



COMMONWEALTH OF KENTUCKY
ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY

403 WAPPING STREET
FRANKFORT, KENTUCKY 40601

ANTHONY M. WILHOIT
Court of Appeals

THOMAS J. KNOPF
District Court

JOSEPH H. ECKERT
Circuit Court

B. M. WESTBERRY, CHAIRMAN
Attorney

UHEL O. BARRICKMAN
Attorney

JUDICIAL ETHICS OPINION JE-45

Formal

GUIDELINES FOR JUDICIAL CAMPAIGNING

I. In General

The Ethics Committee of the Kentucky Judiciary is issuing these guidelines for the benefit of judicial candidates in their primary and general election campaigns. The guidelines should be observed by both incumbent judges and other candidates since Canon 7 of the Code of Judicial Conduct (SCR 4.300) specifically makes non-judge candidates subject to its provisions, and the recent amendments of SCR 4.000 and SCR 4.020 make all candidates subject to discipline by the Retirement and Removal Commission for violations of the Canons. We assume that all candidates are familiar with the provisions of Canon 7; therefore we will not set them out here.

By way of an overview, we quote from Thode, Reporter's Notes to Code of Judicial Conduct (ABA 1972) at 95:

By being a judge or a candidate for judicial office, a person does not surrender his rights as a citizen; nevertheless, the fundamental need for impartiality and the appearance of impartiality of judges dictates that limits be placed on the political conduct of judges and candidates for judicial office.

Those limits are perceived as a means of carrying out the mandate of Canon 1 that "a judge should uphold the integrity and independence of the judiciary;" of Canon 2, requiring judges to "avoid impropriety and the appearance of impropriety" in all their activities, and of Canon 3 which requires them to "perform the duties of the office impartially and diligently."

A candidate should measure his campaign activities against those standards, always remembering that the election is for the purpose of serving the justice system and not to satisfy his personal ambitions.

A basic guideline for campaign conduct is honesty. No candidate should knowingly state an untruth or misrepresent a fact. He must be personally responsible for the truth and propriety of his campaign literature, and should for that reason check all campaign material before it goes out to the public.

2. Political Conduct

Canon 7A forbids active participation in political parties and campaigns. It must be remembered that the Kentucky Constitution, Sec. 117, mandates nonpartisan election of judges. This alone is sufficient reason to ban participation in partisan politics. An additional reason given by writers is that identification with a particular political party or group might lead to a public perception of partiality for that party or group and their positions on controversial issues. In construing this part of Canon 7, we have held that a judge may not be a member of a political club (JE-39); that he may not actively campaign for or publicly endorse a judicial candidate (JE-2); and that judicial candidates may not slate themselves together because it would amount to an endorsement of the others on the slate (JE-6).

It should be pointed out that Canon 7A(2) allows a candidate to appear before a political gathering for the purpose of campaigning for election, and that it specifically states that a judge is a candidate during his entire term of office. Thus, a sitting judge may attend political gatherings at any time for the purpose of promoting his own candidacy. As we said in JE-39, such an appearance does not equate with membership in the party any more than appearances before labor unions, social clubs and business groups can be said to amount to membership in those groups. Because such appearances are permitted, we held in JE-19 that a judge might attend a presidential inaugural ball but that he could not act as its honorary chairman because acceptance of the chairmanship would connect him with the president's political party.

A word of warning is in order here. Canon 7A(2) makes it clear that a candidate may state his political affiliation only in answer to a direct question, "if not initiated by the judge or candidate." In other words, wait until you are asked before you tell anyone your political affiliation.

3. Endorsement of Candidates

A. ENDORSING CANDIDATES

Canon 7A(1)(b) specifically forbids the public endorsement of "a candidate for public office." As mentioned above, we held in JE-2 that this ban extends to public endorsement of judicial candidates, since a judgeship is surely "a public office." The Kentucky Supreme Court, in an informal interpretation, has stated that a sitting judge who is not running for election may privately support a candidate.

What is meant by "public" endorsement as opposed to "private" endorsement? We think that a judicial candidate may express an opinion to a family member or personal friend who seeks his advice on the merits and qualifications of a candidate, including a judicial candidate. Such an endorsement would clearly be "private" rather than "public" and therefore permissible.

But when speaking to a more heterogeneous group, the endorser would be wise to consider the likelihood of his "private" endorsement being converted to a public one by his hearers. Such publicity would compromise the endorser by making it appear that he was ignoring the mandate of Canon 7.

