

NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE

OPINION 2010 - 1

FACTS

A candidate running for judicial office has inquired if the candidate may, while campaigning door-to-door, ask a homeowner to put a campaign sign in the homeowner's yard, or whether such request violates Canon 5(C)(2) of the North Dakota Code of Judicial Conduct.

ANALYSIS

In relevant part, Canon 5(C)(2) of the North Dakota Code of Judicial Conduct states:

A candidate shall not . . . directly and personally solicit publicly stated support. A candidate may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may. . . obtain public statements of support for his or her candidacy. While a candidate may not directly and personally solicit contributions or public statements of support, the candidate may orally solicit contributions or publicly stated support in front of large groups or organizations consisting, for example, of audiences of 25 or more people.

. . . .

N.D. Code Jud. Conduct Canon 5(C)(2) (emphasis added).

The canon prohibits a judicial candidate from personally soliciting "publicly stated support," although the candidate may solicit support when speaking before large groups. Although the term "publicly stated support" is undefined, the appended commentary clarifies that the purpose of the solicitation restriction is:

to insulate candidates for judicial office from personal contacts with contributors or public supporters that may lead to allegations of bias or lack of impartiality if the contributor or supporter should later appear before the judgeThis limitation is intended to minimize the occurrence of direct personal contacts with individual contributors or public supporters.

N.D. Code Jud. Conduct Canon 5(C)(2) cmt. The candidate's campaign committee is the authorized vehicle for soliciting public support from individual voters. N.D. Code Jud. Conduct Canon 5(C)(2).

THE REQUEST TO PLACE A YARD SIGN IS A SOLICITATION OF PULICLY STATE SUPPORT.

A yard sign will be visible to the passing public, and its presence conveys the message that the homeowner who displays the sign supports the candidate. Thus, when the candidate asks if the homeowner will display a campaign sign in the homeowner's yard, the candidate is directly and personally soliciting a public statement of support. See *Kansas Judicial Review v. Stout*, 196 P.3d 1162, 1177, 1179 (Kan. 2008) (defining "to solicit" as "to endeavor to obtain by asking or pleading or to seek eagerly or actively," and defining "support" as "the promotion of a particular person or position or the provision of monetary aid") (answering certified questions from 10th Circuit), *appeal dismissed as moot*, 562 F.3d 1240 (10th Cir. 2009) (dismissing appeal as moot because Kansas had adopted a revised Code of Judicial Conduct that amended the challenged provisions).

Committee research revealed only one advisory opinion that specifically addresses a request for placement of a campaign sign. Ark. JEAC Adv. Op. 95-04 (Aug. 24, 1995), available at http://www.arkansas.gov/jeac/opinions/95_04.html. Construing a canon prohibiting a candidate from "personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support," the Arkansas Judicial Ethics Advisory Committee opined, "[T]he candidate may not ask a supporter for permission to put the supporter's name in a newspaper or other form of media advertisement, and may not ask a landowner for permission to place a sign on the property. Such endorsements ally the supporter or landowner with the candidate and potential judge." *Id.* (emphasis added). The opinion further states that "it is the [campaign] committee that . . . requests landowners to allow signs to be placed." *Id.* This advisory opinion likely has been abrogated by amendments to Arkansas' Code of Judicial Conduct. Currently, Arkansas Canon 4.2 (B)(5) states, "A judicial candidate in a public election may, unless prohibited by law, and not earlier than 365 days before the first applicable election: . . . seek, accept, or use endorsements from any person or organization other than a partisan political organization[.]" Ark. Code of Jud. Cond. Canon 4.2(B)(5), available at http://courts.state.ar.us/rules/judicial_conduct/.

