## ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2006-4

## Use of Information Relating to Prior Judicial Service by Lawyers Who Campaign for Elected Office<sup>1</sup>

## **Question Presented**

May lawyers who run for public office use information relating to their prior judicial service in their campaigns?

The Committee concludes that an attorney who runs for public office may use information indicating prior judicial service where the campaign information (e.g., campaign flier or mailing) only lists the candidate as having been a "former" judicial officer, and identifies the specific position along with the length and location of such service.

## Analysis

The issue cannot be addressed solely by reference to a specific provision either in the American Bar Association Model Rules of Professional Conduct, the Alaska Rules of Professional Conduct, or by way of analogy, the Alaska Code of Judicial Conduct. The Committee therefore has based its conclusion on those rules of professional conduct that set forth the guidelines for communications concerning a lawyer's services and letterheads, and the rules of judicial conduct concerning the appearance of impropriety.<sup>2</sup>

Both the Model Rule and Alaska Rule 7.1 provide in pertinent part that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services" if it "is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law." Correspondingly, both Model Rule and Alaska Rule 7.5 prohibit the use of letterhead that violates Rule 7.1.4

Canon 2 of the Alaska Code of Judicial Conduct, similar to its ABA counterpart, further provides that a judge "shall" avoid the "appearance of

It is assumed for purposes of this opinion that the lawyer is a former judge. *See* Alaska Code of Judicial Conduct Canon 5(d)(2) ("A judge shall resign upon becoming a candidate in either a primary or general election for any non-judicial office except the office of delegate to a state or federal constitutional convention.")

<sup>&</sup>lt;sup>2</sup> Cf. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 95-391 (1995).

See Model Rules of Prof'l Conduct R. 7.1(b) (5th ed. 2003); Alaska R. Prof. C. 7.1(b).

See Model Rules of Prof'l Conduct R. 7.5 (5th ed. 2003); Alaska R. Prof. C. 7.5.

impropriety," "act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary," and "shall not use or lend the prestige of judicial office to advance the private interests of the judge."<sup>5</sup>

Reasonably construed, these specific rules and codes of conduct indicate that an attorney may include readily verifiable – albeit circumscribed – information in a campaign flier or mailing. In other words, the lawyer can indicate in the advertisement only that he or she is a "former" judge and identify only the specific court along with the length and location of such service.<sup>6</sup>

A lawyer campaigning for elected office who refers to himself or herself either as a "former \_\_\_\_ court judge" is distinct from the situation where a lawyer in private practice refers to himself or herself as "Judge" \_\_\_\_\_.7 That is because the latter reference raises an issue under Rule 7.1 as to whether the lawyer either is (1) creating an expectation that he or she can achieve results that a lawyer who is not a former judge cannot or (2) improperly creating a false impression as to his or her professional status and access to the judicial decision-making process.<sup>8</sup>

See Model Code of Judicial Conduct Canon 2 (1990); Alaska Code of Judicial Conduct Canon 2 (1998). A false or misleading communication about the lawyer or the lawyer's services within this context also can be made through a visual statement such as a photograph depicting the lawyer wearing a judicial robe as symbolic of his or her former position. Compare ABA Comm. On Ethics and Professional Responsibility, Informal Op. C-719 (1964) (explaining that paid political advertisement picturing judge in judicial robes and simultaneously advertising judicial position along with endorsement of another candidate for judicial office violates canons of judicial ethics) with ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1450 (1980) (stating no violation of code of judicial conduct when incumbent judge, in re-election campaign, allows use of photograph (including televised photograph) of him- or herself where judicial robe, "if the photograph is otherwise proper and if he [or she] normally wears the robe in the performance of his [or her] judicial duties").

<sup>6</sup> Cf. NJ Eth. Op. 698 at \*2 (2005) (indicating that mailing describing sender as "former Municipal Court Judge" is permissible only if attorney includes the years and location(s) of service in advertisement).

<sup>&</sup>lt;sup>7</sup> See, e.g., MI Eth. Op. RI-327 (2001) (stating that former judge may not ethically retain the title "Honorable" after entering private practice);

Id. See also PA Eth. Inf. Op. 99-156 (1999) (explaining that lawyer in private practice referring to himself or herself as "Judge" improper under Rule 7.1(a) but that designation of law firm member as "Former Judge" on letterhead does not create problem where information is capable of verification); IL Adv. Op. 92-10 (1993) (discussing use of title "Judge" in professional and personal relationships by former judge who is now a practicing attorney); OH Adv. Op. 93-8 at \*3 (1993) (explaining that it is unethical under Ohio code of professional responsibility for former judge returning to private law practice to uses statements as to prior judicial positions held or titles such as "Judge," "Honorable," or "Former Judge," on letterheads or business cards in connection with the practice of law); FL Eth. Op. 87-8 (1987) (concluding that it would not be ethically improper for former chief justice of Florida Supreme Court to identify himself as such below his signature on letters to attorneys and other professionals regarding matters unrelated to the practice of law). But see NY Eth. Op. 637 (1992) (concluding that nothing in New York Code of Professional Responsibility as amended prohibits listing lawyer's prior judicial office, "on a letterhead or elsewhere, in a truthful and

Nevertheless, the Committee cautions that use of the phrase "former judge" in the context of campaigning for public office "has definite status implications in our society," and could be misleading without the additional limitations set forth previously.<sup>9</sup>

Approved by the Alaska Bar Association Ethics Committee on October 5, 2006.

Adopted by the Board of Governors on October 27, 2006.

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non-misleading manner," and overruling prior New York State Bar Association professional ethics committee's opinions to the contrary).

<sup>9</sup> See note 2; note 7 at \*2; IL Adv. Op. 92-10, OH Adv. Op. 93-8, and FL Eth. Op. 87-8, note 8, supra.