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Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7

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INTRODUCTION

"The best justice(s) money can buy." Such a characterization of a recent series of campaign contributions to justices of the Supreme Court of Texas is difficult to resist. Representatives of Texaco made campaign contributions totaling $72,700 to seven justices while the appeal in the $11 billion Pennzoil lawsuit against Texaco was pending before the court. Not to be outdone, Pennzoil lawyers countered with campaign contributions of more than $315,000. Moreover, three of the justices receiving Texaco contributions and four of those receiving Pennzoil contributions weren't even up for re-election.[1]

Practices such as these inevitably raise questions concerning the integrity and impartiality of an elected judiciary.[2] Can a judge resist the temptation to be influenced by such practices? Even if a judge is able to maintain his or her integrity and

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[1] For a discussion of these events and similar judicial campaign practices in other states, see *What Price Justice? Oh, About $10,000*, The Washington Post, May 17, 1987, at C1, col. 1. *See also* Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. L. & POL. 57, 58-72, app. A, tables 1-7 (1985) (surveying and analyzing the substantial sums currently devoted to the financing of judicial election campaigns).

[2] A large number of state court judges are elected. Schotland, *supra* note 1, at 72-73, estimated that, in 1984, 7,424 state appellate and general jurisdiction trial court judges were subject to elections in the thirty-nine states that elect some or all of their judges in partisan, nonpartisan, or retention election campaigns.

impartiality, will the judge's reputation still be open to question and the public's confidence in the judiciary diminished?

Ethics codes for judges and lawyers attempt to reconcile the perceived need for an elected judiciary with the general desire for a judiciary of unquestioned integrity, independence, and impartiality. In the notes to Canon 7 ("A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office") of the ABA's Code of Judicial Conduct, the Reporter for the drafting committee explained that the committee sought to deal with the "tensions between the demands of political reality and the necessity that a judge be impartial and appear to be impartial."[3] He thus characterized the resulting subsections of Canon 7 as "compromises between political reality and the aim of maintaining the appearance of judicial impartiality."[4] Although the Reporter did not elaborate on what was meant by "political reality," we might assume that it included such basic aspects of the electoral process as the notion that judicial candidates must be allowed to develop the resources (funds) to present themselves and their views to the electorate. We might then view the strictures of Canon 7 and similar ethics provisions as seeking to control judicial behavior during a political campaign in ways that will assure 1) faithfulness to the electoral process, and 2) judicial impartiality and the appearance of impartiality.

This article analyzes interpretations of relevant ethics provisions from jurisdictions that elect their judiciaries to determine the extent to which these regulations assist in 1) curbing judicial election campaign excesses while ensuring faithfulness to the electoral process, and 2) achieving the goal of an impartial judiciary whose reputation is beyond reproach. Part I reviews the ethics rules governing judicial election campaigns, and part II identifies the agencies responsible for their interpretation and enforcement. The case law and ethics advisory opinions[5] interpreting these ethics rules are discussed and analyzed in parts III and IV. Part III focuses on restrictions on campaign appearances and advocacy, while part IV focuses on campaign financing.

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[3] E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 96 (1973).

[4] *Id.*

[5] This article reviews ethics advisory opinions on file at the American Judicature Society through 1984.

Part V concludes that these ethical constraints on judicial election campaigns raise serious questions concerning the effectiveness of an elected judiciary.

I. RULES OF ETHICS GOVERNING CANDIDATES FOR JUDICIAL OFFICE

Each American jurisdiction has, by court rule or legislative act, adopted separate codes of conduct for judges and for attorneys. Successive versions of model ethical provisions for judges were promulgated by the American Bar Association in 1924[6] and 1972.[7] Presently 47 states, the Federal Judicial Conference, and the District of Columbia have substantially adopted the 1972 ABA Model Code of Judicial Conduct,[8] and three states use codes of ethics based either in whole[9] or in part[10] on the predecessor 1924 Canons of Judicial Ethics. This paper will focus primarily upon the 1972 Model Code and materials interpreting its provisions.

Canon 7 of the Model Code of Judicial Conduct governs the campaign and political activities of judges and candidates for judicial office.[11] However, there are significant variations in

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[6] CANONS OF JUDICIAL ETHICS (1924) [hereinafter CANONS].

[7] CODE OF JUDICIAL CONDUCT (1972) [hereinafter CODE]. The American Bar Association is presently conducting a review of the Code with an eye toward revision.

[8] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Federal Judicial Conference, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming. See Shaman, *Two States Adopt ABA Model Code of Judicial Conduct*, 8 JUD. CONDUCT REP. 4, 1 (1987) for a discussion of recent efforts at Code adoption.

[9] Montana, Wisconsin.

[10] Rhode Island.

[11] CODE, *supra* note 7, Canon 7:

A Judge Should Refrain from:
Political Activity Inappropriate:
to His Judicial Office:

A. Political Conduct In General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly

the substance of Canon 7 among the 47 states that have adopted

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endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should 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 or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than (90) days before a primary election and no later than (90) days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election

the Code.[12] Most Code states omitted or substantially modified portions of the Canon. Two states did not adopt Canon 7A,[13] which covers political conduct in general, while eleven states omitted 7B,[14] which deals specifically with campaign conduct.

Other provisions of the Code of Judicial Conduct may also be relevant to campaign conduct. In one case a judge who improperly used her office facilities and employees for political purposes was found to have violated Code of Judicial Conduct Canon 2A.[15] This provision requires a judge to act in a manner promoting "public confidence in the integrity and impartiality of the judiciary."[16]

Several provisions of the 1924 Model Canons of Judicial Ethics applied to campaign and political activities of judges and candidates for judicial office.[17] The constraints imposed by these

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to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

CODE, *supra* note 7, Canon 7.

[12] D. FRETZ, R. PEEPLES & T. WICKER, ETHICS FOR JUDGES 42-47 (1982) [hereinafter ETHICS FOR JUDGES].

[13] ETHICS FOR JUDGES, *supra* note 12, at 42 (New Mexico and New York).

[14] *Id.* at 44 (Connecticut, Delaware, Hawaii, Idaho, Maine, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, and Virginia).

[15] *In re* Conda, 370 A.2d 16 (N.J. 1977).

[16] CODE, *supra* note 7, Canon 2A.

[17] CANONS, *supra* note 6, Canons 28, 29, 30, 32 & 34.

28. PARTISAN POLITICS. While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

Id. at Canon 28.

29. SELF-INTEREST. A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he

Canons did not differ markedly from those of the Code of Judicial Conduct, Canon 7. The new Canon merely presents the ethical obligations of judges and candidates in a more specific, orderly, and succinct fashion.

Candidates for judicial office who are attorneys are also subject to provisions regulating the ethical conduct of lawyers. In 1969 the American Bar Association promulgated the Model Code of Professional Responsibility to replace its 1908 Model Canons of Professional Ethics as the national standard for rules

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has personal litigation in the court of which he is a judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Id. at Canon 29.

30. CANDIDACY FOR OFFICE. A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Id. at Canon 30.

32. GIFTS AND FAVORS. A judge should not accept any presents or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgement.

Id. at Canon 32.

34. A SUMMARY OF JUDICIAL OBLIGATION. In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Id. at Canon 34.

of lawyer ethics.[18] The Model Code was adopted in substantially the form promulgated in 49 states, usually by order of the state's supreme court.[19] Illinois drafted and adopted its own code of legal ethics.[20] The American Bar Association later developed the Model Rules of Professional Conduct and promulgated these new standards in 1983 as a suggested replacement for the Model Code,[21] which had proven to be inadequate in some respects.

Several provisions of the Model Code of Professional Responsibility are relevant to lawyers who are candidates for judicial office, or otherwise participate in the process of election or appointment of judicial officers. Disciplinary Rule 1-102(A)(4) states: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This provision would be violated by a lawyer-candidate or campaign worker who participates in the use of campaign advertisements or statements that are untrue or misleading. Additional limitations on campaign advertising are imposed by Disciplinary Rule 2-101,[22] which places restrictions on the form and content of lawyer publicity. Further, Disciplinary Rule 8-102[23] prohibits the use of falsehoods by lawyers who are promoting candidates for judicial office or criticizing incumbent judges. The rationale for the DR 8-102 restrictions is provided in Ethical Considerations 8-6 and 8-8.[24]

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[18] L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 6 (1984).

[19] *Id.*

[20] *Id.* Illinois substantially adopted the ABA Model Code of Professional Responsibility by Supreme Court Order effective August 1, 1981.

[21] *Id.*

[22] "A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1969).

[23]

> (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
>
> (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Id. at DR 8-102.

[24]

> Judges and administrative officials having adjudicatory powers ought to

Finally, Disciplinary Rule 8-103(A) provides that all lawyer-candidates for judicial office must comply with Canon 7 of the Code of Judicial Conduct.[25]

The new Model Rules of Professional Conduct include similar provisions governing the conduct of lawyers who are candidates or are otherwise involved in campaigns for judicial office. Lawyer-candidates are prohibited by Rules 7.1,[26]

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be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

Id. at EC 8-6.

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

Id. at EC 8-8.

[25] "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct." *Id.* at DR 8-103(A).

[26]

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

8.2(a),[27] and 8.4(c)[28] from making false or misleading claims about themselves. Rules 8.2(a) and 8.4(c) also serve to prohibit lawyer-candidates and lawyers working in campaigns from making false statements about opposing candidates. Rule 8.2(b)[29] requires a lawyer who is a candidate for judicial office to comply with relevant provisions of the Model Code of Judicial Conduct. Rule 8.4(f)[30] prohibits lawyers working in a judge's re-election campaign from assisting the candidate in conduct that violates the applicable rules of judicial conduct or other law.

In addition to the ethical provisions governing the conduct of judges and lawyers, candidates for judicial office may also be subject to state statutes concerning election practices, financial disclosure, and other campaign-related matters.[31] Interpretation of the campaign ethics provisions of the judicial and attorney standards of conduct is available through a limited body of case law and through a much larger number of ethics advisory opinions issued by agencies in twenty-one states[32] and the American Bar Association. Also, ethical guidelines for judicial campaigns have been adopted by bar associations in a number of states[33] and by the supreme court in at least one state.[34]

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[27] A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. *Id.* at Rule 8.2(a).

[28] "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* at Rule 8.4(A).

[29] "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct." *Id.* at Rule 8.2(b).

[30] "It is professional misconduct for a lawyer to: . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." *Id.* at Rule 8.4.

[31] *See, e.g.*, Minnesota Fair Campaign Practices Act, MINN. STAT. ANN. 211A.01 (West 1988).

[32] Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Maryland, Michigan, Missouri, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Washington, West Virginia, Administrative Office of the U.S. Courts.

[33] *See, e.g.*, New York State Bar Association Committee on Professional Ethics, Op. 289 (1973).

[34] *See, e.g.*, S.D. CODIFIED LAWS ANN. ch. 12-9 app. (1982).

