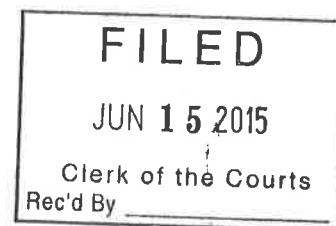


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

No. ADM2015-01092



ORDER

On February 25, 2011, the Tennessee Bar Association filed a petition asking the Court to amend Rule 10, Rules of the Tennessee Supreme Court, and thereby adopt a revised Code of Judicial Conduct (“Code”). The TBA’s petition included as exhibits the TBA’s proposed revision of Rule 10 and related proposed amendments to other court rules. On March 11, 2011, the Court filed an order soliciting public comments on the TBA’s petition and proposed rules amendments. After considering the written comments received during the public-comment period, the Court filed an order on January 4, 2012, granting the TBA’s petition and adopting a revised Code of Judicial Conduct (and related rules amendments), effective July 1, 2012. The Court filed additional orders on June 13, 2012, June 26, 2012, and June 29, 2012, making modifications and corrections to the revised Code previously adopted on January 4, 2012. As modified and corrected, the revised Code of Judicial Conduct took effect on July 1, 2012.

During the time the TBA was developing its proposed revision of the Code of Judicial Conduct, the Tennessee Judicial Conference and the Tennessee Trial Judges Association formed a Joint Committee (“Joint Committee”) to review the TBA’s draft revision of the Code. The Joint Committee submitted a report to the TBA’s task force that was then drafting the proposed revision of the Code, and the Joint Committee issued a second report in the fall of 2011, during the public-comment period on the TBA’s petition. In the fall of 2014, the Tennessee Judicial Conference reconstituted its prior committee to review the revised Code in light of experience over the two years since the revised Code was adopted and to make recommendations as to any proposed amendments to the revised Code.

On June 8, 2015, the Tennessee Judicial Conference transmitted to Chief Justice Sharon G. Lee the Joint Committee’s “Report to the Tennessee Judicial Conference on Revisions to the Tennessee Code of Judicial Conduct.” The Supreme Court has decided to

treat the Joint Committee's Report as a petition to amend Rule 10 (Code of Judicial Conduct) and to solicit public comments on the proposed amendments set out in the Report.

Accordingly, the Court hereby solicits written comments regarding the Joint Committee's proposed amendments from judges, lawyers, bar associations, members of the public, and any other interested parties. A copy of the Joint Committee's Report is attached as an appendix to this Order. The deadline for submitting written comments is Friday, August 14, 2015. Written comments should be addressed to:

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 10
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should reference the docket number set out above.

The Clerk shall provide a copy of this order, including the appendix, to LexisNexis and to Thomson Reuters. In addition, this order, including the appendix, shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

*REPORT TO THE TENNESSEE JUDICIAL CONFERENCE ON REVISIONS
TO THE TENNESSEE CODE OF JUDICIAL CONDUCT
(attached)*

REPORT TO THE TENNESSEE JUDICIAL CONFERENCE ON REVISIONS TO THE TENNESSEE CODE OF JUDICIAL CONDUCT

1 In March of 2010, The Tennessee Judicial Conference and Tennessee Trial Judges
2 Association formed a joint committee to study and report upon the Tennessee Bar
3 Association's Proposed New Tennessee Code of Judicial Conduct. The Joint Committee
4 issued its report on October 20, 2010, to the Tennessee Judicial Conference and
5 Tennessee Trial Judges Association. The Joint Committee issued a second report in the
6 fall of 2011. The Tennessee Supreme Court adopted the current Code of Judicial
7 Conduct on January 4, 2012, with amendments on January 26, 2012, and June 29, 2012.
8 Part, but not all, of the Joint Committee's second report was incorporated into the current
9 code.

10 In the fall of 2014, with more than two years having passed for a practical
11 evaluation of the code, the Tennessee Judicial Conference reconstituted its prior
12 committee. Members of the committee are Senior Judge Don R. Ash, Chancellor Jerri
13 Saunders Bryant, Judge Donald E. Parish, Judge D. Michael Swiney, and Chancellor John
14 F. Weaver, Chair.

