

# JUDICIAL CAMPAIGN CONDUCT COMMITTEES

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## I. WHERE JUDICIAL CAMPAIGN CONDUCT COMMITTEES FIT IN THE OVERALL PICTURE

When all is said and debated about First Amendment limits on what regulation, if any, can be applied to judicial campaign conduct, three lessons stand out:

### A. Lesson One—Florida and Ohio's Approach

The initial First Amendment decision against a canon limiting judicial campaign conduct was by a Florida federal district judge, striking a canon provision that said “a candidate . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of his duties . . . [or] announce his views on disputed legal or political issues . . . .”<sup>1</sup>

That decision relied on the simplistic mantra that once a State decides to elect judges, judicial elections must be like other elections: “[W]hen a state decides that its trial judges are to be popularly elected . . . it must recognize the candidates’ right to make campaign speeches *and* the concomitant right of the public to be informed about the judicial candidates.”<sup>2</sup> Subsequently, the stricken provision was revised. The same provision had been upheld six years earlier by an Ohio federal district court judge, and subsequently affirmed by the Sixth Circuit Court of Appeals.<sup>3</sup> These decisions were not even cited by the Florida federal judge. But that is only the beginning—and by far the lesser part of the lesson, which is: Florida and Ohio have done the most to preempt, and if necessary take steps against, inappropriate judicial campaign conduct. Their effort is described below.

Given that Florida experienced a notable decision invalidating their effort to

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1. FLA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1994).

2. *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (emphasis in original). Neither party requested oral argument in this decision for a preliminary injunction, *id.* at 1095, and the Bar did not appeal the court’s granting of a preliminary injunction barring the enforcement of Canon 7(B)(i)(c). *Id.* at 1199. (A retrospective note: counsel for the Bar was Barry Richard, lead counsel for George W. Bush in Florida during 2000 election dispute.). In 1991, a permanent injunction against the Canon was issued.

3. *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), *aff’d*, 861 F.2d 719 (6th Cir. 1988).

limit judicial campaign conduct, and Ohio experienced a completely opposite decision, it is striking that it is those two States that are unique in having substantial, structured efforts to pre-empt and prevent misconduct in judicial campaigns.<sup>4</sup> These two systems, in place since the mid-1990s, are a model for action. Moreover, the Florida experience shows that, whatever one's view of how the First Amendment affects attempts to limit inappropriate judicial campaign conduct, it does not stop effective, aggressive efforts.

Florida's effort, begun in 1998, is carried out by the State's Judicial Ethics Advisory Committee ("JEAC") made up of ten judges (including a rotating chairperson) and one attorney, with staff support. The JEAC renders "advisory opinions to inquiring judges [on] the propriety of contemplated judicial and non-judicial conduct."<sup>5</sup> Starting with the 1998 elections, the JEAC has performed two functions. For the 1998 and 2000 elections, it conducted campaign conduct forums in every circuit with a contested judicial election (fifteen forums in 1998, sixteen in 2000), for candidates and campaign consultants. Every forum is attended by the chief judge of the particular circuit and a high-ranking representative of the bar. Their "course" material—with a cover page declaring "Play by the Rules . . . or else . . . ."<sup>6</sup> is already serving as a model for other States.<sup>7</sup> The JEAC's Election Practices Subcommittee provides quick responses to campaign questions; in addition to informal responses, opinions are posted promptly on a website. Moreover, the Florida Supreme Court, newly empowered by recent constitutional revision, last year removed a judge from office because of his misconduct in a campaign.<sup>8</sup>

Ohio's Supreme Court revised its canon in 1995 to start a two-part effort to limit inappropriate judicial campaign conduct. First, early in each campaign year, all judicial candidates are required to complete a two-hour course on campaign conduct and finance, to which "candidates are encouraged to bring campaign committee members and other volunteers."<sup>9</sup> Second, the court's "rules

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4. Nevada will have a similar effort active for 2002. And for recent action in Louisiana, Mississippi, and New York, see *infra* notes 35-36 and *infra* text accompanying notes 32-33.

5. Pet. of the Comm. on Standards of Conduct for Judges, 327 So. 2d 5 (Fla. 1976). The committee name was changed to JEAC in 1997. Pet. of the Comm. on Standards of Judges, 698 So. 2d 834 (Fla. 1997).

6. See Appendix A, *infra*, for a few pages of their material.

7. For 2002, the JEAC is considering reducing the number of forums by regionalizing them. Also, it may hold the forums earlier than before. They were held in late July, immediately after the formal filing date for candidates, but that is too close to the September primary, which in fact is the final election for almost all judicial candidates, and it comes after some significant campaigning.

8. *Inquiry re Matthew E. McMillan*, 797 So. 2d 560 (Fla. 2001). Charges included "(1) making explicit campaign promises to favor the State and the police in court proceedings; (2) making explicit promises that he would side against the defense; (3) making unfounded attacks on an incumbent county judge; (4) making unfounded attacks on the local court system and local officials. . . ." *Id.* at 562.

9. Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1456 (2001). Prepared for the December 2000 Chief Justices' Summit,

governing judicial discipline [include] expedited procedures for reviewing and resolving judicial campaign complaints.”<sup>10</sup> Of the eleven actions that have gone through Ohio’s process, seven resulted in either a preliminary finding or final order before the election, and the “slowest” action took five months after the misconduct occurred.<sup>11</sup>

### *B. Lesson Two—Enforcement Is Rare*

Wholly apart from possible First Amendment hurdles that prevent or inhibit enforcement of canon provisions limiting campaign conduct, the unsavory fact is that although enforcement has been active in a handful of States (and localities), in many or most places enforcement is rare, and fear of enforcement is little or none. Moreover, much campaign conduct defies any view that judicial campaigns should be above the gutter, let alone different from other campaigns. Finally, what keeps most judicial campaigning different from other campaigning is a combination of the norms for such campaigns, which rest on the candidates’ professionalism, respect for the bench, and concern to protect the public’s respect for the bench and the fact that in so many campaigns, the norms are not tested by significant—or even any—competition.

We may all point with alarm to problematic advertisements in 2000;<sup>12</sup> however, while earlier years were quieter, there were undeniable indications that the system was vulnerable.

### *C. Last Lesson—Judicial Campaign Conduct Committees Bridge the Gap*

Campaign conduct oversight committees—some of which are official, some quasi-official, and some unofficial committees of diverse community leaders—can make a major difference in curbing inappropriate judicial campaign conduct. First, at the outset of campaigns, they can educate candidates about why judicial campaigns are different, and therefore what kinds of conduct are deemed inappropriate. Second, during campaigns, oversight committees can be available to respond to candidate requests for advice. They can receive complaints about conduct deemed inappropriate, or even take the initiative to try to discourage or stop such conduct. They can also reach out to non-candidate groups (political parties, political leaders and the variety of civic groups that may be active in judicial campaigns) to try to discourage advertising or other conduct that, in the view of the committee, is inappropriate. Finally, at any time, so long

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Dove’s article provides all the information regarding the Ohio committees, as well as that for other States.

10. *Id.* at 1463.

11. *Id.* at 1463-64. In addition to the expedited process, a complaint may go on the “normal track,” with an investigation by the Supreme Court’s disciplinary counsel. One matter was pursued by disciplinary counsel on that track after the complaint had been dismissed, post-election, by the candidates who had filed it.

12. See Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002).

as they act only after fully fair process, they can present to the public their views of why certain conduct is inappropriate.

A few such committees (for example, unofficial local ones, initiated by local bar associations) have been active for over a decade.<sup>13</sup> Then, starting in 1995 in Ohio, spreading in 1998, and with the trend strengthening since, official and other committees have emerged. We consider here the types of problems such committees can act upon; the three types of committees: official, quasi-official and unofficial; the strengths and weaknesses of each type, and the inherent weaknesses of all such efforts; concluding with recommendations for future action.

## II. THE PROBLEMS ON WHICH SUCH COMMITTEES CAN ACT

So far, campaign conduct committees have dealt only with problematic advertisements, and that is bound to remain their main or sole focus. But as we note briefly below, committees should seriously consider the possibility of not ignoring problematic campaign finance conduct. Problematic ads fall into three main categories: factual misstatements; "signaling" and near-promises; and attack ads. At their most innocent, attack ads state accurate, but negative, facts about the opponent; at their most damaging, they assail judges for specific decisions in which they participated, or attack lawyers for specific clients they represented, and/or engage in misrepresentation or falsehood.

Professor Champagne provides an unprecedented picture of judicial campaign ads,<sup>14</sup> and there seems little or no need for more examples of campaign conduct that almost all of us would call undesirable, and many of us seek to stop. However, while unquestionably 2000's judicial campaigns were dimensionally different from previous years, no one should think such conduct is new.<sup>15</sup>

Judicial campaign conduct committees could also help preempt or discourage campaign finance practices that, though legal, are damaging deviations from the community's norms. Examples of the practices include: An incumbent is believed to be engaging in raising campaign funds in ways that may not be a provable violation of the ban on personal solicitation; a challenger, acting as if she will run for a nonjudicial office, begins fundraising before the period allowed for judicial campaign fundraising—and then announces her candidacy for a judicial race, offering to return funds to any contributor who wishes; and an incumbent justice, in a jurisdiction which limits individual contributions but does

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13. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 L.J. & POL. 57, 91-93 n.92, 128-29 (1985).

14. Champagne, *supra* note 12.

15. In addition to the 2000 elections' ads examined in Professor Champagne's paper, earlier horrors are noted in Schotland, *supra* note 13, at 66, 79-80, and in *Choosing Justices: Reforming the Selection of State Judges*, in UNCERTAIN JUSTICE: POLITICS IN AMERICA'S COURTS 77, 101-02 (2000). The 2000 campaigns are examined (mainly as to campaign finance) in Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849.

not impose any aggregate limit on law firms, raises an unprecedented proportion of his funds from a single firm, its members, employees and their spouses, and the firm's PAC. Moreover, the contributions are received just before the justice votes to review a verdict which awarded record damages, and the contributing firm had a one-third contingency interest in the matter.<sup>16</sup>

No existing campaign conduct committee has taken on campaign finance problems. However, campaign contribution and spending patterns in judicial races should do more than merely abide by legal limits: candidates should adhere to the jurisdiction's norms or else be ready to account to the public for deviating from the norms.

