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by Vincent R. Johnson*

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I. ATTACKS ON THE JUDICIARY

It is increasingly common for jurists, rather than their allegedly erroneous rulings, to be the target of wrath by disappointed partisans. Within the last few months, in pleadings and correspondence, justices on various Texas appellate courts have been compared to "Pestilence, Death, [and] Famine," mocked as "bought and paid for employees of the Wall Street rich . . . and the country club set," and lambasted for rendering "pro-rapist, pro-big-insurance-defense firm" decisions.¹ These derogatory taunts by attorneys

* J.D., University of Notre Dame; LL.M., Yale University; LL.D., St. Vincent College (Pa.). Professor of Law, St. Mary's University, San Antonio, Texas. Member, American Law Institute. Commissioner, Federal Judicial Fellows Commission. Fulbright Senior Scholar, People's Republic of China, 1998. This paper was presented in a preliminary form to the Annual Meeting of the Judicial Section of the State Bar of Texas in September 1997. Editorial assistance was provided by several law students: Michael French, Jeffrey Mathews, Jason Kipness, Tamara Pitts, West Winter, Margaret Hopson, and David Lindeman.

1. Robert Elder, Jr., *The Art of the Brief, Disrespectfully Submitted*, TEX. LAW., Aug. 11, 1997, at 2. Elder goes on to say:
Whatever else one can say about them, [attorneys] Robert Halliard, Michael Shore and Marynell Maloney do possess a certain rhetorical flair:
"Outlined against a hazy July sky, the four horsemen rode again last Wednesday, July 9, 1997. You know them: Pestilence, Death, Famine and this Texas Supreme Court," Hilliard

represent only part of what appears to be a much broader attack on the independence and integrity of the judiciary.² There are many examples. During the most recent presidential election, a decision that evidence in a drug case was inadmissible led some of the presidential candidates to call for the resignation of a federal judge in New York, rather than merely for the reversal of his ruling.³ Later in the year, in Texas, an expert witness disappointed with a Houston judge's decision that religious garb could not be worn in a state courtroom sought to have the judge disciplined by the Commission on Judicial Conduct rather than have the correctness of the ruling reviewed on appeal.⁴ More recently, the Majority Whip of the United States House of Representatives charged that a San Antonio federal judge should be impeached for apparently no reason other than that he had granted a preliminary injunction in a discrimination suit arising from elections in Val Verde County, a decision with which the Majority Whip disagreed.⁵ Other federal judges in Tennessee and California have also been targeted for potential removal because of their alleged "judicial activism."⁶

These efforts to personalize, rather than professionalize, the process of judicial criticism suggest the development of an unfortunate trend of abusing judges for personal or political advantage. In some respects this trend is similar to the "scorched earth" tactics that became commonplace in the late

wrote in a July 24 motion for rehearing of a Bendectin birth-defect case.

"You are now considered bought and paid for employees of the Wall Street rich, the insurance conglomerates and the country club set you fawn over," Shore wrote in a letter to the Supreme Court after reading its opinion in a hospital licensing case *in which he wasn't even involved*. "Defense lawyers I work with are laughing at you, considering you their captive pets."

"No wonder the court has elected not to publish its opinion in this matter! It must be embarrassing to take such a decidedly pro-rapist, pro-big-insurance-defense-firm position with so appallingly non-existent legal or logical basis." Maloney wrote in a motion for rehearing to the 4th Court of Appeals after it had ruled against her client in a nursing home case.

These items aren't just inflammatory passages highlighted to make a point—the writings of all three lawyers are shot through with this type of rancor and passion

Id.; see also "Captive Pets" at Supreme Court, TEX. LAW., July 21, 1997, at 2.

2. See N. Lee Cooper, *President Ends Term with Call for Resistance to Legal Services Cuts and to Attacks on Judiciary*, NAT'L L.J., Aug. 4, 1997, at C1, C18 ("The biggest challenge to the legal profession and to the justice system as the new century approaches is the continuing attack upon the federal judiciary."); see also *Federal Writ Frees Lawyer*, SAN ANTONIO EXPRESS-NEWS, Oct. 4, 1997, at 2B. After a lawyer was sanctioned by the Texas Supreme Court and ordered to pay \$1000 to the lawyers on the other side of a case, he sent a check to the court, which was made "payable to any Texas Supreme Court Justice." *Id.* The Supreme Court found the lawyer in contempt. *See id.* He was arrested, placed in jail, then later freed by a federal court writ. *See id.*

3. See Kathy Barrett Carter, *Politicians' Election Year Attacks on Judges Draw Concern from the ABA*, STAR-LEDGER (NEWARK N.J.), Aug. 5, 1996, at 12, available in 1996 WL 7958618.

4. See Brenda Sapino Jeffreys, *Banned Yarmulke Leads to Judicial Conduct Commission Complaint*, TEX. LAW., Sept. 30, 1996, at 5.

5. See Vincent R. Johnson, *Judicial Politics: Unfair Play*, TEX. LAW., Apr. 14, 1997, at 28.

6. See Marcia Coyle, *Impeachment of Judges for "Activism" Mulled*, NAT'L L.J., Mar. 24, 1997, at A12; Harvey Berkman, *Spiking Judges for Rulings*, NAT'L L.J., Jun. 30, 1997, at A1.

1980s and early 1990s in certain fields of civil litigation.⁷ The trend raises the prospect of replacing civility and moderation in public discourse with harshness and excess. These developments also threaten to undermine the public standing and effectiveness of the judiciary.⁸

Of course, criticism of the judiciary is not new. One thinks of past attacks leveled against the lower federal court judges who worked to make the civil rights movement's promise of racial equality a reality,⁹ or attacks against United States Supreme Court justices, such as Chase,¹⁰ Taney,¹¹ Warren,¹² and Douglas.¹³ But the recent spate of criticism has a harder edge to it, and surprisingly, it is sometimes more willingly tolerated. For example, intemperate language that just a few years ago would have caused a court to reject the filing of a motion may today go unchallenged.¹⁴ Moreover, recusal motions, which used to be rare, now have become routine.¹⁵ At a minimum, it can safely be said that if a judge today is subject to harsh attacks for conduct no more grievous than rendering an incorrect decision, it seems likely that one

7. See generally Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (discussing the preference for melodramatic performances by trial lawyers and the growing intolerance of such techniques).

8. See Jeffrey Rosinek, *Political Judge-Bashing Endangers Our System*, NAT'L L.J., Aug. 25, 1997, at A18.

9. See, e.g., ROBERT F. KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY* (1978) (discussing Judge Johnson's role in federal civil rights litigation in Alabama).

10. Justice Samuel Chase was not only widely criticized, but also impeached and tried, though not convicted. See generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992), reviewed in Vincent R. Johnson, *The Moderate Rehnquist*, 17 VT. L. REV. 267, 268 (1992).

11. See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 149 (1987).

12. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 124 (1983).

13. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 97-99 (1986).

14. See Theodore Mack, *Court Disrespect Distasteful*, TEX. LAW., Aug. 25, 1997, at 26. Mack states that the Texas Supreme Court's "apparent decision to benignly ignore attacks is a fairly recent one" and notes that, 15 years ago, a motion for rehearing was rejected for filing because of its intemperate tone. *Id.* The more recent motion said that the court's denial of a writ was "unprincipled" and that the court could not maintain its "intellectual integrity" and allow the decision of the [lower court] to stand." *Id.* Of course, not all courts are inclined to ignore abusive language. See *In re Maloney*, 949 S.W.2d 385, 386 (Tex. App.—San Antonio 1997, n.w.h.) (stating that an attorney's assertions, in a motion for rehearing and in response to an order to show cause, were direct attacks on the integrity of the justices of the court and warranted the forwarding of the matter to the State Bar for disciplinary proceedings). Some bar associations are redoubling their efforts to defend judges from unfair criticism. See Richard L. Fruin, Jr., *Defending Judicial Independence and Opening Up Courts*, NAT'L L.J., Aug. 4, 1997, at C10 (discussing ABA efforts).

15. See John Council, *Recusal Roulette*, TEX. LAW., Sept. 1, 1997, at 1. Council quotes the presiding judge for the First Administrative Judicial Region in Dallas, who now hears an estimated 100 recusal hearings a year, as saying: "[W]e didn't use to have this problem 25 years ago. . . . Most are absolutely frivolous. . . . I think it kind of shows the decline in collegiality of the bar and the respect for judges." *Id.*

who engages in ethically questionable conduct will be even more severely taken to task, producing greater harm to public confidence in the courts.

It has always been important for judges to observe high ethical standards. But in the combative atmosphere that now prevails, judges at all levels need to be especially vigilant to avoid ethical improprieties that may unnecessarily provoke bad publicity.

II. CANON 5: REFRAINING FROM INAPPROPRIATE POLITICAL ACTIVITY

For Texas judges, no field of endeavor is more fraught with potential for an ethical misstep than campaigning for office. The standards differentiating permissible forms of political activity from those which are forbidden are finely drawn and not easy to apply to the dynamic process of running a campaign. In addition, there is relatively little in the way of interpretive guidance, for precedent constraining the pertinent ethics rules is scarce. Moreover, when mistakes occur, they frequently take place in the public eye.

The starting point for conducting an ethical judicial campaign is Canon 5 of the Texas Code of Judicial Conduct. Although its various provisions will be quoted and discussed below, this canon is worth printing in full at the beginning of this paper, for it is the essential benchmark in this field of judicial ethics. It provides:

(1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

(2) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

(3) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).¹⁶

16. TEX. CODE JUD. CONDUCT, Canon 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 1998).

Canon 5 applies not only to sitting judges,¹⁷ but also to candidates for the judiciary.¹⁸ A judge who violates Canon 5 or other provisions in the Code of Judicial Conduct is subject to discipline by the State Commission on Judicial Conduct.¹⁹ Similarly, a lawyer seeking judicial office may be disciplined by the State Bar of Texas for failing to comply with the terms of Canon 5 or other relevant provisions of the judicial code.²⁰ Among those "other relevant provisions" are presumably those portions of Canon 2 which state:

- A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. . . . A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.²¹

These general principles form leitmotifs in the precedent that has emerged with respect to judicial campaigning.

The obligation of a judge or judicial candidate to follow the law²² imposes a duty to comply with various statutory provisions bearing upon fund raising and the like, such as those contained in the Texas Judicial Campaign Fairness Act.²³ However, an examination of those statutory constraints on judicial campaigning will be left to another article. The discussion below focuses on topics falling within the purview of Canon 5 and other provisions of the Texas Code of Judicial Conduct. In considering these subjects, it is useful to bear in mind that case law and advisory opinions have traditionally held judicial candidates to very high standards of conduct, and they are likely to continue to do so.²⁴ Consequently, in charting a campaign, it is wise to err on the side of caution in deciding what is ethically allowed.

17. Canon 6 of the Texas Code of Judicial Conduct specifies which judges and justices are subject to some or all of its terms. *Id.*, Canon 6.

18. Canon 6(G)(1) of the Texas Code of Judicial Conduct provides: "Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary." *Id.*, Canon 6(G)(1).

19. *Id.*, Canon 6(G)(2).

20. *See id.*, Canon 6(G)(3); *see also* Rule 8.02(b) of the Texas Disciplinary Rules of Professional Conduct, which states: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct." TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1998) (TEX. STATE BAR R. art. X, § 9).

21. TEX. CODE JUD. CONDUCT, Canon 2.

22. *See id.*, Canon 2(A).

