

# ENDORSEMENTS IN JUDICIAL CAMPAIGNS: THE ETHICS OF MESSAGING

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*State judicial elections are unlike races for legislative or executive office in that judicial candidates are subject to codes of conduct that curtail what they may say during their campaigns. As a result, endorsements from organizations and elites are especially important in judicial campaigns because they serve as signals to the electorate that the candidate is acceptable to identifiable constituencies and communities. This article discusses the sources of judicial endorsements, the processes by which endorsements are made, and how endorsements can be used strategically by judicial candidates. It also examines endorsements in light of the ethical limits imposed by the need to maintain an independent and impartial judiciary, and proposes avenues of reform that may curtail improper messaging by candidates for the bench.*

Judicial candidates are in the difficult position of running for office on little more than their personality, professional experience and reputation, and vague promises of fairness and justice. Unlike their legislative, executive, and municipal counterparts who promise voters a litany of policy positions, candidates for the bench find themselves gagged on the campaign trail by ethics rules, codes of conduct, and the inherent nature of the profession to which they aspire. That gag may be even tighter when the candidate is running for office in a state that selects its judges in nonpartisan elections. Judicial candidates cannot promise potential voters much more than, "If elected, I will follow the law." Given these limits, the tradition of garnering endorsements from organizations and community leaders is an important element of judicial campaign strategy.

Several organizations have recently placed judges and judicial candidates in the ethical quandary of having to decide whether to engage in the endorsement process. Sparked by the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, interest groups are revising their endorsement processes to probe the personal beliefs of judicial candidates on salient and controversial political issues. Such practices have the potential to compromise a candidate's appearance of impartiality and can possibly limit the ability of a judge to hear a case. However, endorsements served as messages to the public of a candidate's acceptance to particular constituencies and communities long before judicial candidates were gagged by *White*.

In this article, I examine the practice and politics of the endorsement process in the thirty-one states that employ partisan or nonpartisan elections for some or all of their judges. Following a review of the various types of endorsements available to judicial candidates and candidates' perceptions of their import, I discuss the process of securing endorsements and the ethical dilemmas that endorsements can pose for judicial candidates, especially in the wake of the *White* decision. Much of the back-

ground for this discussion stems from my extensive involvement in the 2004 judicial campaign season in south Florida and from conversations with the leadership of endorsing organizations and candidates running for judicial office in Florida.

To prospective candidates who are mining this article for ideas on managing their own campaigns, a word of caution is in order. Do your homework. Know and study your own state's code of judicial ethics, the opinions of your judicial ethics advisory committee, and relevant court opinions on campaign ethics. While the observations made here may be particularly useful to candidates running statewide, regionally, or in highly populated urban areas, there are vast differences among states with respect to the ethical standards to which judges and judicial candidates are held. For example, some states prohibit judicial candidates from personally seeking any endorsements; others, e.g., Florida and Arkansas, prohibit the solicitation and use of endorsements from partisan organizations, or, as in North Dakota, the solicitation of any "political" endorsements. States may even prohibit the advertisement of endorsements by candidates if it would "undermine the candidate's apparent independence and impartiality" (Judicial Ethics Advisory Committee, Arizona Supreme Court, 1996). Sitting judges, for example, in Florida, may also be prohibited from endorsing judicial candidates, while garnering judicial endorsements may be regular practice elsewhere, such as Wisconsin and North Carolina. In short, it is imperative that judicial candidates familiarize themselves with their jurisdiction's prevailing laws and ethical guidance.

### ENDORSEMENTS AS CAMPAIGN STRATEGY

Ask candidates who have won contested elections what they believe the key was to their success and they will likely engage in a lengthy, broad-ranging review of a number of their campaign efforts. As seasoned political consultants know, there is rarely one event or tactic that results in a successful electoral campaign. Rather, success is found in developing a multifaceted strategy that uses available resources efficiently and effectively to "get out the vote." Garnering endorsements is just one of the tools available to judicial candidates, but for judicial candidates running statewide or in diverse, metropolitan districts, endorsements are a necessary, if not essential, component of a successful campaign.