II. JURISDICTION OVER ETHICAL VIOLATIONS BY PARTICIPANTS IN CAMPAIGNS FOR JUDICIAL OFFICE

All 50 states and the District of Columbia have created agencies authorized to investigate allegations of ethical improprieties by judges, and where necessary, either to impose or to recommend the imposition of disciplinary sanctions.[35] These agencies typically have jurisdiction over all state judicial officers.[36] Each jurisdiction specifies grounds for the discipline of judges. Generally, judges may be disciplined for wilful misconduct, for engaging in conduct prejudicial to the administration of justice, or for violation of provisions of the Code of Judicial Conduct or separate state standards of ethics.[37] Some states do not specifically refer to violations of the Code of Judicial Conduct as a ground for discipline, but instead use the provisions of the Code to determine if "wilful misconduct" or "conduct prejudicial" have occurred.[38]

Incumbent judges campaigning for re-election who commit ethical violations are subject to discipline by a judicial discipline agency in all jurisdictions. Most judicial discipline agencies have jurisdiction over acts by judges occurring prior to the time the judge takes office.[39] Thus, these agencies are able to address

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[35] *See* I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS (2d ed. 1980).

[36] *See, e.g.*, ARIZ. CONST. art. VI.I, §§ 4, 5.

> On recommendation of the commission on judicial qualifications, the Supreme Court may retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and may censure or remove a judge for action by him that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Id. at § 4.

> The term "judge" as used in this constitutional amendment shall apply to all justices of the peace, judges of the superior court, judges of the Court of Appeals and justices of the Supreme Court.

Id. at § 5.

[37] I. TESITOR & D. SINKS, *supra* note 35, at 40.

[38] *See, e.g.*, Ariz. Const. art. VI.I § 4; Ga. Const. art. VI, § XIII, ¶ III(b); Ind. Const. art. 7, § 11; S.D. Const. art. V, § 9.

[39] *See, e.g.*, *In re* Samford, 352 So. 2d 1126 (Ala. 1977) (Judge could be removed from office for conduct including stealing funds from a client's trust account while he was an attorney); *In re* Gillard, 271 N.W.2d 785 (Minn. 1978) (Lawyer's misconduct that occurred before his appointment to judicial office may be the basis for judicial disciplinary action).

ethical violations occurring during a campaign after a successful candidate takes office. However, judicial discipline agencies generally do not have jurisdiction over non-judge candidates during the course of a campaign.[40]

Each jurisdiction has also created an agency to investigate allegations of misconduct by attorneys and, in appropriate instances, to initiate proceedings that may result in discipline.[41] Violating the state version of the Model Code of Professional Responsibility, or, in states which have adopted them, the new Model Rules of Professional Conduct are grounds for discipline.[42] Thus, attorney discipline agencies can address ethical violations by attorneys assisting in campaigns for judicial office and by attorneys who are currently candidates or who have been unsuccessful candidates for judicial office.[43]

Some states permit non-attorneys to serve as judicial officers in courts of limited jurisdiction.[44] Ethical violations committed by a non-attorney in the course of a campaign for judicial office can be punished by the judicial discipline agency if the candidate is successful. Otherwise, neither the judicial discipline agency, nor the attorney discipline agency will gain jurisdiction over a non-attorney candidate, and ethical violations by such candidates will remain unaddressed. Of course, all candidates for judicial office, including non-attorneys, are subject to civil or criminal process for violation of state election laws.

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[40] Ala. Judicial Inquiry Comm., Op. 80-83 (1980) ("A candidate for judicial office, who is not a judge, is not subject to the jurisdiction of the Judicial Inquiry Commission but is subject to the original jurisdiction of the Alabama Supreme Court.").

[41] *See* AMERICAN BAR ASSOCIATION, DIRECTORY OF LAWYER DISCIPLINARY AGENCIES AND CLIENTS' SECURITY FUNDS (1985) (agencies listed for all jurisdictions).

[42] AMERICAN BAR ASSOCIATION, SURVEY OF LAWYER DISCIPLINARY PROCEDURES IN THE UNITED STATES 9 (1984).

[43] N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973) ("The canons, the guidelines and all other rules applicable to judicial campaigns apply not only to judges but also to others seeking judicial office, and persons acting on their behalf, and apply to campaigns for primary as well as general elections."); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-103(A) (1969); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (1983).

[44] For a census of lay judges in these courts and a survey of statutes as of 1979, see L.J. SILBERMAN, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY 253-60, 285-317 (1979) (available in Florida State University Law Library).

III. CAMPAIGN APPEARANCES AND ADVOCACY

The Model Code of Judicial Conduct ("Code") places a number of restrictions on the activities of candidates for judicial office.

A. *Code Restrictions on Campaign Appearances*

Restrictions on the time and place of campaign appearances are imposed by the portions of Canon 7 of the Code dealing with judges' political conduct in general, and dealing specifically with conduct of candidates for office. Canon 7A(1) provides that a candidate for judicial office may *never*:

> 1. Serve as a leader or in any office in a political organization.
> 2. Make speeches on behalf of a political organization, party, or a particular candidate other than himself or herself.
> 3. Endorse another candidate for any office.
> 4. Solicit funds for a political organization or another candidate, or contribute funds to another candidate.[45]

Under Canon 7A(2), however, a candidate for a judicial office filled by public election between competing candidates *may*, to the extent permitted by state law:

> 1. Attend political gatherings.
> 2. Contribute to a political organization and purchase tickets to political party dinners.
> 3. Identify himself or herself as a member of a political party.
> 4. Speak to political gatherings on his or her own behalf.[46]

An incumbent judge occupying such an office is also permitted to engage in these activities throughout his or her tenure in office, except that he or she may only speak to political gatherings while a candidate for re-election.[47]

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[45] For the exact text of Canon 7, see *supra* note 11.
[46] For the exact text of Canon 7, see *id.*
[47] *See* CODE, *supra* note 7, Canon 7A(2).

B. *Timing and Types of Campaign Appearances*

To date, all ethics advisory opinions dealing with the earliest permissible date for beginning a campaign for judicial office have been addressed to campaign activity by incumbents. In Kentucky, the state Code of Judicial Conduct states that a judge is a candidate for re-election during his or her entire term of office.[48] Therefore, a Kentucky advisory opinion holds that a judge may campaign for re-election at any time, as long as the time limits on solicitation of campaign funds are observed.[49]

Some states establish by law time limits for campaigning. For example, in New York an "announced" judicial candidate may attend politically sponsored affairs within nine months of a primary or a nominating convention.[50] To qualify for participation in such affairs, an aspirant for office must have publicly announced his or her candidacy by some affirmative action such as a letter to an appropriate political officer or a letter to the media.[51]

It may sometimes be difficult to determine whether an incumbent who is not yet a candidate for re-election is improperly speaking to political gatherings on his or her own behalf or if such a person is merely speaking to such gatherings on legal matters as permitted by Canon 4 of the Code. A Florida advisory opinion states that it is permissible for an incumbent judge, prior to the time of qualifying for re-election, to attend a partisan political club meeting to give a speech about the role of a county court judge in the judicial system, to attend a partisan political club meeting solely to be introduced as a guest who is a county court judge, or to attend a non-partisan meeting of a civil, social, or homeowners group to give a speech about the role of a county court judge.[52]

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[48] Ky. Code of Judicial Conduct Canon 7A(2) [Ky. Supreme Court Rule 4.300].

[49] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-42(3) (1983), Op. JE-45(5) (1983).

[50] Rules of the Chief Administrator of the Courts, Rules Governing Judicial Conduct § 100.7(a)(1).

[51] N.Y. Office of Court Administration, Judicial Ethics Op. 76 (1977), Judicial Ethics Op. 134 (1978), Judicial Ethics Op. 149 (1978).

[52] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 77-21 (1978).

Once the timing issue is resolved and a campaign is clearly under way, candidates for a judicial office filled by a public election between competitors may appear before virtually any group, as long as the appearance does not denigrate the dignity of the office sought or imply that the candidate, if successful, would act in a biased or partial manner. Thus, such a candidate may, along with other candidates, attend a "political fair" sponsored by various civic groups to permit voters to become acquainted with candidates.[53] A candidate may also speak as the sole guest speaker at a club affiliated with a political party.[54] However, it would probably be inappropriate for such a candidate to appear before a group that espouses views of an invidiously discriminatory nature, because an appearance before such a group could be construed as indicating future bias.[55]

The Code is silent on whether candidates competing for the same judicial office may make joint appearances. However, one ethics advisory opinion states that a candidate may not engage in a public debate with another candidate or other candidates for the same office, because this would almost certainly put the candidate in the position of having to make pledges of future conduct in office.[56]

C. *Merit Selection Jurisdictions—Special Considerations*

Somewhat different strictures apply to candidates for retention under a merit system of selection as well as unopposed candidates for re-election. Under Canon 7B(3), such candidates may only begin to campaign once active opposition has formed. An Arizona ethics advisory opinion tempers this rule by holding that a candidate for retention or re-election may begin to campaign as soon as he or she reasonably believes that he or she

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[53] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 74-11 (1974), Op. 77-21 (1978).

[54] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-6 (1978).

[55] *See* CODE, *supra* note 7, Canon 7B(1)(c); *see also* CODE, *supra* note 7, Canon 2 (recently amended comments concern membership by judges in organizations that practice discrimination in selecting members).

[56] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-13 (1978).

has or will have substantial opposition, regardless of how early that may occur.[57]

Because Canon 7A has been interpreted as applying to candidates seeking retention in office under a merit plan,[58] Canons 7A(1)(c) and (2) appear to preclude most types of campaign appearances by these candidates. However, Canon 7B(3) permits such a candidate who encounters active opposition to campaign "in response thereto." Although a sensible reconciliation of these subsections would permit such a candidate to speak before gatherings of voters on his or her own behalf, regardless of the nature of the gathering, the extent to which such campaign activity would be permitted remains unclear.

D. *Appearances on Behalf of Other Candidates*

To avoid enabling judges to lend the prestige of their offices "to advance the private interests of others,"[59] Canon 7A(1)(b) forbids judges or candidates for judicial office to endorse any candidate for public office. Thus, candidates for judicial office must be cautious in appearing with, or participating in joint campaign appearances with, other candidates, so as not to give the impression that such action constitutes an endorsement of the other candidates. Although a non-incumbent candidate has never been found in violation of ethical standards regulating endorsements, at least four sitting judges have been disciplined for participating in and supporting other persons' campaigns for judicial office. One judge was disbarred and effectively removed from office for numerous ethical violations, including arranging and attending political gatherings and serving as a toastmaster at a testimonial for another candidate.[60] Another judge was publicly reprimanded for improper conduct including sending 100 postcards and letters in support of a judicial candidate.[61]

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[57] Ariz. Judicial Ethics Advisory Comm., Op. 78-1 (1978).

[58] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 85-1513 (April 27, 1985).