23. TEX. ELEC. CODE ANN. §§ 253.151-.176 (Vernon Supp. 1998).

24. The Advisory Opinions on Judicial Ethics cited and quoted in this article are issued by the Committee on Judicial Ethics of the State Bar of Texas. They are published in the Annual Report of the Texas Judicial System, which can be ordered through the Texas Judicial Council Office of Court Administration in Austin. Advisory Opinions 168-203 are also available on the Internet. *See Texas Electronic Ethics Reporter* (last modified Dec. 8, 1997) <<http://www.law.uh.edu/ethics/>>.

At various points, this article argues that, on particular facts, discipline cannot be imposed on judges or judicial candidates for constitutional or other reasons. This does not mean that persons involved in judicial races should engage in those forms of conduct. The interests of society are often best served by those who conduct themselves in accordance with standards of behavior far exceeding the lower range of what is protected by the Constitution.

The analysis which follows occasionally cites decisions from other states as guidance relevant to judicial campaigns in Texas.²⁵ It must be remembered, however, that in the field of electing judges, Texas, in many respects, has charted an independent course. Not surprisingly, the terms of Canon 5 of the Texas Code of Judicial Conduct vary considerably from the language of the American Bar Association's Model Code of Judicial Conduct²⁶ and from the provisions based on that model that are currently in force in many states.²⁷ Consequently, care must be exercised in relying on out-of-state precedent dealing with the political activities of judges and judicial candidates. Certain issues relating to judicial campaigns fall within the ambit of the free-speech and free-press provisions of the First Amendment to the United States Constitution.²⁸ To the extent that out-of-state decisions soundly reflect those constitutional principles, they should, of course, carry significant weight in Texas.

III. STATEMENTS MADE DURING JUDICIAL CAMPAIGNS

A. *Knowingly False Statements*

Judges who are lawyers, as well as lawyers running for judicial office, are subject to the requirements of the Texas Disciplinary Rules of Professional Conduct, including the broad provisions of Rule 8.04(a)(3).²⁹ This rule provides that "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."³⁰

In addition, as noted above, Canon 5(2)(ii) of the Code of Judicial Conduct states that "[a] judge or judicial candidate shall not . . . knowingly or

25. See *infra* notes 34-38 and accompanying text (discussing misrepresentations and freedom of expression).

26. MODEL CODE OF JUDICIAL CONDUCT (1990). The legislative history of the 1990 ABA code is set forth in LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992).

27. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 356 (2d ed. 1995) ("[N]o Code provision has more variations among the states that have adopted the . . . [ABA Model Code of Judicial Conduct] than Canon 5.").

28. See *id.* at 337.

29. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3).

30. *Id.*

recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent."³¹

Consequently, if a judge or judicial candidate knowingly makes a false statement of fact, there are at least two potential bases for imposing discipline. Not surprisingly, there is authority that a former judge cannot imply in political advertising that he is a current judge.³² So too, a judge who seeks reelection and is defeated cannot use the words "reelect" or "keep" on campaign materials used in a subsequent race against an incumbent on another court.³³

In *In re Donohoe*, the court held that an intentional and deliberate pattern of making misstatements of fact in connection with a campaign for a position on a court of appeals warranted censure and that the use of false campaign materials justified a separate reprimand.³⁴ In that case, the judicial candidate, among other things, falsely asserted that the court of appeals had never reversed a trial judge if the appellant was represented by a woman.³⁵ In fact, the candidate herself had obtained a reversal from a panel on which the judge she was challenging sat.³⁶ The candidate also published, as part of her campaign materials, a letter written by a fellow attorney, which the candidate had materially altered by removing the essence of three paragraphs.³⁷ In affirming the imposition of discipline, the court reasoned:

We are dealing with a delicate balancing of rights involving the public, the incumbent judge, and the lawyer candidate for judicial office. On the one hand the courts, as an institution, are entitled to the respect due to the *office* because the acceptance of judicial decisions ultimately depends upon the citizens' belief in the integrity and impartiality of the courts. On the other hand, the members of the judiciary are subject to legitimate and accurate criticism and evaluation. *A candidate for judicial office has a right to challenge an incumbent judge's ability, decisions and judicial conduct, but it must be done fairly, accurately and upon facts, not false representations.*

31. TEX. CODE JUD. CONDUCT, Canon 5(2)(ii).

32. See Comm. on Jud. Ethics, State Bar of Tex., Op. 193 (1996), reprinted in 68 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 70 (1996) (stating that Canon 5(2)(ii) would be violated if a former Justice of the Peace implied in political advertising that he was a current Justice of the Peace); Comm. on Jud. Ethics, State Bar of Tex., Op. 195 (1996) reprinted in 68 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 71 (1996) (stating that an individual who has resigned from a County Court at Law bench to run for a District Court bench and who is currently practicing law cannot use the title "Judge" in political advertisements or use election materials from previous campaigns for county bench races that say only "Vote for Judge _____" because such conduct would violate Canon 5(2)(ii)).

33. See Comm. on Jud. Ethics, State Bar of Tex., Op. 135 (1990) reprinted in 62 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 125 (1990).

34. 580 P.2d 1093, 1098-99 (Wash. 1978).

35. See *id.* at 1095.

36. See *id.*

37. See *id.* at 1098.

The voters are entitled to a fair statement and evaluation of the qualifications of the candidates.

By the attorneys' oath, the Code of Judicial Conduct and the Code of Professional Responsibility the candidates must maintain the respect due the courts of justice. Judges should not be subjected to false allegations about particular decisions. A judge's ability to render a reasoned decision should not be clouded by the fear that a challenger can twist words or allege distorted facts in an election campaign.

....

We agree that a person does not surrender freedom of expression rights when becoming a licensed attorney. . . . However, we do not believe that the First Amendment protects one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign.³⁸

A judge or judicial candidate cannot circumvent the rule against communication of a known falsehood by acting through the agency of a third person.³⁹ Rule 8.04(a)(1) of the Texas Disciplinary Rules of Professional Conduct expressly states that "[a] lawyer shall not . . . violate these rules [including Rule 8.04(a)(3), the rule against dishonesty, fraud, deceit, or misrepresentation], knowingly assist or induce another to do so, or do so through the acts of another."⁴⁰ Thus, a judge or judicial candidate may be held liable for knowingly false statements disseminated by a political committee, provided the involvement of the judge or candidate in the committee's misconduct is adequately established.⁴¹

Under general tort principles, an ambiguous statement can support an action for deceit.⁴² If the statement's false meaning is accepted by the listener and known to the maker of the statement, and if the maker intends to convey the false meaning or is indifferent as to how the statement will be understood, an action will lie.⁴³ Similar principles apply to statements made in the course of a judicial campaign. Thus, a candidate for judicial office is not permitted to say that an opponent was "removed" from office when, in fact, the opponent had not been expelled for misconduct but merely defeated for reelection.⁴⁴

38. *Id.* at 1097 (citation omitted) (emphasis added).

39. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(1).

40. *Id.*

41. *Cf. In re Beatty*, 517 N.E.2d 1065, 1069-70 (Ill. 1987) (holding that a complaint charging attorneys with having violated disciplinary rules through the conduct of a political committee, which allegedly had distributed false statements concerning incumbent judicial candidates, failed to allege sufficient allegations of fact to state a disciplinary cause of action).

42. *See* RESTATEMENT (Second) OF TORTS § 527 (1977).

43. *See id.*

44. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 169 (1994), reprinted in 66 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 125-26 (1994).

Recent Supreme Court decisions make clear that the United States Constitution provides no blanket protection for expressions of opinion.⁴⁵ If a statement in the form of an opinion (e.g., "In my opinion, the incumbent judge has swindled the public") carries with it a false implicit statement of fact (i.e., that the judge has committed particular acts of dishonesty), it may serve as the predicate for imposition of legal sanctions.⁴⁶ These rules are now well established in the tort fields of defamation and misrepresentation,⁴⁷ and it should be assumed that the same analysis will be followed in the imposition of professional discipline.

It may be difficult to determine whether a statement of opinion implicitly asserts false facts. Courts regularly struggle with that question and have developed various tests as aids to the analysis of particular situations. Courts typically consider the "general tenor" of the statement, the setting in which it was made, and whether the speaker used precise or imprecise language.⁴⁸ If the listener is unacquainted with the factual context about which the statement is made, a court will be more willing to find that the statement carries an implicit assertion of fact than if the recipient is already fully familiar with the relevant data.⁴⁹ Likewise, a statement which is made under circumstances in which the listener should anticipate the use of fiery or exaggerated rhetoric will less likely be termed a statement of fact.⁵⁰ Ordinarily, statements are not

45. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 5, 17 (1990) (holding that there is no constitutionally based "wholesale defamation exemption for anything that might be labeled 'opinion,'" and that a statement of opinion which implies a false assertion of fact may be defamatory in the case of a sports commentator who wrote in a newspaper column that two school officials testifying at an athletic sanctioning board had lied).

46. See *id.* at 20.

47. See, e.g., RESTATEMENT (Second) OF TORTS § 539 (1977). Section 539 provides:

- (1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
 - (a) that the facts known to the maker are not incompatible with his opinion; or
 - (b) that he knows facts sufficient to justify him in forming it.
- (2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

Id.

48. See *600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 934-38 (N.Y. 1992) (concluding that statements that a proposed restaurant "denigrated" the building, that a lease and "proposition" were fraudulent and "smelled of bribery and corruption," and that the lease was "illegal" could not constitutionally be the subject of a defamation action because none of the statements implied knowledge of a specific criminal transaction, the statements used figurative language, they were in some respects obviously exaggerated, and they were made at a heated public hearing).

49. See, e.g., *Pritsker v. Brudnoy*, 452 N.E.2d 227 (Mass. 1983). In *Pritsker*, a restaurant critic stated on a radio station program that the owners of a dining establishment were "unconscionably rude and vulgar . . . PIGS." *Id.* at 228. In holding that the critic's opinion did not carry with it an implicit statement of fact, the court found it important that the restaurant was open to the public and there was no suggestion that other individuals could not visit the establishment and draw their own conclusions. See *id.* at 229-31. If, in contrast, the speaker had stated or implied that the statement was based on information that was otherwise unavailable to the recipients of the communication, a different result might have followed.

50. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (citing *Hustler Magazine, Inc. v.*

actionable if they lack specificity, or merely indicate that the speaker thinks ill of another. In the end, however, the issue of whether an expression of opinion carries with it a false statement of fact is, by itself, merely a factual question for the fact finder to resolve. A judge or judicial candidate who utters unfavorable opinions about an opponent runs the risk that that question will be decided in a way that permits the imposition of discipline under the usual rules governing the dissemination of false information.

B. False Statements Recklessly, Negligently, or Innocently Made

Knowingly false utterances must be distinguished from other false statements which are not known to be untrue, but are uttered as a result of lack of care (negligently or recklessly) or perhaps even innocently. It seems doubtful that a lawyer will be subject to discipline for making an innocent or even negligent misrepresentation, for courts have routinely refused to so hold.⁵¹ If, however, a high degree of fault is shown (i.e., recklessness as to the

Falwell, 485 U.S. 46, 50 (1988); *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970)).

51. See, e.g., *State Bar v. Lerner*, 859 S.W.2d 496 (Tex. App.—Houston [1st Dist.] 1993, no writ). Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct provides, as noted above, that "a lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3). Decisions interpreting this language have routinely required proof of intentional deception; a finding of innocent misrepresentation, or even negligent conduct, will not support the conclusion that the rule has been violated. See, e.g., *Lerner*, 859 S.W.2d at 499-500.

