



Committee on Professional Ethics

Opinion #289 - 4/27/73 (16-73)

Topic: Campaign guidelines for
judicial candidates

Modified by #558

Digest: Judicial candidates must
adhere to standards
appropriate to judicial
office

Code of
Judicial Conduct: Canon 7(B)

QUESTION

What general guidelines are applicable to campaigns of
candidates for judicial office?

OPINION

In view of the growing number of primary and general election contests for judicial office in New York, it is timely to issue guidelines for the conduct of judicial election campaigns, to assist judicial candidates in conducting campaigns that are consistent with the dignity and integrity of the legal profession and the judicial system.

The conduct of lawyers and of candidates for judicial office in New York is governed by the Code of Professional Responsibility and by the Canons of Judicial Ethics in effect in the State of New York. The Committee has not attempted to restate the relevant provisions of the Canons of Judicial Ethics¹ or the Code of Judicial Conduct recently adopted by the American Bar Association and the New York State Bar Association² or to prepare a digest of decisions rendered by bar associations under them³. The guidelines are intended to supplement these sources, and candidates for judicial office should consult the Canons and relevant bar associations decisions on matters not covered in the guidelines.

Although the Canons, published decisions, and the guidelines should enable candidates and those supporting them to resolve most questions, the Committee stands ready, as part of its regular functions, to consult in confidence with any candidate for judicial office as to the ethical propriety of the candidate's proposed conduct. Complaints by others with respect to the conduct of a candidate and questions arising with respect to action already taken are not in the jurisdiction of this Committee, but may be brought to the attention of this Association or other bar associations for reference to the appropriate committee or other body.

Two general observations should be made at the outset:

1. The canons, the guidelines and all other rules applicable to judicial campaigns apply not only to judges but also to others seeking judicial office,⁴ and persons acting on their behalf, and apply to campaigns for primary as well as general elections.

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2. It is a primary function of all members of the bar to uphold the dignity and integrity of the profession, judicial office and the law. Loyalty to these goals must always override a candidate's desire for his election. Election by means of conduct that debases the judicial office gained not only devalues the victory but, more importantly, decreases the effectiveness of the judicial system in playing its part in upholding the rule of law, which is the highest calling of all members of the profession. Accordingly, every Canon and guideline should be read as being modified by the injunction that all conduct is to be compatible with and in furtherance of professional and judicial dignity and integrity.

A. Fund Raising

1. Persons Soliciting Funds. Neither a candidate nor any member of his immediate family may solicit funds for his campaign, except from members of his family. Campaign funds should be solicited from persons other than members of a candidate's family only through committees of responsible persons.⁵ No judge or candidate may solicit funds for the campaign of any other candidate for judicial or nonjudicial office.

2. Solicitation of Parties. 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.⁶ Similarly, contributions may not be knowingly solicited or accepted from any corporation, firm 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.

3. Solicitation of 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.⁷ Because lawyers may be "better able than laymen to appraise accurately the qualifications of candidates for judicial office",⁸ it would not be appropriate, given the safeguards (nondisclosure of the donors' identity and limitation on amount of contribution) contained in the following guidelines, to prohibit solicitation of lawyers who may appear before the candidate. However, contributions should not knowingly be accepted on behalf of a candidate for a trial court from lawyers who then have cases before the candidate. Moreover, no lawyer should contribute to the campaign of a candidate for a trial court before whom the lawyer has a pending case.⁹

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4. Identity of Donors. To prevent the appearance of impropriety, the names of those who contribute to a candidate's campaign should be kept secret from the candidate to the extent legally permissible. The names may, by law, be required to be filed as a public record by those committees that have solicited funds on the candidate's behalf.¹⁰ Nevertheless, no candidate or judge should attempt to have any such list made available to him, nor should he seek in any other way to learn the identity of those who contributed funds either to him or to his opponent in the election.

