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JUDICIAL CAMPAIGN CONDUCT: RULES, EDUCATION, AND ENFORCEMENT

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I. INTRODUCTION

The increasingly contentious nature of judicial elections and the current methods of political campaigning have created an inexorable conflict between some judicial candidates and the codes of conduct that regulate their campaign activities. A judicial candidate believes or has been told that, in order to be elected, he or she must make use of campaign techniques that are viewed as successful in nonjudicial campaigns. Yet, these techniques may violate judicial codes of conduct that impose standards governing judicial campaign activity for the purpose of promoting the overarching principles of judicial independence, impartiality, and integrity. Decisions applying these standards to allegations of judicial campaign misconduct have decried the use of “buzzwords” and catch phrases, which have long been used by nonjudicial candidates, to characterize one’s record or that of an opponent.¹

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1. See *In re* Judicial Campaign Complaint Against Hein, 706 N.E.2d 34 (Ohio 1999) (discussing a candidate’s receipt of a public reprimand and monetary sanctions totaling nearly \$6,400 for characterizing his opponent as “liberal” and “soft on criminals”); *In re* Judicial Election Campaign Against Burick, 705 N.E.2d 422 (Ohio 1999) (discussing a candidate who was publicly reprimanded and ordered to pay monetary sanctions of \$12,500 for having committed six separate instances of campaign misconduct, including implying that she would impose the death penalty regardless of the evidence presented and mischaracterizing the method by which her opponent was appointed to the bench).

While recognizing a state's compelling interest in protecting the independence, impartiality, and integrity of its judiciary, some courts have found attempts to regulate judicial campaign conduct to be overbroad restrictions on a candidate's First Amendment rights to communicate his or her message to the electorate. Courts have upheld prohibitions against false statements, while enjoining the enforcement of rules that prohibit misleading statements and factual misrepresentations. In short, while states may have a greater interest at stake in attempting to regulate judicial campaign conduct, the First Amendment will afford candidates protection against enforcement of campaign regulations that are viewed as stifling public debate and communication with the electorate. Should these decisions evolve into a widely held majority view in federal and state courts, it appears questionable whether states will be able to place any meaningful restrictions on campaign speech of judicial candidates beyond those that generally are applicable to other candidates for political office.

II. JUDICIAL CAMPAIGN CONDUCT REGULATIONS

Most states in which judges appear on the ballot have adopted some form of the 1990 version of the American Bar Association's Model Code of Judicial Conduct, which generally provides that judges and judicial candidates must refrain from political activity inappropriate to judicial office. Specific provisions require candidates to abstain from engaging in many types of partisan political activity that are appropriate for other candidates for public office, such as publicly endorsing or opposing candidates for public office, appearing in advertisements with other candidates for public office, engaging in personal solicitation of campaign funds, and raising funds with nonjudicial candidates.

Another frequent area of regulation relates to the content of a candidate's campaign communications, whether those be the candidate's speeches, advertisements promoting the candidate, or responses to questionnaires and other public inquiries.² Many states

2. For a discussion regarding the propriety of judicial candidates responding to candidate questionnaires from interest groups, see N.Y. Judicial Op. 93-99 (N.Y. Advisory Comm'n Judicial Ethics) (Dec. 12, 1993), 1993 WL 838870, and Ala. Judicial Advisory Op. 00-763 (Ala. Judicial Inquiry

have based their codes of judicial conduct on the following provisions of the ABA Model Code of Judicial Conduct, which prohibits judicial candidates from making the following types of statements:

- Pledges or promises of conduct in office, other than the faithful and impartial performance of the duties of the office;
- Statements that commit or appear to commit the judicial candidate with respect to cases or controversies that are likely to come before the court;
- Knowing misrepresentations of the identity, qualifications, present position, or other fact of the candidate or an opponent.³

In addition to these restrictions, some state codes prevent judicial candidates from making a campaign communication that is either of the following:

- The communication is false and is made either knowing the information to be false or with a reckless disregard of whether the information is false;
- The communication would be deceiving or misleading to a reasonable person.⁴

Provisions similar to these have formed the basis for disciplinary actions against several candidates for judicial office. Faced with potential sanctions that can include removal from office or a suspension or loss of a law license, some judicial candidates have challenged the enforcement of these provisions as applied to specific statements, claiming that these restrictions on campaign speech infringe on the candidate's First Amendment rights. While state and federal courts have arrived at contrary conclusions when faced with these claims, there appears to be a trend toward invalidating many restrictions on statements made by judicial candidates and the content of judicial candidate advertisements. Whether this trend is reassuring or disturbing depends upon one's view of a judicial

Comm'n) (Sept. 9, 2000).