Due to the complexity of electoral campaigns, it is difficult to assess the impact of endorsements on a candidate's success. In politics, however, perceptions, whether correct or incorrect, become reality. Because candidates and endorsing organizations believe that endorsements are important, candidates act as though these public affirmations are essential to their electoral success. As a result, endorsements are gathered like trophies won through hard-fought competition to be proudly displayed in campaign literature and boasted of during candidate appearances.

Successful judicial candidates also think strategically about whom, both in terms of individuals and organizations, they want endorsing their candidacy, and this

assessment is made from a number of perspectives. The key question for the candidate is what any specific endorsement will bring to, and take away from, the campaign. Organizational endorsements, for example, can directly enhance name recognition if the endorsing group is large and effectively communicates with and mobilizes its members. An endorsement may also generate much-needed campaign contributions from the organization and from its membership. Even more valuable is the endorsement of an organization that provides broad-based campaign support to its supported candidates by posting signs, calling voters beyond their organizational bounds, and working the polls on Election Day. Endorsements from prominent members of the community may do nothing more than allow the candidate to advertise the endorsement, but doing so allows a candidate to enlarge the base of support. Elite endorsements permit the candidate to gain the confidence of voters who, although they know nothing about the candidate, will vote for him or her solely out of respect for the endorsing individual. Ultimately, endorsements serve as important messages to voters, and as discussed later, the message may even be one that the judicial candidate cannot personally deliver.

Endorsements in judicial campaigns come from a variety of sources. Perhaps the most visible and frequent endorsements are those made by the local newspaper editorial boards. Although newspapers are declining in importance in many communities as a result of electronic media and Internet communications, some readers continue to rely on these endorsements as their primary source of information in low-profile campaigns, like those for the bench. Readers who use editorial endorsements as cues to their voting decisions believe that the endorsements are the product of a reliable investigation that fully vets the candidates on issues that ought to be important to the community, and they trust the editors as a source of quality information in making their voting decisions.

Newspaper endorsements are also perceived to be important by judges and editors alike. One national survey of retired state supreme court justices found that 72 percent believed that newspaper endorsements were very important or somewhat important to judicial campaigns (Hale, 2001). Editorial writers also believe that their endorsements have a moderate to high influence on campaigns (Hynds and Archibald, 1992). And one study of judicial elections found that justices who were endorsed by their regional newspapers garnered an additional 6.11 percent of the vote over those who were not endorsed (Wiseman, 2002).

Endorsements in judicial races may also come from local organizations, and those organizations can be as diverse as the community itself. Potential endorsing organizations may be legal, economic, or political, although some groups have multiple purposes. The most popular endorsements in nonpartisan judicial elections are those given by legal organizations directly concerned with the operation of the courts, especially law-enforcement organizations and voluntary bar associations. Police and corrections officers' employee unions and related social organizations are often very active in judicial elections. In South Florida, these include the Police Benevolent

Association and the Fraternal Order of Police and nonunion groups like the National Latino Peace Officers Association.

Voluntary bar associations organized to represent the interests of particular demographic groups of attorneys, like the Caribbean Bar Association or the women's bar, as well as associations organized around practice areas, such as trial attorneys, the criminal-defense bar, or family-practice lawyers, may also endorse judicial candidates. However, some bar associations deliberately stay out of the endorsement process completely, while others choose to conduct and publish bar polls that include questions specific to their particular interests. In South Florida, the Wilkie D. Ferguson, Jr. Bar Association, representing black attorneys, conducts a judicial candidates forum that is open to the public and makes formal endorsements. The League of Prosecutors, a group of active and former state and federal prosecutors, invites candidates to a "meet-the-candidates" event and subsequently issues endorsements. The Florida Association of Women Lawyers sponsors a similar "meet-the-candidates" event, but issues no endorsements. The Cuban American Bar Association in South Florida issues no direct endorsements. Instead, it asks its membership to rate judicial candidates on a three-point scale with respect to general qualifications for the bench (exceptionally qualified, qualified, or not qualified) and to provide a "yes" or "no" answer to the question of whether the candidates treat Hispanics fair and equitably. The Dade County Bar Association also conducts a bar poll using only the three-point qualification scale, and its results are always cited by favorably ranked candidates and the local newspaper.