In *Lerner*, an attorney's mishandling of a settlement check led to charges by the State Bar that she had violated the fraud rule, TEX. STATE BAR R., art. XII, § 8, DR 1-102(A)(4) (Tex. Code Prof'l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990), the predecessor of Rule 8.04(a)(3), which contained identical language, and the rule against conduct adversely reflecting on an attorney's fitness to practice law, TEX. STATE BAR R., art. XII, § 8, DR 1-102(A)(6) (TEX. CODE PROF'L RESP.), 34 TEX. B.J. 758 (1971, superseded 1990). See *id.* at 499-500. Although the appellate court found that Lerner did "not contest the trial judge's finding[] that she . . . [had] misled [opposing counsel] into believing that the . . . lawsuit had been settled," the court affirmed the trial judge's determination that there was no violation of the fraud rule. *Id.* The appellate court wrote:

The trial judge obviously believed that Lerner's conduct was wrong, but not that Lerner acted dishonestly, fraudulently, or deceitfully, as required by DR 1-102(A)(4). *Such findings would obviously require intentional misconduct*, but Lerner's July 14 letter informed [opposite counsel] of all the pertinent facts surrounding her handling of the money and her refusal to return the settlement documents. The trial judge could have concluded that this disclosure by Lerner was inconsistent with the State Bar's allegations of intentional dishonesty done to defraud, deceive, or mislead.

The allegations that Lerner's conduct adversely reflects upon her fitness to practice law, DR 1-102(A)(6), are judged by a different standard. For that conduct, intent is not essential. Negligent conduct alone may adversely reflect upon an attorney's fitness to practice law. Thus, lack of dishonest intent would not necessarily exonerate Lerner from liability for violating DR 1-102(A)(6)

Id. at 499-500 (emphasis added). The above excerpt makes plain that intentional dishonesty is an essential element of a violation of TEX. STATE BAR R., art. XII, § 8, DR 1-102(A)(4) (Tex. Code Prof'l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990), and its identical successor, TEX. DISCIPLINARY RULE PROF'L CONDUCT 8.04(a)(3).

falsity of the statement), a different outcome may result.

There is language in Texas ethics codes which suggests that, for purposes of discipline, a line is to be drawn between negligence on the one hand and recklessness on the other, so that publication of a negligently false statement is an insufficient predicate for discipline, whereas recklessness as to falsity warrants condemnation. For example, Canon 5(2)(ii) of the Texas Code of Judicial Conduct states that "[a] judge or judicial candidate shall not . . . knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent."⁵²

In condemning only knowing or reckless misrepresentation, this language suggests that merely negligent falsity cannot be punished as an ethical infraction. *Expressio unius est exclusio alterius*.⁵³ The same innuendo flows from the language of Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, which states:

A lawyer shall not make a statement that the lawyer *knows to be false or with reckless disregard as to its truth or falsity* concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.⁵⁴

In distinguishing between recklessness and negligence, the drafting of Canon 5(2)(ii) and Rule 8.02(a) appears to reflect the constitutional precedent which has evolved in the field of defamation. Beginning with *New York Times Co. v. Sullivan* in 1964, the Supreme Court of the United States has consistently held that public officials (such as judges) and public figures (such as candidates for judicial office) cannot prevail in an action for libel or slander without proving "actual malice," meaning knowledge of falsity or reckless disregard for the truth.⁵⁵ "Actual malice" must be established in a defamation

52. TEX. CODE JUD. CONDUCT, Canon 5(2)(ii).

53. "[T]he expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

54. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(a).

55. 376 U.S. 254, 284-91 (1964). "Actual malice," as defined in *New York Times* and subsequent cases, is a legal term of art which must be clearly distinguished from "express" or "common law" malice. *See id.* One may utter true statements, just as easily as those which are false, with spite, ill will, vindictiveness or motives of revenge—that is to say, with express or common law malice. A showing that the defendant was actuated by bad motives is not, by itself, sufficient to satisfy the actual malice requirement. *See id.* Proof of ill will says nothing about whether the defendant knew of, or acted recklessly as to, the falsity of the defamatory statement.

Jury instructions permitting a finding of actual malice merely upon proof of hatred, enmity, desire to injure, or the like, are constitutionally defective. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969); *Hirman v. Rogers*, 257 N.W.2d 563, 566-67 (Minn. 1977); *Polzin v. Helmbrecht*, 196 N.W.2d 685, 691 (Wis. 1972). In discussing the reasoning underlying this position, the Supreme Court observed in a criminal defamation case:

[T]he great principles of the Constitution which secure freedom of expression in this area

action by clear and convincing evidence,⁵⁶ and it is a highly subjective standard:

[The] cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.*⁵⁷

The rule on actual malice reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁵⁸ This "profound national commitment" is as relevant to judicial elections as it is to other areas of politics. It would therefore be surprising if the constitutional principles which the courts have recognized in the field of defamation did not have relevance to the imposition of discipline based on statements uttered by judicial candidates and judges in the course of a campaign.

It makes a great difference for disciplinary purposes whether, with respect to false statements, recklessness and negligence are lumped together or are distinguished from one another. In the former case, a judge or judicial candidate could be disciplined merely because the falsity could have been discovered through the exercise of reasonable care. In the latter case, the fact

preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule . . . permitting a finding of [actual] malice based on an intent merely to inflict harm, rather than to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives."

. . . [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. . . . [The Constitution protects even] "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Garrison v. Louisiana, 379 U.S. 64, 73-75 (1964) (citations omitted) (quoting Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 (1949); *New York Times Co.*, 376 U.S. at 270).

Of course, in many instances, evidence of express malice may be coupled with facts showing that the defendant lacked an honest belief in the truth of the statements. In those cases, proof of malice in the *New York Times* sense allows the action to go forward; proof of common-law malice may encourage the jury to award a large verdict.

56. See *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968).

57. *Id.* at 731 (emphasis added).

58. *New York Times Co.*, 376 U.S. at 270. The Supreme Court has reasoned that "[the] . . . erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72.

that the speaker could or should have known of the error is not enough to support the imposition of sanctions.

Is a judge or judicial candidate required to conduct a thorough investigation into the facts before saying anything that adversely reflects upon an opponent? Such diligence is undoubtedly desirable, for it tends to minimize erroneous statements, elevate the tone of public debate, and inspire confidence in the electoral process. However, as a matter of constitutional law, a judge or judicial candidate probably is not bound to make such an inquiry. The precedent which has emerged in the field of news reporting is instructive. In disputes raising the issue of whether members of the media acted with actual malice (i.e., at least recklessness) in publishing false statements, the courts have held that ordinarily the defendant is under no obligation to talk to the subject of the defamatory communication to obtain that person's version of the events described⁵⁹ or to endeavor to present an objective picture.⁶⁰ Moreover, factual inaccuracies alone do not suffice to prove actual malice,⁶¹ nor is recklessness established merely by showing that the reporting in question was speculative or even sloppy.⁶² Indeed, "a public figure plaintiff must prove more than an extreme departure from professional standards and . . . a newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice."⁶³ Even the deliberate alteration of quotations will not prove that the publisher acted with knowledge of falsity, unless the alteration materially changes the meaning of the quotation alleged to be defamatory.⁶⁴

Of course, claiming a constitutional right is one thing and proving a violation is another. A judge or judicial candidate who is charged with misconduct may find the fact-finding process highly invasive. In defamation cases, the publisher's state of mind must normally be inferred from circumstantial evidence.⁶⁵ Consequently, in media libel cases, plaintiffs routinely seek discovery of information about such matters as communications between reporters and editors, facts known but not used in a story, the pressures under which the work was prepared, and the identity and credibility of the defendant's sources.⁶⁶ Presumably, a similar course could

59. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 56-57 (1971).

60. See *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

61. See *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107, 109 (7th Cir. 1977).

62. See *Oliver v. Village Voice, Inc.*, 417 F. Supp. 235, 238 (S.D.N.Y. 1976).

63. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 665 (1989).

64. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

65. Cf. Vincent Robert Johnson, *Defamation (Libel and Slander) § 1.02[3][I]*, in *PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES* (1986) (discussing circumstantial evidence of the editorial process).

66. Cf. *Herbert v. Lando*, 441 U.S. 153 (1979) (stating that the First Amendment does not ban plaintiffs from inquiring into editorial processes and states of mind of those responsible for publication);

be followed by disciplinary authorities if the applicable standard for discipline is modeled on the constitutional principles which have emerged in defamation cases.

A prudent candidate in a judicial campaign will stay clear of the line distinguishing the impermissible from the protected. Nevertheless, it is important to know where the line will be drawn. Although there are some occasional expressions suggesting that negligent misrepresentation will support the imposition of discipline,⁶⁷ it is likely that the constitutional principles governing libel and slander actions by public officials and public figures will continue to set the standard for whether a judge or judicial candidate can be disciplined for misrepresenting the identity, qualifications, present position, or other facts concerning an opponent.⁶⁸

C. *Negative Campaigning that Impugns the Integrity of the Judicial System*

Can the angry temper or negative tone of campaign statements by itself warrant discipline? If a statement is not provably false, can it be challenged on the ground that it is unduly vitriolic or contentious? Put differently, are judges and judicial candidates obliged to observe an elevated tone of debate in the pursuit of an electoral victory? Many writers and courts have suggested or taken this approach.⁶⁹ Thus, the American Bar Association's Code of

St. Amant, 390 U.S. at 727 (1968) (opining that a statement based wholly on "an unverified anonymous telephone call" might be actionable under the actual malice standard).

67. See *State v. Russell*, 610 P.2d 1122 (Kan. 1980). The Kansas Supreme Court stated that "[w]hen derogatory factual allegations are false and with ordinary care should have been known to be false, discipline may be imposed." *Id.* at 1127. However, this endorsement of a negligence standard was dicta, for the court expressly found that the respondent attorney was "guilty of intentionally publishing known falsehoods." *Id.* at 1128. Moreover, the court did not address whether negligence should be distinguished from recklessness, and at least one of the cases cited by the court for support, *State Board of Exam. v. Spriggs*, 155 P.2d 285 (Wyo. 1945), predated the United States Supreme Court's constitutionalization of the law of defamation and articulation of an actual malice standard for public officials and public figures. See *Russell*, 610 P.2d at 1128.

68. The Texas Code of Judicial Conduct expressly notes that its provisions are "rules of reason, which should be applied *consistent with constitutional requirements*." TEX. CODE JUD. CONDUCT, Canon 8(A).

