

COMMUNICATING WITH VOTERS

ETHICS AND JUDICIAL CAMPAIGN SPEECH

INSTRUCTOR'S MANUAL



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American
Judicature Society



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Founded in 1913, the American Judicature Society is an independent, nonprofit organization supported by a national membership of judges, lawyers, and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, judicial independence, and public understanding of the justice system.

COMMUNICATING WITH VOTERS: ETHICS AND JUDICIAL CAMPAIGN SPEECH

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COMMUNICATING WITH VOTERS: ETHICS AND JUDICIAL CAMPAIGN SPEECH INSTRUCTOR'S MANUAL

INTRODUCTION

THE CURRICULUM.

Communicating with Voters: Ethics and Judicial Campaign Speech provides all the materials necessary for an educational program for judicial candidates on campaign speech. Developed by the American Judicature Society under a grant from the State Justice Institute, this curriculum consists of a videotape, this instructor's manual, study materials for distribution to participants in the program, and a self-study guide.

The goals of the curriculum are:

- To describe how judicial candidates, including incumbent judges, 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.
- To describe what judicial campaign statements have been held to violate the code of judicial conduct.
- To encourage judicial candidates, including incumbent judges, to scrupulously comply with the standards of the code of judicial conduct to maintain public confidence in the judiciary.
- To explain the balance maintained between the public interest in the impartiality of the judiciary promoted by the restrictions in the code and the free speech rights of judicial candidates protected by the First Amendment.

THE VIDEOTAPE.

The videotape *Communicating with Voters* is approximately 15 minutes long and has three scenarios in which professional actors portray a judge, a judicial candidate, and a candidate's campaign manager.

The three scenarios are:

1. **Campaign strategy:** Judge Susan MacKenzie meets with her campaign manager Benton Wesley to discuss campaign strategy. They discuss how she can be portrayed in the campaign, her record, endorsements, and how to respond to a questionnaire sent by a community group.
2. **The attack ad:** In an ad, Judge MacKenzie's opponent, Thomas Hanson, attacks Judge MacKenzie for being soft on crime and portrays himself as experienced and tough on crime.

- The response:** Judge MacKenzie and her campaign manager meet to plan how to respond to Hanson's attack. They discuss inaccuracies in Hanson's ad, whether to attack Hanson's experience and qualifications, and how to counter Hanson's claim that Judge MacKenzie is soft on crime.

THE STUDY MATERIALS.

The study materials describe how judicial candidates can campaign in a way that allows them to educate voters without violating the code. The materials include the relevant portions of the code of judicial conduct, examine cases in which candidates have been disciplined for violating the code during judicial campaigns, and analyze advisory opinions issued by state judicial ethics committee giving guidance in the area. The materials:

- Explain what pledges and promises are permitted under the code and which are prohibited.
- Discuss whether a judicial 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 judicial 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.

THE INSTRUCTOR'S MANUAL.

Following is a description of a program using the videotape. The manual refers to a "leader," meaning a judge, law professor, judicial educator, or other expert who has been chosen to plan and present the program. The leader should be both knowledgeable of the substantive issues discussed and proficient at facilitating group discussion. A current or past member of the state judicial conduct commission or judicial ethics advisory committee may be a good leader for the program. The leader should be very familiar with the study materials and have read the decisions and advisory opinions cited in the materials.

The program begins with an introduction of the topic, including a review of the relevant ethical standards. For each of the three scenarios, the manual includes notes for the session leader on introducing the scenario and instructions for small group discussions of the ethical issues raised in the scenario, including discussion questions. The manual also includes suggestions for other educational exercises that can be used to present the program.

Each scenario should be described before it is shown and the participants should be asked to look for statements by the judicial candidate in the scenario that:

- Constitute a pledge or promise of faithful and impartial performance of the duties of the office.
- Constitute a pledge or promise of conduct in office other than the faithful and impartial performance of the duties of the office.
- Commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.
- Knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.
- Do not maintain the dignity appropriate to judicial office or are inconsistent with the integrity and independence of the judiciary.

The session leader should caution that the scenarios are not intended as a model for what judicial candidates can say when communicating with voters but provide only a background for discussion of the ethical issues raised. In the scenarios, some of what the candidates say is clearly ethical, some is clearly unethical, some is debatable, and some may violate the code but be protected by the First Amendment. The situations and statements presented in the scenarios are inspired by actual cases, advisory opinions, or campaign advertisements.

