# Initial Report of the Commission On Judicial Elections and Ethics

## Creation and Mission of the Commission

On March 7, 1997, the Supreme Court of Wisconsin appointed a Commission on Judicial Elections and Ethics under the chairmanship of the Honorable Thomas E. Fairchild of the United States Court of Appeals for the Seventh Circuit. The Commission was assigned:

> to review the provisions of the Code of Judicial Conduct addressing political and campaign activity of judges and candidates for judicial office, determine the extent to which those provisions adequately address issues relevant to the Wisconsin elective system in selecting members of its non-partisan judiciary, and recommend provisions for inclusion in the Code of Judicial Conduct that would better address the issues to which the current Code's provisions are directed and to address relevant issues the current Code does not address.

The Commission's mission was bifurcated, the first task being:

> to review the relevant provisions of the current Code of Judicial Conduct, as well as the provisions recommended by the Code of Judicial Ethics Review Committee in its report filed with the court October 15, 1991, and the provisions of the 1990 American Bar Association Model Code of Judicial Conduct, and identify the political and campaign issues inherent in the election of non-partisan judges and in the activity of those judges while in office.

This Initial Report of the Commission responds to this first task.

After the court has an opportunity to review the issues identified in this report, the court "will provide the Commission further direction as may be appropriate."

## Methodology of the Commission.

The Commission convened in full session three times. The first two meetings of the Commission occurred on April 16 and May 22, 1997. During these sessions, Commission members engaged in a broad discussion of many ethical and related issues inherent in an elected judiciary. Since members of the Commission included appellate and trial judges, state and municipal judges, business and labor executives, law professors, and community leaders active in political and governmental affairs, the discussion was informed and informative.

At the May 22 meeting, Judge Fairchild appointed three committees: Campaign Financing[1], Campaign Content[2], and Other Political Activity.[3] Each of the committees met between May 22 and July 2 and developed a listing of issues appearing to fall within the ambit of the court's charge to the Commission. These issues were compiled in the form of a draft initial report and distributed by Commission member and Reporter Prof. Charles Clausen for discussion at the July 31 meeting. Following the discussion at the July 31 meeting, the draft report was revised and distributed to Commission members. The forwarding letter asked members to advise the Reporter of their opinion whether an additional meeting was necessary before forwarding the report to the supreme court. No member requested an additional meeting. Judge Fairchild advised the Reporter that, although there had been discussion at meetings of the Commission about potential issues under Article VII, section 10 of the Wisconsin Constitution, the tentative final draft of the initial report made no reference to such discussion. Judge Fairchild suggested additional text which the Reporter incorporated into this Initial Report as issue #9 appearing at pages 26-27, *infra.*

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[2] Atty. Carl Ashley, Atty. Linda Balisle, Hon. Charles p. Dykman, Ms. Patricia Finder-Stone, Mr. Roger L. Fitzsimonds, Hon. Ramona Gonzalez, Dist. Atty. E. Michael McCann, Atty Maureen A. McGinnity, and Ms Barbara Stein.

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## The Commission's Approach

The Commission considers the central question in considering any regulation relating to judicial elections and campaigning to be how the citizens of Wisconsin would benefit or suffer from the regulation. Any rule proposed to or by the court must be justified on the basis of the public interest in a competent, honorable, impartial judiciary.

Further, in considering rules governing conduct in judicial elections, rule-makers and their advisors do not operate in a vacuum or write on a clean slate. Any such regulation will be applied to Wisconsin's judicial system where judges are elected in general nonpartisan elections in which candidates must campaign for votes.

Substantial concerns regarding judicial elections and ethics arise from current trends in such elections. Judicial campaigns are assuming a more political tone, becoming areas of interest for independent interest groups, and becoming more expensive, combative, complex, tactical political campaigns. The public interest dimensions of these developments were noted in a recent publication of the American Judicature Society.

> ...current trends in judicial elections have increased the difficulty of ensuring judicial independence and impartiality. Increasing expenses have pressured judicial candidates to raise more money. How they can raise more money, from more people, without compromising their future independence has become an important question...the campaign conduct of judicial candidates has become more problematic. Candidates appear more willing to engage in direct attacks on their opponents. They appear to have become increasingly aggressive in stating their views on legal and political matters, and in soliciting endorsements from political parties and special interest groups. They appear more willing to press the bounds of truth and fairness in their campaign statements. Each of these developments erodes public confidence in the impartiality, independence and dignity of judicial officers.

Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 10 (American Judicature Society 1990). McFadden also describes another problem "[E]lectoral politics sometimes require that candidates act in ways that would be inappropriate for sitting judges." *Id.* at 75 To prevail in a contested election, judicial candidates must seek

votes from the public. Some recent elections, more notably in states other than Wisconsin but to a lesser extent even in Wisconsin, have raised fears that judicial candidates are "acting too much" like political candidates.

To the extent practicable, regulation of conduct in judicial election campaigns must treat incumbent judges and judicial candidates equally, giving neither an unfair or artificial advantage. Incumbency carries with it some advantages and other disadvantages, as does non-incumbency. Rules cannot be expected to change facts inherent in the electoral process. The public interest in a well-informed electorate and concerns of fairness to judicial candidates, both incumbents and challengers, combine to prompt caution in rule-making lest rules tilt the “playing field” unfairly or artificially.

The Commission had the benefit of a presentation by Commission member Professor Gordon Baldwin on First Amendment and other constitutional concerns. Following Professor Baldwin’s suggestion, however, the Commission has not attempted to engage in constitutional analysis in developing the following list of election/ethics issues requested by the court. Rather, the Commission has attempted simply to identify the “good government” issues that appear to inhere in judicial election processes. In this attempt, the Commission has been keenly aware of the inherent tensions that come with an elected judiciary. The election of judges is designed to make judges, as government officials in a democracy, accountable to the citizenry. Unless the electorate is reasonably informed about judicial candidates, their qualifications and judicial philosophies, the intended benefits of electing judges cannot be realized. Restricting campaign speech to qualifications and judicial philosophies may cause the media to ignore the contest. On the other hand, it can hardly be gainsaid that judges are not like other government officials, and a campaign which exploits the unpopularity of a particular decision, though honestly arrived at, can easily compromise the independence of all judges in impartially applying the law as they see it.

