

## FROM THE BENCHES AND TRENCHES

### AFTER *WHITE*: AN INSIDER'S THOUGHTS ON JUDICIAL CAMPAIGN SPEECH\*

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The 2004 judicial election season in the states might have been different from previous electoral cycles because of the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*. There a sharply divided Court ruled that candidates for judicial office could not be prohibited from stating their views on "disputed legal or political issues." The decision effectively removed a long-standing gag on judicial candidates' statements about salient policy and legal matters. It resulted in some judicial electioneering more typical of legislative and executive campaigns (Liptak, 2004).

The ruling had surprisingly little impact, however, in the six contested judicial elections in Miami-Dade County, Florida, held during the summer of 2004. As a political scientist, I expected *White* to alter the dynamics of judicial campaigns as candidates shared their personal views on topics like abortion, the death penalty, gay rights, and the Cuban embargo. As someone who was personally involved in one of these races, I also understand why the decision had virtually no effect in south Florida. Why judicial candidates in Miami-Dade opted for "politics as usual," running traditional apolitical campaigns based on qualifications and experience rather than taking advantage of the rhetorical opening provided by *White*, is the focus of this article.

I suggest three reasons why judicial candidates did not rush to embrace their free-speech rights on the campaign trail. The first has to do with substantive questions about *White*'s applicability in Florida, as well as the candidates' knowledge and understanding of related legal issues. Second, the legal and civic culture in Miami-Dade County explicitly and implicitly discourages candidates from engaging in issue-oriented speech. Finally, given the nature of Miami-Dade's electorate, a campaign strategy focusing on legal experience and judicial temperament is preferred by the candidates over one that emphasizes politically divisive issues. Following an explanation of the *White* decision and the development of Florida law regarding judicial candidate speech, I examine each of these rationales in the context of my own experiences during the campaign season.

It is not often that we who study the courts have an opportunity to become intimately involved in the practical realities of our subject. For twenty years, I have taught judicial process to undergraduate students using a textbook approach, discussing the relative advantages and disadvantages of each method of judicial selec-

\* The analysis and commentary herein are my own, and do not reflect the thoughts, opinions, or assessments of "my judge." I have intentionally omitted the names of candidates and members of the bench.

tion. Even though I live in a state that selects its trial judges in nonpartisan elections, I rarely considered the practical details of judicial campaigns. That all changed in 2004 when my life partner decided to run for a county-court judgeship, thus providing me with an unforgettable participant-observer opportunity.

From January through August 31, 2004, I worked on the campaign from every angle, whether it was strategizing on votes, hanging signs in the wee hours of the night, designing print ads, or standing on street corners at morning drive time. As I participated in our own successful “battle for the bench,” I also enjoyed a closer view of all the contested judicial races in Miami-Dade County, in which fourteen candidates vied for six judicial seats. The experience gave me the opportunity to think about the impact of the *White* decision not only as a student of law and politics, but also from the “street” perspective of the candidates.

### WHITE AND THE LAW IN FLORIDA

In *Republican Party of Minnesota v. White*, a five-justice majority of the U.S. Supreme Court ruled that the “announce clause” of Minnesota’s Code of Judicial Conduct, which prohibited incumbent judges and nonincumbent judicial candidates from publicly declaring their “views on disputed legal or political issues,” violated the free-speech rights of candidates for the bench. Despite Minnesota’s arguments that the clause was necessary to ensure the impartiality and the appearance of impartiality of the state’s courts, Justice Antonin Scalia, writing for the majority, opined that the state’s justifications did not pass the strict-scrutiny test by being narrowly tailored and serving a compelling state interest. The “announce clause” at issue in *White* was adopted by many states from the American Bar Association’s (ABA) Model Code of Judicial Conduct, developed in 1972 to provide members of the judiciary with guidance on behavior and ethics in their professional and personal lives, including their campaign activities.