The manual recommends discussion in small groups to give all participants an opportunity to talk about the issues raised, with the groups reporting back to the larger audience in a dialogue moderated by the session leader. To expedite formation of the small groups, the room should be set up so that the participants are sitting at round tables of 8 to 10, with the participants at each table comprising a group.

The instructor's manual includes questions for each scenario with cross references to the places in the study materials where the issue is discussed. The groups should be instructed that they have 15 minutes to discuss the questions listed and any additional ones developed by the session leader or judicial educator. Depending on the length of the program, the leader may wish to omit some of the questions, assign each group a different set of questions, or have every group answer the same questions. Some of the questions may be omitted from the small group discussions if they are covered in any other educational exercise being used.

The session leader or judicial educator should arrange for some of the participants to have received the study materials enough before the session so that each group will have one member who will have reviewed the materials and can facilitate the discussion. This individual would not be a teacher but could point the group toward any relevant authority in the study materials and keep the discussion headed in the right direction.

As an alternative to small groups discussions, a panel of experts could give their responses to the questions.

INTRODUCING THE PROGRAM.

1. The leader should explain the goals of the program in his or her own words or by referring to the goals of the curriculum, which are:
 - To describe how judicial candidates, including incumbent judges, 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.
 - To describe what judicial campaign statements have been held to violate the code of judicial conduct.
 - To encourage judicial candidates, including incumbent judges, to scrupulously comply with the standards of the code of judicial conduct to maintain public confidence in the judiciary.
 - To explain the balance maintained between the public interest in the impartiality of the judiciary promoted by the restrictions in the code and the free speech rights of judicial candidates protected by the First Amendment.
2. The leader should review the relevant canons from the state's code of judicial conduct, describe any recent changes, and describe any differences between the state's code and the 1990 ABA model code.
3. The leader should highlight any cases and advisory opinions from the state in which the program is being presented.

SPACE AND AUDIO-VISUAL REQUIREMENTS.

The room for the presentation should be set up so participants are sitting at round tables of 8 to 10, with the participants at each table comprising a small group for the discussions. The tables should be arranged so that all participants can see and hear the session leader speaking from a podium or similar set-up at the front of the room. Depending on the leader's preference, a flip chart or overhead projector should be placed at the front to be used by the leader to note points during the discussion. The leader should have a wireless microphone to facilitate the dialogue between tables during the reporting back after the small group discussion. For the panel discussion or debate, a table with chairs and microphones for each speaker set up at the front of the room are required.

A television monitor, preferably the largest available, and VHS videoplayer are needed to show the videotape. If the group is very large or pillars obstruct slight lines, more than one monitor may be necessary.

OTHER EDUCATIONAL EXERCISES.

FIRST AMENDMENT PANEL DISCUSSION OR DEBATE.

The free speech issues raised by the restrictions on judicial candidates' speech make good material for a panel discussion or debate. The panel discussion could be held after the videotape has been shown and the participants have discussed the issues raised in small groups to give the First Amendment discussion a specific context.

Two or three panelists and a moderator should be chosen several weeks before the session, and at least one conference call or face-to-face meeting should be held to outline the procedures for the discussion. The discussion would be most interesting if at least one of the panelists felt strongly that the restrictions violate the First Amendment and at least one other panelist felt strongly that the restrictions can survive a constitutional challenge. Some time should be left after the panelists have had their say for participants to express their opinions. The panelists should read ahead of time the cases cited in the study materials section on the First Amendment and the articles listed in the additional resources section that address the issue.

The following or similar questions could be used by the moderator to guide the debate:

- How do judges differ from legislators and executive officials even when all are elected?
- What state interests are the restrictions on judicial campaign speech designed to promote?
- Is the public interest in maintaining the impartiality of the legal process too great to allow a judicial candidate to make commitments to the electorate on legal issues likely to come before him or her? Why or why not?
- Do the code restrictions impose a gag rule on judicial candidate? Do the code restrictions keep the voters in the dark about issues that are important when electing judges?

CAMPAIGN ADVERTISEMENTS.