5. Amount of Donations. The total amount of funds contributed to the campaign of a candidate should exceed neither the limits imposed by law¹¹ nor the needs of the particular campaign. No committee soliciting funds for a candidate should accept, from any single source other than the candidate or his family, a sum so large as to foster the appearance that the donor is seeking to gain some advantage or special favor from the candidate. A contribution from a person not a member of the candidate's family should not be accepted if the contribution appears to be out of proportion either to the donor's financial ability or to the total amount expected to be raised for the campaign.¹²

B. Media; Campaign Appearances and Support

1. Permissible Media. Any of the media, including, but not limited to, radio and television, newspapers and other publications, posters and handbills, may be used to convey campaign material.¹³

2. Manner of Presentation of Campaign Material. The manner of presentation of any material in connection with a campaign for judicial office should comport with the dignity and integrity required of that office.¹⁴ No campaign material of any kind should be presented in a sensational or dramatic manner or context. Particular care must be taken in the preparation of material for television, in light of the impact of that medium. No campaign material of any kind should depict the candidate in a judicial context, i.e. appearing in a courtroom or other location relating to the administration of justice. Such depiction not only tends towards sensationalism and lack of dignity,¹⁵ but also may arouse suspicion that the candidate is using the power and prestige of his judicial office to promote his candidacy.¹⁶ The candidate or any other person depicted should be shown in neutral surroundings.

3. Appearances by the Candidate. A candidate may appear before political, civic and other organizations, alone or with candidates for other offices, judicial or nonjudicial. While the endorsement by a candidate for judicial office of another candidate for judicial or nonjudicial office is improper,¹⁷ the mere appearance in the company of candidates for other offices does not, in itself, represent such an endorsement.

4. Appearances or Support by Others. Any person may appear in

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support of a candidate or otherwise work on behalf of his candidacy except:

- a) Another candidate for judicial office.
- b) A judge in the New York State court system.
- c) A non-lawyer who is a party, or employed by, affiliated with or a member of the immediate family of a party to pending litigation which is or may reasonably be expected to come before the candidate, or has come before him so recently that appearance on behalf of the candidate may give the appearance of improper use of the power or prestige of judicial office.
- d) A lawyer who is involved in such litigation.¹⁸ No lawyer shall, however, be prevented from appearing on behalf of a candidate solely because he is involved in litigation that might thereafter be appealed to the court to which the candidate seeks election.

C. Subjects for Campaign Material

1. Qualifications of the Candidate and His Opponents. The campaign material for a candidate may include discussion¹⁹ of the qualifications of the candidate and of his opponents. As with all other campaign material, the discussion must be truthful and dignified and may not, in the guise of discussing the qualifications of the candidate or his opponents, constitute a prohibited statement as to the candidate's position on disputed legal or political issues prohibited under guideline C.3 below, an appeal prohibited by guideline C.4 below, or any other topic improper for campaign material.

2. Endorsements. Campaign material may include reference to endorsements received by the candidate²⁰ and his opponents. Endorsements should not be solicited or accepted from any lawyer or non-lawyer whose appearance on his behalf would be prohibited under guidelines B.4 above.²¹ The candidate should not himself solicit endorsements, but should leave the obtaining of endorsements to committees of his supporters.²²

3. Issues Which May Come Before the Court; Views on Disputed Legal or Political Issues. Litigants are entitled to plead their cases before judges who will approach them with an open mind and who will decide them on the basis of precedent, reason and the facts of each case. Accordingly, it has long been the rule that a candidate for judicial office may not discuss how he would decide a case that might come before him.²³

While it is recognized that a candidate must have political and legal views that will inevitably affect his judicial decisions, there is a danger that pronouncement of the views may be construed

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as a promise or indication of the manner in which the candidate would decide cases as a judge or may later embarrass the candidate in the decision of a particular case and may create the impression that the judge is not approaching the case as an "open minded weigher of law and facts."²⁴ In light of these dangers and in view of the uncertain value to the electorate of statements on the general attitudes and philosophy of a candidate, he should not announce his views on disputed legal or political issues if it is foreseeable that such issues may bear on a case that may at some future time come before him if he is elected.²⁵

4. Appeals to Fear, Passion, Prejudice or Other Improper Bases for Voter Action; Reference to Specific Decisions. A candidate may seek votes only on bases which relate to whether he would be a capable and impartial judge. No candidate may appeal directly or indirectly to the fear, passion or prejudice of the electorate. References in campaign material to specific judicial decisions made by the candidate or an opponent are often thinly-veiled attempts to make such an appeal and should for this and other reasons be avoided. A candidate should not, in furtherance of his campaign, employ in any way appeals to or against members of any particular race, sex, ethnic group, religion or similar group.

