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November 13, 2017

ATTORNEY GENERAL OPINION NO. 2017- 16

Christopher Phelan
Coffey County Attorney
110 S. 6th Street, Room 204
Coffey County Courthouse
Burlington, KS 66839

Re: Courts—Nonpartisan Selection of Judges of the District Court—Members Ineligible for Certain Positions

Synopsis: K.S.A. 20-2906(a) prohibits a member of the district judicial nominating commission from concurrently holding an office in a political party but not from holding a public office. Attorney General Opinion No. 94-10 is hereby withdrawn. Cited herein: K.S.A. 20-2905; 20-2906.

* * *

Dear Mr. Phelan:

As the Coffey County Attorney, you ask for our opinion on whether K.S.A. 20-2906 prohibits a member of the board of county commissioners from concurrently serving as a member of a judicial nominating commission. As you note, different conclusions were reached by this office in Attorney General Opinion No. 94-10 and the Johnson County District Court in *Moore v. Robert T. Stephan and State of Kansas*.¹ For the reasons discussed below, we concur with the *Moore* decision and withdraw Opinion No. 94-10.

The pertinent part of K.S.A. 20-2906(a) states: "No member of a district judicial nominating commission, while such member is a member, shall hold any office or official position in a political party."

¹ Case No. 94-C-4864 (June 13, 1994).

In Attorney General Opinion No. 94-10, Attorney General Robert T. Stephan concluded that K.S.A. 20-2906(a) prohibited a member of the board of county commissioners from being appointed to serve as a member of the district judicial nominating commission. There were two reasons for this conclusion. First, the "or" between "office" and "official position" was used as a disjunctive term. The other reason was the word "office" meant "public office" and a member of the board of county commissioners holds a public office.²

In *Moore*, the plaintiff brought a declaratory judgment action in Johnson County District Court challenging the conclusion in Opinion No. 94-10. The plaintiff claimed the word "office" referred only to an office in a political party, not a public office. The district court agreed the language of K.S.A. 20-2906(a) was ambiguous and subject to statutory interpretation; thus, it looked to the legislative history of K.S.A. 20-2906(a).

The adoption of K.S.A. 20-2906 resulted from the passage of the constitutional amendment now found in Article III, Section 6, of the Kansas Constitution. In 1973, the Legislature appointed the Kansas Judicial Study Advisory Committee (Advisory Committee) to make recommendations on the implementation of a legislative scheme for the merit selection of district court judges.³ The district court relied upon the following comment to recommendation number 59 of the Advisory Committee:

This proposed process for selecting district court judges in Kansas is similar to the present proven method of selecting Kansas supreme court justices—nomination by a non-partisan commission and appointment of one of the nominees by the Governor. However because trial court judges are to be selected, certain modifications of the supreme court model are appropriate.⁴

The district court also relied upon recommendation number 63 and the comment appended thereto in the Advisory Committee's report, which stated:

While on a [district judicial nominating] commission, no member should be an officer of a political party, nor should he be eligible for nomination to the district court.

This recommendation provides safeguards against partisanship and bias similar to those established for the Supreme Court Nominating Commission in Article III, Section 5(g) of the Kansas Constitution.⁵

The Advisory Committee's recommendations were adopted, in part, by the Kansas Legislature in 1974. Although there was no discussion about the contested language in the legislative history, the district court concluded that the purpose of K.S.A. 20-2906(a) was obvious—"to protect against bias and partisanship in a manner similar to the

² Opinion No. 94-10 at p. 2.

³ *Moore*, Johnson County District Court Case No. 94-C-4864 at p. 4.

⁴ *Id.*, citing 13 W.J. at 380.

⁵ *Id.* at p. 5, citing 13. W.L.J. at 383.

safeguards established for the Kansas Supreme Court Nominating Commission in Article III, Section 5(g), of the Kansas Constitution as it pertains to supreme court justices."⁶ That provision states in pertinent part: "No member of the supreme court nominating commission shall, while he is a member, hold *any other public office by appointment* or any official position in a political party."⁷

The district court, however, rejected the defendants' argument that "office" referred to all public offices, noting the Supreme Court Nominating Commission restriction only applied to *appointed* public offices;⁸ thus, under the defendant's preferred interpretation, district court nominating commission members would have stricter requirements than the state Supreme Court Nominating Commission members.⁹ The district court noted recommendation number 63 and the accompanying comment made no reference to prohibiting a member of the district judicial nominating commission from being a public officer or employee.¹⁰ The district court also noted the omission of the word "public" in K.S.A. 20-2906(a) was conspicuous when the legislature had used the term "public office" in other statutes to describe the prohibited conduct.¹¹ The district court also rejected the cases cited by the defendants to support their suggestion that the terms "public office" and "office" are synonymous or interchangeable.¹²

Based upon the above legislative history and purpose of K.S.A. 20-2906(a), the district court determined "that the only exclusion sought from membership on the district judicial nominating commission by the advisory committee was for officers of political parties and not public office holders."¹³ In other words, as stated in recommendation number 59, the safeguards for a district judicial nominating committee were modified from the safeguards for the Supreme Court Nominating Commission.

In Attorney General Opinion No. 94-165, we concluded that a precinct committee person for a political party is a person who holds an office or official position in a political party and may not serve as a member of a district judicial nominating commission. In doing so, we acknowledged that the district court in *Moore* had reached a different conclusion than the one in Attorney General Opinion No. 94-10. While the opinion agreed with the district court's conclusion that the purpose of K.S.A. 20-2906(a) is to protect against bias and partisanship, Opinion No. 94-165 did not expressly withdraw Opinion No. 94-10.

After reviewing Opinion No. 94-10 and the district court's decision in *Moore*, we agree with the district court's reasoning and conclude that K.S.A. 20-2906(a) prohibits a member of the district judicial nominating commission from concurrently holding an office in a

⁶ *Id.*

⁷ Emphasis added.

⁸ *Id.* at p. 5.

⁹ *Id.* at p. 6-7.

¹⁰ *Id.* at p. 6.

¹¹ *Id.* at p. 7-8.

¹² *Id.* at p. 8-10.

¹³ *Id.* at 6.

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political party but not from holding a public office. Thus, Opinion No. 94-10 is hereby withdrawn.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Janet L. Arndt

Janet L. Arndt
Assistant Attorney General

DS:AA:JLA:sb