### III. THE THREE TYPES OF COMMITTEES; THEIR POWERS, PROCEDURES, AND MEMBERS

#### A. Official Committees

Along with the official committees established in Florida and Ohio,<sup>17</sup> at least two other states have also adopted an official committee model.

1. *Georgia's Approach.*—In late 1997, Georgia's Judicial Qualifications Commission ("JQC"), the official body responsible for judicial discipline, adopted a rule establishing a three-person special committee to oversee campaign conduct (in Georgia, judges run in nonpartisan, contestable elections). This step reflected concern about a troublesome 1996 campaign for an intermediate appellate seat. The committee's members are, by rule, the senior member of each of the three categories of JQC members: one private attorney, one judge and one "lay person," plus the JQC's full-time director as an *ex officio* member. The initial members were the JQC's chairman, a lawyer, an intermediate appellate judge, and a prominent businessman.

The committee's sole power is to issue statements. It may do so after an expedited but thorough process (of course, affording to the candidate complained against an opportunity to respond), either upon complaint or on its own initiative. This procedure was upheld as constitutional by a federal district court in 2000, although the court also upheld a facial challenge to the particular provision in Georgia's canon.<sup>18</sup>

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16. This is a ninety-percent-literal statement of the conduct of two Ohio Supreme Court justices in 1998. They voted as the firm had hoped. The defendant's motion for recusal was never ruled upon. *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000). The facts are set forth in Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1503-04 (2001).

17. The Florida committee was established in 1998 and the Ohio committee in 1995. *See supra* Part I.A.

18. The court upheld the system as one that "offers the constitutionally preferred cure of more speech. The Rule does not give the Special Committee the power to censor or prohibit speech, to impose fines or other criminal sanctions, or to institute or prosecute disciplinary actions. It only allows the Special Committee to make a public statement." *Weaver v. Bonner*, 114 F. Supp. 2d

2. *Nevada's Approach*.—In 1997, Nevada's Supreme Court established a Standing Committee on Judicial Ethics and Election Practices, which serves as the appellate body for judicial discipline cases, renders advisory opinions to judges throughout the year, and adjudicates disputes between candidates, whether they are already judges or not. The Standing Committee has twenty-eight members, with four judges appointed by the court, twelve lawyers appointed by the state bar, and twelve "public members" appointed by the governor (but these twelve do not participate in the non-election advisory opinion process). They have strong staff support through the state bar's general counsel/executive director.

The Committee divides into five-person panels to handle complaints. Initiated for the first time in 2002, and before candidates formally file for election, the Committee will provide "proactive and advance education . . . to hold down complaints and avoid violations."

*B. Quasi-official Committees: Alabama, Michigan and South Dakota*<sup>19</sup>

In February 1998, the Alabama Supreme Court appointed a twelve-person "Judicial Campaign Oversight Committee," all private citizens, including nonlawyers with reputations for the "utmost integrity." The twelve members were appointed by the Alabama Supreme Court, two other courts and the Circuit Judges' Association. The 1998 members included a homemaker, a businessman, two retired judges, an active judge, a member of the clergy, a mayor, a lawyer and former congressman, a farmer, a prosecutor, a public service leader, a campaign manager, and another lawyer (who was the chair of the court's Standing Committee on Rules of Conduct and Canons of Judicial Ethics). In 2000, the Committee was expanded to twenty-six members, all lawyers and judges appointed by the supreme court.

In 1998, as a result of increased complaints throughout the 1996 campaign cycle, the Michigan bar<sup>20</sup> created five five-person regional panels, made up of lawyers and nonlawyers, to oversee campaign conduct issues; they offered all

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1337, 1345-46 (N.D. Ga. 2000) (citations omitted). See also Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 705-07 (2002).

19. In February 1998, the South Dakota Supreme Court ordered that candidates must complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Judicial Qualifications Commission; (2) in every year with a circuit court election, a Special Committee on Judicial Election Campaign Intervention shall be created . . . to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office.

The committee consists of five persons: two former members of the JQC appointed by the JQC chair; two former members of the state bar's disciplinary board, appointed by its chair; and a retired judge or justice appointed by the chief justice. The members of the JQC and Special Committee, and their counsel and staff, have absolute immunity for acts in the course of duty. See Appendices to SDCL 12-9 and 16-1A.

20. Michigan is a mandatory bar State.

candidates in contested judicial elections the opportunity to participate in the oversight program.<sup>21</sup> If a candidate did not participate, a panel could still investigate allegations of “false, misleading, unfair, unethical or illegal statements” and make public comment and/or refer the matter to the Attorney Grievance Commission or the Judicial Tenure Commission.

In the 1998 primary elections for Michigan trial judges, there were 101 uncontested races and sixty-one contested races with 121 candidates, eighty-four of whom participated in the oversight program. Of the general election’s ninety-four candidates, sixty-nine participated. During the primary, the panels reviewed only one inquiry, which resulted in the candidate’s agreement to alter conduct. The general election produced six requests for action, four of which were dismissed and two that resulted in immediate agreements to alter conduct. Although the bar endorsed continuation of the panels for 2000, they were not continued.

