

State of Tennessee



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August 14, 2015

ADM 2015-01092

Mr. James M. Hivner
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To The Honorable Court,

We would like to take this opportunity to encourage the Supreme Court not to adopt the revision to the Tennessee Code of Judicial Conduct (Code) proposed by the Tennessee Judicial Conference which would delete the terms "or an administrative judge or hearing officer" from the definition of a "judge" in the APPLICATION section of the Code. By including administrative judges and hearing officers in the definition of a judge the Court has made a strong statement to Tennessee citizens as well as to the legal community that these hearing officials will be held to the same high standards of conduct as any other judge. The removal of these terms could be interpreted as a statement by the Court that the citizens and lawyers of this state should not expect the same level of ethics and professionalism from an administrative adjudicator as compared to a judge in the judicial branch.

Tenn. Code Ann. § 4-5-321(b) requires the Secretary of State to adopt by rule a code of conduct for all administrative judges and hearing officers. Pursuant thereto, in 1990, the Tennessee Department of State promulgated Rule 1360-4-1-.20 as part of the Uniform Rules Of Procedure For Hearing Contested Cases Before State Administrative Agencies, which made the Tennessee Code of Judicial Conduct applicable to all administrative judges and hearing officers in the state. Thus, even prior to the 2012 revisions to the Code adopted by the Court, which specifically made the Code applicable to administrative judges and hearing officers, those hearing officials had been governed by the Code for over twenty years. Nevertheless, the existence of Rule 1360-4-1-.20 does not eliminate the need for the specific application of the Code to the administrative judiciary. Although certainly not contemplated at the present time, nothing would prevent the Department of State in the future from amending Rule 1360-4-1-.20 to delete all references to the Code. As long as the department adopted some code of conduct for the administrative judiciary in Tennessee it would be in compliance with the law.

By maintaining the applicability of the Code to the administrative judiciary, the Court is recognizing the importance of the administrative judiciary in this state and confirming that the citizens of this state can expect the same level of conduct to be exhibited by all hearing officials in this state, whether they are in the judicial branch or a member of the administrative judiciary. Two standards of conduct for judicial officers in Tennessee, one for the administrative judiciary and one for judges in the judicial branch, would be confusing and would not be in the best interests of the people of Tennessee who rely upon the judicial system to resolve legal disputes in a fair and impartial manner.

Again, we strongly urge the Court not to adopt the proposed revision to the Code which would remove the applicability of the Code to the administrative judges and hearing officers of this state. Thank you for your consideration in this important matter.

Respectfully,



Tre Hargett
Secretary of State



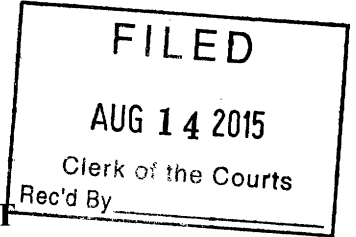
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: PROPOSED AMENDMENTS TO RULE 10, RULES OF THE TENNESSEE
SUPREME COURT (CODE OF JUDICIAL CONDUCT)**

No. ADM2015-01092 – Filed: June 15, 2015

RESPONSE TO INVITATION FOR PUBLIC COMMENT



In response to the Tennessee Supreme Court’s request for comment on the proposed changes to the Judicial Code of Conduct, Rule 10 of the Tennessee Rules of the Supreme Court, the Executive Committee of the Tennessee District Public Defenders Conference (“TDPDC”) expresses its general support of the amendments proposed by the Joint Committee of the Tennessee Judicial Conference and the Tennessee Trial Judges Association (“Joint Committee”). The TDPDC suggests that several of the issues be further reviewed due to a potential appearance of impropriety in recusal proceedings and potential conflicts of interest in the endorsement of those running for judicial office.