[59] CODE, *supra* note 7, Canon 2B. "[A judge] should not lend the prestige of his office to advance the private interests of others." *Id.*

[60] *In re* Troy, 306 N.E.2d 203 (Mass. 1973).

[61] Office of Disciplinary Counsel v. Capers, 15 Ohio St. 3d 122, 472 N.E.2d 1073 (1984).

Two other judges were disciplined for contributing money,[62] or money and public support,[63] to candidates for judicial office.

Campaign literature endorsing several candidates for judicial office issued by someone other than the candidates has been approved by an ethics advisory body in New York.[64] A Louisiana ethics opinion holds that a group of judges facing opposition for re-election may publish a sample ballot suggesting that all be re-elected, but may not include unopposed candidates on the sample ballot.[65] Commentary to the Code states that a candidate may run on the same ticket as other candidates without running afoul of limitations on endorsements.[66]

E. *Code Restrictions on Campaign Advocacy*

Canons 7B(1)(a) and (c) of the Code caution that a candidate for a judicial office:

> (a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;
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> . . . .
>
> (c) should 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 or political issues; or misrepresent his identity, qualifications, present position, or other fact.

Thus, a campaign is undignified if a candidate runs on a platform advocating preferences for specific persons or groups, commits himself or herself in advance on disputed legal issues, or announces views on disputed political issues.[67] These restrictions have been upheld when challenged on first and fourteenth amendment grounds, as serving important state interests.[68] It has

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[62] *In re* Carter, 47 KY. BENCH & BAR 16 (Ky. Comm'n July 1983).

[63] *In re* Smith, 449 So. 2d 755 (Miss. 1984).

[64] N.Y. Office of Court Administration, Judicial Ethics Op. 34 (1975).

[65] La. Supreme Court Comm. on Judicial Ethics, Op. 57 (1982).

[66] CODE, *supra* note 7, Canon 7A(1)(b) comment. "A candidate does not publicly endorse another candidate for public office by having his name on the same ticket." *Id.*

[67] *See, e.g.*, Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-15 (1978).

[68] Morial v. Judiciary Comm'n, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

been said, however, that given the limitations on campaign speech by judicial candidates, "the man in the moon and the weatherman are about all of the people a judicial candidate can with impunity talk about without attitudinizing himself."[69]

F. *Statements Relating to Conduct in Office*

Judges have been found guilty of ethical improprieties for campaign statements indicating what their conduct in office would be, even where the promised conduct involved general statements concerning the administration of the law. An incumbent Washington judge was censured for campaign statements that he was "tough on drunk driving,"[70] and a Kentucky judge was censured for distributing campaign materials containing the phrases, "solid reputation for law and order" and "does not allow plea bargaining."[71] Another Kentucky judge was suspended from office for ten days without pay for suggesting in a campaign advertisement that he would rule favorably toward a particular group if elected.[72]

Ethics advisory opinions have addressed the propriety of numerous statements and pledges candidates have proposed to use in the course of a campaign. The general sense of these opinions is that anything that could be interpreted as a pledge of a particular approach a candidate will take in deciding cases is prohibited. It is inappropriate for a candidate to state that he or she could personally throw the switch on anyone convicted of a capital crime.[73] A candidate may not express the view that marijuana should be decriminalized.[74] A candidate cannot use the slogan "a strict sentencing philosophy," as it gives the impression that he or she would act in a biased manner in certain cases.[75] At least one state takes the view that statements by a

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[69] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-13 (1978).

[70] *In re* Kaiser, 759 P.2d 392, 394-401 (Wash. 1988).

[71] *In re* Nolan, Unreported Order (Ky. Comm'n 1984).

[72] *In re* Ehlschide, Unreported Order (Ky. Comm'n 1982).

[73] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-6 (1978).

[74] *Id.*

[75] State Bar of Mich. Comm. on Professional and Judicial Ethics, Formal Op. C-219 (1980); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1444 (1980).

candidate concerning the use of plea bargaining should be avoided because they may be seen as a pledge of future conduct, and plea bargaining is a controversial (disputed) issue.[76] In Kentucky, a candidate cannot even take the position that a particular rule of court should be changed. This, too, constitutes a pledge of conduct in office.[77]

A candidate may also be limited in the extent of his or her activities outside of the campaign if those activities may indicate future conduct in office. A candidate for an Ohio judicial office was advised that he could not remain involved in a political dispute involving a referendum on an income tax law during the course of his candidacy.[78]

A frequent practice by those interested in campaigns for public office, such as the media or special interest groups, is the circulation of questionnaires on specific issues to all candidates. The results may later be used in news stories, or for formulating an endorsement. Most advisory opinions addressing the use of questionnaires in judicial campaigns strongly disapprove of the practice. Thus, judicial candidates have been advised to refuse to respond to questionnaires from political organizations concerning gun control, abortion, the Equal Rights Amendment, regulation of condominiums and the right to work.[79] A county bar association was cautioned not to survey the views of candidates for judicial office as to whether they agreed or disagreed with specific decisions of an appellate court.[80] The ethics committee reasoned that such a questionnaire would ask candidates to dispose of complex issues in an overly simplistic manner and may give the impression that he or she would not be supportive of controlling authority. That is, expression of an intent to disregard precedent would be unethical.[81] However, the same bar

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[76] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-38 (1982).

[77] *Id.*

[78] Ohio State Bar Association Comm. on Legal and Professional Conduct, Informal Op. 82-3 (1982).

[79] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 80-13 (1980).

[80] State Bar of Mich. Comm. on Professional and Judicial Ethics, Formal Op. C-222 (1982), Informal Op. CI-696 (1982).

[81] *Id.*

ethics committee later ruled that a bar association would be permitted to circulate a questionnaire designed to elicit candidates' criticisms of prior court decisions in a fair and reasonable manner. This meant that the questionnaire could not create even the impression that a candidate would later act with bias or partiality.[82]

The State of Oregon takes the view that the candidate must determine whether the questions asked in a survey are political and controversial.[83] The version of Canon 7B(1)(c) in use in Oregon forbids comments on political issues, but permits comments on legal issues.[84] In attempting to differentiate between the two, this state has indicated that the death penalty, pre-trial release of criminal defendants, the purposes to be accomplished by sentencing and the selection method used to choose judges are all legal issues.[85]

Generally, candidates for judicial office may neither initiate discussion of specific recent cases nor respond to questions concerning such cases. An Alabama judge seeking re-election was instructed that it would be improper for him to comment on specific cases he had been involved in, though he could comment on and explain relevant court procedures and the law governing a judge's duty in particular situations.[86] Comment by an incumbent (including a candidate for retention) about matters pending in court at the time of the campaign is prohibited by Canon 3A(6) of the Code.[87] An advisory opinion committee in Florida takes the unique position that, while Canon 3A(6) prohibits incumbent candidates from commenting on a disputed legal issue

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[82] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-921 (1983).

[83] Or. Judicial Conference, Judicial Conduct Comm., Ethics Op. 80-1 (1980).

[84] *See* Or. Judicial Conference, Judicial Conduct Comm., Ethics Op. 78-5 (1980).

[85] *Id.*

[86] Ala. Judicial Inquiry Comm'n, Advisory Op. 80-85 (1980).

[87] CODE, *supra* note 7, Canon 3A(6).

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Id.

that *is* presently before them, Canon 4 (allowing judges to speak concerning the law and legal system) permits them to comment on disputed legal issues *not* presently before their court.[88] Several advisory opinions hold that a candidate may not comment about specific concluded cases to explain the basis of rulings or sentences, or to justify the result reached,[89] although a candidate may probably explain that the law dictates some results.[90]

Given the limitations on what a candidate for judicial office may say about disputed issues, and about particular cases, what may a candidate say about his or her past conduct or intentions while in office? Advisory committees have been careful to point out that restrictions on campaign speech are not intended to limit the judicial candidate solely to promises of faithful performance of the duties of the judicial office.[91] However, interpretations of Canon 7B(1) of the Code do appear to limit the candidate to discussion of judicial system improvements and reforms the candidate wishes to implement, and truthful criticism of the qualifications of an opponent. In *Berge v. Supreme Court of Ohio*,[92] the court found that Canon 7B(1)(c) passes constitutional muster in that it does not prohibit a judicial candidate from proposing to implement a pre-trial mediation program, or from criticizing the incumbent's frequent use of trial referees. The Kansas Supreme Court, in *In re Baker*,[93] considered the propriety of a variety of campaign statements. The court found that Canon 7B(1)(c) permits a candidate to pledge to increase the efficiency of the court, to work hard and to be prompt, to reduce the need for outside judges to sit in the county, to note the incumbent's ill health and the delays it had caused and to refer to his own robust health, and to characterize his campaign pledges as "reforms." The Minnesota Supreme Court, in a

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[88] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978).

[89] *See* Ala. Judicial Inquiry Comm'n, Advisory Op. 80-85 (1980); Ala. Judicial Inquiry Comm'n, Advisory Op. 80-86 (1980), Advisory Op. 82-156 (1982); New York State Bar Association Committee on Professional Ethics, Op. 289 (1973).

[90] *See, e.g.*, Ala. Judicial Inquiry Comm'n, Advisory Op. 82-156 (1982).

[91] *See, e.g.*, Ala. Judicial Inquiry Comm'n, Advisory Op. 82-153 (1982).

[92] No. C-2-84-1227, slip op. (S.D. Ohio 1984).

[93] 542 P.2d 701 (Kan. 1975).

decision of a similar tenor, held in *Bundlie v. Christensen*[94] that a candidate could criticize the incumbent by pointing out that the county's court expenses were higher than in surrounding counties. In Florida, a candidate may say "I will make every effort to see that there is effective discipline of children who become subject to the juvenile powers of the court,"[95] and in Kentucky candidates may indicate they favor the use of computers to increase the efficiency of the court or propose other methods of improving court procedures.[96]

Questions about an incumbent's record raised in the course of a re-election campaign may be addressed by explanation of legal requirements and procedures. A candidate may, for example, explain that sentences imposed in many criminal cases are based on prosecution recommendations.[97] He or she may also comment on the uses of probation, and the duty of a judge to set reasonable bail and to appoint counsel for indigents.[98] An incumbent is not expected to remain silent in the face of criticism, and may refer to his or her own record, court statistics, and other facts.[99]

The qualifications of a candidate are, of course, a legitimate topic for discussion in the course of a campaign. Candidates may explain their credentials and experience, and indicate areas of expertise and certified specialties, so long as this is not done in a misleading manner.[100]

Advisory opinions reflect the view taken in the *Baker*, *Berge*, and *Bundlie* cases concerning the legitimacy of candidates' directing fair criticism at opponents. For example, a candidate in Florida was permitted to comment on the incumbent's requirement of physical arrest of all persons charged in minor

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[94] 276 N.W.2d 69 (Minn. 1979).

[95] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978).

[96] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-38(2) (1982), Op. JE-45 (1983).

[97] Ala. Judicial Inquiry Comm'n, Advisory Op. 82-156 (1982).

