

CAMPAIGN OVERSIGHT COMMITTEES AND THE CHALLENGE OF PERPETUATING ETHICAL JUDICIAL ELECTIONS

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This article considers the potential contribution that judicial campaign oversight committees can make to maintaining ethical conduct during judicial elections. There is renewed interest in oversight committees because most are voluntary in nature and, thus, unaffected by federal court decisions that greatly diminish what can be officially regulated through the canons. Oversight committees may also be a better counterweight to the out-of-state interest groups that increasingly intervene in judicial elections. The effectiveness of oversight committees is considered in the light of historical experience and specifically the role such committees played in the 2006 elections. Much remains to be learned about the impact of oversight committees, but already there are grounds for cautious optimism.

Judicial campaign oversight committees seek to ensure that judicial candidates campaign differently from those running for political office. Some committees enforce official ethical regulations on what candidates can do and say. Most rely largely or entirely on persuasion to influence candidate behavior. Sixteen statewide and about eighteen local campaign oversight committees were active as of mid-2007.

In *Republican Party of Minnesota v. White* (2002), the U.S. Supreme Court held that Minnesota's "announce clause" was an unconstitutional infringement of judicial candidates' First Amendment rights. Lower federal courts have expanded the scope of what can no longer be regulated to include provisions on "pledges and promises," nonpartisanship, and personal fund-raising (Caufield, 2007). Another defining feature of the post-*White* world is the involvement in judicial elections of political parties and special interests, entities not regulated by the canons before or after *White*. This resulted in massive spending on television attack advertisements and the distribution of candidate questionnaires designed to obtain information on how a candidate might rule in cases, controversies, or issues likely to come before the court.

This article explores the potential contribution that judicial campaign oversight and similar committees can make in the post-*White* world of judicial elections largely unregulated by the canons. Oversight committees are thought to have promise in this new world. Those committees, which have been said to have "encourage[d] and support[ed] appropriate conduct by candidates for judicial office," may, over the long run, "help create a culture and climate in which the expectations of all involved—candidates, political consultants, the bar, interest groups, the media, and the public—promote judicious campaigning" (National Ad Hoc Advisory Committee on Judicial Campaign Conduct, 2004:iii). Based on these and similar claims, various legal reform organizations, law professors, and political scientists point

to oversight committees as one way to promote traditional forms of judicial campaigning (as discussed at the 2000 National Summit on Improving Judicial Elections; see also Reed and Schotland, 2002; American Bar Association House of Delegates, 2002; Commission to Promote Public Confidence in Judicial Elections, 2004; Longan, 2005; Goldberg, 2007:89-90; Streb and Frederick, 2007:211-12).

There is much anecdotal but little empirical evidence that speaks to whether oversight committees can realistically be expected to meet these expectations. To advance what we know about the effectiveness of campaign oversight committees, we consider two types of sources. The first is a survey sent by the National Center for State Courts in January 2007 to all known judicial campaign conduct committees. Questions concerned how such a committee is organized and its activities during the 2006 elections. The second source is documentation provided by the various oversight committees themselves, supplemented through a review of newspaper articles and editorials referencing their work.

THE ORIGINS AND NATURE OF OVERSIGHT COMMITTEES

Statewide judicial campaign conduct committees emerged in the 1980s as mechanisms for enforcing and reinforcing official forms of regulation. Most adopted the form of being special committees of judicial qualifications commissions or similar bodies. Only a few of these original committees remain.

During the mid-to-late 1990s, in response to unprecedented levels of conflict and nastiness in a specific election cycle, other committees were formed for use then or in the next election. These were often voluntary in the sense that they had no formal link to any disciplinary process. Since 2002, new committees were established or reestablished by eleven states: Alabama, Georgia, Illinois, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, Ohio, South Dakota, and West Virginia. Some of the new committees had official committees as predecessors. In Georgia, for example, the special committee formed by its Judicial Qualification Committee was the defendant in the successful challenge to that state's canons in *Weaver v. Bonner* (2002). That effectively removed it as a force in regulating candidate conduct. In 2004 the Georgia Committee for Ethical Campaigns was established by a group of citizens without even the typical link to a bar association.