As recommended by the Joint Committee, the terms “judicial office” and “non-judicial public office” under RJC 4.1(A)(3) may be open to discretionary interpretation without a more specific definition. While it appears that the changes recommended are only to apply to the endorsement of another judge; as written, the proposed changes may be open to discretionary interpretation. As an example, is the office held by a clerk, district attorney general, or district public defender a “judicial office”, since each of these parties is a member of the judicial branch of government? If they are, does a potential conflict of interest develop when a judge is endorsing the political aspirations of an attorney who may eventually appear before that judge in a proceeding as the

district attorney general or the district public defender? What if an attorney who the judge opposed or did not endorse appears before the judge as one of those elected officials? A more specific definition of “judicial office” would be beneficial and remove any unexpected interpretations of the term. This would eliminate any potential conflicts of interest that may develop in the examples provided.

Further, the proposed changes to RJC 2.11 (A)(4) appear to recommend a more relaxed self-examination of whether a judge should recuse himself when a party, party’s lawyer, or party’s law firm in a proceeding before him has contributed to the judge’s political campaign. The current rule has served the judges of Tennessee admirably and is arguably more favorable to a presumption of recusal than the holding in *Caperton*¹. The current rule maintains that recusal is proper *any time* a person’s contribution to a judge’s campaign may lead to the reasonable questioning of a judge’s impartiality. The *Caperton* holding weakens a recusal motion by requiring a showing that any contributions were extraordinary in the amount so as to cause a significant and disproportionate influence on the election’s outcome.² Thus, by maintaining the current rule and amending the comments section with the Joint Committee’s proposal (approval of the *Caperton* holding), the Court may promote the existing recusal procedures with the additional guidance of the *Caperton* holding. The TDPDC recommends the current rule remain in place, and the proposed comment be added as an additional comment under Tenn. S. Ct. Rule 10, RJC 2.11(A)(4) (2014).

The TDPDC believes the changes proposed by the Joint Committee are recommended with the best interest of the judiciary in mind. However, the TDPDC wishes only to demonstrate that some of the proposed changes may have an unintended negative impact on the integrity of the judicial

¹ *Hugh M. Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252 (2009).

² *Id.*

system, and seeks to make the Court aware of the potential negative impact so the Court may further review any proposed changes to the Code of Judicial Conduct.

Respectfully submitted,

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**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE PROPOSED AMENDMENTS TO RULE 10
RULES OF THE TENNESSEE SUPREME COURT
(CODE OF JUDICIAL CONDUCT)**

No ADM2015-01092

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association (“TBA”), by and through its President, William L. Harbison; General Counsel, Paul Ney; and Executive Director, Allan F. Ramsaur, files this comment in response to the report of the Joint Committee of the Tennessee Judicial Conference and Tennessee Trial Judges Association (“Joint Committee”) on revisions to the Tennessee Code of Judicial Conduct. This Honorable Court has elected to treat the Joint Committee’s report (“Report”) as a petition to amend Tenn. Sup. Ct. R. 10. The TBA recommends the adoption of four of the Joint Committee’s proposed amendments and recommends against the adoption of several of the others.

BACKGROUND

At the invitation of the Tennessee Supreme Court, the TBA established its Task Force on Judicial Conduct Rules in 2009. That task force, chaired by Chattanooga lawyer T. Maxfield Bahner and made up of distinguished lawyers and judges from across the state, spent almost two years in study of then-existing Tennessee judicial conduct and recusal procedure rules, and the revised ABA Model Code of Judicial Conduct. Sarah Sheppard of Knoxville served as the Reporter for that Task Force. The Task Force recommended a Tennessee-specific version of new rules to govern judicial conduct in Tennessee. During the process for consideration of the proposed revisions, the TBA twice solicited input from the bench and bar.

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Many of the issues presented in the Joint Committee's Report, now a petition to this Court, were offered at that time. After the TBA considered those recommendations and revised its proposals, the TBA then filed its petition. The Court then published the TBA proposals for comment. Again, the Joint Committee filed recommendations, which were considered as the Court took up the proposal. The Court framed several issues for oral argument. Some of these same issues were argued ably by representatives of the Tennessee Judicial Conference ("TJC") and the Tennessee Trial Judges Association ("TTJA"). In addition, the TBA filed a supplemental report to specifically respond to the issues presented.

Since the January 2012 adoption of the revised Tennessee Code of Judicial Conduct as Tennessee Supreme Court Rule 10, the TBA has converted the Task Force chaired by Max Bahner into its Standing Committee on the Judiciary. Memphis lawyer Al Harvey has chaired that committee the last two bar years and Nashville lawyer Matt Sweeney has taken over as chair in the new bar year commencing in June 2015.