### *C. Unofficial Committees*

Unofficial committees have existed for more than a decade in some localities and are currently employed in eighteen localities over five states. Moreover, North Carolina and Ohio have each, on single occasions, employed the unofficial committee model.

In 1990 in North Carolina, a state bar association committee chairman formed a committee that sponsored debates on public television between statewide candidates, and also published 550,000 copies of a voters’ pamphlet on judicial candidates (after raising nearly \$50,000 to subsidize the pamphlet’s creation) distributed shortly before the election in the main Sunday newspapers. The committee included former Chief Justice Rhoda Billings and a former justice, plus some twelve citizens who were diverse in gender, geography, ethnicity, and professions, but all of whom were leaders or representatives of notable community groups. The committee began its efforts at the end of August and was ready to receive and respond to campaign complaints, but none were submitted (in fact, the only problematic conduct was by one of the state party chairmen).

During 1992, a similar effort was initiated in Ohio by members of a Columbus campaign oversight group that had been functioning in Franklin County for several election cycles. The State Committee of Citizens, chaired by

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21. For a valuable report, see Thomas K. Byerley, *Judicial Campaign Ethics Experiment*, MICH. B. J. 318 (March 1999). Byerley serves as regulation counsel for the Michigan State Bar, and notes that

one major concern [leading to the effort] was that there was no prompt way to address allegedly improper campaign tactics. . . . [A]n “aggrieved” candidate could only file a complaint [and] the investigations . . . took considerable time . . . . Even if a candidate violated ethics rules during the campaign, many times no discipline was ultimately imposed . . . . As with any experimental program, lessons were learned . . . .

*Id.* at 318, 319.

a former federal district judge, had the same goals as the North Carolina effort noted above. However, the State Committee of Citizens collapsed after it failed to secure agreement from supreme court candidates on limiting campaign contributions and spending—each candidate was willing to limit one but not the other.

In 1985 in Columbus, Ohio, the county bar president initiated an oversight committee of lawyers and nonlawyers. The committee succeeded in stopping one advertisement that stated, “Elect Judge X” although X had never been a judge, and another ad that attacked a candidate for having represented a particular criminal defendant. The committee chairman was the local Catholic bishop, who had been a lawyer earlier in his career. The committee, now known locally as the “Bishop’s Committee,” still exists, with eleven members appointed by the county bar president (with the consent of the bar’s board of governors). Of the eleven members, three must be nonlawyers, and not more than five may be from one political party. Before taking any action or releasing any statement, the committee must have seven votes in favor of such a course. Cleveland and Youngstown have recently begun similar efforts.

In addition, San Mateo County, California, has had such a committee since approximately 1980;<sup>22</sup> similar committees can be found in Santa Clara County, California, and King County (Seattle), Washington. In Florida, the Miami-Dade bar association has an active committee. Five other Florida counties have committees of which we learned only at the completion of this Paper: Broward, Escambia-Santa Rosa, Orange, Palm Beach, and Volusia.<sup>23</sup>

New York moved dramatically on this matter in 2001. New York’s pioneer is the Erie County (Buffalo) bar, which around 1985 started a committee of three board members plus the board’s chairman. Each member serves for three years. An effort is made to appoint lawyers with a background in professional ethics or judicial campaigns. And in 2000, the Monroe County (Rochester) bar resumed an effort it had made in the mid-1980s; the committee consists of several bar officers.<sup>24</sup>

#### D. Two Additional Factors

1. *What Some Committees Have Done.*—After Alabama’s 1998 election, the Judicial Campaign Oversight Committee submitted a full report to the court, noting its outreach efforts which brought candidates together (many opponents had not met before); that most candidates signed pledges;<sup>25</sup> and that it responded to 350 inquiries and referred about ten complaints to the state bar or judicial inquiry commission. “A nicer election,” the *Birmingham News* editorialized on November 9, 1998. “Overall . . . it was a much cleaner campaign than in

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22. For the entire San Mateo plan, see Schotland, *supra* note 13, at 91-93.

23. Information on whom to contact in all six counties can be provided by the authors of this Article.

24. See *infra* text accompanying notes 32-33.

25. See *infra* Part II.D.2.

previous years.”<sup>26</sup>

In 2000, an enlarged committee received about thirty complaints or inquiries; however, they did not submit a report. Strikingly, although five supreme court seats were contested with such intensity that over \$13 million was spent, and a major litigation arose over one campaign ad, Alabama was dramatically more decorous than Illinois, Michigan, and Ohio, which had similar hotly-contested races.<sup>27</sup>

2. *Candidate Pledges.*—Many committees of all three types ask candidates to sign pledges. Michigan’s 1998 state bar effort secured pledges from nearly seventy percent of the primary election candidates and seventy-three percent in the general election.<sup>28</sup> The Alabama and the Columbus citizens’ committees have very detailed pledges; the latter even defines how the phrases “jury trial experience,” “trial experience,” “litigation experience,” “appellate experience,” and “administrative hearing experience” may be used in campaign literature. The Santa Clara bar committee’s pledge simply asks candidates to agree to abide by the bar’s Judicial Election Campaign Code of Ethics, which contains specific guidelines. The New York bar committees all use pledges; Seattle’s pledge is a perfunctory paragraph. Nevada does not use a pledge. Obviously, committees using pledges believe them to be helpful. One of the authors recommends the use of pledges, the other feels the need for more information on how they are used. One major benefit of using pledges is that it presents a benchmark against which the voting public may measure candidate conduct as the campaign progresses; it provides an opportunity to hold candidates’ feet to the fire if they fail to comply. A major criticism cited by opponents of pledges is that they may be perceived as coercive, preventing candidates from campaigning according to their own preferences.