Although there were members of the Commission who believe that the time has come to replace election of judges with the Missouri Plan or a similar method of selection, or to provide full public funding of judicial election campaigns, all recognized that consideration of such proposals is not within our mandate.

## Issues Concerning Campaign Financing

1. *Should the code contain special rules regarding campaign financing for judicial elections?*

> Comment: The American Judicature Society monograph *ELECTING JUSTICE* points out that "[J]udges should be independent and impartial, neither indebted to nor favoring any individual or group. Regular public elections, however, can jeopardize that independence and impartiality. Public elections require fundraising, and sometimes in large amounts. Judicial candidates may find themselves indebted to those who finance their elections or at least may give the appearance of such indebtedness. . . Increasing expenses have pressured judicial candidates to raise more money. How they can raise more money, from more people, without compromising their future independence has become an important question. Judicial candidates are likely to turn to lawyers for the increased funds, but funding by lawyers, especially lawyers who will later appear before the candidate, raises obvious questions about the candidate's future ability to remain impartial." *Id*. At 8, 10. That *some* regulation of campaign financing for judicial campaigns is necessary would seem to be beyond cavil. One could hardly imagine, for example, a system in which it would be permissible for a judge personally to solicit campaign contributions from the bench or in chambers from lawyers and litigants appearing in the judge's court. *How much* regulation, on the other hand, and of *what kind,* are subjects on which reasonable minds may differ.

2. *If campaign finance rules promulgated by the court for judges, judicial candidates and personal committees cannot or in any event do not apply to independent expenditures, is it unfair, counterproductive, or otherwise undesirable to restrict candidates?*

> Comment: A recurring focus of discussion during the Commission's deliberations was the growing impact in election processes of independent expenditures by advocacy groups or even individuals. Restrictions on judicial candidates and their committees that would be justifiable if only the candidates and committees were active in the election process may be unfair, counterproductive, or otherwise undesirable if substantial independent expenditures are made in an

attempt to influence the outcome of the election. If independent expenditures are beyond the reach of the court's regulatory powers under Buckley v. Valeo, or if it is in any event undesirable to attempt to regulate independent expenditures, care must be taken in crafting any rules applicable only to candidates and their committees. On the other hand, even if regulation of independent expenditures is constitutionally proscribed, there may be an issue whether judicial candidate relations with independent expenditure committees and/or individuals should be subject to regulation.

3. *Should there be limits on a judge's or candidate's contribution to his or her own campaign?*

Comment: Statutes or rules that restrict the amount of money that may be contributed to a judicial or other campaign are generally cast in terms of contributions by persons other than the candidate himself or herself. Such restrictions create or permit distortions in judicial election "marketplaces" when a wealthy candidate opposes a candidate who is not wealthy. "Studies in three jurisdictions found that judicial candidates, in the aggregate, supplied from 10 to 30 percent of their own campaign funds. . . There are, as might be imagined, some dramatic instances of self-funding in judicial races. . . No state places individual contribution limits on candidates' funding their own campaigns, but half the states limit individual contributions by others." *ELECTING JUSTICE 29.* Section 11.26(5) provides that contribution limits do not apply to a candidate who makes contributions to his or her own campaign for office from the candidate's personal funds or property or such assets owned jointly or as marital property with the candidate's spouse. Additionally, *Buckley v. Valeo* is pertinent.

4. *Should there be limits on the amount of contributions by lawyers?*

Comment: By virtue of experience or professional associations or both, lawyers may be better able to assess judicial qualifications in candidates for judicial office. Lawyers may also be the most likely group to contribute to judicial campaigns which are increasingly expensive. Indeed, without lawyer contributions or public financing, it is hard to imagine how candidates could raise the funds necessary

to mount a credible campaign for certain contested judgeships.[4] On the other hand, contributions by lawyers may be perceived by the public, and by litigants and lawyers, as little different from contributions by lobbyists to partisan political candidates.[5] The larger the contributions, the greater the potential for an appearance of impropriety.[6]

*5. Should judges and their committees be prohibited from soliciting contributions from lawyers generally, or from lawyers with matters currently pending before the court?*

*6. Should judges and their committees be prohibited from soliciting contributions from litigants currently appearing or likely to appear before the prevailing candidate's court?*

Comment: Issue 4 focuses on limiting the maximum amount a lawyer may contribute and a campaign committee may accept. Issues 5 and 6 address whether *solicitation* of contributions from lawyers and/or litigants should be prohibited. The appearance of bias, unseemliness, and undue influence concerns are

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[4] "It is not surprising that attorneys are the principal source of contributions in a judicial election . . . A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring." Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex.Ct.App. 1983).

[5] The Rocha case was described in a respected law review as follows:

> Picture this. You lost as a plaintiff in Texas District Court. Your appeal is to the Texas Court of Appeals, Fourth District, in San Antonio. The case is set for oral argument before a 3 judge panel which includes Associate Justices Rudy S. Esquivel and Peter Tijerina. In the past, opposing counsel Patrick Maloney has contributed thousands of dollars to the election campaigns of the two justices; he provided 21.7 % of Justice Esquivel's campaign funds for Esquivel's most recent race in 1980. After each election, victory celebrations for Justices Esquivel and Tijerina are held at Maloney's office. Local newspapers frequently make reference to Maloney's political power and his influence over judges in San Antonio. How confident are you that the court will be unbiased?
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> In *Rocha v. Ahmand*, the Fourth District of the Texas Court of Appeals, sitting en banc, was unanimous is denying appellant's motion to disqualify the two justices."

Stuart Banner, Note: Disqualifying Elected Judges From Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449 (1988).

[6] Michigan, for example, has limited the amount of money that may be solicited from lawyers to $100. (Greater amounts may be *accepted* from lawyers, but not *solicited.*) The Kentucky supreme court currently has before it a proposal from a committee appointed by the chief justice to prohibit judges from accepting any contributions to judicial campaigns from lawyers. If adopted, Kentucky would be the only state to ban such contributions.

pertinent. Also relevant are considerations based on the wide diversity of judicial races in Wisconsin: one judge circuits as compared to multi-judge circuits, trial courts as compared to appellate courts, etc.

