

COMMUNICATING WITH VOTERS

ETHICS AND JUDICIAL CAMPAIGN SPEECH

STUDY MATERIALS



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American
Judicature Society



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COMMUNICATING WITH VOTERS: ETHICS AND JUDICIAL CAMPAIGN SPEECH

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COMMUNICATING WITH VOTERS: ETHICS AND JUDICIAL CAMPAIGN SPEECH

INTRODUCTION

When judicial office must be won through election campaigns, a judicial candidate may feel pressure from opponents, supporters, campaign consultants, and the public to communicate with voters in a way that is inconsistent with the integrity of the judiciary and that could prevent the candidate from being a neutral, fair decision-maker after the election – or at least could create the impression of pre-judgement and partiality. To decrease the potential for campaign tactics that undermine public confidence in the judiciary, state codes of judicial conduct contain restrictions on judicial campaign speech, based on the American Bar Association Model Code of Judicial Conduct.

The 1990 ABA model code provides that, during a campaign for judicial office, a candidate:

- shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office (Canon 5A(3)(d)(i));
- shall not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court (Canon 5A(3)(d)(ii));
- shall not knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent (Canon 5A(3)(d)(iii)); and
- shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary (Canon 5A(3)(a)).

Judicial candidates, therefore, are prohibited by the code from engaging in much of the rhetoric, promise-making, and distortion that is used in campaigns for other elective offices. However, the restrictions in the code of judicial conduct stop far short of silencing judicial candidates completely and leave them sufficient opportunity to educate voters about their qualifications and what kind of judges they would be.

These study materials describe how judicial candidates can campaign in a way that allows voters to obtain information that is relevant in making their electoral choices but does not compromise the independence of the judiciary or the integrity of judicial decision-making. The materials:

- Explain what pledges and promises are permitted under the code and which are prohibited.
- Discuss whether a candidate can promise to be “tough on crime.”
- Examine the prohibition on making commitments with respect to cases, controversies, or issues.
- Cover how candidates should respond to questionnaires from special interest groups and newspapers.
- Discuss whether a candidate may publicize endorsements.

- Review the campaign claims that have been held to be misrepresentations.
- Describe what criticisms of an opponent are appropriate and what criticisms violate the code.
- Analyze the cases deciding First Amendment challenges to the restrictions in the code.

Unless otherwise indicated, references to canons in the code of judicial conduct are to the 1990 American Bar Association Model Code of Judicial Conduct. The 1990 model code retains most of the basic principles of the 1972 ABA model code but makes several substantial changes and contains many differences in its details. These study materials note any relevant differences between the two model codes. Although the model code is not binding on judges unless it has been adopted in their jurisdiction, forty-nine states, the United States Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either model code.)

PLEDGES AND PROMISES

Under Canon 5A(3)(d)(i), a judicial candidate, including an incumbent judge, is prohibited from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” This provision allows a candidate to make pledges about court reform, administration, or performance as long as the candidate does not promise, expressly or impliedly, to decide cases or issues in a particular way if elected. For discussion of the constitutionality of the prohibition on pledges and promises, *see* page 28 *infra*.

PERMITTED PLEDGES AND PROMISES.

As interpreted by case law and judicial ethics advisory opinions, a judicial candidate, including an incumbent judge, may make specific pledges or promises about court management and is not restricted to simply parroting that he or she will “faithfully uphold the duties of the office.” Any pledge “aimed at the legitimate interests of the entire electorate” is permitted under the code. *In re Baker*, 542 P.2d 701 (Kansas 1975).

A candidate, for example, may make pledges about administrative matters such as disposing of a backlog of cases, methods of assignment of cases, hiring and firing of employees, and reducing administrative expenses relating to travel. *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (U.S. W.D. Kentucky 1991). Similarly, a judicial candidate, including an incumbent judge, may pledge that:

- Jury trials and all other court business will begin at 9:00 a.m (*In re Baker*, 542 P.2d 701 (Kansas 1975)).
- There will be no unnecessary delays or recesses merely for the benefit of court officers or lawyers (*In re Baker*, 542 P.2d 701 (Kansas 1975)).
- Business will be expedited in a manner that gives full and proper consideration to all matters, with diligence and dispatch (*In re Baker*, 542 P.2d 701 (Kansas 1975)).
- The court will serve the citizens instead of being a convenience to lawyers (*In re Baker*, 542 P.2d 701 (Kansas 1975)).
- Plea agreement forms will be uniform and consistent (*Arkansas Advisory Opinion 98-1*).
- Specific procedural measures will be implemented to save money (*Florida Advisory Opinion 94-16*).
- Computers will be used to increase the efficiency of the judicial system (*Kentucky Advisory Opinion JE-38* (1982)).

The Minnesota Board on Judicial Standards approved a list of questions that judicial candidates could answer at a candidates' forum in keeping with the code's authorization of pledges to faithfully uphold the duties of the office. The questions included:

- What do you believe to be the most critical issue currently facing the county criminal justice system and what do you recommend be done to address it?
- How do you feel about judicial evaluation being undertaken by outside organizations? Should the results be disclosed publicly or should they be given privately and used only for the judge's personal improvement?
- The caseload in the county juvenile court has skyrocketed over the past few years. What do you believe to be the root cause for the high numbers of juvenile offenders? What can the court system do to reduce these numbers?
- As a judge, who are your clients and what does it mean to provide good service to them?
- Without giving his or her name, please describe the character of the judge you most admire.
- Attorneys in civil litigation practice express great frustration at the length of time it takes to get their cases to trial. What can be done to address their concerns?
- If you were given 50 million dollars and were told that it must be used to address the issues of crime and violence, what would you spend it on?
- A variety of articles and reports on the problem of domestic abuse points to the very high percentage of cases (around 70%) that are dismissed at the pre-trial stage, reportedly because the victim cannot be found or is unwilling to cooperate. What can be done to lower the number of domestic assault cases that are being dismissed?
- What kinds of things would you do outside the courtroom to improve the justice system?
- Many feel that voluntary professional and community service is a necessary commitment for persons holding public office. What types of voluntary service have you been involved in?
- What is, or will be, your personal mission in your role as judge and how will you go about accomplishing it?
- Recent polls show that public trust in the justice system is at an all time low. Why do you think the public is so distrustful and what would you do to gain their trust?
- If you observed a party in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?
- The Racial Bias and Gender Bias Task Force Reports identify a multitude of ways in which women and minorities are not treated fairly by our court system. What would you do to remedy the situation described in these reports?

- Many victims' advocates have concerns about victims' rights in juvenile court. How would you balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile respondents?
- Why should voters support you rather than your opponent?

PROHIBITED PLEDGES AND PROMISES.

