

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-8

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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: Canon 7 of the Ohio Code of Judicial Conduct regulates judicial campaign speech. To assist judicial candidates in appropriate campaign speech, guidelines on the scope of judicial campaign speech are set forth. The guidelines arise from the mandatory rules set forth in Canon 7 and as such are not optional. Guideline 1: The Ohio Code of Judicial Conduct does not prohibit a judicial candidate from announcing views on disputed legal or political issues, but in so doing, the judge must abide by the restraints on judicial campaign speech within Canon 7. Guideline 2: The canons do not place absolute limits on comments and debate in judicial campaigns, but the canons ban statements that are false/misrepresent/deceive/mislead for such statements promote public misunderstanding regarding campaign issues, judicial candidates, and the judicial branch of government. Guideline 3: Truthful and specific comments regarding one's self or regarding an opponent or an opponent's record are appropriate judicial campaign speech, as are truthful criticisms of an opponent. Guideline 4: Promising or pledging conduct in office (other than faithful and impartial performance of judicial duties) is not permitted. Guideline 5: Statements regarding substantive matters in specific cases pending before any judge are prohibited, as are, statements that commit the judicial candidate with regard to cases or controversies that are likely to come before the court on which the judge serves or will serve. Guideline 6: Statements that manifest bias or prejudice with regard to an opponent's race, sex, religion, national origin, disability, age, sexual orientation, or social economic status are not permitted by the judicial candidate or his or her campaign committee. Guideline 7: It is improper for a judicial candidate to speak on behalf of a political organization and it is improper to publicly endorse or oppose candidates for another public office through written or oral public communication. Guideline 8: A judicial candidate at any time during the campaign is permitted to identify himself or herself in person as a member of a political party and at any time during the campaign is permitted in person or in written communication to truthfully state he or she is a nominee or endorsed by a party; however, in written advertisements a judicial candidate is permitted to identify himself or herself as a member of a political party only in the primary period. A judicial candidate is permitted to appear with other candidates for public office on slate cards, sample ballots, and other publications of a political party that identify all candidates endorsed by the party in an election. Guideline 9: Personal solicitation of campaign funds by a judicial candidate is prohibited, as is solicitation or receipt of campaign fund contributions by public employees subject to the judicial candidate's direction or control. Guideline 10: Judicial candidates are responsible for the contents of their campaign communication and for the compliance of their campaign

committee with the restrictions on solicitation and contributions. Guideline 11: Judicial speech is not only restrained in the context of judicial campaigns—an incumbent judge has ethical restrictions on judicial speech, regardless of whether he or she is engaged in a judicial campaign.

Opinions 87-006 (1987), 87-030 (1987), and 89-33 (1989) issued by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio are withdrawn.

OPINION: This opinion provides guidance as to the scope of permissible judicial campaign speech under the Ohio Code of Judicial Conduct.

On June 27, 2002, the United States Supreme Court struck down as unconstitutional under the First Amendment, the Minnesota Supreme Court’s canon prohibiting judicial candidates from announcing their views on disputed legal or political issues. *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2542 (2002). That decision from the highest court in the United States of America triggered the Supreme Court of Ohio to request that the Board of Commissioners on Grievances and Discipline provide an advisory opinion to Ohio’s judicial candidates regarding the scope of permissible judicial speech under the Ohio Code of Judicial Conduct. In response, this opinion by the Board of Commissioners on Grievances and Discipline sets forth the restraints on judicial campaign speech in Ohio’s Code of Judicial Conduct and provides guidance as to the application of the rules. Throughout this opinion, the use of the term “judicial candidate” refers to incumbent judges who are candidates for judicial office as well as non-incumbents seeking judicial office.

Two things bear noting. First, the “announce clause,” found unconstitutional by United States Supreme Court in *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2542 (2002), is not currently part of the Ohio Code of Judicial Conduct. Former Canon 7(B)(1)(c) included the prohibition that “[a] candidate, including an incumbent judge, for a judicial office should not . . . announce his views on disputed legal or political issues.” The “announce clause” prohibition was eliminated from the Ohio Code of Judicial Conduct by amendment, effective July 1, 1995.

Second, in striking down Minnesota’s “announce clause,” the United States Supreme Court did not rule on the constitutionality of other provisions of the Minnesota judicial campaign canons. The court stated it expressed no view on the “pledges and promises clause,” a rule prohibiting judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” *Id.* at 2532. Nor did the court agree or disagree with the oral argument of the Minnesota Lawyers Board and the Minnesota Board on Judicial Standards that the scope of the “announce clause” as limited by the Eighth Circuit and adopted by the Minnesota Supreme Court was no broader than the scope of ABA 1990 Canon 5(A)(3)(d)(ii) rule prohibiting “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” *Id.* at 2534, f.n. 5. “We do not know whether the announce clause (as interpreted by state authorities) and

the 1990 ABA canon [statements that commit or appear to commit] are one and the same. No aspect of our constitutional analysis turns on this question.” *Id.*

Announcing views on disputed legal and political issues.