Under Al Harvey's leadership, the Committee on the Judiciary considered the operation of the judicial conduct rules during the 2014 octennial election and proposed that the rules should be amended in two respects. Those proposals were adopted by the TBA Board at its June 2015 meeting. In summary, those proposals are: (1) that judges only be prohibited from endorsing *non-judicial* candidates, thus *allowing* judges to endorse judicial candidates (Tenn. Sup. Ct. R. 10, RJC 4.1(A)(3)); and (2) that the prohibition on simultaneously seeking judicial and non-judicial elective office be clarified by a revision to Tenn. Sup. Ct. R. 10, RJC 4.5.

After the entry of the Order treating the Report as a petition, the Judiciary Committee, under Matt Sweeney's leadership, took up the report, reviewed it in light of the earlier policy positions of the TBA, as well as more recent experience under the revised Tennessee Code of

Judicial Conduct, and recommended the adoption of the Joint Committee's proposal that the time period for permitting fundraising prior to election day be expanded from 180 to 270 days. The TBA also concurred in the Joint Committee's recommendation to modify Tenn. Sup Ct. R. 10, RJC 4.1(A)(4) concerning the solicitation of campaign funds and offers appropriate language for that amendment.

1. THREE RULES OF JUDICIAL CONDUCT RELATED TO JUDICIAL CAMPAIGNS SHOULD BE MODIFIED

The TBA recommends that: Tenn. Sup. Ct. R. 10, RJC 4.1(A)(3) be amended to continue the prohibition on judges endorsing or opposing candidates for non-judicial office; that the time period for permitted fundraising under Tenn. Sup. Ct. R. 10, RJC 4.2(B)(1) be expanded from 180 to 270 days; and that Tenn. Supt. Ct. R. 10, RJC 4.5(A) be amended to make clear that a judicial candidate may not run for non-judicial elective office at the same time the candidate is running for judicial office.

The prohibition on endorsement of fellow judges found in Tenn. Sup. Ct. R. 10, RJC 4.1(A)(3) was adopted by the Court in its revision of the rules in 2012 as recommended by the TBA. In doing so, the TBA endorsed and the Court adopted the ABA Model Rule of Judicial Conduct provision. This was a change in policy as to judges on multi-judge courts from the previous rule. Experience from the 2014 election, however, has shown that the application of this prohibition to the endorsement of fellow judges led to confusion and arbitrary distinctions, and did not contribute to an orderly process. Moreover, because judges, no less than lawyers, are in a unique position to speak to the qualifications of judges who are standing for election the TBA believes that they should be permitted to do so.

The Joint Committee recommends Tenn. Sup. Ct. R. 10, RJC 4.2(B)(1) be amended to expand the campaign fundraising period from 180 days to 270 days. The TBA concurs that the demands of modern judicial campaigns means that an expanded period to raise necessary funds is needed.

In at least in once instance in the recent election cycle, a candidate for non-judicial office was also a candidate for judicial office. As noted in the comments to Tenn. Sup. Ct. R. 4.5, strictures imposed on candidates for judicial office in terms of fundraising and other conduct make it unfair for a candidate for non-judicial office to be a candidate against a judge or other candidate who is subject to those strictures. The TBA, therefore, recommends an amendment to RJC 4.5, consistent with the ABA Model Code of Judicial Conduct, by adding a new subsection as follows:

“(C) No judicial candidate may also simultaneously be a candidate for an elected non-judicial position.”

2. THE CODE OF JUDICIAL CONDUCT SHOULD CONTINUE TO APPLY TO ADMINISTRATIVE JUDGES

The Tennessee Secretary of State has specifically adopted the Tennessee Code of Judicial Conduct as a code of conduct for all administrative judges and hearing officers in the state. In addition, even though the rules are not enforced by the Board of Judicial Conduct, they do set a high standard of conduct that is and should be expected of all Tennessee judicial officers. Because we call upon the administrative law judges to decide all manner of significant, often multi-million dollar matters, the application of these rules to administrative law judges fosters public trust and confidence in this administrative justice system that is necessary for the effective operation of government.