15 The committee's recommendations for revisions to the current Code of Judicial
16 Conduct are set forth below. The recommendations follow the format of the existing
17 code, and in particular, its sections for the Preamble, Scope, Terminology, and
18 Application, followed by Canons I-IV. Revisions proposed for a section or rule of the
19 code may require similar revisions to the comments.

20 **Preamble, Scope, Terminology, and Application**

21 The committee renews its recommendation from its 2011 report that administrative
22 judges and hearing officers be deleted from the Application section of the Preamble and
23 Comment 4. The committee recommends deleting the terms “or an administrative judge
24 or hearing officer” from the Application section for two reasons. First, administrative
25 judges and hearing officers are not within the jurisdiction of the Board of Judicial
26 Conduct and its disciplinary authority. Second, administrative law judges and hearing
27 officers are not within the judicial branch but perform judicial functions within the
28 executive branch.

29 **Canon I**

30 The committee does not recommend any revision to Canon I.

31 **Canon II**

32 The committee recommends the following for Canon 2:

- 33 1. Delete Rule 2.11(A)(4).
34 2. Replace with the following comment:

35 In deciding whether a judge shall recuse himself or herself the judge shall
36 consider, among other factors which are brought to the attention of the
37 judge, whether a party or law firm for a party has made financial or in kind
38 contributions to the judge or an opponent of the judge in a judicial election,
39 if those contributions are extraordinary in amount so as to reasonably have
40 caused a significant and disproportionate influence on the outcome of the
41 election. See: Hugh M. Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct.
42 2252 (2009).

43 **Canon III**

44 The TBA did not adopt any of the Joint Committee's 2011 recommendations for
45 Canon 3. With the exception of Rule 3.7(A)(4), the committee continues to make all of
46 the Joint Committee's prior recommendations which are as follows:

47 Proposed Rule 3.1(E) currently reads as follows:

48 RULE 3.1 Extrajudicial Activities in General

49 A judge may engage in personal or extrajudicial activities, except as
50 prohibited by law or this Code. However, when engaging in such
51 activities, a judge shall not:

52 (E) make inappropriate use of court premises, staff, stationery, equipment,
53 or other resources.

54 The Joint Committee recommends that part (E) of Proposed Rule 3.1 be revised to read
55 as follows:

56 (E) make use of court premises, staff, stationery, equipment, or other
57 resources in a manner prohibited by these rules.

58 Proposed Rule 3.6 currently reads as follows:

59 Rule 3.6 Affiliation with Discriminatory Organizations

60 (A) A judge shall not hold membership in any organization that practices invidious
61 discrimination on the basis of race, sex, gender, religion, national origin,
62 ethnicity, or sexual orientation.

63 (B) A judge shall not use the benefits or facilities of an organization if the judge
64 knows or should know that the organization practices invidious discrimination on
65 one or more of the bases identified in paragraph (A). A judge's attendance at an
66 event in a facility or an organization that the judge is not permitted to join is not a
67 violation of this Rule when the judge's attendance is an isolated event that could
68 not reasonably be perceived as an endorsement of the organization's practices.

69 The Joint Committee further recommends that the TBA’s proposal for Rule 3.6 be
70 replaced by the Oklahoma version of Rule 3.6 as follows:

71 Rule 3.6 Affiliation with Discriminatory Organizations

72 (A) A judge shall not hold membership in any organization that practices invidious
73 discrimination.

74 (B) A judge shall not use the benefits or facilities of an organization if the judge knows
75 or should know that the organization practices invidious discrimination.

76 (C) A judge’s attendance at an event in a facility of an organization that the judge is not
77 permitted to join is not a violation of this Rule when the judge’s attendance is an isolated
78 event that could not reasonably be perceived as an endorsement of the organization’s
79 practices.

80 Existing Rule 3.7(A)(4) reads as follows:

81 RULE 3.7 Participation in Educational, Religious, Charitable, Fraternal, or
82 Civic Organizations and Activities

83 (A) Subject to the requirements of Rule 3.1, a judge may participate in
84 activities sponsored by organizations or governmental entities concerned
85 with the law, the legal system, or the administration of justice, and those
86 sponsored by or on behalf of educational, religious, charitable, fraternal, or
87 civic organizations not conducted for profit, including but not limited to
88 the following activities:

89 (4) appearing or speaking at, receiving an award or other recognition at,
90 being featured on the program of, and permitting his or her title to be used
91 in connection with an event of such an organization or entity, but if the
92 event serves a fund-raising purpose, the judge may participate only if the
93 event concerns the law, the legal system, or the administration of justice[.]