3. See MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i-iii) (Anderson 2000).

4. See, e.g., ALA. CANONS OF JUDICIAL ETHICS Canon 7B(2) (2000); OHIO CODE OF JUDICIAL CONDUCT Canon 7(E)(1) (1999). For a summary of proposed amendments to the Wisconsin Code of Judicial Ethics, see Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1 (1999).

candidate's right to unfettered campaign speech versus the public interest in ensuring the trust and confidence in the fairness of the judiciary. However, these decisions will likely force many jurisdictions to search for new methods of regulating judicial campaigns in order to protect what has been recognized uniformly as a legitimate and compelling state interest or treat judicial campaigns in the same manner as other campaigns for public office.

A. Case Law Prior to 2000

A relatively early case upheld Ohio's former prohibition against a judicial candidate announcing his or her views on disputed legal or political issues. In *Berger v. Supreme Court of Ohio*,⁵ a judicial candidate claimed the Ohio prohibition barred him from promoting the use of mediation in domestic relations cases, criticizing the excessive use of referees in those proceedings, and generally announcing his judicial "philosophy" and "platform."⁶ The district court found that the state's interest in ensuring the actual and perceived integrity and impartiality of judges outweighed any intrusion on the First Amendment rights of judicial candidates.⁷ A similar conclusion was reached in *Stretton v. Disciplinary Board of Pennsylvania*⁸ where a candidate sought to avoid disciplinary action for stating his views on several issues including the need to elect "activist" judges, the importance of the right to privacy, supervision of lower court judges, criminal sentencing and victims' rights, and application of the reasonable doubt standard.⁹ In vacating an injunction issued by the district court, the circuit court assumed that the phrase "disputed legal and political issues" would be applied only to issues likely to come before the candidate and, therefore, constituted a narrowly tailored restriction designed to serve the state's compelling interest in an impartial judiciary.¹⁰ The Supreme Court of Washington similarly upheld the censuring of a judge who, during his campaign, identified himself as a Democrat and stated his intention to be tough on drunk

5. 598 F. Supp. 69 (S.D. Ohio 1984), *aff'd*, 861 F.2d 719 (6th Cir. 1988).

6. *Id.* at 72.

7. *See id.* at 75-76.

8. 944 F.2d 137 (3rd Cir. 1991).

9. *See id.* at 139.

10. *See id.* at 143.

driving offenders.¹¹ The latter statement was found by the court to be contradictory to an "impartial performance of the duties of the office."¹²

In contrast to these decisions, two federal courts and the Kentucky Supreme Court invalidated similar prohibitions. In *Buckley v. Illinois Judicial Inquiry Board*,¹³ an appellate judge running for the Illinois Supreme Court touted the fact that he had never authored an opinion reversing a rape conviction, worked to protect the civil rights of working people, and issued rulings that protect and expand women's rights. The Seventh Circuit weighed the competing principles of free speech and judicial impartiality and, unlike the Third Circuit in *Stretton*,¹⁴ concluded that the regulation, as written, reached "far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election."¹⁵ A similar conclusion was reached in *ACLU of Florida v. Florida Bar*,¹⁶ which found that the regulation was not the most narrowly drawn means of promoting the state's interest in protecting the integrity of the judiciary.¹⁷

In 1991, the Kentucky Supreme Court dismissed charges against a judicial candidate who was charged with violating the prohibition against announcing views on disputed legal and political issues.¹⁸ Among the statements included in the complaint were criticism of a Kentucky Supreme Court ruling in a personal injury case, statements about statutes that bar felons from carrying handguns, and comments on the standard of review in workers' compensation cases.¹⁹ The court recognized the compelling state interest behind the regulation but concluded that it "strictly prohibits dialogue on virtually every

11. See *In re Kaiser*, 759 P.2d 392 (Wash. 1988).

12. *Id.* at 396.

13. 997 F.2d 225 (7th Cir. 1993).

14. See *id.* at 228.

15. *Id.*

16. 744 F. Supp. 1094 (N.D. Fla. 1990).

17. See also *Beshear v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991) (discussing a state enjoined from sanctioning a candidate who promised voters that, if elected, he would not allow plea bargaining).

18. *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 954 (Ky. 1991).

