The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution
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Abstract

Candidates for judicial office looked to the Canons of Judicial Ethics for the appropriate behavior expected of a candidate during a judicial campaign. Canons 30 and 32 require candidates to remain free from an appearance of influence by those who have contributed to the campaign. The difficulty in complying with the need to raise money and to remain free from the appearance of influence led to the adoption of the Code of Judicial Conduct in 1972. Canon 7B(2) bars candidates from solicitation and acceptance of campaign contributions. The Note examines the ambiguities surrounding Canon 7B(2), and conducts a survey of judges for their reaction to Canon 7B(2). Lastly, the Note proposes a resolution that would adequately blend the candidate’s need to fund his campaign and the requirement that he maintain the appearance of impartiality.

KEYWORDS: Code of Judicial Conduct Canon 7B(2), judicial campaign

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THE ETHICAL DILEMMA OF CAMPAIGNING FOR JUDICIAL OFFICE: A PROPOSED SOLUTION*

1. Introduction

Judges in the United States have been guided by formal ethical standards since the American Bar Association (ABA) adopted the Canons of Judicial Ethics (the Canons) in 1924.1 The aim of the drafters in adopting the Canons was to set forth the views of the ABA "respecting those principles which should govern the personal practice of the members of the judiciary in the administration of their office."2

Under the Canons,3 a candidate for judicial office, whether an incumbent or a lawyer seeking judicial office for the first time,4 looked to the provisions of Canons 30 and 32 for the appropriate behavior expected of a candidate during a judicial campaign.5 Chiefly, these Canons attempted to alleviate the tensions that arise during

* We would like to thank the Stein Institute of Law & Ethics and its Director, Professor Joseph Perillo, for their assistance and guidance in the preparation of this Note.
1. MODEL CANONS OF JUDICIAL ETHICS (1924).
2. Id. Preamble.
3. The Canons of Judicial Ethics have been superseded by a new set of ethical guidelines, but are discussed at this point to set out the foundations upon which the present ethical standards have been built. See infra notes 12-20 and accompanying text for a discussion of the new guidelines.
Although the political activity canon of the ABA Canons of Judicial Ethics did not expressly provide for application to incumbents as well as to other candidates, Formal Opinion 226 did declare that the canon should apply to both. Id. The distinction between an Informal Opinion and a Formal Opinion is that an Informal Opinion responds to a specific inquiry raised by a particular set of facts, and a Formal Opinion sets forth a discussion that the Standing Committee on Ethics and Professional Responsibility of the ABA finds is of special interest to the Bar.
ABA INFORMAL ETHICS OPINIONS Introduction at 2 (1975).
5. Canon 30 stated:
Candidacy for Office
A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.
While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office.
campaigns for judicial office. A candidate for such office must raise funds for his campaign yet remain free from any appearance of impropriety or influence by those who have contributed to his campaign. As a result, a candidate is often caught between the requirements of judicial ethics and the realities of the democratic machinery. The Canons did not explicitly address this conflict, and consequently, they proposed no solution. As one justice stated, "[i]t 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."

By 1969, the consensus in the legal community was that the Canons were no longer effective and were not representative of a society other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should 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 or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

MODEL CANONS OF JUDICIAL ETHICS Canon 30 (1935).

Canon 30 stated:

Gifts and Favors
He [a judge] should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

MODEL CANONS OF JUDICIAL ETHICS Canon 32 (1937).

6. See generally ABA Comm. on Professional Ethics and Grievances, Formal Op. 139 (1975) ("A judge should refrain from using or appearing to use the power or prestige of his office to promote his candidacy for office. In every particular a judge's conduct should be above reproach.").

7. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 98 (1973) (Wayne Thode was the Reporter for the Special Committee that was responsible for drafting the Model Code of Judicial Conduct) [hereinafter cited as REPORTER'S NOTES]; see also Armstrong, Standards of Judicial Conduct, 18 TENN. B.J. 46, 52 (1982); Scott, Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?, 57 WASH. L. REV. 119, 135 (1981-82).


9. REPORTER'S NOTES, supra note 7, at 98. But see ABA Comm. on Professional Ethics and Grievances, Formal Op. 226 (1941) ("It would also be preferable that such contribution be made to a campaign committee rather than to the candidate personally"). ABA Formal Opinion 226 was the only formal statement issued by the ABA suggesting how a candidate for judicial office could comply with the Canon's requirement against creating an appearance of partiality.

10. Anderson, supra note 8, at 823.
that was beginning to place an increasing emphasis upon professional responsibility.\textsuperscript{11} As a result, a new set of ethical guidelines, with an emphasis on maintaining the independence and integrity of the judiciary,\textsuperscript{12} was adopted in 1972 by the ABA as the Code of Judicial Conduct (CJC).\textsuperscript{13} The guidelines and requirements set out in the CJC are intended as minimum standards, not as maximum requirements.\textsuperscript{14} The CJC has been adopted in forty-seven states and in the District of Columbia in substantially the same form as it was adopted by the ABA.\textsuperscript{15}

Canon 7B(2) of the CJC regulates the financing of a campaign for judicial office. It provides:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit


\textsuperscript{12} \textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 1 (1972). Canon 1 states:

\begin{quote}
A Judge Should Uphold the Integrity and Independence of the Judiciary An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.
\end{quote}

\textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 1 (1972); see also Note, \textit{ Judges—Standards of Judicial Conduct—In re De Saulnier—Mass.—279 N.E.2d 296, 6 SUFFOLK U.L. REV. 1113, 1121 (1972); Seymour, \textit{The Code of Judicial Conduct from the Point of View of a Member of the Bar}, 1972 \textit{UTAH L. REV.} 352 (Whitney Seymour was Vice Chairman of the Special Committee responsible for drafting the Model Code of Judicial Conduct).}

\textsuperscript{13} \textit{MODEL CODE OF JUDICIAL CONDUCT} (1972).

\textsuperscript{14} The preface to the \textit{Model Code of Judicial Conduct states in part:}

\begin{quote}
[T]he accompanying text setting forth specific rules, and-the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement.
\end{quote}

\textit{MODEL CODE OF JUDICIAL CONDUCT Preface} (1972); see also \textit{ETHICS FOR JUDGES} (Fretz ed. 1973).

