Memorandum

To: Supreme Court Advisory Committee

From: Legislative Mandates Subcommittee

Date: June 10, 2019

Re: Joint Judicial Campaign Activity

The Texas Supreme Court has referred a new provision addressing joint judicial campaign activity to the Supreme Court Rules Advisory Committee to address whether the text of the Code of Judicial Conduct "should be changed or a comment added to reference or restate the statute."

I. Election Code Amendment: New Section 253.1612

The Governor signed House Bill 3233, from the 86th Legislative Session, into law on June 2, 2019. It is effective immediately. HB 3233 amends the Election Code to include new section 253.1612. Entitled "Certain Campaign Activities Authorized," it provides:

> The Code of Judicial Conduct may not prohibit, and a judicial candidate may not be penalized for, a joint campaign activity conducted by two or more judicial candidates.

See 2019 Bill Text TX H.B. 3233.

II. Affected Provisions of the Code of Judicial Conduct

The Code of Judicial Conduct has two provisions that implicate judicial endorsements, Canons 2B and 5(2).

Canon 2B states in part:

> A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or

permit others to convey the impression that they are in a special position to influence the judge.

Canon 5(2) states:

> A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

See TEX. CODE JUD. CONDUCT, Canons 2B & 5(2).

III. Background

Last December, the State Commission on Judicial Conduct publicly warned two Dallas County State District Judges for violating Canons 5(2) and 2B of the Code of Judicial Conduct.

The Commission found that, during the 2018 campaign for reelection, the judges together produced and distributed a campaign mailer that featured their names, titles, and likenesses, and urged constituents to vote for each of them in their respective judicial races. The judges also produced campaign videos and posted them to social media, in which they asked voters to support both of them in their respective reelection efforts. Finally, the judges jointly hosted a fundraising event where donations were made to each campaign individually. The judges' individual campaigns shared equally in the costs associated with the mailer, videos, and fundraising event.

The Commission concluded that, by engaging in joint campaign efforts, the judges suggested they were "running as a team," and by authorizing the use of their names, titles, and likenesses on advertisements supporting both candidates, their conduct constituted a public endorsement, in violation of Canons 5(2) and 2B.

IV. History of Canon 5

There was no Code of Judicial Conduct in Texas until 1974, when it was enacted by the Texas Supreme Court. The first version of the Code contained an "endorsement" prohibition:

> A judge or candidate for election to judicial office should not: ... (b) make political speeches for a political organization or candidate or publicly endorse a candidate for public office.

TEX. CODE JUD. CONDUCT, Canon 7A(1)(b), 37 TEX. B.J. 853 (1974) (now Canon 5(2)).

The American Bar Association model code, from which the rule against endorsement is derived, justified the restriction on endorsement based on the danger of "abusing the prestige of judicial office to advance the interests of others." Model Code of Judicial Conduct R. 4.1 cmt. [4] (2014).

In 1976, the Texas Supreme Court removed the endorsement prohibition from the Code, but Canon 2B remained.

In 1980, the Committee on Judicial Ethics issued an opinion in answer to the question: "May a judge endorse a specific candidate or candidates?" The opinion stated the Code did not "specifically prohibit a judge from supporting a candidate or candidates." But, after reviewing the provisions of Canon 2, the opinion concluded:

> The Committee is of the opinion that endorsing a candidate or candidates is within the discretion of a judge provided the nature and type of endorsement does not contravene Canon 1, Canon 2A and Canon 2B of the Code of Judicial Conduct.

Comm. on Jud. Ethics, State Bar of Tex., Op. 53A (1980).

In 1989, the Texas Committee of Judicial Ethics answered "no," when asked whether a judge may endorse a candidate for public office:

> The Judicial Ethics Committee concludes again that a judge's public endorsement of a candidate for public office violates the Code of Judicial Conduct because such an endorsement tends to diminish public confidence in the independence and impartiality of the judiciary and may give the appearance of involvement in partisan interests and of judicial concern about public clamor or criticism, and because such an endorsement of necessity involves the use of the prestige of the judge and the prestige of his office.

Op. No. 130 (1989).

In 1990, the Texas Supreme Court amended the canons to include a no endorsement provision:

> A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that a candidate may indicate support for a political party.

TEX. CODE JUD. CONDUCT, Canon 7(3), 53 TEX. B.J. 240–41 (1990) [now found in Canon 5].