Economic organizations can also play a significant role in judicial campaigns through the endorsement process. Labor unions, already adept at mobilizing their membership, have active political action committees that play a very significant role in South Florida's judicial elections. The South Florida AFL-CIO, the umbrella organization for numerous unions as diverse as university and public-school faculty, painters, plumbers, and aircraft mechanics, issues endorsements in judicial campaigns, as does AFSCME, the union for state and municipal employees. Chambers of commerce and business organizations that have associated political action committees may also issue endorsements.

Political organizations, ranging from the local neighborhood or condo association to the sophisticated political machine, may also endorse judicial candidates. In states that hold nonpartisan elections, judicial candidates are generally not permitted to identify or announce endorsements from political parties or associations identified with political parties, whether or not those endorsements are solicited, and candidates may not declare their own party affiliation. In Florida, for example, judicial candidates may attend partisan events only under certain circumstances and must tread carefully when it comes to using pictures or endorsements by prominent party officials in their campaign literature. Nonpartisan political-advocacy groups, however, have long endorsed judicial candidates. Local chapters of organizations like the National Women's Political Caucus or the Concerned Women of America, which are

nonpartisan, are not prohibited from endorsing judicial candidates, and candidates are not restricted in advertising those endorsements. In South Florida, the Christian Family Coalition, the African American Grassroots Committee, SAVE-Dade (a gay-rights organization), and the Northeast Dade Leadership Council (a neighborhood organization) are some of the more visible political organizations that endorse judicial candidates.

Community elites are also a source of endorsements for judicial candidates. Securing the support of other elected officials or prominent members of the social and business communities allows the judicial candidate to benefit from someone else's name recognition and stature among voters. This can be effective in reaching sectors of a community to which the candidate has little access. For example, broad-based support of Hispanic legislators and local elected officials can provide the non-Hispanic judicial candidate with credibility by association among voters in the Hispanic community. Much as legislative candidates use the coattails of a successful presidential contender, judicial candidates can use the coattails of those who have already achieved success in the electoral arena. More interesting, however, is the proliferation of endorsement slates by individuals who are low-profile political activists or simply politically attentive citizens who have a large e-mail base. It is not unusual for a candidate to be given a copy of a "slate" developed by someone in the community, previously unknown to the candidate, who has endorsed his or her candidacy for the bench.

Endorsements by individual attorneys are also important to judicial candidates because attorneys often have the best opportunity to evaluate incumbents on their performance and to know challengers through their professional activities and associations. Widespread support for one candidate by prominent members of the legal profession can send a powerful message to the electorate that those who are most knowledgeable about the court's work and who are in the best position to evaluate the candidates have a clear preference. Most states recognize that allowing judicial candidates to solicit attorneys directly for their public support is problematic in that attorneys may feel coerced into the endorsement; those states require instead that a campaign committee be charged with soliciting both endorsements and campaign contributions on behalf of the candidates. While the practice may temper some of the ethical concerns regarding the direct solicitation of funds, to suggest that judicial candidates and incumbents are unaware of who supported and who refused to support their campaigns would be naive.

Finally, a few states, like Wisconsin, North Carolina, and Oregon, permit sitting judges to publicly support candidates in judicial races. Other states, like Florida, expressly prohibit both sitting judges and judicial candidates from lending any public support to candidates for the bench. Given the lack of research in this area, we do not know whether endorsements by sitting judges are given on the basis of that judge's professional evaluation of the candidates, political preferences, or simply collegial and social relationships. In states with partisan elections, party politics is like-

ly to dominate this endorsement process. Beyond partisanship, however, incumbents may enjoy an advantage in securing endorsements from other judges simply because they have daily or frequent contact with each other. For the incumbent, an endorsement from one's colleagues serves as a valuable message to the electorate that those who work with the judge regularly and who are most knowledgeable about the judicial process believe the incumbent should be reelected. Even more valuable, to incumbents and challengers alike, is the endorsement of a chief justice, members of the state's highest court, or judges sitting on a higher court than the one to which the candidate aspires. The message is that the endorsing judge is sufficiently familiar with the candidate or the candidate's professional work, either as a judge or as an attorney, and believes the candidate to be well-qualified to serve.