Analysis of the law of judicial candidate speech in Florida suggests that it is not clear as to what one can and cannot say, where and to whom one may say it, and when they can or cannot speak. In 1973 Florida had adopted most of the ABA’s Model Code, as well as the “announce clause” (*In re: The Florida Bar—Code of Judicial Conduct*, 1973). The Florida Code of Judicial Conduct (the Code) directed that 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; announce his views on disputed legal and political issues; or misrepresent his identity, qualifications, present position, or other fact.” Canon 7B(1)(c)(1973). In 1990 a federal district court ruled in *American Civil Liberties Union v. The Florida Bar* that Florida’s proscription on candidate speech violated the First Amendment. That same year, the ABA revised its Model Code and abandoned the “announce clause.” A subsequent federal court opinion, *American Civil Liberties Union and Larry Schack v. The Florida Bar* (1994), again held Florida’s “announce clause” unconstitutional, and the Florida Supreme Court finally amended the canon containing the clause in 1994 (*In re: Code of Judicial Conduct*).

The revised Florida Code, while retaining the “pledges and promises” and misrepresentation prohibitions on campaign speech, eliminated the “announce clause” altogether and replaced it with a “commit clause.” Under the new provision, a judicial candidate was not to “(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) 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; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.” In March 2005 the Florida Supreme Court added a fourth prohibition by extending to nonincumbent candidates an existing speech restriction on incumbent judges that they not publicly comment on any pending litigation. The canon’s commentary, relied upon as guidance with respect to purpose and meaning, specifically restates the “commit clause” and cautions that candidates “should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.”

One week before the decision in *White*, the Florida Supreme Court Judicial Ethics Advisory Committee (JEAC) Election Practices Subcommittee issued an opinion directly addressing the issue of campaign speech. Asked whether a candidate may “discuss his or her philosophy regarding general approaches to the construction of the Constitution and Florida Statutes . . . and personal opinions about controversial topics such as religious freedom and abortion,” the committee responded in the affirmative. However, its discussion—that the candidate could “not advocate opposition to or support of political issues,” “make statements which commit or appear to commit the candidate with respect to case, controversies or issues that are likely to come before the Court,” or make a “pledge or promise of conduct in office” (JEAC Opinion, 2002)—suggests the lack of a bright-line distinction between what is and what is not permitted. The opinion seems to suggest to the careful reader that a candidate may say, “I personally favor same-sex marriages,” but she may not say, “I believe that the State of Florida should recognize same-sex marriages.” In either case, candidates should also state that regardless of their personal beliefs, as judges they would be obligated to follow the law.

When *White* was handed down, the JEAC’s acting chair reportedly said that *White* did not affect Florida’s campaign speech regulations because the state had long abandoned its “announce clause” in favor of the “commit clause.” However, an ABA ethics attorney, noting that the “commit clause” is also likely to be ruled as an unconstitutional restraint on political speech, suggested otherwise (Jones, 2005). When the Florida Supreme Court had its first opportunity to examine the state’s Code in light of *White*, its ruling cast even more doubt and confusion on the state of the law for prospective judicial candidates (*Inquiry Concerning a Judge, Re: Patricia Kinsey*, 2003).

In *Kinsey*, the Judicial Qualifications Commission found a judge guilty of violating the “commit clause” because she made a number of pro-law-enforcement and pro-community-will statements and media commercials during her campaign. On

appeal, the Florida Supreme Court rejected outright her arguments that *White* protected her campaign speech, and the justices distinguished Florida's "commit clause" from Minnesota's "announce clause." Although the compelling state interest relied upon, "to preserve the integrity of our judiciary and maintain the public confidence in an impartial judiciary," and the conclusion that the canon is "narrowly tailored to protect the state's compelling interest without unnecessarily prohibiting protected speech" sound very much like the justifications the *White* majority rejected, the U.S. Supreme Court denied review (*Judge Patricia Kinsey v. Florida JQC*, 2003).

In anticipation of the 2004 election season, the Florida JEAC was once again asked for its opinion on whether a candidate may "announce the candidate's views on disputed legal or political issues, orally or in writing, consistent with" *White*. Again, the JEAC, citing *Kinsey*, answered in the affirmative, "provided the candidate also states the candidate will uphold the law." The discussion warned, however, that candidates should exercise caution in invoking their First Amendment rights during the campaign season: "The parts of Canon 7 concerning promises, commitments, and pledges will be enforced" (JEAC Opinion, 2004b).

