

2014

**JUDICIAL
ELECTIONS: A
GUIDE TO
ETHICAL
CAMPAIGNING
IN SOUTH
DAKOTA**

The purpose of this brochure is to promote ethical judicial elections in South Dakota and thus preserve the dignity and integrity of South Dakota’s judicial system. This brochure is intended to be a useful reference, not a replacement for the candidate’s independent review of the South Dakota Code of Judicial Conduct, the South Dakota Code of Professional Responsibility, applicable statutes and case law, and advisory opinions of the South Dakota Special Committee on Judicial Election Campaign Intervention.

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1. Scope

Q. *Who must comply with the South Dakota Code of Judicial Conduct?*

A. All candidates for judicial office must comply with the South Dakota Code of Judicial Conduct. A successful candidate, regardless of whether the candidate is an incumbent, is subject to judicial discipline for engaging in improper conduct during his or her campaign. An unsuccessful attorney candidate is subject to disciplinary action from the State Bar of South Dakota. See South Dakota Code of Judicial Conduct Canon 5E; see also South Dakota Code of Professional Responsibility R. 8.2(b) (providing that “[a] lawyer who is a candidate for judicial office shall comply with applicable provisions of the code of judicial conduct”).

Q. *Why are there different rules for judicial elections?*

A. Different rules apply to judicial elections because different standards apply to judicial officers. Impartiality, fairness, and integrity are integral to the success of our legal system. As the preamble to the South Dakota Code of Judicial Conduct recognizes,

“[o]ur legal system is based on the principle that an independent, impartial, fair and competent judiciary will interpret and apply the laws that govern us.” In light of this important principle, judges are bound to perform their duties fairly and impartially, without bias or prejudice. See Canons 3B(5), (9), & (10).

Consequently, candidates for judicial office must “maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity, impartiality, and independence of the judiciary” Canon 5A(3). Judicial candidates must conduct themselves and their campaigns differently than other candidates for public office. Unlike other candidates, who may freely advocate their personal views, make promises, and commit themselves to certain actions if elected, candidates for judicial office must refrain from making “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” Canon 5A(3)(d). Allowing judicial candidates to campaign without these restrictions would undermine the fundamental duty of impartiality all judicial officers must uphold.

2. Finances

Q. *Are there any restrictions on my ability to raise funds for my campaign?*

A. Yes, Canon 5A(1)(e) prohibits judicial candidates from personally soliciting or accepting campaign contributions “other than through a campaign committee authorized by Section 5C(2).” Section 5C(2) permits a judicial candidate subject to public election to establish a campaign committee and sets forth a number of restrictions the candidate and campaign committee must follow. As noted in the commentary to Section 5C(2), “[c]ampaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns.” Judicial candidates, however, may only personally solicit campaign contributions from family members, intimate partners, or judges over whom the candidate does not hold a position of authority. See Canon 5C(2)(c).

Q. *Am I responsible for the actions of my campaign committee?*

A. Yes, as the commentary to Canon 5C(2) points out, judicial candidates “are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.” According to Section 5C(2)(b), a judicial candidate is required to direct his or her campaign committee:

- (i) to solicit and accept only such campaign contributions as are reasonable, in any event not to exceed one-thousand dollars (\$1,000) in the election year per individual or organization;
- (ii) not to solicit contributions for the candidates’ campaign earlier than January 1 of the election year and no later than December 31 of the election year;
- (iii) that in addition to complying with all applicable statutory requirements for disclosure of campaign contributions, candidates or candidates’

campaign committees shall comply with all applicable statutory campaign reporting requirements;

- (iv) not to use or permit the use of campaign contributions for the private benefit of the candidate or others; and
- (v) not to disclose to the candidate the identity of campaign contributors nor to disclose to the candidate the identity of those who were solicited for contribution and refused such solicitation. The candidate may be advised of aggregate contribution information in a manner that does not reveal the source(s) of the contributions.

Q. *May my campaign committee accept contributions from lawyers practicing before me?*

A. Yes, the commentary to Canon 5C(2) expressly permits the solicitation and acceptance of contributions from lawyers practicing before a judicial candidate,

“provided that the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation.” However, it is important to note that contributions “should not be knowingly solicited or accepted from a party, or one employed by, affiliated with or a member of the immediate family of a party, to litigation that (a) is before the candidate, (b) may reasonably be expected to come before the candidate if elected, or (c) has come before the candidate so recently that the knowing solicitation or acceptance of funds may give the appearance of improper use of the power or prestige of judicial office.” Canon 5C(2) (commentary). Further, “contributions may not be knowingly solicited or accepted from any firm, corporation or other organization that has as one of its purposes the promotion of one side of a legal issue which may reasonably be expected to come before the candidate if elected.” *Id.*

Q. *Is my campaign committee permitted to solicit on-line contributions?*

A. Currently, campaign committees are not precluded from soliciting on-line contributions. However, it is important to remember that the requirements of Canon

5(C)(2) discussed above, along with the campaign finance reporting requirements found in SDCL chapter 12-27, apply regardless of how contributions are received. Judicial candidates should also note that campaign committee websites must adhere to the requirements for printed political communications found in SDCL 12-27-15. See Canon 5(C)(2) (commentary) (noting requirement).

3. Political Involvement

Q. *Am I allowed to attend political gatherings and contribute to a political organization or candidate during my campaign?*

A. Yes, a judge or candidate may “purchase tickets for and attend political gatherings” and “contribute to a political organization or candidate” at any time. See Canon 5C(1)(a). Identifying oneself as a member of a political party and speaking at gatherings on one’s own behalf are also permissible. *Id.* Soliciting funds, however, is generally not allowed, and a candidate must exercise caution in this area. See Canons 5A(1) & 5(C)(2).