[98] *Id.*; *see also* Ala. Judicial Inquiry Comm'n, Advisory Op. 80-85 (1980).

[99] Ala. Judicial Inquiry Comm'n, Advisory Op. 80-86 (1980).

[100] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 84-10 (1984); Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-45 (1983); N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973).

offenses, and of threatening defendants with a jail term if they did not plea bargain.[101] The challenger was permitted to openly disagree with these practices, and to state that he would look closely at each misdemeanor case before issuing a *capias*, would generally be in favor of using the summons power rather than physical arrest, and would not threaten defendants for exercising their rights.[102] The ethics advisory committee in Kentucky has indicated that, as in *Baker*, a challenging candidate may criticize the incumbent's frequent absences from court,[103] although, as noted earlier, judicial candidates are generally prohibited from responding to questionnaires seeking their views on controversial topics. At least one ethics committee has indicated that a candidate for an appellate court may appropriately criticize an earlier opinion of the court and the legal philosophy underlying that opinion.[104] Another jurisdiction has permitted a candidate to challenge the current representational balance of the court on which he wished to sit.[105]

Although judicial candidates have some leeway in criticizing their opponents or their opponents' supporters, their criticism may not be of a nature that brings their own impartiality or that of the judiciary into question. In *In re Kaiser*,[106] the Supreme Court of Washington censured an incumbent who stated that he was tough on drunk driving and who questioned the motives of DWI defense attorneys in supporting the judge's opponent: "their primary interests are getting their clients off."[107] The court found that the drunk driving statements, "promise exactly the opposite of 'impartial performance of the duties of the office.'"[108] However, the court declined to sanction the judge for criticizing his opponent for receiving most of his financial

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[101] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 84-18 (1984).

[102] *Id.*

[103] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-45 (1983).

[104] State Bar of Mich. Comm. on Professional and Judicial Ethics, Formal Op. C-227 (1982).

[105] Ohio State Bar Association Comm. on Legal Ethics and Professional Conduct, Informal Op. 84-4 (1984).

[106] 759 P.2d 392 (Wash. 1988).

[107] *Id.* at 396-401.

[108] *Id.* at 396.

support from drunk driving defense attorneys.[109] The supreme court ruled that statements concerning an opponent's sources of support are constitutionally protected speech unless the statements are false and made with knowledge of their falsity.[110]

G. *Accuracy of Campaign Statements*

The case law and advisory opinions hold candidates for judicial office to a high standard of accuracy in their campaign statements. In the *Baker* case, the respondent judge was censured for issuing a mailing which falsely stated that the incumbent would receive substantial retirement benefits if defeated, thereby implying he would not be harmed by a defeat. The court ruled that this conduct constituted a violation of Canon 7B(1)(c).[111] A Washington state attorney was reprimanded in *In re Donohue*,[112] for violations of DR's 1-102 and 8-102, as well as Code of Judicial Conduct Canon 7B(1), when she engaged in a pattern of making false statements about incumbents on the court to whose offices she aspired, and altered and then reproduced a letter from another attorney and used it as part of her campaign materials. A candidate for a Kentucky judicial post was reprimanded for distributing campaign materials falsely representing that he was the incumbent by using the phrase "John Doe, District Judge."[113] Similarly, a Florida domestic relations commissioner seeking a position as a judge was cautioned, in an advisory opinion, that he could not indicate in campaign literature that he was a judicial officer, although he could cite his "judicial experience."[114] A Michigan candidate for judicial office was instructed that he could not use the slogan "A Judge for a

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[109] "My opponent . . . has received the majority of his financial contributions from *drunk driving defense attorneys*. This is the only group involved with Northeast District Court not supporting my re-election." *Id.* at 395.

[110] *Id.* at 397-99. The court stated that "even though Judge Kaiser's statements violate the strict terms of Canon 7(B)(1)(d), they are constitutionally protected and there is no violation." *Id.* at 399.

[111] *In re* Baker, 542 P.2d 701, 706 (Kan. 1975).

[112] 580 P.2d 1093, 1097-99 (Wash. 1978).

[113] Order of Private Reprimand, 7 Accent on Courts, No. 1, at 23 (Ky. Comm'n 1985).

[114] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 84-17 (1984).

Change" because it falsely suggested that he was an incumbent judge.[115]

The current law does not resolve the question of whether a candidate for judicial office must fairly represent both sides of an issue relevant to the campaign. In *Bundlie v. Christensen*,[116] a candidate was not found to have violated Canon 7B when he criticized the high level of county court expenses without explaining that there were good reasons that the costs were higher than in surrounding counties. However, a judge in Washington state was publicly admonished for a violation of Canon 7B(1)(c) after issuing a campaign pamphlet, deceptively similar to the official voter's pamphlet, that failed to reveal that he had opposition and that the position sought was contested.[117]

Another area where case law concerning the accuracy of campaign materials is inconsistent is the use of campaign polls. A Kentucky judge was suspended without salary for ten days for a violation of Canon 7B(1)(c) after publishing campaign advertising that indicated a professional poll placed him ahead of his opponent when in fact no such poll had been conducted.[118] But in *In re Elward*,[119] the Illinois Courts Commission found that no punishable impropriety had occurred where an incumbent judge excerpted for use in a campaign advertisement a favorable portion of a bar association evaluation that was generally unfavorable to the judge. The Commission found that the total mix of information available to the voters was sufficiently accurate so that no discipline was warranted.

H. *Campaign Advertisements and Endorsements*

Generally, advisory opinions merely specify that advertisements for a judicial candidate must contain statements that are true, must maintain the dignity appropriate to judicial office, and may not make false statements designed to promote the

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[115] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-556 (1980).

[116] 276 N.W.2d 69 (Minn. 1979).

[117] *In re* McGlothen, Unreported Letter of Admonishment (Wash. Judicial Qual. Comm'n 1983).

[118] *In re* Jack D. Wood, Unreported Order (Ky. Comm'n 1982).

[119] 1 Ill. Cts. Comm. 114 (Ill. 1977).

election or defeat of a candidate.[120] Few opinions limit the forms of media that may be used. Thus, most media, including radio, television, newspapers and other publications, posters and handbills may be used to convey campaign material.[121]

Some restrictions exist on direct mail contact with voters. Ethics advisory opinions have approved the use, by a lawyer, of his or her law office stationery to advertise the candidacy of the aspirant to office.[122] However, other opinions hold that it is improper for a judge to use his or her court stationery for the same purpose.[123] Judges who wish to send letters of appreciation to those having completed jury service have been cautioned to take care that the timing or content of the letters does not imply an attempt to use the letters to promote a re-election bid.[124] These opinions concerning the use of court stationery are based on the long-standing principle that a judge may not exploit the power and prestige of the office to promote his or her candidacy.

All campaign advertisements are subject to the Canon 7B(1)(a) requirement that a campaign be conducted with dignity. This may be of particular importance to those using the broadcast media. One advisory opinion states that it would be inappropriate for an attorney-candidate to give answers over the radio to specific legal questions sent in by listeners.[125]

All jurisdictions that have addressed the question agree that an incumbent judge may be pictured in his or her robe in

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[120] Ohio State Bar Association Comm. on Legal and Professional Conduct, Informal Op. 84-4 (1984).

[121] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 84-10 (1984) (television commercial implicitly approved); Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-38(3) (1982) (candidate may advertise on television and radio); State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-545 (1980) (campaign committee may place advertisements in newspapers, on television and radio); N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973) (may use any media).

[122] N.Y. Office of Court Administration, Judicial Ethics Op. 40 (1975) (Part-time lawyer/judge may use law office stationery to advertise campaign); Pa. Bar Association Professional Guidance Comm., Op. 81-27 (1981) (Attorney may seek contributions to campaign on law office stationery).

[123] N.Y. Office of Court Administration, Judicial Ethics Op. 129 (1978).

[124] Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 68 (1983), Op. 69 (1983).

[125] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93 (1933).

campaign materials, so long as the picture is not misleading.[126] A candidate who was not presently a judge, but had previously served on the bench, was allowed by the Florida ethics advisory committee to use a picture taken during his previous tenure in campaign materials that clearly explained the source of the picture and the dates when he previously served.[127] Other jurisdictions, however, disagree with this position. A Michigan committee would not permit a former temporary magistrate to use photographs of himself in judicial robes. The advisory committee reasoned that such a picture would misrepresent the candidate as an incumbent.[128] Washington takes the same stance. A candidate there was admonished for publishing a picture of himself in judicial robes when he had merely served as a judge pro tem.[129] Even though text accompanying the photograph explained the candidate's judicial service, the Commission believed that the impression created misrepresented the candidate's position.[130]

A few jurisdictions have ruled on the propriety of photographs of a candidate in a courtroom. However, in *Saefke v. VandeWalle*,[131] the court found no impropriety in an incumbent justice's use of campaign materials showing him in his robe in a courtroom. A New York ethics advisory committee takes a narrower view. Although the New York committee approves photographs showing an incumbent in judicial robes, it specifies that the photograph may not show the candidate in court.[132] The rationale for this position is that a picture of an incumbent in court takes unfair advantage of the power and prestige of the candidate's office.

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[126] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 80-10 (1980); La. Supreme Court Comm. on Judicial Ethics, Op. 7 (1972); Md. Judicial Ethics Comm., Op. 18 (1973); N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973), Op. 558 (1984); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1450 (1980).

[127] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 80-10 (1980).

[128] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-1007 (1984).

[129] *In re* McGlothen, Unreported Letter of Admonishment (Wash. Judicial Qual. Comm'n 1983)..

[130] *Id.*

[131] 279 N.W.2d 415 (N.D. 1978).

[132] N.Y. State Bar Association Comm. on Professional Ethics, Op. 558 (1984).

The Code establishes identical standards for the procurement of endorsements and the procurement of campaign funds. Canon 7B(2) forbids a candidate from personally soliciting publicly stated support and requires him or her to establish a campaign committee to perform that task.[133] The predecessor Canons of Judicial Ethics did not contain a specific prohibition of personal solicitation of endorsements, but were interpreted to prohibit such personal solicitation in several advisory opinions.[134] Kentucky has adopted a modified version of Canon 7B(2). It permits a candidate to personally solicit public statements of support from lawyers and others. The state supreme court has informally interpreted this provision to prohibit such solicitation of lawyers in or about the courthouse.[135]

Theoretically, similar concerns over the solicitation of endorsements should exist in jurisdictions using an appointive system. An advisory opinion issued in Maryland, a jurisdiction which then used a code of judicial ethics based on the 1924 Canons of Judicial Ethics, strikes an interesting compromise between a flat prohibition of personal solicitation of endorsements and the more liberal Kentucky rule. In Maryland, one wishing to be appointed to a judicial office may inform members of the bar of this interest, and advise them that any support they would care to communicate to the appointing authority would be appreciated. Attorneys contacted should not be asked to tell the candidate if they will do as asked, nor to tell the candidate of any action subsequently taken.[136]

A few restrictions apply concerning the source of endorsements. Canon 7A(1)(b) prohibits a judge from endorsing a can-

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> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy.