19. See *id.* at 956.

issue that would be of interest to the voting public" and, thus, was overbroad.²⁰

Subsequent to this decision, the Kentucky Supreme Court revised its Code of Judicial Conduct to reflect the provision of the 1990 ABA Model Code, which prohibits statements that commit or appear to commit candidates with respect to cases, controversies, or issues likely to come before the court.²¹ In *Deters v. Judicial Retirement and Removal Commission*,²² which involved a candidate who ran advertisements claiming to be a "pro-life" candidate, the court upheld the revised prohibition as a narrowly drawn regulation protecting the state's interest in a fair and impartial judiciary.²³ The *Deters* court relied on *Ackerson v. Kentucky Judicial Retirement and Removal Commission*,²⁴ which had generally upheld the canon except as it applied to a candidate's comments on court administration, but stated "[t]here is no compelling state interest which justifies limiting a judicial candidate's speech on court administrative issues. . . . Impartiality is an attribute of the exercise of a court's adjudicatory power, not its administrative function."²⁵

Indiana Chief Justice Randall T. Shepard, in his article discussing the use and misuse of the First Amendment in invalidating judicial campaign ethics provisions, noted that the aforementioned success of First Amendment challenges to ethics rules governing judicial campaign conduct has "prompted doubt about the viability of rules covering other judicial behavior."²⁶ Several states have followed Kentucky's lead and amended their judicial conduct codes in

20. *Id.*

21. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(d)(ii) (2000).

22. 873 S.W.2d 200 (Ky. 1994).

23. Cf. N.Y. Advisory Comm'n on Judicial Ethics Op. No. 93-52 (October 28, 1993), 1993 WL 838832 (finding that a judicial candidate may accept endorsement from the Right to Life party); N.Y. Judicial Op. No. 93-99, *supra* at note 2 (finding that a judicial candidate may seek and accept endorsements from the National Women's Political Caucus and Republican Pro Choice PAC). Although not expressly stated in these opinions, it is presumed that candidates may advertise the fact that they received these endorsements.

24. 776 F. Supp. 309, 314 (W.D. Ky. 1991) (holding that it was unnecessary to void the entire regulations when they can tailor the relief).

25. *Id.*

26. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

an attempt to more carefully tailor limits on campaign speech.²⁷ However, these states have met with mixed success in defending the revised regulations against First Amendment challenges by judicial candidates. Decisions striking these more narrow limits on campaign speech increases the doubt expressed by Chief Justice Shepard in 1996.

B. Recent Decisions

Earlier this year, the Supreme Court of Michigan held that its prohibition against misleading judicial campaign advertisements was overbroad and amended its canons to prohibit only those campaign communications that are knowingly or recklessly false.²⁸ The court reviewed its canon in light of several campaign advertisements distributed by an appointed, incumbent judge whose election was opposed by an administrator-magistrate from the same court.²⁹ In those advertisements, the judge touted his involvement, as an attorney, in opposing a redistribution of tax dollars to urban school districts, criticized the court's disposition of several criminal cases involving a defendant who later committed multiple rapes and murders, noting that these dispositions occurred while his opponent was serving as court administrator, and referenced a former court employee's allegations of sexual harassment against his opponent.³⁰ The candidate also circulated a flier that included statements describing the incumbent as "[o]ne [t]ough [j]udge" and "[t]ough on [d]omestic [v]iolence and [s]talkers," and stating that he is "tough on criminals who prey on women" and "won't stand for acts of domestic violence or allow stalkers to run wild."³¹

In reviewing the canon, the court recognized the rationale for the regulation, including the state's interest in judicial integrity and the desire to maintain civility in judicial campaigns, as well as its ability to impose more stringent regulations on judicial campaign conduct.³² The court nonetheless concluded that the regulation was at odds with

27. See *infra* Part B.

28. See *In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000).

29. See *id.*

30. See *id.* at 34-35.

31. *Id.* at 33-34.

32. See *id.* at 39-40.

the popular election of judges because it discourages meaningful debate regarding judicial qualifications and, therefore, “impedes the public’s ability to influence the direction of the courts through the electoral process.”³³ The court revised the canon to prohibit only those statements that are knowingly false or that are made with reckless disregard of their truth and remanded the matter to the Judicial Tenure Commission with instructions to determine whether the judge’s conduct was contrary to the amended canon.³⁴

Relying heavily on the Michigan Supreme Court’s decision in *Chmura*, a federal court invalidated an identical provision of the Georgia Code of Judicial Conduct. In *Weaver v. Bonner*,³⁵ the plaintiff, who was challenging an incumbent Georgia Supreme Court justice, distributed campaign brochures and television advertisements that noted his opponent’s support for same-sex marriages, characterized his opponent’s statements as questioning the constitutionality of laws that prohibit sex with children under the age of fourteen, and quoted her as referring to the electric chair as “silly.” After a special committee of the Judicial Qualifications Commission found these advertisements to be “unethical, unfair, false, and intentionally deceptive” and in violation of the prohibition against false and misleading statements, the candidate challenged the constitutionality of the canon.³⁶ The district court found that the ban on misleading statements “chills debate by requiring candidates to attempt to determine whether a reasonable person would view their speech as fraudulent, misleading, or somehow deceptive. It therefore has a great likelihood of forcing candidates to remain silent on questionable matters instead of risking adverse action.”³⁷ The court tacitly recognized the state’s ability to prohibit false statements but declined to revise the canon to bring it within the First Amendment.³⁸

Chmura was cited extensively in another federal court action that resulted in the issuance of a temporary injunction against the Alabama Judicial Inquiry Commission, pending a full hearing of the

33. *Id.* at 42-43.