B. SOLICITING ENDORSEMENTS

While Canon 7B(2) forbids direct fundraising efforts by the candidate himself and requires him to create a committee for this purpose, it permits him to engage directly in the solicitation of public statements of support from lawyers and others. In an informal interpretation of Canon 7B(2), the Kentucky Supreme Court has stated that judges and judicial candidates may not engage in such solicitation of lawyers in the courthouse or in the vicinity of the courthouse.

We held in JE-38 that a candidate may advertise the fact that he has received endorsements of named groups and individuals. He should, however, refrain from publicizing private endorsements of judges and other judicial candidates. To advertise such private endorsements is a disservice to the endorser because the public cannot be expected to know that the endorsement was in fact private. The publicity given to it makes it appear that the endorser was flouting the Code of Judicial Conduct.

4. Campaign Rhetoric

Canon 7B(1)(c) is probably the most difficult part of the Code of Judicial Conduct. What may a candidate say during his campaign? It is clear that he may speak, in a dignified manner, about his professional qualifications and those of his opponent, and he may refer to such things as his opponent's frequent absence from the bench if such be the case. He may also discuss plans and ideas for greater efficiency in the administration of justice. It is equally clear that he may not indicate what his decision would be in a particular case or type of case, or what sentence he would pass on a defendant charged with a particular crime. But what of the middle ground between those extremes? It is impossible to lay down definite rules, but a few examples may be helpful.

In American Bar Association Informal Opinion 1444 a candidate was told that he should not use "A Strict Sentencing Philosophy" as a campaign slogan because it "might be viewed by the voters as a campaign pledge of judicial conduct and also an announcement of your position on sentencing which is a disputed legal and political issue." Again, we stated in JE-38 that a campaign statement on plea bargaining should probably be avoided because it is a controversial issue, but that a pledge to work for increased efficiency of the judicial system by the use of computers is acceptable because it is not a disputed legal issue. Perhaps the best rule of thumb is to be found in In re Baker, 542 P.2d 701 (Kan. 1975) which involved statements about the fitness of the candidate's opponent. In finding such statements acceptable, the court said that they were "aimed at the legitimate interests of the entire electorate" and were not campaign promises which appeal to prejudices or special interests.

In short, the candidate must avoid campaign statements which could be viewed as campaign promises or which indicate a lack of impartiality.

5. Fundraising

Canon 7B(2) sets out the parameters of fundraising activities. Soliciting must be left to the campaign committee, and must be conducted within the time limits set out in Canon 7B(2). We held in JE-42 that "soliciting" means any request for contributions, including a person-to-person appeal as well as a public advertisement.

Because there is no time limit on campaigning as distinguished from fundraising, we held in JE-42 that the typical "Meet the Candidate" function, for which no admission fee is charged, may be held at any time. On the other hand, an affair which is clearly intended to make a profit must be held within the time frame mandated by the Canon. An intermediate type of affair, such as a breakfast at a restaurant at which each person in attendance pays for his meal, has no reasonable likelihood of making a profit; therefore, as we held in JE-42, it is essentially a "Meet the Candidate" affair and may be held at any time. We warned in that opinion, however, that an event whose cost could not be accurately determined in advance would not meet the criteria for a "Meet the Candidate" event because it might reap a profit and thus fall into the fundraising category. Such events should be held within the time frame of Canon 7B(2).

We also held in JE-42 that the campaign committee and the candidate himself may accept contributions whenever they are offered, even outside the time frame for soliciting. Of course the candidate may not do any soliciting, and he must promptly turn over any contributions to his campaign committee.

6. Freedom of Speech and Association

Some candidates may regard Canon 7 and our rulings thereunder as an infringement on their rights of freedom of speech and association. Those issues were presented to the Court of Appeals for the Fifth Circuit in a suit challenging the constitutionality of Canon 7A(3) requiring judges to resign before running for non-judicial office. In upholding the resign-to-run requirement, the court found an overriding state interest in an independent judiciary. Morial v. Judiciary Comm. of Louisiana, 565 F.2d 295 (1977) cert. den. 435 U.S. 1013 (1978). We think that the same reasoning would apply to the other requirements of Canon 7.

Also, it is commonly said that a judge or judicial candidate voluntarily relinquishes certain rights when he becomes a judge or candidate. We find the following language in ABA Formal Ethics Opinion 113:

It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice

JE-45
Page five

some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, ex necessitate rei, he thereby voluntarily places certain well recognized limitations upon his activities.

B. M. Westberry / eds

B. M. Westberry, Chairman
Ethics Committee of the Kentucky Judiciary