By now, judicial candidates in Ohio should be aware (through rule amendment, case law, and advisory opinions) that the expression of views on disputed legal or political issues is not banned by the Ohio Code of Judicial Conduct and as announced in *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2542 (2002) cannot be constitutionally banned. As already stated, the prohibitory “announce clause” was amended from the Ohio Code of Judicial Conduct, effective July 1, 1995.

Further, in a 1996 Ohio case involving judicial campaign speech, the First Amendment right of judicial candidates to express opinions was acknowledged: “Opinions are protected under the First Amendment. . . . By the same token, however, First Amendment protection does not adhere to statements of opinion that imply false assertions of fact.” *In re Complaint Against Harper* (1996), 77 Ohio St. 3d 211, 228 (citations omitted). [In that 1996 case, the court stated there was nothing wrong with the respondent informing the public that her opponent received substantial contributions from a special interest group, for that could be verified from campaign finance reports; however, some of the candidate’s statements in the advertisement implied false assertions of fact and were inappropriate. *Id.* at 227, 228, 229.]

As early as October 13, 1987, the Board issued Opinion 87-044 advising, “[j]udges may ethically express their opinion regarding economic and political issues or measures intended to improve the law, the legal system, and the administration of justice.” In Opinion 87-044, the Board stated, “whether a judge agrees or disagrees with a local county sales tax or the merit selection plan, he or she may ethically make known his or her opinion regarding these issues.”

As recently as April 5, 2002, the Board issued Opinion 2002-3 advising that expression of views by a judge on disputed legal or political issues related to the law, the legal system, and the administration of justice is permitted under Canon 2(A)(1) of the Ohio Code of Judicial Conduct, provided that the standards of speech with Canon 7 and Canon 3(B)(9) are not violated. The first two paragraphs of the Syllabus of Opinion 2002-3 state as follows:

It is proper under Canon 2(A)(1) of the Ohio Code of Judicial Conduct for a judge to communicate to the public about a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, to explain the proposed amendment, to compare it to current law, and to describe its potential impact on the constitution, the law, and the operation of the courts. At all times during public communications, a judge must maintain the dignity appropriate to judicial office and abide by the high standards of speech in Canon 7. High standards of speech under Canon 7 include, Canon 7(B)(2)(c) prohibiting a judge from making pledges or promises of

conduct in office other than the faithful and impartial performance of the duties of the office; Canon 7(B)(2)(d) prohibiting a judge from making statements that commit or appear to commit a judge or judicial candidate with regard to cases or controversies that are likely to come before the court; and Canon 7(B)(2)(e) prohibiting a judge from commenting on any substantive matter relating to a specific pending case on the docket of a judge. A judge should consider the possibility that legal challenges may arise with regard to a proposed constitutional amendment. With regard to the proposed constitutional amendment as well as any other proposed constitutional amendment, Ohio voters have a right to a fair election. Under Canon 7(B)(2)(e) and Canon 3(B)(9), if legal action with regard to the proposed constitutional amendment is pending on the docket of *any* court, a judge must not comment on substantive matters relating to the pending case and must not make comments that might reasonably be expected to affect its outcome, impair fairness, or substantially interfere with a fair trial or hearing. In addition, a judge should not make comments that would cause questions as to a judge's impartiality and lead to a judge's disqualification under Canon 3(E)(1).

It is proper under Canon 2(A)(1) of the Ohio Code of Judicial Conduct for a judge to communicate to the public his or her views in support of or opposition to a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, basing such support or opposition on the judge's understanding of the potential impact on the courts, the law, the legal system, and the administration of justice. Expression of views by a judge on disputed legal and political issues related to the law, the legal system, and the administration of justice is appropriate under Canon 2(A)(1) of the Ohio Code of Judicial Conduct, provided that the standards of speech within Canon 7 and Canon 3(B)(9) are not violated. Unfettered expression of personal views by a judge is improper and under Canon 3(E)(1) may lead to a judge's disqualification from proceedings. A judge should avoid making comments that would lead to a judge's disqualification under Canon 3(E)(1).

In announcing views on disputed legal or political issues, a judicial candidate must be vigilant to avoid making pledges or promises or committing himself or herself with regard to cases and controversies that might come before the court. Unfettered expressions of views may later become disqualification issues when on the bench.