5. Use of Power or Prestige of Judicial Office to Promote Candidacy. The campaign material of an incumbent judge should not arouse reasonable suspicion that he is using the power or prestige of his judicial office to promote his candidacy.²⁶ Thus, for example, an incumbent judge should take no judicial action which is calculated to obtain support for his candidacy.²⁷ Similarly, while a candidate's past or present position as a judge is clearly relevant to his qualifications, an incumbent judge takes unfair advantage of his judicial position if any campaign material shows him in court or in his judicial robes.²⁸

6. Misrepresentations. As new Code, Canon 7(B)(1)(c) states, a candidate for judicial office should never "misrepresent his identity, qualifications, present position, or other fact."

D. Other Matters

1. Use of Term "Judge". Nothing contained in these guidelines should be construed to prohibit an incumbent judge who is a candidate from using the word "judge" or "justice" (as may be appropriate) as a title or as a description of his present office.

2. No Partisan Politics. A candidate is not permitted to participate in any "partisan politics" other than supporting his own candidacy.²⁹

3. Fulfillment of Judicial Responsibilities. During any campaign, an incumbent judge who is a candidate for a judicial office must continue to discharge fully his official judicial duties

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and responsibilities. No participation by the candidate in his campaign may be permitted to interfere with the fulfillment of those duties and responsibilities.

These guidelines are the same as those adopted by The Association of the Bar of the City of New York. N.Y. City 882(1973).

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FOOTNOTES

1. The Canon that most directly bears on campaigns for judicial office is Canon 30 ("Candidacy for Office"), which provides:

"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 other to do anything in behalf of his candidacy which would reasonably lead to such suspicion."

Other Canons that bear on such campaigns include Canons 4 ("Avoidance of Impropriety"), 6 ("Industry"), 14 ("Independence"), 24 ("Inconsistent Obligations"), 28 ("Partisan Politics"), 32 ("Gifts and Favors"), and 34 ("A Summary of Judicial Obligation").

2. The Canon under the new Code that most directly bears on campaigns for judicial office is Canon 7 ("A Judge Should Refrain From Political Activity Inappropriate to His Judicial Office"), and, in particular, Part B ("Campaign Conduct"), which provides:

"(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;

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(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 six months before a primary election and no later than six months 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.

"COMMENTARY

"Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.

"[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

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

Other Canons of the new Code that bear upon judicial campaigns include Canons 1 (upholding the integrity and independence of the judiciary), 2 (avoidance of impropriety and the appearance of impropriety), and 3 (impartial and diligent performance of duties).

The Code of Judicial Conduct was adopted by the American Bar Association at its 1972 Annual Meeting and by the New York State

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Bar Association on March 3, 1973. In the Committee's opinion, the Committee's guidelines are consistent with the Code. But cf. footnote 25, below.

3. The opinions of the Committees on Professional Ethics of The Association of the Bar of the City of New York and of the New York County Lawyers' Association have been gathered in "Opinions on Professional Ethics", Columbia University Press, New York 1956. Subsequent opinions of the City Bar's Committee are published in its Record. Opinions of the Committee on Professional Ethics of the American Bar Association are collected in "Opinions on Professional Ethics" published by the American Bar Foundation, Chicago, Illinois, 1967. Formal opinions of the Committee on Professional Ethics of the New York State Bar Association were published by that Association in 1972.

4. ABA Formal Opinion 312 (August 9, 1964); NYSBA Formal Opinion 11 (April 23, 1965).

5. NYSBA Formal Opinions 94 (December 5, 1968); 186 (April 28, 1971); ABA Formal Opinion 226 (July 12, 1941); Code, Canon 7B(2).

