

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr. Chairman
Hon. Thomas A. Donnelly
Prof. William T. MacPhearson, Jr.

January 26, 1996

The Honorable

Re: Judicial Advisory Opinion 96-01

Dear Judge

The Judicial Advisory Committee is in receipt of your letter of January 19, 1996. You have requested an opinion as to whether an active or sitting judge is precluded under the New Mexico Code of Judicial Conduct from signing a nominating petition for a judicial candidate, and whether the Code restricts a judge from circulating a nominating petition for a judicial candidate. Subject to the limitations noted herein, we conclude that a judge is not precluded from such activity.

SCRA 1986, 21-700(A) (3) (b) (Repl. 1995) of the Code of Judicial Conduct is pertinent to your inquiry. This canon provides that "(a) judge shall not...publicly endorse or publicly oppose a candidate for public office through the news media or in campaign literature." Examination of this provision and the Commentary to Canon 21-700, we conclude indicates that a judge is not forbidden from either signing or circulating nominating petitions of another judge, so long as he or she does not publicly endorse or oppose a judicial candidate through the news media or in campaign literature. The Commentary to Canon 21-700 states in part, "A judge or candidate for judicial office retains the right to participate in the political process as a voter." The Commentary also observes that "(a) judge or judicial candidate is not prohibited from privately expressing the judge's or judicial candidate's views on judicial candidates or other candidates for public office." See Vigil v. Miners Colfax Medical Center, 117 N.M. 665,668,875 P.2d 1096,1099 (Ct. App. 1994) (committee commentary, although not binding, is persuasive authority).

Our research discloses two advisory opinions from other states which hold that signing a nominating petition is encompassed within the general right of a judge to participate

in the political process as a voter, and such action does not constitute a public endorsement of a candidate. The two advisory opinions are unanimous in their conclusion that it is not improper for a judge to sign a nominating petition. See New York, Opinion: 89-89/issue 1, September 12, 1989 ("Judges may sign nominating petitions to place the names of individuals on an electoral ballot."); Tennessee, Opinion 90-4/issue 1, 1990 ("Signing a candidate's qualifying petition does not constitute a public endorsement of that candidate."). We agree that a judge's act of signing a nominating petition for a judicial candidate is similar to voting and, therefore, is not a prohibited political activity under the New Mexico Code of Judicial Conduct.

Similarly, we conclude, subject to certain restrictions, that there is no impropriety under the New Mexico Code of Judicial Conduct in a judge circulating a nominating petition for another judge or judicial candidate. Nothing in the language of Canon 21-700(A)(3)(b), as adopted in New Mexico, specifically bars a judge from circulating a nominating petition for a candidate for judicial office. Although the New York Advisory Committee reached a different conclusion, see New York, Opinion 89-89/issue 1, September 12, 1989 ("The judge may not circulate petitions for other candidates or solicit others to sign those petitions."), that decision was based on language contained in the New York Code of Judicial Conduct which specifically prohibited a judge from participating "either directly or indirectly, in any political campaign for any office, except his or her own campaign for elective judicial office." New York Standards and Admin. Policies, § 100.7(c), at 178-79 (Vol. 45, 1993). Canon 21-700, as adopted by our Supreme Court, does not contain the restrictive language contained in the version of the New York Code interpreted by the New York Advisory Committee, and the New Mexico Code differs in part from the pertinent section of the Model Code of Judicial Conduct drafted by the American Bar Association. See American Bar Association, Model Code of Judicial Conduct, Canon 5 (1990).

The language adopted by our Supreme Court in Canon 21-700 of the New Mexico Code of Judicial Conduct omits any provision precluding a judge from signing or circulating a judicial candidate's nominating petition. Instead, our Code expressly prohibits the making of any public endorsement or statement of opposition by a judge concerning of judicial candidate through "the news media or in campaign literature." Canon 21-700(A)(3)(b).

Canon 21-700(B) also states in pertinent part:

Candidates for election to a judicial office in partisan, non-partisan and retention elections...are permitted to participate in the electoral process,

subject to the requirements that all candidates:

(1) shall maintain the dignity appropriate to judicial office, and should encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate;

(2) shall prohibit public officials and employees subject to the candidate's direction or control from doing for the judge what the candidate is prohibited from doing under these rules;

(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

We hold that a judge's act of signing a nominating petition of a judicial candidate is not improper. Additionally, we conclude that a judge's act of circulating a nominating petition of a judicial candidate does not violate the provisions of the New Mexico Code of Judicial Conduct, so long as such act is not done during the judge's normal business hours, the judge does not utilize court facilities, supplies or postage in carrying out such act, or solicit others to sign such petition while the judge is performing judicial duties or acting in his or her official capacity.

Very truly yours,

Frank H. Allen, Jr.
Chairman, Judicial Advisory
Committee