Give each small group three pieces of large paper and a magic marker and ask them to draft:

- One campaign ad that clearly does not violate the code.
- One campaign ad that clearly does violate the code.
- One campaign ad that raises debatable questions under the code, particularly given First Amendment considerations.

Have the groups display and discuss their results.

CAMPAIGN QUESTIONS.

Give each small group a copy of the questions, from pages 4-5 of the study materials, approved by the Minnesota Board on Judicial Standards for a judicial candidates' forum. Instruct the groups to draft a list of similar questions that a judicial candidate could answer that would address issues of legitimate interest to voters in judicial elections without violating the code. Have the groups exchange lists and determine how they would respond to the other group's questions. Instruct each group to make a list of specific pledges or promises about court administration or reform that a judicial candidate could appropriately make under the code of judicial conduct during a campaign and that would address specific court management issues facing the local courts.

CAMPAIGN PLEDGES.

The State Bar of Michigan asks judicial candidates to sign an agreement regarding judicial campaign conduct. The candidate agrees:

- to become familiar with and conduct his or her campaign according to state law and the code,
- to be personally responsible for all statements and campaign materials,
- to disavow publicly all statements or materials issued by an unauthorized source that are found by a panel to violate the code,
- that the omission of relevant information could make an otherwise truthful statement either misleading or unfair, and
- that it would be inherently unfair and improper to comment on any pending or impending case.

Instruct the small groups to discuss whether it would be a good idea for the state bar or supreme court to require candidates to take such a pledge and to draft an appropriate pledge.

SCENARIO 1 – THE CAMPAIGN STRATEGY

INTRODUCING THE CAMPAIGN STRATEGY SCENARIO.

1. The leader should conduct a discussion that will get the participants thinking and talking about judicial campaign speech. The following or similar questions should be used:
 - Do you think that judicial campaigns are getting more contentious? Give examples. Why? What pressures are there on judicial candidates?
 - How do judges differ from legislators and executive officials, even when all are elected?
 - What state interests are the restrictions on judicial campaign speech designed to promote?
 - Who agrees with the statement “phrases such as ‘tough on crime’ suggest nothing more than a strict application of the law and are of such an amorphous nature that they do not define any specific conduct”? Why or why not?
 - Ask for examples of questionnaires the participants have received during campaigns, questions asked, and how they responded.
 - Who agrees with the statement “recounting actions taken in previous cases is an implied pledge by an incumbent judge to do the same in future cases of the same nature”? Who agrees with the statement “recounting actions taken in cases is innocuous”? Why?
2. The leader should advise the participants that the first scenario will show Judge Susan MacKenzie meeting with her campaign manager Benton Wesley to discuss campaign strategy. Remind the participants that the scenario is not intended as a model for what judicial candidates can say when communicating with voters but provides only a background for discussion of the ethical issues raised. Explain that the campaign strategy scenario is designed to raise the following questions:
 - May a judicial candidate use phrases such as “tough on crime”?
 - May a judicial candidate who is an incumbent judge describe actions taken in previous cases?
 - What pledges and promises may a judicial candidate make during a campaign?
 - May a judicial candidate answer questionnaires from special interest groups?
 - May a candidate publicize endorsements from special interest groups?

The participants should be advised to look for proposed campaign speech by Judge MacKenzie that:

- Constitutes a pledge or promise of faithful and impartial performance of the duties of the office.
- Constitutes a pledge or promise of conduct in office other than the faithful and impartial performance of the duties of the office.
- Commits or appears to commit the judge with respect to cases, controversies, or issues that are likely to come before the court.
- Knowingly misrepresents the identity, qualifications, present position, or other fact concerning the candidate or an opponent.
- Does not maintain the dignity appropriate to judicial office or is inconsistent with the integrity and independence of the judiciary.

SMALL GROUP DISCUSSIONS.

1. After the campaign strategy scenario is shown, the audience should discuss the issues raised in their small groups. (Alternatively, these questions could be answered by a panel of experts arranged before the session.) The groups should be instructed that they have 15 minutes to discuss the questions relating to the scenario included in this manual and any additional ones developed by the session leader or judicial educator. Each group should choose one of its members to report the consensus of the group after the discussion. Depending on the length of the program, the leader may wish to omit some of the questions, assign each group a different set of questions, or have every group answer the same questions.