\textsuperscript{15} The following states have adopted some form of the ABA Model Code of Judicial Conduct: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. For a complete discussion of the specific treatment of the Model Code of Judicial Conduct by each state, see \textit{infra} notes 105-55 and accompanying text.
publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary

Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate. [Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]16

The goal of this provision is to resolve the dilemma between the candidate's need to raise campaign funds and his need to remain unbiased, "the greatest of all conflicts between political necessity and judicial impartiality."17 The drafters felt that by allowing the candidate,18 through his campaign committee, to solicit and accept campaign funds, the pressures of campaigning for judicial office would be alleviated to some degree.19 In addition, the provision requiring the committee to keep the list of contributors concealed from the candidate would insulate the candidate from the appearance of impropriety.20

This Note describes the development and application of Canon 7B(2) of the ABA Model Code of Judicial Conduct.21 It also discusses

16. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972).
17. REPORTER'S NOTES, supra note 7, at 98; see supra notes 6-9 and accompanying text.
18. The Model Code of Judicial Conduct also provides guidelines for an incumbent judge who is running in a retention election or unopposed election when his candidacy has drawn opposition. Canon 7B(3) states: "An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2)." MODEL CODE OF JUDICIAL CONDUCT Canon 7B(3) (1972).
19. REPORTER'S NOTES, supra note 7, at 99.
21. See infra notes 25-82 and accompanying text.
state adoption, modification and enforcement of Canon 7B(2). This Note then discusses the results of a survey sent to elected judges regarding judicial campaign conduct. Finally, this Note recommends that a revision of Model Canon 7B(2) be adopted by the ABA to respond to the concerns raised by the respondents to the survey and to incorporate various modifications adopted by individual states in their codes of judicial conduct.

II. The Scope and Application of Canon 7B(2)

Canon 7B(2) of the CJC explicitly prohibits a candidate for judicial office from soliciting or accepting campaign funds and from soliciting publicly stated support. The focus of this Note is upon the first two prohibitions of Canon 7B(2), solicitation and acceptance of campaign contributions. These two prohibitions raise such issues as: (1) how a candidate for judicial office may raise funds for his campaign while complying with Canon 7B(2), and (2) how ethics commissions can enforce sanctions against losing candidates, as well as against prevailing candidates, if the provisions of the Canon have been violated. In response to these issues, various resolutions have been proposed by jurisdictions that have found the ABA approach difficult to implement.

A. Prohibitions Against the Candidate Soliciting and Accepting Campaign Contributions

A candidate for judicial office is expressly prohibited by Canon 7B(2) from personally soliciting and accepting campaign contributions.

22. See infra notes 83-190 and accompanying text.
23. See infra notes 191-279 and accompanying text.
24. See infra notes 280-302 and accompanying text.
25. For the full text of Canon 7B(2), see supra note 16 and accompanying text. The discussion herein is based upon the Model Code of Judicial Conduct's Canon 7B(2), as adopted by the ABA. The ABA version is used as a model, with reference to the individual treatment of Canon 7B(2) by the various states as examples of its scope and application. For a discussion of Canon 7B(2) as adopted in each state, see infra Section III.
26. For a discussion of these prohibitions, see infra notes 30-43 and accompanying text.
27. For a discussion of acceptable behavior permitted while the candidate is raising funds for a campaign, see infra notes 41-43 and accompanying text.
28. For a discussion of the ability of ethics commissions to enforce Canon 7B(2), see infra notes 174-90 and accompanying text.
29. For a discussion of these resolutions, see infra notes 69-82 and accompanying text.
The purpose of such a provision is to "insulate the judge [or candidate] from suspicion of partiality were he to directly request and receive funds from lawyers, persons likely to be involved as plaintiffs and defendants in court proceedings, and political organizations." These proscriptions, because of the delicate nature of the conflict involved, have been the focus of many ethics committee opinions and bar association guidelines. While most of these opinions and guidelines reiterate the prohibitions found in Canon 7B(2) of the CJC, some committees have elaborated by providing definitions and examples of the scope and applicability of Canon 7B(2). For example, one bar association prohibits the candidate's campaign committee from accepting a contribution from an attorney, if that committee has knowledge that the contributor has cases pending before the candidate. That same guideline, how-

32. See supra notes 6 and 7 and accompanying text for a discussion of this conflict.
34. See, e.g., California Judges Ass'n, Suggested Guidelines, reprinted in AJS Resource Material, supra note 31, at 3 ("[s]olicitation and collection of funds for campaigns should be handled by representatives or committees for the candidates rather than by the candidates themselves"); Commonwealth of Pennsylvania Judicial Inquiry and Review Board, Guidelines to Ethical Conduct in Judicial Campaigns, reprinted in AJS Resource Material, supra note 31, at 2 ("proscribes solicitation and acceptance of funds personally by candidates").
ever, would allow the committee to solicit contributions from lawyers who may, from time to time, appear before the candidate. Another ethics committee has defined the word "solicitation" broadly to encompass "any request for contributions, including a person-to-person appeal as well as a public advertisement." 

It follows from these opinions, guidelines and the CJC, that to remain in full compliance with Canon 7B(2), a candidate for judicial office may not attend a fund raising event held on his behalf if he has been involved in any way with the planning of the event. However, in order to determine what will or will not be accepted as appropriate behavior during an election campaign, one must look to the particular facts and circumstances of the specific situation at issue. For example, if the candidate assists in compiling a list of guests to attend a fund raiser for the purposes of securing contributions for his campaign, or he is personally in contact with potential contributors, either by mail or by phone, such activity will be deemed solicitation and the candidate will be in violation of Canon 7B(2) of the CJC. Such an ethical violation could result in a written public reprimand of the candidate, and furthermore, the candidate could be required to reimburse the state for the costs of the proceedings brought against him.

B. The Campaign Committee

In order to achieve a system where a candidate for judicial office is not subject to the political pressures of campaigning, the CJC

37. Id.
40. ABA Formal Opinion 226 states: “[i]t clearly appears that the answers to the questions propounded [regarding permissible campaign behavior] depend primarily upon the facts of each particular case.” ABA Comm. on Professional Ethics and Grievances, Formal Op. 226 (1941).
43. In re Inquiry Concerning A Judge, 402 So. 2d 1144 (Fla. 1981) (direct
provides that while a candidate himself is forbidden from soliciting and accepting campaign contributions,¹⁴ he is allowed to set up a committee of "responsible persons" to solicit and manage the candidate's campaign funds.¹⁵ To avoid any appearance of partiality, the committee, not the candidate, is required to solicit and collect all of the contributions.¹⁶ To the extent permissible by law, the committee should not reveal to the candidate the names of the contributors to the candidate.¹⁷

Requiring the candidate for judicial office to establish a committee to solicit and manage his campaign funds effectively bars him from attending a fund raiser, or similar event, on his own behalf where any part of the price of admission will be donated to his campaign. If the candidate were present at such a function, he would discover the identities of many, if not all, of the contributors to his campaign and thereby defeat the purpose of the prohibition.¹⁸ By contrast, a candidate for judicial office is not prohibited from soliciting or accepting campaign contributions from the immediate members of his family; he may accept these contributions without the buffer of a campaign committee.¹⁹

In addition to the requirements and prohibitions of Canon 7B(2),

solicitation of election support resulted in public reprimand and order to pay $3,000 to the state of Florida in partial reimbursement for the costs of the proceedings).¹⁴⁴ For a discussion of these prohibitions, see supra notes 30-38 and accompanying text.