Thus, the first guideline on judicial campaign speech is offered. **Guideline 1. The Ohio Code of Judicial Conduct does not prohibit a judicial candidate from announcing views on disputed legal or political issues, but in so doing, the judge must abide by the restraints on judicial campaign speech within Canon 7.**

Judicial candidates in Ohio should be aware that there are areas of judicial campaign speech that remain regulated by the Ohio Code of Judicial Conduct. Canon 7 sets forth

high standards of campaign conduct including restrictions on campaign speech. The rules setting forth high standards of campaign speech are addressed in Opinion 2002-3 and are revisited in this opinion.

Statements that are false/misrepresent/deceive/mislead are banned under Canon 7 (B)(2)(F), Canon 7(D)(1) through (11), and Canon 7(E)(1). Statements pledging or promising conduct in office is regulated under Canon 7(B)(2)(c). Statements regarding cases and controversies pending before or likely to come before the court and statements related to a substantive matter in a specific case are regulated under Canon 7(B)(2)(d) and (e). Statements manifesting bias or prejudice are banned under Canon 7(E)(2). Statements on behalf of a political organization or another candidate and statements publicly endorsing or opposing another candidate are restricted by Canon 7(B)(2)(b). Speaking at political gatherings and statements regarding political affiliation are restricted by Canon 7(B)(3)(a), (b), (c) and Canon 7(B)(2)(g). Statements soliciting campaign funds are prohibited under Canon 7(C)(1) and Canon 7(C)(2)(a). Statements by a judicial campaign committee and accountability by a judicial candidate are addressed in Canon 7(F). Further, it is noted that the Ohio Code of Judicial Conduct imposes on incumbent judges speech restrictions unrelated to judicial campaigns through Canons 3(B)(5), 3(B)(6), 3(B)(7), 3(B)(9), 3(B)(10), 3(B)(11), and 4(C)(1). Each is set forth and addressed below.

Statements that are false/misrepresent/deceive/mislead.

Canon 7 prohibits judicial statements that are false, that misrepresent, that deceive, or that mislead the public.

Canon 7(B)(2) A judge or judicial candidate shall not do any of the following:

- (f) Knowingly misrepresent his or her identity, qualifications, present position, or other fact or the identity, qualifications, present position, or other fact of an opponent.

Canon 7(D) Campaign Standards. During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

- (1) Use the title of an office not currently held by a judicial candidate in a manner that implies that the judicial candidate does currently hold that office;
- (2) Use the term "judge" when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves;

- (3) Use the term "judge" when the judicial candidate is not a judge unless that term appears after or below the name of the judicial candidate and is accompanied by either or both of the following:
 - (a) The words "elect" or "vote," in prominent lettering, before the judicial candidate's name;
 - (b) The word "for," in prominent lettering, between the name of the judicial candidate and the term "judge."
- (4) Use the term "re-elect" when the judicial candidate has never been elected at a general or special election to the office for which he or she is a judicial candidate.
- (5) Make a false statement concerning the formal schooling or training completed or attempted by a judicial candidate; a degree, diploma, certificate, scholarship, grant, award, prize of honor received, earned, or held by a judicial candidate; or the period of time during which a judicial candidate attended any school, college, community technical school, or institution;
- (6) Make a false statement concerning the professional, occupational, or vocational licenses held by a judicial candidate, or concerning any position a judicial candidate held for which he or she received a salary or wages;
- (7) Make a false statement that a judicial candidate has been arrested, indicted, or convicted of a crime;
- (8) Make a statement that a judicial candidate has been arrested, indicted, or convicted of any crime without disclosing the outcome of all pending or concluded legal proceedings resulting from the arrest, indictment, or conviction;
- (9) Make a false statement that a judicial candidate has a record of treatment or confinement for mental disorder;
- (10) Make a false statement that a judicial candidate has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;
- (11) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a judicial candidate by a person, organization, political party, or publication.

Canon 7(E) Campaign Communications. During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

- (1) Post, publish, broadcast, transmit, circulate, or distribute information concerning a judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

Judicial candidates must carefully abide by Canon 7(B)(2)(f), Canon 7 (D), and Canon 7(E). Statements that are false/misrepresent/deceive/mislead have been the gravamen of several campaign grievances.

For examples of statements regarding self that are false/misrepresent/deceive/mislead, review the following cases.

In re Judicial Campaign Complaint Against Emrich (1996), 78 Ohio Misc. 2d 32, 36 (violating Canon 7(B)(2)(f), Canon 7(D)(1), and Canon 7(E)(1) by campaign billboard and yard sign stating “Elect Judge Emrich to Probate Court” that did not specify the particular judgeship (county court judge) that the respondent currently holds).