Endorsements by sitting judges may have significant value to the public, but they can also present an ethical conflict or the appearance of a conflict when the endorser sits on a court that reviews the successful candidate's later rulings. The endorsing judge has publicly expressed a personal bias in favor of the now-sitting judge and, therefore, has a vested personal interest—in his or her own reputation—in that judge's success. To overrule the endorsed judge's decision would be to suggest publicly that one was wrong in evaluating the candidate. Thus, judicial endorsements can potentially undermine the confidence of parties to litigation that they will be treated fairly when challenging judicial decisions.

### THE ENDORSEMENT PROCESS

Identifying the organizations and individuals likely to provide endorsement support is only the first step of securing a valuable endorsement. More difficult is negotiating the maze of processes established by the organizations or individuals in determining which judicial candidate they will endorse and when. What follows is a general description of the common avenues of securing organizational and individual endorsements. Most states require that candidates who receive endorsements have evidence of the endorsement in writing, and even if this were not required by law, candidates would be ill-advised to advertise an endorsement for which they do not have tangible evidence, even if that endorsement is from a best friend. Excuses of miscommunication or staff shortcomings do not play well to the general public and can be an embarrassment when a judicial candidate must retract an endorsement. And candidates are well advised to keep a copy of all written correspondence to endorsing organizations, especially responses to questionnaires.

The most time-consuming endorsement process is the one that, on its face, appears to be the most fair and evenhanded to all candidates, and it is one that reputable newspapers and established organizations frequently use. It involves a three-step process in which all candidates for a judicial seat are invited to participate. Generally, the endorsing organization asks the candidates to complete a questionnaire and participate in an interview, and, before making its endorsements, the organization conducts its own independent investigation into the candidate's background. The extent of

that investigation varies, of course, depending upon the organization's resources, contact with the legal community, and interest in confirming information that the candidates have submitted. Consider the endorsement process by the *Miami Herald*, South Florida's largest newspaper and the only daily paper in Miami-Dade County.

Judicial candidates receive an invitation from the editor to participate, accompanied by a written questionnaire that must be completed and submitted in advance of a scheduled interview. The *Miami Herald's* 2004 judicial questionnaire asked thirty-six questions that ranged from demographic information, including the candidate's financial and employment history, to open-ended questions like, "What is your opinion of sentencing guidelines? As a rule, do they help or hurt the administration of justice? Explain." "When should court files be sealed?" and "What makes you the most qualified candidate in this race?" The submission of a candidate's written responses to the questionnaire is followed by a thirty-minute interview in which the candidates for a seat appear together before the newspaper's editorial board. Reports from candidates who have participated in these interviews suggest that each interview session is unique in that its direction is largely dependent upon the candidates' personalities, as well as the board members' inquiries.

While many major newspapers engage in a rigorous endorsement process, value judgments remain at the heart of any editor's decision making, just as they do for organizations' endorsement decisions. Some editorial boards, for example, are viewed as pro-incumbent, and have a history of supporting judicial incumbents even when the incumbent judge has lost the confidence of the community. Other editorial boards are known for their partisan leanings, which come through even when the election is formally nonpartisan. As with politics in any venue, the coveted editorial endorsement may be attained through personal connections; the candidate who hires a political consultant who is also the legislative lobbyist for the newspaper undoubtedly enjoys a marked advantage with the local press over her opponent.

The newspaper endorsement is especially valuable on the campaign trail because judicial candidates struggle for media exposure. Miami-Dade judicial candidates have come to expect at least one news article of six to eight paragraphs featuring their race in the *Miami Herald* in advance of the editorial endorsements. Anything more during campaign season would appear only in response to some serious transgression or other newsworthy action by a candidate. The endorsement, which is four to six paragraphs in length and appears on the editorial page, is followed by the subsequent publication of the candidate's name as part of the paper's slate of endorsements for the full ballot on or near Election Day.

A variation on this comprehensive endorsement process is one in which the candidates complete a candidate questionnaire and then appear at a candidates forum held by the endorsing organization. Each candidate is given equal time to introduce him- or herself and to address the audience on any issue. The membership or an endorsement committee meets at some time after the forum, votes on the candidates, and publicly announces its endorsements.