94 The Committee recommends retention of existing Rule 3.7(A)(4). However,
95 respecting the reference in Rule 3.7(A)(4) to an event which “serves a fund-raising
96 purpose,” the Committee recommends adding the following to Comment (1):

97 With respect to whether an event serves a fund-raising purpose, see
98 Cynthia Gray, *Defining Charitable "Fund-Raising Event,"* 36 Judicial
99 Conduct Reporter, 1; 4-7 (Spring 2014).

100 **Canon IV**

101 This committee recommends refinements and revisions, as set forth below, to the
102 existing rules under Canon 4.

103 **Rule 4.1(A)(3)**

104 Rule 4.1(A)(3) currently states:

105 Except as permitted by law, or by RJC's 4.2, 4.3, and 4.4, a judge or a judicial
106 candidate shall not:

107 (3) publicly endorse or oppose a candidate for any public office[.]

108 In contrast, the Joint Committee, in its 2011 report, proposed:

109 [t]he Joint Committee while aware of the uncertainty as to nonendorsement rules
110 and federal case law, recommends that the following be inserted as [Rule 4.1(A)(3)]:

111 a judge or judicial candidate shall not publicly endorse or publicly oppose a
112 candidate for a nonjudicial public office.

113 This committee readopts the Joint Committee's above recommendation which
114 would permit judges to endorse or oppose candidates for judicial office. As stated by the
115 Joint Committee in its 2011 report, "[j]udges may have special knowledge of the fitness
116 and qualifications of candidates of judicial offices." However, as also stated by the Joint
117 Committee in its 2011 report, "that specialized knowledge does not embrace nonjudicial
118 candidates." Like the Joint Committee's 2011 report, this committee would leave the
119 code's prohibition against judges endorsing a candidate for nonjudicial public office. As

120 stated by the Joint Committee in its 2011 report, “[a]s traditionally stated, the prestige of
121 the judiciary should not be loaned to nonmembers of the judiciary. Considerations of
122 judicial independence should make judges reluctant to become involved in nonjudicial
123 political contests. The endorsement of nonjudicial candidates appears to be inconsistent
124 with judicial independence and impartiality. Such endorsements may be a source of
125 judicial disqualification and contrary to public interests and perception.”

126 **Rule 4.1(A)(4)**

127 Rule 4.1(A)(4) currently reads as follows:

128 Except as permitted by law, or by RJC’s 4.2, 4.3, and 4.4, a judge or a judicial
129 candidate shall not:

130 (4) solicit funds for, pay an assessment to, or make a contribution to a
131 political organization or candidate for public office[.]

132 The Joint Committee, in its September 30, 2011 report, recommended that the
133 following language be adopted for Rule [4.1A(4)]:

134 [Rule 4.1](A) Except as permitted by law, or by RJC’s 4.2, 4.3, and 4.4, a
135 judge or judicial candidate shall not:

136 (5) solicit funds for a political organization or another candidate for public
137 office except that a judge or judicial candidate may make such a solicitation
138 from a family member or domestic partner of the judge or judicial candidate
139 and from a judge or judicial candidate of the same or higher judicial level.

140 This Committee continues to believe that the solicitation of funds from a family
141 member or domestic partner or from another judge of the same or higher level does not
142 involve political influence or pressure. This Committee recommends that current rule

143 4.1(A)(4) be stricken and replaced with the above version from the Joint Committee's
144 2011 Report.

145 **Rule 4.1(A)(8)**

146 Rule 4.1(A)(8) currently reads as follows:

147 Except as permitted by law, or by RJC's 4.2, 4.3, and 4.4, a judge or a judicial
148 candidate shall not:

149 (8) personally solicit or accept campaign contributions other than through a
150 campaign committee authorized by RJC 4.4[.]