7. *Should the amount of contributions that may be solicited or accepted be capped by supreme court rule or be addressed by non-binding guidelines?*

Comment: The legislature has enacted caps for contributions to election campaigns in Section 11.26 of the Wisconsin Statutes. The amounts vary from $10,000 for supreme court campaigns to $3,000 and $1,000 for circuit court races in Milwaukee and other counties, respectively. Canon 5C(2) of the ABA Model Code of Judicial Conduct provides that campaign committees may solicit and accept *reasonable campaign contributions.* The Beilfuss/DeWitt committee adopted the ABA position, with no reference to the statutory caps found in Section 11.26. Candidates, of course, are free to adopt voluntary caps lower than statutory caps and opposing candidates may enter into agreements to do so. The issue identified here is whether there should be any caps in addition to the statutory caps in Chapter 11, Stats.

8. *Should judicial campaign funds be solicited and accepted only by campaign committees and not by judicial candidates themselves? Should there be one rule for solicitation and another for acceptance?*

Comment: Presumably, some part of the rationale for prohibiting judicial candidates from soliciting and accepting campaign donations is avoiding the appearance of bias. "The [ABA Model] Code attempts to insulate candidates from personal contact with contributors which may lead to allegations of bias when a contributor appears before the judge. Thus, candidates are prohibited from personally soliciting or accepting campaign funds, and commentary to the Code urges that, where possible, candidates should not be told the identity of contributors."[7] In light of the statutory requirement that public reports of contributions over $20 must be filed with the Elections Board, and in light of the widespread use of public endorsement lists, it may be that this version

[7] Jeffrey M. Shaman, Steven Lubet, James J. Alfini, *Judicial Conduct and Ethics* 341-42 (1990).

of "don't ask, don't tell" is unrealistic. [8] On the other hand, (a) there is a "seemliness" rationale for the prohibition and (b) the prohibition provides a degree of protection to solicitees from potential embarrassment and [c] may diminish perceptions of undue influence arising from judges and judicial candidates asking for money from those most likely to be seeking judicial relief. A related issue is whether judicial candidates should be precluded from personally soliciting publicly stated endorsements. The issues may be practically indistinguishable where an organizational endorsement carries with it a virtually automatic campaign contribution.

9. *Should judges and judicial candidates be prohibited from serving on their own committees? If not prohibited, should they nonetheless be exhorted to avoid involvement in their committee's fundraising efforts?*

Comment: This "insulation" issue is related to the preceding one and similar policy concerns obtain for both. It should be noted that section 11.10(1), Wis. Stats., provides that candidates are responsible for the accuracy of campaign finance reports for purposes of civil liability under ch. 11, whether or not the candidate certifies the reports personally. Section 11.27(2) provides: "In civil actions under this chapter, the acts of every member of a personal campaign committee are presumed to be with the knowledge and approval of the candidate, until it has been clearly proved that the candidate did not have knowledge of and approve the same."

*10. Should the rules limit membership on personal campaign committees to avoid identification of judicial candidates with political partisans and/or with advocacy groups representing particular positions on controversial political issues likely to come before the court? Should the rules restrict the choice of*

[8] California, for example, has no restriction on fundraising by judges except in a commentary to the code of judicial conduct: "In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. It is not possible for judges to do the same sort of fund raising as an ordinary politician and at the same time maintain the dignity and respect necessary for an independent judiciary."

*paid campaign consultants or managers to avoid such identifications?*

> Comment: Judicial elections in Wisconsin are nonpartisan. Political partisanship in judges is viewed as a serious threat to judicial independence and to the fact and appearance of judicial impartiality. Hence the rules restricting political activities by judges and, in some cases, judicial candidates. *See* **Issues Concerning Other Political Activity**, pp. 17 - 25, *infra.* The nonpartisan nature of a judicial campaign may be compromised by the composition of personal campaign committees and by the choice of campaign managers and consultants. The same may be true with respect to persons closely identified with controversial political issues likely to come before the court.

11. *Should the code require or encourage disqualification or recusal in response to a judge's previous campaign fundraising or campaign conduct? Should the code provide specific rules on when recusal is appropriate, e.g., when an attorney or litigant has contributed more than a specified dollar amount to the judge or to the judge's opponent, or when an attorney or litigant has served as a member of the judge's campaign committee or the committee of the judge's opponent?*

> Comment: It is unknown to what extent judges recuse themselves from matters because of campaign activities by lawyers or litigants. Recusals are not litigated; only refusals to recuse are litigated. Furthermore, judges who recuse themselves are not required to, and usually do not, state the reason for recusal, except as required by §757.19(5), Stats. Recusal generally is governed by SCR 60.04(4) which requires recusal under certain specified circumstances and also "when reasonable well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." This test may be so imprecise in the campaign financing and support area as to be unhelpful, both to judges and to litigants and their attorneys.[9] The Beilfuss/DeWitt

[9] "Although the test was meant to be objective, one court has noted that it is inherently subjective. (Citations omitted.) That is because the appearance of partiality depends upon one's standard of observation, which will vary from individual to individual. In reality, there is no objective

committee stated in its Commentary to its proposed Section 5C(2): "Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under [the committee's version of SCR 60.04(4)]."

12. *Should campaign fundraising by an incumbent be prohibited until active opposition develops? Should fundraising be prohibited except for a period of three (four)(six)(twelve) months before a contested election? Should fundraising be prohibited entirely after an election, or alternatively, be restricted to a period of thirty (sixty) days after the election?*

Comment: A number of states restrict the time within which a judicial candidate may solicit and accept campaign funds. The ABA Model Code provides that a candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than ninety days after the last election in which the candidate participates during the election year. The Beilfuss/DeWitt Committee recommended that solicitation of contributions and public support be permitted "for a reasonable period of time before and after the last election in which the candidate participates during the election year."

"Several jurisdictions have addressed questions arising from the differing rules regarding campaign committees for candidates competing with other candidates, and for incumbents who do not face competitors. One jurisdiction holds that an incumbent may not establish a committee until opposition becomes apparent. Another takes a middle view that such a candidate may form a committee prior to opposition having developed, but that the committee may not solicit funds until opposition develops. Finally, a third state holds that to require a candidate to wait to form a committee until the candidacy has been opposed would be analogous to closing the barn door after the cows had escaped. Therefore, this state permits any candidate, including unopposed incumbents,

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standard to determine the appearance of partiality, but it is clear that the appearance of partiality is to be decided from the viewpoint of a disinterested observer, and not from the subjective viewpoint of the judge in question." Shaman, Lubet, and Alfini, JUDICIAL CONDUCT AND ETHICS 144 (1990)

to establish a campaign committee and begin soliciting and collecting funds."