Florida's Code contains several other significant speech restrictions. In Florida's nonpartisan elections, candidates may not reveal their personal partisan affiliations. At partisan events, which they may attend if all candidates for the office are invited, candidates are limited to speech in the form of an address or open question-and-answer sessions (JEAC Opinion, 2000). Finally, the content is restricted to speech "on behalf of his or her candidacy or on a matter that relates to the law, the improvement of the legal system, or the administration of justice." Canon 7(C)(3) goes on to state, however, that "[t]he candidate should refrain from commenting on the candidate's affiliation with any political party or other candidate, and *should avoid expressing a position on any political issue*" (1994, emphasis added). The canon implicitly suggests that candidates should be able to separate their candidacy and a "matter that relates to law" from "positions on any political issue," something that might be more difficult after *White*. Neither the JEAC nor the courts have been asked to examine the issue in the context of the First Amendment, but the matter is certainly ripe for challenge.

A final speech restriction, in Canon 7(C)(1), forbids candidates, including incumbents, from soliciting attorneys for campaign funds or publicly stated support, generally understood to be public endorsements. However, after a federal appellate court ruled unconstitutional an identical Georgia solicitation and endorsement provision on First Amendment grounds (*Weaver v. Bonner*, 2002), a Florida judge seeking reelection queried the JEAC on the application of that case. The JEAC upheld the canon's prohibition on candidates' direct solicitation of attorneys for contributions and endorsements, but avoided any discussion of the constitutionality of Florida's rule (JEAC, 2004a). Despite this ruling, one Miami-Dade incumbent directly solicited funds and public endorsements from attorneys and posted a Web site that solicited campaign contributions from the community at large. Because his candida-

cy remained unchallenged, I suspect no one was motivated to file a formal complaint and pursue the matter through the grievance process.

Despite the development of Florida's rules on judicial campaign speech, the real question at hand is how much candidates knew—or did not know—about what they could say during their campaigns. All judicial candidates in Florida should be aware of the Code, especially Canon 7, as the Code requires that, within ten days of filing for office, they sign a statement that attests to the fact that they “have received, have read, and understand the requirements of the Florida Code of Judicial Conduct.” Most candidates also knew about the *White* decision at a cursory level, but they were probably not aware of the differences between the Minnesota and Florida canons nor were they cognizant of the *Kinsey* and *Weaver* decisions. Only one candidate, a challenged incumbent who had served a number of years on the JEAC, was likely well versed in the intricacies of the Code, the JEAC opinions, and the legal rulings governing campaign speech.

If the candidates were unsure as to what they could or could not say, they were not alone; so was the local body responsible for reviewing campaign practices in Miami-Dade County. The Judicial Campaign Practices Commission of the Dade County Bar Association (DCBA) had to clarify its own advice to Miami-Dade candidates. In a March letter to candidates, the commission chair stated that “the Commission believes that judicial candidates may be legally able to directly solicit support and contribution [from attorneys],” but requested that they “voluntarily agree not to directly solicit campaign contributions” (Goodman, 2004a). Included with the letter was a copy of a voluntary Elections Campaign Pledge that candidates could sign and submit.

The pledge, which has been used since 1992, commits candidates to conducting “positive and ethical campaigns” by conforming with the Code, bar rules and regulations, and statutes; refraining from appeals to prejudice and limiting criticism of opponents to qualifications; personally approving campaign materials; upholding the “honor and integrity of the legal profession”; and assuming responsibility for the actions of those who work for the candidate's campaign and repudiating behavior that violates the pledge (DCBA, 2004). It did not directly address the solicitation issue. Three weeks later, the commission sent out a second letter retracting its earlier opinion that the canon was probably unconstitutional in the wake of *Weaver*. This time the commission said it had “no formal opinion as to whether *Weaver* . . . invalidates Florida's Judicial Canon 7C(1), nor do we opine as to whether a candidate for a judicial seat in Dade County can or should rely on *Weaver*” (Goodman, 2004b).

We became more than familiar with the Code, especially Canon 7, early in our campaign when we were planning our strategy to reach the 11,000-plus members of the Miami-Dade legal community. In June, the county bar association oversees the administration of a poll that asks attorneys to evaluate sitting judges and nonincumbent candidates. The results, released to the public in advance of the elections, are regularly cited by the media and by candidates in their campaign materials.