69. See, e.g., *In re Donohoe*, 580 P.2d 1093 (Wash. 1978). The Washington Supreme Court concluded that, "[i]f running for judicial office, a lawyer may criticize an incumbent judge who is his opponent but the criticism must be well founded, on a high plane, factual, and not personal." *Id.* at 1097 (citing R. WISE, LEGAL ETHICS 21 (1966)). In the same vein, the old Texas Code of Professional Responsibility, which was superseded by the current Texas Disciplinary Rules of Professional Conduct on January 1, 1990, see TEX. STATE BAR R., art. XII, § 8 (Tex. Code Prof'l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990), articulated a similar aspirational goal for lawyer criticism of judicial candidates. Also, Ethical Consideration 8-6 provided in relevant part:

Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. . . . While a lawyer as a citizen has a right to

Judicial Conduct cautions in mandatory terms that "a candidate for a judicial office: . . . shall maintain the dignity appropriate to judicial office."⁷⁰ In a recent case, which is illustrative, the New York Commission on Judicial Conduct wrote in imposing discipline:

Even in his or her own campaign, a judge faces constraints. A judicial candidate must "maintain the dignity appropriate to judicial office" Even in the face of provocation by an opponent, a judge must adhere to this standard. Respondent's political advertisements, suggesting that his opponent would be biased as a judge and was not respected in his profession and comparing him to comic characters, lacked the dignity required of judicial candidates.⁷¹

It is easy to posit examples of negative campaigning. Consider, for instance, whether it would be permissible for a judicial candidate for the Texas Supreme Court to make statements like those quoted at the beginning of this article, painting the incumbents as the judicial equivalent of pestilence, death, and famine or as "captive pets" of the insurance industry.⁷² Or take the recent case where a judicial candidate labeled the incumbent a "judicial reactionary" and accused him of having a "campaign treasury heavily laden with lavish contributions by politically influential lawyers and lobbyists, power brokers for liability risk insurance companies, finances, environmental polluters and a heavy handed law enforcement establishment of this community."⁷³ Of course, harsh statements make for easy cases. But there are also mild forms of negative campaigning, such as those contained in a recent fund-raising letter which said only that the candidate was running "to restore fairness, respect and experience" to the bench and urged voters to "give justice a chance."⁷⁴ Even if such statements can be labeled "negative," how they should be dealt with as a matter of judicial ethics is far from clear.

criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticism, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (1980).

70. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(a) (1990). The Texas Code of Judicial Conduct contains no parallel language.

71. N.Y. COM. JUD. COND., Jan. 27, 1994, available in 1994 WL 897478.

72. See Elder, *supra* note 1, at 2.

73. *In re Hopewell*, 507 N.W.2d 911, 913-14 (S.D. 1993). The court suspended the attorney-candidate from practice based in part on its finding that the quoted statements violated provisions of the state code of judicial conduct requiring a judge or judicial candidate to promote confidence in the judiciary. See *id.* at 914-15, 918. The court noted, however, that the attorney had abandoned his initial plan to defend his conduct on the ground that it was protected by the First Amendment's guarantee of free speech and that, therefore, the court did not address that issue. See *id.* at 917 n.11.

74. This language appeared in a fund-raising letter used in San Antonio in fall of 1997. A copy is on file with the author of this article.

The most relevant provision in the Texas Code of Judicial Conduct would appear to be Canon 2(A): "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."⁷⁵

Although the text of Canon 2(A) imposes this obligation of promoting public confidence only on judges, the same requirements are made applicable by other provisions of the code to "[a]ny person seeking elective judicial office."⁷⁶ It might reasonably be argued that negative campaigning by a judge or judicial candidate diminishes "public confidence in the integrity and impartiality of the judiciary" and, therefore, such statements run afoul of Canon 2(A).

However, it is open to question whether a rule that judicial campaign speech must promote public confidence in the judiciary could survive constitutional scrutiny. The United States Supreme Court has never directly ruled on the issue.

In the field of lawyer advertising, disciplinary authorities at one time insisted that communications by lawyers about their availability or services had to be restrained and dignified.⁷⁷ It is now clear that the constitutionality of restrictions on commercial speech by attorneys turns not on whether the ad is tasteful, but whether it is false or misleading. Thus, in *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court rejected a rule which, for the purpose of ensuring that attorneys advertised "in a dignified manner," restricted the use of illustrations.⁷⁸ The Court wrote:

[W]e are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. . . . [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.⁷⁹

At least one other court has taken a similar approach in a case involving an attorney's campaign for a non-judicial office. In *State v. Russell*, the court observed that publishing statements which do not appear to be in good taste and which are largely political rhetoric cannot be the basis for imposing

75. TEX. CODE JUD. CONDUCT, Canon 2(A).

76. *Id.*, Canon 6(G)(1).

77. See Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 23-25 (1988) (discussing the rules once applicable to the announcement of a lawyer's move from one firm to another).

78. 471 U.S. 626, 648 (1985).

79. *Id.*

discipline against an attorney.⁸⁰

However, other courts have focused on the impact that judicial campaign language has on the administration of justice. They have reasoned, in effect, that lawyers and judges have special obligations because of their professional status, and that important state interests justify according them a diminished scope for free expression,⁸¹ even in the context of a political race. For example, in *In re Riley*, the Supreme Court of Arizona wrote in 1984:

Even if not a candidate for judicial office, a lawyer is held to a narrower standard of free speech than a non-lawyer when discussing the judiciary:

A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.

A lawyer may be disciplined if his public comments threaten a significant state interest. The good standing of the judicial system is such a significant interest. Generally, and also during a judicial campaign, *a lawyer may accurately criticize a sitting judge, but may not impugn the integrity of the judicial system or question the decisions of the judge.*⁸²

Elaborating on this view, the court stated:

Freedom of speech does allow fair comment even by a lawyer candidate concerning a judge opponent:

A candidate for non judicial office is free to announce his stand on the issues he must pass upon in office, and to pledge his vote on those issues; the judicial candidate is forbidden to enter this customary campaign arena. Hence, unless the election is to be a pure popularity contest based on name recognition alone, the only legitimate area for debate is the relative qualifications of the candidates. *In our view, the health, work habits, experience and ability of the candidates are all matters of legitimate concern to the electorate who must make the choice. . . .*

We believe that candidates for judicial office have a First Amendment right to criticize an incumbent judge for such matters as intemperate

80. 610 P.2d 1122, 1127 (Kan. 1980).

81. See *In re Schenk*, 870 P.2d 185, 203-05 (Or. 1994). In *Schenk*, a judge wrote a letter to the local paper and a "guest editorial" which criticized the district attorney for actions in a case that was tried before the judge. See *id.* at 200. In suspending the judge for 45 days without pay, the Oregon Supreme Court held that the judge's comments did not preserve or promote public confidence in the judiciary or in its impartiality and that those interests outweighed the judge's interests in speaking out on a matter of public concern. See *id.* at 204-05.

82. 691 P.2d 695, 703 (Ariz. 1984) (citations omitted) (emphasis added) (quoting *In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. 1957)).

behavior, injudicious actions, lack of judicial temperament, unpredictability, and unnecessary delay in rendering decisions. We are aware that the line between fair comment and impermissible comment is indistinct and also that judges are relatively helpless to defend themselves from such attacks. Nevertheless, in jurisdictions that require the election of judges, such comment must be allowed.

Lawyers who are candidates for judicial office may not impugn the integrity of the judicial system or question the decisions of the judge. *Lawyers may make fair comment on the judge's fitness so long as the comment does not call into question decisions of the court or question the integrity of the judicial system.* For example, a lawyer may criticize a judge for unnecessary delay in reaching a decision, but may not question the decision itself except on appeal. This is not to say, however, that a lawyer may not publicly disagree with a judge's decision. Proper avenues for questioning a decision include the appellate route and disciplinary proceedings where appropriate. What we condemn is conduct which denigrates the judicial system as a whole and undermines the public's confidence in it.⁸³

It can hardly be disputed that there is an important state interest in maintaining public confidence in the administration of justice.⁸⁴ Many cases have relied upon that interest in holding that attorneys enjoy diminished free speech rights when acting as advocates in the course of litigation.⁸⁵ The

83. *Id.* at 704 (citations omitted) (emphasis added).

84. A state's interest in maintaining confidence in the judicial system is undoubtedly related to its interest in maintaining confidence in the legal profession. In *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster were upheld in part because the Court found that the Bar had a substantial interest in preventing the erosion of confidence in the legal profession that such invasions were found to have engendered. *See id.* at 625-28. It is difficult to predict what significance, if any, *Went For It* may have with regard to restrictions on speech incidental to judicial campaigns. The rules at issue in *Went for It* were limitations on *commercial* speech by attorneys, which is a form of expression that enjoys only diminished First Amendment protection. *See id.* at 622. A restriction on commercial speech that does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is "narrowly drawn." *Id.* at 623-24 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980)). In contrast, speech incidental to judicial campaigns is *political* speech, and therefore entitled to a higher degree of constitutional protection. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 29 (1971).

85. *See* *Gentile v. State Bar*, 501 U.S. 1030, 1074 (1991) (holding that a state may limit out-of-court statements by attorneys about pending proceedings); *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996) (suspending an attorney for stating in a motion that a judge was a "lying incompetent asshole"), *cert. denied*, 117 S. Ct. 949 (1997). In *Waller*, the court wrote:

Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language

question, however, is whether the state interest in maintaining public confidence in the courts is sufficient to restrict attorney speech outside the courtroom when no litigation is pending and there is no serious risk of prejudice to an ongoing proceeding. Some scholars answer that question in the negative. For example, Professor Erwin Chemerinsky is of the view that “[c]onfidence in government should never be gained by silencing speech”⁸⁶ and that the speech rights of judges “only should be infringed if there is a compelling justification.”⁸⁷ As a general rule, restrictions on political speech are upheld only in the most limited circumstances,⁸⁸ such as where, under the test in *Brandenburg v. Ohio*, the speech is “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”⁸⁹

Aside from questions of constitutionality, the distinction proposed in *Riley*—between speech which criticizes a judge’s actions or qualifications, on the one hand, and speech which criticizes decisions of the judge and the integrity of the judicial system, on the other hand⁹⁰—can be challenged on the ground that it is unworkable in practice. Is it possible to impugn a judge’s actions or qualifications without adversely reflecting upon the judge’s decisions? Doesn’t revelation of the fact that a judge is incompetent, lazy, or corrupt necessarily cast a dark shadow on the integrity of the judicial process? It can be plausibly argued that the ruling in *Riley* renders the First Amendment rights of judicial candidates illusory by providing that they can criticize a sitting judge only if the statements about the judge do not undermine confidence in the judicial system.⁹¹

In *Riley*, the candidate in question (who was successful in winning a judgeship) had criticized the incumbent judge by telling reporters that a contempt order was “crazy,” “absolutely insane,” and “motivated by revenge on the part of [the incumbent],” stating that the incumbent was “vindictive” and “partial,” and alleging that the “state simply doesn’t get a fair trial in his court.”⁹² The court found that these comments, and “particularly the statement that ‘[t]he state simply doesn’t get a fair trial in his court,’ questioned the

promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

Waller, 929 S.W.2d at 183. See generally W.E. Shipley, Annotation, *Attorney’s Criticism of Judicial Acts as Ground of Disciplinary Action*, 12 A.L.R.3d 1408, 1418-27 (1967).

86. Erwin Chemerinsky, *In Defense of Speech: Judges and the First Amendment*, 4 The Long Term View 78, 81 (1997).

87. *Id.* at 79.

88. See Bork, *supra* note 84, at 29 (stating that the “core of the first amendment” is “speech that is explicitly political,” which includes “criticisms of public officials and policies” and “speech addressed to the conduct of any governmental unit in the country”).

89. 395 U.S. 444, 447 (1969).

90. See *In re Riley*, 691 P.2d 695, 704 (Ariz. 1984).

91. See *id.*

92. *Id.* at 703-04.

decisions of the court and the administration of justice."⁹³ The candidate's actions, the court ruled, constituted "conduct prejudicial to the administration of justice,"⁹⁴ and therefore discipline in the form of public censure was imposed.⁹⁵ In dissent, the Chief Justice of the Arizona Supreme Court noted the impracticality of the standard articulated by the majority, observing that "[o]ften the only way the deficiencies or prejudices of a judge can be shown is by referring to specific cases or categories of cases decided by that judge."⁹⁶

93. *Id.* at 704.

