



**General Assembly of Tennessee  
OFFICE OF LEGAL SERVICES  
War Memorial Building  
Nashville, Tennessee 37243-0059**

June 19, 2014

**MEMORANDUM**

TO: Senator Randy McNally  
FROM: Joel Hayes and Rachel Militana, Legislative Attorneys  
RE: Code of Judicial Conduct Prohibiting Endorsements of Judicial Candidates

Chairman McNally:

The information below is provided in response to your question regarding judges in Tennessee being prohibited from publicly endorsing or publicly opposing another candidate for office.

Tennessee Code Annotated § 17-3-106 recognizes that the state judicial conference has the "full power and authority to prescribe rules of official conduct of all judges, the rules to be in compliance with the code of judicial ethics as promulgated by the American Bar Association but not otherwise."<sup>1</sup> In 2012, the Tennessee Supreme Court adopted a revised Code of Judicial Conduct based on the American Bar Association (ABA) Model Code of Judicial Conduct, which was amended by the ABA in 2010. Tennessee Supreme Court Rule 10, Canon 4 addresses election campaign activity by judges. Except as permitted by law or by another provision in the Rules of Judicial Conduct, a judge or judicial candidate shall not publicly endorse or oppose a candidate for any public office.<sup>2</sup>

Rule 10, however, does not provide any comment or definition for the term "endorse."<sup>3</sup> After reviewing Tennessee case law, opinions of the Attorney General and Reporter, opinions of the Judicial Ethics Committee, and public disciplinary actions by the Board of Judicial Conduct, this office has not found any analysis, interpretation, or decision in Tennessee regarding the language "shall not publicly endorse."

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<sup>1</sup> TENN. CODE ANN. § 17-3-106 (2014).

<sup>2</sup> TENN. SUP CT. R. 10, CANON 4, RJC 4.1(A)(3).

<sup>3</sup> See TENN. SUP. CT. R. 10, TERMINOLOGY, available at: <http://www.tsc.state.tn.us/rules/supreme-court/10#CANON%204>.

Of some note, when adopting the revised Code of Judicial Conduct, the Tennessee Supreme Court "intentionally omitted" ABA Model Code Rule 4.2(B)(3) which permits a "candidate for elective judicial office [to] publicly endorse or oppose candidates for the same judicial office for which he or she is running."<sup>4</sup> The accompanying official comment states that "candidates are considered to be running for the same judicial office . . . if several judgeships on the same court are to be filled as a result of the election."<sup>5</sup> By intentionally omitting this provision from the revised Code of Judicial Conduct, the Tennessee Supreme Court may have signaled a stricter application or interpretation of the code as it relates to merit retention election campaigns.

A majority of other states' respective codes of judicial conduct are also based on the ABA's Model Code of Judicial Conduct and, therefore, contain a canon similar to Tennessee's Rule 10, Canon 4. For the most part, other states' codes also fail to define "endorse."<sup>6</sup> This void often fosters ambiguity in both interpretation and application as there is no bright line rule between acceptable and prohibited conduct.<sup>7</sup> An examination of advisory ethics opinions and case law from other states does, however, offer some additional guidance.

Similar to Tennessee's Supreme Court Rule 4.1, Canon 7A(1)(b) of Florida's Code of Judicial Conduct provides that except as permitted by law or by another provision in the Code of Judicial Conduct, a judge or judicial candidate for election or appointment to a judicial office shall not publicly endorse or publicly oppose another candidate for political office.<sup>8</sup> The Florida Supreme Court ordered strict compliance with this canon in 1993 when reviewing the Judicial Qualification Commission's petition against a judge who wrote and published a letter written on the court's letterhead endorsing the retention of chief justice in a political race.<sup>9</sup> The Supreme Court affirmed the commission's decision to reprimand the judge for violating Canon 7A, reasoning that "neither honest motives nor well-intentioned conduct excuse less than strict compliance" with Canon 7A, which is "absolute in its prohibition of public endorsements of political candidates."<sup>10</sup>

Florida's Judicial Ethical Advisory Committee has issued several opinions in response to questions regarding the scope and application of Canon 7A and, specifically, what it means to "endorse" a judicial candidate. In the *Glickstein* case, the Florida Supreme Court relied in part on the committee's Opinion 90-3, which clarified the scope of Canon 7A as it related to endorsements for judges considered for merit retention.<sup>11</sup>

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<sup>4</sup> TENN. SUP CT. R. 10, CANON 4, RJC 4.2(B)(3); see [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_4/rule4\\_2politicalandcampaignactivitiesofjudicial.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_4/rule4_2politicalandcampaignactivitiesofjudicial.html).

<sup>5</sup> MODEL CODE OF JUDICIAL CONDUCT R. 4.2, cmt. 6 (2010), available at: [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_4/rule4\\_2politicalandcampaignactivitiesofjudicial/commentonrule4\\_2.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_4/rule4_2politicalandcampaignactivitiesofjudicial/commentonrule4_2.html).

