

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2009-8

Issued October 10, 2009

Withdrawn-by Board on August 13, 2010 due to amendments to Jud. Cond. Rule 4.2(B) and (C) and Comment [2], eff. August 12, 2010.

SYLLABUS: Throughout a judicial campaign, a judicial candidate may truthfully state **in person or in advertising** that he or she is “Endorsed by (or a nominee of) the Democratic Party” or “Democratic Party Endorsed (or nominee)” or “Endorsed by (or a nominee of) the Republican Party” or “Republican Party Endorsed (or nominee)”; provided that the phrase identifies which political party entity endorsed the candidate, for example, the county, state, or national Democratic or Republican Party. Any other statement that identifies a judicial candidate as a member of or affiliated with a political party is regulated as follows. At any time during a judicial campaign, a judicial candidate **may** identify himself or herself **in person** as a member of or affiliated with a political party. From the date of becoming a judicial candidate through the day of the primary a judicial candidate **may** identify himself or herself **in person and in advertising** as a member of or affiliated with a political party. After the day of a primary, a judicial candidate **may in person, but not in advertising**, identify himself or herself as a member of or affiliated with a political party. Jud. Cond. Rules 4.2(B)(4), 4.2(C)(6), 4.2(C)(7), 4.3(A), 4.3(M).

OPINION: This opinion addresses a question regarding a judicial candidate’s use of a statement of endorsement by a political party.

Is it proper for a judicial candidate to use the phrase “Democratic Party Endorsed” or “Republican Party Endorsed” in judicial campaign advertisements, such as on billboards or yards signs?

Under the Ohio Code of Judicial Conduct a judicial candidate’s statement that he or she is a nominee of or endorsed by a political party is treated differently from a judicial candidate’s statement that he or she is a member of or affiliated with a political party. This distinction must be grasped in order to avoid violating the Ohio Code of Judicial Conduct.

Statement identifying judicial candidate as a member of or affiliated with a political party

Under Rule 4.2(C)(7) a judicial candidate *may*: “From the day on which he or she becomes a judicial candidate through the day of the primary election, identify himself or herself **in person or in advertising** as a member or affiliated with a political party.” (Emphasis added).

In contrast, Rule 4.2(B)(4) requires that a judicial candidate *shall not*: “After the day of the primary election, identify himself or herself **in advertising** as a member of or affiliated with a political party.” (Emphasis added.)

Thus, upon becoming a judicial candidate and up through the day of the primary, a judicial candidate may identify himself or herself in person or in advertising as a member of or affiliated with a political party. After the day of the primary, a judicial candidate may no longer identify himself or herself in advertising as a member of or affiliated with a political party, but may so state in person.

After the day of the primary, a judicial candidate must carefully word advertising so as not to identify himself or herself as a member of or affiliate with a political party. For example, in a case interpreting Canon 7(B)(3)(c), a predecessor rule to Rule 4.2(B)(4), a judicial candidate’s use of the phrase “Endorsed Democrat” on billboards violated the campaign conduct rule by identifying the candidate in advertising after the date of the primary as a member of a political party. *In re Judicial Campaign Complaint Against Grunda*, 100 Ohio St.3d 1465, 2003-Ohio-5896. In another case interpreting the same rule, a judicial candidate’s identification in campaign literature as a “conservative Republican” violated the campaign conduct rule by identifying the candidate in advertising after the date of the primary as a member of a political party. *In re Judicial Campaign Complaint Against Per Due*, 98 Ohio St.3d 1548, 2003-Ohio-2032.

Statement that judicial candidate is a nominee of or endorsed by a political party

Rule 4.2(C)(6) of the Ohio Code of Judicial Conduct states that a judicial candidate *may*: “**State in person or in advertising** that he or she is a nominee of or endorsed by a *political party*.” (Emphasis added). This rule applies throughout a judicial campaign.

Political party is defined in Rule 4.6(M): “‘Political party’ has the same meaning as in R.C. 3517.01 and includes any national, state, or county political party.”

Thus, throughout a judicial campaign, a judicial candidate is permitted to state in person and in advertising that he or she is a nominee of or endorsed by a political party, but there are two caveats. First, pursuant to Rule 4.3(A) and Rule 4.3(M), a statement of endorsement must be truthful and not misleading or deceiving. Second, pursuant to Rule 4.2(B)(4) and Rule 4.2(C)(7), a statement of endorsement used in advertising after a primary must not identify a judicial candidate as a member of or affiliated with a political party.

A judicial candidate's statement of nomination or endorsement by a political party made pursuant to Rule 4.2(C)(6) requires careful phrasing so as to comply with Rule 4.3(A), Rule 4.3(M), Rule 4.2(B)(4), and Rule 4.2(C)(7).