3. THE STANDARDS FOR DISQUALIFICATION, RECUSAL OR DETERMINATION OF CONSTITUTIONAL OR STATUTORY INCOMPETENCE OF A JUDGE SHOULD INCLUDE CONSIDERATION OF CONTRIBUTIONS OR SUPPORT IN JUDICIAL CAMPAIGNS

One of the principal contributions made by the TBA Task Force on Judicial Conduct was assisting the Court in crafting new standards, articulated guidance, and effective procedure for dealing with disqualification, recusal, and determinations of constitutional and statutory incompetence. The task force conducted an exhaustive review of the ABA Model Code of Judicial Conduct, the judicial conduct rules adopted by several other states, and the commentary on those rules and proposals. That review disclosed that the model rules and other state rules simply did not take it into account the reality of modern judicial campaigns.

For that reason, the TBA crafted the present standard in Tenn. Sup. Ct. R. 10, RJC 2.11(A)(4) which indicates that consideration should be given to the amount of contributions or support given by the party, lawyer, or law firm which would draw the judge's impartiality into question.

Comment 7 to that Rule offers further explanatory guidance as an aide to the interpretation and application of the rule. As noted in the Comment, contributions within the limits of the Campaign Contributions Limits Act of 1995 should not, absent other factors, lead to disqualification. However, the amount of support the campaign of a judge or judicial candidate has received would be considered with respect to its timing and the aggregate amount of support or opposition. The Comment suggests that a court should also take into account indirect as well as direct expenditures for or against the judge's candidacy.

The approach recommended in the Joint Committee Report is to simply do away with any consideration of campaign support or contributions except to the extent that it rises to the

level of a due process violation as found in the *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868 (2009). Because the TBA is concerned that the conduct permitted under that proposed amendment could lead to the perception that justice is for sale, the TBA opposes this recommendation of the Joint Committee.¹

4. THE CJC PROVISIONS REGARDING EXTRAJUDICIAL ACTIVITIES, AFFILIATION WITH DISCRIMINATORY ORGANIZATIONS, AND PARTICIPATION IN CERTAIN CIVIC ORGANIZATIONS SHOULD BE PRESERVED

In recommending adoption by this Court of Tenn. Sup. Ct. R. 10, RJC 3.1(E), the approach adopted by the TBA was to indicate that there might be some appropriate personal uses of court premises, stationery, equipment, and other resources, but, in addition to those activities prohibited by law, other inappropriate use would be prohibited. Conversely, the rule proposed by the Joint Committee prohibits judges from engaging in personal or extrajudicial activities “prohibited by these rules” when such activities are not prohibited by these rules causing the rule to be ineffective.

Since 1992, Tennessee’s judicial conduct rules have prohibited judges from holding membership in organizations which practice specific types of invidious discrimination. The rule proposed by the TBA and adopted by the Court in 2012 preserved that specific listing of the types of prohibited invidious discrimination -- that is, discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation. The amendment previously proposed by the Joint Committee and rejected by this Court, and now again proposed by the Joint

¹ The TBA would also call the Court’s attention to the fact that, even within the last year, the Tennessee Court of Appeals has issued two decisions on recusal motions grounded in judicial campaign activity, and these two decisions each quoted and relied upon the guidance this Court gave in adopting Tenn. Sup. Ct. R. 10, RJC 2.11(A)(4), and its unique Tennessee comments. *See Cotham v. Cotham*, No. W2015-00521-COA-T10B-CV. 2015 WL 1517785 (Tenn. Ct. App. March 30, 2015); *In re Gabriel V.*, No. M2014-01298-COA-T10B, 2014 WL 3808916 (Tenn. Ct. App. July 31, 2014). This guidance, already shown to be helpful to Tennessee courts, should not be abandoned.

Committee, could be read as signaling a retreat from a foundational principle of justice and equality in American life. In addition, by removing specific references, the proposal would place Tennessee in the significant minority of jurisdictions, as 17 states of the 22 that have recently undertaken a review of their codes of judicial conduct based on the ABA's 2010 revisions have adopted language identical to that of the TBA's current rule. Further, stripping the specificity this Court adopted as part of this Rule would provide less guidance to Tennessee judges, in an area where clear guidance is needed, both as a guide to action by judges and as a public benchmark by which judicial conduct is measured.