34. *See id.* at 45.

35. 114 F. Supp. 1337 (N.D. Ga. 2000).

36. *See id.* at 1340.

37. *Id.* at 1342-43.

38. *See id.*

matter in early 2001.³⁹ *Butler v. Alabama Judicial Inquiry Commission* involved a primary campaign for chief justice of the Alabama Supreme Court between a sitting justice and a trial court judge.⁴⁰ During the campaign, the justice ran campaign advertisements in which he criticized his opponent, who was a sitting judge, for his record of sentencing in drug cases.⁴¹ In temporarily enjoining enforcement of a provision of the Alabama Canons of Judicial Ethics that prohibits the knowing or reckless distribution of false information and the distribution of true information that would be misleading or deceiving to a reasonable person, the court stated:

[T]he “deceiving or misleading” portion of Canon 7B(2) does not allow for erroneous but unintentional or innocent statements. As a result, it has the potential to squelch free speech by inhibiting candidates from speaking for fear of violating the canon and being disciplined. Without an intent element or falsity requirement, candidates risk violating the canon for mistaken but innocent dissemination of “deceiving or misleading” information. Thus, rather than risk violating the canon, the candidate may choose to remain silent rather than exercise his or her freedom of speech.⁴²

Contrary to this line of cases, a portion of the Nevada Code of Judicial Conduct, which prohibits the knowing misrepresentation of facts concerning the candidate or an opponent, has withstood constitutional challenge.⁴³ The federal district court in *Mahan v. Judicial Ethics and Election Practices Commission*⁴⁴ held that this prohibition was neither vague nor overbroad in that it gives clear notice to candidates of the type of speech that is prohibited and does not chill political speech since false statements are not protected by the First Amendment.⁴⁵ The court did strike as vague the general provision of

39. *Butler v. Ala. Judicial Inquiry Comm’n*, 111 F. Supp. 2d 1224, 1233-35 (M.D. Ala. 2000).

40. *See id.* at 1226-27.

41. *See id.* at 1224.

42. *Id.* at 1235.

43. *See* NEV. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (1999).

44. CV-S-98-01663-DAE (D. Nev. Mar. 23, 2000).

45. *See Court Upholds Prohibition on Misrepresentations in Campaigns, Overturns Provision on Maintaining Dignity*, JUDICIAL CONDUCT REPORTER, Spring 2000.

the canons that require judicial candidates to "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary."⁴⁶

III. EFFORTS TO EDUCATE CANDIDATES AND THE PUBLIC

Meaningful judicial election reform efforts must include components of education and enforcement. If candidates and the public are not familiar with the rules, they will be unable to comprehend and follow them. If the rules are not enforced, or if enforcement efforts are delayed or ineffectual, candidates may be less inclined to obey them. As a result, the public may lose confidence in the electoral, and perhaps the judicial, process.

Several jurisdictions have deemed it worthwhile to educate candidates and the public about the unique nature of judicial elections. For example, as part of its 1995 rewrite of the canon pertaining to judicial campaign conduct, the Supreme Court of Ohio included a provision that requires all judicial candidates to complete a two-hour course on campaign conduct and finance.⁴⁷ This course, which must be completed no later than thirty days after being certified as a candidate, addresses conduct and campaign finance rules unique to judicial campaigns and statutory campaign finance reporting requirements applicable to all candidates for public office. Attendees receive a handbook containing the judicial conduct rules, advisory opinions and court decisions interpreting those rules, and materials detailing statutory campaign finance reporting requirements. Judicial candidates are encouraged to bring campaign committee members and other volunteers with them to the seminars as a means of educating persons who have positions of responsibility and accountability in the campaign.⁴⁸ Attendees at past seminars have included state

46. *Id.* Compare this holding with the unpublished opinion of *Harper v. Office of Disciplinary Counsel*, 113 F.3d 1234 (6th Cir. 1997), wherein the court declined to strike a similar provision of the Ohio Code of Judicial Conduct because Ohio judicial candidates, through advisory opinions and case law, are provided with guidance regarding appropriate campaign conduct.