94. *Id.* Disciplinary Rule 1-102(A)(5) of the Arizona ethics code prohibits an attorney from engaging in "conduct prejudicial to the administration of justice." *Id.* That same language was contained in the old Texas Code of Professional Responsibility, TEX. STATE BAR R., art. XII, § 8. (Tex. Code Prof'l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990), which was replaced by the current Texas Disciplinary Rules of Professional Conduct on January 1, 1990. See TEX. DISCIPLINARY R. PROF'L CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1998) (TEX. STATE BAR R., art. X, § 9); Robert P. Schuwerk and John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOU. L. REV. 1, 468 (1990) (discussing TEX. STATE BAR R., art. XII, § 8, DR 1-102(A)(5) (Tex. Code Prof'l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990)). The Texas Rules do not carry forward the "conduct prejudicial to the administration of justice" language, but instead have replaced it with a very different standard which prohibits attorneys from engaging in conduct "constituting obstruction of justice." The "obstruction of justice" standard is "substantially narrower" than the "prejudicial to the administration of justice" rule, and it is doubtful that the language at issue in *Riley* could be found to violate the new Texas formulation. "The drafters did not intend this new standard to be triggered by conduct significantly less egregious than that involved in the federal criminal offense of obstruction of justice or its state counterparts." Schuwerk & Sutton, *supra* at 475. It is therefore interesting to speculate what provision of the Texas Rules or the Texas Code of Judicial Conduct, if any, a Texas court could rely upon if it were inclined to embrace a position similar to the one taken by the Arizona Supreme Court in *Riley*. As noted above in the text, Canon 2(A) of the Texas Code of Judicial Conduct provides that "[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." TEX. CODE JUD. CONDUCT, Canon 2(A). Canon 6(G)(3) of the judicial code further provides that "[a]ny lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas." *Id.*, Canon 6(G)(3).

It seems reasonable that a judge who makes statements during a campaign impugning the integrity of the judicial system could be disciplined by the Commission on Judicial Conduct for violating Canon 2(A) and that a lawyer guilty of the same conduct could be disciplined by the State Bar because Canon 2(A) is an "other relevant provision," within the meaning of Canon 6(G)(3). Of course, whether such action would survive review under the First Amendment is presently unresolved.

95. See *Riley*, 691 P.2d at 704-05. Interestingly, the court also criticized the candidate for having publicly revealed that the incumbent judge had engaged in improper ex parte communication. The court wrote:

Any grievance a lawyer may have concerning ethical misconduct by a sitting judge should be submitted to the Commission on Judicial Qualifications. "Going public" by a member of the Bar is not the appropriate method to redress misconduct by a judge. As the South Dakota Supreme Court has noted: "That respondent sought instead to voice his complaints in precisely the manner and forum that would most likely cast doubt upon the competence and integrity of the member of the judiciary without the slightest possibility that any constructive, remedial actions would result from those remarks belies respondent's assertions that he made the statement in good faith and in the spirit of constructive criticism."

Id. at 705 (quoting *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979)).

96. *Id.* at 709-10 (Holohan, C.J., dissenting). The Chief Justice further wrote:

If the court's opinion had limited itself to statements by the lawyer candidate which were false, misleading, or concerning pending litigation, I could have joined in that portion of the opinion.

In other contexts, similar notes have sounded. For example, in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, “much of [a] . . . motion for rehearing [was] an intemperate attack on the members” of the Texas Supreme Court.⁹⁷ In dissenting from an order of referral, Justice Rose Specter argued that the writing could not possibly “form the basis for lawyer discipline,” noting that:

[M]ore than fifty years ago Justice [Hugo] Black recognized (in the context of a contempt proceeding for statements published in a newspaper) that attempts to stifle criticism of judges and our courts may, in fact, be counterproductive:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.⁹⁸

The holding that a lawyer as a candidate for judge may not criticize the decisions of a sitting judge, however, is neither in harmony with the First Amendment nor with the necessities of a free society.

Judges are not unique in the realm of public officeholders. The record books regretfully show that some have been dishonest, incompetent, and prejudiced. A ruling that a lawyer as a candidate for the judiciary cannot bring such facts to the public notice, if such be the facts, is a threat to our constitutional system. . . .

. . . .

Under the freedom guaranteed by the Constitution, we must begin with the proposition that “[l]ike other citizens, attorneys are entitled to the full protection of the First Amendment, even as participants in the administration of justice.” A review of the cases in which attorneys were disciplined for campaign comments directed at an incumbent judge strongly suggests that, absent misrepresentation, courts should be most reluctant to impose discipline upon an attorney for comments during a judicial campaign except in egregious circumstances where a candidate seriously denigrates the judicial system, impugns the reputation of an incumbent judge, or in any way interferes with an ongoing proceeding. . . . Campaign criticism of an incumbent judge’s decisions, voting record, courtroom demeanor, or work habits, however, should be considered fair comment.

. . . .

While misstatement of fact by an attorney universally warrants sanction, the law is equally clear that an attorney may criticize the legal decisions of a judge without sanction, so long as these comments do not interfere with ongoing proceedings. . . .

The broad general statements in the majority opinion serve to stifle honest and truthful discussion about the decisions of a judge or court. As I read the majority opinion, a lawyer may appeal a case, but the lawyer may never comment after the case is finally resolved that the case made bad law, poor policy, or resulted in an injustice. Such a position is not only contrary to the Constitution, but it also deprives the public of necessary information to make an informed decision about the performance of their judges.

Id. (citations omitted) (quoting *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982)).

97. 956 S.W.2d 532, 532 (Specter, J., dissenting).

98. *Id.* (Specter, J., dissenting) (citing *Bridges v. California*, 314 U.S. 252, 270-71 (1941)); see

The constitutional uncertainty of restrictions on negative campaigning strongly suggest that judges and judicial candidates must chart a cautious course unless they wish to become embroiled in disciplinary proceedings. Indeed, even if such limitations on political speech during the course of a judicial campaign run afoul of the First Amendment, such statements should be avoided, if for no other reason than that they place the speaker in a bad light if there is a debate over the truth or falsity of the charges made by the speaker. That is, the negativity or tastelessness of a statement made during a judicial campaign may be taken into account by a fact finder in determining whether the speaker acted with knowledge that the statement was false, or with reckless disregard for the truth, and is therefore subject to discipline on that independent ground.

D. Statements About Justiciable Issues

For better or worse,⁹⁹ the Texas Code of Judicial Conduct prohibits judges and judicial candidates from expressing opinions "on *any issue* that may be subject to judicial interpretation by the office which is being sought or held."¹⁰⁰ This general rule is subject to a qualification which permits discussion of a judge or candidate's "judicial philosophy," provided that discussion would "not suggest to a reasonable person a probable decision on any particular case."¹⁰¹ The effect of these rules may be that judges are protected from being forced to publicly commit to positions on issues they have not fully considered and citizens are not compelled to litigate their controversies before judges who have prejudged those matters. On the other

also Keith C. Livesay, Letter to the Editor, TEX. LAWYER, Dec. 8, 1997, at 36 ("If the justices expect decorum and respect, they must not only accept the truth, they must act in a manner which merits it by writing intellectually honest and consistent opinions.").

99. See Steven Lubet, *Judicial Conduct: Speech and Consequences*, 41 *Long Term View* 71 (1997) (arguing that judging generally benefits from privacy and that too much public speaking may debase the process of judging, taking it out of the contemplative solitude of chambers and into the messy, disputatious civic square).

100. TEX. CODE JUD. CONDUCT, Canon 5(1) (emphasis added). One occasionally hears surprising, if not bizarre, reports of a candidate for a civil court judgeship publicly declaring to be in favor of the death penalty, even though the court to which the candidate aspires has nothing to do with criminal cases or the imposition of capital punishment. Presumably, such conduct would not violate Canon 5(1) since the prohibition against the expression of an opinion applies only if the opinion involves an "issue that may be subject to judicial interpretation by the office which is being sought." *Id.* Further, in such circumstances, the candidate's statements about the desirability of the death penalty might be regarded as merely reflective of his or her judicial philosophy, and for that reason permissible under the exception to the general rule discussed above in the text. Nevertheless, deliberate deception of electorate is a serious matter. On appropriate facts, it might be argued that an attempt to curry support by misleading voters into believing that the office in question has some power over the imposition of capital punishment is conduct involving "dishonesty, fraud, deceit or misrepresentation," and therefore punishable under Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3).

101. TEX. CODE JUD. CONDUCT, Canon 5(1).

hand, the effect may be that the public is relegated to vapid campaign rhetoric and deprived of the information they would most like to have in order to cast informed ballots. It would be possible to frame a rule narrower than the current Texas provisions regulating discussion of judiciable issues that would protect most, if not all, of the relevant interests. Such a rule might, for example, prohibit a judge or judicial candidate from discussing issues in a manner that would indicate a probable decision in any particular case. However, that and other alternative paths have not been taken in Texas, and the existing prohibition of issue discussion must be understood as broad. "There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."¹⁰²

Some courts have found that language similar to that found in the Texas code was so broadly drawn as to be unconstitutional.¹⁰³ For example in *Buckley v. Illinois Judicial Inquiry Board*, the Seventh Circuit invalidated a rule which provided that:

[A judge or judicial candidate] [s]hould not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues . . . ; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him.¹⁰⁴

Finding the rule unconstitutional, Judge Richard Posner wrote for the court:

Two principles are in conflict and must, to the extent possible, be reconciled. Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others. . . . [O]nly a fanatic would suppose that one of the principles should give way completely to the other—that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases or that the principle of impartial legal justice should be held to prevent a candidate for such office from furnishing any information or opinion to the electorate beyond his name, rank, and serial number. . . .
 . . . [T]he concern which animates the rule is precisely that a candidate

102. *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993).

103. *See J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 955 (Ky. 1991) (invalidating on constitutional grounds a rule which barred judges and judicial candidates from announcing views on disputed legal or political issues). *But see Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3rd Cir. 1991) (upholding a rule that was almost identical to the one at issue in *Buckley*, which is discussed below in the text).

104. 997 F.2d at 225.

in a judicial election might, in order to attract votes or to rally his supporters, make commitments to decide particular cases or types of case in a particular way and having made such a commitment would be under pressure to honor it if he won the election and such a case later came before him. This commitment, this pressure, would hamper the judge's ability to make an impartial decision and would undermine the credibility of his decision to the losing litigant and to the community. The difficulty with crafting a rule to prevent the making of such commitments is that a commitment can be implicit as well as explicit. And this in two ways. The candidate might make an explicit commitment to do something that was not, in so many words, taking sides in a particular case or class of cases but would be so understood by the electorate; he might for example promise always to give paramount weight to public safety or to a woman's right of privacy. Or he might discuss a particular case or class of cases in a way that was understood as a commitment to rule in a particular way, even though he avoided the language of pledges, promises, or commitments.

The rule here challenged deals with both forms of implied commitment and in the most comprehensive fashion imaginable. The "pledges or promises" clause is not limited to pledges or promises to rule a particular way in particular cases or classes of case; all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office. The "announce" clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. . . . All these are disputed legal or political issues.

The rule thus reaches 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. Indeed, the only safe response to Illinois Supreme Court Rule 67(B)(1)(c) is silence. . . .

