

**NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE**  
**Opinion 2016-3**

**ISSUE**

Whether a judicial candidate may use a written advertisement setting forth the comparative attorney records of the candidate and his opponent.

**ANALYSIS**

A judicial candidate may use a written advertisement setting forth the comparative attorney records of the candidate and his opponent so long as the candidate has a good faith basis to believe that the information is accurate and is fairly presented.

Rule 4.3 of the North Dakota Code of Judicial Conduct provides guidance to a judicial candidate contemplating a comparative attorney record advertisement. Under the Rule, a candidate may<sup>1</sup> “speak on behalf of his or her candidacy through any medium, including advertisements,” and “speak in regard to opponents for the same judicial office.” N.D. Code Jud. Conduct Canon 4.3(B)(1) & (3). In doing so, the candidate “shall act at all times in a manner consistent with the impartiality, integrity, and independence of the judiciary” and “shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.” N.D. Code Jud. Conduct Canon 4.3(A)(1) & (3). “Knowingly” is defined in the terminology section of the Code as meaning “actual knowledge of the fact in question.”

Assuming that the candidate here has a good faith basis to believe that the information in his contemplated advertisement is accurate and is fairly presented,<sup>2</sup> use of the advertisement would not be a violation of Rule 4.3 or any other provision of the Code. The contemplated advertisement includes a chart entitled “Attorney Record of the Candidates” with respective tallies for supreme court appeals, jury trials, and total cases; the source of the information in the chart (North Dakota Supreme Court Lawyers Directory-Related Documents and North Dakota Courts Records Inquiry); the slogan “Experience Counts”; and a campaign website.<sup>3</sup> The information presented relates to a relevant campaign factor – experience as an attorney practicing in the state courts of North Dakota. Moreover, nothing about the manner of presentation (again assuming the candidate has a good faith basis to believe the figures are accurate) would conflict with

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<sup>1</sup> The Rule specifically provides that the candidate “may, except as prohibited by law[.]” The Committee is not aware of any rule, statute, constitutional provision, or decision that prohibits a candidate from speaking about an opponent for the same judicial office. See N.D. Code Jud. Conduct Terminology (defining “law”).

<sup>2</sup> The Committee does not verify information in contemplated advertisements and thus makes no assertion regarding the accuracy of the information in the candidate’s contemplated advertisement. See N.D. Sup. Ct. Admin. R. 54 (providing the scope and duties of the Committee).

<sup>3</sup> The website is not within the scope of the candidate’s inquiry, and the Committee makes no assertions about it.

the duty to act in a manner consistent with the integrity of the judiciary or to not knowingly misrepresent the qualifications or other facts concerning the candidate or his opponent.

Importantly, the chart contains an appropriate title and lists the information source. These are critical characteristics. The heading provides the reader with proper context, and the source enables the reader to further analyze the information – which would be fundamental for comparative statistics or any candidate statistics.

### CONCLUSION

The Committee is of the opinion that a judicial candidate may use a written advertisement setting forth the comparative attorney records of the candidate and his opponent so long as the candidate has a good faith basis to believe that the information is accurate and is fairly presented.