47. See OHIO REV. CODE JUDICIAL CONDUCT ANN. Canon 7(B)(5) (Supp. 1999).

48. See OHIO REV. CODE JUDICIAL CONDUCT ANN. Canon 7(F) (Supp. 1999) (holding a judicial candidate responsible for the conduct of his or her campaign committee, including compliance with provisions relative to cam-

and county political party staff, including the state chairmen of the Republican and Democratic parties, members of local judicial monitoring committees, and members and staff of county boards of election with which local judicial candidates must file campaign finance reports.

Similarly, the Washington State Judicial Ethics Committee hosted two campaign forums in 2000 for judicial candidates and members of their campaign committees.⁴⁹ While candidates were not required to attend these forums, they provided candidates and others involved in judicial campaigns with an opportunity to learn more about the applicable rules of conduct.

States also have established telephone contacts to address questions that arise during the campaign. In Ohio, the staff of the supreme court and the court's Board of Commissioners on Grievances and Discipline are available to respond to questions from candidates, the public, and the media regarding judicial campaign conduct.⁵⁰ A similar hotline was established by the State Bar of Michigan in 1998 and received more than 100 calls from judicial candidates seeking guidance about campaign conduct.⁵¹ While it requires staff time to respond to these inquiries, the time can be well spent if a prompt response steers a candidate away from conduct that is contrary to judicial campaign regulations and could result in more time-consuming and costly grievance proceedings.

Education efforts do not stop with candidates. Members of the public, who cast ballots for judicial candidates need to better comprehend the differences between judicial elections and other elections for public office. Often, the public does not understand why a judicial candidate cannot express views on issues of general public concern ranging from the merits of the death penalty to a local zoning issue. To address this knowledge gap, several states, including

paign communications and finance).

49. See *Judicial Campaign Forums*, Wash. State Bar Assoc., at <http://www.wsba.org/barnews/2000/05/forum.htm> (last visited Apr. 1, 2001).

50. See *Judicial Candidate Information*, Bd. of Comm'rs on Grievances and Discipline, at http://www.sconet.state.oh.us/Judicial_Candidates/ (last visited Apr. 1, 2001).

51. See Thomas K. Byerley, *Focus on Professional Responsibility: Judicial Campaign Ethics Experiment*, 78 MICH. B.J. 318, 319 (1999).

Michigan, Florida, Ohio, and Washington, provide voter pamphlets or information guides to registered voters.

Voter education efforts are not unique to courts or their affiliated agencies. The Citizens for Independent Courts, a national organization that promotes judicial independence and greater public understanding of the courts, has developed "Higher Ground" standards that primarily are intended to provide voters with information about ethics rules that govern judicial campaigns.⁵² While these standards do not differ substantively from the rules that already are applicable to judicial candidates in most states, they also are used as a means of further encouraging judicial candidates to conduct their campaigns in a manner that advances the independence and dignity of the judiciary. The "Higher Ground" standards have been endorsed by organizations in states that are experiencing contentious elections in 2000, including Common Cause and the League of Women Voters in Alabama⁵³ and the state bar association, Common Cause, League of Women Voters, and the Council of Churches in Ohio.⁵⁴

IV. ENSURING COMPLIANCE WITH CAMPAIGN CONDUCT RULES

Any standards of conduct that are more than aspirational in nature must be accompanied by procedures to resolve alleged violations and, if necessary, impose appropriate sanctions on offending candidates. For many years, states have had procedures in place to address complaints of judicial misconduct, including those that arise during campaigns. However, just as our judicial system has developed methods of resolving legal disputes as alternatives to litigation, several jurisdictions have established informal procedures for deciding campaign disputes. Whether these procedures consist of informational hotlines, advisory opinions, or voluntary campaign oversight committees, they can provide faster and more satisfactory

52. See *The Higher Ground Standards of Conduct for Judicial Candidates*, The Constitution Project, at <http://www.constitutionproject.org/ci/standards.html> (last visited Apr. 1, 2001).

53. See *Alabama Groups Push Higher Standards for Court Campaigns*, The Constitution Project, at http://www.constitutionproject.org/ci/press_releases_alstandards.html (last visited Apr. 1, 2001).

54. See *Ohio Groups Push Higher Standards for Court Campaigns*, The Constitution Project, at http://www.constitutionproject.org/ci/press_releases_ohstandards.html (last visited Apr. 1, 2001).

means of addressing claims of inappropriate behavior. Moreover, while informal efforts may not allow for imposition of sanctions that directly affect a judge's tenure or a lawyer's ability to practice law, they can be effective in deterring or halting inappropriate campaign conduct.

