

N.D.A.G. Letter to Kusler (March 31, 1992)

March 31, 1992

Honorable Jim Kusler
Secretary of State
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Secretary of State Kusler:

Thank you for your March 25, 1992, letter in which you inquire whether a member of the sponsoring committee of an initiated measure may notarize the signature form of another member of the sponsoring committee.

N.D. Const. art. III, § 2 provides:

A petition to initiate or to refer a measure shall be presented to the secretary of state for approval as to form. A request for approval shall be presented over the names and signatures of twenty-five or more electors as sponsors, one of whom shall be designated as chairman of the sponsoring committee. The secretary of state shall approve the petition for circulation if it is in proper form and contains the names and addresses of the sponsors and the full text of the measure.

N.D. Const. art. III, § 1 provides, in part:

. . . .

Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.

The powers referred to in this section are the powers of initiative and referendum. In order to implement these powers, the North Dakota Legislative Assembly adopted North Dakota Century Code (N.D.C.C.) § 16.1-01-09 which provides, in part:

16.1-01-09. Initiative, referendum, or recall petitions -- Signature -- Form -- Circulation.

1. A request of the secretary of state for approval of a petition to initiate or refer a measure may be presented over the signatures of the sponsoring committee on individual signature forms that have been notarized. The secretary of state shall prepare a signature form that includes provisions for

identification of the measure, the printed name, signature, and address of the committee member, and notarization of the signature.

You indicate that you received signature forms from the sponsoring committee of an initiated measure which were notarized by other members of the sponsoring committee. You inquire whether, in light of the provisions of N.D.C.C. § 47-19-33, you may accept these signature forms as properly notarized.

N.D.C.C. § 47-19-33 provides:

47-19-33. Who shall not execute acknowledgments and affidavits.--No person heretofore or hereafter authorized by law to take or receive the proof or acknowledgment of the execution of an instrument or affidavit and to certify thereto shall take or receive such proof, acknowledgment, or affidavit or certify to the same, if he shall be a party to such instrument, or a member of any partnership which shall or may be a party to such instrument, nor if the husband or wife of such person or officer shall be a party to such instrument.

The specific inquiry is whether a member of the sponsoring committee of an initiated measure who notarizes the signature form of another member of the sponsoring committee is a party to the instrument, and, therefore, disqualified from notarizing the signature form. A review of the North Dakota statutes and case law does not provide guidance as to who is considered to be a party to the instrument for purposes of N.D.C.C. § 47-19-33. However, it is important to note that under N.D.C.C. § 16.1-01-09(2), the qualified electors who serve "as the sponsoring committee for the petitioners, represent and act for the petitioners in accordance with law."

In order to determine who may notarize a signature form for a sponsoring committee member in light of N.D.C.C. § 47-19-33, it is necessary to look at the intent and the purpose of the statutes which require that the signatures be notarized. The North Dakota Supreme Court, in Wood v. Byrne, 232 N.W. 303 (N.D. 1930), indicated that the statute which regulated referendum and initiative petitions in 1925 "is intended to regulate the circulation of petitions for all initiative and referendum legislation to prevent fraud and to enable the secretary of state to pass upon, and determine the sufficiency of the petitions." Id. at 304. The statute in 1925 is essentially the same as the current statute. The statute is designed to discourage fraud and abuse and minimize the number of mistakes that might occur in exercising the right of initiative and referendum. Dawson v. Meier, 78 N.W.2d 420, 424 (N.D. 1956).

The Georgia Supreme Court in Howell v. Tidwell, 368 S.E.2d 311 (Ga. 1988), addressed a similar issue. In that case, petitions to recall an elected official were notarized by individuals who were active in circulating the petitions as well as publicly advocating the recall of the individuals. Id. at 313. The court held that, because these individuals were more than generally interested electors, they could not notarize the affidavits required to

accompany the petitions. Id. at 313. See Citizens Committee v. Board of Elections, 367 A.2d 232 (1976). It is my opinion that a member of the sponsoring committee for an initiated measure may not notarize the signature form of another member of the sponsoring committee because the members of the sponsoring committees are more than generally interested individuals.

A second issue, raised by a letter from attorney John Gosbee attached to your opinion request, is whether requiring a notary on the signature forms for the sponsoring committee violates N.D. Const. art. III, § 1. This provision provides that laws may not be enacted to hamper, restrict, or impair the powers of referral and initiative. The North Dakota Supreme Court, in Wood v. Byrne, supra, held that the provision requiring an affidavit accompany all signed referral and initiative petitions indicating that the signatures on the petition were executed in the presence of the individual making the affidavit did not hamper, restrict, or impair the exercise of the rights reserved to the people by the North Dakota Constitution. Wood at 305. Requiring a notary on a signature form which indicates that one individual is a member of the sponsoring committee is a much less invasive requirement than requiring an affidavit on the petition that the signatures of the signers are genuine. Therefore, it is my opinion that requiring a notary on the signature form for the sponsoring committee members does not violate N.D. Const. Art. III, § 1.

I trust this responds to your inquiry.

Sincerely,

Nicholas J. Spaeth

pg