Fifteen statewide judicial campaign oversight committees were active in the 2006 judicial elections (see Table 1). Six participated in their first election cycle then; New Mexico's committee did not become active until after the elections. Most existing committees are unofficial in nature. The new committees in New Mexico and West Virginia are affiliated with mandatory bar associations, and South Dakota's committee is an adjunct to the state supreme court. All but two oversight committees, even those formed by mandatory bars, have nonattorney members. If one excludes Georgia's sixty-one-member committee, one-third (34 percent) of all oversight committee members are not attorneys. Most oversight committees are authorized to

Table 1
Statewide Oversight Committees—Structure

Official Name	Date Established	How Established	Members TOTAL / No. Non-attorneys	Authorized Actions*
2006 Alabama Judicial Campaign Oversight Committee	2006	By voluntary bar association	13 / 4	1, 2, 4, 5, 8
Florida Judicial Ethics Advisory Committee	1976	Appointed by supreme court	12 / 0	2
Georgia Committee for Ethical Judicial Campaigns	2004	Established by group of concerned citizens	61 / 6	1, 2, 4, 5, 8
Illinois State Bar Association Supreme and Appellate Court Election Tone and Conduct Committee	2004	By voluntary bar association	10 / 1	1, 2, 4, 5, 8
Kentucky Judicial Campaign Conduct Committee	2005	Established by group of concerned citizens	17 / 8	1, 2, 4, 5, 6, 8
Louisiana Judicial Campaign Oversight Committee	2002	Appointed by supreme court	15 / 5	1, 2, 4, 5, 6, 8
Maryland Judicial Campaign Conduct Committee	2005	Established by chief judge	14 / 8	1, 2, 4, 5, 6, 8
Mississippi Special Committee on Judicial Election Campaign Intervention	2002	Appointed by supreme court; judicial code of conduct	5 / 2	2, 4, 5, 6, 8, 9
New Mexico State Bar Association Fair Judicial Election Committee	2006	By mandatory bar association	N/A	10
Nevada Standing Committee on Judicial Election Campaign Intervention	1997	Appointed by supreme court	28 / 12	1, 2, 4, 6, 7, 8
New York State Bar Association Special Committee on Judicial Campaign Monitoring	2003	By voluntary bar association	8 / 0	4, 8
Ohio State Bar Association Judicial Election Campaign Advertising Monitoring Committee	2002	By voluntary bar association	11 / 3	4, 5, 8
South Dakota Special Committee of Judicial Election Campaign Intervention	2006	Appointed by supreme court	9 / 3	1, 2, 4, 5, 6, 8
West Virginia State Bar Judicial Election Campaign Advertising Commission	2006	By mandatory bar association	11 / 3	1, 2, 4, 5, 8

*** Authorized Actions**

- | | |
|-----------------------------|---|
| 1 = Outreach to candidates | 6 = Referral to disciplinary boards |
| 2 = Educate candidates | 7 = Implement disciplinary actions |
| 3 = Candidate hotline | 8 = Issue public statements |
| 4 = Receive complaints | 9 = Issue cease-and-desist requests/orders |
| 5 = Initiate investigations | 10 = Collect information on campaign advertisements |

receive and investigate complaints and then issue public statements. Only the “older” Nevada committee can implement disciplinary actions.

Local committees have limited visibility at the national or even the state level. Their number cannot be stated with certainty. As best as can be determined, the first local committee was in Columbus, Ohio (Franklin County), known locally as the Bishop’s Committee in recognition of the law-trained Catholic bishop who, in 1987, served as its first chair. This committee sets voluntary standards, educates candidates, receives complaints, makes public statements if appropriate, and reviews campaign advertising. It was a pioneer in that its bylaws require that three of its eleven members must be nonlawyers (Reed and Schotland, 2002).

Local committees typically began as an activity of voluntary local bar associations, and most continue in that mode. Local committees also have experienced a recent growth spurt. Local committees are known to exist in California (two counties), Florida (four counties), Georgia (one county), Illinois (one county), Minnesota (two counties), New York (two counties and one multicounty district), North Carolina (one region), Ohio (one county), and Washington (one county). Other local committees active in previous elections appear to have been inactive during the 2006 elections. They have either been dissolved or lie dormant in anticipation of future contentious elections and a group of leaders willing and able to activate them.