Pledges and promises that indicate what decisions a judicial candidate would make in future cases if elected are prohibited. Therefore, a judicial candidate may not:

- promise to stop plea bargains (*Letter from Arkansas Judicial Discipline & Disability Commission to Judge Francis Donovan* (November 16, 1990) (public admonishment)).
- pledge to "stop suspending sentences" and to "stop putting criminals on probation" (*In the Matter of Haan*, 676 N.E.2d 740 (Indiana 1997) (public reprimand)).
- promise not to "experiment with 'alternative sentencing'" (*In the Matter of Polito, Determination* (New York Commission on Judicial Conduct December 23, 1998) (public admonition)).
- promise to be "a tough Judge that supports the death penalty and isn't afraid to use it" (*In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 4221 (Commission of Five Judges Appointed by the Ohio Supreme Court 1999) (public reprimand and fine)).
- state that he or she will require mandatory incarceration for violent crimes, mandatory incarceration for drug dealers, and mandatory incarceration and treatment for hard drug addicts (*In the Matter of Tighe* (West Virginia Judicial Investigation Commission November 19, 1996) (public admonishment)).

Implied promises also violate the prohibition on pledges and promises of conduct in office. The New York Commission on Judicial Conduct condemned a brochure distributed to voters by a judge running for re-election that asserted that voters had a "clear choice" between the judge, who was identified as a tenant, and his opponent, who was identified as a landlord. *In the Matter of Birnbaum, Determination* (New York Commission on Judicial Conduct September 29, 1997) (public censure). The brochure also used photographs and quotations that were favorable to the judge from tenants who had appeared before him in housing court, including tenants in a case that was pending before him. The Commission concluded that the literature "gave the unmistakable impression that he would favor tenants over landlords in housing matters." The Commission also determined that by selecting, soliciting, and using the testimonials, the judge "compromised his impartiality and failed to maintain the dignity expected of a judicial officer."

In a second case, the New York Commission also found that a judge's campaign advertisements had improperly implied that he would jail all those charged with crimes, rather than judge the merits of individual cases. *In the Matter of Maislin, Determination* (New York State Commission on Judicial Conduct August 7, 1998) (public admonition). The advertisements:

- stated that the judge had "a special place called jail" for "thieves, burglars, stick-up artists, spouse beaters and repeat drunk drivers," and
- used the campaign slogan, "Do the Crime – Do the Time."

Similarly, the New York Commission stated that a judge should not have run campaign advertisements that impliedly promised that he would jail every defendant who came before him charged with a violation of an order of protection. *In the Matter of Herrick, Determination* (New York State Commission on Judicial Conduct February 6, 1998) (admonishment pursuant to an agreed statement of facts). During his campaign, the judge ran televised advertisements that stated:

You can't elevate somebody or elect somebody to a high judicial position without knowing what they're going to be like when they put the robe on. You need to know that. It's too important a position. . . .

They [defendants] know they violated the Order of Protection. I'll ask them: "You know what's going to happen, don't you?" And they say, "Yes, judge, I'm going to jail." And they do.

The Commission concluded that by his campaign statements, the judge promised that he would jail every defendant who came before him charged with a violation of an order of protection, rather than judging the merits of individual cases.

Describing actions taken in previous cases has also been determined to be an impermissible, implied pledge. For example, the New York judicial ethics committee stated that a judge during a reelection campaign should not recount actions taken in DWI cases, domestic violence cases, and noise and public nuisance cases because to do so implied what the judge would do in future cases of the same nature. *New York Advisory Opinion 93-101*.

The New York Commission found that a judge's references in campaign ads to the judge's previous judicial decisions improperly implied that he would jail all those charged with crimes, rather than judge the merits of individual cases. *In the Matter of Maislin, Determination* (New York State Commission on Judicial Conduct August 7, 1998) (public admonition). The ads:

- stated that the judge had refused to let "the Wal-Mart armed robbers, the Berk murderer, the Amherst rapist or the Summer Stalker out on low bail;" and
- stated that "he convicted 88% of those charged with alcohol-related offenses," depicting drawings of jail cell windows and bars.

The Illinois Courts Commission held that an appellate court justice violated the code of judicial conduct by stating in advertisements during his campaign for the state supreme court that he "has never written an opinion reversing a rape conviction." *In re Buckley, No. 91-CC-1, Order* (Illinois Courts Commission October 25, 1991). (However, the Commission concluded that the violation was insubstantial and did not warrant a reprimand.) The Commission found that, although the statement may have been an accurate assessment of the justice's record, its suggestion that a defendant convicted of rape must meet a higher standard on review was an implicit, improper pledge that the judge would treat rape convictions summarily.

In rejecting the judge's First Amendment challenge to that decision, a federal district court also concluded that "a person of ordinary intelligence would know that a statement made in the context of a political campaign, singling out a specific issue of high emotional appeal, conveys implications beyond the bare words of the statement." *Buckley v. Illinois Judicial Inquiry Board*, 801 F. Supp. 83 (U.S. District Court for the Northern District of Illinois 1992). The court asked, "[f]or what other reason would a candidate comment on the consistency of his record on an issue except to imply to the electorate his continued consistency." However, reversing the decision on the First Amendment challenge, the United States Court of Appeals for the 7th Circuit characterized as "innocuous" the candidate's report of his past record in rape appeals and cited the Courts Commission's conclusion that it was impermissible as one of the grounds for declaring the campaign speech restrictions unconstitutionally overbroad. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. Court of Appeals for the 7th Circuit 1993). See discussion at pages 25-28, *infra*.

TOUGHNESS PROMISES.

Promises to be, for example, "tough on crime" have been determined to be consistent with the code, but promises to be "tough" in specific types of cases have been held to inappropriately signal pre-judgment.

Phrases such as "tough on crime" are not considered impermissible pledges or promises because they:

- suggest "nothing more than a strict application of the law" (*In re Kaiser*, 758 P.2d 392 (Washington 1988));
- are "of such an amorphous nature that they do not define any specific conduct" (*Texas Advisory Opinion 212* (1998));
- convey a meaning that "is so complex that it certainly does not suggest a probable decision in any particular type of case" (*Texas Advisory Opinion 212* (1998));
- "at most, are within general comment" (*Tennessee Advisory Opinion 98-3*); and
- at most indicate "a general intent to strictly enforce certain legal codes, a judicial philosophy entirely consistent" with promising a faithful and impartial performance of the duties of the office (*Buckley v. Illinois Judicial Inquiry Board*, 801 F. Supp. 83 (U.S. District Court for the Northern District of Illinois 1992), *reversed on other grounds*, *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. 7th Circuit 1993)).

This interpretation of the restriction allows statements that a candidate:

- will be a "tough, no-nonsense judge" (*In re Kaiser*, 758 P.2d 392 (Washington 1988));
- will "get tough with criminals," was "tough on crime" and would be a "conservative judge" (*Texas Advisory Opinion 212* (1998)); or
- is "experienced and committed" (*Tennessee Advisory Opinion 98-3*).

Similarly, the Texas advisory committee stated that a judicial candidate may produce a campaign brochure that includes a statement that the candidate was "an experienced prosecutor." *Texas Advisory Opinion 212* (1998). The committee reasoned that an "accurate discussion of qualifications is permissible, including prior positions held, even though some persons reading the statement might conclude that a judge or judicial candidate who had been a prosecutor would be more likely to rule a particular way in certain types of cases."

More specific promises of “toughness,” however, are prohibited.