Candidates who work in large private firms and government offices or have practices, e.g., personal injury, where attorneys network extensively have an advantage over candidates who work in a small office or in a discrete legal arena in that the former are likely to be more widely known and will naturally receive a higher number of responses on the poll. The more responses, the more likely it is statistically that the poll reflects an accurate appraisal of the candidate's fitness for the bench.

My candidate fit the profile of a lawyer in a small practice, so we needed a tactic that efficiently and effectively "introduced" the candidate to the legal community without violating the canons or the DCBA pledge, which the candidate had signed. We were especially aware of the prohibition in Canon 7(C)(1) on soliciting attorneys for campaign funds or "publicly stated support." Our solution was to craft a letter of introduction, signed by the candidate, that was mailed to all attorneys in Miami-Dade County in advance of the bar poll. The letter did not ask for money or endorsements nor did it make any political statements, commitments, or pledges. Rather, it simply described the candidate's personal background and professional experience and asked that attorneys "consider my experience, my commitment to public service, and my professional reputation in the legal community when you respond to the bar poll and when you vote on August 31st."

To our knowledge, no candidate had ever written directly to attorneys in Miami-Dade County. Thus, we were not surprised when our letter prompted our opponent's campaign treasurer to file a complaint with the DCBA's Judicial Campaign Practices Commission, alleging a violation of the solicitation-and-endorsement clause. Our response was to deny any transgression and to draw parallels between the attorney letter and traditional campaign brochures, law-office walk-throughs, and candidate attendance at bar-related events, and to assert that the "speech" in the letter was restricted to qualifications and experience only. The commission ruled in our favor on the initial complaint, but took the opportunity to raise a second issue. Citing a "Bar Poll Rule" that prohibits virtually everyone (candidates, bar members, "or any other persons") "from taking any *direct or indirect action* which will in *any way* affect the results of the poll," the commission invited both sides to address whether our letter had violated this rule (Promoff, 2004; emphasis added).

The response by our opponent's treasurer was a second complaint citing the "Bar Poll Rule," alleging that our letter was a direct solicitation for favorable poll ratings. In our rebuttal, we argued that if the rule were applied literally, it would prohibit all campaign activity that might influence members of the bar in advance of the completion of the poll. That would include fund raising by candidate committees, candidate attendance at bar functions, distribution of campaign material that might inadvertently find its way into the hands of bar members, and even the posting of campaign yard signs or billboards that might be visible to attorneys. In essence, all speech—regardless of the source or the content—about judicial candidates would be prohibited before the bar poll's release in late June, well after the campaign season had commenced. We suggested that a more reasonable reading of the rule would pro-

hibit activities that impugn the integrity of the poll results, such as vote trading, ballot theft, group voting, or coercion. Not surprisingly, the commission's advisory opinion found in our favor, noting that the rule "is broad and would arguably . . . prohibit any person from publicly commenting on a judicial candidate's qualifications before the Poll was completed." The commission also took the opportunity to establish its own understanding of the rule as prohibiting "conduct which would affect the integrity of the poll results" (Ezell, 2004).

During this process, we considered what it would have meant to defend our actions had the commission ruled that we violated the canon. We realized rather quickly that the costs of prevailing on the merits might have outweighed the benefits of the transgression. Mounting a legal challenge to a canon or statute costs a judicial candidate precious time, imposes a great distraction, and creates unnecessary stress in addition to the financial costs associated with litigation. More important, how a lawsuit is portrayed by the media and perceived by the community could ultimately cost the candidate the most important resource they have—voter support. Rather than fight for change and push for more speech, I believe that we would have been unwilling to test the limits of the law and submit to the burdens of litigation. The risks were just too great.