OVERSIGHT COMMITTEES IN THE 2006 ELECTIONS

The New Mexico and West Virginia oversight committees were not sufficiently organized to participate in the 2006 elections. Of the other committees, those in Georgia, Kentucky, Louisiana, Maryland, Ohio, and South Dakota requested that all candidates sign an agreement or statement that typically reflected the wording of the ethical standards set by the canons regardless of the legal status of those canons. Formal complaints were received by committees in Alabama (3), Georgia (1), Kentucky (19), Louisiana (2), Maryland (10), Nevada (2), and South Dakota (10) (see Table 2). Other inquiries or complaints were received, investigated, and resolved without a public statement.

The experiences of four campaign oversight committees during the elections can illustrate what such committees accomplished. Three committees—Kentucky, Maryland, and South Dakota—were in their first election cycle. An Ohio committee formed in 2002 offers a look at a committee in its third election cycle.

Kentucky. “A perfect storm” was one description of the Kentucky’s 2006 judicial elections (Gibson, 2006). All but two of the state’s appellate and general jurisdiction judgeships were on the ballot in nonpartisan contested elections. The scene was complicated by the dismantling of the state’s canons regulating judicial campaign conduct by the decision of the Sixth Circuit Court of Appeals in *Family Trust Foundation of Kentucky v. Judicial Conduct Commission* (2004). That decision left considerable uncertainty in its wake as to what candidates could say or do to promote their candidacy (see Goldman, 2006).

Table 2
Statewide Oversight Committees—2006 Elections

Official Name		<i>Public Complaints Received</i>	<i>Statement Issued?</i>
	<i>Preparation for Elections</i>		
2006 Alabama Judicial Campaign Oversight Committee	Candidates, local bar presidents, and several newspaper editorial boards were informed about the committee. An op-ed was also produced and made available about the committee.	3	No
Georgia Committee for Ethical Judicial Campaigns	Media were alerted to the committee's existence and purpose. Candidates were encouraged to uphold committee's principles regarding judicial campaign conduct.	1	No
Kentucky Judicial Campaign Conduct Committee	Candidates were sent letters regarding candidate questionnaires, ethical campaigning, and encouraging them to sign a "good conduct" pledge. A brochure on judicial campaigning was widely distributed. They participated in a panel discussion on the same topic at the state bar convention. A committee Web site responded to candidate questions and posted press releases. Voter education included addresses to citizens groups and distribution of brochures at libraries, courthouses, and the state fair.	19 complaints filed in 15 races	Yes, in response to several of the complaints. Statements were issued in the form of press releases posted on the committee Web site.
Louisiana Judicial Campaign Oversight Committee	All candidates in contested judicial races received a committee packet including a letter from the chair, an informational paper titled "Ethical Guidelines for Judicial Campaigning," and a form that the candidate was asked to sign and return regarding their acknowledgment that they were bound by Canon 7 of the Louisiana Code of Judicial Conduct.	2	No
Maryland Judicial Campaign Conduct Committee	A public-education campaign was launched including editorial board and other media meetings and a press conference. Committee handbooks were distributed to all circuit-court candidates. An accompanying letter invited candidates to subscribe to the committee's Standards for Judicial Elections. Public outreach and education efforts occurred through participation in public forums and legal community events.	10	Yes
Nevada Standing Committee on Judicial Election Campaign Intervention	Candidates were sent letters advising them of the committee and its purpose. It also included the booklet <i>An Aid to Understanding Canon 5, Guidelines to Assist Judicial Candidates in Campaign & Political Activities</i> .	2	No
Ohio State Bar Association Judicial Election Campaign Advertising Monitoring Committee	Candidates received requests to sign the candidate agreement to abide by the committee guidelines regarding candidate conduct.	0	N/A
South Dakota Special Committee of Judicial Election Campaign Intervention	The committee held an election school to educate candidates and conducted a media outreach. A separate committee on the Code of Judicial Conduct completed revisions to the code governing candidate behavior following the <i>White</i> decision.	10	No
West Virginia State Bar Judicial Election Campaign Advertising Commission	Not in existence at time of 2006 elections	N/A	N/A

The state's chief justice had taken the lead in establishing the committee by bringing a group of judges, lawyers, and civic leaders to a workshop run by the National Ad Hoc Advisory Committee on Judicial Campaign Conduct. The non-judicial members of the Kentucky group incorporated as a nonprofit organization in November 2005 as the Kentucky Judicial Campaign Conduct Committee; the committee has no affiliation with the bar. The cochairs were selected by the chief justice, but all subsequent decisions regarding membership, bylaws, and operating procedures were made by the committee as it formed.