- ◆ A judicial candidate’s statement during an election campaign that he would be tough on drunk driving inappropriately singled out a special class of defendants and suggested that they would be held to a higher standard. *In re Kaiser*, 759 P.2d 392 (Washington 1988) (public censure).
- ◆ A candidate’s statement that she would “let no one walk away before justice is served” was inappropriate when accompanied by criticism of an incumbent judge for giving probation to a man convicted of child abuse. *Summe v. Judicial Retirement and Removal Commission*, 947 S.W.2d 42 (Kentucky 1997) (30-day suspension). The court concluded, “[w]hile in isolation, a judge who ‘will let no one walk away before justice is served’ is something to which all should aspire, in the context of the present judicial campaign, it represented [the candidate’s] commitment to prevent the probation of child abusers.”
- ◆ Statements such as “tough on drunk driving” imply a predisposition against a particular class of criminal defendant. *Buckley v. Illinois Judicial Inquiry Board*, 801 F. Supp. 83 (U.S. District Court for the Northern District of Illinois 1992), *reversed on other grounds*, *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. 7th Circuit 1993).

COMMITMENTS WITH RESPECT TO CASES

The 1972 model code prohibited a judicial candidate from “announc[ing] his or her views on disputed legal or political issues.” To “be more in line with constitutional guarantees of free speech,” the ABA did not include the “disputed legal or political issues” language when it revised the model code in 1990. Milord, *The Development of the ABA Judicial Code*, at 50 (1992). Instead, the 1990 model code prohibits a judicial candidate from “mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.” For a discussion of First Amendment challenges to these restrictions on judicial campaign speech, see pages 23-28, *infra*.

As a practical matter, there is little difference between the prohibition on a judicial candidate “announc[ing] his or her views on disputed legal or political issues” and the prohibition on a judicial candidate “mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court” because so many controversies and issues come before the judiciary. For example, a candidate’s statement that he or she is pro-life certainly violates the former provision, but it violates the latter one as well. *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Kentucky), *cert. denied*, 513 U.S. 871 (1994) (public censure). See also *In the Matter of LaCava*, Determination (New York State Commission on Judicial Conduct September 16, 1999) (public admonition for expressing a “commitment to the sanctity of life from the moment of conception,” a “strong moral opposition to the scourge of abortion and the termination of lives of millions of human beings in the womb,” and outrage about “the continuation of the murderous and barbaric partial birth abortion procedure in this state”); *Texas Advisory Opinion 184* (1995) (statement that judge is pro-life or pro-choice indicates an opinion on an issue possibly subject to judicial interpretation and strongly implying a promise of particular conduct in office).

In *Deters*, the candidate, who was running for the county district court, argued that abortion was not an issue that was “likely to come before the court” because no abortion-related cases had come before the county district court for over a decade, the only two hospitals in the county were Catholic and did not perform abortions, and there were no licensed abortion clinics in the county; the candidate also pointed to “the strong Catholic heritage of the populace, and the easy availability of abortion services less than fifteen minutes away, in Cincinnati.” Rejecting that argument, the Kentucky Supreme Court noted that a state statute authorizes a minor to petition a district court for an order permitting an abortion and that misdemeanor cases involving an abortion protest could come before the district court. The court also noted that district court judges are often asked to serve as special judges in other counties where numerous abortion-related issues are pending and that the pro-life movement is not limited to abortion but also deals with living wills and controversies involving removing tubes or respirators that might come before a district court judge. *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Kentucky), *cert. denied*, 513 U.S. 871 (1994) (public censure).

Commentary to Canon 5A(3)(d) states that “a candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.” The Florida advisory committee has stated that a candidate for judge, when asked for his or her position on the death penalty, may reply:

My sworn duty as a circuit judge will be to faithfully and impartially uphold the law and that duty may include ordering a person’s execution in an appropriate case. If I am ever presiding over a case in which the death penalty is sought and it is the legally appropriate punishment, I will impose it.

Florida Advisory Opinion 94-26.

QUESTIONNAIRES

The types of statements a judicial candidate is prohibited from making are illustrated by the questions included in questionnaires from interest groups and newspapers. A candidate should not answer questions that:

- ask the candidate to make prospective rulings,
- call for responses that reasonably give the impression that the candidate is committed to acting in a certain way, or
- request the candidate's views on cases, controversies, or issues likely to come before the candidate or any court.

See *Alabama Advisory Opinion 94-537*; *Arizona Advisory Opinion 96-11*; *Florida Advisory Opinion 94-34*; *Georgia Advisory Opinion 228* (1998); *Michigan Advisory Opinion JI-82* (1994); *Tennessee Advisory Opinion 98-4*; *Washington Advisory Opinion 92-16*. Candidates also should not answer questions that:

- ask complex legal or political questions (*Florida Advisory Opinion 94-34*);
- relate to a current "hot" issue in the candidate's locale (*Florida Advisory Opinion 94-34*);
- are irrelevant to judicial qualifications (*Florida Advisory Opinion 94-34*); or
- enlist the candidate as an advocate for a particular position (*Kentucky Advisory Opinion JE-85* (1993)).

For example, the Washington judicial ethics advisory committee (*Washington Advisory Opinion 92-16*) stated that a judicial candidate should not answer a questionnaire developed by families and friends of violent crime victims that asks whether the judicial candidate agrees or disagrees with the following statements:

- Criminal sentencing alternatives should be implemented only if they protect victim rights and do not further diminish public safety.
- Victims of crime should have their voice heard and their input considered in the criminal justice process.
- The state should reinstate an habitual offender law for repeat violent offenders.
- Victims whose constitutional or statutory rights are violated by the criminal justice system should have legal recourse.
- The family members of a homicide victim should be entitled to provide the court with a victim impact statement in a capital murder case.
- Victim impact statements are an important tool for judges to utilize in the sentencing phase of a criminal trial.
- Restitution, when reasonably ascertainable, should be ordered for every offender who commits a crime.

- Judges should be given more discretionary powers in determining appropriate criminal sentences.

The committee reasoned that the statements called for the responding judicial candidate to comment on issues that are likely to come before the judge and “the responses may reasonably give the impression that a judge is committed to acting in a certain way with respect to questions that may come before the judge.”

Similarly, the Michigan committee (*Michigan Advisory Opinion JI-82* (1994)) stated that a judicial candidate may not respond to a survey that asks questions such as:

- Do you believe that a jury must include persons of the same nationality as the criminal defendant in order for there to be a fair trial?
- Do you believe that adopted children should be able to obtain their birth records in a medical emergency?
- Do you believe that life begins at conception?
- Do you believe school children should be allowed time at school for prayer?

See also *California Advisory Opinion 35* (1987) (a judicial candidate should not answer a questionnaire from a right-to-life group that asks whether the candidate will oppose state funding of abortions except in life-of-the-mother cases); *Kentucky Advisory Opinion JE-85* (1993) (a judicial candidate should not answer a questionnaire soliciting opinions on child abuse issues circulated by an exploited children’s help organization).

A judicial candidate may answer questions that do not ask for the candidate’s opinion on pending cases, complex legal or political questions, or issues that are likely to come before him or her. For example, a candidate could answer a question where the answer is governed by the law with a reference to the controlling authority. *Florida Advisory Opinion 94-34*.