The exercise of responding to the two complaints better educated us on the variety of rules and regulations to which we had not previously paid much attention, including the Florida Bar's Rules of Professional Conduct and the JEAC opinions. However, once we resolved the complaints, our focus returned to campaign tactics and strategies, and we had no need to delve further into the intricacies of campaign speech. Only in preparing for this article did I methodically examine the JEAC opinions, the *Weaver* decision, and earlier cases on Florida's "announce clause." It was then that I stumbled upon an online document buried on the Florida Supreme Court's Web site, "An Aid to Understanding Canon 7: Guidelines to Assist Judicial Candidates in Campaign and Political Activities" (JEAC, 2004c). Because it contains important guidance and references for the candidate on campaign speech and conduct, it should have been required reading for every judicial candidate in Florida's 2004 elections. Yet even if they had this document to guide them, the conflicts in Florida law would have kept candidates uncertain of *White's* application.

## CAMPAIGNING AS USUAL

Judicial candidates preferred to campaign on experience and qualifications alone, a style that was also embraced by the broader legal and civic community. Legal professionals, who should have had more knowledge about the *White* decision and its implications, reinforced traditional campaigning by allowing the candidates to avoid political speech. For example, at a judicial forum hosted by a local bar association, the president of the association—an attorney—carefully explained to the nonlegal audience that judicial candidates are not permitted to offer their opinions or take a position on matters of law due to the Code of Judicial Conduct. He urged the audience

to respect these limitations. And when, shortly after the date by which candidates must have declared their seat and have met all requirements necessary to run for the position, the chief judge of Miami-Dade's trial courts invited the judicial candidates to a forum, advised them to avoid partisan activities, and urged them to uphold the integrity of the profession. As noted earlier, the local bar's "Judicial Elections Campaign Pledge" asked candidates to run their campaigns by "emphasizing qualifications for office" and "limiting criticism . . . to challenges based on that person's qualifications" (DCBA, 2004).

Civic groups, unions, and the local newspapers also play an active role in elections with their public endorsements, commodities that are particularly valuable to judicial candidates in our large, metropolitan county. Organizational endorsements serve as a low-cost, highly effective method of reaching voters that the candidate may never encounter during their campaign. The endorsing organization generally bears the costs of publicizing its slate of candidates to its membership and may even support their endorsed candidates with a financial contribution. Endorsements are prominently displayed in candidate advertisements because they cue potential voters to organizations that think highly of the candidate. Despite the decision in *White*, nearly every endorsement interview began with a colloquy by the chair of the interview committee, acknowledging the speech limitations imposed on judicial candidates and admonishing fellow committee members to respect those constraints. Thus, the 2004 endorsement process permitted the candidates to campaign in traditional fashion.

There were a few exceptions. The Dade County Police Benevolent Association asked one question that clearly went to the heart of personal viewpoints when it inquired, "Do you consider yourself conservative, moderate or liberal on law enforcement issues?" The *Miami Herald's* exhaustive questionnaire focused on a number of legal issues that would have forced judicial candidates who chose to respond directly and fully to conclude their commentaries with the caveat, "If elected, I will follow the law." For example, one *Herald* question on Florida's laws regarding public records and open meetings asked, "What, if anything, do you think should be exempted from these laws?" Another sought an opinion on sentencing guidelines and asked whether "they help or hurt the administration of justice."

SAVE Dade, a well-established gay-rights organization that regularly endorsed legislative and executive candidates for office, conducted its first-ever endorsements of judicial candidates in the 2004 election. Senior judges reportedly advised several candidates not to respond to some items on the questionnaire. Among questions that may have merited greater scrutiny by the candidates was one that asked whether Canon 2(C), stating that a judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin, should be modified to add sexual orientation to the list of discriminatory categories. We answered the question, viewing it as a request for a personal opinion on an administrative matter that affected court operations, which candidates have been permitted to answer in the past. Our answer included the caveat that if elected, the

judge would be required to uphold the law. We were less comfortable answering two follow-up questions that inquired whether the candidate would be “willing to” ask the Florida Supreme Court to change the canon and “willing to” join a committee to seek future change in the canon. To us, these queries came dangerously close to a commitment or pledge for future action on the part of the candidate, even though the language was not an explicit promise to act.

