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ETHICAL PROBLEMS OF LAWYERS AND JUDGES IN ELECTION CAMPAIGNS

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Lawyers are forbidden to pay "marked attention" to a judge or to attempt to gain from him any "special consideration or favor."[1] Conversely the judge cannot accept gifts or favors from lawyers practicing before him.[2] His conduct should be free not only from impropriety but from its appearance,[3] and from the "impression" that any person can influence him.[4] He must ignore partisan demands,[5] avoid incurring obligations which might "appear" to interfere with proper administration of his court[6] and have no relationships which might "tend to arouse the suspicion" that he may not be completely impartial.[7] Not least, he must select trustees, receivers, masters, referees, guardians, and other appointees "with a view solely to their character and fitness," and the power to make such appointments should not be exercised by him for "personal or partisan advantage."[8]

In short, relationships between lawyers and judges should be marked by considerable reserve; there is a gulf between them broader than that which separates other men. They must avoid not merely the fact of impropriety, but its appearance.

This ethereal code does not exactly fit the maculate world of party politics. The judicial candidate cannot hope to be elected unless someone contributes work and money to his campaign. Since only lawyers are ordinarily willing to do this, judicial election campaigns always create the appearance of an unhealthy obligation running from the judge to lawyers. There is a basic conflict between professional ethical ideas and the practical necessities of democratic elections, and the profession has had no real success in resolving this dilemma.

The canons themselves offer a little help. Apparently the bar has a special obligation, beyond that of other citizens, to aid in the selection of a strong bench.[9] During a campaign the judge must "refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy . . . he should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion."[10] And this applies equally to the candidate who is not yet a judge.[11] While the judge may further his campaign

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1 Professional Canon 3. The professional canons are cited herein as "P.C."
2 Judicial Canon 32. Cited herein as "J.C."
3 J.C. 4.
4 J.C. 13.
5 J.C. 14.
6 J.C. 24.
7 J.C. 26.
8 J.C. 12.
9 P.C. 2; A.B.A. Op. 189 (1938).
10 J.C. 30.
11 A.B.A. Op. 226 (1941). "While this Canon [J.C. 30] refers to a judge who is a candidate, its admonition should be respected by a lawyer who seeks to be judge. The prestige of the lawyer candidate is largely potential, dependent upon his success. But if the chances of success are substantial, then the prestige of the candidate is capable of the same abuse as that of the judge. Each should observe the same restraint, and for the same reasons." (Bracketed material supplied.)

through speeches in his own behalf, he may not accept office in his political party, be a delegate to its conventions, endorse other candidates or otherwise be active in partisan politics.[12] But the canons are silent on the basic question: how does the judge remain free from the slightest breath of suspicion, even though he owes his position largely to gifts of money and work from lawyers? Rulings of ethics committees are beginning to cast some feeble light in this thicket.

CAMPAIGN GIFTS: JUDICAL CANON 32.

Judicial Canon 32, which prohibits a judge from receiving a gift, has been relaxed in order to adjust to the practical realities of elections. The judge cannot himself accept gifts of money, and the canons make no exception for campaign contributions. Therefore gifts must be made to a committee, never to the judge himself.[13] It is implicit that the committee cannot be a conduit for passing money to the judge. If he cannot receive it directly, neither can he take it indirectly. All the funds must be spent by the committee. And, since he cannot personally receive the gift, he cannot solicit it.[14] Indeed, there are some gifts which the candidate may not permit his committee to accept. The gift may be taken only if the cost of the campaign " . . . when reasonably conducted, exceeds that which the candidate would be expected to bear personally . . . the amount contributed must, of course, be only that which the circumstances warrant."[15] This appears to be a delicate way of saying that the judge's partisans should not collect more than the campaign actually costs. Most plainly, he may not permit his committee to accept any contribution whose amount or source indicate that it is designed to influence him.