¹⁴. See supra note 30-38 and accompanying text.

¹⁵. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972); see supra note 16 and accompanying text.


¹⁷. MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 7B(2) (1972).

¹⁸. Whether this prohibition reflects the true state of judicial campaigns as they are presently run is the focus of the survey conducted by the authors. For a complete analysis of the results, see infra Section IV.

several ethics opinions address the issue of what should be done with any excess contributions which remain after the costs of the election have been fully paid. For example, Michigan requires a candidate to refund the contributions to the donors or to contribute the funds to the Client Security Fund of the Michigan State Bar. The candidate may not contribute the excess to a charitable organization of his choice. In Missouri, a judge is required to return any excess funds to the contributors on a pro rata basis. Presumably, the judge is required to return the funds through his campaign committee, since compliance with Canon 7B(2) requires the judge’s campaign committee not only to retain the names of the contributors after the election, but also to continue to conceal them from the judge.

C. Application of Canon 7B(2) to Candidates and Incumbents

The CJC requires all “judges” to comply with its provisions, with limited exceptions for part-time, pro tempore and retired judges. Canon 7 is the only Canon that extends its compliance requirements beyond the scope of “judges,” as defined by the CJC, by requiring that “a candidate, including an incumbent judge, running for judicial office” comply with the provisions stated therein. Compliance with Canon 7B(2) is mandated by the ABA Model Code of Professional

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54. Obviously, the appearance of partiality is no longer an issue applicable to a candidate who has waged an unsuccessful campaign.
55. The Compliance provision of the Model Code of Judicial Conduct states that:
   Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code. . . .
   MODEL CODE OF JUDICIAL CONDUCT Compliance provision (1972). Subdivisions (A), (B) and (C) of the Compliance provision make limited exceptions for the Model Code of Judicial Conduct’s application to a “Part-Time Judge,” a “Judge Pro Tempore” and a “Retired Judge,” respectively, as they are defined in that provision.
   Id.
56. See supra note 55.
57. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972).
Responsibility and the Model Rules of Professional Conduct. Ethics opinions and guidelines are also in accord with the model provisions, requiring candidates for judicial office, including incumbents, to comply with Canon 7B(2). A major concern voiced by many judges is whether Canon 7B(2) is enforceable against an unsuccessful candidate in a judicial election. This issue has been resolved to a great degree by the codes and rules that require a lawyer running for judicial office to comply with Canon 7B(2) of the CJC. The fear that a commission policing judicial conduct will not have jurisdiction over an unsuccessful candidate for judicial office is alleviated by the provisions stated in the ABA Model Code of Professional Responsibility or the Model Rules of Professional Conduct. The appropriate bar association will have jurisdiction over the losing candidate, presuming the candidate is an attorney, in the event that a judicial conduct commission does not. Additionally, public opinion will be an active incentive to the candidate


59. Rule 8.2(b) states: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct." Model Rules of Professional Conduct Rule 8.2(b) (1983).


61. See infra notes 261-67 and accompanying text for a complete discussion of this concern raised by many of the respondents to the survey conducted by the authors; see also Brooks, Campaigning for Judicial Office: A Review of the Ethical Constraints 139 (1985) (unpublished lecture, available at the Fordham Urban Law Journal Office).


63. See infra notes 156-90 and accompanying text for a discussion of the jurisdiction and authority of these commissions in each state.


to remain within the permissible bounds of the campaign financing provisions of the CJC.\textsuperscript{66} The drafters of the CJC suggested that "[t]he very threat of a public statement that a candidate for judicial office is violating Canon 7 may induce the candidate to comply."\textsuperscript{67} However, it is the belief of many incumbent judges that this issue has been resolved in theory only and that, in reality, losing candidates are not bound by Canon 7B(2).\textsuperscript{68}

D. Variations on a Theme—Attempts to Amend Canon 7B(2)

The costs of campaigning for judicial office have reached exorbitant heights.\textsuperscript{69} Unless a candidate is capable of financing his campaign from personal funds, it is virtually impossible for him to run for judicial office without seeking financial support from his constituency. It is unrealistic to presume that a candidate will not personally solicit or accept campaign contributions and will not learn the names of his contributors.\textsuperscript{70} California has responded by suspending Canon 7B entirely from its Code of Judicial Conduct.\textsuperscript{71} Other jurisdictions have attempted to enact variations of Canon 7B(2) which take into account both the candidate's need to raise substantial funds for a campaign, as well as the countervailing aims of remaining impartial and independent.\textsuperscript{72}

The Detroit Bar Association proposed the "Fair Plan," which

\begin{itemize}
\item only will have jurisdiction over candidates who are lawyers. This does not include lay magistrates. \textit{Id.}
\item 66. \textit{REPORTER'S NOTES, supra note 7}, at 96; Thode, \textit{The Development of the Code of Judicial Conduct, 9 SAN DIEGO L. REV. 793, 802 (1972).}
\item 67. Thode, \textit{The Development of the Code of Judicial Conduct, 9 SAN DIEGO L. REV. 793, 802 (1972).}
\item 68. See \textit{infra} notes 261-267 and accompanying text for a discussion of this concern raised by many of the judges who responded to the survey conducted by the authors.
\item 69. For a complete discussion of these costs, see \textit{Emperor's Clothes, supra note 39. See also N.Y. Times, Oct. 19, 1985, at B6, col. 1 ("[j]legal researchers say judicial campaign costs have soared recently in New York, Texas, Ohio, Pennsylvania, Alabama, Oregon, Florida and most of the 31 other states that require judges to face voters either for confirmation of the initial appointment or for retention on the bench").}
\item 70. See, e.g., Spaeth, \textit{Reflections on a judicial campaign, 60 JUDICATURE 11, 14 (1976) ("in general, I did not know who gave me money. . . . [S]ometimes by accident, I learned of contributions by others").}
\item 71. \textit{CAL. CIV. & CRIM. CT. RULES CODE, CODE OF JUDICIAL CONDUCT (West 1981) (Canon 7B suspended, 9/21/76). In California, it was determined that there was no agency that could effectively sanction unsuccessful candidates. \textit{Emperor's Clothes, supra note 39, at 91. Presumably, this fear of the inability to enforce the provision arose out of violations by candidates and the states' subsequent inability to protect the public from such violations.}
\item 72. See, e.g., Baum, \textit{Should Judges know who gave to their campaigns?, 60 JUDICATURE 258 (1977) [hereinafter cited as Detroit Plan]; Dade County Lawyers
provided for the appointment of trustees through whom lawyers could contribute to a judicial campaign. The goal of this plan was to keep the identity of the contributor from ever being revealed to the candidate. The "Fair Plan" was to be a totally voluntary system in which the contributor would be able to label the funds he was contributing for a specific candidate, if the contributor so desired. The undesignated funds would then be distributed equally among all of the candidates. In addition, the plan provided for the imposition of a fine of five hundred dollars on the candidate in the event of a breach of anonymity by the contributor.