A. Georgia

By rule, the Georgia Judicial Qualifications Commission has established a three member Special Committee on Judicial Election Campaign Intervention. The stated objective of that committee is to "alleviate unethical and unfair campaign practices," and the committee is given the power to "deal expeditiously with allegations of ethical misconduct in campaigns for judicial office."⁵⁵ The rule establishes an "informal and nonadversarial" means of addressing allegations of judicial campaign misconduct and provides that all complaints must be acted on within ten days.⁵⁶ Rule 27 was challenged on due process grounds in *Weaver*.⁵⁷ However, the court concluded that the rule "sufficiently balance[s] the state's interest in expeditiously resolving [campaign conduct] issues against a candidate's interest in being heard" and that "further procedural safeguards would be overly burdensome and unrealistic."⁵⁸

B. Michigan

In response to concerns that judicial campaign complaints were not expeditiously addressed and often were dismissed following the election, the Michigan Bar implemented a Judicial Election Campaign Conduct program in 1998. The program, which was voluntary in nature, required participating candidates to sign a pledge of clean campaign conduct that bound the candidate and others working under the candidate's direction and control.⁵⁹ Multiple judicial election panels were established throughout Michigan to hear and resolve, within forty-eight hours, complaints of inappropriate campaign conduct. Approximately seventy percent of the candidates in contested

55. GA. JUDICIAL QUALIFICATIONS COMM'N RULE 27 (2000).

56. *See id.*

57. *See Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000).

58. *Id.* at 1346.

59. *See Byerley, supra* note 51, at 318-19.

trial court cases agreed to participate in the program, and the panels reviewed six formal complaints, all of which either were dismissed or resolved.⁶⁰ The program was considered successful in “heighten[ing] all candidates’ awareness of ethical considerations for judicial campaigns.”⁶¹ Notwithstanding this perceived success, the program was not renewed for the 2000 election.

C. Alabama

Other states have engaged in similar monitoring activities for the purposes of enhancing candidate and public awareness of judicial campaign conduct requirements and promoting the integrity of judicial campaigns. The Supreme Court of Alabama appointed a twelve-member Judicial Campaign Oversight Committee for the 1998 election, and the committee engaged in candidate and voter education efforts and received more than 350 inquiries regarding judicial campaign conduct.⁶² The initial oversight committee was “instrumental in improving the overall tone of judicial campaigns in Alabama,” and a successor committee was reappointed for the 2000 election.⁶³

D. Ohio

Judicial election oversight committees can also be created on a local basis. For the past several elections, voluntary judicial election monitoring committees have been established by bar associations in Ohio’s two largest counties—Cuyahoga (Cleveland) and Franklin (Columbus). Since 1987, the Franklin County committee, has allowed candidates to enter into voluntary campaign conduct

60. *See id.* at 319.

61. *Id.*

62. *ABA Task Force Recognizes Alabama Judicial Campaign Oversight Committee*, ALA. CT. NEWS, Sept. 1998, at http://www.alalinc.net/aoc/pub_info/Ct_news.htm (last visited Oct. 2000).

63. ALA. CT. NEWS, Aug. 1999, at http://www.alalinc.net/aoc/pub_info/CT_news.htm (last visited Oct. 2000). For additional information regarding similar informal campaign monitoring efforts in Georgia, South Dakota, Oklahoma, and Nevada, see Earle B. May Jr., *Georgia Adopts New Rules Governing Political Conduct*, JUD. CONDUCT REP., Summer-Fall 1997, available at Westlaw, JCR Database; *South Dakota Adopts Procedures for Handling Judicial Campaign Complaints*, JUD. CONDUCT. REP., Winter-Spring 1998, available at Westlaw, JCR Database; and *Judicial Campaign Oversight*, Winter 2000.

agreements while providing a method for resolving disputes over the content of advertisements and other forms of campaign conduct. In addition to considering complaints filed by candidates, the committee prescreens print and electronic campaign advertisements and contacts candidates whose materials appear to violate either the Code of Judicial Conduct or the voluntary agreement. The committee discusses the matter with the candidate or representatives of his or her campaign, and in a majority of instances, secures an agreement from the candidate to alter advertisements or campaign conduct. Where no agreement can be reached, the committee has the authority to publicize the noncompliance in the local media and can refer the matter to the disciplinary counsel or elections commission for formal review. According to the current committee chair, judicial candidates in the last four elections have abided by the committee's determinations. The committee has not found it necessary to issue media releases or refer complaints for formal action.