The same principles apply to lawyers who make such gifts.[16] (A) The lawyer must not *himself* be a candidate for receiver, trustee, guardian *ad litem* or any other appointment, (B) the gift must not be part of his litigation strategy, and (C) the size of the gifts must not be sufficient to provide a surplus for distribution to the judge after the campaign is over. Since a lawyer may contribute, it follows that he may also solicit contributions.[17]

COERCIVE TACTICS: JUDICIAL CANON 30.

This canon prohibits the judge, the lawyer-candidate and their partisans from using the power and prestige of judicial office to further the candidacy. A judge may not solicit endorsement of his candidacy by members of the bar. A judge who sent out letters asking the addressees to have their friends mail postcards urging

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12 J.C. 28.

13 Colo. Bar Ass'n Op. 33 (1964). The statement in A.B.A. Op. 226 (1941), " . . . it would also be preferable that such contribution be made to a campaign committee rather than to the candidate personally," is too permissive. "A judge should not accept any presents or favors . . . from lawyers practising before him . . . " J.C. 32 (Emphasis added.)

14 N.Y. County Op. 304 (1933).

15 A.B.A. Op. 226 (1941).

16 N.Y. County Op. 304 (1933). "A lawyer may not with propriety make a contribution . . . under circumstances which might justify the inference that the contribution is a 'device or attempt to gain from a judge special consideration or favor'."

17 A.B.A. Informal Op. 626 (1963).

his reappointment by the governor violated this canon and also Judicial Canon 34, " . . . his conduct shall be above reproach."[18] Lawyers, however, may circulate petitions endorsing judicial candidates, and other lawyers may sign them.[19]. While this ruling apparently permits the normal postcard campaign, the practice of sending postcards to a lawyer and asking him to address them and then return them to the campaign manager for mailing (so that the degree of his compliance may be determined) is a virulent breach of Judicial Canon 30.[20] Obviously, the lawyer is coerced. The candidate cannot avoid responsibility, since he " . . . should not permit others to do anything in behalf of his candidacy which would reasonably lead to" the suspicion that he is using the power and prestige of the office to promote his election.[21] Even so, the lawyer should have the "courage and moral stamina" to resist such pressures when they are applied.[22]

Under Canon 30 the judicial candidate may not answer legal questions submitted to him in a radio program,[23] nor may he unfairly state his own qualifications, unjustly attack incumbents, or indicate his probable decisions from the bench. For example, he may not promise that he will refuse to issue injunctions against labor unions or decrees in foreclosure and eviction cases.[24]

Partisan Activities: Judicial Canon 28.

Under this canon the judge's activities as a member of his political party are severely curtailed.[25] "He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions. He should neither accept nor retain a place on any party committee, nor act as party leader, nor engage generally in partisan activities." But during his own campaign he can speak at political gatherings and contribute to his own party. Judges may not, however, contribute to campaign funds which are to be used in an election in which the judges are not themselves running. The canon only permits the judge to contribute to "the party that has nominated him and seeks his election or re-election." This could never be the case except in a year when he is on the ballot.[26]

Patronage: Judicial Canon 12.

In states where judges are chosen in contested elections, it is difficult to believe that receivers, masters, guardians and the like are always "selected with a view solely to their character and

18 A.B.A. Op. 139 (1935). "Persons to whom the foregoing letter was mailed, who had or contemplated that they might have a matter pending before the judge, would in many cases feel under some pressure to comply with his request . . . " "Ordinarily a judge should stand on his official record and leave the promotion of his candidacy to others." See also A.B.A. Op. 105 (1934).

19 A.B.A. Op. 189 (1938).

20 Colo. Bar Ass'n Op. 33 (1964).

21 J.C. 30.

22 A.B.A. Op. 189 (1938).

23 A.B.A. Op. 93 (1933).

24 Michigan Op. 74 (1941).

25 A.B.A. Op. 193 (1939); see also generally A.B.A. Op. 113 (1934), which also restricts somewhat the activities of his bailiff and, perhaps too optimistically, his wife.