. . . [T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech. Beyond that valuable generality the cases do not provide much guidance, but they certainly do not support the proposition

that to prevent the slightest danger of judicial candidates' making statements that might be interpreted as commitments a state is free to circumscribe their freedom of speech by a rule so sweeping that only complete silence would comply with a literal, which is also so far as appears the intended and the reasonable interpretation of the rule.¹⁰⁵

The constitutionality of the Texas rule has not been squarely addressed. However, there is authority in Texas that it is impermissible for a judge or judicial candidate to advertise or state a position on abortion, such as declaring to be a pro-choice or pro-life candidate.¹⁰⁶ Such conduct would violate the rule on discussion of issues subject to judicial interpretation and might also violate Canon 5(2)(I) because it carries a "strong implication of a promise of particular conduct in office other than the faithful performance of official duties."¹⁰⁷

One recent San Antonio judicial campaign ad touted the candidate as being "Tough-As-Nails. Tough-on-Crime,"¹⁰⁸ and another ad, for a different judge, announced "Respect for the Victim. Tough Justice for the Criminal."¹⁰⁹ Such rhetoric is undoubtedly a consequence of America's never ending "war on crime." Presumably, the proponents of such advertising take the position that this kind of advertising is merely reflective of the candidate's "judicial philosophy" and would "not suggest to a reasonable person a probable decision on any particular case."¹¹⁰ That is a legitimate position. But it is also a risky one. Judges and judicial candidates in other states have been disciplined for making similar statements, such as "tough on drunk driving,"¹¹¹ "solid reputation for law and order,"¹¹² and "does not allow plea bargaining."¹¹³ "The general sense of . . . [those out of state] opinions is that anything that could be interpreted as a pledge that the candidate will take a particular approach in deciding cases or a particular class of cases is prohibited."¹¹⁴

The severe limitations imposed in the discussion of justiciable issues means that a judge or judicial candidate should exercise great care in responding to a questionnaire submitted by a private group seeking

105. *Id.* at 227-31.

106. Comm. on Jud. Ethics, State Bar of Tex., Op. 184 (1995), *reprinted in* 67 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 76 (1995).

107. *Id.*

108. Ad on file with the Texas Tech Law Review.

109. Ad on file with the Texas Tech Law Review.

110. TEX. COD. JUD. CONDUCT, Canon 5(1).

111. *In re Kaiser*, 759 P.2d 392, 394-96 (Wash. 1988) (censuring an incumbent judge).

112. SHAMAN ET AL., *supra* note 27, at 372 (citing *In re Nolan*, a 1984 Unreported Order of the Kentucky Commission on Judicial Conduct that censured a Kentucky judge for making improper remarks and distributing improper campaign materials during a reelection campaign).

113. *Id.*

114. *Id.*

information about the judge's views.¹¹⁵ It is permissible for the judge or candidate to submit answers which communicate the judge's judicial philosophy, but only if those answers do not represent an expression of opinion on "any issue that may be subject to judicial interpretation by the office which is being sought or held"¹¹⁶ or, as discussed below, an opinion on cases previously decided by a court on which the judge sat.¹¹⁷

E. True Information

As the discussion above may suggest, dissemination of the truth generally enjoys a high degree of constitutional protection. Thus, it is permissible for a judge who is running for judicial office to use the title "judge" in political advertising and in the name of the campaign committee, on campaign literature and stationery, in press releases, and in newspaper articles.¹¹⁸ Political literature may also accurately describe the judge's judicial experience.¹¹⁹ This is true even if the judge is running for non-judicial office.¹²⁰ Likewise, a judge or judicial candidate may accurately list in political advertising the fact that he or she has been endorsed by special interest groups, such as Texans Against Drunk Driving, Texans for Tort Reform, Texas Prosecutors Association, Texas Peace Officers Association, Texans for Law Enforcement, Pro-Life Texans, or Texans for Choice.¹²¹ Even though such groups may have strong political agendas, the mere listing of their endorsement, by itself, does not violate the rule against expressing an opinion on an area subject to judicial interpretation.¹²²

Of course, even accurate information may be presented in a way that is misleading or otherwise objectionable. Thus, a judge may not use in his

115. See *id.* at 373. "Most advisory opinions addressing the use of questionnaires in judicial campaigns strongly disapprove of the practice." *Id.*

116. TEX. CODE JUD. CONDUCT, Canon 5(1) (emphasis added).

117. See discussion *infra* Part III.G.

118. See Comm. on Jud. Ethics, State Bar of Tex., Op. 164 (1993), reprinted in 65 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 133 (1993). A different rule applies when the judge is running for a non-judicial political office. See Comm. on Jud. Ethics, State Bar of Tex., Op. 159 (1993), reprinted in 65 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 131 (1993). The use of the title "Judge" in that connection would violate the rule against lending the prestige of judicial office to the advancement of private interest. See TEX. CODE JUD. CONDUCT, Canon 2(B). Thus, a sitting judge cannot state in a political advertisement, "Elect Judge to Congress." See Comm. on Jud. Ethics, State Bar of Tex., Op. 159 (1993). In addition, a sitting judge who runs for a non-judicial political office cannot use the title "Judge" in the name of the campaign committee. See *id.*

119. See Comm. on Jud. Ethics, State Bar of Tex., Op. 165 (1993), reprinted in TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 133 (1993).

120. See Comm. on Jud. Ethics, State Bar of Tex., Op. 159 (1993). "The judge must be cautious not to give undue emphasis to his or her present [judicial] position so as to give the impression he or she is attempting to exploit his or her judicial office." *Id.*

121. See Comm. on Jud. Ethics, State Bar of Tex., Op. 184 (1995), reprinted in 67 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 76 (1995).

122. See *id.*

campaign advertising confidential anonymous comments written by other judges who attended a class that was taught by the judge.¹²³ To present those comments as reflective of what other judges think about the judge as a candidate running for office would "violate the trust in which they were given," tend to mislead the reader because the judges who filled out the evaluations may or may not be supportive of the candidate, and indirectly lend the prestige of judicial office to the advancement of private interests, in violation of Canon 2(B).¹²⁴

F. Comments About Pending and Impending Cases

A judge is prohibited from publicly discussing the merits of cases that are, or may come, before the judge's court.¹²⁵ Similar restrictions apply to statements by a judicial candidate.¹²⁶ The key provision is Canon 3(B)(10), which provides:

A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.¹²⁷

As drafted, the rule effectively distinguishes between statements about the merits of a case, on the one hand, and mere procedural matters, on the other hand.¹²⁸ The public discussion of procedural matters—such as whether jurors will be sequestered or whether a losing party has a right to appeal—serves to educate the citizenry about the operation of the legal system and poses little or no risk to the adjudicatory process. Accordingly, there is no prohibition

123. See Comm. on Jud. Ethics, State Bar of Tex., Op. 168 (1994), reprinted in TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 125 (1994).

124. *Id.*

125. See TEX. CODE JUD. CONDUCT, Canon 3(B)(10).

126. See *id.*, Canon 5(3). This conclusion finds support in the language of Canon 5(3), which states in relevant part that a "judicial candidate may . . . express his or her views on political matters in accord with . . . Canon 3(B)(10)," the canon which restricts statements by judges about pending or impending cases. *Id.*

127. *Id.*, Canon 3(B)(10). The last sentence of Canon 3(B)(10) is odd and perhaps unnecessary. *Cf. id.*, Canon 3(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate."). If the dispute was one in which the judge was a litigant in a personal capacity, the judge would be disqualified from hearing the case, and therefore the matter could not "come before the judge's court." *Id.*

128. See *id.*, Canon 3(B)(10).

against such statements.

In contrast, comments about the merits of a case may jeopardize the litigation process in any of several ways. Such statements may prematurely commit the judge to a position before all evidence has been presented or they may be animated more by a desire to please the public audience than by a commitment to render an impartial decision. For these and other reasons, statements about the merits of pending or impending cases, just like expressions of opinion on other issues subject to judicial interpretation, are broadly condemned.¹²⁹

Interestingly, the Code of Judicial Conduct expressly states that a lawyer who contributes to a judge or judicial candidate's violation of Canon 3(B)(10) is subject to disciplinary action by the State Bar of Texas.¹³⁰ In so stating, the judicial code is partially duplicative of a broader standard contained in Rule 8.04(a)(6) of the Texas Disciplinary Rules of Professional Conduct, which provides that "A lawyer shall not . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct."¹³¹ However, the express reference to the impermissibility of a lawyer's aiding a judge or judicial candidate in a 3(B)(10) violation suggests that the drafters regarded that provision as imposing a very serious obligation.

Even in the absence of a discussion about the merits of a case, a judge's conduct may suggest how a case will be decided. In a Mississippi disciplinary action, the facts showed that a judge had made a telephone call soliciting political support from a person whom, unknown to the judge, was a litigant in a case before him.¹³² Because the contact raised the specter of influence peddling, the judge was privately reprimanded.¹³³

G. Comments About Past Cases

Judicial candidates in recent elections "have directly targeted [past] judicial decisions as issues in the campaign."¹³⁴ For example:

During a 1994 Democratic primary race for the Texas Supreme Court, one challenger circulated a brochure picturing an abused woman and portrayed the incumbent justice as a judge who voted for wrongdoers rather than victims. The obvious implication was that if voters did not like the result in

129. See discussion of Canon 5(1) *supra* Part III.D.

130. See TEX. CODE JUD. CONDUCT, Canon 6(H). Texas Code of Judicial Conduct Canon 6(H) states in full: "Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5 or 6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas." *Id.*

131. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(6).

132. See *In re Baker*, 535 So. 2d 47, 48-49 (Miss. 1988).

133. See *id.*

134. Justice Craig Enoch, Foreword to *Annual Survey of Texas Law*, 48 S.M.U. L. REV. 723, 725 (1995).

that case, they needed to elect the challenger in order to produce a different result.¹³⁵

Are such statements ethically permissible because they deal with *past* decisions rather than *pending* or *impending* cases? Similarly, may a judge who dissented in a case discuss that controversy when running for re-election? The judge may wish to illustrate his judicial philosophy by referring to the dissent, or may desire to identify errors in the majority opinion which the judge still believes require correction.

Statements of the sort described above may run afoul of Canon 3(B)(11), which provides:

A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. *The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines* for a court approved history project.¹³⁶

Canon 3(B)(11) has been interpreted to mean that a judge on the Court of Criminal Appeals or a justice on the Texas Supreme Court may not write a newspaper opinion or editorial piece discussing his or her stated position on a case that has been finally resolved by the court.¹³⁷

H. Discriminatory Bias or Prejudice

Today, overtly discriminatory statements rarely occur in American political campaigns. Rather, when bias and prejudice are present, they typically manifest themselves covertly through the use of code words or, perhaps, carefully phrased rhetorical questions. While such forms of divisive campaigning are not readily associated with judicial elections, it is easy to recall widely publicized occasions when judges on the bench, in recent years, have resorted to the use of demeaning language making clear their disdain for members of minority groups,¹³⁸ such as homosexuals.¹³⁹ What if such

135. *Id.*

136. TEX. CODE JUD. CONDUCT, Canon 3(B)(11) (emphasis added).

137. See Comm. on Jud. Ethics, State Bar of Tex., Op. 191 (1996), reprinted in 67 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 78 (1995).