To comply with Rule 4.3(A) and Rule 4.3(M), a statement of endorsement must be truthful and specific enough so as not to mislead or deceive.

Rule 4.3 During the course of any campaign for nomination or election to judicial office, a *judicial candidate*, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not *knowingly* or with reckless disregard:

(A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the *judicial candidate* or an opponent, either *knowing* the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person;

(M) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a *judicial candidate* by a person, *organization*, *political party*, or publication.

Case law involving predecessor rules to Rule 4.3(A) and Rule 4.3(M) provide examples of endorsement statements that were either false; or were truthful, but misleading or deceiving.

A judicial candidate's statement on a campaign placard that the "Neighborhood Protection Council has endorsed Gary Kaup" and similar statements in a campaign letter when in reality no entity called that ever existed and the name was a shortened version of the candidate's campaign committee was deceptive and false. *Disciplinary Counsel v. Kaup*, 102 Ohio St.3d 29, 30, 2004-Ohio-1525.

A judicial candidate's statements in campaign literature that he was endorsed by the "legal community" in the appellate district was a false statement when only one county bar association endorsed the candidacy and there were seven other counties in the district. *In re Judicial Campaign Complaint Against Roberts* (1996), 81 Ohio Misc.2d 59, 61.

A judicial candidate's statement in a distributed letter that she "received the Union endorsements" while technically true, was misleading and deceiving because it would lead a reasonable person to conclude the candidate received all of the union endorsements when both candidates had received labor union endorsements. *In Re Judicial Campaign Complaint Against Burick* (1999), 95 Ohio Misc.2d 1, 9.

A judicial candidate's broadcasted and distributed information stating that she was "endorsed by Fraternal Order of Police" while to some degree true, was at the same time misleading and deceiving because it was the endorsement of one lodge and her failure to identify more specifically the nature of the FOP endorsement such as by including the name of the lodge, made the statement misleading. *In Re Judicial Campaign Complaint Against Burick* (1999), 95 Ohio Misc.2d 1, 9.

A judicial candidate's statement in literature, print, radio, and television advertisements, and in telephone scripts that he was "Endorsed by Southern Ohio's Top Prosecutors and Sheriffs!" when only five of the fourteen sheriffs and three of the fourteen county prosecuting attorneys in the appellate district had endorsed or supported the candidate were misleading and did not maintain the dignity appropriate to judicial office. *Disciplinary Counsel v. Evans*, 89 Ohio St. 3d 497, 499-500, 2000-Ohio-0348.

Further, it is the Board's view that the phrase "Endorsed by (or a nominee of) the Democratic Party" or "Democratic Party Endorsed (or nominee)" or "Endorsed by (or a nominee of) the Republican Party" or "Republican Party Endorsed (or nominee), even though truthful, is potentially misleading when the phrase does not also identify which political party entity endorsed the candidate, for example, the county, the state, or the national Democratic Party or Republican Party.

In addition, as a reminder, a judicial candidate is responsible, pursuant to Rule 4.2(A)(2) and Rule 4.2(A)(3) for all campaign statements and materials.

Rule 4.2(A) A *judicial candidate* shall be responsible for all of the following:

- (2) Reviewing and approving the content of all campaign statements and materials produced by the *judicial candidate* or his or her campaign committee before their dissemination;
- (3) The content of statement communicated in any medium by his or her campaign committee and for compliance by his or her campaign committee with the limitations on campaign solicitations and *contributions* contained in Rule 4.4, if the candidate knew of the statement, solicitation, or *contribution*.

In conclusion, in answer to the question raised, the Board advises as follows. Throughout a judicial campaign, a judicial candidate may truthfully state **in person or in advertising** that he or she is "Endorsed by (or a nominee of) the Democratic Party" or "Democratic Party Endorsed (or nominee)" or "Endorsed by (or a nominee of) the Republican Party" or "Republican Party Endorsed (or nominee)"; provided that the phrase identifies which political party entity endorsed the candidate, for example, the county, state, or national Democratic or Republican Party. Any other statement that identifies a judicial candidate as a member of or affiliated with a political party is regulated as follows. At any time during a judicial campaign, a judicial candidate **may** identify himself or herself **in person**

as a member of or affiliated with a political party. From the date of becoming a judicial candidate through the day of the primary a judicial candidate **may** identify himself or herself **in person and in advertising** as a member of or affiliated with a political party. After the day of a primary, a judicial candidate **may in person, but not in advertising**, identify himself or herself as a member of or affiliated with a political party. Jud. Cond. Rules 4.2(B)(4), 4.2(C)(6), 4.2(C)(7), 4.3(A), 4.3(M).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.