The Wilkie D. Ferguson, Jr. Bar Association, Miami's black bar organization, employed one of the more noteworthy endorsement processes. This group hosts an event in the black community at which candidates for each judicial seat are given an allotted time to introduce themselves and are then asked a number of probing questions by a panel of three members of the bar. Both the audience and the panel generate the questions. Following the forum, audience members are permitted to speak directly with the candidates; this makes the event a particularly useful and educational vehicle for the public and candidates alike. Endorsements are announced by this bar association within two weeks of the forum.

Most organizations prefer to conduct their interviews with candidates in private and with only one candidate at a time. Some ask for a completed questionnaire in advance, while others rely solely on the candidates' interviews. I do not know of any Miami-Dade organizations, however, that give endorsements without a face-to-face meeting in some format, and all the interviews take place with a number of members or before the entire membership in a forum-type atmosphere. Thus, to the citizen-voter, the value of an organizational endorsement may come in knowing that several members of an organization, with which they share common values, have met and engaged in conversation with the candidates before making their decision to endorse.

Endorsements by individuals are generally also obtained from elite members of the community by way of existing relationships or through networking. Close friends or business associates who know members of a community's elite can provide the candidate with the access necessary for an endorsement. In states where ethics rules prohibit judicial candidates from directly asking for an endorsement, the candidates must rely on their campaign committees to generate those endorsements. For example, candidates in Florida may not directly solicit lawyers for publicly stated support; their campaign committees must be charged with collecting all campaign contributions and any endorsements from the legal community. Ethics rule or not, sitting judges would be wise to have their campaign committees or managers handle all requests for support from lawyers to avoid any appearance of judicial impropriety.

Finally, as mentioned earlier, there are those "magical" endorsements that appear out of thin air, unsolicited and usually unknown to the candidate until after they have been made. These black-box endorsements are unplanned and can be quite a surprise to the candidate, particularly if they come from unexpected sources like fringe political groups or individuals with agendas that the community views as controversial. A candidate can ask a group to withdraw its endorsement, but the damage may have already been done by the time the candidate is aware of the endorsement and its distribution.

Underhanded and unorthodox politics is always a risk in judicial campaigns, and endorsements can become part of this. In the 2004 judicial elections, a mailer from "The Republican Party of Miami" was delivered to an unknown number of Hispanic households in Miami on the first day of early voting. On preprinted "Republican Party" stationary, complete with the requisite red, white, and blue ele-



phant, was a letter relaying the “party’s” endorsements in a number of races, including the mayor’s race, a state legislative race, and several judicial races. Candidates would never have known about the slate but for the fact that some voters arrived at the early voting sites with the slate in hand. Even the most seasoned politicians could easily have mistaken it for the real thing unless they considered carefully just who was endorsed. One judicial candidate’s mother, who was very active in local Republican party politics for years, was livid to see her daughter’s opponent “endorsed.” And for a number of days, there was no way to convince many of the voters arriving at the polls that the slate was a fraud. There is no Republican Party of Miami, and even if there were, under Florida law it would not be permitted to endorse judicial candidates. An article in the *Miami Herald* revealing the fraud appeared too late to mitigate some of the damage.

As judicial campaigns become more like campaigns for other elective offices, with candidates increasingly relying on the advice of professional campaign managers, endorsements have become more visible, and thus they are more important to the candidates. At the same time, the substance of endorsement interviews has undergone a change that has been spurred in part by the United States Supreme Court’s decision in *White*. However, this change is tied to the historical debate over the role of courts in a democratic society and to issues of judicial accountability and independence. It is a debate that has moved from the legal and scholarly community to the broader public agenda as a result of the public’s increasing recognition of the importance of state courts in our federal system.

### ETHICS AND ENDORSEMENT QUESTIONNAIRES

There is little reason to doubt that endorsing organizations have always tried to ask judicial candidates questions that would require the candidate to reveal personal views on issues salient to the organization. And it would be unrealistic not to expect that, in the privacy of an interview with a sympathetic audience, a few sitting judges and judicial candidates have revealed more of themselves and their personal views than the ethics rules envisioned. Such is the craft of the politician, and in those states where prospective judges must engage in and endure competitive campaign politics, they sometimes act like typical politicians. However, it has generally been the case that organizations that endorse judges know there are boundaries to the kinds of information a judicial candidate can, and would, provide.