Shaman, Lubet, and Alfini, *JUDICIAL CONDUCT AND ETHICS* 389-90 (2d ed. 1995).

13. *Should the rules address explicitly the proper uses of campaign funds, including excess campaign funds?*

Comment: The Beilfuss/DeWitt Committee recommended a rule similar to the ABA Model Code respecting use of campaign funds: "A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others."[10] The Committee added a recommended prohibition on transferring funds already collected for a partisan campaign to a judicial campaign committee or otherwise using such funds for a judicial campaign.

## Issues Concerning Campaign Content

1. *Should rules governing judicial election campaign conduct proscribe campaign rhetoric that "commits or appears to commit" a candidate for judicial office with respect to a [a] particular case, [b] particular controversy, or [c] issues likely to come before the court to which the candidate seeks election or appointment? Should issues respecting adoption, modification, or repeal of court rules or administrative practices be subject to a different rule from other issues likely to come before the court?*

Comment: At least since the 1924 ABA Canons of Judicial Ethics, campaign promises by judicial candidates have been considered problematic. The 1924 Canons proscribed promises appealing to "cupidity or prejudices of the appointing or electing power" and forbade announcing in advance "his conclusions of law on disputed issues to secure class support." The 1972 Model Code forbade promises of conduct in office "other than the faithful and impartial performance of the duties of the office" and announcing "his views on disputed legal or political issues." The 1990 Code repeated the proscription of promises other than the faithful and impartial performance of the duties of the office and forbade campaign statements "that commit or appear to commit the candidate with respect

[10] The Model Code refers to "the private benefit of [the candidate] or his family."

to cases, controversies or issues that are likely to come before the court." The Beilfuss/DeWitt Committee recommended a rule that proscribed promises that "would appeal to the partisanship of the electorate" and statements that commit or appear to commit a candidate with respect to "cases or controversies that were likely to come before the court." The Beilfuss/DeWitt Committee omitted the ABA language about "issues" that were likely to come before the court, commenting: "The drafters specifically omitted the words "or issues" in the ABA Model Code to allow the voters to receive valuable information in judicial elections." None of the previous treatments of the question have addressed whether there should be different rules for issues that are likely to come before the court in a litigation context as opposed to issues arising under the court's rule-making or administrative powers.

2. *Should rules governing judicial elections explicitly prohibit misrepresentation by candidates for judicial office? If so, should the prohibition be limited in scope (e.g., restricted to misrepresentations of the qualifications of the candidate or his/her opponent) or should it be broad, (e.g., applicable to any misrepresentation of fact)? If the latter, should there be a materiality restriction? If misrepresentation is to be explicitly prohibited, should the prohibition apply only to intentional misrepresentation, or to representations made with reckless disregard for truth or falsity, or even to negligent or innocent misrepresentations?*

Comment: Prohibitions of misrepresentations by judicial candidates are commonplace throughout the United States. Difficult issues arise as to whether such prohibitions should be limited in scope or broad. The 1990 ABA Model Code and the Beilfuss/DeWitt Committee recommendation by their express terms prohibited only knowing misrepresentation of "the identity, qualifications, present position or other fact concerning the candidate or an opponent." SCR 20:8.2(a), on the other hand, prohibits lawyer candidates from making statements "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 . . . or of a candidate for election or appointment to a judicial . . . office." The New Mexico code omits "knowingly" from its prohibition of misrepresentations by judicial candidates and limits its prohibition to "material facts". Section 12.05, Wis. Stats., provides: "No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election." Violation may result in a fine not to exceed $1,000 or imprisonment not more than 6 months, or both. *Quaere* whether the code should prohibit any violation of any state statute by a judicial candidate in the course of a judicial election campaign so as to bring violations of section 12.05, Wis. Stats., within the court's disciplinary jurisdiction.

3. *Should rules governing judicial elections identify with some degree of specificity what areas of campaign speech are ethically permissible? Should the rules identify with some degree of specificity what areas of campaign speech are not ethically permissible? Is it, rather, preferable to paint with a broad brush in this area?*

Comment: Rules drafted in broad language are necessarily imprecise and provide relatively little guidance to candidates as to what is permissible and what is impermissible campaign speech. Candidates thus speak at their peril when speaking of matters that may be held to be within proscibed areas or outside such areas. In light of the inherent tension between the public good of informing the electorate as to candidates' views and the public good of not creating the appearance of partiality or prejudgment of cases or issues, judicial candidates and the public might benefit from rules that more clearly outline

permissible and impermissible areas of campaign speech. The AJS monograph *ELECTING JUSTICE* points out that under the 1972 ABA Model Code, ethics advisory committees suggested that each of the following topics should not be discussed in a judicial campaign: pre-trial release, plea bargaining, sentencing, capital punishment, abortion, gun control, equal rights amendment, drug laws, gambling laws, liquor licensing, dram shop legislation, labor laws, property tax exemptions, regulation of condominiums, court rules, prior court decisions (both of other courts and of the candidate's own court), and "for good measure, specific legal questions and hypothetical legal questions." *Id.* at 86-87. The Beilfuss/DeWitt Committee recommended a rule that proscribed candidates from making statements that appeared to commit the candidate with respect to "controversies that are likely to come before the court" but permitted, inferentially at least, statements that appeared to commit the candidate with respect to "issues" that were likely to come before the court. It may be questioned whether candidates can reasonably be expected to distinguish the permissible from the impermissible under such a rule.

An additional concern is the chilling effect on speech created by rules that are broadly stated. Judge Richard Posner has written: "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. The roots of both principles lie deep in our constitutional heritage." *Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224, 227 (7th Cir. 1993). Requiring judicial candidates to reconcile these principles on the hustings on the basis of rules as broadly stated as the ABA rules may disserve both the candidates and the public.