138. See, e.g., *In re Agresta*, 476 N.E.2d 285, 286 (N.Y. 1985) (upholding a sanction against a judge who used the phrase "nigger in the woodpile" in open court in a case with black defendants); *In re Gorenstein*, 434 N.W.2d 603, 609 (Wis. 1989) (suspending a judge for two years for, inter alia, intemperate comments, including stereotypical remarks that stigmatized black people).

139. See *Favorable Decision for Judge Ignores Key Facts*, DALLAS MORNING NEWS, Nov. 2, 1989, at 30A, available in 1989 WL 6130219. The article discusses proceedings against a judge who referred to two slain men as "queers" who were looking for trouble by "cruising for teen-agers." *Id.* The judge

expressions of bias or prejudice creep into a judicial race? Does the use of such words or conduct, by itself, subject a judge or a judicial candidate to discipline?

The Texas Code of Judicial Conduct does not expressly answer these questions. In the courtroom or in the performance of other official duties, a judge is obliged to observe a very high standard of conduct and to insist that staff members and lawyers appearing before the judge conduct themselves accordingly. Canon 3 provides in part that:

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.¹⁴⁰

Although these provisions are not by their terms applicable to statements made during a judicial campaign, they undoubtedly set a standard toward which candidates should aspire. Admittedly, the campaign trail is different from the courtroom, and a greater range of expression may be defensible in an electoral contest than during the course of formal litigation. However, the provisions quoted above must be read in conjunction with relevant portions of Canon 2(A). That canon admonishes that a "judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹⁴¹ Discriminatory words and conduct fly in the face of this rule, for they suggest that the present or potential occupant of the judicial post in question is unable or unwilling to act in an impartial manner.

In a recent South Dakota case, a judicial candidate had made statements asserting that there was "a collapse of rule of law" and implying that Native Americans, blacks, farmers, women and other " 'powerless financially distressed nonvested' elements of society [were] not being treated fairly and impartially by the judiciary."¹⁴² More specifically, the candidate accused the incumbent "of giving 'the most severe of punishments' under the 'cruel and

went on to say " 'I put gays and prostitutes at about the same level. . . . And I'd be hard put to give somebody life for killing a prostitute.' " *Id.*

140. TEX. CODE JUD. CONDUCT, Canon 3(B)(6)-(7).

141. *Id.*, Canon 2(A).

142. *In re Hopewell*, 507 N.W.2d 911, 912-14 (S.D. 1993).

deceptive guise of deterrence of crime' [to] 'juvenile Native American offenders.'¹⁴³ The court found that those comments violated Canon 2(A), which requires a judge or judicial candidate to " 'conduct himself at all times in a manner which promotes public confidence in the integrity and impartiality of the judiciary.' "¹⁴⁴ Based on those and other violations, the attorney was suspended from practice.¹⁴⁵

Over the last two decades, much ink has been spilt over the issue of whether judges may belong to clubs which exclude certain categories of members, such as women, blacks, or Jews. In explaining the provision in the ABA Model Code of Judicial Conduct which now clearly condemns "membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin,"¹⁴⁶ the official comment states:

[P]ublic manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.¹⁴⁷

It is likely that Texas disciplinary authorities would follow a similar analysis with respect to improper discriminatory statements made in a judicial campaign.

I. Statements By Others

A judge may not convey or "permit others to convey the impression that they are in a special position to influence the judge."¹⁴⁸ Presumably, a judge therefore has an affirmative duty to correct any such misstatements by others that occur in the course of a campaign.

Interestingly, a lawyer working on a judicial campaign may also have a duty to call upon the judge or judicial candidate to correct any misstatements that he or she has made. Rule 8.04(a)(6) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer shall not . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of

143. *Id.* at 913.

144. *Id.* at 914.

145. *See id.* at 918.

146. MODEL CODE OF JUDICIAL CONDUCT Canon 2(C) (1990). The parallel provision in the Texas Code of Judicial Conduct differs slightly. Canon 2(C) of the Texas code states: "A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law." TEX. CODE JUD. CONDUCT, Canon 2(C).

147. MODEL CODE OF JUDICIAL CONDUCT Canon 2(C) cmt. (1990).

148. TEX. CODE JUD. CONDUCT, Canon 2(B).

judicial conduct or other law."¹⁴⁹ It seems likely that mere knowledge of a misstatement by the judge or the candidate will not be equated with knowing assistance and will not trigger whatever remedial duties are inherent in the rule, but involvement rising above "mere knowledge" may be treated differently. Thus, a lawyer who distributes campaign literature which is known to contain a misrepresentation or who knowingly repeats incorrect information obtained from the judge or judicial candidate runs a risk of discipline.

IV. SUPPORT FOR OTHER CAMPAIGNS AND POLITICAL PARTIES

A judge or judicial candidate can do very little to advance directly the electoral chances of another candidate running for public office.¹⁵⁰ Canon 5(3) prohibits a judge from "authoriz[ing] the public use of his or her name endorsing another candidate,"¹⁵¹ and Canon 2(B) prohibits a judge from lending the prestige of judicial office to the advancement of private interests.¹⁵² These provisions have been construed in Texas to prohibit a judge or judicial candidate from verbally recommending another candidate or even asking the voters to consider the candidate.¹⁵³ Undoubtedly, more active forms of endorsement will be found to run afoul of these precepts. In *In re Ovard*, the Texas Commission on Judicial Conduct publicly reprimanded a

149. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(6).

150. See SHAMAN ET AL., *supra* note 27, at 365 ("Although a nonincumbent candidate has never been found in violation of ethical standards regulating endorsements, a number of sitting judges have been disciplined for participating in and supporting other persons' campaigns for judicial office.")

151. TEX. CODE JUD. CONDUCT, Canon 5(3). Prior provisions of the Texas Code of Judicial Conduct were construed to reach the same result. See Comm. on Jud. Ethics, State Bar of Tex., Op. 73 (1984), reprinted in 56 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 85-86 (1984). Finding that a judge could not publicly endorse a candidate for public office, the committee noted that "the public endorsement of another person's candidacy, of necessity, involves the use of the prestige of the judge and the prestige of his office" and that "a judge's involvement in another person's political race places the judge in a partisan posture and gives the public cause to question the judge's independence." *Id.*

The ABA Model Code of Judicial Conduct draws a distinction not found in the Texas code. The ABA code permits some limited forms of endorsement. Thus, Canon 5(A)(1)(b) states the general rule that "a judge or a candidate for election or appointment to judicial office shall not . . . publicly endorse or publicly oppose another candidate for public office." MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(b) (1990), but Canon 3(C)(1)(b)(iv) states the exception that a "judge or a candidate subject to public election may, except as prohibited by law . . . when a candidate for election . . . publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running." *Id.* Canon 3(C)(1)(b)(iv).

152. See TEX. JUD. CODE CONDUCT, Canon 2(B).

153. See Comm. on Jud. Ethics, State Bar of Tex., Op. 170 (1994), reprinted in 66 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 126 (1994); see also *In re Troy*, 306 N.E.2d 203, 234-36 (Mass. 1973) (discussing a judge disbarred for numerous ethical infractions, including arranging and attending political gatherings and serving as a toastmaster at a testimonial for another candidate); *In re Decker*, 1994 WL 897478 at *4-5 (N.Y. Com. Jud. Cond.) (admonishing a judge for publicly supporting a county executive's campaign and for improper advertising in his own campaign).

judge for endorsing, in several pieces of campaign literature, a candidate to succeed himself as justice of the peace following the expiration of his term.¹⁵⁴ In one instance, the judge's endorsement was contained in the candidate's paid political "valentine," in another it was part of the candidate's four-page "Notice of False Endorsements," and in other instances the endorsement was included in letters paid for by the candidate or the judge.¹⁵⁵ The Commission found that this conduct constituted "willful and flagrant" violations of the provisions of Canon 7.¹⁵⁶

There is authority to similar effect in other jurisdictions. In other states, authorities have held that it is improper for a judge to aid a candidate by sending out letters of support,¹⁵⁷ hosting a barbeque,¹⁵⁸ assisting in the formulation of campaign strategies,¹⁵⁹ purchasing advertisements,¹⁶⁰ or even influencing a political party's choice of primary candidates.¹⁶¹

For essentially the same reasons, a judge or judicial candidate may not hand out campaign materials for another candidate or for a political party, regardless of whether the materials are accompanied by a verbal endorsement or whether an advertisement for the judge or judicial candidate appears in the materials.¹⁶² In addition, joint campaign activity by two judges is deemed to be impermissible,¹⁶³ such as mailing sample ballots which give the impression that each judge endorses the other.¹⁶⁴ Thus, two or more judges running for judicial office at the same time may not jointly sponsor a fund raising event or have a politically active group do that for them.¹⁶⁵

Care must also be exercised with respect to political contributions to other campaigns. In general, a contribution is appropriate only "when the judge is satisfied that neither the contribution nor the public record thereof will receive public attention before the election."¹⁶⁶ Presumably, this means that the best course for a judge or judicial candidate is to avoid making such

154. See Tex. Comm. on Jud. Conduct (Dec. 27, 1994) (copy on file with the Texas Tech Law Review).

155. See *id.*

156. See *id.*

157. See Office of Disciplinary Counsel v. Capers, 472 N.E.2d 1073, 1073-74 (Ohio 1984).

158. See *In re Martin*, 434 S.E.2d 262, 263-64 (S.C. 1993) (per curiam).

159. See *In re DeFoor*, 494 So. 2d 1121, 1121-23 (Fla. 1986) (per curiam).

160. See *In re Steady*, 641 A.2d 117, 119 (Vt. 1994); *Martin*, 434 S.E.2d at 262-64.

161. See *In re Katic*, 549 N.E.2d 1039, 1039-40 (Ind. 1990) (per curiam).

162. See Comm. on Jud. Ethics, State Bar of Tex., Op. 170 (1994), reprinted in 66 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 126 (1994).

163. See *id.* (citing with approval Comm. on Jud. Ethics, State Bar of Tex., Op. 100 (1987), reprinted in 59 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 78 (1987)).

164. See *In re Pratt*, 508 So. 2d 8, 9-10 (Fla. 1987) (per curiam); *In re Kay*, 508 So. 2d 329, 329-30 (Fla. 1987) (per curiam).

165. See Comm. on Jud. Ethics, State Bar of Tex., Op. 100 (1987).

166. Comm. on Jud. Ethics, State Bar of Tex., Op. 145 (1992), reprinted in 65 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 126 (1993).

contributions.¹⁶⁷ In addition, a judge cannot display on the judge's vehicle a bumper sticker supporting a political candidate.¹⁶⁸ The same rule also likely applies to the erection of yard signs endorsing other candidates.¹⁶⁹

Because a judge has an obligation to exercise proper supervision over official staff members, a judge must take reasonable steps to ensure that staff members do not engage in forms of political activity which would be improper for the judge to engage in directly.¹⁷⁰ Accordingly, there is authority in Texas that states a judge should not permit members of the judge's office staff "to participate in political activities such as publicly supporting a candidate for election, acting as a campaign manager, and fund raising."¹⁷¹ "[S]uch political activity by a member of a judge's office staff would imply, or would be likely to give the appearance of, the judge's support for the candidate."¹⁷² Likewise, authorities suggest, a staff member should not be permitted to contribute money to another campaign unless such a contribution by the judge would be appropriate.¹⁷³

The Code of Judicial Conduct does not attempt to regulate the political activities of a judge or judicial candidate's spouse.¹⁷⁴ However, if a judge's spouse is a candidate for elective office, the judge faces many of the same restrictions that ordinarily limit judicial involvement in the campaign of unrelated persons.¹⁷⁵ The judge may attend political events relating to his or

167. *See id.* Whether similar restrictions apply in Texas to contributions made to a political party, rather than to a specific candidate, is unclear. The American Bar Association's Model Code of Judicial Conduct contains language not found in the Texas Judicial Code of Conduct. The ABA code provides, in relevant part:

- (1) a judge or a candidate subject to public election may, except as prohibited by law:
- (a) at any time
 - (i) purchase tickets for and attend political gatherings;
 - (ii) identify himself or herself as a member of a political party; and
 - (iii) contribute to a political organization

MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

168. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 136 (1990), reprinted in 62 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 125 (1990).