Those boundaries have moved in recent years and are less crisp today than they were ten years ago, as a result of the Supreme Court’s ruling in *Republican Party of Minnesota v. White* (2002) striking down the “announce clause” of the Minnesota Code of Judicial Conduct as violative of the free-speech rights of judges and judicial candidates. This section of the code prohibited a judge or judicial candidate from announcing their “views on disputed or political issues.” The Court’s decision left many unsure as to whether any restriction could withstand the Court’s scrutiny, particularly in those states that retained restrictions on judicial speech in the form of a

“pledges-or-promises” provision, a “commit clause,” and a ban on misrepresentation (Salokar, 2005).

Florida is one such state, with Canon 3 of its Code of Judicial Conduct stating that judges and judicial candidates may not “(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 appear 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.”

The Florida Supreme Court Judicial Ethics Advisory Committee (JEAC) has issued several opinions on the code in response to candidate inquiries regarding questions posed by endorsement questionnaires, and it has done so carefully. Generally, the committee’s response has been that candidates may answer questions that probe their personal opinions, provided that the candidate makes it clear that as a member of the judiciary, the judge will be bound to follow the law and not personal inclinations (Judicial Ethics Advisory Committee, Florida Supreme Court, 2006). Further, the JEAC habitually warns candidates that the revelation of their personal opinions can jeopardize the public’s perception that the judge can remain fair and impartial in cases involving the topic on which the judge has spoken. In such an event, the judge would be forced to recuse himself.

In 2006 Florida’s Canon 3 was the target of a federal lawsuit filed by the Florida Family Policy Council (FFPC), a conservative group associated with the national organization Focus on the Family. With the Christian Coalition, the FFPC sent its endorsement questionnaire to Florida trial-court candidates and to appellate judges subject to retention election in fall 2006. The instrument sought personal information on marital status, number of children, and the identification of organizations to which they had given charitable donations, and asked candidates to name a justice on the U.S. Supreme Court and one on the state supreme court who best reflected their own judicial philosophy. Additional questions asked candidates to reveal their personal opinions on court decisions rendered on issues like abortion, prayer in schools, assisted suicide, and gay adoption and to indicate whether they agreed or disagreed with the decisions, were undecided as to the decision, declined to answer, or refused to respond. The “decline” response was footnoted to mean that the candidate would have responded to the inquiry but did not do so out of fear that they would be forced to recuse themselves from certain cases in the future (Carter, 2006).

Upon inquiries by several judicial candidates, the JEAC issued an opinion on the questionnaire that reiterated the committee’s contemporary stance on such questions (Judicial Ethics Advisory Committee, Florida Supreme Court, 2006). The JEAC again stated that judicial candidates could answer the solicited questions provided they explained that as a judge, they would only follow the law, and the JEAC warned the candidates of the potential for future recusals. Not a single appellate judge responded to the survey nor did nearly one-third of the trial-court judges who

were in the November runoff elections. While most of the responding trial-court candidates marked “decline,” fourteen of the fifty-three respondents named a U.S. Supreme Court justice who reflected their philosophy, and seventeen apparently gave more substantive answers that remained unreported by the FFPC (Florida Family Policy Council, 2006).

The FFPC’s suit, filed by James Bopp, the same attorney who prevailed in the *White* decision (see Bopp and Woudenberg, in this issue), sought an injunction to prohibit Florida’s Judicial Qualifications Commission from taking any future action regarding a judge’s failure to recuse in a case in which the judge had expressed a personal opinion in response to an endorsement survey. The federal court held an evidentiary hearing on the matter and ultimately denied the injunction, noting that in the *White* decision, Justice Anthony Kennedy specifically provided for the recusal possibility. “There is no right to a biased judge, nor to a judge with a closed mind,” wrote Judge Robert Hinkle of the U.S. District Court for Northern Florida (*Florida Family Policy Council v. Freeman*, at 11).