<sup>6</sup> *In re Hect*, 213 S.W.3d 547, 571 (Texas 2006).

<sup>7</sup> *Id.* at 579.

<sup>8</sup> *In re Code of Judicial Conduct*, 643 So. 2d 1037 (Fla. 1994).

<sup>9</sup> *Inquiry Concerning a Judge, Hugh S. Glickstein*, 620 So. 2d 1000 (Fla. 1993).

<sup>10</sup> *Id.* at 1002.

<sup>11</sup> *Id.*

Opinion 90-3 advised that "a judge could not engage in public activity on behalf of a member of the judiciary who is the target of a retention campaign."<sup>12</sup> Further, the Court found that the reprimanded judge's claim that he was unaware of this ethics opinion did not constitute excuse or justify his failure to comply with the rule.<sup>13</sup>

More recent ethics opinions from Florida's Judicial Ethical Advisory Committee shed light on what also would constitute an "endorsement" in violation of Canon 7A. The committee has opined that the canon prohibits judicial candidates running for different judicial seats from mailing individual campaign brochures together in the same envelope, even when each candidate includes a disclaimer that they are not endorsing each other. Despite the disclaimer, the committee found that including brochures in the same envelope may give voters and potential donors the impression that the judicial candidates are working together.<sup>14</sup> A joint mailing could lead to the impression that the judges share judicial and political philosophies. The committee stated that mailing brochures together was an obvious "implied mutual endorsement" that would violate Canon 7A.<sup>15</sup>

The Florida Judicial Ethical Advisory Committee has issued consistent, subsequent opinions focusing on the impressions that may be given by judges in judicial campaigns. In 2008, the committee was asked whether campaign materials for a judge seeking reelection may include photos of the judge posing with fellow judges.<sup>16</sup> The committee stated that Canon 7A "absolutely forbids judges from endorsing any candidate for any office in any way."<sup>17</sup> While judges may pose for photos at "routine news events featuring any and all officials who wished to attend," judicial candidates should avoid the use of photographs depicting other judges in campaign literature or on any web site.<sup>18</sup> In 2011, the committee advised that judges campaigning for different races must use discretion in traveling to campaign speaking events together.<sup>19</sup> Reasoning that although Canon 7A does not prohibit all relationships among judicial candidates, the relationships cannot create the *impression* that one judicial candidate is publicly endorsing the other.<sup>20</sup> Judicial candidates for different races may travel together to campaign speaking events "so long as the candidates do not travel together so frequently that it creates the impression that the judicial candidates are working together or endorsing each other."<sup>21</sup> The committee's reasoning relied in part on an opinion from 2006, which advised that judicial candidates must not appear to run as a slate.<sup>22</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> JUDICIAL ETHICS ADVISORY COMMITTEE, Opinion 2004-29, Florida Supreme Court (July 20, 2004).

<sup>15</sup> *Id.*

<sup>16</sup> JUDICIAL ETHICS ADVISORY COMMITTEE, Opinion 2008-11, Florida Supreme Court (May 16, 2008).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> JUDICIAL ETHICS ADVISORY COMMITTEE, Opinion 2011-20, Florida Supreme Court (December 13, 2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> JUDICIAL ETHICS ADVISORY COMMITTEE, Opinion 2006-21, Florida Supreme Court (August 28, 2006) (citing *In re Kay*, 508 So. 2d 329 (Fla. 1987)).

Ohio and North Carolina are the only states our office could find that offer a definition of "endorsement." Ohio's Canon 7(B)(2)(b) prohibits a judge or judicial candidate from publicly endorsing or opposing a candidate for another public office.<sup>23</sup> The Ohio Board of Commissioners referred to a dictionary for broad direction in defining the term "endorsement" and ultimately defined it as "to give approval of or support to."<sup>24</sup> North Carolina's definition of "endorse" requires more than mere support. North Carolina's Code of Judicial Conduct defines "endorse" as to "knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in his efforts to be elected to public office."<sup>25</sup>

While other jurisdictions' codes of judicial conduct and ethics opinions are not binding on Tennessee, they do offer some guidance as to how a court, the Board of Judicial Conduct, or the Judicial Ethics Committee could interpret the term "endorse" as found in Rule 10.

If you have any questions, or if our office may be of further assistance, please do not hesitate to contact either Joel Hayes or Rachel Militana.

Respectfully,

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<sup>23</sup> OHIO CODE JUD. CONDUCT, Canon 7(B)(2)(b).

<sup>24</sup> OHIO BD. OF COMM'RS ON GRIEVANCES & DISCIPLINE, Op. 89-15 (Apr. 10, 1992).

<sup>25</sup> N.C. CODE OF JUD. CONDUCT, Canon 7B(2).