Each group should have one member who has been sent the study materials for review before the session to facilitate discussion. The individual would not be a teacher but could point the group toward any relevant authority in the study materials and keep the discussion heading in the right direction.

2. After approximately 15 minutes, the small groups should reconvene as one large group, and the leader should moderate the reports from each group about its answers to the questions. For example, the leader may ask one group's reporter for its answer to the first question, ask a second group's reporter if that group agreed, and then ask for the second group's answer to the second questions, and so on. If an answer seem "wrong" (either unduly restrictive of a candidate's speech or inappropriately permissive), the leader may ask for other opinions to ensure that the "right" answer is given. Follow-up questions about the rationale for answers and exceptions to the rules should also be asked.

DISCUSSION QUESTIONS FOR THE CAMPAIGN STRATEGY SCENARIO.

1. May Judge MacKenzie say in her campaign she is “conservative and no-nonsense”?

See discussion at pages 7-8 of study materials.

2. May Judge MacKenzie say in her campaign she is “tough on crime”?

See discussion at pages 7-8 of study materials.

3. May Judge MacKenzie say in her campaign she is concerned about victims’ rights?

See discussion at pages 10-11 of study materials.

4. May Judge MacKenzie include in campaign materials testimonials from tenants who have won cases against their landlords or employees who have won cases against their employers in her court?

See discussion at page 5 of study materials.

5. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “I’ve never thrown out a criminal conviction when the jury has returned a guilty verdict”?

See discussion at pages 6-7 of study materials.

6. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “I have denied 90% of all motions to suppress evidence filed in criminal cases”?

See discussion at pages 6-7 of study materials.

7. How can Judge MacKenzie talk about her “strong record on domestic violence” in a way that constitutes a promise to impartially uphold judicial duties rather than a pledge to decide all domestic violence cases in a pre-determined way?

See discussion at pages 3-5, 6-7 of study materials.

8. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “I pledge to do everything in my power to help these victims [of domestic violence], including using the full protection of the courts”?

See discussion at pages 6-7 of study materials.

9. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “ I have taken a leadership role in the community raising public awareness about domestic violence and adopting a protocol to make the courts more responsive to domestic violence victims”?

See discussion at pages 3-5 of study materials.

10. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “the courts have got to serve the citizens, not the lawyers. We’ve got to increase the efficiency of the courts . . . open the courthouse doors wider”?

See discussion at page 3 of study materials.

11. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “I have used innovative sentences in cases involving first-time offenders”?

See discussion at pages 3-5, 6-7 of study materials.

12. Would Judge MacKenzie violate the code of judicial conduct if she said during her campaign “I have been instrumental in enacting jury reforms in our jurisdiction, making jury service less onerous”?

See discussion at page 3 of study materials.

13. May Judge MacKenzie answer the question “do you support the death penalty”?

See discussion at pages 10-11 of study materials.

14. May Judge MacKenzie answer the question “should victims of crime have their voice heard and their input considered in the criminal justice process”?

See discussion at pages 10-11 of study materials.

15. May Judge MacKenzie answer the question “what do you think should be done about the extremely high verdicts in tort cases that are driving up the cost of health care and other insurance for everyone”?

See discussion at pages 10-11 of study materials.

16. May Judge MacKenzie answer the question “should judges be given less discretionary power in determining appropriate criminal sentences”?

See discussion at pages 10-11 of study materials.

17. May Judge MacKenzie answer the question “do you think the courts should be tougher on domestic violence cases”?

See discussion at pages 10-11 of study materials.

18. May Judge MacKenzie’s campaign committee solicit and publicize the endorsement of the groups such as Mothers Against Drunk Driving, Citizens for Tort Reform, State Prosecutors Association, Fraternal Order of Police, AFL-CIO, National Women’s Political Caucus, Republican Pro-Life PAC, and Victims Rights Groups? Do you think soliciting or publicizing the endorsement of, for example, a county sheriff inappropriately suggests that a candidate is pro-law enforcement?

See discussion at pages 12-13 of study materials.

19. List three specific pledges or promises about court management, administration, or reform that could appropriately be made under the code of judicial conduct during a campaign.

See discussion at pages 3-5 of study materials.

