

What judicial candidates can say

Judicial candidates can campaign in a way that allows voters to obtain relevant information but does not compromise the integrity of judicial decision making.

The code of judicial conduct is often criticized as imposing a “gag rule” in judicial campaigns that leaves candidates unable to communicate effectively and voters unable to make informed choices. According to this analysis, under the code, judicial candidates can “only” pledge to faithfully and impartially perform the duties of the office, and voters must decide based only on unrevealing details of professional history, biographical data, or personal appearance.

That criticism, however, is based on a fundamental misunderstanding of both what is permitted by the code and the nature of the judicial office. As described in the new AJS curriculum, *Communicating with Voters: Ethics and Judicial Campaign Speech*, judicial candidates can campaign in a way that allows voters to obtain information that is relevant in making their electoral choices but does not compromise the independence of the judiciary or the integrity of judicial decision making.

Under the code, judicial candidates are not restricted to simply parroting that they will “faithfully and impartially uphold the duties of the office” but may give that pledge meaningful content by discussing specific matters relating to judicial organization, administration, and court management. Although candidates may not make statements expressly or impliedly signaling what decisions they would make on issues, they may, for example, pledge to dispose of a backlog of cases, to avoid favoritism in appointments and hiring, to start court on time, to improve conditions for jurors, and to increase efficiency. Candidates can discuss matters such as what they would do outside the courtroom to improve the justice system, how to improve public confidence in the courts, and how to implement the recommendations of racial and gender bias task forces.

A judicial candidate may even criticize an opponent if the criticism is scrupulously truthful and does not relate to the opponent’s decisions in specific cases. For example, a candidate may criticize an opponent’s work habits and lack of experience as long as the criticism does not use half truths or distortions, and does not create unjustified expectations to mislead the voters. The code allows debate on crucial issues facing the judiciary and of interest to the public. The kind of debate allowed by the code provides candidates with sufficient opportunity to educate voters about their qualifications and to differentiate themselves from other candidates. What is prohibited by the code is much of the rhetoric, promise making, and distortion that is used in campaigns for other elective offices. Therefore, to comply with the code while running effective campaigns, judicial candidates must act with thoughtfulness and imagination that does not rely on the usual strategies of political campaigns such as negative generalizations, inflammatory terms, and buzzwords. By demonstrating intelligence, vision, and restraint during a campaign, a judicial candidate begins to demonstrate to voters the kind of judge he or she will be.

Moreover, judges, even elected ones, differ from legislators and executive officials, and judicial campaigns should be run with those differences in mind. Judges serve voters when they are parties and persons affected by cases, and citizens have a right to expect that judges will make decisions based on the evidence, the law, and the arguments of the parties regardless of the

personal views of the judge or a position taken while a candidate to win votes. Therefore, the code prohibits campaign speech that would prevent the candidate from being a fair decision maker after the election or create the impression of prejudgement.

If the speech restrictions are not followed by candidates or are lifted by courts in the name of free speech, the differences between the judicial office and other political offices will be lost in the clamor of campaign commitments and promises. Once the public can no longer distinguish between judicial campaigns and other campaigns, it may no longer be willing to accord the judiciary the independence that is justified by the differences between judges and other government officials. Therefore, to preserve the independence of the judiciary, judicial candidates must resist the pressure to change the nature of judicial campaign speech and to make pronouncements of personal positions on issues such as abortion, the death penalty, and the exclusionary rule. Instead, confidence must be placed in the candidates' ability, consistent with the code, to stimulate robust public discussion on issues of legitimate interest to the voters and, thereby, prove their capacity to fulfill the judicial role.

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