Other jurisdictions have recognized difficulty defining the term "publicly stated support." In Georgia Judicial Qualifications Commission Op. 205 (Mar. 22, 1996), available at www.georgiacourts.org/agencies/gqc/Opinions/205.htm, and *In re Starcher*, 501 S.E.2d 772 (W.Va. 1998). In the Georgia opinion, the Commission noted, "Extensive research fails to reveal any precise definition in Georgia or elsewhere of the words 'public stated support.'" The opinion concludes personally asking individuals or groups "for permission to place the supporter's name in any form of campaign literature or media advertisement" is prohibited conduct. Moreover, "personally seeking any form of public expression of support or other form of written endorsement for use in a judicial campaign is the activity intended to be prohibited by the language used in [the Canon.]" *Id.* (emphasis added). In *Starcher*, a judicial candidate was admonished after he, rather than his campaign committee, authored and mailed a letter to a labor organization requesting an endorsement. 501 S.E.2d at 775-76. See *Kansas Judicial Review v. Stout*, 196 P.3d 1162, 1179 (Kan. 2008) (finding that "support" and "endorsements" are synonymous). The court stated, "By its express language, Section 5C(2) provides . . . [p]ublicly stated support must be solicited through a committee of responsible persons, not by the candidate. This Court is of the opinion that no clearer guidance could be given." 501 S.E.2d at 782 (emphasis added). The *Starcher* court nevertheless did offer a definition of "publicly stated support" in a 156-word sentence:

An endorsement or other statement of support for a judicial candidate, whether made by or on behalf of an individual, corporation, partnership, association, organization, political action committee or other entity, which may be or is intended to be disseminated to a person or persons, other than the judicial candidate, members of his or her committee, or to the individual or individuals making the endorsement or other statement of support, either on their own behalf or on behalf of a corporation, partnership, association, organization, political action committee or other entity, and which may be or is intended to be disseminated to officers, employees, shareholders, partners, associates, members of a profession or organization, or to the public at large, or which may be published, and which is intended to or may have the effect of persuading, influencing or otherwise causing the person or persons to whom it is disseminated to vote for or otherwise support said judicial candidate.

Id. at 784 (indicating that the term should be broadly construed so as to "include any statement that may not fall within the express terms of the definition, but which might constitute an attempt to cause any individual or entity to make a public statement which might influence any voter to vote for or otherwise support a judicial candidate").

The commentary to North Dakota's Canon indicates the primary concern results from one-on-one solicitation by the candidate. N.D. Code Jud. Conduct Canon 5(C)(2) cmt. The purpose of Canon 5(C)(2) is to "minimize the occurrence of direct personal contacts with individual contributors or public supporters" and thus avoid any allegation of favoritism toward such supporters. See N.D. Code Jud. Conduct Canon 5(C)(2) & cmt.

CONCLUSION

The Committee unanimously concludes that although the judicial candidate may not ask the homeowner to place a campaign sign in a homeowner's yard, the candidate's campaign committee is permitted to make that request on the candidate's behalf. N.D. Code Jud. Conduct Canon 5(C)(2) & cmt. This Committee does not render legal opinions regarding the constitutionality or enforceability of various provisions of the Code of Judicial Conduct. See N.D. Sup. Ct. Admin. R. 54, sec. 3(A) ("The committee will not issue an opinion on a question of the constitutionality of the code.") The Committee does, however, unanimously agree to refer the present issue to the North Dakota Judiciary Standards Committee for further review.

Unlike the current North Dakota Code, the ABA Model Code of Judicial Conduct now permits a candidate for elective judicial office to personally "seek, accept or use endorsements from any person or organization other than a partisan political organization." ABA Model Code of Judicial Conduct (2007) Canon 4.2(B)(5). Judicial canons are under attack across the nation as individuals and organizations are seeking to dismantle restrictions on political activity by judges and judicial candidates. See, e.g., Judicial Accountability Project, www.jamesmadisoncenter.org (linking lawsuits undertaken to challenge restrictions). This Committee's research has revealed a number of instances in which courts have found restrictions similar to those in Canon 5(C)(2) of the North Dakota Code of Judicial Conduct to be

unconstitutional restrictions on the First Amendment right of free speech. This Committee's research will be shared with the Judiciary Standards Committee.