The Joint Committee, in dealing with interpretation of Tenn. Sup. Ct. R. 10, RJC 3.7(A)(4) regarding whether an event serves a fundraising purpose, recommends adoption of a comment which would cite an article on fundraising events. The article is by a well-respected author, but it addresses itself to prior formulations of the rule. Because it would be highly unusual to cite a specific article as guidance in a comment to the rules, the TBA is opposed to this proposed amendment.

5. THE RULES SHOULD PERMIT JUDGES TO SOLICIT FAMILY MEMBERS AND CERTAIN OTHER JUDGES FOR CERTAIN POLITICAL CONTRIBUTIONS

When the proposed adoption of the Code of Judicial Conduct in 2012 was under consideration, the TBA agreed with the Joint Committee's proposal to provide an exception to the rule on solicitation of campaign contributions to political organizations and candidates that allowed for solicitation of a judge's family members and judges at a higher level. The Court, however, adopted Tenn. Sup. Ct. R. 10, RJC 4.1(A)(4), without any such exception. The judges, through their Joint Committee, again propose the adoption of the exception to the blanket prohibition, but would leave out the phrase "pay an assessment to."

The TBA is again in general agreement with the Joint Committee's recommendation to allow an exception to the prohibition, and suggests that the appropriate prohibition (and exception language) would read as Tenn. Sup. Ct. R. 10, RJC 4.1(A)(4) as follows:


“(4) Solicit funds for or pay an assessment to a political organization or candidate for public office except that a judge or judicial candidate may solicit funds for a political organization or candidate for public office from a member of the judge's family or a member of the candidate's family or a judge or judicial candidate at the same or higher judicial level.”


CONCLUSION


The 2012 Tennessee Code of Judicial Conduct has done a superlative job of serving the purposes set forth in the preamble: “judges individually and collectively must respect and honor the judicial office as a public trust and strive to maintain an enhanced confidence in the legal system.” The Code has provided guidance and assistance to judges in maintaining the highest standards of judicial and personal conduct, and provided a basis for regulating their conduct.

The TBA concurs with the Joint Committee in the adoption of the minor changes to four provisions of the rule. However, as to the other issues raised by the petition, the TBA believes that this Court, after extensive argument and an arduous review, has adopted some of the most workable, fair, and comprehensive set of standards for judicial candidates and judges in the country and should reaffirm that good work.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.


Allan F. Ramsaur

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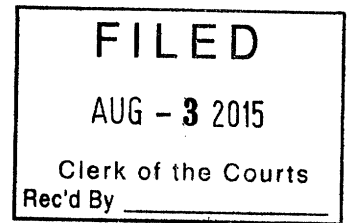
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IN THE SUPREME COURT OF TENNESSEE,
AT NASHVILLE



IN RE: PETITION TO AMEND)
TENNESSEE SUPREME COURT) NO. ADM2015-01092
RULE 10)

COMMENT OF THE KNOXVILLE BAR ASSOCIATION

The Knoxville Bar Association (the “KBA”), through its Judicial Committee and Board of Governors, has carefully considered the Petition to Amend Tennessee Supreme Court Rule 10.

In its review, the KBA sought the opinions of its members regarding the proposed changes to the Code of Judicial Conduct. The Judicial Committee of the KBA (the “Committee”), has a longstanding practice of evaluating proposed rule changes. Consistent with that practice, the Committee carefully considered these proposals. In this instance, the Committee had the benefit of hearing from Chancellor John F. Weaver and the Hon. D. Michael Swiney who graciously agreed to present to the Committee the Petition and the reasons for the proposed revisions drafted by the Tennessee Judicial Conference. The Committee held an informative discussion and would like to thank Chancellor Weaver and Judge Swiney for their presentations.

After discussion, the Committee voted to recommend to the KBA Board of Governors, (the “Board”), that the Board adopt the recommendations of the Tennessee Judicial Conference. The matter was thoroughly considered at the meeting of the Board on July 29, 2015, and the proposed amendment to Supreme Court Rule 10 was approved as recommended.