In re Judicial Campaign Complaint Against Roberts, (1996), 81 Ohio Misc. 2d 59, 60-61 (violating Canon 7(D)(8) by circulating campaign literature stating “the legal Community says Only County Court Judge Bob Roberts is qualified to be Judge of the 7th District Court of Appeals” when only one bar association had endorsed his candidacy”).

Disciplinary Counsel v. Evans (2000), 89 Ohio St. 3d 497, 499, 500-501 (violating Canon 7(B)(1) and 7(E)(1) by stating that he was “Endorsed by Southern Ohio’s Top Prosecutors and Sheriffs” when at the time the advertisements were created and distributed, only five of the fourteen sheriffs and three of the fourteen county prosecuting attorneys in the Fourth Appellate District had endorsed or supported him).

For examples of statements regarding judicial candidates’ opponents that are false/misrepresent/deceive/mislead, review the following cases.

In re Jud. Campaign Complaint Against Brigner (2000), 89 Ohio St. 3d 1460, 1461 (violating Canon 7(E)(1) by false, deceiving, or misleading statements in campaign committee fundraising letter that the opponent “has never handled a divorce case” and is “a novice who lacks even one day of domestic relations experience” and an enclosure containing a chart contrasting the experience of the two candidates and claiming that the opponent had no experience in various types of domestic relations cases). Opponent had practiced law for more than twenty two years, had served as a magistrate in the juvenile division of a common pleas court for ten years, had opened and handled more than seventy domestic relations actions as a legal aid attorney during a five month period in 1987 and 1988.

In re Complaint Against Harper (1996), 77 Ohio St. 3d 211, 212, 229. (violating Canon 2(A) and 7(B)(1)(a) by approving television advertisement stating, “On the Ohio Supreme Court, one Justice has a problem. It’s money. Most of Resnick’s money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over \$300,000.00 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees. It’s time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, 20 years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.” The court stated the advertisement undermines public confidence in the integrity and impartiality of the judiciary. The public could conclude from the advertisements that lawyers representing plaintiffs’ interest are dishonest and dishonest lawyers desired opponent’s re-election. Further the advertisement suggested there is something improper about lawyers contributing to a judicial campaign. *Id.* at 1460.

In re Jud. Campaign Complaint Against Carr (1996), 76 Ohio St. 3d 320 (violating Canon 7B(2)(f) by references to her opponent as “never [having] handled a single case in housing court as an attorney”).

In re Jud. Complaint Against Hildebrandt (1997), 82 Ohio Misc. 2d 1, 2-4 (violating Canon 7(B)(1), 7(B)(2)(f), and (E)(1) by running television and radio advertisements stating “according to the district attorneys, he [Hildebrandt’s opponent] voted to end the death penalty” which was misleading to the public as to the opponent’s voting record in Congress with regard to the death penalty; and by incorrectly stating that his opponent “ran for judge, then dropped out, then ran for Congress and lost” misleading the public as to his opponent’s service as a public official when the opponent had in fact won election to Congress in 1992, before being defeated in 1994).

In re Jud. Campaign Complaint Against Kienzle (1999), 96 Ohio Misc. 2d 31, 32-33 (violating Canon 7(E)(1) by statements in campaign material characterizing the opponent incumbent judge’s ruling in a case by stating “[a]s Judge, Robert Brown imposed \$430,000 in taxes on Wayne countians. The Court of Appeals said he was wrong” which promoted the public’s misunderstanding of the role of the judiciary in our form of government).

In re Jud. Campaign Complaint Against Morris (1997), 81 Ohio Misc. 2d 64, 68 (violating Canon 7(E)(1) by running television advertisement portraying opponent’s remarks made as an attorney in a domestic proceeding “[t]he kids a loser, it’s a shame” out of context to falsely convey to the public that her opponent made the remark in her capacity as a judge, in a courtroom to a small, troubled boy).

In re Jud. Campaign Against Burick (1999), 95 Ohio Misc. 2d 1, 5, 8, 9, 14 (violating Canon 7(B)(2)(f) and (E)(1) by advertisements alleging that her opponent was appointed by political bosses, when in fact the appointment was

made by the Governor which was false and misled public as to the process for filling vacancies in judicial office; violating Canon 7(B)(2)(f), (E)(1) and (F) by making false and misleading statements regarding a criminal case pending on the docket of her opponent by referring to a defendant as being a rapist who received a lenient sentence, when in fact the defendant pled guilty to a charge of sexual battery and received the maximum sentence; violating Canon 7(E)(1) by stating “I am proud to have received the Union endorsements” when in fact both candidates received the labor union endorsements—the information while technically true was misleading and deceiving for it would lead a reasonable person to conclude that she had received all of the union endorsement in the contested race; violating Canon 7(D)(10) by the statement “endorsed by Fraternal Order of Police,” when it was the endorsement of one lodge of the Fraternal Order of Police, thus, while the information was truthful, her failure to identify the nature of the endorsement, such as the name of the lodge that issued the endorsement, made the statement misleading.

