

Serial: **212357**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99013-SCT

IN RE: CODE OF JUDICIAL CONDUCT

ORDER

This matter is before the Court en banc on the Petition to Amend the Code of Judicial Conduct. The petition seeks to amend Canon 5F of the Code of Judicial Conduct to add, *inter alia*, provisions for notice to the subject of a complaint, and an opportunity to respond. After due consideration, the Court finds that the petition should be granted in part as set forth in Exhibit A.

IT IS THEREFORE ORDERED that the Code of Judicial Conduct is hereby amended as set forth in Exhibit A. This amendment is effective immediately.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forward a true copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Third Series, (Mississippi Edition)*.

SO ORDERED, this the 30th day of October, 2017.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH,
PRESIDING JUSTICE
FOR THE COURT

**AGREE: RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM AND
CHAMBERLIN, JJ.**

**WALLER, C.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN
STATEMENT JOINED BY KITCHENS, P.J., AND KING, J.**

**KING, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT
JOINED BY WALLER, C.J., AND KITCHENS, J.**

NOT PARTICIPATING: ISHEE, J.

EXHIBIT A

Canon 5F(3) – Mississippi Code of Judicial Conduct

(3) Upon receipt of a written allegation ~~information~~ ~~facially~~ indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by any ~~independent~~ person(s), committee(s) or organization(s) which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the allegation by e-mail ~~or facsimile, if available,~~ and U.S. mail to the Special Committee members and the judicial candidate, and said Committee shall:

(a) in a manner which comports with due process, provide the candidate with a list of provisions he or she is accused of violating, and provide the candidate an opportunity to respond;

~~(ba)~~ seek, from the informing party and/or the subject of the information, such further information on the allegations as it deems necessary;

~~(cb)~~ conduct such additional investigation as the Committee may deem necessary;

~~(de)~~ determine whether the allegations warrant speedy intervention and, if so, immediately issue a confidential cease-and-desist request to the candidate and/or organization or independent committee or organization believed to be engaging in unethical and/or unfair campaign practices. If the Committee determines that the unethical and/or unfair campaign practice is of a serious and damaging nature, the Committee may, in its discretion, disregard the issuance of a cease-and-desist request and immediately take action authorized by the provisions of paragraph (3)~~(ed)~~(i) and (ii), hereafter described. If the allegations of the complaint do not warrant intervention, the Committee shall dismiss the same and so notify the complaining party.

~~(ed)~~ If a cease-and-desist request is disregarded or if the unethical or unfair campaign practices otherwise continue, the Committee is further authorized:

(i) to immediately release to all appropriate media outlets, as well as the reporting party and the person and/or organization against whom the information is submitted, a public statement setting out the violations believed to exist, or, in the case of independent persons, committees or organizations, the actions

by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5. In the event that the violations or actions have continued after the imposition of the cease and desist request, the media release shall also include a statement that the candidate and/or organization or independent person, committee or organization has failed to honor the cease-and-desist request, and

(ii) to refer the matter to the Commission on Judicial Performance or to any other appropriate regulatory or enforcement authority for such action as may be appropriate under the applicable rules.

....

Commentary

~~*This Section 5F does not appear in the ABA Model Code and was added with the adoption of this Section 5. Similar provisions have been adopted for South Dakota and Georgia. See South Dakota Rules of Commission on Judicial Qualifications, Rule IV and Rules of Georgia Judicial Qualification Commission, Rule 27. In Weaver v. Bonner, 114 F. Supp. 2d 1337 (N.D. Ga. 2000), a constitutional challenge to the Georgia rule was rejected, the court saying the government may “participate in the marketplace of ideas” and “contribute its own views to those of the other speakers. Weaver at 1345, quoting Muir v. Ala. Educ. Television Comm’n, 688 F. 2d 1033, 1037 (5th Cir. 1982). In Weaver, the court also specifically found the procedures adequate to satisfy due process requirement.*~~

Provision is made for the Special Committee to issue opinions to judicial candidates. Ordinarily, absent extraordinary circumstances or statutory authority to the contrary, when a judge or candidate, relying on the opinion of the Special Committee, acts in accordance with the opinion and the opinion is based on a full disclosure of facts and circumstances, the judge or candidate will not be subject to disciplinary or enforcement action or liability.

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WALLER, CHIEF JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. I respectfully disagree with the amendment to Canon 5F(3) to require notice to the candidate “in a manner which comports with due process.” The Campaign Committee is a body of volunteers who conduct a nonjudicial investigation with no authority to impose sanctions or punishment. This is not a judicial process, and the requirement of service “which comports with due process” is both overly burdensome and vague. I agree that the person subject to the complaint must have notice of the complaint and the identity of the party who filed it and must have the opportunity to respond. But no more than this should be required for an administrative proceeding such as this. A civil action is commenced simply by serving a complaint and summons upon the opposing party pursuant to the Rules of Civil Procedure. Is this the “due process” required here? No other rule of judicial procedure uses the term “due process” to describe the manner of notice to a party, and this proposal does not give any guidance to the Committee as to how this requirement can be satisfied. I do not believe we should subject the Bar, the candidates, and the volunteer Committee members to these overly burdensome and unnecessary requirements.

KITCHENS, P.J., AND KING, J., JOIN THIS SEPARATE WRITTEN STATEMENT.

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KING, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶2. I agree that Canon 5F(3) of the Code of Judicial Conduct should be amended to clarify that the subject of any campaign complaint shall be given notice and an opportunity to respond to the substance of that complaint. However, given the purpose of Canon 5F, I disagree with the amendment adopted by the majority. The amendment adopted by the majority is overly broad, unnecessarily restrictive, and inconsistent with the duties assigned to the Special Committee.

¶3. Under Canon 5F, the Special Committee is appointed in judicial-election years to address “the propriety of any act or conduct by a judicial candidate, a candidate’s campaign organization or an independent person, committee or organization conducting activities which impact on the election.” Canon 5F(2). Section 5F(4) provides that the work of the Committee shall be informal and nonadversarial, but requires that its work be done “as soon as possible taking into consideration the exigencies of the circumstances.” The amendment adopted by the majority eliminates the Special Committee’s ability to respond expeditiously to any last-minute complaint.

¶4. Section 5F(5) makes abundantly clear that the Special Committee is not a disciplinary body and lacks any authority to “institute disciplinary action against any candidate for judicial office.” Notwithstanding the language of Canon 5F, the amendment adopted by the majority incorrectly suggests: 1) that this applies only to candidates for judicial office, and 2) that it imposes disciplinary actions upon judicial candidates. The majority concerns itself more with due process in a nondisciplinary judicial-election matter than it does in actual disciplinary actions against criminal defendants, whose liberty or very life is at risk.

¶5. Given the purpose and nature of the work of the Special Committee, the right to notice of and an opportunity to respond to a complaint may be clarified by simply inserting a new 5F(3)(a), reading: “in a manner determined by the Committee, provide the candidate, person, committee or organization against whom a complaint has been filed with notice and an opportunity to respond.”

¶6. For the foregoing reasons, I object to the order amending Canon 5F(3) of the Code of Judicial Conduct.

WALLER, C.J., AND KITCHENS, P.J., JOIN THIS SEPARATE WRITTEN STATEMENT.