However, when answering even appropriate questions, the candidate should not simply check the “yes,” “no,” “agree,” “disagree,” or “undecided” boxes on a questionnaire if that response is not adequate. *Florida Advisory Opinion 94-34*; *Michigan Advisory Opinion CI-921* (1983). Instead, the candidate should provide “a thoughtfully drafted explanation or elaboration” (*Florida Advisory Opinion 94-34*) that includes, in reasonable detail, the legal analysis and judicial philosophy underlying the responses (*Michigan Advisory Opinion CI-921* (1983)).

Moreover, in answering a questionnaire, a judicial candidate should make it clear that:

- the candidate is expressing a personal opinion and will be bound by and follow the law (*Alabama Advisory Opinion 94-537*);
- the answers should not be construed to imply that the candidate does not support controlling judicial authority (*Michigan Advisory Opinion CI-921* (1983)); and
- the answers should not be construed as a promise of conduct in office other than the faithful and impartial performance of the duties of office (*Michigan Advisory Opinion CI-921* (1983)).

PUBLICIZING ENDORSEMENTS

There is a division of authority on the issue whether a judicial candidate may publicize the endorsement of a special interest group that takes sides in issues before the courts. Banning publicity for such endorsements, the Arizona judicial ethics advisory committee concluded that soliciting or publicizing the endorsement of a county sheriff would suggest that a candidate is pro-law enforcement rather than an independent and impartial decision-maker. *Arizona Advisory Opinion 96-12*.

In contrast, the Texas judicial ethics committee advised that listing the endorsement of groups makes “no statement indicating an opinion on an area subject to judicial interpretation,” but only indicates that these groups endorse the candidate. *Texas Advisory Opinion 184* (1995). Similarly, the New York advisory committee stated that a “candidate who accepts the endorsement of a party that limits its platform to one issue . . . does not necessarily imply agreement with the position of that party.” *New York Advisory Opinion 93-52*. Therefore, a candidate may list endorsements from:

- groups such as Texans Against Drunk Driving, Texans for Tort Reform, Texas Prosecutors Association, Texas Peace Officers Association, Texans for Law Enforcement, Pro-Life Texans, or Texans for Choice (*Texas Advisory Opinion 184* (1995));
- the Right to Life Party (*New York Advisory Opinion 93-52*);
- the National Women’s Political Caucus (*New York Advisory Opinion 93-99*);
- the Republican Pro Choice PAC (*New York Advisory Opinion 93-99*);
- labor unions (*Kentucky Advisory Opinion JE-38* (1982); *In re Judicial Campaign Complaint against Burick*, 705 N.E.2d 422 (Commission of Five Judges Appointed by Ohio Supreme Court 1999) (*but see* discussion of case at page 14, *infra*));
- fraternal groups (*Kentucky Advisory Opinion JE-38* (1982)); and
- the Fraternal Order of Police (*In re Judicial Campaign Complaint against Burick*, 705 N.E.2d 422 (Commission of Five Judges Appointed by Ohio Supreme Court 1999) (*but see* discussion of case at page 14, *infra*)).

Of course, any representation about an endorsement must be accurate. *See* discussion at page 14, *infra*.

Moreover, in seeking the endorsement of such parties, a candidate may not answer any questions or make statements that would otherwise violate the code.

- ◆ A judicial candidate may not send to members of the Right-to-Life Party a letter seeking their support and expressing a “commitment to the sanctity of life from the moment of conception,” a “strong moral opposition to the scourge of abortion and the termination of lives of millions of human beings in the womb,” and outrage about “the continuation of the murderous and barbaric partial birth abortion procedure in this state.” *In the Matter of LaCava*, Determination (New York State Commission on Judicial Conduct September 16, 1999) (public admonition).

- ◆ A candidate should not sign a pledge to support the Right to Life Party's platform or position in connection with acceptance of the party's endorsement or as a condition precedent to endorsement by the party. Nor should the candidate manifest an acceptance of the principles of the party in any other fashion. *New York Advisory Opinion 93-52.*
- ◆ A judicial candidate should not answer any questions in the National Women's Political Caucus questionnaire that are designed to elicit a formal or informal pledge as to the position the judge would take on an issue or whether the judge would accept or decline the endorsement of another party or organizations. *New York Advisory Opinion 93-99.*

MISREPRESENTATIONS

Canon 5A(3) prohibits a judicial candidate from “knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent.” According to the terminology section of the code, “knowingly” “denotes actual knowledge of the fact in question,” but a “person’s knowledge may be inferred from circumstances.”

In its public reprimand of a judge for misrepresentations made during her campaign for office, the Florida Supreme Court emphasized the importance of this prohibition.

The selection of judges by election is at best a choice by a general public who has to rely on information provided during a campaign. For that information to be false, not only disadvantages the voters in making that choice, it undermines the very foundations — integrity and independence — upon which the judicial system rests.

No doubt, in your short term as circuit judge, you have asked a number of people to take an oath to tell the truth before they testify in your courtroom. Yet, in your election campaign, you personally failed to speak truthfully to the public.

“The Florida Supreme Court Takes Aim at Unethical Judicial Campaign Conduct,” by Scott J. Silverman, *Judicial Conduct Reporter*, Vol. 19. No. 4 – Vol. 20, No. 1 (winter 1998)

MISREPRESENTATIONS ABOUT ENDORSEMENTS.

A candidate’s representations about endorsements must be truthful and must clearly identify who made the endorsement .

- ◆ A candidate’s advertisements may not include the phrases “highly qualified & endorsed” and “‘highly qualified’; trial lawyers group,” without identifying the persons or organizations, if any, who had endorsed the candidate. *In re Tully*, No. 90-CC-2, Order (Illinois Courts Commission October 25, 1991) (public reprimand).
- ◆ A judicial candidate may not include in a campaign brochure a photograph of the candidate with a recognized office-holder who has not endorsed the candidate. *Texas Advisory Opinion 212* (1998).
- ◆ A candidate may not falsely imply that she, not her opponent, had been endorsed by a newspaper. *Inquiry Concerning Alley*, 699 So. 2d 1369 (Florida 1997) (public reprimand).
- ◆ A candidate may not state in campaign literature that he was endorsed by the “legal community” when, in fact, he had been endorsed by only one county bar association in the seven-county district. *In re Judicial Elections Complaint Against Roberts*, 675 N.E.2d 84 (Commission of Five Judges Appointed by the Ohio Supreme Court 1996) (\$125 fine).
- ◆ A judicial candidate should not state that she was “proud to have received the Union endorsements” and she had been “endorsed by Fraternal Order of Police” when both candidates had received labor union endorsements and the candidate had received the endorsement of only one Fraternal Order of Police lodge. *In re Judicial Campaign Complaint against Burick*, 705 N.E.2d 4221 (Commission of Five Judges Appointed by the Ohio Supreme Court 1999) (public reprimand and fine).

MISREPRESENTATIONS ABOUT INCUMBENCY.

The campaign materials of a non-judge candidate, a judge running for a different office, a part-time or temporary judge, or a former judge must clearly indicate that he or she is not the incumbent judge.