4. *What rule, if any, should be adopted with respect to campaign speech regarding decisions of a sitting judge? Decisions of an appellate court? Should the code contain a hortatory provision that ideally a candidate should restrict his or her comments on the record of an opponent to matters which are clearly relevant to integrity, impartiality, judicial temperament, legal ability, or industry?*

Comment: Is there a need for specific rules respecting candidate comment on the performance of a sitting judge? Are sitting judges especially vulnerable to unfair or misleading campaign attacks? Do the rules governing comment by judges unfairly constrain candidates who are judges from countering attacks by non-judge opponents? Is the public interest in the fair and impartial administration of justice so likely to be compromised by misleading or otherwise unfair attacks on sitting judges as to justify rules governing attacks on sitting judges that would inevitably be seen as incumbent-biased?

Like the issues raised in item 4, this set of related issues implicates the tensions between reasonably informing the electorate of differences between candidates and the need to preserve judicial independence and impartiality, qualities no less important in an elected judiciary than in an appointed one. These issues also involve the problem of fashioning rules that do not unfairly or artificially favor or disfavor incumbents. AJS' *ELECTING JUSTICE* noted: "Sitting judges are constrained by ethics rules from engaging in *ex parte* communications or commenting on pending or impending cases, and by more general injunction to maintain the integrity, independence and impartiality of the judiciary. Consequently, they are often foreclosed, or believe themselves foreclosed, from discussing their own records in office, either in a positive way or in response to criticism. In reality, sitting judges can say quite a lot about their records in office. . . It is true, nonetheless, that sitting judges labor under a disadvantage when they are criticized for their actions in pending or impending matters." *Id.* At 83.

Unpopularity of a particular judicial decision is never relevant to the desired judicial qualities of integrity, impartiality, judicial temperament, legal ability or industry. Although it may be possible to point to a judge's decisions which taken together demonstrate a judicial philosophy with which an opponent can legitimately differ, this will be rare.

5. *Should rules governing judicial election campaign conduct address candidate representations that, though true, are misleading or otherwise unfair? Should rules address judicial campaign rhetoric focused on legislative or executive branch issues, i.e., issues constitutionally committed to branches of government other than the judiciary? Should candidates be*

*prohibited from announcing their views on disputed political issues?*

> Comment: The ABA Model Code does not require "fairness" in judicial campaigns, only that candidates not "knowingly misrepresent" facts concerning the candidate or his or her opponent. Even truthful statements, however, can be seriously misleading, through incompleteness, innuendo, or otherwise. When the electorate is misled, the electorate is disserved, whether the misleading occurs through conscious false statement or carefully crafted half-truths, smears, irrelevancies, or distortions. One form of misleading irrelevancy is judicial campaigning on political issues constitutionally committed to other branches of government, especially the legislature. The voters may be misled "into believing that these views are relevant, and thus a legitimate basis upon which to choose between candidates. . ." *ELECTING JUSTICE* at 85. On the other hand: "It could also be argued that restrictions on legal and political debate cut off discussion that could enliven judicial campaigns. No one suggests that liveliness be purchased at any cost, but restrictions on legal and political debate arguably exacerbate the already serious problem of voter apathy in judicial elections. Set against these concerns is the state's interest, and indeed the public interest, in preserving the independence and integrity of the judiciary, and in assuring that the electorate is not misled about the nature of the judicial office." *Id*. At 86.

6. *Should rules governing judicial election campaign conduct address campaign rhetoric likely to confuse the public concerning the proper roles of judges and lawyers in the American adversary system of justice?*

> Comment: This issue is related to the preceding set of issues. Should a judicial candidate be able to campaign against an opponent on the ground that the opponent, as a lawyer, represented people accused of crime? Or campaign against a sitting judge on the ground that the judge released a defendant on bail or found a defendant in a serious crime case incompetent to stand trial? Examples abound of judges being assailed for doing what judges are supposed to do, i.e., following the law.

7. *Should rules governing judicial election campaign conduct require that candidates disclaim misrepresentations made through*

*independent expenditures? Should reasonable monitoring of representations through independent expenditures be required?*

> Comment: Candidates may scrupulously avoid misrepresentations during a campaign but nonetheless benefit from misrepresentations made through independent expenditures. The misrepresentations may relate either to the candidate or to the candidate's opponent or both. To the extent the electorate is deceived, whether by a candidate or her agents or by others acting independently, the public interest is impaired. The issue is whether judicial candidates should be expected to monitor public representations made through independent expenditures and to disclaim those the candidate knows to be false.

## Issues Concerning Other Political Activity

In analyzing issues of "Other Political Activity" in the context of judicial elections, the commission considered two categories: (1) Political Activities, and (2) Campaign Activities.

### I. Political Activities:

### A. Political Organizations

*1. Should judges and judicial candidates be prohibited from [a] membership in a political party during the term of office or when a candidate; [b] office holding or leadership of a political party during the term of office or when a candidate; or [c] active participation in the affairs of a political party during the term of office or when a candidate?*

> Comment: Regarding political activities by judges, the AJS monograph is instructive: "No area of judicial campaign conduct has been more difficult to regulate, or more lacking in regulatory consensus. Disagreements have come at all levels: on how much political involvement is ideal, on how much involvement must realistically be tolerated, on what exactly is "political", and on what set of rules will best reflect those ideal or tolerated levels of political involvement. . . Even states with similar selection systems vary markedly in what actions they

prohibit in the cause of restricting 'political activity.'" *ELECTING JUSTICE* at 100.

The issues raised above relate to [a] restrictions on membership, leadership, and active participation in the affairs of political parties and [b] whether restrictions, if any, should apply to both judges and other judicial candidates, and [c} whether restrictions, if any, should be limited to campaign times. Wisconsin's 1967 Code of Judicial Ethics forbade party membership, participation in party affairs, making or soliciting contributions in support of party causes, and public support of candidates and platforms. SCR 60.14. The Beilfuss/DeWitt committee recommendations in large measure replicated the 1967 Code, except that they permitted [a] public endorsement of and opposition to other candidates for judicial office, [b] attending political party meetings as a member of the public, [c] making contributions to judicial candidates. Additionally, the Beilfuss/DeWitt committee recommendations would permit judges and candidates, when a candidate for election, [a] to purchase tickets for and attend political gatherings, [b] to speak to gatherings on his or her own behalf, [c] to appear in media advertisements supporting his or her candidacy, and [d] to distribute campaign literature supporting his or her own candidacy.