In re Jud. Campaign Against Hein (1999), 95 Ohio Misc. 2d 31, 34-35 (violating Canon 7(B)(2)(f) and Canon 7(E)(1) by statements in printed and oral campaign communications that misrepresented the position of the opponent by labeling opponent as “liberal” and “soft on crime”). The court stated “the terms do not allow for a fair and accurate portrayal of the respondent’s opponent. As such, they would be deceiving and misleading to a reasonable person.” *Id.* at 35.

From the canons and the cases, the second and third guidelines are set forth. **Guideline 2. The canons do not place absolute limits on comments and debate in judicial campaigns, but the canons ban statements that are false/misrepresent/deceive/mislead for such statements promote public misunderstanding regarding campaign issues, judicial candidates, and the judicial branch of government.**

While we find that the respondent’s statements in this instance [a statement in reference to the incumbent judge’s ruling in a case] to be contrary to Canon 7(E)(1), we do not intend to imply the existence of absolute limits on comments and debate in judicial campaigns. However, the respondent’s statement not only was inaccurate but promotes the public’s misunderstanding of the role of the judiciary in our form of government.

In re Jud. Campaign Complaint Against Kienzle (1999), 96 Ohio Misc. 2d 31, 34.

Guideline 3. Truthful and specific comments regarding one's self or regarding an opponent or an opponent’s record are appropriate judicial campaign speech, as are truthful criticisms of an opponent. “[T]he Canons do not prohibit truthful criticism, so long as the criticism is done fairly, accurately, and upon facts, not false representations. . . . we also stress that criticism of the judiciary has an important function in our society.” *In re Complaint Against Harper* (1996), 77 Ohio St. 3d 211, 225. Inaccurate

representations, such as suggesting that there is something improper in lawyers contributing to a judicial campaign, undermine public confidence in the integrity and impartiality of the judiciary. *In re Complaint Against Harper* (1996), 77 Ohio St. 3d 211, 229. Truthful comments on an opponent's record are not banned, so long as the comments are not false, do not misrepresent facts or mislead, and do not address the opponent's decision in a pending case.

However, inflammatory terms or buzzwords about an opponent are not appropriate judicial campaign speech.

[T]he use of general, inflammatory terms or "buzzwords," such as those employed by the respondent ["liberal" and "soft on crime"] in his printed and oral campaign communications, are inappropriate in judicial campaigns. Moreover, the terms do not allow for a fair and accurate portrayal of the record of the respondent's opponent. As such, they "would be deceiving or misleading to a reasonable person." Canon 7(E)(1).

In finding the respondent's comments to be in violation of Canon 7(E)(1), we do not mean to imply that Canon 7 precludes a judicial candidate from commenting on the record of his or her opponent, or, as the respondent suggests, that a candidate can only mimic words and phrases used by his or her opponent. . . . Comments regarding an opponent's record must be truthful and specific. Generalizations such as those used by the respondent in this campaign must be avoided, as they are more prone to be misleading or deceiving than specific comments and observations.

In re Jud. Campaign Complaint Against Hein (1999), 95 Ohio Misc. 2d 31, 35.

Statements pledging or promising conduct in office.

Canon 7 prohibits judicial candidates from making statements pledging or promising conduct in office other than the faithful/impartial performance of judicial duties.

Canon 7(B)(2) A judge or judicial candidate shall not do any of the following:

- (c) Make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

There is a distinction between announcing a view and making a pledge or promise. "An affirmative declaration can be . . . a pledge or promise. A philosophical viewpoint, while perhaps inappropriate under another section of the canon, is unlikely to rise to a pledge or promise as reasonable persons would define them." *In re Jud. Campaign Complaint Against Runyan* (1999), 95 Ohio Misc. 3d 62, 67 (no violation of Canon 7(B)(2)(c) because complainant failed to show by clear and convincing evidence that his opponent said that if elected, he would imprison all convicted felons).

An example of a pledge or promise is the affirmative declaration “I will imprison all convicted felons.” An example of expressing a philosophical view is the statement “I believe incarceration is an appropriate sentencing tool in some cases.” An example of a pledge or promise is “In my court, I will impose the death penalty on criminals at every opportunity.” An example of expressing a view is the statement “The death penalty should be reconsidered by the legislature.”