CODE, *supra* note 7, Canon 7B(2).

[134] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 105 (1934), Formal Op. 139 (1935), Informal Op. 817 (1965).

[135] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-45 (1983).

[136] Md. Judicial Ethics Comm., Op. 79 (1980).

didate for any public office. Thus, it is improper for a judge to endorse a judicial candidate or for a judicial candidate to accept such an endorsement if it is offered.[137] An exception may be made in jurisdictions using merit selection. One advisory opinion holds that a judge may properly submit names of potential candidates to a merit selection panel, and submit evaluations to the panel in response to a request.[138]

Another questionable source of endorsements are special interest groups. Acceptance of the endorsement or nomination of a group such as Right to Life may be construed as a pledge of conduct in office, and therefore place a candidate in violation of Canon 7B(1)(c). The only law on this point is an advisory opinion issued by the New York State Bar Association.[139] That opinion states that a judicial candidate may accept the endorsement or nomination of the Right to Life Party provided he or she refrains from expressing a view on abortion and that the endorsement or nomination is not conditioned on the candidate's view on that topic.[140]

Statements of public support may be freely sought from lawyers. Because lawyers have a special opportunity to observe and assess the qualifications of judicial candidates, they are encouraged to come forward with their views.[141] An incumbent in a contested election is free to use in the campaign unsolicited complimentary commentary from lawyers, as long as a campaign committee secures permission from the statement's authors.[142] A candidate may announce that he or she has the support of X number of local bar former presidents, or of X number of local lawyers, if such statements are accurate.[143] A candidate may

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[137] *See* N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973); Or. Judicial Conference, Judicial Conduct Comm., Ethics Op. 82-3 (1982); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 719 (1964).

[138] United States Judicial Conference Advisory Comm. on Judicial Activities, Op. 59 (1979).

[139] N.Y. State Bar Association Comm. on Judicial Election Monitoring, Op. 1 (1983).

[140] *Id.*

[141] Ky. Bar Association Ethics Comm., Op. E-277 (1984); State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-565 (1981).

[142] Ethics Advisory Comm., State of Wash., Op. 85-2 (1985).

[143] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 817 (1965).

advertise the fact that he or she has been endorsed by labor unions and fraternal or other civil groups.[144] An attorney or group of attorneys practicing together may publicly endorse a candidate for judicial office by distributing letters printed on professional letterhead.[145]

A question may arise concerning whether the relationship between an endorser and an incumbent candidate or successful aspirant to office should lead to the disqualification of the judge when the endorser appears in court. All ethics advisory panels which have addressed this question agree that *per se* disqualification is unnecessary.[146] Some opinions, however, caution that a judge should look at each case where an endorser appears to determine if factors beyond the mere public support of the judge's candidacy militate in favor of disqualification.[147]

I. *Disqualification Implications*

Should the successful candidate disqualify himself or herself in cases where a losing opposing candidate appears in court? Should an incumbent judge who will seek re-election disqualify himself or herself when an announced opponent appears in court? The Florida ethics advisory committee takes the view that an incumbent is required, by Canon 3C, to disqualify himself or herself in all cases where an announced opponent appears.[148] The same committee also believes that a successful candidate should disqualify himself or herself in all cases where the defeated opponent appears; such disqualification is necessary until the judge believes that his or her impartiality can no longer reasonably be questioned—perhaps for as long as two years.[149]

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[144] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-38 (1982).

[145] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-565 (1981).

[146] Ala. Judicial Inquiry Comm'n, Advisory Op. 84-213 (1984); Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978); Ill. State Bar Association Comm. on Professional Ethics, Op. 866 (1984).

[147] Ala. Judicial Inquiry Comm'n, Advisory Op. 84-213 (1984).

[148] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 84-12 (1984).

[149] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 84-23 (1984).

The ethics advisory committee in Alabama disagrees with the Florida opinion. It would only require a judge to disqualify himself or herself if facts and circumstances exist, arising out of the campaign, which cause the judge to harbor a personal bias or prejudice against the defeated opponent, or if other facts would cause the judge's impartiality to be reasonably questioned.[150]

IV. FINANCING AN ELECTION CAMPAIGN

The financing of a campaign for judicial office is governed by Canons 7B(2) and 7B(3) of the Code. Through these provisions, the Code attempts to insulate candidates from personal contact with contributors that may lead to allegations of bias when a contributor appears before the judge.[151] Thus, candidates are prohibited from personally soliciting or accepting campaign funds, and commentary to the Code urges that, where possible, candidates should not be told the identity of contributors.[152] Instead, the Code calls for candidates to establish committees of responsible persons to secure and manage the expenditure of funds, and to file any necessary disclosure statements.[153]

A. *Campaign Committee Requirements*

Because the membership of a candidate's campaign committee is not explicitly delineated by a Code provision, the composition of campaign committees has been the subject of a number of inquiries resulting in ethics opinions. A South Carolina advisory opinion states that the language of Canon 7B(2) indicating

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[150] Ala. Judicial Inquiry Comm'n, Advisory Op. 84-219 (1984).

[151] E. THODE, *supra* note 3, at 99.

> In order to insulate the candidate to some extent and thereby reduce the danger of the appearance of a lack of impartiality toward those persons who financially support him, or refuse to support him, the Committee required that soliciting and accepting of funds be performed on the candidate's behalf by a committee or committees.

Id.

[152] *See* CODE, *supra* note 7, Canon 7B(2). "Unless a candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate." *Id.* Canon 7B(2) comment.

[153] CODE, *supra* note 7, Canon 7B(2).

that campaign committees "are not prohibited from soliciting campaign contributions . . . from lawyers," does not imply that lawyers cannot serve on such a committee.[154] It is generally accepted that lawyers may serve on a committee working for the election of a candidate for judicial office.[155] A candidate may name his brother as his campaign chairman.[156] A candidate may appoint a public official to his or her campaign finance committee so long as that person is not in some manner subject to the direction and control of the candidate by virtue of the candidate's position as an incumbent judge or other supervisory official.[157]

A candidate is not, according to one advisory opinion, ethically permitted to appoint as campaign chairperson a person who is running for a government attorney position, even if that person is unopposed.[158] Also, an incumbent candidate may not appoint his or her trial commissioner as campaign treasurer—or presumably to any post on the campaign committee. A trial commissioner is generally considered a judicial officer, and the commissioner's appointment to the committee would constitute an improper public endorsement of the candidate by the commissioner in violation of the commissioner's obligation under Canon 7A(1)(b) of the Code of Judicial Conduct.[159] Finally, a candidate may not appoint himself or herself to the committee, and thereby avoid the strictures of provisions limiting personal solicitation by candidates.[160]

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[154] S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 5-1982 (1982).

[155] Committee on Professional Ethics, Bar Association of Nassau County, N.Y., Op. 80-9 (1980).

[156] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-28 (1981).

[157] Ga. Judicial Qualifications Comm'n, Op. 4 (1976); *see also* CODE, *supra* note 7, Canon 7B(1)(b). Appointment to the committee of an employee would authorize the employee to solicit contributions and support, acts which are prohibited for the candidate, and which the candidate must also prohibit his or her employees from doing.

[158] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-30 (1981).

[159] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-52 (1985).

[160] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 72-1 (1972).

What happens when a member of an incumbent candidate's committee appears before the candidate as a litigant or as an attorney? Only one advisory opinion has explicitly addressed this question, holding that Canons 1 and 2, concerning the integrity of the judiciary and the appearance of judicial impropriety, mandate that an incumbent candidate disqualify himself or herself under Canon 3C when a lawyer-committee member appears in the candidate's court.[161] This is considered to be necessary because the judge-candidate's impartiality might reasonably be questioned in those circumstances. Such a result is supported by ethics advisory opinions dealing with an analogous situation—where an attorney representing a judge in other litigation appears before the judge as a party or as attorney for a party. In this situation, most jurisdictions take the view that the judge must disqualify himself or herself,[162] or at least disclose the relationship and continue to hear the case only upon the consent of all litigants and counsel.[163]

The question of whether an incumbent candidate must also recuse himself or herself when associates or partners of a member of his or her campaign committee appear has never been directly addressed. Several advisory opinions state that a judge may not hear a case involving partners or associates of an attorney who is representing the judge.[164] At least one opinion finds that there is no *per se* rule requiring disqualification in these circumstances, but that the judge may proceed only after full disclosure and consent by all concerned.[165]

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[161] S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 5-1982 (1982).

[162] Ala. Judicial Inquiry Comm'n, Advisory Op. 80-74 (1980), Advisory Op. 82-168 (1982); Mo. Comm'n on Retirement, Removal and Discipline, Op. 101 (1984); S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 3-1983 (1983); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1477 (1981); *see also* Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 6 (1975); Md. Judicial Ethics Comm., Op. 95 (1982).

[163] S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 3-1983 (1983).

[164] Mo. Comm'n on Retirement, Removal and Discipline, Op. 101 (1984); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1477 (1981); N.Y. State Bar Association Comm. on Professional Ethics, Op. 511 (1979).

[165] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 79-2 (1979).

Assuming that a judge cannot hear cases involving members of his or her campaign committee during the campaign, the next logical inquiry must be whether the necessity for disqualification ceases at some point after the campaign has successfully been completed. One opinion states, without further explanation, that when an attorney serving *or having served* on a candidate's campaign committee comes before the judge in his or her official capacity, disqualification is required.[166] However, most opinions concerning disqualification when a judge's personal attorney appears in his or her court indicate that the need for disqualification ends when the attorney-client relationship with the judge is terminated.[167] And one opinion that takes the strong view that a judge may not hear a case involving his or her former attorney, and that this requirement continues, virtually *ad infinitum*, specifically states that a judge need not automatically recuse himself or herself when attorneys "who are known to have actively supported" the judge's candidacy appear in court.[168]

A candidate may avoid such conflicts by deciding not to form a committee. Campaign committees are not mandatory under the Code. A candidate need not form a committee and maintain a separate bank account if he or she will not accept contributions and will only expend personal funds on a campaign.[169] However, candidates who wish to use funds contributed by others must do so through a committee.[170] One jurisdiction holds that this is true even if the candidate is seeking appointment to office, rather than election, and even though contributions will not be accepted from litigants, practicing attorneys or others likely to come before the court.[171] The evils sought to be avoided by Canon 7B(2), which by its terms applies only to those seeking election, are also deemed to be present where a candidate seeks appointment.[172]

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[166] S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 5-1982 (1982).

[167] Ala. Judicial Inquiry Comm'n, Advisory Op. 80-74 (1980); Mo. Comm'n on Retirement, Removal and Discipline, Op. 101 (1984); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1477 (1981).

[168] N.Y. State Bar Association Comm. on Professional Ethics, Op. 511 (1979).

[169] Ga. Judicial Qualifications Comm'n, Op. 5 (1976).