Another plan, adopted by one county in Florida, similarly established a "Trust Fund." The trustees of the fund were to solicit voluntary contributions from all practicing members of the bar in that county. The funds donated were to be distributed pro rata to each candidate. The "Fair Plan," however, was never adopted, and the "Trust Fund" failed soon after it was implemented. These unsuccessful attempts at revision of the present system illustrate the inability of the CJC, and each respective implementing commission, to effectively regulate and police the financing of a judicial campaign. It is time for the adoption of a uniform proposal that will successfully guide and regulate all candidates who run for judicial office.

III. State Treatment of Canon 7B(2)

Either the bar association or the highest court of most of the fifty states, as well as the Joint Committee on Judicial Administration in the District of Columbia, have adopted the ABA's Code of Judicial Conduct or its predecessor, as modified to conform with applicable

Support Qualified Judicial Candidates, 56 JUDICATURE 218 (1972) [hereinafter cited as Dade County Plan]; see also Emperor's Clothes, supra note 39, at 96-107, for a discussion of these and other plans.

73. Detroit Plan, supra note 72, at 258.
74. Id.
75. Id.
76. Id. at 259.
77. Id.
78. Dade County Plan, supra note 72, at 218.
79. Id.
80. Id.
81. See Emperor's Clothes, supra note 39, at 104-07.
82. For a complete discussion of the authors' proposal for a resolution of this problem, see infra notes 280-302 and accompanying text.
83. MODEL CODE OF JUDICIAL CONDUCT (1972).
84. MODEL CANONS OF JUDICIAL ETHICS (1924).
judicial procedures.\textsuperscript{85} The choice of whether to adopt a form of Canon 7B(2) in each of those states has depended upon both the state's judicial selection system and the adopting body's philosophy concerning appropriate judicial campaign conduct.\textsuperscript{86} Enforcement procedures have been established in most of the states that have adopted a campaign conduct provision.\textsuperscript{87}


\textsuperscript{86} See infra notes 88-155 and accompanying text.

\textsuperscript{87} See infra notes 156-90 and accompanying text.
A. State Judicial Selection Systems

Partisan popular election, nonpartisan popular election, executive appointment, legislative election or appointment, and merit selection constitute the five major judicial selection methods currently existing in the United States.88 Judges selected by partisan popular election are nominated at party conventions and primary elections, and then are elected by the people of their respective jurisdictions.99 At least eighteen states have recently selected some or all of their judges by partisan popular election.90

In nonpartisan popular elections, a candidate's name is placed on the ballot if he obtains enough signatures on a petition that he has circulated. The candidate then runs without a party designation in an election decided by the people of his jurisdiction.91 Initial selection of all or some judges at nonpartisan popular elections has recently taken place in twenty states.92

Judicial selection by executive appointment involves appointment by the chief executive of a state, often from a list of nominees submitted by a nominating commission, and is sometimes subject to the approval of a confirming body.93 The executives of at least fourteen states and the District of Columbia appoint either all or some of the judges in their respective jurisdictions.94

88. See Comment, Methods of Judicial Selection and A Viable Alternative, 3-4 SAN FERN. V.L. REV. 109, 109 (1974-75) [hereinafter cited as Methods]. Many of the survey's respondents expressed a preference for a particular selection system. See infra notes 242-48 and accompanying text. However, the purpose of this Note is to examine the practicability of Canon 7B(2) and thus, it assumes the status quo of elective systems in the United States. For treatment of the pros and cons of various judicial selection systems, see Emperor's Clothes, supra note 39, at 81-83; Methods, supra.

89. See, e.g., Methods, supra note 88, at 110.


91. See, e.g., Methods, supra note 88, at 111.

92. See Book of the States, supra note 90, at 154-55. The twenty states are Arizona, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. Id.


94. See Book of the States, supra note 90, at 154-55. The fourteen states are California, Delaware, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Utah and Vermont. Id.
Selections by the legislature are made from nominations submitted by the chief executive of a state or a judicial nominating commission. In four states, judicial selection is made in whole, or in part, by legislative appointment or election.

Under merit selection, or the "Missouri Plan," a nonpartisan nominating commission, composed of judges, lawyers and laymen, select several qualified judicial candidates and send a list of their names to an appointive power, usually the chief executive or legislature of the state. Once an individual has been appointed to the bench and has served for an initial term of one to three years, he must be approved by the voters in a nonpartisan merit retention election in order to retain his judicial position. States following the "Missouri Plan" for the selection of some or all of their judges number at least fourteen. In addition, California follows a modified "Missouri Plan" for the selection of some of its judges. However, one authority has suggested that California's selection method is, in effect, one of executive appointment. In Idaho, magistrates are appointed for an initial eighteen-month period by the District Magistrates Commission, and then must run for retention in the next general election.

In sum, there are forty-two states in which some or all of the judicial officers must stand for election, either for initial selection or for retention of their appointive positions. Thus, it is probable that a vast majority of the states have, at one time or another,

95. See, e.g., Methods, supra note 88, at 113.
96. See Book of the States, supra note 90, at 154-55. The four states are Connecticut, Rhode Island, South Carolina and Virginia. Id.
97. Missouri was the first state to adopt a merit selection plan. Frank, His Honor, the candidate, A.B.A. J., Nov. 1984 at 25, 27.
98. See id., at 27; Methods, supra note 88, at 114-15.
99. See Book of the States, supra note 90, at 154-55. The fourteen states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee and Wyoming. Id.
100. Judges of the supreme court and court of appeals are approved after, rather than nominated before, appointment by the governor, by a Commission on Judicial Appointment. However, like candidates subject to the typical merit selection system, those judges must subsequently stand for retention on a nonpartisan ballot at general elections. Book of the States, supra note 90, at 154.
101. See Methods, supra note 88, at 116 (author states that "[i]n practice, the Commission has repeatedly approved the governor's nominations").
102. See Book of the States, supra note 90, at 154.
103. See supra notes 90, 92, 99, 100, 102 and accompanying text for a list of these states.
considered the possibility of establishing judicial campaign conduct regulations.104