For examples of statements pledging or promising conduct in office see the following case.

In re Jud. Campaign Against Burick, (1999), 95 Ohio Misc. 2d 1, 5, 7 (violating Canon 7(B)(2)(c) and (d) by statements regarding her support for and intended use of the death penalty “Elizabeth Burick will be a tough Judge that supports the death penalty and isn’t afraid to use it,” and “Burick favors the death penalty for convicted murderers.” The statements “imply to a reasonable person that she will use the death penalty in a capital case regardless of the evidence produced during the mitigation phase of trial and notwithstanding the statutory standards a judge or jury must consider in determining the appropriateness of the death penalty.”)

Guideline 4. Promising or pledging conduct in office (other than faithful and impartial performance of judicial duties) is not permitted. Judges must decide each case on its merits and in accord with the law and judges must sentence in accord with the law. Pledges and promises about how cases will be decided or how the judge will sentence each criminal, convey that the judge will not consider each case on its merits.

Statements regarding cases and controversies pending before or likely to come before the court/Statements related to a substantive matter in a specific case.

Canon 7 prohibits statements that commit a judicial candidate with respect to cases or controversies that are likely to come before the court or substantive matters on cases pending on the docket of any judge.

Canon 7(B)(2) A judge or judicial candidate shall not do any of the following:

(d) Make statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court;

(e) Comment on any substantive matter relating to a specific pending case on the docket of a judge;

Pending on the docket means not just matters pending on the docket of a judicial candidate but matters “pending on the docket of *any* judge at the time the statements were made.” *In re Jud. Campaign Against Burick*, (1999), 95 Ohio Misc. 2d 1, 7. The term

pending includes “actions which a lower tribunal has finally adjudicated, but from which an appeal has not yet been taken.” *In re Jud. Campaign Against Burick*, (1999), 95 Ohio Misc. 2d 1, 7 (citations omitted).

For examples of statements regarding pending cases see the following cases.

In re Jud. Campaign Against Burick (1999), 95 Ohio Misc. 2d 1 (violating Canon 7(B)(2)(e) by making false and misleading statements (referring to a defendant as being sentenced by the judge as a rapist and receiving a lenient sentence, when in fact the defendant pled guilty to a charge of sexual battery and received the maximum sentence) regarding a criminal case pending on the docket of her opponent during the time from which an appeal could be taken.).

In re Jud. Campaign Against Hein (1999), 95 Ohio Misc. 2d 31, 34 (violating 7(B)(2)(e) by comments in a press release related to the sentence imposed by his opponent as trial judge in a specific case that was pending before the court of appeals).

Guideline 5. Statements regarding substantive matters in specific cases pending before any judge are prohibited, as are, statements regarding cases that commit the judicial candidate with regard to cases or controversies that are likely to come before the court on which the judge serves or will serve.

Statements manifesting bias/prejudice.

Canon 7 prohibits judicial statements that manifest bias or prejudice toward an opponent.

Canon 7(E) Campaign Communications. During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

- (2) Manifest bias or prejudice toward an opponent based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status or permit members of his or her campaign committee or others subject to his or her direction or control to do so.

Guideline 6. Statements that manifest bias or prejudice with regard to an opponent’s race, sex, religion, national origin, disability, age, sexual orientation, or social economic status are not permitted by the judicial candidate or his or her campaign committee.

Statements on behalf of a political organization or another candidate/Statements publicly endorsing or opposing another candidate.

Canon 7(B)(2) A judge or judicial candidate shall not do any of the following:

- (b) Make speeches on behalf of a political organization or another candidate at a political meeting or publicly endorse or oppose a candidate for another public office.

The prohibition on public endorsement of other candidates applies not only to oral communication but also to written communication. See *In re Jud Campaign Complaint Against Keys* (1996), 80 Ohio Misc. 2d 1, 2 (violating Canon 7(B)(2)(b) by having names of two judicial candidates placed on an invitation to another candidate's fund raiser).

Guideline 7. It is improper for a judicial candidate to speak on behalf of a political organization and it is improper to publicly endorse or oppose candidates for another public office through written or oral public communication.

Speaking at political gatherings/Statements regarding political affiliations.

Canon 7(B)(3) A judge or judicial candidate may attend political gatherings and speak to political gatherings. A judicial candidate may do any of the following:

- (a) State in person or in advertising that he or she is the nominee of or has been endorsed by a political party;
- (b) From the day on which he or she becomes a judicial candidate through the day of the primary election, identify himself or herself in person or in advertising as a member of a political party;
- (c) After the day of the primary, identify himself or herself in person as a member of a political party.