- ◆ A non-judge candidate's campaign materials should use language such as "elect" or "for" (e.g., "Elect John Doe District Judge" or "John Doe for District Judge") in lettering of sufficient size to be clearly visible to the public. *Order of Private Reprimand* (Kentucky Judicial Retirement and Removal Commission August 20, 1992). See also *New Mexico Advisory Opinion 92-3* (the phrase "for judge" should be used after a non-incumbent candidate's name and the "for" should be in the same or almost the same size type as the name and "judge").
- ◆ An incumbent judge running for a different office should not use the title "judge" in campaign materials without clearly indicating that he or she is a judge in a different court than the one that is the subject of the campaign. *In re Emrich*, 665 N.E.2d 1133 (Ohio 1996) (cease and desist order; fine); *Alabama Advisory Opinion 98-718*; *New Mexico Advisory Opinion 92-3*.
- ◆ A part-time or temporary judge may not use the title "judge" before his or her name in campaign literature and advertisements unless he or she also specifies the position held. *Georgia Advisory Opinion 167* (1992).
- ◆ A former judge may not state "vote for judge [name]" or "re-elect judge [name]" in campaign advertising if he or she is not currently serving as a judge. *Louisiana Advisory Opinion 104* (1993); *New York Advisory Opinion 97-72*.
- ◆ A former judge may not use the title "judge" in campaign material unless the material makes clear that the judge is not currently a judge. *New Mexico Advisory Opinion 92-3*.
- ◆ A judicial candidate may not be pictured in campaign materials wearing a judicial robe if he or she is not and never was a judge. *New Mexico Advisory Opinion 92-3*.

CANDIDATE'S OTHER MISREPRESENTATIONS ABOUT SELF.

- ◆ A judicial candidate may not claim to have circuit judicial experience, when in fact her service was that of a general master. *Inquiry Concerning Alley*, 699 So. 2d 1369 (Florida 1997) (public reprimand).
- ◆ A judge may not refer to his ex-wife as "my wife" in literature and in public during an election campaign. *Letter from California Commission on Judicial Performance to Judge Van Voorhis* (September 8, 1992) (public reproval for this and other misconduct).
- ◆ A judge may not imply in campaign materials that he or she presided over certain cases of notoriety in which he only set bail. *In the Matter of Maislin, Determination* (New York State Commission on Judicial Conduct August 7, 1998) (public admonition).
- ◆ A judge who was appointed to office may not use the term "re-elect" in campaign statements. *New York Advisory Opinion 97-18*.

For a discussion of misrepresentations about a candidate's opponent, see pages 19-21, *infra*.

THE DIGNITY, INTEGRITY, AND INDEPENDENCE APPROPRIATE TO THE JUDICIAL OFFICE
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Canon 5A(3) requires a candidate for judicial office to “maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary.”

- ◆ A judicial candidate should not run television advertisements that refer to “Violent crimes in our streets,” “The menace of drugs,” and “Sexual predators terrorize our lives,” portray a masked man with a gun attacking a woman outside her car, and note a candidate’s endorsement by several local sheriffs, concluding with “November 5, pull the lever for Bill Polito, and crack down on crime,” as a jail door slams shut. Neither should judicial campaign advertisements proclaim, “Many violent criminals and sexual predators have already visited our criminal justice system. [The candidate] will stick his foot in the revolving door of justice. [The candidate] won’t experiment with alternative sentences or send convicted child molesters home for the weekend Criminals belong in jail, not on the street.” *In the Matter of Polito*, Determination (New York Commission on Judicial Conduct December 23, 1998).
- ◆ A candidate should not state that he would expose corruption in the courthouse due to the influence of “politically influential lawyer and lobbyist power brokers for liability risk insurance companies, finance, environmental polluters and the heavy handed law enforcement establishment,” and that he had been gagged by the state “elections campaign guidelines committee comprised of incumbent state judges and pawnbrokering lawyers for vested interests.” *In the Matter of Hopewell*, 507 N.W.2d 911 (South Dakota 1993).
- ◆ A candidate should not use “innuendo or equivocal statements” that are designed to raise doubts about a judge and destroy public confidence in the judicial office. *In the Matter of Bybee*, 716 N.E.2d 957 (Indiana 1999).

A prohibition on manifesting inappropriate bias in a judicial campaign is implicit and inherent in the code’s requirement that a candidate “maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary.” Two states add provisions explicitly prohibiting expressions of bias during campaigns.

- ◆ The Ohio code states that a candidate shall not “manifest bias or prejudice toward an opponent based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status”
- ◆ The Minnesota codes prohibits a candidate from manifesting “bias or prejudice inappropriate to the judicial office.”

PERMITTED CRITICISM.

A judicial candidate may criticize an opponent if the criticism:

- is fair and truthful;
- is pertinent and material to the judicial office;
- is based on factual, not personal, grounds;
- is not about a pending case; and
- does not bring the candidate's impartiality or that of the judiciary into question.

Criticism of an opponent's work habits.

- ◆ A judicial candidate may criticize an opponent's health, work habits, experience, ability, and record. *In re Baker*, 542 P.2d 701 (Kansas 1975).
- ◆ A candidate may refer to an opponent's frequent absences from the bench. *Kentucky Advisory Opinion JE-45* (1983).

Criticism of an opponent's experience.

- ◆ If an opponent claims experience, a candidate may question the opponent's experience or demand that the experience be set out in detail. *Kentucky Advisory Opinion JE-62*.
- ◆ A judicial candidate may point out that his or her opponent has not had experience with types of cases that come before the court. *Alabama Advisory Opinion 98-696*.

Other permitted criticism of an opponent.

- ◆ A candidate may openly disagree with various practices of the incumbent judge (such as requiring the physical arrest of all persons charged with minor offenses and threatening defendants with maximum sentences if they proceed to trial) and state that these practices are unfair. *Florida Advisory Opinion 84-18*.
- ◆ A judicial candidate may inform the public that an incumbent judge received substantial contributions from an organization of plaintiffs' lawyers and political action committees associated with the organization. *In re Harper*, 673 N.E.2d 1253 (Ohio 1996). *But see* further discussion of case at page 21, *infra*.
- ◆ A judicial candidate's advertisement may reproduce negative or critical headlines, stories, or opinions about the candidate's opponent if the candidate verifies the information. *Florida Advisory Opinion 98-27*.

- ◆ A candidate may reproduce and distribute public statements made by the candidate's opposition; may refer to a candidate's record in public office; and may refer to endorsements that the opponent has received from individuals or organizations. *Kansas Advisory Opinion JE-64* (1996).

PROHIBITED CRITICISM.

A candidate may not criticize an opponent if the criticism:

- denounces a judge-candidate's decision in a case,
- contains misrepresentations,
- creates a false impression or withholds information that explains a negative statement,
- unfairly blames a judge for someone else's actions, or
- uses general, inflammatory terms.

Criticism of an opponent's decision in a case.

A judicial candidate's criticism of an opponent's decision in a case has been determined to violate the code because it constitutes at least an implied commitment or promise that the candidate will reach a different decision when presented with a similar case after being elected. For example, the Georgia Judicial Qualifications Commission condemned an ad in which the candidate criticized his or her opponent's vote, as a judge on the court of appeals, to overturn a conviction. *Georgia Advisory Opinion 213* (1996). In the ad, an announcer said, "A man who repeatedly sexually assaulted his 4 year-old son, confessed to those crimes — twice — and was convicted." A picture of the incumbent judge, in his robe, was shown, and the announcer continued, "But Judge [naming the incumbent] overturned the jury's verdict and reversed those convictions — on a technicality." The candidate himself then appeared and said, "People who commit crimes against innocent children should be convicted and serve their entire sentences. Isn't it time our judges protects us from criminals instead of protecting criminals from justice?"

