

North Dakota Judicial Ethics Advisory Committee
Opinion 2016-2

Issues

- Whether a candidate for judicial office or his or her campaign committee can establish internet social media pages in support of the candidate.
Answer: Yes
- Whether social media pages established by the candidate or the candidate's committee may link to a web page that provides a place that allows for visitors to the page to financially contribute to the candidate's campaign.
Answer: Yes, with caveats.
- Whether the candidate or the committee may invite friends to "like" or "share" the campaign page from the candidate's personal page.
Answer: Yes
- Whether a sitting judge who is a candidate for the same office may pose in a judicial robe for the purpose of promoting his or her campaign.
Answer: Yes

Discussion

The opinion of the Committee is that all issues above should be answered "yes". As noted in a 2012 Utah Law Review article, "Several states permit the use of social media in judicial campaigns so long as it comports with ethical guidelines and the law." Nathaneal J. Mitchell, A New Approach to Judicial Ethics in the Age of Social Media, 2012 Utah L. Rev. 2127. (citing, Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009) and N.Y. Advisory Comm. On Judicial Ethics, Op.13-126 (2009))

The North Dakota Code of Judicial Conduct allows for the establishment of campaign committees to "conduct campaigns for the candidate using media advertisement, brochures, mailings, candidate forums and other means not prohibited by law." Rule 4.6 N. D. Code of Jud. Conduct The comments to the Rule gives further details as to the candidate and/or the committee can do in support of the candidate's campaign. *See*. Comments to Rule 4.6 N.D Code

of Jud. Conduct Cond. Neither the Rule nor the comments specifically refer to the use of social media in judicial campaigns, but Judicial Ethics Advisory Committees of several states have issued opinions as to the use of such media.

In 2009 the Florida Judicial Ethics Advisory Committee answered questions similar to those presented to this Committee. The Florida Committee questions pertinent to this issue were, “Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge’s candidacy, may post material on the committee’s page on a social networking site, if the publication does not otherwise violate the Code of Judicial Conduct.”, and “Whether a committee of responsible persons, . . . may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as “fans” or supporters of the judge’s candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.”

The timing of this opinion was prior to the adoption of the new Code of Judicial Conduct which was adopted by North Dakota in 2012, so the references within the opinion are to the 2007 Code. The Florida committee cites the 2007 Canon 2A for the admonition that a judge must avoid impropriety and the appearance of impropriety. The admonition is now contained in Rule 1.2 of the 2012 Code. The Florida committee also cites its version 2007 Canon 5A for the general proposition that a judge’s extra-judicial activities do not interfere with his duties as a judge to act impartially, not undermine his independence, demean the office, interfere with his judicial duties, lead to frequent disqualifications, or be appear to be coercive. The components of this Canon were contained in Canon 4 under the 2007 Code in North Dakota, and are contained in Rule 3.1 of the 2012 Code in North Dakota. The Florida Committee was of the opinion that so long as the Judge or his or her committee complied with these and other pertinent sections of the Code of Judicial Conduct (ex. Rule 4 of the current Code) the establishing and maintaining of social network sites would be permissible.

The New York opinion cited above is more specific as to what that state’s committee advises their judges on the use of social media during judicial campaigns.

A judicial candidate’s campaign committee may maintain a campaign website on behalf of the candidate (citations) For example, the [Judicial Ethics] Committee has advised that a judicial candidate may authorize his/her

campaign committee to solicit campaign contributions on a website it sponsors, provided that the contributors are directed to send all donations to the campaign committee and not to the candidate. . .(N.Y. Advisory Comm. on Judicial Ethics Opinion 08-176—this opinion noting that the Advisory Committee could not discern anything inherently inappropriate about a Judge joining and making use of a social network.)