SCENARIO 2 – THE ATTACK AD

INTRODUCING THE ATTACK AD SCENARIO.

1. The leader should introduce the scenario by asking the following or similar questions:
 - Who agrees with the statement “a judicial candidate’s criticism of an opponent’s decision in a case 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”? Why or why not?
 - Who agrees with the statement “criticism of an opponent is a violation of the code of judicial conduct if it creates a false impression by withholding information that explains a negative statement”? Why or why not?
 - Is the use of general, inflammatory terms such as “soft on crime” inappropriate in judicial campaigns? Why or why not?
 - Do you think a slogan such as “the candidate has a special place for criminals – jail” is an implied, inappropriate promise to jail all those charged with crimes? Why or why not?
 - Does the code prohibit dialogue on virtually every issue that would be of interest to the voting public? Why or why not?
 - Is the public interest in maintaining the impartiality of the legal process too great to allow judicial candidates to commitments to the electorate on legal issues likely to come before him or her? Why or why not?
2. Advise the participants that the second scenario will show an ad in which Judge MacKenzie’s opponent, Thomas Hanson, attacks Judge MacKenzie for being soft on crime and supported by rich lawyers and portrays himself as experienced and tough on crime. Remind the participants that the scenario is not intended as a model for what judicial candidates can say when communicating with voters but provides only a background for discussion of the ethical issues raised. Explain that the attack ad scenario is designed to raise the following questions:
 - What criticisms may a candidate make of his or her opponent?
 - What pledges and promises of conduct in office are prohibited under the code of judicial conduct?
 - May a judicial candidate claim to be “tough on crime”?
 - What representations may a candidate make about his or her endorsements, experience, and incumbency?

The participants should be advised to look for statements in Hanson's ad that:

- Constitute a pledge or promise of faithful and impartial performance of the duties of the office.
- Constitute a pledge or promise of conduct in office other than the faithful and impartial performance of the duties of the office.
- Commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.
- Knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.
- Do not maintain the dignity appropriate to judicial office or are inconsistent with the integrity and independence of the judiciary.

SMALL GROUP DISCUSSIONS.

1. After the attack ad scenario is shown, the audience should discuss the issues raised in their small groups. (Alternatively, these questions could be answered by a panel of experts arranged before the session.) The groups should be instructed that they have 15 minutes to discuss the questions relating to the scenario included in this manual and any additional ones developed by the session leader or judicial educator. Each group should choose one of its members to report the consensus of the group after the discussion. Depending on the length of the program, the leader may wish to omit some of the questions, assign each group a different set of questions, or have every group answer the same questions.

Each group should have one member who has been sent the study materials for review before the session to facilitate discussion. The individual would not be a teacher but could point the group toward any relevant authority in the study materials and keep the discussion heading in the right direction.

3. After approximately 15 minutes, the small groups should reconvene as one large group, and the leader should moderate the reports from each group about its answers to the questions. For example, the leader may ask one group's reporter for its answer to the first question, ask a second group's reporter if that group agreed, and then ask the second group's answer to the second questions, and so on. If an answer seem "wrong" (either unduly restrictive of a judge's speech or inappropriately permissive), the leader may ask for other opinions to ensure that the "right" answer is given. Follow-up questions about the rationale for answers and exceptions to the rules should also be asked.

DISCUSSION QUESTIONS FOR THE ATTACK AD SCENARIO.

1. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge Susan MacKenzie threw out the prosecution’s evidence against the accused killer [of Jennifer Armstrong and her son Ryan] on a technicality”?

See discussion at pages 18-19 of study materials.

2. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “MacKenzie’s justice [for a man who repeatedly raped a 13-year-old girl] was only a 5-year prison term”?

See discussion at pages 18-19 of study materials.

3. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge MacKenzie is soft on crime”?

See discussion at page 21 of study materials.

4. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge MacKenzie made her living defending cop killers, murderers, and rapists”?

See discussion at pages 20-21 of study materials.

5. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge MacKenzie’s campaign is bankrolled by rich lawyers who use every trick to get their clients off”?

See discussion at pages 20-21 of study materials.

6. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge Hanson has a special place for child molesters, mugger, rapists – it’s called prison”?

See discussion at page 5 of study materials.

7. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Thomas Hanson is a highly qualified, experienced, and endorsed candidate”?