In concluding that the ad violated the code of judicial conduct, the Commission stated "the candidate's statement appears to prejudge legal issues which may well come before him for decision should he be elected." The Commission also noted that "the obvious intent of the ad is to focus the attention of an unknowing voting public, not on the qualifications of a judicial candidate, but rather on one of the most controversial issues of the day — child molestation."

Similarly, the Texas advisory committee stated that a judicial candidate may not criticize an incumbent's previous decision by stating, for example, that "Judge X was wrong in giving probation to a convicted drug dealer." *Texas Advisory Opinion 212* (1998). The committee explained such a statement "goes beyond a statement of judicial philosophy and implies to a reasonable person that he or she would reach a different decision in a similar type of case." (Canon 5(1) of the Texas Code of Judicial Conduct prohibits a candidate from making "statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.")

The Kentucky Supreme Court concluded that a candidate's statement that she would "let no one walk away before justice is served" was inappropriate when accompanied by criticism of an incumbent judge for giving probation to a man convicted of child abuse. *Summe v. Judicial Retirement and Removal Commission*, 947 S.W.2d 42 (Kentucky 1997) (30-day suspension). The court explained, "[w]hile in isolation, a judge who 'will let no one walk away before justice is served' is something to which all should aspire, in the context of the present judicial campaign, it represented [the candidate's] commitment to prevent the probation of child abusers."

Criticism of an opponent's decision is also a violation of the code of judicial conduct if it is inaccurate.

- ◆ A candidate should not state that the candidate's opponent had sentenced to "only five years" a defendant who had "repeatedly raped" a minor victim where the defendant had pleaded guilty to a single charge of sexual battery for which he was sentenced to the maximum term of incarceration allowed by law. *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422 (Commission of Five Judges Appointed by Ohio Supreme Court 1999) (public reprimand and \$7,500 fine).
- ◆ A candidate may not state that his or her opponent's decision in a case imposed taxes on the community because that statement promoted the public's misunderstanding of the role of the judiciary in a democratic government. *In re Judicial Campaign Complaint Against Kienzle*, 708 N.E.2d 800 (Commission of Five Judges Appointed by Ohio Supreme Court 1999) (public reprimand and \$1,000 fine).

Criticism of an opponent's decision is also a violation of the code of judicial conduct if it creates a false impression by withholding information that explains a negative statement. In condemning the ad in which the candidate criticized his opponent's vote, as a judge on the court of appeals, to overturn a conviction, the Georgia Commission on Judicial Qualifications noted that the ad failed to disclose that:

- the decision was a 7-2 majority of the court;
- "cases, especially those on appeal, are frequently and properly decided on technical and procedural aspects of the law;" and
- the Supreme Court of Georgia "refused to hear an appeal of this decision by the State."

Georgia Advisory Opinion 213 (1996).

Misleading criticism of an opponent's qualifications.

Criticism of the qualifications, experience, record, or other fact concerning an opponent that contains misrepresentations is a violation of the code of judicial conduct.

- ◆ A candidate for housing court should not state that her opponent "has never handled a single case in housing court as an attorney," when, in fact, the opponent had. *In re Carr*, 658 N.E.2d 1158 (Commission of Five Judges Appointed by the Ohio Supreme Court 1995), *affirmed*, 667 N.E.2d 956 (Ohio 1996) (\$1,000 fine).
- ◆ A candidate may not claim that her opponent had no circuit judicial experience, when in fact, the opponent had extensive experience as a county judge who had been assigned to the circuit court. *Inquiry Concerning Alley*, 699 So. 2d 1369 (Florida 1997) (public reprimand).

- ◆ A candidate for judicial office may not state that his or her opponent had been “removed” as a district judge when the opponent had been defeated for re-election. *Texas Advisory Opinion 169* (1994).
- ◆ A candidate should not state, referring to the candidate’s opponent, that “Less than one year ago, the political bosses appointed a new judge to our courts,” when the opponent had been appointed by the governor pursuant to the constitutional provisions for filling vacancies in judicial office. *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422 (Commission of Five Judges Appointed by Ohio Supreme Court 1999) (public reprimand and fine).
- ◆ A candidate may not run an ad suggesting that her opponent while on the bench called a small boy “a loser” where the opponent made the comment about a 19-year-old man, out of his presence, and while representing the man’s father as an attorney. *In re Judicial Campaign Complaint Against Morris*, 675 N.E.2d 580 (Commission of Five Judges Appointed by Ohio Supreme Court 1997) (\$500 fine).
- ◆ A candidate should not run campaign television and radio advertisements that state that, according to the district attorneys, his opponent, when a member of Congress, had voted against the death penalty, when, in fact, the opponent had not. Neither should the candidate state that the candidate’s opponent had previously run for judge, dropped out, then ran for Congress and lost, when, in fact, the opponent had won his initial election for Congress but then lost his bid for re-election. *In re Hildebrandt*, 675 N.E.2d 889 (Commission of Five Judges Appointed by Ohio Supreme Court 1997) (\$15,000 fine).

Criticism that blames an opponent for actions taken by others is an example of inaccurate criticism that violates the code of judicial conduct.

- ◆ A judicial candidate should not directly or impliedly blame incumbent judges for a decision made by state or local legislative entities. *Michigan Advisory Opinion JI-4* (1989).
- ◆ A judicial candidate should not criticize a sitting judge’s absence from the county or circuit while the judge was serving under assignment. *Missouri Advisory Opinion 155* (1990).

Criticism of an opponent’s experience or record is inaccurate, unfair, and, therefore, a violation of the code, if it creates a false impression by withholding information that explains a negative statement. “When a fact is necessary to make the candidate’s campaign statement considered as a whole not materially misleading it must be included in all announcements.” *Michigan Advisory Opinion JI-120* (1999).

- ◆ A judicial candidate should not selectively use anecdotal information and statistics to try to create the false impression that an incumbent judge was causing needless delays and holding large numbers of cases under advisement. *In the Matter of Bybee*, 716 N.E.2d 957 (Indiana 1999) (public reprimand).
- ◆ A candidate should not state in a campaign mailer that her opponent defended a mass murderer and cop killer because, in representing the defendant charged with the crimes, the opponent was observing a duty placed on her as a member of the bar. *Inquiry Concerning Alley*, 699 So. 2d 1369 (Florida 1997) (public reprimand).

- ◆ A candidate for judicial office should not refer to an opponent's rating by a local bar association as "not recommended" when the bar association's actual rating of the opponent was "qualified, but not recommended." *Michigan Advisory Opinion JI-120* (1999).

In *In re Harper*, 673 N.E.2d 1253 (Ohio 1996), *cert. denied*, 52 U.S. 1274 (1997), the Ohio Supreme Court considered an ad that stated:

On the Ohio Supreme Court, one Justice has a problem. It's money. Most of Resnick's money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over \$300,000.00 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees.

Part of the video for the ad displayed a large check with the words "Trial Lawyers" and "Sue & Sue" on the top left-hand corner of the check. "Over \$300,000" was written in for the dollar amount, and the check was signed by "Cheatem Good."