The committee's 2006 election preparation began in January 2006 with an announcement in the state bar association's monthly newsletter. This was followed by a newspaper op-ed piece by the committee's chair and the mailing of letters to all candidates involved in the more than 100 contested elections, and the committee organized six regional meetings for candidates and maintained a Web site. Candidates were asked to sign an agreement to campaign

in accordance with the Kentucky Code of Judicial Conduct and to disavow advertisements that are false or misleading and/or accusations to impugn the integrity of the judicial system, the integrity of a candidate or erode public trust and confidence in the independence and impartiality of the judiciary (cited in Fortune and Cross, 2007).

One candidate, a sitting supreme court Justice, was chastised for signing the pledge and then speaking out on issues like abortion. He was defeated in the election.

A notable feature of this rather assertive committee's efforts was the positive manner in which its interventions were portrayed in the media. Examples are descriptions like "a non-partisan group that has stepped up to referee candidates' claims and tactics" (Alessi, 2006) and "a non-partisan group formed to monitor Kentucky's judicial campaigns" (Jafari, 2006).

The Kentucky committee consistently stressed that candidates taking advantage of their newly granted freedom to ignore traditional ethical standards were compromising the independence of the judicial branch. The committee cochairs spoke out frequently against candidates responding to questionnaires that sought views on legal and social controversies. The cochairs were modest in describing the committee's impact:

We believe our activity reminded voters that judicial elections are supposed to be different than those for legislative and executive office, and probably influenced voters to cast ballots for candidates who demonstrated that they agreed with that principle. (Fortune and Cross, 2007).

Maryland. Maryland, which also participated in the workshop convened by the National Ad Hoc Advisory Committee, subsequently formed the Maryland Judicial Campaign Conduct Committee (MJCCC). The state's chief justice selected the cochairs, a former U.S. attorney and former state attorney general. At that point, the

committee became self-governing. The committee made its plans public on May 1, 2006, noting that “All we have is our credibility and public attention to what we say” (Hartley, 2006:B1).

The committee prepared and circulated a candidate agreement form to all candidates in contested circuit-court races (appellate judges in Maryland are appointed to the bench). Candidates were asked to agree that they and their staff would abide by a set of standards linked to the Maryland Code of Judicial Conduct and the Maryland Rules of Professional Conduct. Of thirty-five candidates, twenty-six signed the agreement. The committee reserved the right to address complaints against candidates who failed to sign the agreement, “noting, however, that the candidate who did not agree to abide by the Standards cannot be said to have violated any agreement” (Maryland Judicial Campaign Conduct Committee, Inc., 2006).

The committee received ten complaints through its hotline: four in June, one in August, four in September, and one in October. Findings were issued on nine of the complaints. The committee received public criticism from a candidate who, although not a judge, used campaign materials reading “People’s Choice for **Judge Arthur M. Frank.**” Replying to a negative editorial from the *Baltimore Sun* that endorsed the MJCCC’s position, the candidate responded in a letter to the editor:

Despite the opinion of the hastily formed, undemocratic Maryland Judicial Campaign Conduct Committee (MJCCC), I will continue campaigning to become the ‘people’s choice for judge’. The new MJCCC, which is changing the rules just prior to the election, is comprised mostly of lawyers who seek to eliminate judicial elections, a position also urged by *The Sun* (Frank, 2006).

South Dakota. The Special Committee on Judicial Election Campaign Intervention was established in 2006 by the state supreme court with the duty “to alleviate unethical and unfair campaign practices in judicial elections” (SDCL ch. 16-A [Appendix]). A retired chief justice serves as its chair. A team of judges and bar and civic-group leaders from South Dakota participated in one of the National Ad Hoc Committee’s workshops.

