your complaint has raised the following issue for the Special Committee on Judicial Election Campaign Intervention:

Whether Candidate [REDACTED] actions related to participation with a political party violate the Code of Judicial Conduct.

The Committee answers this question in the negative.

The complaint alleges that Candidate [REDACTED] has appeared at a Republican Party booth at the fair; has stated that his opponent had previously contributed to certain individual candidates in political contests in the state; appeared at a Republican Party picnic; and the Republican Party has made the candidate's campaign materials available to the public. The complaint alleges this is a violation of SDCL 12-9-2. Candidate Russell has responded and further explained his actions during the incidents highlighted in the complaint. The Committee notes that there are disputed facts at issue in this complaint related to the specific conduct that occurred during each of these incidents. However, for the purpose of this opinion the Committee believes that viewing the facts as alleged by the complainant as true and in their most favorable light, there has been no violation of the Code of Judicial Conduct. That opinion is based on the following:

The South Dakota Constitution provides that all elections for judicial office shall be "nonpolitical." SD Const. Art. V, § 7. SDCL 12-9-2 provides that "[i]t is a Class 2 misdemeanor for any political party to endorse or nominate by any convention, or other method, any candidate for judicial office." Specifically, the Code of Judicial Conduct contains the following provisions relevant to this complaint:

The Code is not to be construed so as to impinge on the essential independence of judges in making judicial decisions or on judges' or candidates' First Amendment rights of freedom of speech and association but should be construed to protect the due process rights of litigants to impartial courts and to promote public confidence in the judiciary. Preamble.

A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly, without impinging on the judge's or candidate's First Amendment rights of freedom of speech and association. Canon 2 Commentary.

A judge or candidate subject to public election may, except as provided by law[,] at any time[,] purchase tickets for and attend political gatherings; identify himself or herself as a member of a political party; contribute to a political organization; and speak to gatherings on his or her own behalf. Canon 5C(1).

Candidates, including an incumbent judge, may personally solicit campaign contributions and publicly stated support from individuals and organizations other than political parties. Canon 5C(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. Canon 5C(2) Commentary.

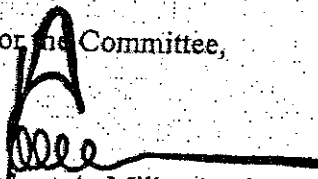
In recommending changes to the Code of Judicial Conduct, including a significant portion of the above provisions, the Code of Judicial Conduct Committee noted that the Eighth Circuit Court of Appeals on remand from the United States Supreme Court in *Republican Party of Minnesota v. White*, 416 F3d 739 (8th Cir 2005), determined that Minnesota's restrictions on partisan activities by judicial candidates was an unconstitutional burden on the freedom of speech and association. That committee also indicated that in revising the Code of Judicial Conduct it was expressing no opinion on the constitutionality of SDCL 12-9-2 making it a misdemeanor for a political party to endorse or nominate a judicial candidate. Moreover, in adopting Rule 05-13, the Supreme Court also enacted a conditional amendment to the Code of Judicial Conduct that is to become effective in the event SDCL 12-9-2 is repealed. That amendment would remove the definition of political party from the Code as well as the prohibition on the solicitation of public support

and contributions from political parties. The repeal of this restriction would be consistent with federal case law holding that the prohibition on the association of judicial candidates with political parties is unconstitutional. *See White*, 416 F3d at 738; *California Democratic Party v. Lungren*, 919 FSupp 1397, 1405 (N.D. Cal 1996)(holding a restriction preventing political parties from endorsing, supporting, or opposing candidates for nonpartisan judicial office unconstitutional). However, the prohibition on political party participation contained in SDCL 12-9-2 has not been repealed. Additionally, SDCL 12-9-2 applies to political parties, not the judicial candidates themselves and is inapplicable for purposes of our analysis here. While Candidate [REDACTED] has admittedly attended political gatherings he has not been formally endorsed or nominated by the Republican Party. Any further discussion of the validity of SDCL 12-9-2 is beyond the purview of the Special Committee.

As previously set forth, the Code of Judicial Conduct has been relaxed with regards to the limits of political participation. A candidate may purchase tickets for political gatherings, attend political gatherings, identify themselves as members of a political party, contribute to a political organization and speak to political gatherings on their own behalf. Construing these provisions with due regard to the protections offered to candidates to freely associate and engage in political speech, the complaint does not indicate a violation of the Code.

With this letter, the Committee considers this matter concluded and the complaint is to remain confidential.

For the Committee,



Robert A. Miller, Retired Chief Justice
Committee Chair

Cc: [REDACTED]

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