B. State Adoption and Modification of Canon 7B(2)

Canon 7B(2) has been adopted without modification in only eight of the forty-seven states that have adopted the Code.105 In nine other states, the model Canon has been modified only by an elimination or modification of the solicitation time limit provision.106 Such modifications are in full accordance with the intentions of the drafters of the CJC, who proposed that “[e]ach jurisdiction adopting [the CJC] should prescribe a time limit on soliciting campaign funds that

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104. The need for adoption and enforcement of ethical campaign guidelines will of course vary depending upon the type of judicial election. There is far less campaigning for merit retention elections than there is for initial selection at partisan or nonpartisan elections. See Griffin & Horan, Merit retention elections: what influences the voters?, 63 JUDICATURE 78, 84 (1979-80); Note, Analysis of Methods of Judicial Selection and Tenure, 6 SUFFOLK U.L. REV. 955, 966 (1971-72). Furthermore, even in states that have established elective judicial selection systems, many judges are initially appointed rather than elected, through the chief executive’s power of interim appointment. That power is enhanced by the cooperation of many judges, who retire or resign shortly before the expiration of their terms. See H. Glick & K. Vines, State Court Systems 42 (1973).


106. See In re Code of Judicial Conduct, 627 S.W.2d 1, 2 (Ark. 1982) (per curiam) (“campaign funds may be solicited and accepted on behalf of a judicial candidate beginning 180 days prior to the first election in which he is a candidate”); Minn. Rules of Court, Code of Judicial Conduct (West 1986) (elimates time limit provision); Mo. Rules of Court, Sup. Ct. Rule 2 (West 1986) (eliminates time limit provision); N.Y. Jud. Law app. (Mckinney 1975) (time limit is 6 months rather than 90 days); N. C. GEN. STAT., RULES, CODE OF JUDICIAL CONDUCT (1984) (eliminates time limit provision; also eliminates prohibition against candidate soliciting publicly stated support); Pa. Rules of Court, Code of Judicial Conduct (West 1986) (committees may solicit funds no earlier than 30 days prior to first day for filing nominating petitions or last day for filing declaration of intention to seek reelection on a retention basis); R.I. GEN. LAWS, Sup. Ct. Rule 48 Canon 27(c) (1976) (eliminates time limit provision); Wash. Rev. Code, Rules of Ct., Code of Judicial Conduct 7B(2) (1983) (committees may solicit funds no earlier than 120 days from date when filing for office first permitted and no later than 30 days after last election in which candidate participates during election year);
is appropriate to the elective process therein." Thus, approximately one-third of the jurisdictions with elective judicial selection or retention systems maintain that the ethical standards contained in Canon 7B(2) are appropriate for judicial election campaigns.

The Supreme Court of Ohio has adopted a Canon 7B(2) which incorporates all of the prohibitions contained in the model Canon, but goes well beyond the model in establishing procedures for the operation of campaign committees. The Canon, like the CJC, allows a committee to solicit contributions from lawyers but, unlike the CJC, states that "[such] committee should not, directly or indirectly, solicit or receive any . . . contribution for any political or personal purpose whatever from any employee, appointee of the court or anyone who does business with the court."

Thus, it appears that the committee is prohibited from soliciting and accepting contributions from attorneys with cases pending in the candidate's court. Although the Canon provides that "[e]ach candidate for

W. VA. CODE, JUDICIAL CODE OF ETHICS Canon 7B(2) (1982) (committees may solicit funds in accordance with state law).

107. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972).

108. Every type of judicial election is represented by the states that have adopted Canon 7B(2). All of the judges who are initially selected by popular election in Arkansas, New York, North Carolina, Pennsylvania, South Carolina and West Virginia run on a partisan ballot. See BOOK OF THE STATES, supra note 90, at 154-55. Minnesota and Washington have only nonpartisan elections. Id. Georgia has both partisan and nonpartisan elections. Id. In Alaska and Nebraska, all judicial elections are for the retention of office. Id. While partisan and retention elections are held in Indiana and Missouri, nonpartisan and retention elections are held in South Dakota and Wyoming. Id. Since Canon 7B(2) applies to candidates for judicial offices that are filled by public election between competing candidates, it is surprising that the exact language of subsection (2) has been adopted by jurisdictions in which all judicial elections are for the retention of office. One possible explanation is that Canon 7B(3) provides that candidates for retention in office may obtain campaign funds in the manner provided in subsection (2). MODEL CODE OF JUDICIAL CONDUCT Canon 7B(3) (1972). However, for examples of more accurate draftmanship for merit selection systems, see infra notes 153-55 and accompanying text. In any event, there does not appear to be any explanation for the adoption of Canon 7B(2) in Rhode Island, where judges are either appointed by the governor or elected by the legislature, or in Vermont, where all judges are appointed by the governor with the advice and consent of the senate. See BOOK OF THE STATES, supra note 90, at 154-55.


110. Id. The candidate is also prohibited from soliciting or receiving any contribution from an employee, appointee, or anyone who does business with the court. Id. Canon 7B(3). The commentary to Canon 7B(3) provides: "Appointees of the court include officials such as referees, commissioners, special masters, receivers, guardians, appraisers and personnel such as clerks, secretaries, bailiffs and all other employees and appointees." Id. Canon 7B(3) commentary.
judicial office shall have no more than one campaign committee for purposes of receiving contributions and making expenditures," the commentary further provides that "[t]hese restrictions shall not be interpreted to prohibit a civic organization, bar association or duly constituted and lawfully elected political party organization from raising funds and making expenditures in behalf of judicial candidates which it has decided to support." 111

According to the Michigan Code of Judicial Conduct, candidates' committees "are prohibited from soliciting campaign contributions from lawyers in excess of $100 per lawyer." 112 The Michigan code also modifies the time limit provision on soliciting and accepting contributions, 113 and provides for the disposition of excess funds. 114

While Canon 7B(2) of the CJC prohibits a candidate from personally soliciting and accepting campaign funds, 115 in several states, a candidate is prohibited only from soliciting campaign contributions. 116 The codes of some of these states, like the CJC, provide that the candidate may establish committees to both secure and manage the expenditure of funds for his campaign, 117 while another simply permits the committees to secure funds for the election campaign. 118 Arizona’s code provides that "[a]ll candidates should refrain

111. Id. Canon 7B(2) commentary.
113. Id. (may solicit funds no earlier than 180 days before a primary election or nominating convention and may not solicit or accept funds after date of the general election).
114. Id.
from personally soliciting campaign contributions [and] should refer prospective contributors to the candidate's campaign committee."

In Illinois, "[a] candidate for election to or retention in a judicial office shall not personally solicit campaign contributions, but should establish some method which will not involve him in the direct solicitation of funds." In Georgia, candidates should not "be present at a function while solicitations of campaign funds on their behalf are conducted." According to the code of Nevada, a candidate may personally solicit, as well as accept, funds for his campaign, provided he remain within the stated time limitation and does not use or permit the use of campaign contributions for purposes unrelated to the campaign.