Canon 7(B)(2) A judge or judicial candidate shall not do any of the following:

- (g) Jointly raise funds with a candidate for nonjudicial office. Judicial candidates may appear together in joint campaign advertisements and may conduct joint fund raising activities with other judicial candidates. A judicial candidate may participate with judicial and nonjudicial candidates in fund raising activities organized or sponsored by a political party and may appear with other candidates for public office on slate cards, sample ballots,

and other publications of a political party that identify all candidates endorsed by the party in an election.

Guideline 8. A judicial candidate at any time during the campaign is permitted to identify himself or herself in person as a member of a political party and at any time during the campaign is permitted in person or in written communication to truthfully state he or she is a nominee or endorsed by a party; however, in written advertisements a judicial candidate is permitted to identify himself or herself as a member of a political party only in the primary period. A judicial candidate is permitted to appear with other candidates for public office on slate cards, sample ballots, and other publications of a political party that identify all candidates endorsed by the party in an election.

Statements soliciting campaign funds.

Canon 7(C)(1) A judicial candidate shall prohibit public employees subject to his or her direction or control from soliciting or receiving campaign fund contributions.

Canon 7(C)(2)(a) A judicial candidate personally shall not solicit or receive campaign funds. A judicial candidate may establish a committee to secure and manage the expenditure of funds for his or her campaign and to obtain statements of support for his or her candidacy. The campaign committee shall not knowingly receive directly or indirectly for any political or personal purpose any of the following: [i, ii, iii omitted].

See *In re Judicial Campaign Complaint Against Carr* (1996), 76 Ohio St. 3d 320, 323 (violating Canon 7(C)(2)(a) by signing a fund-raising letter thereby personally soliciting campaign funds).

Guideline 9. Personal solicitation of campaign funds by a judicial candidate is prohibited, as is solicitation or receipt of campaign fund contributions by public employees subject to the judicial candidate's direction or control.

Statements by judicial campaign committee/Accountability by judicial candidate.

Canon 7 (F) Accountability. A judicial candidate shall be responsible for the content of any statement communicated in any medium by his or her campaign committee and for compliance by his or her campaign committee with the limitations on campaign solicitation and contributions contained in this canon if the candidate knew of the statement, solicitation, or contribution.

Case law has addressed the accountability of judicial candidates.

[A] judicial candidate is not relieved from compliance with Canon 7 simply because a third party authorizes a particular type of campaign conduct or communication. . . . The Supreme Court and previous five-judge commissions have made it clear that judicial candidates must independently measure the propriety of their actions against the standards contained in Canon 7 and will be held accountable should their conduct fall short of the required principles. See Canon 7(F) and *In re Judicial Campaign Complaint Against Hildebrandt* (1997), 82 Ohio Misc. 2d 1, 4, 675 N.E.2d 889, 891.”

In re Jud. Campaign Complaint Against Burick (1999), 95 Ohio Misc.2d 1, 9.

Guideline 10. Judicial candidates are responsible for the contents of their campaign communication and for the compliance of their campaign committee with the restrictions on solicitation and contributions.

Statements by incumbent judges.

It is important to remember that judicial speech is not just restrained in the context of judicial campaigns. An incumbent judge has restrictions on judicial speech, regardless of whether he or she is engaged in a judicial campaign. Under Canon 3(B)(5) and (6), judges must perform judicial duties without bias or prejudice and require lawyers in proceedings before the judge to refrain from manifesting bias or prejudice. Under Canon 3(B)(7), a judge is not permitted (with limited exceptions) to participate in communications outside the presence of the parties concerning a pending or impending proceeding. Under Canon 3(B)(9), a judge is restrained from comment regarding a proceeding pending or impending in any court that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. Under Canon 3(B)(10), a judge is restricted from commending or criticizing jurors for their verdict other than in a court order or opinion. Under Canon 3(B)(11)(a), a judge is restricted from disclosure of information regarding probable or actual decisions in a case or legal proceeding before a court. Under Canon 4(C)(1), a judge’s appearance at a public hearing or consultation with an executive or legislative body or official is limited to matters concerning the law, the legal system, or the administration of justice, or to pro se matters involving the judge or the judge’s interest.

Guideline 11. Judicial speech is not only restrained in the context of judicial campaigns—an incumbent judge has restrictions on judicial speech, regardless of whether he or she is engaged in a judicial campaign.

Withdrawal of former board opinions and discussion.

With this opinion, the Board takes the opportunity to withdraw several opinions that interpreted the Ohio Code of Judicial Conduct when it contained the “announce clause” prohibiting judges from announcing views on disputed legal and political issues.