Q. *May I endorse another judicial candidate while I'm a candidate for election?*

A. Yes, a candidate may “publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.” Canon 5(C)(1)(b)(iii); *see also* South Dakota Special Committee on Judicial Election Campaign Intervention Opinions #06-02 & #06-06. A candidate may also “seek, accept, or use endorsements from any person or organization.” Canon 5(C)(1)(b)(v).

4. Advertising and Campaigning

Q. *How am I allowed to advertise my campaign?*

A. A candidate for election may “appear in newspaper, television and other media advertisements” supporting his or her candidacy. Canon 5C(1)(b)(i). A candidate is also permitted to “distribute pamphlets and other promotional campaign literature.” Canon 5C(1)(b)(ii). Regardless of the form of advertisement, candidates should take care to ensure that the content of the advertisement is accurate, complies with all applicable authority, and comports with the

“dignity and integrity” a judicial office requires. See Canon 5(C)(1) (commentary). Judicial candidates should also be aware that SDCL 12-27-15 requires advertisements to “prominently display or clearly speak the statement: ‘Paid for by (Name of candidate, political committee, or political party).’” See Canon 5(C)(2) (commentary) (noting requirement).

Q. *May my campaign committee create a website supporting my candidacy?*

A. Yes, provided the website complies with the South Dakota Code of Judicial Conduct and all other applicable authority. As noted in the commentary to Canon 5C(1), “[t]he conduct of a judicial campaign and the manner of presentation of any material in connection with a campaign for judicial office should comport with the dignity and integrity required of that office.” When creating a website, a judicial candidate’s campaign committee should adhere to the requirements for printed political communications found in SDCL 12-27-15. See Canon 5(C)(2) (commentary) (noting requirement). If on-line contributions are accepted through the website, judicial candidates must also be careful to comply

with the solicitation requirements of Canon 5C(2) outlined previously in this brochure as well as the campaign finance requirements in SDCL chapter 12-27.

Q. *May I wear my robe and appear in a courtroom in campaign materials?*

A. An incumbent judge may wear a robe in campaign materials. See Special Committee Opinion #06-01. Magistrate judges who are candidates for circuit judge positions may also wear their robes, but such candidates “should take adequate steps to insure that they are accurately identified as a magistrate judge when appearing in judicial robes.” Special Committee Opinion #06-03. Campaign materials depicting a judge or attorney in the courtroom are also permissible. See Special Committee Opinion #06-01. When considering one’s appearance in campaign materials, all candidates for judicial office should ensure campaign materials are not “false, deceptive or misleading.” *Id.* According to Canon 5A(3)(d)(ii), a candidate shall not “knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.”

Q. *May I use the title of “judge” in my campaign materials?*

A. Yes, provided you actually are an incumbent judge. If you are a judge who is running for a different judicial office than the one you currently hold, you should make sure you are accurately identified to avoid misleading the public. As discussed above, candidates should be careful to avoid producing campaign materials of any kind that are “false, deceptive, or misleading.” Special Committee Opinion #06-01; *see also* Canon 5A(3)(d)(ii).

Q. *Is it permissible to use the term “reelect” in my campaign materials?*

A. Again, context and accuracy are critical when determining the propriety of campaign materials. If you were previously elected to your position, then using the term “reelect” would be permissible. However, if you were appointed, then “the use of the word ‘reelect’ in your campaign materials could be misleading.” Special Committee Opinion #06-09. For an appointed incumbent, the word “retain” would be more accurate and should be used instead of “reelect.” *Id.*

Q. *May I respond to a written questionnaire?*

A. Candidates are permitted to respond to written questionnaires. See Special Committee Opinion #06-05. However, when deciding how to proceed, candidates should carefully consider Canon 5A(3)(d)(i), which provides that a candidate shall not “make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” In other words, great care should be taken to avoid making statements that commit the candidate to certain actions or decisions concerning issues that are likely to come before the court.

A candidate should also avoid knowingly misrepresenting “the identity, qualifications, present position or other fact concerning the candidate or an opponent.” Canon 5A(3)(d)(ii). As the commentary to Canon 5A(3)(d) notes, “[a] candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.”

The commentary to Canon 3E(1)(e) discusses issues surrounding written questionnaires as follows:

Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations, seeking to learn their views on disputed or controversial legal or political issues. Expressing such views may require a judge's recusal or disqualification. Candidates are generally not prohibited from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a candidate's responses might constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. In order to avoid violating Canon 3, therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views. If elected, such candidate shall be recused from cases where a candidate's responses constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way.

If a candidate does choose to respond to a written questionnaire, the candidate must “file a copy of any response with the Clerk of the Supreme Court within ten days of the submission of the response to the questionnaire.” Canon 3E(3).

Q. *What do I do if I believe another candidate’s campaign is unethical?*

A. If you believe another candidate is conducting an unethical campaign, the best course of action is to file a complaint with the Special Committee on Judicial Election Campaign Intervention. The Special Committee is a committee of nine members appointed by the South Dakota Supreme Court “to alleviate unethical and unfair campaign practices” arising during judicial elections. See SDCL App. 16-1A, Jud. Qual. Comm. R. IV. “The Special Committee was created to issue advisory opinions and to deal expeditiously with allegations of misconduct in campaigns for judicial office.” See Special Committee R. 1. To learn more about the Special Committee, access prior opinions, or obtain a complaint form, visit <http://uj.s.sd.gov/Information/judicialections.aspx>.

Q. *When are the primary and general elections?*

A. Primary elections will be held June 3, 2014, and general elections will be held November 4, 2014.

South Dakota Unified Judicial System
Judicial Circuit Boundaries and Candidates