The supreme courts of some states have expressed greater dissatisfaction with Model Canon 7B(2), believing that it inadequately addresses the pressures of political reality. For example, the code of Alabama states that although judges and candidates for judicial office should refrain from engaging in political activities, it is realized that they cannot divorce themselves completely from activities related to their own election campaigns. The only prohibition from model Canon 7B(2) incorporated into Alabama's Canons of Judicial Ethics

120. ILL. ANN. STAT. ch. 110A, § 70 (Smith-Hurd 1985).
122. SEE NEV. REV. STAT., SUP. CT. RULES (1985) (may solicit funds no earlier than 180 days before the primary election and no later than 90 days after the last election in which he participates).
123. The Code provides:

A judge or a candidate for election to a judicial office should endeavor at all times to refrain from political activities inappropriate to the judicial office that he holds or seeks. It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than candidates for judicial offices and not be involved in political fund solicitations other than for himself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his election or re-election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he conduct himself in a manner at all times to prevent any political considerations, entanglements or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

is that against the use of campaign contributions for the private benefit of the candidate.124

The Supreme Court of New Mexico repealed Canon 7, including subdivision B(2),125 in 1979 and replaced it with a provision that allows judges to participate in the political process to the same extent as other publicly elected officials.126 However, the Court has adopted a new Canon 8, effective October 1, 1985, entitled "A judge shall refrain from campaign fund raising activity which has the appearance of impropriety."127 Under this Canon, a judge may not personally solicit or accept funds from a litigant in a case presently pending before him in court or accept contributions from an attorney in a pending case.128 In addition, no candidate for judicial office may solicit funds from any attorney or accept any contributions which would give the appearance of impropriety.129 While, unlike the CJC, the Canon does not prohibit candidates from personally soliciting contributions from anyone who is not an attorney or current litigant, or from accepting funds from anyone not involved in a case that is pending before him, it does prohibit the types of campaign fund raising that could most readily lead to charges of judicial partiality.

124. Id. Canon 7B(1)(d).
125. Prior to repeal, Canon 7B(2) read:
   A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates may establish committees of responsible persons to secure and manage the expenditure of funds campaign [sic] and to obtain public statements of support for his candidacy. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family. See Ellis, Judges and Politics: Accountability and Independence in an Election Year (Book Review), 12 N.M.L. REV. 873, 885 n.50 (1982) (citing N.M. STAT. ANN. § 16-11-7 (Supp. 1975) (repealed 1979)).
126. The Canon provides:
   The New Mexico constitution provides that judges shall be elected. Judges are obligated to participate as candidates for judicial office the same as other publicly elected officials. The constitution does not place any special restrictions on participation in politics by judges. Prior court rules have severely restricted such participation. These rules are inconsistent with the constitutional mandate that judicial offices shall be elective. Therefore, judges may hereinafter participate in the political process to the same extent as is provided by laws for other citizens, but only in strict conformity with the provisions of the Code of Judicial Conduct regarding upholding the integrity and independence of the judiciary, avoiding impropriety, performing impartially and diligently and avoiding conflicts of interest.
127. Id. Canon 8.
128. Id. Canon 8A, D.
129. Id. Canon 8A, E.
In Maryland and Wisconsin, the codes provide that "[a] judge shall not accept gifts from lawyers, groups or persons whose interests are, are likely to be, or have been before him in his official capacity." However, both codes also provide that "[t]his rule does not prohibit reasonable financial contributions to a voluntary campaign committee in behalf of a judicial candidate." The Wisconsin code further reads: "The nonpartisan elective process ... is an expensive one and until other means of conducting and financing judicial elections are devised, this rule should be so construed."

California suspended its Canon 7B in 1976, not only for the lack of more appropriate means of conducting and financing judicial elections, but also for lack of an enforcement body with both the authority and willingness to enforce the subdivision against non-incumbents. Mississippi regulates judicial campaign fund raising, not by holding judicial candidates to the campaign conduct standards set out in the CJC, but rather by imposing a contribution amount limitation on potential contributors. Reasonable contribution limitations have been recognized as practical devices for allowing candidates for elective office to raise funds for their campaigns without

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates, should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate’s committees may solicit funds for his campaign no earlier than such time as an announcement of a potential candidacy against the incumbent judge has been made, and then no later than 120 days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

134. Emperor’s Clothes, supra note 39, at 91. For a discussion of the enforcement of Canon 7B(2) against non-incumbents, see infra notes 179-90 and accompanying text.
135. See Miss. Code Ann. § 23-3-65 (Supp. 1984). The statute provides:
It shall be unlawful for any person, trustee, or corporation or any association of persons, by whatever name known, to make a contribution,
risking an appearance of partiality. Thus, the approach taken by Mississippi in regulating its judicial campaigns both avoids the problems of code enforceability against judicial candidates and serves the dual aims of Canon 7B(2) of the CJC. However, this approach may deprive a candidate of funds that he would be permitted to accept, under Canon 7B(2), through his campaign committee. On the other hand, it permits a candidate to personally solicit and accept contributions, conduct prohibited by the CJC.

The commentary to Canon 7B(2) of the CJC provides that “[u]nless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.” Only ten states have incorporated this commentary into their codes of judicial conduct. In recent years, each of the fifty states and the District of Columbia have enacted campaign finance disclosure laws which require the reporting of all campaign contributions and, with respect to individual contributions exceeding minimum amounts, the names of contributors as well. One state has also enacted a disclosure provision that applies specifically to candidates for judicial

as the term contribution is hereinafore defined, in the aggregate in excess of two hundred fifty dollars ($250.00) to or for any candidate at any primary for nomination to any of the judicial offices mentioned in section 23-3-63.

Id. However, prior to its amendment in 1978, the statute made it unlawful for anyone, except a member of the bar, to make such contributions, and the amount of the contributions from members of the bar was limited to $50. See Miss. Code Ann. § 23-3-65 (1972). For a discussion of contribution amount limitations, see infra notes 276-77 and accompanying text.

137. For a discussion of the goals of Model Canon 7B(2), see supra notes 17-20 and accompanying text.

The enactment of these laws may account for the absence of the commentary in most states and warrant its elimination in those states in which it has been adopted. References have been made to the disclosure laws in a few of the state codes of judicial conduct. The enactment of these laws may account for the absence of the commentary in most states and warrant its elimination in those states in which it has been adopted. References have been made to the disclosure laws in a few of the state codes of judicial conduct.

Seventeen states have adopted Canon 7B(3) as it is stated in the CJC. Subsection (3) provides: "An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support..."
and campaign funds in the manner provided in subsection B(2)."  