The Board withdraws Opinion 87-006 the Syllabus of which states: “Candidates for judicial office are not specifically prohibited from engaging in a public debate under the Code of Judicial Conduct. However Canon 7(B)(1)(c) of the Code of Judicial Conduct only allows candidates to promise faithful and impartial performance of the duties of office. Moreover, a judicial candidate may not make pledges or promises of conduct in office, announce his views on disputed legal or political issues or misrepresent his identity, qualifications, present position, or other fact.”

In withdrawing Opinion 87-006, the Board notes that it agrees with the conclusion of that opinion that public debates are not prohibited by the Code, but nevertheless, the opinion is withdrawn because of its reliance on the announce clause as a regulation that applies to judicial debates.

The Board withdraws Opinion 87-030 the Syllabus of which states: “A candidate for judicial office may not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity qualifications, present position or other fact. In this regard, a judicial candidate may not promise to treat a certain classification of criminal offenses in a certain way if elected, nor announce a specific sentencing policy for criminal cases.” In withdrawing Opinion 87-030, the Board notes that it agrees with the conclusion that “an incumbent candidate running for judicial office may not promise to continue to handle certain classifications of offenses in a particular way if re-elected, such as not accepting plea bargaining in D.W.I. cases or continuing to sentence in a particular manner in D.W.I. cases,” but nevertheless, the opinion is withdrawn because of its reference to the announce clause.

The Board withdraws Opinion 89-33 the Syllabus of which states: “A candidate for judicial office may not announce his or her views on disputed legal or political issues. Therefore, judges and judicial candidates may not announce their personal views on the issue of abortion or how they would decide abortion issues coming before them.” In withdrawing Opinion 89-33, the Board notes it agrees that a judicial candidate may not state how he or she will decide abortion issues for that is a pledge or promise still prohibited under the Ohio Code of Judicial Conduct, however, judges are free to express their views on abortion or other disputed legal or political issues, so long as there is no pledge or promise or statement that commits the candidate with regard to a case or controversy.

In conclusion, the Board advises as follows. Canon 7 of the Ohio Code of Judicial Conduct regulates judicial campaign speech. To assist judicial candidates in appropriate campaign speech, guidelines on the scope of judicial campaign speech are set forth. The guidelines arise from the mandatory rules set forth in Canon 7 and as such are not optional. Guideline 1: The Ohio Code of Judicial Conduct does not prohibit a judicial candidate from announcing views on disputed legal or political issues, but in so doing, the judge must abide by the restraints on judicial campaign speech within Canon 7. Guideline 2: The canons do not place absolute limits on comments and debate in judicial

campaigns, but the canons ban statements that are false/misrepresent/deceive/mislead for such statements promote public misunderstanding regarding campaign issues, judicial candidates, and the judicial branch of government. Guideline 3: Truthful and specific comments regarding one's self or regarding an opponent or an opponent's record are appropriate judicial campaign speech, as are truthful criticisms of an opponent. Guideline 4: Promising or pledging conduct in office (other than faithful and impartial performance of judicial duties) is not permitted. Guideline 5: Statements regarding substantive matters in specific cases pending before any judge are prohibited, as are statements that commit the judicial candidate with regard to cases or controversies that are likely to come before the court on which the judge serves or will serve. Guideline 6: Statements that manifest bias or prejudice with regard to an opponent's race, sex, religion, national origin, disability, age, sexual orientation, or social economic status are not permitted by the judicial candidate or his or her campaign committee. Guideline 7: It is improper for a judicial candidate to speak on behalf of a political organization and it is improper to publicly endorse or oppose candidates for another public office through written or oral public communication. Guideline 8: A judicial candidate at any time during the campaign is permitted to identify himself or herself in person as a member of a political party and at any time during the campaign is permitted in person or in written communication to truthfully state he or she is a nominee or endorsed by a party; however, in written advertisements a judicial candidate is permitted to identify himself or herself as a member of a political party only in the primary period. A judicial candidate is permitted to appear with other candidates for public office on slate cards, sample ballots, and other publications of a political party that identify all candidates endorsed by the party in an election. Guideline 9: Personal solicitation of campaign funds by a judicial candidate is prohibited, as is solicitation or receipt of campaign fund contributions by public employees subject to the judicial candidate's direction or control. Guideline 10: Judicial candidates are responsible for the contents of their campaign communication and for the compliance of their campaign committee with the restrictions on solicitation and contributions. Guideline 11: Judicial speech is not only restrained in the context of judicial campaigns—an incumbent judge has ethical restrictions on judicial speech, regardless of whether he or she is engaged in a judicial campaign.

Opinions 87-006 (1987), 87-030 (1987), and 89-33 (1989) issued by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio are withdrawn.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.