26 A.B.A. Op. 289 (1955).

fitness." On the contrary, partisan activity seems to be a primary qualification. A rule that judges may not distribute patronage to their campaign committees would be a healthy development, but there is no such rule now, and until there is, almost superhuman strength of character would be required for a judge to overlook his campaign manager in distributing patronage, even though the manager may not be the best-qualified lawyer available.[27]

ADVERTISING: PROFESSIONAL CANON 27.

> "It is unprofessional to solicit professional employment by . . . personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, . . . and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible . . . "[28]

Since judges are lawyers, they are bound by this canon. An exception has been created for elections, but its scope is strictly limited to the necessities.[29] Therefore a candidate for district attorney may send out letters soliciting votes, and he may distribute campaign literature with his picture and a statement that he is a lawyer.[30] He can make newspaper releases, but only if they are for the sole purpose of furthering his candidacy. Similarly, he may state in advertisements that he is a lawyer, but only if the advertisements are during the campaign.[31] And he may be identified in television programs as a lawyer, when he is a candidate for Congress.[32]

But even this canon is not completely repealed. If a lawyer files for an office to which he has no hope or intention of being elected, and uses his candidacy as an excuse for a barrage of mailings, campaign cards and statements to the press which are really designed to acquaint potential clients with the lawyer's name, he violates the canon.[33] Unfortunately the candidate's motives are usually known only to himself so that few violations of this sort are ever punished. Nevertheless a liberal policy is essential, even though it permits the sham candidate to advertise himself as a

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27 N.Y. County Op. 422 (1953) discusses (rather uncomfortably) a similar question: appointment of the judge's former partner. " . . . an occasional appointment by a judge of a former partner, with whom the judge has no financial relationship and presuming that the former partner is otherwise qualified, would not in our opinion be an improper act." But since the act may well be misunderstod, " . . . unusual care should be taken to avoid the charge of favoritism. Consideration should be given both to the frequency of such appointments, as well as to the size of the matters." These principles apply even more strongly to those who play a prominent part in the judge's election.

28 P.C. 27.

29 Michigan Op. 74 (1941).

30 A.B.A. Informal Dec. No. 656 (1963).

31 A.B.A. Informal Dec. No. 529 (1962).

32 A.B.A. Informal Dec. No. C-230(b)(1961).

33 A.B.A. Informal Op. No. 546 (1962). "On the other hand, releases relating to the lawyer's civic and social activities, as a lawyer, might well be included within the forbidden area of indirect advertising for professional employment; obviously, he should avoid the suspicion of any such motive."

Drinker, *Legal Ethics* 248 (1953). "The candidate for a public office who is a lawyer may advise the public of this when the office sought is one in which his legal training adds to his qualifications to fill the office (Wash. 9; Mich. 52; Mo. 36) *but may not use his candidacy as an excuse for advertising that he is a lawyer.* (App. A 65; Mich. 89; Cleveland 10; . . .)" (Emphasis supplied.)

lawyer while the genuine candidate is advertising for votes. The candidate should not, however, use his professional letterhead for campaign advertising. Thus a lawyer who was also mayor of his city could not mail political messages to 15,000 voters upon his professional letterhead. Plainly this is a solicitation of legal business.[34]

The judge's campaign managers must be careful not to advertise *themselves* in the press. While few of the rulings deal with elections, the analogies are strongly suggestive. A lawyer may not pose for pictures or submit material to a newspaper or a magazine since this advertises him to possible future clients.[35] And he must suppress laudatory newspaper comments about himself.[36] Therefore he may not inspire or furnish newspaper comments concerning cases in which he is engaged,[37] or make any other unsolicited newspaper release.[38] He may not permit others to make a release stating that he is leaving governmental service and will resume practice, if the release also describes his experience or qualifications.[39] He may not permit his name to be published in an advertisement for a charitable cause along with his address or a statement that he is a lawyer. The advertisement is ethical if he is not identified as a lawyer, however.[40] And obviously the use of his *firm's* name in a charitable advertisement " . . . smacks somewhat of self-laudation or commercialism, even though not so intended."[41] He cannot write "letters to the editor" in which he is identified as a lawyer, and in a small community where many readers would know he is a lawyer, he may not write such letters at all where "The subject matter was of a controversial nature and one that could easily require the services of an attorney."[42]