This same election cycle also saw a continuing battle in the judicial endorsement process play out between the Miami-Dade Christian Family Coalition (CFC) and SAVE-Dade, the major local gay-rights organization. According to reports, the CFC invited judicial candidates to an endorsement interview where candidates were handed an endorsement survey that they had to complete immediately and sign in the presence of the CFC committee. It also included an agreement that if the CFC endorsed the candidate, that candidate could not accept an endorsement from SAVE-Dade. It is clear that nearly half of the candidates refused to participate in the CFC endorsement process, as their responses were unreported by the organization. One candidate who was endorsed by SAVE-Dade withdrew her endorsement in favor of the CFC, while another publicly denounced the CFC endorsement in favor of SAVE-Dade. SAVE-Dade, upon hearing of the CFC’s exclusivity rule, concluded that the ideal judge—one who would be fair and impartial to all parties—could secure the endorsements of both organizations, and thus left candidates to make their own decisions on how to deal with the situation.

This increase in the use of substantive judicial questionnaires and the widespread confusion in the wake of the *White* decision were among the reasons that the American Bar Association undertook its recent revision of the *Model Code for Judicial Conduct*. The revised Canon 4 states, “A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” Two rules that are especially relevant to the issue of endorsements in judicial campaigns support it. Rule 4.1, which addresses “Political and Campaign Activities of Judges and Judicial Candidates in General,” prohibits judges and candidates “in connection with cases, controversies, or issues that are likely to come before the court,” from making “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” This rule is supported by a five-paragraph commentary

Maintaining the ethics of judicial campaigns should not be left to the candidates alone. States interested in preserving the appearance of integrity, independence, and impartiality of the bench should consider the revised *Model Code of Judicial Conduct*, especially Canon 4, Rules 4.1 and 4.2, with their commentaries, and should tailor the Model Code to fit their own state's ethical standards. They might also incorporate several rules that regulate the process by which endorsements take place by adopting checks on candidate behavior. For example, no candidate should attend an endorsement interview unless his or her opponent is also invited *and* present. Candidates should also be required to make public any endorsement questionnaire they complete, which will permit the public and the bar to monitor for misrepresentation and bias. This would limit the potential for ethical violations that are outside the public's view.

Education of judicial candidates and the public is essential. The more interest groups participate in the judicial endorsement process, the easier it will be for candidates to "craft a message" through their endorsements. Judicial ethics commissions should develop workshops on campaign ethics for all judicial candidates. These workshops must be useful and dynamic, accessible with respect to time and location, and presented as soon as possible after the qualifying or candidacy deadline. Additional semiannual workshops for incumbents facing reelection or retention, and early nonincumbent filers—a modern trend in south Florida—are also necessary. Inculcating candidates with the values of the profession must start early. State bar associations must also actively educate the public on the importance of an impartial judiciary. Ultimately, when all else fails and a candidate knowingly crosses the ethical line in a campaign, the state supreme court must remove whatever incentive motivated that candidate by exerting meaningful discipline, even if that means removal from office or the ballot. When judicial candidates know the standards of conduct, understand that they will be in the public eye, and realize that they have much to lose, they will act less like politicians and more like candidates for the independent and impartial judiciary. **jsj**

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given our hypothetical candidate's professional experience, it is unlikely she would secure such an organization's backing. Perhaps not advertising the endorsements in the brochure at all would be a more ethical alternative. Ultimately, the question for ethics scholars and judicial disciplinary commissions in grappling with each of these scenarios is how to balance the public's interest in the appearance of an independent and impartial judiciary against the knowledge that voters need to cast an informed vote in a democratic system. It is usually a close call.

The Arizona Supreme Court Judicial Ethics Advisory Committee recognized the dilemma of endorsement "messaging" in 1996, when it was asked whether an incumbent, seeking reelection, could publicize the endorsement by the local sheriff (Judicial Ethics Advisory Committee, Arizona Supreme Court, 1996). The state's canons had no restrictions on the use of endorsements by judicial candidates, and the committee recognized that "an endorsement that must be withheld from public knowledge is of no value to either the candidate or to the voters." The committee also understood that the context in which the endorsement appeared could jeopardize the "integrity-and-independence" requirement of the canons. Apparently, the sheriff had publicly announced to local media that his endorsements were only given to candidates who supported his "law-and-order" agenda. The committee advised that such an endorsement should not be solicited or publicized. Going on to consider whether "publicizing a single endorsement, to the exclusion of other support" would also violate the integrity-and-independence canon, they concluded that "emphasizing a single source, such as a law enforcement official, might reasonably be seen as indicating that the candidate is pro police or pro prosecution."