*2. Should judges and judicial candidates be prohibited from speaking publicly on behalf of a party or party candidates?*

Comment: The 1967 Code prohibited judges [but not non-judge candidates] from "publicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platform." The Beilfuss/DeWitt committee recommendations continued the prohibitions. The 1990 ABA Code [Section 5C(a)] similarly prohibits such activities, although it permits judges and candidates subject to public election to identify themselves as members of a political party and to contribute to political organizations.

*3. Should judges and judicial candidates be prohibited from contributing to a party or its candidates? [If contributions are permitted, should the amount be regulated?]*

Comment: The 1967 Code prohibited judges [but not non-judge candidates] from making *contributions* in support of a political party's causes. The Beilfuss/DeWitt committee recommendations would have continued the

prohibitions except to permit a judge and candidate, when a candidate for election, to purchase tickets for and attend political gatherings.

*4. Should judges and judicial candidates be prohibited from attending party sponsored public meetings or partisan candidate fund raisers? From purchasing tickets as a member of the public, even if it is a fundraising event for the party? Should attending as the guest of one's spouse or other person be permissible?*

Comment: If judges are to be elected, arguably they must attend gatherings and functions that voters attend. Many judges are elected in low turnout election years and the most ardent voters are generally those involved with political parties, community groups and charitable organizations. Judicial candidates must seek endorsements from political leaders, community leaders, labor organizations, and other politically active members of the community. Many of these individuals gather at political events, non-judicial campaign events, fundraising dinners for their organization, and charitable events. "Pre-candidates" appear at these events making contacts with potential supporters and campaign workers while making contributions to the organizations. Currently, judges are substantially prohibited from engaging in these same activities.

*5. Should judges and judicial candidates be prohibited from giving speeches at events described in #4? Should there be different rules for election years and non-election years? Should speech-making be permitted so long as all candidates are invited to address the gathering?*

Comment: The current Code provides that "[e]xcept for activities concerning his or her own election, a judge shall not . . . participate in [a political party's] activities." The Note to SCR 60.06 states: "This rule does not preclude a judge from attending a political meeting as a member of the public, but he or she shall not attend as a participant." The Beilfuss/DeWitt committee and the 1990 ABA Model Code would permit judges and candidates to "speak to gatherings [presumably including political gatherings] on his or her own behalf". Party meetings are, of course, gatherings of voters. There may be no suggestion that a judicial candidate who addresses a meeting either supports the party or is endorsed by it.

**B. Civic and Charitable Organizations:**

The supreme court has not explicitly asked the Commission to consider SCR 60.05 relating to extra-judicial activities as it has with respect to SCR 60.06 relating to inappropriate political activities. The Other Political Activities committee notes, however, that there is a statutory prohibition of candidates, including candidates for judicial office, offering or making contributions to religious, charitable, or fraternal causes or organizations and of the asking and receiving of such contributions by such organizations. Sec. 11.34, Wis. Stats. Additionally, the committee notes that, subject to certain exceptions not germane here, SCR 60.05[3][c] permits judges to serve as officers, directors, trustees or nonlegal advisors of "nonprofit educational, religious, charitable, fraternal, sororal, or civic organizations." Such organizations may have controversial legal and political agendas though they would not seem to fall within the definition of "political organization" under 1990 ABA Model Code terminology, i.e., "a political party or other group, the *principal purpose* of which is to further the election or appointment of candidates to political office." (Emphasis supplied). On the other hand, issue advocacy groups, which are typically nonprofit and educational in terms of mission, may have as a principal purpose the advancing of highly controversial legal or political positions, i.e., positions having widespread opposition within the electorate. It may be that the general rule stated in SCR 60.05(1), requiring a judge so to conduct his or

her extrajudicial activities so they do not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties, is sufficient. On the other hand, issues similar to the political party issues may exist as to other groups which are significantly though not primarily political in nature or purpose. As used below, the terms "civic or charitable organization" refers to organizations whose principal purposes do not include advancing particular legal or political agendas and which do not generate widespread opposition. "Interest groups" refers to organizations that, although nonprofit, educational, religious, charitable, etc. under SCR 60.05[3][c], have as a principal purpose the advancing of controversial legal or political agendas.

*1. Should judges and judicial candidates be prohibited from [a] membership in civic or charitable organizations during the term of office or when a candidate; or [b] holding office or a leadership position of civic or charitable organizations during term of office or when a candidate; or [c] active participation in the affairs of a civic or charitable organization during term of office or when a candidate? Should any such prohibition obtain with respect to interest groups?*

*2. Should judges and judicial candidates be prohibited from speaking publicly on behalf of civic or charitable organizations or their goals and activities? On behalf of interest groups or their goals and activities?*

*3. Should judges and judicial candidates be prohibited from contributing to civic or charitable organizations beyond the prohibition stated in sec. 11.34, Stats.? To interest groups?*

*4. Should judges and judicial candidates be prohibited from participating in fundraising activities of civic or charitable organizations? Of interest groups?*

*5. Should judges and judicial candidates be prohibited from giving speeches at events described in #4?*

*6. Should judges and judicial candidates be prohibited from attending events described in #4? From purchasing tickets as a member of the public, even if it is a fundraising event? Should attendance as the guest of one's spouse or other person be permitted?*

*7. If the activities of judges and judicial activities with respect to interest groups is to be subject to rules of judicial conduct, how should "interest group" be defined?*

### C. Holding Nonpartisan Offices:

1. *Should municipal judges be permitted to hold other nonpartisan offices while serving as part-time municipal judges.*

## II. Campaign Activities:

### A. Endorsements:

1. *Whose endorsement may be solicited or accepted by judicial candidates:*
   - *a. judges?*
   - *b. public office holders - political, nonpartisan, or both?*
   - *c. lawyers - all lawyers - those not appearing regularly before the judge?*
   - *d. interest groups?*

Comment: The current Wisconsin code is silent on these issues, nor did the 1967 code address them. The 1990 ABA Model Code prohibits endorsements by judges of candidates for other offices, including judicial offices but excluding "candidates for the same judicial office in a public election in which the judge or judicial candidate is running." The Beilfuss/DeWitt committee recommended this rule. There are no rules prohibiting soliciting or accepting endorsements by lawyers, although the Beilfuss/DeWitt committee would prohibit judges from soliciting endorsements "while engaging in official duties or while in the courthouse."