See discussion at page 14 of study materials.

8. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Thomas Hanson is an experienced prosecutor with 5 years experience on the bench” assuming the statement is accurate?

See discussion at page 7 of study materials.

9. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge Hanson is tough on crime”?

See discussion at pages 7-8 of study materials.

10. Do you think Thomas Hanson violated the code of judicial conduct by stating in his ad “Judge Hanson will support prosecutors and police and stop plea bargains and suspended sentences”?

See discussion at pages 5-7 of study materials.

11. Do you think Thomas Hanson violated the code of judicial conduct by referring to himself in his ad as “Judge Hanson”?

See discussion at page 15 of study materials.

12. Do you think any of the comments by Hanson that violate the code should be protected by the First Amendment? If so, which ones?

SCENARIO 3 – THE RESPONSE

INTRODUCING THE RESPONSE SCENARIO.

1. The leader should introduce the response scenario by asking the following or similar questions:
 - If you were a member of Judge MacKenzie’s campaign committee how would you recommend she respond to Hanson’s ad?
 - Do you agree with the statement “under the code of judicial conduct, a judicial candidate may criticize an opponent’s health, work habits, experience, ability, and record”? Why or why not?
 - Do you think a slogan such as “Do the Crime – Do the Time” implies that a candidate would jail all those charged with crimes, rather than judge the merits of individual cases”? Why or why not?
 - Do you agree with the statement “discussion of solutions to problems facing the courts is consistent with the code’s authorization of pledges to faithfully uphold the duties of the office”? Why or why not?
 - Do you think it would be appropriate for a judicial candidate to answer questions such as “what do you believe to be the most critical issue currently facing the justice system and what do you recommend be done to address it”? Why or why not? How would you answer the question? Give examples of questions you think a candidate could appropriately answer under the code of judicial conduct during a campaign.
 - Do you agree with the statement “judicial candidates are 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”? Why or why not?
 - Do you agree with the statement “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 and, therefore, a matter of much concern to the litigants, lawyers, and the public alike”? Why or why not?
2. The leader should advise the participants that the third scenario will show Judge MacKenzie and her campaign manager meeting to plan how to respond to Hanson’s attack ad. Remind the participants that the scenario is not intended as a model for what judicial candidates can say when communicating with voters but provides only a background for discussion of the ethical issues raised. Explain that the response scenario is designed to raise the following questions:
 - What criticisms may a candidate make of his or her opponent?
 - What pledges and promises of conduct in office are prohibited under the code of judicial conduct?
 - How may a candidate respond to criticism?

The participants should be advised to look for statements proposed for Judge MacKenzie to use in response to Hanson's ad that:

- Constitute a pledge or promise of faithful and impartial performance of the duties of the office.
- Constitute a pledge or promise of conduct in office other than the faithful and impartial performance of the duties of the office.
- Commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.
- Knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.
- Do not maintain the dignity appropriate to judicial office or are inconsistent with the integrity and independence of the judiciary.

SMALL GROUP DISCUSSIONS.

1. After the response scenario is shown, the audience should discuss the issues raised in their small groups. (Alternatively, these questions could be answered by a panel of experts arranged before the session.) The groups should be instructed that they have 15 minutes to discuss the questions relating to the scenario included in this manual and any additional ones developed by the session leader or judicial educator. Each group should choose one of its members to report the consensus of the group after the discussion. Depending on the length of the program, the leader may wish to omit some of the questions, assign each group a different set of questions, or have every group answer the same questions.

Each group should have one member who has been sent the study materials for review before the session to facilitate discussion. The individual would not be a teacher but could point the group toward any relevant authority in the study materials and keep the discussion heading in the right direction.

4. After approximately 15 minutes, the small groups should reconvene as one large group, and the leader should moderate the reports from each group about its answers to the questions. For example, the leader may ask one group's reporter for its answer to the first question, ask a second group's reporter if that group agreed, and then ask the second group's answer to the second questions, and so on. If an answer seems "wrong" (either unduly restrictive of a judge's speech or inappropriately permissive), the leader may ask for other opinions to ensure that the "right" answer is given. Follow-up questions about the rationale for answers and exceptions to the rules should also be asked.