169. *See In re Martin*, 434 S.E.2d 262, 262-64 (S.C. 1993) (per curiam).

170. *See* TEX. CODE JUD. CONDUCT, Canon 3(C)(2). Canon 3(C)(2) provides: "A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties." *Id.* According to Canon 8(B)(11):

The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

Id., Canon 8(B)(11).

171. Comm. on Jud. Ethics, State Bar of Tex., Op. 145 (1992).

172. *Id.*

173. *See id.*

174. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 170 (1994), reprinted in 66 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 126 (1994).

175. *See In re Codispoti*, 438 S.E.2d 549, 552-53 (W. Va. 1993) (censuring a judge for improper

her spouse's campaign, but may not speak at those events in support of the spouse's campaign, for doing so would violate the rule against endorsements and would lend the prestige of judicial office to the advancement of private interests.¹⁷⁶ For similar reasons, the judge may not allow the judge's name and title to be used in press releases or campaign literature identifying the candidate as the judge's spouse, and may not be introduced at the spouse's campaign functions by name and title.¹⁷⁷ Presumably, similar restrictions apply to a judge's involvement in the campaign of a closely related family member other than a spouse.¹⁷⁸

A reasonable argument can be made that it is unethical for a judge to induce his or her spouse to engage in the very activities that the judge is prohibited from undertaking.¹⁷⁹ It is a basic principle of legal ethics that one cannot do indirectly what one is prohibited from doing directly.¹⁸⁰ Thus, Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney not only from personally violating the ethics rules but also from "do[ing] so through the acts of another."¹⁸¹ It would seem that, as a matter of sound policy, the same rule should apply to judges.¹⁸² In a decision suggestive of this principle, a recent Indiana court reprimanded a judge for purporting to make an improper campaign contribution in the name of his spouse.¹⁸³ Of course, the law has long abandoned the questionable fiction that the husband and the wife are one; and therefore there should be a presumption that a spouse has acted independently in undertaking any political activities in which he or she has chosen to engage. Some cases have taken the principle against indirect unethical conduct to considerable lengths.¹⁸⁴ In a New York controversy, a judge "was admonished for permitting a partnership in which he had an interest to contribute to campaigns other than his own."¹⁸⁵

involvement in his wife's judicial campaign and for misleading campaign advertisements); *In re McGregor*, 614 So. 2d 1089, 1090 (Fla. 1993) (per curiam) (reprimanding a judge for actively participating in his wife's campaign for county clerk of court).

176. See Comm. on Jud. Ethics, State Bar of Tex., Op. 180 (1995), reprinted in 67 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 75 (1995).

177. See *id.*

178. See *In re Turner*, 573 So. 2d 1, 1-2 (Fla. 1990) (reprimanding a judge for involvement in his son's campaign for county judge).

179. See TEX. DISCIPLINARY R. PROF'L CONDUCT 5.03(b)(1), 8.04(a)(1).

180. See *id.*

181. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(1).

182. Such an approach, in many respects, would be consistent with the rule of judicial ethics which, in the context of discussing administrative responsibilities, states that a "judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge." TEX. CODE OF JUD. CONDUCT Canon 3(C)(2).

183. See *In re Sallee*, 579 N.E.2d 75, 76-77 (Ind. 1991).

184. See SHAMAN ET AL., *supra* note 27, at 367 n.57 (discussing *In re Devani*, an unreported 1985 Determination of the New York Commission on Judicial Conduct).

185. *Id.*

"A judge or judicial candidate . . . may indicate support for a political party."¹⁸⁶ They may also attend political events and may express their views on political matters.¹⁸⁷ These latter two actions are subject to the very significant limitations imposed by Canon 5 and Canon 3(B)(10) with respect to issues that may come before the judicial office sought or held,¹⁸⁸ pledges or promises of conduct in office,¹⁸⁹ and comments about pending or impending proceedings.¹⁹⁰

One advisory ethics opinion has taken the position that judges may even "support a county bond election, designated a 'law and order election,' to fund an expanded and improved jail facility, a new county criminal courts building, and renovation and improvement of civil district and family courts facilities."¹⁹¹ Perhaps this is not surprising since judges are permitted to engage in activities to improve "the law, the legal system, [and] the administration of justice"¹⁹² and because, strictly speaking, on the posited scenario, the judges would not be lending "the prestige of judicial office to advance the *private interests* of the judge or others."¹⁹³ However, judicial involvement with other types of ballot issues may be improper, particularly where the actions "cast reasonable doubt on the judge's capacity to act impartially as a judge"¹⁹⁴ or amount to an expression of opinion on any issue that may be subject to judicial interpretation.¹⁹⁵ Accordingly, a judge may not "actively support a bond election to raise funds to develop a city water project."¹⁹⁶

V. USE OF PUBLIC RESOURCES

Because a judge may not lend the prestige of judicial office to the advancement of private interests, "judicial letterhead" may not be used to solicit contributions or other support for the judge's campaign.¹⁹⁷ "Of course a judge's campaign literature should state the judge's present title and position, but the use of official judicial letterhead for campaign purposes

186. TEX. CODE JUD. CONDUCT, Canon 5(3).

187. *See id.*

188. *See* discussion *supra* Part III.D.

189. *See* TEX. CODE JUD. CONDUCT, Canon 5(2)(I).

190. *See* discussion *supra* Part III.F.

191. Comm. on Jud. Ethics, State Bar of Tex., Op. 82 (1986), *reprinted in* 58 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 80 (1986).

192. TEX. CODE JUD. CONDUCT, Canon 4(B).

193. *Id.*, Canon 2(B) (emphasis added).

194. *Id.*, Canon 4(A)(1).

195. *See id.*, Canon 5(1).

196. Comm. on Jud. Ethics, State Bar of Tex., Op. 82 (1986).

197. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 137 (1990), *reprinted in* 63 TEX. JUD. COUNCIL & OFF. CT. ADMIN. TEX. JUD. SYS. ANN. REP. 120 (1991). "Judicial letterhead [is] letterhead that shows a judge's title, position, and official address and is suitable for official judicial correspondence." *Id.*

could give the appearance that a judge-candidate is attempting to exploit the judge's judicial position."¹⁹⁸

One result of this limitation on the use of judicial letterhead is that, in some parts of the state, campaign literature has taken on a markedly lighthearted look. Far from the heavyhanded appearance of governmental stationery, fundraising communications for judicial candidates often resemble festive party invitations. One recent mailing in San Antonio, which was not atypical, involved a large postcard that, amidst a coil of rope and a scattering of stars, depicted a mustachioed character with a cowboy hat, shotgun, and star on his chest.¹⁹⁹ The image perhaps looked more like the town sheriff than even a frontier judge—which may have been an attempt to convey a subtle message on law and order. The text on the invitation cheerfully invited the recipient to a fundraiser, stating "Join the Round Up to Keep Judge _____ in the Saddle."²⁰⁰ In terms of suggested donations, it read: "Cowpokes \$50, Wrangler Hosts \$500, Traildriver Sponsor \$250, Lil' Cowpokes free."²⁰¹ In addition to music, the event offered "vittles" and entertainment in the form of "Shootin' by the South Texas Gunfighters."²⁰² Another invitation, from a different judge, had a picture of a team mascot (a dragon) on the front cover, then invited the recipient to hockey game, complete with a reception and a silent auction offering the chance to bid on a weekend in Las Vegas, autographed team souvenirs, and a "Steer (Dead or Alive)."²⁰³ A pair of tickets to the game were enclosed "complements of" the judge.²⁰⁴ A fastidious ethicist might argue that such insouciant campaign literature is undignified and therefore runs afoul to the duties under Canons 1 and 2 to promote the integrity of the judiciary.²⁰⁵ But it is hard to imagine that such advertising does any real harm to the public image of the judiciary. What is wrong with thinking that a judge has a sense of humor, can enjoy a good time when away from the bench, and likes music, good food, or sports?

The prohibition against improper use of public resources encompasses much more than judicial stationery. Thus, a judge who improperly uses office

198. *Id.*

199. Ad on file with the Texas Tech Law Review.

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See* TEX. CODE JUD. CONDUCT, Canon 1. Canon 1 provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Id. Canon 2(A) states "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*, Canon 2(A).

facilities and employees for political purposes may be found to violate the canon requiring a judge to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary or other standards.²⁰⁶ In *In re Devine*, the Texas Commission on Judicial Conduct publicly admonished a judge for using his chambers for a gathering of supporters to announce his intention to run for Congress.²⁰⁷ "The judge's chambers, an area designated for the judge's benefit in the furtherance of his judicial duties, is not to be used as a forum for the judge's personal pursuit of public office."²⁰⁸ The Commission found that the holding of the political gathering was a wilful violation of Canon 2(B), which prohibits lending the prestige of judicial office to the advancement of private interests.²⁰⁹

VI. CONCLUSION

A candidate for judicial office faces a daunting array of obstacles. First, he or she must identify a race which, because of the existence of a vacancy or the weakness of the incumbent, it is possible to win. Then, the candidate must rally supporters, raise contributions, comply with financial disclosure requirements, attract favorable attention, achieve name recognition, and cajole potential voters at what often seems to be an endless array of public events. Finally, the candidate must persuade the electorate to turn out at the polls and to mark the right box or pull the right lever in numbers sufficient to surpass all opponents. To add to this host of obstacles a tangle of ethical restrictions, which limit what the candidate may say on his or her own behalf or what types of support others may provide, might strike some as unfair.²¹⁰ But that is the American way, and, in general, the system works. The tradition of the American judiciary, on the whole, has been one of honor, integrity, hard work, and fairness. The ethics rules that preclude judges and judicial candidates from engaging in inappropriate political activity make an important contribution to continuing that tradition and, through it, to advancing the administration of justice. The ethical limitations applicable to political campaigns, perhaps more than ever, need to be followed and enforced with the same passion that accompanies other aspects of the political process. If they

206. See *In re Conda*, 370 A.2d 16, 19-20 (N.J. 1977). The "promote confidence" obligation is embodied in Canon 2(A) of the Texas Code of Judicial Conduct.

207. Tex. Comm. on Jud. Conduct (Mar. 25, 1997) (copy on file with the Texas Tech Law Review). Effective January 1, 1999, a recent amendment to Canon 5(4) of the Texas Code of Judicial Conduct provides in part:

A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election.

Adoption of Amendments to the Texas Code of Judicial Conduct, 61 Tex. B.J. 63 (1998).

208. Tex. Comm. on Jud. Conduct (Mar. 25, 1997) (copy on file with the Texas Tech Law Review).

209. See *id.*

210. See TEX. CODE JUD. CONDUCT, Canons 5, 2.

are, the judiciary will take an important step toward weathering the current storm of judicial criticism that recently has attracted so much attention and threatened public confidence in the courts.