[170] *See* CODE, *supra* note 7, Canon 7B(2).

[171] Or. Judicial Conference, Judicial Conduct Comm., Ethics Op. 78-2 (1978).

[172] *Id.*

If limitations are to be placed on a judge's hearing cases in which members of the judge's campaign committee are involved, should similar limitations be placed on a judge's hearing cases involving members of the campaign committee of the judge's opponent? Although no advisory opinion has addressed this question, the potential dangers are indicated by a recent Alabama case in which a judge who had been an unsuccessful candidate for a higher judicial post maintained a "hit list" of supporters of his opponent.[173] The list was posted on the judge's office wall and included attorneys and law firms that had contributed to his opponent's campaign. Numerous attorneys appearing on the list moved for recusal in cases they had before the judge, but all recusal motions were denied. Alabama's Court of the Judiciary suspended the judge for six months for violating Canons 1 and 2 of Alabama's Canons of Judicial Ethics.[174]

B. *Solicitation of Funds*

Different constraints are imposed upon the activities of campaign committees, depending upon whether the candidate is seeking an office filled by a public election between competing candidates or is an incumbent seeking retention in or re-election to office without a competing candidate. In the case of a public election involving competing candidates, the Code states that a campaign committee may be formed and may solicit contributions no earlier than ninety days before a primary election, and no more than ninety days after the last election in which the candidate participates.[175] However, in the case of an incumbent who is unopposed for re-election, or who is running for retention under a merit plan system, the candidate's committee may not begin to collect contributions until active opposition to the candidate has appeared. If opposition is encountered, then a com-

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[173] *In re* Epperson, COJ-19, Unreported Judgment (Ala. Ct. of the Jud., Feb. 23, 1987).

[174] *Id.*

[175] CODE, *supra* note 7, Canon 7B(2). The time limits specified in this section of the Model Code are merely suggestions. "Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein." *Id.* Canon 7B(2) comment.

mittee may solicit funds subject to the same time limits that apply to competing candidates in public elections.[176]

The period of time during which a campaign committee is permitted to solicit contributions varies from jurisdiction to jurisdiction. Only eleven states have adopted the ninety-day periods suggested by the Code.[177] Eight states have adopted different time limits,[178] and six states[179] and the District of Columbia have placed no time limits on the period of solicitation.

Several jurisdictions have addressed questions arising from the differing rules regarding campaign committees for candidates competing with other candidates and for incumbents who do not face competitors. One jurisdiction holds that an incumbent may not establish a committee until opposition becomes apparent.[180] Another takes a middle view that such a candidate may form a committee prior to the emergence of opposition, but that the committee may not solicit funds until opposition actually appears.[181] Finally, a third state holds that to require a candidate to wait to form a committee until the candidacy has been opposed would be analogous to closing the barn door after the cows had escaped.[182] Therefore, this state permits any candidate, including unopposed incumbents, to establish a campaign committee and begin soliciting and collecting funds.[183]

Provisions governing when solicitation may begin do not affect the time when a candidate may begin to campaign. Accordingly, one jurisdiction permits the holding of a function designed to allow voters to meet the candidate prior to the time when solicitation is permitted, as long as no solicitation occurs

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[176] CODE, *supra* note 7, Canon 7B(3).

[177] Alaska, Indiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Vermont, Wyoming.

[178] Arkansas, Florida, Kentucky, Michigan, Oregon, Pennsylvania, Tennessee, Washington.

[179] Georgia, Kansas, Minnesota, Missouri, North Carolina, West Virginia.

[180] S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 5-1982 (1982).

[181] Ariz. Judicial Ethics Advisory Comm., Op. 78-1(3) (1978).

[182] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-11 (1978).

[183] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 76-15 (1976), Op. 78-11 (1978).

at the function.[184] This ruling further states that no violation of the fundraising restrictions would occur if food was served and those attending such a function were required to pay for their own meals, but that it would be improper to hold a function with no fixed cost which might yield a profit, before the solicitation period begins.[185] When a campaign fundraiser is to be held shortly after the solicitation period commences, one jurisdiction has taken the position that the event cannot be publicly announced nor any tickets be sold prior to the beginning of the solicitation period.[186]

Some jurisdictions permit fundraising to continue for a period of time after an election to defray campaign debts.[187] Other jurisdictions dictate that fundraising must cease on the date of the election.[188] In one state that has adopted the latter view, an ethics opinion holds that the candidate may nevertheless contribute personal funds to his or her campaign committee after the election to the extent necessary to pay outstanding campaign debts.[189]

Until recently, Georgia's Code of Judicial Conduct prohibited post-election solicitation.[190] An unsuccessful candidate for judicial office challenged that provision, and a trial court ruled that the state supreme court lacked the authority to promulgate Canon 7B(2) and that the canon violated the first and fourteenth amendments to the United States Constitution. In *Judicial Qualifications Commission v. Lowenstein*,[191] the Georgia Supreme

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[184] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-42 (1983).

[185] *Id.*

[186] Ga. Judicial Qualifications Comm'n, Op. 22 (1978).

[187] *See, e.g.*, Judicial Qualification Comm'n v. Lowenstein, 314 S.E. 107 (Ga. 1984).

[188] *See, e.g.*, State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-386 (1979).

[189] *Id.*

[190] Until March of 1984, Georgia's Code of Judicial Conduct provided: "A candidate's committee may solicit funds for his campaign no earlier than six months before a primary election and no later than the date of the last contested primary or election in which he participates during that election year." Georgia Code of Judicial Conduct, 231 Ga. A-1; 232 Ga. 901; 238 Ga. 855; 245 Ga. 885. On March 15, 1984 the Georgia Code was amended to eliminate all time limitations on the solicitation of funds. 251 Ga. 897 (1984).

[191] 314 S.E.2d 107 (Ga. 1984) (challenging constitutionality of campaign fund-raising restrictions in Canon 7B(2) of Georgia Code of Judicial Conduct).

Court ruled that it had inherent authority to promulgate rules governing judicial officers.[192] The court further stated that the question of the constitutionality of the canon was moot, as it has subsequently been amended to delete fundraising restrictions.[193]

Several states impose no restrictions on the time when campaign contributions may be solicited. Ethics opinions in these states provide varying views on the propriety of fundraising after an election. Louisiana permits a testimonial fundraiser to defray a campaign deficit "within a reasonable time" after the election.[194] Missouri permits solicitation and fundraising events to continue until a campaign deficit is paid,[195] and Alabama takes a similar view.[196] Texas permits a judge to conduct a fundraising benefit in a non-election year as long as its purpose does not violate any provisions of the Code.[197]

A distinction should be made between solicitation of funds and their acceptance. Although it may be improper for a committee to solicit funds outside of a certain period of time, it is not necessarily improper to accept unsolicited contributions proffered when solicitation is prohibited.[198]

As noted, Canon 7B(2) of the Code prohibits candidates for judicial office from personally soliciting campaign contributions.[199] At least two judges have been publicly reprimanded for

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[192] *Id.* at 108.

[193] *Id.*

[194] La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973).

[195] Mo. Comm'n on Retirement, Removal and Discipline, Op. 93 (1983).

[196] Ala. Judicial Inquiry Comm'n, Advisory Op. 82-147 (1982).

[197] Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 56 (1981).

[198] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-42 (1983); *see also* Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 82-10 (1982).

[199] CODE, *supra* note 7, Canon 7B(2).

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy.

Id. See also State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-509 (1980); N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973); S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 5-1982

personally contacting members of the bar and asking for campaign contributions.[200] One of these judges was disciplined despite his having assured the attorney he solicited that a contribution, or lack thereof, would have no effect on cases the attorney or his firm had pending in the candidate's court.[201]

Questions may arise concerning what constitutes "solicitation." A Kentucky ethics opinion indicates that the word solicit has its ordinary dictionary meaning: to ask for something.[202] Another state has stated that it would be improper for an incumbent candidate to write letters inviting people to a fundraiser, or to place newspaper advertisements concerning ticket information for a fundraiser.[203] An ethics advisory committee in Florida takes a more liberal view, holding that a candidate may properly write a letter to local attorneys concluding by saying, "I now personally solicit your vote and your *Active* support."[204] However, the same opinion finds that it would be improper for the candidate to add a postscript specifically asking for financial contributions, or to enclose a card for recipients to return with a contribution.[205] The Florida committee also has stated that it would not be a violation of Canon 7B(2) for a candidate to write letters to all financial contributors to his upcoming campaign personally thanking them for their assistance.[206]

Canon 7B(2) of the Code establishes time limits during which campaign committees may solicit funds, and states that such committees "are not prohibited from soliciting campaign contributions . . . from lawyers," but does not set forth further

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(1982). Candidate's immediate families are also prohibited from personally soliciting campaign funds pursuant to Canon 7B(1)(a) of the Model Code of Judicial Conduct, the South Dakota Campaign Guidelines, and N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973).

[200] *In re* Lantz, 402 So. 2d 1144 (Fla. 1981); *In re* Hotchkiss, 327 N.W.2d 312 (Mich. 1982).

[201] *Hotchkiss*, 327 N.W.2d 312.

[202] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-42 (1983).

[203] La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973), Op. 13 (1973).

[204] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-1 (1978).

[205] *Id.*

[206] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 77-22 (1978).

specific limitations on the fundraising activities of campaign committees.[207] Further elaboration of the restrictions imposed on campaign committees is left to ethics advisory opinions and state guidelines for judicial campaigns. Guidelines used in some jurisdictions state:

> Contributions for a campaign for judicial office may not be knowingly solicited or accepted from a party, or one employed by, affiliated with or a member of the immediate family of a party, to litigation that (a) is before the candidate, (b) may reasonably be expected to come before him if he is elected, or (c) has come before him so recently that the knowing solicitation or acceptance of funds may give the appearance of improper use of the power or prestige of judicial office. Similarly, contributions may not be knowingly solicited or accepted from any firm, corporation or other organization that has as one of its purposes the promotion of one side of a legal issue which may reasonably be expected to come before the candidate if he is elected.[208]

These guidelines also address the propriety of solicitation of contributions from lawyers:

> Contributions may be solicited and accepted from lawyers (including lawyers having cases before, or which may come before, the candidate), provided that the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation. Because lawyers may be better able than laymen to appraise accurately the qualifications of candidates for judicial office, it would not be appropriate . . . to prohibit solicitation of lawyers who may appear before the candidate.[209]

In New York, the campaign guidelines add that contributions should not knowingly be accepted by an incumbent candidate for a trial court judgeship from attorneys with cases before the candidate, nor should lawyers contribute to such a candidate if they have cases pending in the candidate's court.[210]

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[207] CODE, *supra* note 7, Canon 7B(2).

[208] Ethical Guidelines for Judicial Campaigns, 4B SDCL Appendix Ch. 12-9 (1982); N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973).

[209] Ethical Guidelines for Judicial Campaigns, 4B SDCL Appendix Ch. 12-9 (1982).

[210] N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973).