DISCUSSION QUESTIONS FOR THE RESPONSE SCENARIO.

1. Was it a violation of the code of judicial conduct for Hanson to criticize Judge MacKenzie for sentencing Peasley to only a 5-year prison term for repeatedly raping a 13-year-old when the sentence was pursuant to a plea bargain?

See discussion at page 19 of study materials.

2. Would it be a violation of the code if Judge MacKenzie responded to Hanson's criticism of her decision in *Peasley*, a case that is pending on appeal?

See discussion at page 22 of study materials.

3. Would Judge MacKenzie violate the code of judicial conduct if she criticized Hanson by stating "Hanson is inexperienced. He was only a prosecutor for 1 year in the child support division of the attorney general's office"?

See discussion at page 17 of study materials.

4. Would Judge MacKenzie violate the code of judicial conduct if she criticized Hanson by stating "Hanson spent most of his career working for insurance companies, fighting against people who were injured on the job or by doctors who botched operations"?

See discussion at pages 20-21 of study materials.

5. Would Judge MacKenzie violate the code of judicial conduct if she criticized Hanson by stating "Hanson is inexperienced. He was seldom in court as an attorney"?

See discussion at page 17 of study materials.

6. Would Judge MacKenzie violate the code of judicial conduct if she criticized Hanson by stating "When he was a traffic court judge, Hanson left court every day by 2. His biggest ruling every day is whether to use a three iron or a wood"?

See discussion at page 17 of study materials.

7. Would Judge MacKenzie violate the code of judicial conduct if she responded to Hanson's attacks by stating she is not afraid to impose the death penalty and discussing the *Semple* case?

See discussion at pages 5-7 of study materials.

8. Would Judge MacKenzie violate the code of judicial conduct if used the slogan "do the crime – do the time" in her campaign materials?

See discussion at page 5 of study materials.

9. In her interview with the reporter, can Judge MacKenzie explain her decision in *Peasley*, a case pending on appeal?

See discussion at page 22 of study materials.

10. In her interview with the reporter, can Judge MacKenzie describe how the law applies to *Peasley*, a case pending on appeal?

See discussion at page 22 of study materials.

11. In her interview with the reporter, can Judge MacKenzie talk about her work on domestic violence?

Compare discussion at pages 3-5 of study materials with discussion at pages 6-7.

12. In her interview with the reporter, can Judge MacKenzie stress that she imposes lengthy sentences for repeat criminals and refuses to let child abusers walk?

See discussion at pages 6-8 of study materials.

13. In her interview with the reporter, can Judge MacKenzie talk about the root cause of juvenile crime and what can be done to deal with juvenile offenders?

See discussion at pages 3-5 of study materials.

14. In her interview with the reporter, can Judge MacKenzie talk about what is the biggest issue facing the courts and what she proposes to do to address it?

See discussion at pages 3-5 of study materials.

ADDITIONAL RESOURCES

Daniel Burke, "Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns," 7 *Georgetown Journal of Legal Ethics* 181 (Summer 1993)

Cynthia Gray, *When Judges Speak Up: Ethics, the Public, and the Media* (AJS 1998)

Charles J. Kahn, Jr., "Judicial Elections: Canon 7, Politics, and Free Speech," *The Florida Bar Journal*, vol. LXXII, No. 7, page 22 (July/August 1998)

Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* (AJS 1990)

Sara Mathias, *Electing Justice: A Handbook of Judicial Election Reforms* (AJS 1990)

Lisa L. Milord, *The Development of the ABA Judicial Code* (1992)

Mark R. Riccardi, "Code of Judicial Conduct Canon 7B(1)(c): An Unconstitutional Restriction on Freedom of Speech," 7 *Georgetown Journal of Legal Ethics* 153 (Summer 1993)

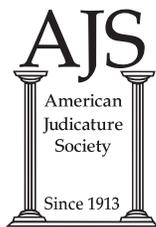
David M. Rothman, *California Judicial Conduct Handbook* (2nd edition 1999)

Neil K. Sethi, "The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection," 145 *University of Pennsylvania Law Review* 711 (January 1997)

Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics* (1990)

Randall T. Shepard, "Campaign Speech: Restraint and Liberty in Judicial Ethics," 9 *Georgetown Journal of Legal Ethics* 1059 (1996)

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



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