#### IV. STRENGTHS AND WEAKNESSES OF EACH COMMITTEE TYPE

An inherent strength of any type of campaign oversight committee described here is that if inappropriate judicial campaign conduct occurs, the voters will hear from diverse, respected, knowledgeable, and neutral people. Indeed, the committee’s mere existence is likely to help inhibit improper conduct; and if any does occur, committee members can give the public an informed, detached analysis.

An inherent weakness in these committees is the tendency that people willing to undertake responsibility for such an effort, may tend to have unrealistically high aspirations for what constitutes proper conduct. This weakness can be met

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26. Editorial, *A Nicer Election in Judicial Races, No Repeat of 1996’s Tacky Campaign*, BIRMINGHAM NEWS, Nov. 9, 1998, at 6A.

27. However, one supreme court candidate in 2000, Lyn Stuart, let voters know that she had sentenced two convicted murderers to death, that she had a ninety-one percent conviction rate in DUI cases, that she had a twenty year record in fighting crime as both a prosecutor and judge and that “she respects law enforcement.”

28. See Byerley, *supra* note 21, at 319.

by a well-structured appointment process. We recognize that the inherent strength of these committees will, for some people, seem insufficient unless it includes the power to stop improper conduct. However, the existence of such committees is an essential step toward protecting long-standing values that are not merely fundamental but are also crucial to allowing our state courts to continue to render justice—specifically, judicial independence and accountability.

Official committees have the advantage of durability, resources, and the potency that comes with the potential for official sanctions for misconduct. However, those undeniable advantages are outweighed by two factors that are inseparable from the advantages. One is the certainty that official action is limited by requirements of the First Amendment and due process. Unofficial action, of course, also must be procedurally fair, but unofficial action is free of constitutional limits.<sup>29</sup> The second advantage of unofficial committees is the greater credibility that comes with a diverse membership in a voluntary body—members who are selected precisely because they are respected and neutral voices.<sup>30</sup> In the unofficial context, such members are more likely to be regarded as respected and neutral, rather than as purely political appointees charged with protecting favorites. On balance, we favor unofficial committees for this role.

### CONCLUSION

Three recent events, taken together, constitute the strongest possible recommendation for bar associations to initiate campaign conduct committees.

The December 2000 Summit of State Chief Justices recommended that: “Non-governmental monitoring groups should be established to encourage fair and ethical judicial campaigns.”<sup>31</sup> As a direct result, in March 2001, New York’s Administrative Board of the Courts adopted a new rule that all judicial candidates (lawyers and judges) have the same campaign conduct

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29. Even official action is reviewed more favorably if it chooses “the constitutionally preferred cure of more speech.” See *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1345 (N.D. Ga. 2000).

30. In an Ohio Supreme Court election in 2000, the U.S. and Ohio Chambers of Commerce ran what became the most controversial television ads of 2000’s unprecedentedly heated campaigns. A press conference to attack the attack ads was held by the state bar’s president. There is no reason to question that individual’s reputation for integrity, but we note that as a member of a large law firm, he happened to have as partners the then-president of the Trial Lawyers’ Association and a partner who was then a member of the official state election commission, where he was active in trying to have the commission act against those same ads. We believe that media efforts, and discussions aimed at making it unnecessary to “go public,” are likely to be more effective if conducted by a panel of diverse community leaders whose efforts cannot easily be dismissed as those of insiders whose agenda is to protect themselves and their colleagues.

31. *Summit on Improving Judicial Selection, Call To Action*, 34 LOY. L.A. L. REV. 1352, 1356 (2001) [hereinafter *Call To Action*].

responsibilities.<sup>32</sup> The Board also formally

endorsed the establishment and maintenance by statewide and local bar associations of judicial election campaign practices committees that, as part of the bar associations' process of evaluating candidates for judicial office, request candidates to provide written commitments that they will campaign in accordance with the requirements of the Code . . . applicable case law and ethics opinions. . . .

Further, the Board urged the chief judge and chief administrative judge to meet with bar representatives. In June 2001, Chief Administrative Judge Jonathan Lippman announced this effort, and by October, when the *New York Law Journal* placed on its front page an article about a meeting of judges and bar officials, several counties had started new committees, joining the existing committees in Erie and Monroe Counties.<sup>33</sup> In one judicial district, each county has a local committee (most were founded recently), and also has a delegate on a district-wide "super-committee" to address problems in district-wide races that cross county lines.