151 On April 29, 2015, the United States Supreme Court held, in a five-four decision,
152 that a rule of judicial conduct that prohibits candidates from personally soliciting
153 campaign funds does not violate the 1st Amendment. *The Florida Bar v. Williams-Yulee*,
154 2015 WL 1913912, at *4 (April 29, 2015). The opinion is especially noteworthy for its
155 recognition that "a State has a compelling interest in regulating judicial elections that
156 extend beyond its interest in regulating political elections, because judges are not
157 politicians." *Id.*, at *15. The opinion unequivocally holds that "States have a compelling
158 interest in preserving public confidence in their judiciaries." *Id.*, at *16. The committee
159 has considered whether to retain or delete current Rule 4.1(A)(8) and recommends that
160 the rule be retained.

161 **Rule 4.2(B)(1)**

162 The Committee recommends that Rule 4.2(B)(1) be amended to expand the period
163 for campaign activity from one hundred eighty days to nine months. The limited period

164 of one hundred eighty days is insufficient for judges in statewide elections. It is also
165 insufficient for judges needing an expanded period to raise funds necessary to adequately
166 inform the public through media advertising about the issues and the judicial candidates
167 including themselves.

168 **Rule 4.5(A)**

169 Rule 4.5(A) and the Comment currently state:

170 Upon becoming a candidate for a nonjudicial elective office, a judge shall
171 resign from judicial office, unless permitted by law to continue to hold
172 judicial office.

173 *Comment*

174 *[1] In campaigns for nonjudicial elective public office, candidates may make*
175 *pledges, promises, or commitments related to positions they would take and*
176 *ways they would act if elected to office. Although appropriate in nonjudicial*
177 *campaigns, this manner of campaigning is inconsistent with the role of a*
178 *judge, who must remain fair and impartial to all who come before him or her.*
179 *The potential for misuse of the judicial office, and the political promises that*
180 *the judge would be compelled to make in the course of campaigning for*
181 *nonjudicial elective office, together dictate that a judge who wishes to run for*
182 *such an office must resign upon becoming a candidate.*

183 *[2] The “resign to run” rule set forth in paragraph (A) ensures that a judge*
184 *cannot use the judicial office to promote his or her candidacy, and prevents*
185 *post-campaign retaliation from the judge in the event the judge is defeated in*
186 *the election. When a judge is seeking appointive nonjudicial office, however,*
187 *the dangers are not sufficient to warrant imposing the “resign to run” rule.*

188 The Application section of the current judicial code states that Canon 4 applies to
189 judicial candidates. Under the Terminology section of the code, a judicial candidate may
190 or may not be a sitting judge. A judicial candidate, who is not a sitting judge, may seek

191 to run for a judicial office and a nonjudicial office during the same election period. A
192 judicial candidate, who is not a sitting judge, has no judicial office from which to resign.
193 However, to serve the purposes of Rule 4.5(A), a judicial candidate, who is not a sitting
194 judge, should likewise be prohibited from running for nonjudicial elective office while
195 being a judicial candidate. Accordingly, the Committee recommends that Rule 4.5(A) be
196 amended by adding the sentence:

197 A judicial candidate, who is not a sitting judge, may not also run for a
198 nonjudicial elective office, unless the judicial candidate, if a sitting judge,
199 would be permitted by law to continue to hold judicial office.

200 **Summary of Recommendations for Canon 4**

201 The Committee recommends:

202 (1) Amending Rule 4.1(A)(3) to permit judges and judicial candidates to endorse
203 or oppose a candidate for judicial office;

204 (2) Amending Rule 4.1(A)(4), pertaining to the solicitation of funds for judges
205 and judicial candidates, to permit judges and judicial candidates to solicit funds from a
206 family member or domestic partner of the judge or judicial candidate and from a judge or
207 judicial candidate of the same or higher level;

208 (3) Retaining Rule 4.1(A)(8) which prohibits judges, except as permitted by law,
209 or by RJC's 4.1, 4.2, 4.3, and 4.4, from soliciting or accepting campaign contributions
210 other than through a campaign committee;

211 (4) Amending Rule 4.2(B)(1) to expand the period for a judge or judicial

212 candidate to establish a campaign committee, by which to manage and conduct a
213 campaign, from one hundred eighty days to nine months; and

214 (5) Amending Rule 4.5(A) to prohibit a judicial candidate, who is not a sitting
215 judge, as in the situation of a sitting judge, from also running for a nonjudicial elective
216 office.

[end of Appendix]