Moreover, although a judicial candidate may not personally solicit or accept campaign funds, . . . the Rules Governing Judicial Conduct do not prohibit a candidate from personally soliciting and accepting non-financial support. Of particular note, the Committee has advised that a judicial candidate may personally solicit endorsement for his/her campaign . . . (N.Y. Advisory Comm. On Judicial Ethics Opinions 11-65, also discussing other opinions, and 01-44.) By analogy, the Committee concludes that a judicial candidate may personally request that voters “like” a social media site maintained by the candidate’s campaign committee, as this is a request for non-financial support. . . .

The American Bar Association has also commented on the use of social networking during elections by judges in a formal opinion it issued in 2013. It is a little more restrictive than New York in that it states, “Websites and electronic social media promoting the candidacy of a judge or judicial candidate may be established maintained by campaign committees to obtain public statements of support for the judges campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.” ABA Formal Opinion 462 (Feb. 21, 2013)

The North Dakota Judicial Ethics Advisory Committee takes the more liberal position that the candidate may establish electronic social media pages along with his/her campaign committee and participate in those aspects of maintaining the social media pages that do not involve financial solicitation on behalf of the candidate. Depending on the specific context a candidate asking for the reader of a social media page to “like” or “share” the page is not necessarily a request for an endorsement or publicly stated support. For example, a “like” of a candidate’s page on Facebook allows one to subscribe to later posts and events from the page and generally to follow the progress of the election campaign. Public posts on social media

pages are similar to and pose the same issues as a newspaper or television ad soliciting private support for the candidate. The official comments to Rule 4.6 explain that the Rule is “intended to minimize the occurrence of direct personal contacts with individual contributors and public supporters.” The Rule authorizes the candidate to make in-person oral solicitations to groups of 25 or more people and also authorizes the candidate to sign “printed or electronic materials distribute by the committee which solicit contributions or publicly stated support.” On social media, just as in person, a candidate should avoid the sort of direct personal solicitation that could lead to allegations of bias, such as personal solicitations directed at individuals by private message or email. If a person responds to a public post or group solicitation by visiting the campaign committee web page where it makes a solicitation of funds, that does not by itself raise the concerns addressed by Rule 4.6.

The candidate should be cautious when inviting people to “like” or “share” a campaign page or post and take care to avoid any suggestion that in context might be perceived as a direct, personal solicitation of contributions or public endorsement. The candidate may include a link from a campaign social media page to a web page maintained by the campaign committee, but any solicitation for contributions should be incidental to the structure of the page.

The North Dakota Judicial Ethics Advisory Committee notes that several state Judicial Ethics Advisory Committees have issued more restrictive opinions in this area. The Connecticut Committee in a 2013 informal opinion stated, “Judicial officials should not engage in political activities on social media sites.” Connecticut Committee on Judicial Ethics, 2013-06. The Connecticut position is in the minority. The Ohio and Maryland committees have suggested that candidates proceed cautiously when operating social media sites. Maryland Judicial Ethics Committee, Opinion 2012-07; Ohio Board of Commissioners on Grievances and Discipline, Opinion 2010-07.

One further concern to be addressed in this opinion is whether a sitting judge running for another term may pose in a judicial robe for the purpose of promoting his or her campaign. The issue is that such action would be using State resources in an inappropriate manner. In North Dakota, that question is rather easily answered. The North Dakota Supreme Court addressed the matter of a justice running for reelection to the North Dakota Supreme Court was videotaped wearing his judicial robes and sitting in a courtroom. Saefke v. VandeWalle,

279 N.W.2d 414 (ND 1979) The Court concluded that the voters of the state were “not misled or unduly influenced” by the justice in his robe pictured in a courtroom. Id. At 417. The Court further concluded that to argue that the use of the courtroom and the electricity consumed for the time it took to videotape was an illegal use of state resources was frivolous.

Conclusion

The North Dakota Judicial Ethics Committee has concluded that a judicial candidate may use electronic social media to further his or her campaign so long as that use does not violate the North Dakota Rules of Judicial Conduct. The candidates are cautioned to be aware of the limitations discussed in this opinion.

The Committee is also of the opinion that a sitting judge involved in a judicial election may wear his or her robe in connection with the campaign.