

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr., Chairman
Hon. James J. Wechsler

September 20, 2002

Re: Judicial Advisory Opinion No. 02-08

Dear

You have asked this committee to give you an opinion as to whether you are permitted by the Code of Judicial Conduct to provide a photograph to a political party in light of your status as a candidate in a non-partisan retention election.

You have informed us that as a public official, it has been your practice to provide photos to organizations when requested. You would be willing to provide a photo to any political party that makes such a request.

Rule 21-700. Elections and political activity provide as follows:

A. Incumbent judges.

(1) A judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by law or by this Code.

(b) identify himself of herself as a member of a political party, except as prohibited by Subparagraph (6) of Paragraph B of this rule.

B. Candidates for election to judicial office. Candidates for election to judicial office in partisan, non-partisan and retention elections, including judges, lawyers and non-lawyers, are permitted to participate in the electoral process, subject to the requirements that all candidates:

(3) shall not allow any other person to do for the candidate what the candidate is prohibited from doing under these rules, except activities permitted to a campaign committee;

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bonds of proper judicial decorum and does not, in non-partisan elections, contain any reference to the candidate's affiliation with a political party.

The Commentary makes no reference to the provisions of Rule 21- 700 quoted above.

The Code allows a candidate to advertise but requires that in non-partisan elections that the advertisements not contain any reference to the candidate's affiliation with a political party. It also provides that the candidate shall not allow any other person to do for the candidate what the candidate is prohibited from doing.

The timing of the request, two months prior to an election, circumstantially indicates that the photograph would be used as part of the political party's election advertising. One would reasonably expect that in an election season, a political party would request a photograph from a candidate that is a member of that party and use that photograph in an advertisement that would identify the candidate with that party. By providing a photograph to a political party of which you belong for this purpose, you would be allowing another to do what you are prohibited from doing -that is, providing advertisements that contain a reference, or at least a logical inference, to your affiliation with a political party.

If the political party intends to use the photograph in a way not prohibited by the Code, you may provide the photograph. However, because of the Code prohibition and your candidacy in a non-partisan election, we believe that the circumstances require that you initiate an inquiry as to the intended use before providing a photograph.

In Republican Party of Minnesota vs. White, _____ U.S. _____, 2002 (June 27, 2002) the United States Supreme Court held that a canon that provides that a "candidate for judicial office, including an incumbent judge" shall not "announce his or her views.

on disputed legal or political issues," violates the First Amendment. In an earlier state of the White case, the plaintiffs had challenged a Minnesota canon precluding a judicial candidate from accepting partisan endorsements. That provision was upheld below, and the issue was excluded from the grant of certiorari. The Supreme Court decision, thus, does nothing to cast doubt on the ban on partisan endorsements or other canons designed to limit partisanship, such as the prohibition on a candidate's identification of his or her own party allegiance. (National Ad Hoc Advisory Committee on Judicial Election Law. July 12, 2002).

It is our opinion that the Code prohibits a judge candidate from providing his or her political party with a photograph under circumstances that indicate that the photo will be used in an advertisement that will reflect or imply the candidate's affiliation with that party.

Sincerely,

A handwritten signature in cursive script that reads "Frank H. Allen, Jr." with a question mark at the end of the signature.

Frank H. Allen, Jr. Chairperson
Judicial Advisory Committee

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