The Florida Supreme Court grappled head-on with the issue of messaging, and a candidate's use of endorsements, in *In re Kinsey*, a 2003 judicial discipline case. Judge Patricia Kinsey, in successfully challenging an incumbent, ran a thematically crafted "law-and-order" campaign using multiple indirect statements about what a judge should be (note the third-person approach), trotting out her legal experience as a prosecutor, and employing suggestive advertising that clearly crossed the ethical boundary established by the canons. One of her campaign photos showed her with a group of ten law-enforcement officers. In campaign brochures, she touted the fact that she had the "unanimous support of law enforcement" and that "area police officers [had] unanimously endorsed Pat Kinsey for County Judge." Twelve charges were levied by the Judicial Qualifications Commission (JQC), and the general conclusion to be drawn from those charges is that the judge-as-candidate crossed the ethical line by stating that, as a judge, she would protect victims "from being victimized a second time" during their court proceedings and use jail bonds to keep the community safe; that a judge should protect victims' rights; and "that judges must support 'hard-working law enforcement officers by putting criminals behind bars, not back on our streets'" (*In re Kinsey*, at 80).

Reviewing the JQC's findings and recommendations, the Florida Supreme Court considered judicial speech and the state's Code of Judicial Conduct for the first time in the wake of the *White* decision. The justices ruled that Florida's "pledges-and-

promises” and “commit” clauses were unaffected by the *White* decision, because, unlike the “announce” clause, Florida’s language was narrowly tailored to protect the state’s interest in an independent and impartial judiciary. Candidates could announce personal views on issues but must affirm that as members of the judiciary, they would follow the law.

The court acknowledged that some of the matters charged by the JQC “taken in isolation would not violate the judicial canons.” However, the justices also reasoned that several of the statements charged were “implicit promises” that, when taken together, “fostered the distinct impression” that the candidate’s platform was one of allegiance to law enforcement (at 88). Four of the charges for which the justices found the judge guilty included implicit promises that suggested her prosecutorial bias. However, the justices did not find Judge Kinsey guilty on a charge that related to a discussion in which she distinguished her past experience as a prosecutor from the incumbent judge’s past as a defense attorney. Said the court, “Such comments by themselves are not per se improper; a candidate is free to discuss his or her background, qualifications for the position, and character and integrity, as well as the background and qualifications of his or her opponent” (at 89).

Finding Judge Kinsey guilty on most of the charges, the Florida Supreme Court not only imposed a public reprimand but also levied court costs and a \$50,000 fine, the equivalent of six months’ salary. The penalty was intended to serve as a warning to all judicial candidates in Florida that the court “will not tolerate improper campaign statements which imply that, if elected, the judicial candidate will favor one group of citizens over another or will make rulings based upon the sway of popular sentiment in the community” (at 92).

## CONCLUSION

Endorsements of judicial candidates serve useful purposes for candidates and voters, but more dilemmas will arise with the growing number of organizations engaging in the judicial endorsement process. In the near future, judges and judicial candidates may find themselves making ethical decisions not to solicit or accept endorsements from certain groups. Should a candidate, for example, refuse to accept an endorsement interview by an organization that discriminates on the basis of race, especially if that candidate knows that her opponent was not considered for an endorsement because of her race? Substitute religion or sexual orientation for race, and candidates have even a more difficult decision to make. Furthermore, as endorsement questionnaires focus more on personal viewpoints, candidates might be better served by simply refusing to answer some of the questions that organizations put to them. On highly divisive issues, wise political candidates should refrain from answering queries that will alienate a substantial bloc of voters. While candidates can use the First Amendment to express their personal opinions freely, that same fundamental right permits candidates not to speak when their words will cast doubt on their independence and integrity as members of the bench.

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