FLORIDA SUPREME COURT
JUDICIAL ETHICS ADVISORY COMMITTEE

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ISSUE

MAY A CANDIDATE FOR JUDICIAL OFFICE RESPOND TO QUESTIONNAIRES WHICH COVER SUCH SUBJECTS AS SAME-SEX MARRIAGE, PARENTAL NOTIFICATION, AND SCHOOL VOUCHERS, AND WHETHER THE CANDIDATE AGREES OR DISAGREES WITH RECENT COURT DECISIONS?

ANSWER: Yes, so long as (1) the candidate clearly indicates that the answers do not constitute a promise that the candidate will rule a certain way in a case; (2) the candidate clearly acknowledges the obligation to follow binding legal precedent anywhere it exists; (3) the candidate does not appear to endorse any other individual who is likely to stand for election to or retention in any public office or any platform of a political party; and (4) any commentary on past judicial decisions is analytical, informed, respectful, and dignified.

FACTS

Our attention has been drawn to two questionnaires mailed to judicial candidates statewide. The more detailed of the two is a "Judicial Voters' Guide Questionnaire" sent out by the Florida Family Policy Council.[1] The second is from the Christian Coalition of Florida. Neither organization makes reference to any organized political party.[2] Cover letters state that responding candidates will not be rated. Instead, their responses will be included in "a mass distributed Voter's Guide" prior to the November, 2006, election.

Both questionnaires seek a combination of personal and political information. For example, the Family Policy Council asks recipients to specify which United States and Florida Supreme Court Justices most reflect the candidate's own judicial philosophy, whether the candidate believes that the Florida Constitution recognizes a right to same-sex marriage, and whether the candidate agrees with federal or Florida Supreme Court opinions on such subjects as parental consent for abortion, school vouchers, and assisted suicide. This particular survey gives respondents five options: "agree," "disagree," "undecided," "decline to respond," and "refuse to respond." A footnote provides that those who "decline" will be viewed as willing to answer but for a belief that such action is prohibited by the Florida Code of Judicial Conduct

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[1] We wish to acknowledge that the Florida Family Policy Council, in its cover letter, suggests candidates may wish to seek guidance from this Committee and provides information on how to do so.

[2] Judicial candidates in Florida are absolutely prohibited from engaging in partisan political activity. See, e.g., In re Alley, 699 So. 2d 1369 (Fla. 1997).

and/or that providing answers might subject a judge to disqualification in a future case. Some of the Christian Coalition's options are more extensive, but several questions ask for "yes," "no," or "refused."

The inquiring candidates seek this Committee's opinion about whether the Code of Judicial Conduct permits them to answer all or any part of the questionnaires.

DISCUSSION

In Fla. JEAC Op. 94-35 this Committee adopted a policy, held to steadfastly since that time, not to vet individual examples of candidates' campaign literature. A majority of the Committee now determines that a similar policy should be adopted *vis-à-vis* questionnaires such as the two presently submitted. We limit ourselves to general guidance as to what sorts of answers or comment are likely to run afoul of the Code of Judicial Conduct. One committee member dissented from this approach, expressing a strong preference for a more detailed advisory opinion.[3]

The Family Policy Council's cover letter states the Council's belief that candidates' responses are "constitutionally protected under Republican Party of Minnesota v. White, 536 U.S. 765 (2002)." A full review of First Amendment litigation in judicial races is beyond the scope of this opinion. We must be careful to emphasize that this Committee is authorized only to give advice on ethical standards for judges and judicial candidates, not to render legal opinions regarding the constitutionality or enforceability of various provisions of the Code of Judicial Conduct. Fla. JEAC Op. 02-16. Instead, we will state only that our Supreme Court's decision in In re Kinsey, 842 So. 2d 77 (Fla. 2003), represents the current state of the law in Florida. White dealt with the so-called "announce clause," which forbade judicial candidates from expressing their opinion on disputed legal or political issues. Kinsey dealt with a different issue not decided by White: the "pledge [or promise] clause," wherein candidates provide answers or make statements which appear to bind the candidate to a certain result in matters that may come before the court. See Fla. Code Jud. Conduct, Canon 7A(3)(d)(i).[4]

To the extent the questionnaires seek comment on the Florida Constitution or published judicial decisions, we note that the Code of Judicial Conduct does not impose a blanket proscription on expressions of a *general* judicial philosophy, including "views on constitutional or statutory construction." Fla. JEAC Op. 02-13. The scope of such expression, however, should acknowledge the cardinal duty of a judge to follow the law whether the judge agrees with it or not. Apart from this we know of no ethical impediment to analytical, informed, respectful, and

[3] One Committee member in Fla. JEAC Op. 94-34 similarly reviewed a Christian Coalition form question-by-question and suggested how it should be answered.