Similarly, in April 2000, Louisiana's Supreme Court named an *Ad Hoc* Committee to Study the Creation of a Judicial Campaign Oversight Committee. Co-chaired by Chief Justice Pascal Calogero and retired Judge Graydon Kitchens, the Committee met with Alabama lawyer Mark White, who had spearheaded the Alabama effort, and held a public hearing. In 2001, the Committee recommended creation of a permanent oversight committee, to "benefit the citizens of Louisiana by: (1) Serving as a resource for judges and judicial candidates; (2) Educating judges and judicial candidates about ethical campaign conduct; and (3) Helping deter unethical judicial campaign conduct."<sup>34</sup>

In March 2002, the Louisiana Supreme Court established such a committee on the Alabama model.<sup>35</sup> And in April 2002, the Mississippi Supreme Court also acted, establishing a committee on the Georgia model.<sup>36</sup>

Fully recognizing that of course the right course of action varies to fit each jurisdiction, and particularly, that special steps may be needed for statewide elections, we urge the following action regarding the creation and work of

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32. See Appendix B, *infra*.

33. John Caher, *Judicial Election Reform Sought in Campaign for Bench: State Joins National Push for Greater Civility*, 226 N.Y. L.J. 1 (2001). The other two counties that already had committees are Monroe (Rochester) and Onondaga. One of the leaders of these new movements is Craig Landy, head of the New York County Lawyers' Association and an active participant at the Summit. The New York State Bar Association, headed by Steven Krane, is spearheading efforts at the county level to establish oversight committees, and will act as a clearinghouse for these efforts. Copies of each bar's basic materials are available from the authors.

34. AD HOC COMM. TO STUDY THE CREATION OF A JUDICIAL CAMPAIGN OVERSIGHT COMM., REPORT TO THE SUPREME COURT OF LOUISIANA 3 (2000). Copies of that report can be obtained from the authors.

35. LA. SUP. CT. R. 35.

36. *In re* Miss. Code of Judicial Conduct, 2002 Miss. LEXIS 124, Canon 5(E), 5(F) and cmt.

judicial campaign oversight committees.

First, while we believe the need for such committees is acute and the contribution that these committees can bring is large, we also believe that, on balance, such committees will be more effective if they are unofficial rather than official. Any committee must be fair and deliberate, but unofficial committees cannot be sued (which sometimes is done for publicity) on constitutional grounds.<sup>37</sup> Second, bar associations, as the most naturally interested bodies, should take steps to establish campaign conduct committees. Such steps should be taken as early as possible prior to the commencement of an election year so that the committee will be in place, and able to begin its work, before campaigns (including primaries) begin.

Whether or not a committee is established for statewide elections, state bar associations should, as in New York, serve as central sources for information on the applicable rules of conduct. Similarly, the National Center for State Courts should serve as a central source of information. By compiling and sharing their different experiences in creating judicial campaign oversight committees, bar associations can only be better served in their efforts to further the work of such committees.

Third, such committees must have by-laws describing their functions and membership, and prescribing procedures (including their approach to confidentiality). The National Center for State Courts should serve as a clearinghouse for "best-practice" examples. Finally, a number of factors should be considered when creating committees. As an initial matter, while the initiative to create such committees comes naturally from bar associations, the committee's balance and credibility will be far greater if the committee includes non-lawyers. In the words of the Alabama Supreme Court's order creating such a body, committees should comprise of persons who have reputations in the community for the "utmost integrity," and who are diverse community organization leaders or representatives. There should be at least as many non-lawyer committee members as lawyers, with co-chairs or the members choosing a chair.<sup>38</sup>

Additionally, given that the purpose of the committee is to encourage

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37. Such committees should distinguish themselves from any other unofficial groups that may hold themselves out as "campaign ethics committees," but are parts of groups pursuing substantive agendas, e.g., special interest groups, including the business lobby, organized labor, religious and social policy groups, etc.

38. New Jersey has no judicial elections, but to meet widespread concerns about its judicial selection process—in which, in operation, senators have a veto over nominations from their own district—one senator has established the Morris County Selection Committee to identify and screen candidates for the bench.

That committee has five non-lawyers chosen by the county's two senators, five attorneys chosen by the county bar, and a chair chosen by the committee members. This process has worked very well. See Robert J. Martin, *Reinforcing New Jersey's Bench: Power Tools for Remodeling Senatorial Courtesy and Refinishing Judicial Selection and Retention*, 53 RUTGERS L. REV. 1, 63-69 (2000). In May 2001, the state bar recommended such committees for all counties. NEW JERSEY STATE BAR ASSOC., IMPROVING THE JUDICIAL SELECTION PROCESS 10 (2000).

appropriate conduct in judicial campaigns, the committee should decide whether its mission is limited to advertisements, statements and similar matters, or includes campaign finance practices; and what forms of action it may take. Likewise, the committee or its creators should determine whether it possesses the power to initiate a discussion about what it deems inappropriate action, or only to act upon an external complaint.

Educating candidates and campaign staff would also be beneficial; the National Center for State Courts could serve as a clearinghouse for curricula. In addition to education for candidates and campaign staff, it would be valuable for members to maintain contact with leaders of civic organizations (and in some States, political parties) that may participate in judicial campaigns. Similarly, asking candidates to sign pledges, as many committees do, is recommended by one of the authors, while the other feels the need for more information on how they are used.

“Hotlines” to provide campaign advice exist in several jurisdictions, and were recommended by the 2000 Summit.<sup>39</sup> Finally, experience makes clear that during the weeks immediately before an election, it may be necessary to have a “rapid response” panel or executive committee on call to respond to immediate campaign concerns.