The eleven formal opinions issued by the committee during the election were redacted, and copies were provided to the news media and all judicial candidates; they were also posted on the special committee’s Web site and filed with the clerk of the supreme court. Formal opinions were issued when the committee felt an issue of general interest had been raised. In one instance, an informal opinion was provided to the state’s trial lawyers association because the issue failed to rise to the standard of general interest. Private letters of admonishment were also sent to individual candidates. The special committee used these rather than issuing public statements; it then redacted some of them and treated them as formal opinions to guide other candidates. No recourse was made to further discipline concerning possible violations of the Code of Judicial Conduct. In addition, the committee also intervened in a mat-

ter about the use of state employees to perform campaign functions, based on an inquiry originating through the Office of the State Court Administrator.

The committee's final report concluded:

While at times the Committee was frustrated with its inability to reign in what it believed was questionable campaign conduct, particularly in the Seventh Judicial Circuit race, the Committee also believes it provided timely and effective advice to candidates that prevented the occurrence of conduct that would have required its intervention (South Dakota Special Committee on Judicial Election Campaign Intervention, 2007:4).

Ohio. In 2000 Ohio was one of three states in which there were television advertisements in judicial races; it offered some of the most controversial examples of such advertising. The low point was the costly negative advertising funded by the Ohio Chamber of Commerce against one incumbent. In the advertisements, Lady Justice peeks through her blindfold and uses campaign contributions to shift the balance on the scales of justice, and the announcer asks, "Is justice for sale in Ohio"? (Goldberg and Sanchez, 2002:21).

Before the 2002 elections, the Ohio State Bar Association responded by establishing the Ohio Advertising Monitoring Committee. This committee distributes an "Agreement Regarding Judicial Elections" to candidates, who are asked to agree that

based on my personal examination of judicial advertisements, to publicly disavow advertisements that impugn the integrity of the judicial system, the integrity of a candidate for the Supreme Court, or erode public trust and confidence in the independence and impartiality of the judiciary by verbally or visually attempting to lead voters to believe that a candidate will decide issues or cases in a predetermined manner (Ohio State Bar Association, as revised in January 2004).

In 2002, the committee reviewed seven controversial advertisements. By 2006, all but one candidate, who lacked sufficient funding to mount television ads, signed the agreement. The committee achieved its mission simply by existing.

THE FUTURE OF JUDICIAL CAMPAIGN OVERSIGHT COMMITTEES

The history and 2006 election experience provide more reasons for optimism than for pessimism regarding the effectiveness of oversight committees. Clearly, voluntary oversight committees can help establish a climate in which ethical campaigning is expected by all concerned. Even in its first year of operation, Kentucky's new statewide committee had a moderating effect. And, writing at the end of 2006 in the local newspaper, the president of the Columbus Bar Association said:

Before election season fades from memory, one group of closely watched candidates deserves special recognition for their sensible and above-board

Table 3
Public and Judicial Support for Establishing Judicial Campaign Oversight Committees

	Public	State Judges
Strongly support	55	43
Somewhat support	32	34
Somewhat oppose	6	11
Strongly oppose	6	9
	100 %*	100 %*

* Percentages do not total to 100 % due to rounding error.

conduct. Congratulations to the men and women who ran for judicial seats in central Ohio. They fought their campaigns with passion and integrity—and did it without misleading materials and virulent attack ads that mired contests for most other public offices (Barnes, 2006).

Much the same letter could have been and perhaps was written after past elections in Columbus (Franklin County). The “sensible and above-board conduct” is attributable to widely shared local expectations about how candidates and their supporters *should* campaign. The oversight committee is the public face of those expectations.

There is further reason for optimism. The concept of judicial campaign oversight committees is viewed favorably by both judges and the public. In 2001 the organization Justice at Stake conducted surveys of random samples of 2,300 state-court trial and appellate judges and, by telephone, of 1,000 randomly selected adults. Both groups were asked if they supported or opposed the following statement: “Independent citizen boards should be established to inform the public about misleading or inaccurate advertising in judicial campaigns.” Eighty-seven percent of the public and 77 percent of judges supported the statements. The judges’ survey suggests that judges place self-imposed boundaries on their own campaign behavior. Asked how strongly they support or oppose the following statement, “Judicial candidates should never make promises during elections about how they will rule in cases that may come before them,” 97 percent of the judges offered strong support.