One state, that has otherwise adopted the model, does not require the candidacy to have drawn active opposition. Another state has deleted both that requirement and the requirement that there be no competing candidate.  

Florida’s Canon 7B(3) provides that “[a]n incumbent judge who is a candidate for retention in office or re-election to office without a competing candidate, may conduct only limited campaign activities until such time as the judge certifies that his candidacy has drawn active opposition.” The term “limited campaign activities” is defined as including the conduct authorized by the state’s subsection B(2), which is substantially the same as Canon 7B(2) of the CJC. After certifying that his candidacy has drawn active opposition, the judge may campaign “in any manner authorized by law, subject [only] to the restrictions of subsection B(1).” Thus, an incumbent


144. Model Code of Judicial Conduct Canon 7B(3) (1972). The Supreme Court of one state has adopted a single rule that governs the campaign conduct of both candidates for initial election and incumbents seeking retention of office. See supra note 120 and accompanying text.  


146. See Ariz. Rev. Stat. Ann., Sup. Ct. Rule 81, Canon 7B(3) (Supp. 1985). The subdivision provides in full: “An incumbent judge who is a candidate for retention in or re-election to office may campaign for retention or re-election to office; may obtain publicly stated support; and in the manner provided in subsection B(2) may obtain campaign funds.” Id.  


148. Id.  


judge in Florida who is running without competing candidates and
who can demonstrate that his candidacy has drawn active opposition,
may conduct his campaign without the restrictions imposed by the
prohibitions of Canon 7B(2) binding other candidates for judicial
office. The commentary to Florida’s Canon 7B(3) provides that while
the term “active opposition” is difficult to define, it is intended to
include any form of organized public opposition or an unfavorable
vote on a bar poll.\footnote{151}

New Mexico’s code seems to provide that regardless of whether
or not a judge’s candidacy has drawn “active opposition,” in the
event that he does not have an opponent, he may not retain funds
that have been contributed for his campaign.\footnote{152} Thus, it appears
that unless the candidate is expected to use only his own resources,
he is forbidden to campaign for retention in, or re-election to,
judicial office.

In Colorado and Iowa, where judicial elections are held only on
a merit retention basis, codes of judicial conduct have been adopted
with a Canon 7B(2) that is applicable only to candidates for retention

\footnote{Code of Judicial Conduct. \textit{Compare Model Code of Judicial Conduct Canon
Conduct Canon 7B(1) (West 1983). Florida’s Canon 7B(1) provides in full:
A candidate, including an incumbent judge, for a judicial office that is
filled either by public election between competing candidates or on the
basis of a merit system election: (a) should maintain the dignity appro-
priate to judicial office; (b) should prohibit public officials or employees
subject to his direction or control from doing for him what he is prohibited
from doing under this canon; and except to the extent authorized under
subsection B(2) or B(3), he should not allow any other person to do for
him what he is prohibited from doing under this canon; (c) should 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; or misrepresent his identity, qual-
ifications, present position, or other fact.

Canon 7B(1) (West 1983).}\n
Canon 7B(3) commentary (West 1983). Neither the ABA nor any of the other
states define the term “active opposition” in their codes of judicial conduct.}

\footnote{152. The code provides:
B. Unopposed campaign. A candidate for judicial office who has a
campaign fund or any other mechanism for the collection and disburse-
ment of campaign contributions, and for any reason, at any time, does
not have an opponent, shall return all unused funds pro rata to the
contributors within thirty days of the time he determines he has no
opponent. If for any reason the contribution cannot be refunded to the
contributor it may be donated to a charitable organization.

in office, thus, eliminating the need for a Canon 7B(3). Iowa's code simply provides that "[a] judge who is a candidate for retention in office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may establish committees of responsible persons to obtain publicly stated support and campaign funds." Colorado's code provides that "if there is active opposition to the retention of a candidate judge," a nonpartisan committee may be organized to raise funds for the judge's campaign, but that the judge should not personally solicit or accept funds, and should not be advised of the source of any campaign contributions. Thus, in Colorado, candidates for retention in judicial office are bound by restrictions similar to those stated in Canon 7B(2) of the CJC and the comment thereto.

C. State Enforcement of Canon 7B(2)

There is some debate over the legal effect that may be attached to a Code of Judicial Conduct. In Alabama, where Canons were adopted as "a Code for judges and a declaration of that which the people of the state . . . have a right to expect of them," a court has suggested that the Canons have the force of law. However, the Supreme Court of Colorado has held that judicial and professional ethics codes cannot be given the effect of law, but rather, "are recognized generally as a system of principles of exemplary conduct and good character." When the Supreme Court of Arkansas declared that the ABA Code of Judicial Conduct "constitutes proper standards for the Judiciary of [the] State," one Justice dissented, commenting: "Even if the per curiam adopting the 'Judicial Code' be considered only as a guide to judicial conduct and not as a rule of judicial conduct, still we are giving the appearance of legislating and with some logic can be accused of legislating contrary

153. See COLO. REV. STAT., COURT RULES ch. 24 app., CODE OF JUDICIAL CONDUCT Canon 7B(2) (Supp. 1984); IOWA CODE ANN. § 610 app., CODE OF JUDICIAL CONDUCT Canon 7B(2) (West 1975).
154. IOWA CODE ANN. § 610 app., CODE OF JUDICIAL CONDUCT Canon 7B(2) (West 1975).
159. 255 Ark. 1075 (1973-74).
However, the Supreme Court of Florida has asserted that there is no need for specific constitutional authority because "[t]he authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government." Notwithstanding the debate on the effect of a Code of Judicial Conduct, most of the states have established procedures for the investigation of judicial misconduct.

Judicial conduct commissions have been established in a majority of the fifty states and the District of Columbia. The commissions have from five to fourteen members, generally consisting of judges,
members of the bar, and other residents of the state.\textsuperscript{164} In some states, these commissions have the power to censure, suspend, or remove offending judges.\textsuperscript{165} In other states, they have power only to recommend that discipline be taken by the highest court of the state\textsuperscript{166}