"Another questionable source of endorsements are special interest groups. Acceptance of the endorsement . . . of a group such as Right to Life may be construed as a pledge of conduct in office, and therefore place a candidate in violation of [ABA 1990 Model Code] Canon 5A(3)(d)(I). A New York State Bar Association opinion states that a judicial candidate may accept the endorsement . . . of the Right to Life Party provided he or she refrains from expressing a view on abortion and further provided that the endorsement . . . is not conditioned on the candidate's view on that topic." Shaman, Lubet, and Alfini, *JUDICIAL CONDUCT AND ETHICS* 382 (2d ed. 1995).

*2. Should a judge and a judicial candidate be permitted "personally" to seek endorsements or must the committee do so?*

Comment: The AJS monograph *ELECTING JUSTICE* is instructive:

> The American Bar Association has long taken the position that judges should be restricted in how they solicit endorsements. Although the 1924 Canons of Judicial Ethics failed to address the issue explicitly, the ABA's Committeeon Ethics and Professional Responsibility interpreted those Canons to impose some restrictions. . . . Adumbrating regulations to come, the same panel suggested that: "Ordinarily a judge should stand on his official record *and leave the promotion of his candidacy to others."* In 1965 the Committee found it improper for a judge to approach lawyers with pending cases, or to use official stationery in the solicitation effort.
>
> In 1972, the drafters of the Model Code of Judicial Conduct codified the suggestion that candidates leave the promotion of their candidacies to others:
>
> > A candidate … should not himself … solicit publicly stated support, but he may establish committees of responsible persons … to obtain public statements of support for his candidacy.
>
> *Id.* At 96
>
> The 1990 ABA Model Code, Canon 5C(1)(b) prohibits judicial candidates, judges and nonjudges, from personally soliciting publicly stated support.
>
> The Beilfuss/DeWitt committee recommended that candidates be permitted personally to solicit endorsements, but not contributions. The proposed rule restricted the solicitation of endorsements to "a reasonable period of time before and after" the election and prohibited judges, but not nonjudge candidates, from soliciting endorsements "while engaging in official duties or while in the courthouse."

3. *Should a judge and a judicial candidate be permitted to endorse and/or make speeches on behalf of:*

*a. judicial candidates?*

*b. nonpartisan, non-judicial candidates?*

*c. partisan candidates?*

*Does the concept of endorsement need to be defined? Should there be any restriction on a judge's or judicial candidate's signing of nomination papers of the types of candidates listed above?*

> Comment: The 1990 ABA Model Code prohibits candidates from publicly endorsing or publicly opposing another candidate for public office except to permit judges and other candidates, when a candidate for election, to publicly endorse or oppose "other candidates for the same judicial office in a public election in which the judge or judicial candidate is running." The Beilfuss/DeWitt proposal would prohibit public endorsement or opposition of "another candidate for *any nonjudicial* office".
>
> "In states that explicitly prohibit or restrict endorsements, the real problem has been to determine what constitutes an "endorsement." A public statement of support for another candidate clearly qualifies, but less direct statements, and some actions, can constitute endorsements as well. Advisory bodies appear to agree that a judicial candidate's simple appearance at a political function held for another candidate does not constitute an improper endorsement, but any greater involvement has raised objections. . . Between the extremes of passive attendance and active participation in the campaign events of others lies a large gray area of activity whose ethical status remains uncertain." *ELECTING JUSTICE* at 95.

5. *Should a judge and a judicial candidate be permitted to make contributions to:*

*a. judicial candidates?*

*b. nonpartisan-non judicial candidate?*

c. *partisan candidates?*

> Comment: The 1990 ABA Model Code permits judges and candidates for public election to contribute to political organizations, identify himself or herself as a member of a political party, and purchase tickets for and attend political gatherings. The Beilfuss/DeWitt committee recommendation was

considerably narrower, permitting judges and candidates, only when a candidate for election, to purchase tickets for and attend political gatherings and to speak to gatherings on his or her own behalf.

*6. Should applicants for appointment to a judicial vacancy be bound by any regulations or prohibitions?*

Comment: The Beilfuss/DeWitt proposal prohibited candidates for appointment to judicial office from soliciting or accepting funds to support the candidacy. Additionally, it prohibited "any political activity to secure the appointment" except to permit communications *by the candidate* to the appointing authority and screening committees, and seeking support from *organizations* that regularly make recommendations for appointment. Support could be sought from *individuals* only "to the extent requested or required by" the appointing authority or screening committee. Information concerning the qualifications of the candidate for the judicial office sought could be provided *only* to the appointing authority, screening committee, organizations regularly making recommendations to the appointing authority, and individuals as requested or required by the appointing authority, screening committee, or organization regularly making recommendations. These recommendations parallel the 1990 ABA Model Code provisions.

The Beilfuss/DeWitt committee rejected the Model Code provisions that permitted *non-judge* candidates for appointment to retain an office in a political organization, attend political gatherings, and continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions. The committee Commentary on the rule noted that the change was intended "to insure that all candidates, judicial and nonjudicial, have the same restrictions on their political activities when they become candidates for judicial appointment."

7. *Should a judge be permitted to endorse or write a letter of support on behalf of an applicant for judicial appointment.*

*8. What, if any, prohibitions should be placed on a judge and a judicial candidate whose spouse or family member is seeking or holds a partisan or nonpartisan elected office.*

*9. Should the Code (1) prohibit a judge or justice from becoming a candidate for a non-judicial office during the term for which elected, and (2) prohibit a judge from becoming a candidate for a non-judicial elective office without first resigning his judgeship?*

> Comment: Issue 9(1) derives from Article VII, section 10 of the Wisconsin Constitution, which prohibits a judge from *holding* any other office of public trust, except a judicial office, during the term for which elected. *See* State v. McCarthy, 255 Wis. 234, 38 N.W.2d 679 (1949) and State *ex rel* Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946). Issue 9(2) appears in present SCR 60.06(1), in Canon 5(2)A(2) of the DeWitt-Beilfuss Proposal, and in Canon 5A(2) of the 1990 ABA Model Code.