Some states have adopted versions of Canon 7 that delineate restrictions on the activities of campaign committees. The Michigan Code of Judicial Conduct contains five subsections to Canon 7B(2). Section (c) states, in part, that a committee is "prohibited from soliciting campaign contributions from lawyers in excess of $100 per lawyer."[211] An ethics advisory committee in Michigan has opined that it is presently unclear whether lawyers may be solicited for an additional contribution for a general election if they have already given $100 to a candidate in a primary election.[212]

The Ohio Code of Judicial Conduct also limits campaign solicitations, stating that a committee "should not, directly or indirectly, solicit or receive any assessment, subscription, or contribution for any political or personal purpose whatever from any employee, appointee of the court or anyone who does business with the court but may solicit campaign contributions from lawyers."[213] Commentary indicates that "appointees of the court include officials such as referees, commissioners, special masters, receivers, guardians, appraisers and personnel such as clerks, secretaries, bailiffs, and all other employees and appointees."[214] Although the Ohio Code permits solicitation of lawyers in general, it does not indicate whether lawyers involved in cases pending before a candidate may be solicited for contributions by the candidate's campaign committee. It is conceivable that such lawyers would be considered persons who do "business with the court" and thus are ineligible to be contributors.

C. *Donations*

On the other side of the solicitation coin lies the issue of donations. Who may donate to a candidate's campaign; how

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[211] Michigan Code of Judicial Conduct, Michigan Court Rules 1319 (West Supp. 1983).

[212] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-574 (1980).

[213] Ohio Code of Judicial Conduct, Canon 7(B)(2), 36 Ohio St. 2d.

[214] *Id.* Technically, this commentary applies only to Canon 7B(3), prohibiting solicitation or receipt of monies by a candidate. However, the language used to describe persons from whom a candidate may not solicit money is the same as the language used in Canon 7B(2), which limits persons from whom the committee may receive money.

much may be donated; and what effect does the creation of a candidate-donor relationship have on pending or future cases involving both parties?

In the absence of more restrictive provisions contained in a state's version of the Code of Judicial Conduct or election law, the general rule is that any person or group may donate a reasonable amount of money or time to the campaign of a candidate for judicial office, as long as the contributor does not expect to receive any direct benefit from the candidate's election.

The Code of Judicial Conduct, by permitting campaign committees to solicit contributions from lawyers,[215] implicitly authorizes lawyers to offer donations and candidates to accept them. The Model Code of Professional Responsibility, in Disciplinary Rule 7-110(A), states that a lawyer may make a contribution to the campaign fund of a candidate for judicial office. It is clear, however, that the Model Code of Professional Responsibility does not permit lawyers to give anything to judges or candidates for judicial office with the intention of influencing their official actions.[216] The Model Rules of Professional Conduct do not specifically authorize lawyer contributions to judicial campaigns, but the Rules do indicate that lawyers may not contribute money in an attempt to influence a judge's official actions.[217]

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[215] CODE, *supra* note 7, Canon 7B(2) ("Such [campaign] committees are not prohibited from soliciting campaign contributions and public support from lawyers.").

[216] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-34 (1969).

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(A) (1983).

> The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal, except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-34 (1969).

[217] MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.5, 8.4 (1983). "A lawyer shall

Some interpretation of these black-letter rules is provided by ethics advisory opinions and formal guidelines for judicial campaigns. Several state's ethics committees have issued opinions stating that campaign contributions to candidates for judicial office from lawyers or law firms are not only proper, but are to be encouraged.[218] Such contributions are permissible whenever the cost of a reasonably conducted campaign will likely exceed an amount that the candidate could be personally expected to bear,[219] and such contributions may be ethically accepted by a campaign committee even though the contributor is an attorney who is likely to appear before a successful candidate, as long as they are offered and accepted without any expectation that the contributor will be rewarded.[220] However, the total amount of donations should not exceed the needs of the campaign. A campaign committee should not accept an amount from a single source, other than the candidate or the candidate's family, that is so large as to foster an appearance that the donor is seeking favored treatment. Moreover, a contribution from a person other than a member of a candidate's family should not be accepted if the amount appears to be out of proportion to the contributor's financial resources or to the total amount expected to be raised for the campaign.[221]

Some potential problem areas remain concerning donations to candidates for judicial office. Contributions by persons or groups representing a particular point of view, such as opposition to abortion or to capital punishment, may receive significant public attention and lead to later perceptions of favoritism, even where a candidate is not supposed to know the identity of financial contributors. Candidates and their committees may therefore find it judicious to avoid receiving contributions from donors espousing particular ideologies.

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not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law." *Id.* at Rule 3.5(a). "It is professional misconduct for a lawyer to: . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." *Id.* at Rule 8.4(f).

[218] Ky. Bar Association Ethics Comm., Op. E-277 (1984); Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 80-9 (1980), Op. 82-10 (1982); N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973).

[219] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 226 (1941).

[220] Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 48.

[221] N.Y. State Bar Association Comm. on Professional Ethics, Op. 289 (1973).

Because campaigns for public office are likely to involve deficit spending, candidates for judicial office or their committees may find it necessary to borrow to meet expenses. Both the Model Code of Judicial Conduct and the Model Code of Professional Responsibility contain provisions indicating that a candidate may need to be cautious when choosing a lender to provide campaign funds. Canon 5C(4)(c) states that a judge may accept a loan only if the lender is not a party or other person whose interests have come or are likely to come before the judge.[222] This prohibition generally precludes receipt of loans from attorneys who practice in the judge's court.[223] Disciplinary Rule 7-110(A) of the Model Code of Professional Responsibility also prohibits loans to judges by attorneys. At the very least, these rules indicate that it is improper for a candidate to personally negotiate a loan for campaign purposes from an attorney or other person who will appear before the candidate if he or she is elected. By its terms, DR 7-110(A) does not apply to loans made to a campaign committee, but an argument could be made that local practicing attorneys should not make loans to candidates' campaign committees, or that the judges should recuse themselves when they have actual knowledge that an attorney in a case before the court has made a substantial loan to their campaign.[224]

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[222] A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

CODE, *supra* note 7, Canon 5C(4)(c).

[223] *See In re* Anderson, 252 N.W.2d 592, 594 (Minn. 1977) (holding that accepting loans from members of bar, failure to file requested informational reports, and failure to timely decide matters submitted constitutes judicial misconduct justifying suspension without pay for three months).

[224] A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(A) (1983).

Some states impose limits on donations to candidates for judicial office, or to their committee, either as part of state ethical standards or through other laws. Ohio limits the persons who are eligible to contribute to a campaign for judicial office.[225] Under the Michigan Code of Judicial Conduct, judicial campaign committees cannot solicit contributions from lawyers in excess of $100.[226] However, two state ethics advisory opinions indicate that campaign committees may accept unsolicited in-kind or monetary contributions from lawyers larger than that amount.[227] Other states limit sources or amounts of contributions by statute.[228]

Another question that may arise if a candidate is successful is whether the judge must disqualify himself or herself when financial contributors appear in court. The Code of Judicial Conduct requires recusal of a judge whenever the judge's impartiality might reasonably be questioned by an ordinary reasonable person with knowledge of all the facts.[229] However, no court or ethics advisory committee has found that contribution to a judge's campaign, standing alone, is sufficient to merit recusal when a contributor later appears in court.[230] Further, the only two ethics advisory opinions that have considered the matter hold that it is not necessary for a judge to disclose to other attorneys or parties when one party or attorney contributed to the judge's campaign.[231] Finally, ethics opinions indicate that while a candidate-supporter relationship alone does not require automatic disqualification, a case-by-case evaluation (by the judge

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[225] *See supra* notes 99-100 and accompanying text.

[226] Michigan Code of Judicial Conduct, Canon 7B(2)(c); *see also* State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-352 (1978).

[227] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-509 (1980), Informal Op. CI-531 (1980).

[228] *E.g.*, Mississippi Corrupt Practices Act; MISS. CODE ANN. 23-6-25 (1972); *see also* THE COUNCIL OF STATE GOVERNMENTS, 25 THE BOOK OF THE STATES 1984-85, 192-96 (1984).

[229] CODE, *supra* note 7B(1)(a).

[230] *See* Ala. Judicial Inquiry Comm'n, Advisory Op. 84-213 (1984), Advisory Op. 84-227 (1985); Ill. State Bar Association Comm. on Professional Ethics, Op. 866 (1984); N.Y. State Bar Association Comm. on Professional Ethics, Op. 511 (1979); Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978).

[231] Ala. Judicial Inquiry Comm'n, Advisory Op. 84-227 (1984); Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978).

involved) is necessary to determine whether this relationship combined with other factors may cause the judge's impartiality to be reasonably open to question.[232]

D. *Permissible Fundraising Functions and Events*

A campaign committee may sponsor a fundraising benefit to raise money for campaign expenses provided that the nature and type of event does not compromise the candidate's integrity, independence in future judicial affairs or give the appearance of impropriety.[233] Permissible events include dinners for which a fee is charged or at which contributions are sought,[234] testimonials,[235] or other events designed to promote the candidacy.[236] Even the use of raffles has been approved,[237] but only where it does not violate state law.[238] Such events should be advertised and held during the period when solicitation is permitted.[239] The candidate should not personally solicit people to attend,[240] nor should he or she make a plea for contributions during the event.[241]

The Code suggests that a candidate should not be informed of the identities of contributors to his or her campaign.[242] In jurisdictions adhering to this rule, tickets to fundraisers should not be numbered, and the candidate should not be informed of those who purchase tickets or make donations during an event.[243]

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[232] Ala. Judicial Inquiry Comm'n, Advisory Op. 84-213 (1984), Advisory Op. 84-227 (1984).

[233] Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 55 (1981); *see also* CODE, *supra* note 7, Canon 7B(1)(a).

[234] Ga. Judicial Qualifications Comm'n, Op. 7 (1976).

[235] La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973).

[236] Ga. Judicial Qualifications Comm'n, Op. 22 (1978).

[237] La. Supreme Court Comm. on Judicial Ethics, Op. 56 (1982).

[238] Ky. Judicial Ethics Comm., Administrative Office of the Courts, Op. JE-46 (1983).

[239] Ga. Judicial Qualifications Comm'n, Op. 7 (1976); Ga. Judicial Qualifications Comm'n, Op. 22 (1978); La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973).

[240] La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973).

[241] Ga. Judicial Qualifications Comm'n, Op. 7 (1976).

[242] CODE, *supra* note 7, Canon 7B(2) comment. "Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate." *Id.*

[243] Numbering solicitations or tickets to fundraising events may create the perception that a record is kept of those who attend that is passed along to the candidate. La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973), Op. 56 (1973).