[4] Florida had already abolished its own version of the "announce clause" after a successful lawsuit by the ACLU and a judicial candidate. American Civil Liberties Union v. The Florida Bar, 999 F.2d 1486 (11th Cir. 1993). See also In re Code of Judicial Conduct, 643 So. 2d 1037 (Fla. 1994).

dignified comment on past decisions.[5] Judicial opinions on most controversial legal issues will have been the subject of scholarly analysis (*e.g.,* law review articles), from which endeavor judges are not barred. Fla. Code Jud. Conduct, Canon 4B. Moreover, the mere expression of an opinion does not necessarily mean the person giving the opinion has researched the issue exhaustively, or that the person would not be amenable to altering the opinion in the face of capable advocacy. That is, expressing an opinion does not automatically indicate closed-mindedness.

The Committee cautions that the line between "announcing" and "promising" can be a thin one. Though the Council states, "it is understood that your responses to the questions indicate your current view on issues and do not constitute any pledge, promise, or commitment … to reach any particular result in a case," it must be remembered that, when considering motions for disqualification, the "eye of the beholder" is the primary focus.[6] Despite the fact a judicial candidate's pronouncements may be constitutionally protected speech and in compliance with ethical canons, the dispositive question is still whether the individual "beholder's" fear of partiality is reasonable, reasonableness being determined by a neutral and objective standard.

We conclude by noting that neither questionnaire leaves much room for any candidate wishing to elaborate upon any question. Instead the forms essentially call for "yes or no" answers to their questions on substantive law. Other than that, the cover letters do not affirmatively discourage elaboration or indicate any refusal to accept extended answers. Whether such additional comment would be included in the projected voters' guides is not for us to speculate. In Fla. JEAC Op. 94-34, involving a questionnaire from the Christian Coalition of Brevard County, while we concluded it was not improper to return the form we also addressed "[t]he thornier issue [of] how and to what extent … a judicial candidate [may] ethically respond to specific questions." We stated:

> [M]any responses may not necessarily fit into the "yes" or "no" or "undecided" boxes on the questionnaire. Depending upon the subject matter of the question, some complex legal or political questions may not be able to be ethically answered at all. Other questions may need a thoughtfully drafted explanation or elaboration to

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[5] Of course a judge or candidate should rarely, if ever, comment on a *pending* case. Fla. Code Jud. Conduct, Canon 3B(9).

[6] The Christian Coalition questionnaire contains similar language: "Florida has adopted a canon of judicial conduct that prohibits a candidate for a judicial office from stating his or her views on disputed legal or political issues which may appear before the court in which the candidate will serve as judge if elected. The following questions are therefore posed in accordance with previous decisions and/or personal matters and qualifications. The candidate's answers are not expressing views that bind him/her by *stare decisis.* Furthermore, it is expected that the candidate if elected will judge cases presented before them impartially, according to the law after examining all of the evidence."

appropriately satisfy ethical considerations.

In the present case we leave to the candidates' professional judgment whether such brevity is sufficient.

In sum, this Committee concludes that candidates are not *per se* barred from responding to questionnaires which deal with disputed legal and political issues. We repeat that any candidate who does so *must* clearly indicate that the candidate pledges, when adjudicating a specific case, only to follow binding legal precedent anywhere it exists. The candidate *must not* furnish answers that appear to bind the candidate if such issues arise once the candidate has assumed judicial office. Finally, candidate speech must always be accurate, dignified, informed, and respectful. This last admonition is not limited to political questionnaires such as these.

Four Committee members, while concurring in the Committee's opinion, expressed the further view that refusing to answer a questionnaire (or some of the questions on a questionnaire) might be an ethical imperative, in certain circumstances. Although in agreement that the Committee would be ill advised to speculate on the uses to be made of questionnaire answers, these concurring members feel candidates should inquire to ascertain the uses to which questionnaires are to be put; and that, where the answers will be used to misstate or mischaracterize the obligations of judicial office or candidates' qualifications for judicial office, a candidate should decline to participate in the enterprise.

REFERENCES

Republican Party of Minnesota v. White, 536 U.S. 765 (2002)
American Civil Liberties Union v. The Florida Bar, 999 F.2d 1486 (11th Cir. 1993)
In re Kinsey, 842 So. 2d 77 (Fla. 2003)
In re Alley, 699 So. 2d 1369 (Fla. 1997).
In re Code of Judicial Conduct, 643 So. 2d 1037 (Fla. 1994)

Florida Code of Judicial Conduct, Canons 3B(9), 4B and 7A(3)(d)(i).

Florida Judicial Ethics Advisory Opinions, 94-34, 94-35, 02-13 and 02-16.

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate. **Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission and to the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is not bound by the interpretive opinions by the committee.** See *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So.2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with

a Committee opinion as evidence of good faith. *Id*.

Participating Members:

Judge Robert T. Benton, II, Judge Terry Michael Jones, Judge Lisa Davidson, Judge Michael Raiden, Judge Jose Rodriguez, Judge McFerrin Smith, III, Judge Leslie B. Rothenberg, Judge Emerson R. Thompson, Jr., Judge Richard R. Townsend, Judge Dorothy L. Vaccaro, Patricia Lowry, Esquire, and Marjorie Gadarian Graham, Esquire.

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