In sum, as the other papers presented at this Symposium make abundantly clear, the problems associated with inappropriate statements and conduct during judicial elections are unlikely to abate anytime soon. Bench and bar leaders across the country are being joined by a growing chorus of members of the media and the public in demands that something be done. As an initial step that requires relatively little yet holds great promise, the authors endorse the use of judicial campaign conduct committees as a means of long-term improvement.

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39. *Call To Action*, *supra* note 31, at 1355-56.

**Table 1: Summary on Judicial Campaign Conduct Committees**  
(The authors can furnish contact information on committees in each state)

	Alabama	Florida	Georgia	Michigan	Nevada	New York	Ohio
Type	Appointed by supreme court	Official	Official	Mandatory bar	Supreme Court's Official Standing Committee on Judicial Ethics	Bar associations	Official <sup>a</sup>
Membership	In 1998, twelve lawyers and non-lawyers; in 2000, twenty-six judges and lawyers	Judicial Ethics Advisory Committee Staff: Senior attorney in State Courts Administration	Special Committee of Judicial Qualification Commission Staff: Director of JQC	Five regional panels, each comprised of five lawyers and non-lawyers Staff: Bar's "regulation counsel"	Twenty-eight members <sup>b</sup> Staff: Executive director is the exec. dir./general counsel of the Constitutional Commission (for judicial discipline)	Committees of lawyers (some also have non-lawyers)	Special panel of judges Staff: Disciplinary Counsel of Sup. Ct.
Since	1998	1998	1998	1998 only	1997	2001 <sup>c</sup>	1995
Forms of Action	-Outreach to candidates; -Hotline; -Receives complaints; -Can initiate investigations and actions; -Can refer to disciplinary bodies; and -Can make public statements.	-Educates candidates; -Hotline; and -Can refer to disciplinary bodies.	-Receives complaints; -Can initiate investigations and actions; -Can make public statements; and -Can refer to disciplinary bodies.	-Hotline; -Receives complaints; and -Can refer to disciplinary bodies	-Educates; and -Hotline.	Various, for a few long-standing committees; however, most committees are just beginning	-Education (mandatory for candidates); -Hotline; -Receives complaints, <sup>d</sup> -Can make public statements, if "probable cause" has been found; and -Formal disciplinary proceedings (expedited process).

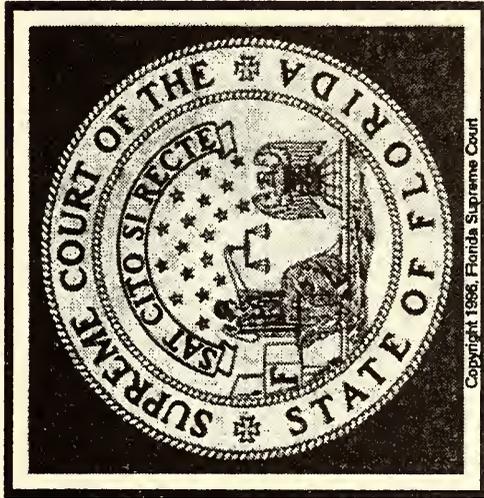
<sup>a</sup> In addition, unofficial citizens' (county) committees were formed in Columbus, Cleveland and Youngstown. Columbus's goes back to 1985. Such committees are recognized by the supreme court rules, which provide for referring to such committees any complaints involving candidates who have voluntarily signed an agreement with such a committee.

<sup>b</sup> In the . . . period involving more than 100 separate judicial campaigns, only one formal campaign complaint has arisen from these counties." Richard A. Dove, *Judicial Campaign Conduct: Rules, Education and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1461 (2001).

APPENDIX A  
FLORIDA JUDICIAL ETHICS CAMPAIGN FORUM



# Judicial Ethics Campaign Forum



Playing by the Rules . . . **or else** . . . .

## Welcomes & Introductions

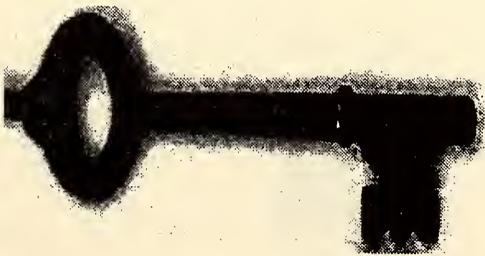
- ◆ Chief judge welcome & introductions.
- ◆ A message from Chief Justice Charles T. Wells.
- ◆ A message from the Florida bar board of governors.



## Your Responsibilities

- ◆ Compliance with the Code of Judicial Conduct.
- ◆ Compliance with Florida Statutes.