The exception to the traditional endorsement survey, which was significant in drawing directly on *White*, came from the Miami-Dade Christian Family Coalition. This organization sent a candidate letter specifically citing the *White* decision and referring to the 2004 JEAC opinion, noting that it permitted judicial candidates to state their personal views on disputed issues; a copy of an online *Florida Bar Journal* article that discussed the JEAC opinion was also included (Verdugo, 2004). Central to the mailing was the “2004 Kelly Judicial Candidate Survey,” apparently developed in the wake of *White* by an Atlanta attorney and used in other communities as well (Ringel, 2004). It asked candidates to identify one of two selected quotes—one from a Supreme Court majority opinion and one from a dissent—with which the candidate most agreed, with respect to abortion, sodomy laws, prayer at public schools, tuition-voucher programs, and state funding of theology programs.

In seeking responses, the letter explaining the survey was, at best, confusing and, at worst, misleading. The letter noted that the JEAC “determined that Canon 7 permits candidates to state their personal views, even on disputed issues,” provided that the candidates stress that they will uphold the law. It went on, however, to state that the “survey does not require you, as a judicial candidate, to express your personal opinions regarding political issues,” but instead asks the candidate for their judicial philosophy. The letter even provided an example, “You may personally be anti-school choice; however your judicial philosophy may be that the implementation of a school choice program by a state does not violate the Establishment Clause” (Verdugo, 2004). Putting aside the misleading distinction between judicial philosophy and personal opinion, the issue areas included in the survey were undoubtedly disputable political matters.

We never received any correspondence, including the Kelly Survey, from the Christian Family Coalition and they did not issue an endorsement in our race. We knew that other judicial candidates had received the survey and that several responded to some or all of the inquiries, but few advertised their endorsement by the Christian Family Coalition. The coalition posted its endorsements in a “secure” location on its Web site that was accessible only to those who registered online with personal information, including a voter registration number. I believe that the survey played a key role in the one judicial race decided by a run-off election only because the *Miami Herald* reported on the coalition’s endorsement of one of the candidates. The candidate had answered one question on the Kelly survey—on sodomy laws. That response, in gay-friendly Miami-Dade, was a strategic error that cost the candidate a large number of potential votes and, perhaps, the election.

Another judicial candidate who completed and submitted the coalition's survey, but whose answers are unknown, quickly learned the difficulty of engaging in political speech. He had previously received the endorsement of SAVE Dade, the large gay-rights group. When word got back to SAVE Dade, the group contacted him and explained the inherent conflict that would occur if the candidate received both endorsements. The candidate promptly and willingly withdrew his name from endorsement consideration by the Christian Family Coalition and the incident never became public. (See Ringel, 2004, for similar endorsement tensions in Georgia's statewide judicial races.)

Queries about partisanship and personal views from individuals were generally manageable and easily dismissed or avoided by falling back on the antiquated version of the Code with an explanation that the canons prohibited judicial candidates from responding. However, in one encounter following a fund-raiser, an individual approached my candidate; repeatedly demanding to know the candidate's partisanship, he "threatened" to vote for our opponent without this information. The candidate as insistently—but politely, of course—responded that the question was off-limits according to the judicial canons. Eventually he conceded, "That's the right answer; you've got my vote." We suspect, but will likely never know, that the wrong answer might have resulted in a campaign-practices complaint.

The elections of 2004 in Miami-Dade County were evidence that judicial candidates could still withhold their personal views from the public forum by relying on a traditional understanding of the law. Repeatedly, every judicial candidate avoided answering questions by giving the standard response: "I'm sorry, but as a judicial candidate, I am not permitted to answer that question." Whether candidates actually knew that they could answer a politically loaded question and simply chose not to, or whether they truly believed the law continued to impose restrictions, is difficult to know. What was clear was that neither the legal nor the civic communities except the Christian Family Coalition seemed aware that the rules of judicial campaigning had changed.

Even if it is clear that *White* and Florida law permit candidates to speak on salient political and legal topics, and even if the legal and civic communities ask probing questions, future judicial candidates in Miami-Dade and elsewhere may continue to avoid political speech. During our own campaign, we often commented on how lucky we were not to engage in the political rhetoric we heard in the mayoral and legislative races. We believed that discussing policy or explaining personal beliefs could only be costly in terms of voter support; it was much less confrontational to talk about one's legal experience, community service, and educational background.