In later litigation about the provision, Supreme Court Justice Hecht observed that the "authorization" provision was generated at the request of the judges:

> The problem, the reason that 5(2) was proposed in the first place, the judges were concerned that county officials were muscling them into endorsements that they didn't want to make. And they said, look, you've got to endorse me for, let's say a district judge, you have to endorse me for County Commissioner. The district judge didn't want to do it, but he didn't have any way of saying no. If he said no, then he was afraid of what was going to happen to him in the budgeting process. So he wanted cover for that. So that's why the judges came to us back in 88 and said, we're tired of getting hammered on here, and we want an excuse that we can hold up and say, we don't have to do this anymore.

In re Hecht, 213 S.W. 3d 547 (Tex. 2006).

In *Republican Party of Minnesota v. White*, the United States Supreme Court held that a canon of judicial conduct that prohibits a candidate for a judicial office from "announc[ing] his or her views on disputed legal or political issues" is an unconstitutional violation of the First Amendment. 536 U.S. 765 (2002). The Court applied strict scrutiny to the canon and determined that, while a state has a compelling interest in maintaining the impartiality of judges, the Minnesota canon was not narrowly tailored to achieve that end.

In *White*, Gregory Wersal ran for associate justice of the Minnesota Supreme Court. During the course of his campaign, he distributed literature criticizing several Minnesota Supreme Court decisions involving crime, welfare, and abortion. Wersal sued, seeking a declaration that the clause violated the First Amendment and an injunction against its enforcement. The Court acknowledged that a state has an interest in maintaining the impartiality of judges but acknowledged that the way the canon was written prevented judicial candidates from stating their view that prior decisions were erroneous. The Court held that this announcement clause was overbroad and violated the First Amendment.

Two appellate courts have addressed "endorsement" clauses and their constitutionality with the First Amendment. In *Werssal v. Sexton*, the United States Court of Appeals for the Eighth Circuit held that Minnesota's "no endorsement" clause did not violate the First Amendment. *Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012). The Minnesota endorsement clause stated that a judge or judicial

candidate shall not "publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office." 52. Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(3). The Eighth Circuit concluded that Minnesota's interest in preserving impartiality was compelling and the provision survived strict scrutiny. *Id*. The court concluded that the endorsement clause is a restriction of speech for or against particular parties, rather than for or against particular issues, distinguishing *White*:

> When a judge or judicial candidate endorses another candidate, it creates a risk of partiality toward the endorsed party and his or her supporters, as well as a risk of partiality against other candidates opposing the endorsed party. The endorsement clause is directly aimed at this speech about parties, as it prevents potential litigants in a case from the risk of having an unfair trial. At the very least, the clause serves the State's interest in avoiding the appearance of impropriety. Namely, even if a particular endorsement does not serve to create an actual bias toward or against a particular party, the act of endorsement itself undermines the judiciary's appearance of impartiality because the public may perceive the judge to be beholden to political interests."

674 F.3d at 1020.

The Seventh Circuit similarly has upheld Wisconsin's no-endorsement clause. *See Seifert v. Alexander*, 608 F.3d 974 (7th Cir. 2010). There, the court upheld Wisconsin Supreme Court Rule 60.06(2)(b)4, which states: "[n]o judge or candidate for judicial office or judge-elect may …[p]ublicly endorse or speak on behalf of its candidates or platforms", did not violate the First Amendment.

The Seventh Circuit observed, "[w]hile an interest in the impartiality and perceived impartiality of the judiciary does not justify forbidding judges from identifying as members of political parties, a public endorsement is not the same type of campaign speech targeted by the impermissible rule against party affiliation in this case…." *Id* at 984.

Following the Supreme Court decision in *Republican Party of Minn. v. White*, the Texas Code of Judicial Conduct was amended. Supreme Court of Texas Justice Nathan L. Hecht wrote in a concurrence to the amendments that, "Before promulgating any rule, the Supreme Court of Texas must, in my view, determine that the rule does not violate the United States Constitution, the Texas Constitution, or federal or state law. The Court should not adopt rules of doubtful validity."

III. Recommendation

Any section of the Code should comply with state law.

There are two options: eliminating the no-endorsement provisions entirely or limiting their reach to comply with the new statute. The latter is possible because the new statute does not require the repeal of the no-endorsement provisions in their entirety. Instead, as its title states, the new law authorizes "certain campaign activities."

The subcommittee recommends the following amendments:

Canon 2B:

> A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. **Nothing in this provision precludes two or more judicial candidates from conducting joint campaign activity.**

Canon 5(2):

> A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10). **Two or more judicial candidates may conduct joint campaign activity.**

Comment: **The revisions to Canons 2B and 5(2) address section 253.1612 of the Election Code, which provides that the Code of Judicial Conduct may not prohibit or penalize joint campaign activity conducted by two or more judicial candidates.**