When the Supreme Court of Ohio revised its judicial campaign conduct rules in 1995, the court recognized that these local volunteer committees could serve as effective alternatives to the formal disciplinary process. The rules governing consideration of judicial campaign grievances allow campaign complaints between candidates who voluntarily have signed an agreement with a monitoring committee to be referred to that committee for resolution.⁶⁴ In the elections since the committees have been established, a period involving more than 100 separate judicial campaigns, only one formal campaign complaint has arisen from these counties.⁶⁵

E. New York

Monroe County (Rochester), New York established a similar bar committee for the 2000 election as a result of "the tone and conduct of several recent judicial campaigns."⁶⁶ The resolution creating the Judicial Campaign Practices Committee establishes a process by

64. *See* OHIO GOV. JUD. R. II § 5(C)(2).

65. This information is based on the author's personal knowledge having served as staff attorney to the judicial commissions that have been appointed since 1995.

66. Letter from Monroe County Bar Association President to New York Justice Albert M. Rosenblatt (Nov. 3, 2000) (on file with author).

which candidates who sign a voluntary campaign pledge may have campaign conduct disputes mediated by the committee. If the mediation process does not resolve the dispute and the committee believes the conduct violates the Code of Judicial Conduct or impacts negatively on the public trust and confidence in the judiciary, the bar association's board of trustees may issue a news release about the complaint.⁶⁷

Informal monitoring efforts are most successful when perceived by candidates and the public as a fair and effective alternative to formal oversight bodies. The likelihood of success is enhanced if the entity engaged in the monitoring is nonpartisan or bipartisan and consists of a diverse group of responsible and well-respected community leaders, including persons outside the legal profession.

F. Formal Enforcement of Judicial Campaign Regulations

Formal processes to address allegations of judicial campaign misconduct must have two key components in order to be effective. First, the rules must apply to all judicial candidates, regardless of whether a candidate is a sitting judge or an attorney, and provide for disciplinary proceedings extending beyond election day. A defeated candidate should not be able to escape punishment for campaign misconduct solely because the candidate did not win the election. Moreover, because inappropriate campaign conduct may diminish the public's confidence in the judiciary, campaign violations should not be ignored or dismissed simply because the election is over or because the alleged misconduct is perceived to have had no impact on the outcome.

Second, the procedures for addressing judicial campaign complaints should take into account the dynamic nature of the campaign process. Like other political campaigns, judicial elections are most vigorously contested during the weeks immediately preceding election day, and it is during this time that campaign conduct complaints are most likely to arise. A grievance process must allow for a prompt, yet fair, consideration of those complaints. Regardless of whether allegations of misconduct are found to have merit, the

67. See *Resolution of the Monroe County, N.Y. BAR ASS'N*, June 20, 2000 (on file with author).

electorate should be aware of the resolution of the complaint, if at all possible, before going to the polls.

The Supreme Court of Ohio addressed these components in drafting new rules for the expedited consideration of campaign complaints. First, the court amended the Code of Professional Responsibility to add DR 1-102(A)(1), which subjects an attorney to disciplinary action if, while a judicial candidate, the attorney violated any provision of the Code of Judicial Conduct that applies to judicial candidates.⁶⁸ This amendment closed a loophole that arguably barred post election grievance proceedings against an unsuccessful candidate who no longer was subject to the Code of Judicial Conduct.

Second, the court included in its rules governing judicial discipline procedures expedited procedures for reviewing and resolving judicial campaign complaints.⁶⁹ The expedited procedures allow a maximum of twenty days to elapse from the time a campaign complaint is filed until an initial determination is made by a complaint hearing panel. This timeline can be extended for any one of five reasons, including due process considerations or the complexity of the issues presented in the complaint.⁷⁰ While the hearing panel does not have final authority to determine a violation or impose sanctions against a judicial candidate, the panel's findings and recommendations carry great weight and will, in most cases, bring a halt to the improper conduct. These procedures do not allow for the resolution of every campaign grievance prior to the election since many violations occur or come to light only a few days in advance of election day. However, the process for expediting campaign grievances has afforded a hearing panel of the Board of Commissioners on Grievances and Discipline to issue a preelection finding and recommendation in several key cases. Moreover, once the hearing panel issues its report, a judicial commission appointed by the supreme court has the authority to enter an interim cease and desist order, based on the hearing panel's report, pending further review of the matter.

68. See OHIO C.P.R. Canon 1 (Anderson 2000).

69. See OHIO GOV. JUD. R. II § 5(C)(2) (Anderson 2000).

70. See *id.* at § 5(K).

An important element of the expedited procedure is the availability of judges, attorneys, and lay people to hear the complaints. Probable cause and hearing panels appointed by the Board of Commissioners consist primarily of current members of the board. Because of the expedited nature of these complaints and the regular slate of disciplinary cases assigned to board members, the board is authorized to appoint former board members to serve on these panels.⁷¹ The supreme court appoints the five member judicial commissions from a list of approximately twenty-five judges who have agreed, in advance, to accept such an appointment. Judges are asked to serve on no more than two commissions and may decline an appointment for any reason. While the judicial commissions have authority to conduct hearings, they have routinely conducted their independent review of the hearing panel's report by considering the record made before the board and briefs filed by the parties. The process is expedited through the use of express mail and electronic transmission of documents to and from commission members and telephone conferences to conduct deliberations.