6. Cf. Canon 32 ("a judge should not accept any presents or favors from litigants...or from others whose interests are likely to be submitted to him for judgment"). This proscription extends to corporations and other firms as well as natural persons.

7. Cf. Code, Canon 7(B) (2) (fund-raising committees "are not prohibited from soliciting campaign contributions...from lawyers"); ABA Formal Opinion 226 (July 12, 1941) (a lawyer may contribute to the campaign of a candidate before whom the lawyer is likely to appear).

8. ABA Formal Opinion 189 (November 11, 1938).

9. A lawyer should not be considered to be involved in litigation pending before a judge if his firm is so involved but he has not personally participated and does not expect to participate personally in the litigation in any material way.

10. See Election Law Sections 321-23.

11. See Election Law Section 455.

12. Cf. NYSBA Formal Opinion 186 (April 28, 1971) (a contribution by a lawyer must be "reasonable in amount").

13. Cf. NYSBA Formal Opinion 88 (October 7, 1968) (permissible media include door-to-door canvassing, radio advertising and posters).

14. NYSBA Formal Opinion 88 (October 7, 1968).

15. Cf. 21 Oregon State Bar 6, Opinion 94 (April 1961) (filming of court proceedings should not be allowed by a judge who is seeking

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re-election).

16. See guideline C.5, below.

17. See, e.g., ABA Formal Opinion 312 (August 9, 1964).

18. A lawyer should not be considered to be involved in litigation if his firm is so involved but he has not personally participated and does not expect to personally participate in the litigation in any material way.

19. See NYSBA Formal Opinion 88 (October 7, 1968).

20. See ABA Informal Opinion 817 (February 15, 1965) (permissible for a candidate to state that he has the support of a specified number of former presidents of bar associations, or that he is endorsed by a specified number of lawyers in the area); NYSBA Formal Opinion 88 (October 7, 1968) (permissible to publish endorsements).

21. Cf. ABA Formal Opinions 105 (March 9, 1934) (a judge desiring promotion to an appellate bench should not engage in widespread solicitation of endorsements from members of the local bar), 139 (May 9, 1935) (improper for judge seeking reappointment to solicit letters of support indiscriminately, when some of the addresses might have, or might contemplate having matters before the judge); NYSBA Formal Opinion 11 (April 23, 1965) (improper for an attorney to endorse a judge if the attorney has a matter pending before the judge or with a clear probability of being submitted to the judge.)

22. Cf. paragraph A.1 above; Code, Canon 7(B)(2); ABA Informal Opinion 817 (February 15, 1965) (preferable for a candidate to approach only a limited number of lawyers seeking endorsement, leaving the obtaining of further endorsements to members of the legal profession).

23. Cf. Canon 30; ABA Formal Opinion 93 (May 2, 1933) (a candidate for judicial office should not undertake publicly to answer wide range of legal questions, in part because if similar questions later become the subject matter of litigation before him, his decisions "will carry the taint and color of the influence and restraint of previous pronouncements"). For much the same reason, appointees to the Supreme Court have typically declined to discuss, in confirmation hearings, their views on issues that may come before the Court.

24. ABA Opinion 93 (May 2, 1933). See also, ABA Formal Opinion 52 (December 14, 1931) (one reason why a judge should not conduct a newspaper column is that "the public expression of views may influence the judge's decision of political or economic questions which he has publicly discussed in print.")

25. Code, Canon 7(B)(1)(c) would appear to prohibit a candidate

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from any announcement of his views on disputed legal or political issues. We believe a candidate should be free to express his views on issues that do not foreseeably bear on any case that may come before him as a judge, such as certain aspects of judicial administration.

26. Canon 30.

27 Cf. ABA Formal Opinion 193 (April 22, 1939) (unnecessarily far reaching decisions).

28. We recognize that there is some authority for a contrary conclusion, Washington State Bar Opinion 48 (December 1956) (judge may have his photograph in judicial robes displayed on campaign posters or campaign literature), and that it has been common practice in New York for campaign material to contain such photographs.

29. Canon 28. For a thorough discussion of the limits on partisan activity by a judge or candidate, see ABA Formal Opinion 312. (August 9, 1964).