## Common Issues

1. *Should rules governing judicial elections be located in a separate chapter of the Supreme Court Rules?*

> Comment: It may be desirable to locate all the rules governing judicial elections in one chapter of the Supreme Court rules, not only for ease of reference, but also to permit publication in pamphlet form for candidates and committee. Currently, most rules are found in the Rules of Judicial Conduct, but some rules are found in the Rules of Professional Conduct for attorneys. [non-lawyer, non-judge candidates]

2. *Should rules governing judicial election be restricted to rules having the force of law or should they include hortatory or aspirational statements, e. g., voluntary guidelines for contributions and expenditures, rules of civility for judicial campaigns and restatement of standards akin to those found in the former SCR 60.01 (Characteristics of an ideal judge)?*

> Comment. In light of the threat of politicization of judicial elections, it may be desirable to include

aspirational statements among rules governing conduct in judicial campaigns. The court has recently promulgated standards of professional civility for attorneys. The 1967 Code of Judicial Ethics contained an initial section that set forth the "significant qualities of an ideal judge," many of which relate significantly to campaign conduct. (SCR 60.01 (1967)) For example, SCR 60.01(1) provided that "A judge should be mindful that ours is a government of law and not of men and should not permit his or her personal concept of justice override the law. SCR 60.01(9) urges a judge to act with dignity and decorum, while sub. (10) contemplates "scrupulous adherence to the rules of fair play" and sub. (12) warns against extreme, peculiar, spectacular, or sensational conduct. Although violation of the standards found in SCR 60.01 was not subject to sanctions unless "aggravated or persistent", the standards served as reminders to judges (and candidates for judicial office) of how judges are to comport themselves. Including appropriate hortatory or aspirational standards in rules governing judicial elections may tend to raise the level of campaign conduct in such elections.

*3. Should rules governing judicial elections apply with equal vigor to all candidates, i.e., those who are incumbent judges, those who are lawyers, and those (in municipal elections} who are neither judges nor lawyers? Should the rules apply equally to successful and unsuccessful candidates?*

Comment: Currently, some rules apply to candidates who are judges but not to candidates who are non-judge lawyers. Candidates who are lawyers are subject to SCR Ch. 20, including SCR 20:8.2(b) and 8.4, but non-lawyers are not. Even the rule that appears to "level the playing field" for judge and non-judge lawyer candidates does so only partially and inadequately. SCR 20:8.2(b) requires lawyer candidates for judicial office to "comply with the *applicable* rules of the code of judicial conduct." The code of judicial conduct defines "candidate" as persons seeking election or appointment to judicial office, whether an incumbent judge or not. Some restrictions, however, apply by their terms only to judge candidates even though the policy or policies sought to be forwarded appear to require compliance by any candidate for judicial office. For example, only candidates who are judges are forbidden to make promises or suggestions

of conduct in office which appeal to cupidity or partisanship or to do anything which appears to commit the judge in advance with respect to any particular case or controversy (SCR 60.06(3)). The public interest justifying the rule is found in the need for both the fact and the appearance of integrity and impartiality in the judiciary. No reasonable basis seems to justify treating judge and nonjudge candidates differently with respect to "promise or commit" rules.

There are related issues that appear to be beyond the mandate of the Commission relating to the appropriate locus of enforcement authority for judge candidates, lawyer candidates, non-judge and non-lawyer candidates, and non-candidates making independent expenditures (single issue committees, other advocacy groups and individuals). Section 757.83, Wis. Stats., provides that the Judicial Commission has jurisdiction to investigate and prosecute cases of misconduct by judges and court commissioners. Professional misconduct by attorneys, including violations of SCR 20:8.2[11] and 8.4[12], are within the jurisdiction of the Board of Attorneys Professional Responsibility. Actions to recover civil penalties for violation of chapter 11 may be brought by either the Elections Board or the district attorney of the county where the violation is alleged to have occurred.

> "Although the campaign regulations in most judicial ethics codes apply by their terms to *all* judicial candidates, this does not always work out in practice. Judicial ethics codes are enforced by judicial conduct organizations, many of which, by statute or internal regulation,

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[11] **SCR 20:8.2 JUDICIAL AND LEGAL OFFICIALS.** (a) 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 officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

[12] **SCR 20:8.4 MISCONDUCT.** It is professional misconduct for a lawyer to:

[a] violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . .

[c] engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

. . .

[f] violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers; or

[g] violate the attorney's oath.

> exercise jurisdiction only over sitting judges. Consequently, non-judge candidates who fail in their election efforts, and thus never reach the bench, are never within such organization's jurisdiction. Even non-judge candidates who *are* elected may escape the organization's jurisdiction because it may lack jurisdiction for a judge's pre-bench conduct. Lawyer candidates, whether elected or not, will be subject to the code of conduct for lawyers, but not all of these codes require that lawyers adhere to the judges' code when they run for judicial office. Without such a provision, non-judge candidates are limited by only a few basic rules to tell the truth and obey the law. Even *with* such a provision, lawyer discipline for campaign conduct is exceedingly rare.

Patrick M. McFadden, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 116-17 (1990).]

4. *Should rules governing candidate in judicial elections apply with equal vigor, insofar as they may be applicable, to candidates for appointment to judicial office?*

Comment: Under current rules, judges may not be a member of a political party or participate in a party's affairs or activities, "except for activities concerning his or her own election." A judge who is a candidate for appointment to another judicial office by the governor is provided no guidance by the current rules as to permissible activity in connection with seeking the appointment. The ABA Model Code permits a non-judge candidate for judicial appointment to hold office in a political organization, attend political gatherings, and to pay ordinary assessment and make ordinary contributions to a political organization, activities forbidden to a judge candidate. The Beilfuss-DeWitt Committee, on the other hand, recommended that candidates for appointment to judicial office be forbidden to engage in any political activity to secure the appointment, except for communications with the appointing authority and a selection, nomination or screening committee, and seeking support from *organizations* that regularly make recommendations for appointments. Support could be sought from *individuals* only to the extent requested or required by the appointing authority or a selection, nomination, or screening committee.

The Commission awaits further instruction from the court.

Dated at Madison, Wisconsin this ____ day of October, 1997.

Respectfully submitted,

Hon. Thomas E. Fairchild
Commission Chairperson