Ohio's expedited procedure has significantly reduced the time necessary to resolve campaign grievances. Since 1995, two cases involving allegations of campaign misconduct have proceeded through the normal disciplinary process and were not resolved until more than two years had elapsed since the alleged misconduct occurred. By contrast, the eleven actions that have been heard through the expedited process have reached final resolution approximately two to five months after the misconduct occurred. In seven of these eleven cases, either a preliminary finding or a final order was issued prior to the election.⁷²

71. See *id.* § 5(C)(1)(c).

72. For more information about Ohio's expedited campaign grievance process and enforcement of the Ohio Code of Judicial Conduct through the 1998 election, see Jennifer Brunner, *Separation of Power as a Basis for Restraint on a Free Speaking Judiciary and the Implementation of Canon 7 of the Code of Judicial Conduct as a Model for Other States*, 1999 DETROIT C.L. REV. 729 (1999).

G. Sanctions for Campaign Misconduct

Sanctions against candidates who have violated judicial campaign conduct regulations serve a dual purpose of punishing the offender and informing the legal community of the standards of appropriate judicial campaign conduct.⁷³ While these sanctions may do little to lessen the damage caused by false or misleading statements, the expedited and public nature of the complaint process and the attentiveness of the media to campaign violations can ensure that the public is made aware of the offense. Commissions that review judicial campaign conduct violations in Ohio have available a range of sanctions that include fines, cease and desist orders, suspension of a law license, and suspension or removal from office.⁷⁴ In addition, the judicial commissions charged with reviewing can be creative in their imposition of punishment. One commission required an offending candidate to apologize publicly to his opponent and to the citizens of his judicial district.⁷⁵ When the candidate submitted the apology for review, the commission found it to be an attempt to justify his actions rather than a true expression of remorse. The commission rewrote the proposed apology and ordered the candidate to publish the revised version.⁷⁶

V. CONCLUSION

Courts called upon to review judicial campaign conduct regulations have given passing deference to Justice Stewart's statement that "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary"⁷⁷ while ultimately concluding that this interest does not justify the imposition of regulations that infringe on the candidate's First Amendment rights. These decisions have severely limited the ability of many states to regulate the

73. See *In re Judicial Campaign Complaint Against Morris*, 675 N.E.2d 580 (Ohio 1997).

74. See OHIO GOV. JUD. R. II § 5(E)(1)(a)-(e).

75. See *In re Judicial Campaign Complaint Against Hildebrandt*, 675 N.E.2d 889, 892 (Ohio 1997).

76. See *In re Judicial Campaign Complaint Against Hildebrandt*, 680 N.E.2d 631, 631 (Ohio 1997).

77. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

conduct of their judicial candidates and arguably allow the imposition of few restrictions beyond those commonly placed on candidates for nonjudicial office. We are faced with the distinct prospect, in the not too distant future, of seeing judicial campaigns that are indistinguishable from those conducted by legislative and executive branch candidates, replete with misleading “buzzwords” and labels, implied, if not express, promises of conduct in office, and negative campaigning. Indeed, some feel as though this day is already here. As stated by one trial judge who invalidated a portion of Georgia’s judicial campaign rules:

Abuses are no longer potential or theoretical; they have arrived. The people of Georgia have chosen to elect their judges. That decision, like all decisions, has consequences, one of which is that contested elections, with all their baggage, will occur.⁷⁸

This prospect carries very significant, and potentially adverse ramifications for the independence and integrity of the judiciary in those states in which judicial candidates appear on the ballot. Short of abandoning the popular election of judges, these states must explore new means to regulate judicial campaign conduct that fall within the confines of the First Amendment. While these attempts are underway, judges, judicial candidates, and persons in positions of influence and authority can continue to engage in and promote activities designed to further dignify judicial campaign conduct. Efforts to educate candidates and the public on the rationale for legitimate limitations on judicial campaign activities and the need for judicial candidates to observe higher standards of conduct will help sustain judicial independence and integrity. Informal monitoring committees can encourage candidates to engage in legitimate, yet respectful, debate about qualifications, court administration, general judicial philosophy, and provide a forum for addressing disagreements that arise during the campaign. Formal enforcement efforts that allow for a prompt and fair resolution of campaign complaints can serve to compel compliance with permissible campaign regulations and impose meaningful sanctions against candidates who run afoul of the rules.

78. *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1347 (N.D. Ga. 2000).