From all this one infers that lawyers who are members of the judge's campaign committee should not publish their *own* names in newspapers. Although there does not seem to be any decision precisely in point the charitable advertisement cases are indistinguishable. This rule should apply both to press releases and to advertisements endorsing the candidate. It clearly prohibits the kind of advertisement in which the endorsing lawyers are listed by name.[43] Often these imply in a more or less subtle way that the endorsers are men of substance in the profession. The mere statement, "we have observed Judge X in court daily" certainly leads one to believe that the endorsers are unusually experienced litigators, since few lawyers are in court "daily." But even a tombstone advertisement which merely lists the endorsing lawyers by name may carry the inference that they are respected (and in effect endorsed) by the judge, who would perhaps not otherwise

34 Cp. Michigan Op. 89 (1945) with A.B.A. Op. 93 (1933).
35 A.B.A. Op. 42 (1931).
36 A.B.A. Op. 62 (1932).
37 A.B.A. Op. 140 (1935).
38 A.B.A. Informal Dec. No. C-479 (1962).
39 A.B.A. Op. 184 (1938).
40 A.B.A. Informal Op. 547 (1962).
41 A.B.A. Informal Op. 653 (1963).
42 A.B.A. Informal Dec. No. C-473 (1962).
43 Colo. Bar Ass'n Op. 32 (1964); the A.B.A.'s committee has, however, reached an opposite result, authorizing at least one advertisement of this type. A.B.A. Informal Dec. C-748 (1964).

permit the advertisement. In any case, the necessity principle does not apply. The qualifications and biography of Judge X can (and should) be presented to the voters in an advertisement paid for by the "Committee of 100 lawyers for the election of Judge X," who are not identified by name.

The solicitation of votes by a letter-writing or postcard campaign, and solicitation of funds on the lawyer's letterhead, are apparently authorized *only* if addressed to brother lawyers, personal friends and clients who already know the sender to be a lawyer, because this is "warranted by personal relations."[44] Mailings on a professional letterhead to any large group, whatever the purpose, necessarily advertise the sender and are forbidden. Similarly, solicitation on the "Committee of Lawyers" type of letterhead appears to violate the canon, because few of the recipients would have the necessary personal relationship with *all* the lawyers listed on the letterhead.[45]

CONCLUSIONS

Underlying all these opinions is the general idea that the canons will be relaxed to the extent necessary to permit conduct of a vigorous campaign, but no further. Practices not absolutely necessary for that purpose are condemned. It is unfortunately plain, however, that even the most ethically conducted campaign involves a series of exceptions to the canons which warp their spirit and which add nothing to the public respect for our judicial system.

The lawyer-candidate must advertise himself on a massive scale. Judges inevitably incur obligations to those who manage campaigns and donate money which certainly "tend to arouse the suspicion" that the judge may not have an "impartial attitude of mind in the administering of his judicial duties." Doubtless there is occasionally some substance in these shadows, at least in the distribution of patronage. As long as judges, through their committees, must accept gifts of money and work from lawyers there will be gnawing doubts as to their freedom from influence and bias. Nevertheless, if a stricter attitude should be taken toward campaign activities of lawyers, the selection of judges will be left entirely in the hands of party organizations and newspapers, both relatively uninformed lay groups. A serious deterioration in the quality of the bench might well result. Wherever judges are chosen in contested elections some bending of professional standards is vitally necessary.

The ultimate solution must lie in adoption of another method of selecting judges. The federal system appears to produce judges at least as good as those selected in state elections, and it does so without compromising their dignity or independence. There are of course a number of other plans. Until one of them is adopted, however, the candidate and his manager must maintain an exceedingly delicate and uneasy balance between principle and necessity.

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44 A.B.A. Informal Dec. No. 626 (1963).

45 Colo. Bar Ass'n Op. 32, *supra* (1964).