That ethical standards can be sustained in the absence of official regulation is not unexpected: “After all, the norms at issue emerged long before formal disciplinary processes were even in existence” (Geyh, 2006). Norms make social life possible by allowing us to anticipate how others will act and react, but at the same time norms are constraints on the choices we make. Violating a norm imposes a cost that is not monetary but is real nonetheless: “The cost attached to an action is what we have to give up in order to carry out that action” (Breen and Rottman, 1995:9). For judicial

candidates, one cost of deviating from norms on how to campaign may be a reduction in the esteem they enjoy in their social and professional networks.

The costs that constrain judicial candidate behavior can be better understood in the context of the audiences to which judges and judicial candidates are attentive. Lawrence Baum (2006:25) explains the link through three basic premises drawn from social psychology: "(1) people want to be liked and respected by other people; (2) the desire to be liked and respected affects behavior; and (3) in these respects, judges are people." To varying degrees, candidates for judicial office will be influenced by the reactions they anticipate from their conduct by audiences "whose approval is important to judges for its own sake, not as a means to other ends" (Baum, 2006:158).

If there are reasons to be optimistic, there also are less positive signs. Experience shows that some campaign oversight committees are short-lived. Statewide committees in Alabama, Georgia, Michigan, Ohio, and North Carolina were started and functioned for a relatively short period of time. To a degree, this is inherent in the nature of the way most oversight committees are organized. Most are designed to be active at intervals of two or more years. Between elections, and particularly between contentious elections, institutional memory fades. Success is no protection against being short-lived. The Michigan oversight committee active in the 1988 elections was not continued despite having been viewed as successful and broadly acceptable (Reed and Schotland, 2002).

There is also the need to create a fine balance between a voluntary committee's need to be effective with the need for it to avoid being oppressive. When a newly formed campaign oversight committee in Tampa, Florida (Hillsborough County) criticized a sitting judge, the judge complained that he was not allowed to present his side of the story. This led the committee to reverse its opinion, but only after the election, and the committee was disbanded. At least one media observer felt that the absence of the committee was detrimental to the quality of 2006 judicial campaigns in the county (Krause, 2006).

The Georgia Committee for Ethical Judicial Campaigns, a citizens' body unaffiliated with even a bar association, was repeatedly attacked by a columnist for the *Atlanta Journal-Constitution* as being the "speech police." His complaint was not that the committee gave voice to its opinions, but that "It crosses the line, however, when the opinion is framed as authoritative, based on some expertise or standing, and it has free-speech consequence for the disfavored" (Wooten, 2006). The committee continues to be active, with an ambitious agenda of reforms it will pursue between now and the next election.

Accusations of being "speech police" underline the importance of having a broad-based committee membership. The natural allies of oversight committees, the bar and lawyers generally, have limited credibility with the public in such matters. The growing involvement of nonlawyers in committees offers some protection against being dismissed as part of the establishment. An expert on judicial ethics argues that "committee membership should be extended in nontraditional directions to include

civic activists, school teachers, community organizers, small business owners, and, shall we say, ordinary people” (Lubet, 2002:820). However, it is uncertain if that much diversity would be consistent with the efficient conduct of committee business.

CONCLUSION

In his concurring opinion in *White*, Justice Kennedy focused on the power of persuasion to fill the gap left by overturning the “announce clause.”

The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so (at 4).

The evidence presented here seems sufficient to support the claim that judicial campaign oversight committees meet that job description. The role played in the 2006 elections by the newly formed committees was impressive.

In the long-term, judicial campaign oversight committees will have to demonstrate that they can meet three primary objectives. First, they must succeed in persuading judicial candidates to comply voluntarily with ethical standards promulgated in state codes of judicial conduct. Second, oversight committees must persuade the news media, community leaders, and the public at large that negative advertisements are inappropriate for judicial races. Third, these committees need to broaden their mission to embrace other problematic aspects of judicial election campaigns. One advocate of oversight committees urges that “clearly they can and should take steps to establish and encourage appropriately limited campaign fund-raising and spending” (Schotland, 2007:30).

The challenge to meeting these objectives is considerable, but past performance gives grounds for optimism that oversight committees can contribute to a self-perpetuating set of expectations that judicial candidates are different from those seeking legislative or executive office. **jsj**

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