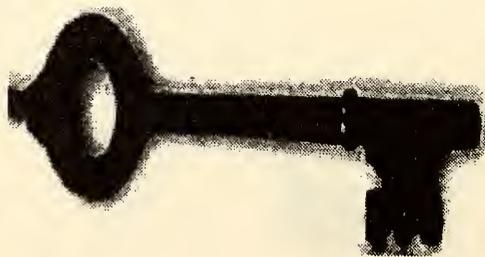
**These are YOUR responsibilities.**



## Is It Ethical?

### The Common Sense Approach:

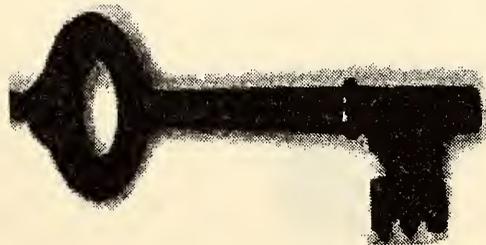
- ◆ Some questions you may want to ask yourself?
  - Would you do it in front of your mother?
  - Will it hurt or harm your reputation?
  - Will the conduct promote public confidence in the integrity and impartiality of the judiciary?
  - How will it appear on the front page of *The Miami Herald* or *El Nuevo Herald*?
  - Does Channel 7 really care about which is your "good side?"



Are Ethics Important?

To be ethical, you have to  
be willing to lose.

Otherwise, you will do whatever it takes to win.





**The "Doctrine" of Relative Filth**

**"I'm not so bad as long as there  
are people who are worse."**

**Subtitled:**

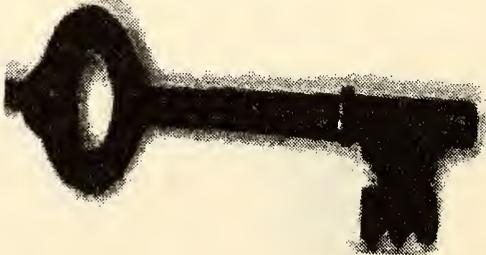
**"Don't look at me!!! Look at her!"**

# The Code of Judicial Conduct

## Canon 7

### A Judge or Candidate for Judicial Office Shall Refrain from Inappropriate Political Activity.

[This page is followed by one page of "A judicial candidate shall . . ." then by three pages of "A judicial candidate shall not . . ." and then by another eighteen pages, the last of which is the following page here:]



"Candidates for judicial office should be well aware that they win nothing if they win elections by violating Canon 7. They can and will be disciplined, and the discipline can include removal from office."

Chief Justice Charles T. Wells  
Florida Supreme Court  
July 1, 2000

For such removal, see *In re McMillan*, 797 So. 2d 560, 2001 Fla. LEXIS 1581,  
26 Fla. L. Weekly S 522 (Fla. 2001)

**APPENDIX B****RESOLUTION  
OF THE  
ADMINISTRATIVE BOARD OF THE COURTS\***

WHEREAS, the role of the Judiciary is central to the American concepts of justice and the rule of law;

WHEREAS, public trust and confidence in the integrity of the judicial system is critical to the effective functioning of the Judiciary;

WHEREAS, the manner in which campaigns for judicial office are conducted have an important impact on public trust and confidence in the judicial system;

WHEREAS, the Code of Judicial Conduct requires that candidates for judicial office maintain the dignity appropriate to judicial office and act in a manner consistent with the independence and integrity of the Judiciary;

WHEREAS, there is evidence of inappropriate and highly acrimonious campaign conduct and rhetoric in judicial elections in New York State;

WHEREAS, the recent Summit on Improving Judicial Selection, attended by judicial, legislative and bar leaders from the 17 most populous states with judicial elections, identified this trend as posing a substantial threat to public trust and confidence in the integrity of the judicial system;

WHEREAS, the Summit on Improving Judicial Selection issued a *Call to Action* recommending that bar associations addresses [sic] this problem through the establishment of judicial campaign conduct committees;

It is hereby RESOLVED,

THAT the Administrative Board of the Courts endorses the establishment and maintenance by statewide and local bar associations of judicial election campaign practices committees that, as part of the bar associations' process of evaluating candidates for judicial office, request candidates to provide written commitments that they will campaign in accordance with the requirements of the Code of Judicial Conduct, the Code of Professional Responsibility, and applicable case law and ethics opinions; and

THAT the Administrative Board of the Courts urges the Chief Judge and Chief Administrative Judge to meet with representatives of Statewide and local bar associations to discuss the establishment of campaign conduct committees throughout the State.

\* Adopted by the Administrative Board of the Courts on March 14, 2001.

**JOINT ORDER OF THE APPELLATE DIVISIONS**

The Appellate Divisions of the Supreme Court, pursuant to the authority vested in them, do hereby amend, effective immediately, section 1200.44 of the Disciplinary Rules of the Code of Professional Responsibility (Title 22 of the Official Compilations of Codes, Rules, and Regulations of the State of New York), as follows:

**§1200.44 [DR8-103] Lawyer Candidate for Judicial Office**

[(a)] A lawyer who is a candidate for judicial office shall comply with [the applicable provisions of] section 100.5 of the Chief Administrator's Rules Governing Judicial Conduct (22 NYCRR) and Canon 5 of the Code of Ethical Conduct.

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Joseph P. Sullivan

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Lawrence J. Bracken

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Anthony V. Cardona

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Eugene F. Pigott, Jr.

Dated: March 14, 2001

My back-up contact person is:

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(Name)

---

(Address)

---

(City, State)

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(Phone)

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(FAX)

I have read the foregoing agreement and Objectives and Procedures and I agree to abide by the terms set forth therein. I have also requested those persons managing my campaign to familiarize themselves with this agreement and to assist in its implementation.

Dated: \_\_\_\_\_

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(Candidate's signature)

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(Print name)