Several advisory opinions suggest that candidates should not attend fundraising events for which a ticket must be purchased by those in attendance, because this would bring the candidate into direct contact with contributors and provide certain knowledge of their identities.[244] If no fee is charged for attendance, candidates sometimes appear at a fundraising event, but leave before any donations are solicited.[245]

E. *Use of Campaign Funds*

Funds raised by a campaign committee will be used, in most instances, for advertising in the print and broadcast media, brochures and materials for distribution, travel expenses, telephone expenses, administrative expenses and other costs incurred in promoting the candidacy. The Code merely requires that campaign contributions not be used for the private benefit of a candidate or the candidate's family,[246] and places no other restrictions on the use of campaign funds.

One ethics advisory opinion holds that a candidate who is unopposed may not form a finance committee to raise funds to pay a qualifying fee.[247] Opinions in another state have held that it is proper for a candidate who is unopposed to accept contributions to cover the expenses of filing for election, but several members of the committee issuing those opinions did not agree with the majority view and suggested that an unopposed candidate should not raise or use campaign funds for that purpose.[248] Finally, a third state takes the view that a candidate for judicial office, opposed or unopposed, incumbent or not, may raise funds and use them to pay a qualifying fee, so long as the funds are raised during the period when solicitation is permitted.[249]

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[244] Ga. Judicial Qualifications Comm'n, Op. 7 (1976), Op. 22 (1978); La. Supreme Court Comm. on Judicial Ethics, Op. 11 (1973).

[245] Tenth Annual Report, New York State Commission on Judicial Conduct 77 (1985).

[246] CODE, *supra* note 7, Canon 7B(2). "A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family." *Id.*

[247] S.C. Advisory Comm. on Standards of Judicial Conduct, Advisory Op. 5-1982 (1982).

[248] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 78-11 (1978), Op. 82-10 (1982).

[249] Ga. Judicial Qualifications Comm'n, Op. 41 (1980).

Candidates often lend money to their campaign committees. No case or advisory opinion has ever suggested that it is improper to use campaign funds to repay such loans, or that such repayment would constitute a prohibited "private benefit" for the candidate. One opinion does state, however, that a candidate who loaned his campaign committee money in one election could not properly be repaid using funds raised during a subsequent election campaign. Any excess funds from the subsequent campaign, said the opinion, must be disposed of as prescribed by the state Code of Judicial Conduct.[250]

Two judges have been disciplined for using campaign funds for personal purposes. An incumbent New York judge was found to have violated Canon 5C(4) of the Code of Judicial Conduct (prohibiting receipt of gifts from persons appearing before a judge) when he used for personal expenditures more than $10,000 raised during a campaign "testimonial" from attorneys who practiced in his court and persons who had appeared in his court as litigants.[251] The judge was admonished for this conduct. A Michigan judge was publicly censured, suspended from office for nine months without pay, and ordered to pay costs of the discipline proceedings after he violated Code of Judicial Conduct Canon 7B(2) by diverting contributions to his campaign committee into an "expense fund" used for his own purposes.[252]

Campaign committees sometimes find, after paying all expenses of a campaign, that an excess remains in the treasury. Since Canon 7B(2) prohibits personal use of such excess money by the candidate, it cannot be turned over to the candidate and must be disposed of in some other manner.[253] Florida advisory opinions state that a candidate's committee may retain surplus funds for use in the next election, or may donate the surplus funds to charity.[254] A Missouri advisory opinion specifies that

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[250] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-1040 (1984).

[251] *In re* Certo, Unreported Determination (N.Y. Comm'n 1982).

[252] *In re* Lawrence, 335 N.W.2d 456 (Mich. 1983).

[253] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 83-1 (1983) (under Florida law, a county or circuit judge may transfer as much as $1,500 into his or her office account).

[254] Fla. Supreme Court Comm. on Standards of Conduct Governing Judges, Op. 83-1 (1983), Op. 77-5 (1977). The latter opinion notes that a donation to charity should

any excess campaign funds must be returned to contributors on a pro-rata basis, but notes that expenses of administering the refund may be paid out of the surplus funds.[255] The Michigan Code of Judicial Conduct requires candidates either to return any excess funds to the contributors or to donate those funds to the Client Security Fund of the State Bar of Michigan, not later than the end of the year in which the election was held.[256] This rule precludes donation of excess funds to charity.[257]

CONCLUSION

This review of the ethics rules and the case law and advisory opinions interpreting them raises serious questions about the efficacy of Canon 7 of the ABA's Model Code of Judicial Conduct. It suggests that the Code falls short of achieving the goals of faithfulness to the electoral process and maintenance of the appearance of judicial impartiality. Code restrictions on campaign appearances and advocacy have tended to be interpreted in a manner that precludes presentation of meaningful information on judicial candidates to the electorate; and, Code restrictions on campaign financing tend to raise more questions about judicial impartiality and the appearance of impartiality than they answer.

Ethical restrictions on campaign appearances and advocacy severely limit information on judicial candidates that may be presented to the electorate. The Code has been interpreted to prevent public debates between competing candidates,[258] to prohibit statements concerning a candidate's anticipated conduct in office (other than general statements promising the faithful performance of duties),[259] to prevent or curtail responses to ques-

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not be followed by the candidate's claim of a charitable deduction on his or her personal income tax return.

[255] Mo. Comm'n on Retirement, Removal and Discipline, Op. 18 (1979).

[256] Michigan Code of Judicial Conduct, Canon 7B(2)(d) and (e), Michigan Court Rules (West Supp. 1983); State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-1040 (1984).

[257] State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-664 (1981).

[258] *See supra* note 53.

[259] *See supra* notes 69-73 and accompanying text.

tionnaire surveys of candidates' views[260] and to preclude statements concerning the candidate's performance or the performance of the candidate's opponent other than those relating to court administration.[261] In short, the electorate has inadequate information to judge the judges.[262] For these and other reasons, judicial elections have been characterized as "quasi-elections."[263]

One way in which judicial "quasi-elections" emulate election contests of other elected officials is their cost. Judicial election campaign costs have escalated in recent years.[264] Although Canon 7B(2) of the Code seeks to insulate the judicial candidate from campaign fundraising and knowledge of the identity of contributors through the use of campaign committees, this protection is rendered somewhat ineffectual by state campaign financing disclosure laws.[265] Although judges may not personally solicit campaign funds, they tend to know who their contributors are.

The use of campaign financing committees, coupled with the knowledge of the identity of campaign contributors, brings a judge's impartiality into question. However, there are no clear rules to restore the appearance of impartiality. It is unclear whether a judge may hear a case in which a member of the judge's campaign committee or one associated with the committee member is involved as a litigant or as an attorney.[266] It is less clear whether a judge may hear a case involving contributors to the campaign of the judge's opponent or members of the opponent's campaign committee.[267] Although a restrictive rule that would disqualify a judge from sitting in such cases might

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[260] *See supra* notes 79-85 and accompanying text.

[261] *See supra* notes 91-109 and accompanying text.

[262] For recent proposals to lift restrictions on campaign speech by judicial candidates, see Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1988); Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986).

[263] Schotland, *supra* note 1, at 83.

[264] For discussions of the costs of judicial election campaigns, see Schotland, *supra* note 1, at 59-65; Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 452-55 (1988).

[265] For a critique of Canon 7B(2) in operation, see Banner, *supra* note 264.

[266] *See supra* notes 154-61 and accompanying text.

[267] For the potential dangers involved in allowing judges to participate in such cases, see *supra* note 164.

be advisable from the standpoint of maintaining the appearance of impartiality, such a rule could have adverse consequences from an administration of justice standpoint. In less populous communities, to ban the judge from sitting in cases involving both campaign supporters and opponents in order to preserve the appearance of impartiality might result in the judge's disqualification in a large percentage of cases filed in the judge's court. Attempts by the organized bar to implement campaign financing plans that would address these problems have proved largely unsuccessful.[268]

Therefore, while Canon 7 of the ABA's Code of Judicial Conduct may appear to represent a sensible approach to curbing judicial election campaign abuses, a closer analysis of the operation of the Canon reveals significant shortcomings. Such an analysis tends to support the succinct statement of a prominent political commentator earlier in this century that, "for the election of judges by popular vote there is nothing to be said."[269]

Although some states have abandoned judicial elections in favor of the "merit plan" for selecting judges, most states still choose all or some of their judges through popular election. It is, therefore, imperative that the problem caused by judicial elections be addressed in a meaningful way.

Drafters of judicial ethics codes and others concerned about the problem of judicial elections might first take note of its polycentric character. As we have seen, efforts to correct one aspect of the problem are likely to have an adverse effect on others. For example, an attempt to sanitize campaign conduct by curbing campaign speech may assist in maintaining the appearance of impartiality but it detracts from the goal of faithfulness to the electoral process because it severely limits the information the electorate may obtain about a candidate's views.

Because the problem of judicial elections is polycentric, it is more appropriate to deal with it through local direction and

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[268] For a review of three bar reform efforts, *see* Schotland, *supra* note 1, at 96-107.

[269] Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 531 (1926).

control than through the application of state-wide ethics rules.[270] A local program aimed at controlling campaign abuses by establishing local ground rules for individual campaigns and then monitoring these campaigns would appear to be in a much better position to fashion appropriate responses to questions concerning campaign conduct and financing than a state-wide body applying state-wide rules in piecemeal fashion. As we have seen, the latter approach—necessitated by the current wording of Canon 7—has proven woefully inadequate.

Although local programs to control campaign abuses have been established,[271] the experiences of these programs have not been systematically evaluated. Assessments of the experiences of these programs would be of great assistance to those seeking guidance in dealing with this problem. If these local programs are found to have achieved a measure of success, Canon 7 should be revised. The wording of Canon 7 might then be limited to (1) offer *general* guidance to the judge (e.g., a judge should avoid political activity that may give rise to an appearance of bias) and (2) account for, or encourage the establishment of, local plans to monitor and control specific campaign conduct. Localizing Canon 7 in this way would increase the likelihood of

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[270] In arguing that adjudication is ill-suited for dealing with a polycentric problem, Lou Fuller argues that the only adequate methods for handling polycentric problems are managerial direction and contract. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 398 (1978).

[271] One example of such a program is the "Fair Election Practices Committee for Judicial Campaigns" of the San Mateo County (California) Bar Association:

> The Fair Election Practices Committee for Judicial Campaigns provides a resource and a hearing forum for a candidate who might be the victim of an opponent's false or misleading statements. It also provides a forum for the truthfulness of a candidate's allegations. It is the obligation of the Committee to assist candidates in an advisory capacity. The Committee is constituted in such a fashion that it can act swiftly in the event of untruthful or misleading statements by a candidate as to his qualifications or as to the qualifications of his opponent.
>
> The Committee recognizes that a contested election for judicial office is still a political contest and fully embraces the concepts of free speech and fair comment. The Committee also realizes that during the heat of a campaign candidates may be the subject of vicious, untruthful and libelous statements against which they have no adequate remedy except by an immediate reference of a neutral committee, which is then empowered to provide a prompt public response.

San Mateo County (Calif.) Bar Association, *Plan for Judicial Campaigns* (1985).

accomplishing the goals of an impartial judiciary and faithfulness to the electoral process.