In finding that the ad violated the code, the Ohio Supreme Court concluded:

- A reasonable member of the public could have concluded from the advertisement that lawyers representing plaintiffs' interests are dishonest, noting that contrary to the inferences in the ad, lawyers representing plaintiffs' interests provide a valuable contribution to the public.
- The advertisement suggested dishonest lawyers might find comfort in Justice Resnick's re-election.
- The ads inaccurately suggested that there was something improper in lawyers contributing to a judicial campaign.

The candidate in *Harper* was reprimanded. (Canon 7E(1) of the Ohio code states that a judicial candidate shall not "[p]ost, publish, broadcast, transmit, circulate, or distribute information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.")

Use of vague generalizations is also unfair because such "buzzwords" cannot fairly and accurately portray an opponent's record and, therefore, "are more prone to be misleading or deceiving than specific comments and observations." *In re Judicial Campaign Complaint Against Hein*, 706 N.E.2d 34 (Commission of Five Judges Appointed by Ohio Supreme Court 1999) (public reprimand and \$2,500 fine). In *Hein*, a commission of five judges appointed by the Supreme Court of Ohio to hear a complaint about judicial campaign speech held that a candidate should not state that his or her opponent is a "liberal" and "soft on criminals." The commission stated that "the use of general, inflammatory terms or 'buzzwords,' such as those employed by the respondent in his printed and oral campaign communications, are inappropriate in judicial campaigns."

RESPONDING TO CRITICISM.

Canon 5A(3)(e) allows a judicial candidate to “respond to personal attacks or attacks on the candidate’s record as long as the response does not violate Section 5A(3)(d)” — in other words as long as the response is not a prohibited pledge or promise, does not commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court, and does not knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

Moreover, a candidate who is an incumbent judge is required to comply with Canon 3B(9), which provides that “A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness.” This prohibition prohibits an incumbent judge-candidate from defending a decision in a pending case during a campaign if the defense goes beyond the explanation the judge gave in an opinion or in open court. An incumbent judge-candidate may refer to the explanation given in the public record to explain his or her decision or to correct any inaccurate statements made in the campaign. Also, an incumbent judge-candidate may “explain for public information the procedures of the court,” which includes explaining a case in abstract legal terms, providing background information relating to the operation of the court system, and explaining legal terms, concepts, procedures, and the issues involved in a case. See *In the Matter of Sheffield*, 465 So. 2d 350 (Alabama 1985). For a discussion of Canon 3B(9), see *When Judges Speak Up: Ethics, the Public, and the Media* (AJS 1998).

THE FIRST AMENDMENT AND JUDICIAL CAMPAIGN SPEECH

Judicial candidates have challenged the restrictions on judicial campaign speech on First Amendment grounds with mixed success.

- Although the provision prohibiting all discussion of a judicial candidate's views on **disputed legal or political issues** has been held to violate constitutional free speech rights of judicial candidates in several cases, it has been narrowly construed by other courts to prohibit candidates from expressing opinions only on issues that might come before them in their capacity as judges and, in that interpretation, has survived constitutional challenge.
 - ◆ The cases declaring the provision unconstitutional are: *Beshear v. Butt*, 863 F. Supp. 913 (U.S. District Court for the Eastern District of Arkansas 1994); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. Court of Appeals for the 7th Circuit 1993); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Kentucky 1991); *American Civil Liberties Union v. The Florida Bar*, 744 F. Supp. 1094 (U.S. District Court for the Northern District of Florida 1990), Permanent injunction order (May 22, 1991).
 - ◆ The cases giving the provision a narrow interpretation are: *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (U.S. Court of Appeals for the 3rd Circuit 1991); *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967 (U.S. District Court for the District of Minnesota 1999).
- The prohibition on a candidate making **statements that commit or appear to commit** the candidate with respect to cases, controversies, or issues that are likely to come before the court has survived constitutional challenge. *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Kentucky), cert. denied, 513 U.S. 871 (1994); *Ackerson v. Kentucky Judicial Retirement and Review Commission*, 776 F. Supp. 309 (U.S. District Court for the Western District of Kentucky 1991).
- In one case, the provision prohibiting **pledges or promises** of conduct in office other than the faithful and impartial performance of the duties of the office has been declared unconstitutional. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. Court of Appeals for the 7th Circuit 1993).

THE TEST.

The cases addressing First Amendment challenges to the provisions regarding judicial candidates' speech apply a strict scrutiny test because the restrictions impinge on two interests protected by the First Amendment:

- Judicial candidates have a right to discuss public issues and advocate their own election.
- Voters have a right to obtain the information that is relevant in making their electoral choices.

The cases on judicial candidates' speech strictly scrutinize the restrictions to determine:

- Whether a compelling state interest is demonstrated **and**
- Whether the regulation has been narrowly drafted to avoid unnecessary abridgement of constitutional rights.

The cases recognize that judges differ in key respects from legislators and executive officials, even when all are elected, and a state may regulate its judges with those differences in mind.

- "Pledges to follow certain paths [by candidates for the legislative or executive branch] are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government." *Stretton*.
- "A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He cannot, consistent with the proper exercise of judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result." *Ackerson, quoting Morial v. Judiciary Commission*, 565 F.2d 295, 298 (U.S. Court of Appeals for the 5th Circuit 1977), *cert. denied*, 435 U.S. 1013 (1978).
- The difference between campaigns for judicial office and those for legislative and executive offices "is fundamental and profound. For while officeholders in all three branches serve their constituents as voters, judges serve their constituents in another, equally important way: as litigants and potential litigants . . . entitled to due process of law before they may be deprived of life, liberty or property. . . . Voters elect mayors, city councilmen, governors, state legislators, presidents and members of congress to pursue certain public policies. But voters elect judges to 'listen and rule impartially on the issues brought before the bench.'" *In the Matter of Bybee*, 716 N.E.2d 957 (Indiana 1999), *quoting* Shepard, "Campaign Speech: Restraint and Liberty in Judicial Ethics," 9 *Georgetown Journal of Legal Ethics* 1059, 1077 (1996).

Therefore, the cases, even those that find a restriction unconstitutional, concede that the state interest that the restrictions on judicial campaign speech are designed to promote is a compelling one.

- A commitment by a judicial candidate to decide particular cases or types of case in a particular way would place the candidate "under pressure to honor it if he won the election and such a case later came before him. This commitment, this pressure, would hamper the judge's ability to make an impartial decision and would undermine the credibility of his decision to the losing litigant and to the community." *Buckley*.
- "Justice can hardly be blind if the judge has made a pre-election commitment or pre-judgment which causes him or her to apply the blindfold only as to one side of an issue." *Deters*.
- "If judicial candidates during a campaign pre-judge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined." *Stretton*.

- “The public has the right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge’s ability to consider the matter impartially. Even if he or she should reach the correct result in a given case, the campaign announcement would leave the impression that, in fact, if not in actuality, the case was prejudged rather than adjudicated through a proper application of the law to facts impartially determined.” *Stretton*.
- “Pre-election commitments by judicial candidates impair the integrity of the court by making the candidate appear to have pre-judged an issue without benefit of argument of counsel, applicable law, and the particular facts presented in each case.” *Ackerson*.

