

# National Ad Hoc Advisory Committee on Judicial Campaign Oversight



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## How Should Judicial Candidates Respond to Questionnaires?

An Advisory Memorandum  
August 28, 2006

### The Current Scene:

“Questionnaires” from interest groups to candidates for election or reelection to the bench are proliferating and becoming more pointed. Also more loaded, like the following paragraph, here quoting from a 7/19/06 federal court decision in Kansas.

[The Questionnaire’s] ‘Decline to Respond’ option is accompanied by an asterisk, which reads:

This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Kansas Canon of Judicial Conduct 5A(3)(I) and (ii), which forbids judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” or “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself as a judge in any proceeding concerning this answer on account of Kansas Canon 3E(1), which requires a judge or judicial candidate to recuse him or herself when “the judge’s impartiality might reasonably be questioned . . . .”<sup>1</sup>

An almost identical paragraph is used on every page of the Tennessee Family Action Council’s June 2006 Questionnaire. A Georgia questionnaire (sent out in July) has a similar paragraph without the treatment of recusal.

NOTE that states in which candidates have declined to respond *because of the Canons* have been subject to lawsuits.

Of 64 Tennessee judges who received questionnaires, 25 sent letters declining to respond (some citing Chief Justice John Roberts, and almost all giving biographic information), 35 did not respond, and 3 gave limited responses (*e.g.*, that Reagan and Rehnquist best represent their political or judicial philosophy among the listed Presidents and Justices). The Tennesseans’ letters

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<sup>1</sup> From *Kansas Judicial Watch v. Stout*, Case 5:06-cv-04056-JAR-KGS (D.Ct. Kansas 7/19/06), at 5-6. Citations to other relevant cases are available upon request.

\*Affiliations are for identification purposes only.

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declining to respond may be helpful. An Addendum provides excerpts from three of them. Tennessee, a few weeks later, voted on average 75 percent *for* retention of their 27 appellate judges.

### Recommendations:

There is no simple right answer on how to respond. This is true because of variations in local circumstances and candidates' own preferences. Judicial candidates should research the law in their jurisdiction, consult with local judicial campaign committees, and definitely confer with other candidates.

1. Do not be rushed in deciding how to handle the questionnaire. Questionnaires often arrive only a few days before what the questionnaire states is the “due” date for responding. The Chief Justice of Tennessee opened his recent letter (declining to respond) noting that he had received the questionnaire on June 13; the due date was June 16. You should know that the response by all but a *very* few judges and candidates, has been either not responding at all or sending a letter like those in the Addendum. While this characterization is valid in general, we do not know or mean to presume about your jurisdiction. Some judges who have responded later said they were unaware that their responses would be made public, not merely as part of a tabulation. Generally, a judicial candidate should assume that any response to a questionnaire becomes part of a permanent file where statements made by the candidate can be used for years to come.
2. Never use the pre-printed answers provided on the questionnaire. Candidates have greater First Amendment rights to discuss views post-*White*, but no case law, statute, rule or practice creates any obligation to discuss any issue. Even a well intentioned and well written response may be used in a way you do not agree with. Indeed, simplifying a legal or political issue to a “yes/no” answer is inconsistent with the judge’s role—*e.g.*, how the issue comes before the judges; what facts are proven and what law is applicable; and protecting the parties’ due process rights.
3. Consider responding with a letter. A letter is an opportunity to educate voters on the role of judges and judicial independence and impartiality—and about yourself! Candidates who reply with a letter are advised to request that the letter be distributed to members of the group sponsoring the questionnaire. You might release the letter, especially if the interest group attempts to portray you as non-responsive. Candidates’ letters might express their concern that completing the questionnaire will mislead voters about the relevance of any judges’ personal views and the relevance of the issues raised in the questionnaire to being a judge since so few cases concern such issues.
4. Never use a judicial Canon to justify a decision not to respond. Since *White*, interest groups have successfully litigated (in four states, with two more pending) to strike down Canons that are read as prohibiting responses to their questionnaire, with recovery of costs and fees from the states.
5. Distinguish general-interest, non-advocacy groups from special interest advocacy groups—and be consistent. There is a notable difference between, on the one hand, general-interest media and general interest non-advocacy groups that have a neutral claim on a response to their questionnaires. On the other hand, there are special interest advocacy groups that are likely to draft questionnaires so as to encourage a candidate to make a pledge, promise or commitment. Different general-interest, non-advocacy groups send out their own questionnaires, but in our experience they are as neutral and as aimed at obtaining sheer information as are the general news media questionnaires. Any questions from any source that encourage a candidate to make a pledge, promise or commitment should not be answered. Once you have decided on your general approach to questionnaires, apply it consistently so that you won’t be accused of favoritism.

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### ADDENDUM

#### Excerpts from Tennessee Judges' Letters Declining to Answer the Questionnaire:

Judge John Everett Williams:

. . . . I believe that Chief Justice John Roberts set the gold standard in ethical conduct during his confirmation hearing. As did Justice Roberts, I do not wish to hint or signal that I am predisposed to rule on any matter that may come before me as a judge. I have pledged to maintain the highest degree of ethical conduct.

As a judge, my role is to interpret the law, not make it. My opinions reflect my strict adherence to the rule of law.

It is my hope and desire that by maintaining the highest degree of ethical conduct, I promote public trust and confidence in the independence of the judiciary.

Judge Robert W. Wedemeyer:

. . . . My Dad is from Iowa and my Mom is from Kentucky. They met at Fort Knox at the end of World War II, married, and moved to Nashville, where I was born in 1951....

I grew up attending the First Presbyterian Church in Oak Ridge, and served as a Deacon, Elder, Sunday School teacher, and Stewardship chairman at the First Presbyterian Church in Clarksville. My wife and I have 5 grown children and are hoping for a grandchild soon . . . .

Judge Gary R. Wade:

. . . . I am a great believer in the ethical canon of our profession which authorizes judges to engage in activities which promote respect for the administration of justice. On the theory that judges should make every effort to support worthy community causes as a part of that mission, I often lend support to a number of non-profit organizations with an educational, historic, or charitable purpose. For example, I am a founding member of the Friends of the Great Smoky Mountains National Park and have served as President of that organization since its inception in 1993. I am the immediate past President of both the Knoxville Zoo and the Walters State Community College Foundation. I support a number of other organizations, including the Sevier County Library Foundation, Boys and Girls Club of the Smoky Mountains, Safe Harbor Child Advocacy Center, and United Way of both Sevier and Knox Counties . . . .