This is especially true in a heterogeneous, sprawling community like Miami-Dade where the ethnic and racial diversity of 2.25 million people is mirrored in its political landscape. At the time of our election, the county's registered voters were divided between Democrats (43 percent) and Republicans (35 percent), with nearly 21 percent non-party-affiliated or unknown (Miami-Dade Supervisor, 2004). One

only need live in this community for a short time to understand that an inadvertent stumble into issue politics could just as likely lose voters as win electoral support. Talking about one's jury trial experience will not cost a judicial candidate anywhere near the number of votes that a public position on the Cuban embargo, abortion, or the death penalty will lose at the polls. Political speech may be less risky, however, in a community that is homogeneous or where a clearly defined majority maintains political power. Had we been running our campaign in a rural county in north Florida, for example, it may have been to our benefit to discuss the virtues of displaying the Ten Commandments in the courthouse lobby.

Candidates know that they are best served by tailoring their speech to the interests of their audience. Whether or not judicial candidates eventually opt to engage in more political speech as a result of *White* will not transform this practice. When candidates attend functions in middle-class neighborhoods or for senior citizens, they will be more likely to emphasize their experiences in fighting crime or the role of courts in maintaining a safe community, and at events with a female audience, they will focus on their community service to children and families. Business meetings likewise demand that candidates exhibit their experience in the area of civil litigation. And I suspect that judicial candidates have always been more willing to engage in discussions about political and legal issues in one-on-one situations where they can simply confirm what the listener believes, more closely tailor their comments to what the listener wants to hear, or even speak openly with little fear of reprisal, publicity, or backlash. Whether the speech is in print, on radio, or delivered in person, the successful candidate learns to target the message to the audience.

## CONCLUSION

In Miami-Dade County's 2004 judicial elections, candidate speech was virtually unaffected by the *White* decision, but Supreme Court decisions do not generally spark revolutionary and immediate change in the social, political, or legal arenas. The Court's decision must be studied by scholars, tested by practitioners, and disseminated to those who are most affected. The decision's impact may remain murky, as the issue of judicial speech in Florida suggests. Whether *White* applies only to states that have an "announce clause," or whether it also strikes down Florida's "commit clause" and other constraints on judicial speech, is a legal question that will likely reach the U.S. Supreme Court. For now, confusion remains as to what candidates may and may not say. This lack of legal clarity constrains judicial candidates, who have a singular goal—winning their elections. Testing legal principles and generating questionable press in a gut-wrenching campaign is simply not a desirable course of action.

My experience also confirms that extralegal factors shape the impact of a court decision. Our legal community is content with a culture in which judicial candidates run on experience and qualifications rather than on political positions. Similarly, most civic organizations continue to ask the same questions they have asked for the past decade, unwittingly perpetuating the traditional judicial campaign. Even when

provided the opportunity, candidates tended not to speak on political issues. They were either unaware of legal changes or simply recognized the electoral liabilities inherent in political speech, especially in our heterogeneous community.

This restraint could easily change during the next judicial election cycle. If just one candidate tests the limits of campaign speech publicly, other candidates may find themselves in the difficult position of trying to explain why they are unwilling—not unable—to speak about politics and law. Such an evolution in judicial campaigns could dramatically transform current campaign practices. It would likely change the way candidates currently raise money by mediating the monetary influence of lawyers who have traditionally supported incumbents, while increasing the potential for contributions from interest groups. Strategists may have to identify the most popular political position early in the campaign season and use it as a theme. Finally, expressing personal political beliefs would largely undermine the nonpartisan electoral process in Florida and elsewhere. While party organizations may continue to be barred from engagement in judicial elections, a candidate would not be prohibited from expressing her position on a litany of cue issues that would all but say, “I am a Republican.”

What we can conclude from this analysis is that *White* did not loosen the tongues of judicial candidates in Miami-Dade. Even those who knew or should have known that candidates had a bit more freedom to discuss their personal views were unwilling to break with tradition. I suspect that the future course of judicial campaigns will be up to the individual candidates who will decide whether political speech complements their electoral strategy. Ultimately, however, having the *right* to speak does not impose a requirement that one *must* speak. Many judicial candidates will likely choose not to enjoy the freedom granted by *White*. Traditions die hard. *jsj*

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- Judge Patricia Kinsey v. Florida Judicial Qualifications Commission*, 540 U.S. 825 (2003).
- Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).
- Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).