Because the compelling state interest is acknowledged, the focus of the analysis in First Amendment challenges to the code restrictions is whether the regulation has been narrowly drafted to avoid unnecessary abridgement of campaign speech.

■ VIEWS ON DISPUTED LEGAL OR POLITICAL ISSUES.

Four decisions have held that the prohibition on a judicial candidate announcing his or her views on disputed legal or political issues is unconstitutional. *Beshear v. Butt*, 863 F. Supp. 913 (U.S. District Court for the Eastern District of Arkansas 1994); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. Court of Appeals for the 7th Circuit 1993); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Kentucky 1991); *American Civil Liberties Union v. The Florida Bar*, 744 F. Supp. 1094 (U.S. District Court for the Northern District of Florida 1990), Permanent injunction order (May 22, 1991). Those cases conclude:

- The provision wrongly assumes that judicial candidates are not capable of announcing “their views on legal and political issues without jeopardizing the integrity and impartiality of the legal system or undermining the impartiality of the judiciary.” *J.C.J.D.*
- The prohibition “underestimates the ability of the public to place the information [about a candidate’s views on disputed legal or political issues] in its proper perspective.” *ACLU*.
- A judicial candidate’s views on disputed legal and political issues are relevant to how the candidate as a judge will choose to exercise discretion, “a matter of much concern to the litigants, lawyers, and the public alike.” *ACLU*.
- “The ‘announce’ clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not ‘announce his views on disputed legal or political issues,’ period.” *Buckley*.
- The provision is vague: “a judicial candidate striving diligently to conduct a campaign that is consistent with the canons, without the benefit of any specific standards as a guide, would in all likelihood refrain” from expressing views that are in fact permitted to avoid the risk of a public reprimand. *Beshear*.

Those cases are based in part on the premise that the restriction imposes a “gag rule” on judicial candidates.

- “Other than allowing a judicial candidate to state a professional history, and promise faithful and impartial performance of duties if elected, the existing Canon strictly prohibits dialogue on virtually every issue that would be of interest to the voting public. [W]e are encouraging the public to judge candidates for our judiciary by not much more than their personal appearances.” *J.C.J.D.*

- ❑ “Except for information about the candidates’ background,” the prohibition on a judicial candidate announcing his or her views on disputed legal or political issues “effectively proscribes announcements on almost every issue that might be of interest to the public and the candidates in a judicial race. . . . In fact, the electorate must choose its judges based upon little more than biographical data.” *ACLU*.
- ❑ “The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. [T]he only safe response to [the campaign speech restrictions] is silence. . . . It is basically only during the campaign that judicial aspirants have an audience, and literal compliance with [the campaign speech restrictions] would deprive the audience of the show.” *Buckley*.

However, in reviewing a challenge to the disputed legal or political issues provision, the court in *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967 (U.S. Court for the District of Minnesota 1999), concluded that the provision does not in fact impose a gag rule on judicial candidates.

- ❑ The “announce rule does not prohibit judicial candidates from discussing or stating their views as to matters relating to judicial organization and administration, or to other issues involving the character of candidates, their background and experience. . . . Thus, contrary to the finding of the court in *Buckley*, the Judicial Codes do not prevent candidates from discussing more than their name, rank and serial number.” *Kelly*.
- ❑ Since the announce clause was adopted in 1974, “there have been many contested elections for judicial seats during which there was robust public discussion as to the candidate’s qualification. Thus, . . . there is no evidence that the announce clause has had a chilling effect on the First Amendment rights of judicial candidates in the past.” *Kelly*.

See also discussions of permitted pledges and promises and permitted criticisms at pages 3-5, 17-18, *supra*.

Kelly and Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania, 944 F.2d 137 (U.S. Court of Appeals for the 3rd Circuit 1991), narrowly interpreted the prohibition on judicial candidates announcing their views on disputed legal or political issues and held that a prohibition limited to expressions of opinion only on issues that might come before the candidates for resolution in their capacity as judges is constitutional. Those cases note:

- ❑ “The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Stretton, quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988).
- ❑ “Giving a narrow construction to ‘announce views’ in Canon 7 is consistent with other provisions of the Code. For example, Canon 4 permits judges to write and speak about the law, the legal system and the administration of justice so long as the judge does not cast doubt on his capacity to decide any issue that may come before him.” *Stretton*.
- ❑ “When determining a facial challenge to a statute, the Court must uphold it if the statute’s language is readily susceptible to a narrowing construction that would make it constitutional.” *Kelly, quoting Virginia v. American Booksellers Association*, 484 U.S. 383 (1988).

Those cases conclude:

- A prohibition on discussion of a judicial candidate's views on disputed legal or political issues likely to come before the court "does not violate the First Amendment because the limitation does not unnecessarily curtail protected speech, but does serve a compelling state interest." *Stretton*.
- "[B]y interpreting the announce clause as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court, the announce clause serves the state's compelling interest in maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech." *Kelly*.

COMMITMENTS WITH RESPECT TO CASES, CONTROVERSIES, OR ISSUES THAT ARE LIKELY TO COME BEFORE THE COURT.

The two cases that have addressed the issue have held that the prohibition on a judicial candidate making a commitment or appearing to make a commitment with respect to cases, controversies, or issues that are likely to come before the court is constitutional. *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Kentucky), *cert. denied*, 513 U.S. 871 (1994); *Ackerson v. Kentucky Judicial Retirement and Review Commission*, 776 F. Supp. 309 (U.S. District Court for the Western District of Kentucky 1991).

- "The canon does not prohibit all speech by a judicial candidate on legal issues. A candidate may fully discuss, debate, and commit himself with respect to legal issues which are unlikely to come before the court. A candidate may also fully discuss and debate legal issues which are likely to come before the court. It is only with respect to the latter that the candidate is prohibited from making direct or indirect commitments." *Ackerson*.
- Making "campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system." *Ackerson*.
- "If a judicial candidate is unable to gauge the likelihood of an issue coming before his court, and is therefore constrained by caution so as to avoid making a pre-election commitment with respect to such an issue, . . . that constraint on First Amendment speech is permissible and proper when balanced against the necessity of maintaining the impartiality of the legal process." *Ackerson*.
- The interest in maintaining the impartiality of the legal process "is simply too great to allow judicial campaigns to degenerate into a contest of which candidate can make more commitments to the electorate on legal issues likely to come before him or her." *Ackerson*.

The Kentucky Supreme Court adopted this analysis in *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Kentucky), *cert. denied*, 513 U.S. 871 (1994).

PLEDGES OR PROMISES.

One case has held that the prohibition on a judicial candidate making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office is unconstitutional. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (U.S. Court of Appeals for the 7th Circuit 1993).

- “The ‘pledges or promises’ clause is not limited to pledges or promises to rule a particular way in particular cases or classes of case; all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office.” *Buckley*.
- The “rule reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election.” *Buckley*.

However, the decision in *Buckley* was based at least in part on the premise that the restriction “gags the judicial candidate,” and that premise ignores that breadth of discussion and debate open to judicial candidates under the code. See discussions of *Republican Party of Minnesota v. Kelly*, permitted pledges and promises, and permitted criticisms at pages 3-5, 17-18, 26, *supra*.

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