Respectfully submitted this 30th day of July, 2015.

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July 23, 2015

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ADM2015-01092

Dear Mr. Hivner:

In response to the order soliciting public comments as to proposed changes to Tennessee Supreme Court Rule 10, the Code of Judicial Conduct, I wish to set out my opinions regarding the joint petition of the Tennessee Judicial Conference and the Tennessee Trial Judges Association. Although their petition presents several recommendations, I will discuss only those with which I have had experience as chair of the Tennessee Judicial Ethics Committee.

The joint committee has recommended that, from the applicability section of the CJC, the language "an administrative judge or hearing officer" be deleted from the definition of "judge." On several occasions, I have dealt with situations in which administrative hearing officers, based upon their interpretation of the CJC, contended that certain procedures of their departments regarding appeals be changed, so as to be in compliance with the CJC. Although I disagreed with the positions they were taking, the matters still had to be reviewed within the CJC because the hearing officers were made subject to its provisions. Based upon my experiences in this regard, I see that practical problems are created when rules intended for judges presiding in courtrooms are extended to hearings within the administrative branch of state government.

Additionally, the joint committee has recommended that Rule 3.7(A)(4) be amended to include in the comments a reference to an article in the Judicial Conduct Reporter, for guidance in determining which charitable "fund-raising events" are permitted for a judge's participation. For reasons which I will set out, I recommend against this addition to the comments.

The ethics rule regarding judges' attendance at fund-raising events was substantially changed in the 2012 revisions of the Tennessee Code of Judicial Conduct. Prior to 2012, the rule, then denominated as Rule 4(C), provided in the comments that "[a] judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code." However, in 2012, Rule 3.7, which replaced Rule 4(C), allows a judge to appear, speak, be recognized, be featured on the program, or permits a judicial title to be used at a fund-raising event of certain described entities or organizations which "serves a fund-raising purpose . . . if the event concerns the law, the legal system or the administration of justice."

The problem with including the article recommended by the joint committee is that many, if not the majority, of the ethics opinions cited in the article predate the extensive 2012 revisions to the CJC. Pre-2012 opinions of the Tennessee Judicial Ethics Committee can no longer be relied upon, and the same is true of those from other states, which further have differing judicial ethics codes. Judges who seek guidance as to whether their participation in a particular event is allowed are able to obtain a prompt response to the matter. Thus, I see no utility in referring to outdated ethics opinions, even from Tennessee, and oppose this addition to the CJC.

As to the proposed changes to Rule 4.1(A)(3) regarding judges endorsing or opposing other judges, I wish to provide some background. From, I believe, 1997 until the 2012 changes to the CJC, now deleted Rule 5(D) permitted judges subject to retention elections to publicly endorse or oppose judges for retention or appointment to the court of which the endorsing judge was a member. This provision was deleted in the 2012 version, but I recommend, for reasons which I will explain, that judges again be allowed to endorse or oppose other judicial candidates.

Prior to the 2014 elections, I received several telephone inquiries from incumbent judges, seeking reelection, as to whether they could appear with other judges in joint newspaper and television advertisements, saying, "Vote for the Incumbent _____ County Judges." My opinion was that such an advertisement was permitted, for it did not amount to an endorsement. Likewise, my response to similar questions was that, although traveling together and jointly appearing at campaign functions, judicial candidates were not endorsing each other, which was prohibited by Rule 4.1(A)(3). I recommend that judicial candidates again be allowed to endorse or oppose other judicial candidates. An open question is whether judges could do so only for their own courts or for those seeking election to courts at other levels.

I also support a change to Rule 4.5, to make explicit that a person may not simultaneously be a candidate for an elected judicial and a non-judicial position. During the 2014 election season, I received two calls from county officials telling me that two

different lawyers were doing exactly this. I believe that the CJC should be amended to prohibit this practice.

I appreciate having the opportunity to respond to the recommendations of the joint committee.

Yours truly,

A handwritten signature in cursive script, appearing to read "Alan E. Glenn".

Alan E. Glenn

AEG/jcr