\footnotesize
\begin{quote}
\textsuperscript{164} See Ala. Const. amend. 328, \textsuperscript{a} 6.17(a); Alaska Const. art. IV, \textsuperscript{a} 10 (1956, amended 1982); Ariz. Const. art. VI, \textsuperscript{a} 1, \textsuperscript{a} 1; Ark. Stat. Ann. \textsuperscript{a} 22-145(a) (Supp. 1985); Cal. Const. art. VI, \textsuperscript{a} 8 (1879, amended 1976); Colo. Const. art. VI, \textsuperscript{a} 23(3) (1876, amended 1982); Conn. Gen. Stat. Ann. \textsuperscript{a} 51-51K (West 1985); D.C. Code Ann. \textsuperscript{a} 11-1522 (1985); Fla. Const. art. V, \textsuperscript{a} 12 (1885, amended 1976); Ga. Const. art. VI, \textsuperscript{a} VII, \textsuperscript{a} VI; Rules of Court, the Judiciary of Hawaii vol. 2, Sup. Ct. Rule 8.1(a) (1984); Idaho Code \textsuperscript{a} 1-2101 (1979); Ill. Const. art. VI, \textsuperscript{a} 15(b); Ky. Const. \textsuperscript{a} 121 (1891, amended 1976); La. Const. art. V, \textsuperscript{a} 25(A); Md. Const. art. IV, \textsuperscript{a} 4A (1867, amended 1980); Mass. Ann. Laws ch. 211C, \textsuperscript{a} 1 (Michie/Law. Co-op. Supp. 1985); Mich. Const. art. VI, \textsuperscript{a} 30(1); Minn. Stat. Ann. \textsuperscript{a} 490-15(1) (West Supp. 1985); Miss. Const. art. 6, \textsuperscript{a} 177A; Mo. Const. art. V, \textsuperscript{a} 24(1) (1945, amended 1976); Neb. Rev. Stat. \textsuperscript{a} 24-715 (Supp. 1984); Nev. Const. art. 6, \textsuperscript{a} 21(2); N.M. Const. art. VI, \textsuperscript{a} 32 (1911, amended 1978); N.Y. Const. art. 6, \textsuperscript{a} 22b(1) (1894, amended 1977); N.C. Gen. Stat. \textsuperscript{a} 7A-375(a) (1981); N.D. Cent. Code \textsuperscript{a} 27-23-02 (Supp. 1985); Ohio Rev. Code Ann., Sup. Ct. Rules for the Gov't of the Judiciary Rule 11(1) (Page Supp. 1984); Or. Rev. Stat. \textsuperscript{a} 1.410(1) (1985); Pa. Const. art. V, \textsuperscript{a} 18(a); R.I. Gen. Laws \textsuperscript{a} 8-16-1(a) (1985); S.D. Codified Laws Ann. \textsuperscript{a} 16-1A-2 (1979); Tenn. Code Ann. \textsuperscript{a} 17-5-201(a) (Supp. 1985); Tex. Const. art. V, \textsuperscript{a} 1-a(2) (1876, amended 1984); Va. Code \textsuperscript{a} 2.1-37.3 (1979); Wash. Const. art. IV, \textsuperscript{a} 31; W. Va. Code, Ct. Rules of Proc. for Handling of Complaints Against Justices, Judges and Magistrates Rule II A (Supp. 1985); Wis. Stat. Ann. \textsuperscript{a} 757.83(1) (West Supp. 1985); Wyo. Const. art. 5, \textsuperscript{a} 6 (1890, amended 1972). In one state, "[t]he Council shall consist of three (3) members, only two of whom shall be members of the Bar . . . ." Okla. Stat. Ann. tit. 20, \textsuperscript{a} 1653 (West Supp. 1985). In another state, commission membership includes members of the senate, house of representatives and board of commissioners of the state bar, as well as 2 persons who are not members of the state bar. Utah Code Ann. \textsuperscript{a} 78-7-27(1) (Supp. 1985).

\textsuperscript{165} See D.C. Code Ann. \textsuperscript{a} 11-1521 (1981); Ga. Const. art. VI, \textsuperscript{a} VII, \textsuperscript{a} VI; Ky. Const. \textsuperscript{a} 121 (1891, amended 1976); Nev. Const. art. 6, \textsuperscript{a} 21(1); Utah Code Ann. \textsuperscript{a} 78-7-30 (Supp. 1985).

\textsuperscript{166} See Ariz. Const. art. VI, \textsuperscript{a} 4; Ark. Stat. Ann. \textsuperscript{a} 22-145(b) (Supp. 1985); Colo. Const. art. VI, \textsuperscript{a} 23(3)(e) (1876, amended 1982); Fla. Const. art. V, \textsuperscript{a} 12(a) (1885, amended 1976); Rules of Court, the Judiciary of Hawaii vol. 2, Sup. Ct. Rule 8.2(a)(6) (1985); Idaho Code \textsuperscript{a} 1-2103 (1979); La. Const. art. V, \textsuperscript{a} 25; Mass. Ann. Laws ch. 211C, \textsuperscript{a} 2 (Michie/Law. Co-op. Supp. 1985); Mich. Const. art. VI, \textsuperscript{a} 30(2); Minn. Stat. Ann. \textsuperscript{a} 490.16(3) (West Supp. 1985); Miss. Const. art. 6, \textsuperscript{a} 177A; Mo. Const. art. V, \textsuperscript{a} 24(3) (1945, amended 1976); N.M. Const. art. VI, \textsuperscript{a} 32 (1911, amended 1978); N.Y. Const. art. 6, \textsuperscript{a} 22 (1894, amended 1977); N.C. Gen. Stat. \textsuperscript{a} 7A-376 (1981); N.D. Cent. Code \textsuperscript{a} 27-23
or by a Court on the Judiciary. In still other states, commissions have the power to reprimand or censure a judge, but can only recommend his suspension or removal. In many jurisdictions, violations of the Code of Judicial Conduct are either constitutional or statutory grounds for censure, suspension, or removal. In other jurisdictions, judicial conduct commissions must determine whether a judge's actions constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" or "conduct unbecoming a member of the judiciary." However, such language has been interpreted to include violations of the Code of Judicial Conduct.
duct. A judge may be disciplined "for good cause" in other states.

A few states have expressly provided in their Codes of Judicial Conduct that violations of the Code shall be investigated by a judicial conduct commission.

Although procedures for the enforcement of the Code of Judicial Conduct clearly have been established, it is not clear what percentage of judicial ethics violations are investigated. Most proceedings of the judicial conduct commissions are confidential, at least until a complaint or recommendation is filed with the court. Private censure, in no event, would be made public. Even in states where code violations are possible grounds for the discipline of judges, it is recognized that not every code violation warrants the public

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171. See, e.g., In re Babineaux, 346 So. 2d 676 (La.), cert. denied, 434 U.S. 940 (1977); In re Foster, 271 Md. 449, 318 A.2d 523 (1974).


174. See ALA. CONST. amend. 328, § 6.17(b); ALASKA STAT. § 22.30.060(b) (Supp. 1985); ARIZ. REV. STAT. ANN., RULE OF PROCEDURE FOR THE COMMISSION ON JUDICIAL QUALIFICATIONS 5 (Supp. 1985); CAL. CONST. art. VI, § 18(l) (1879, amended 1976); COLO. CONST. art. VI, § 23(3)(g) (1876, amended 1982); CONN. GEN. STAT. ANN. § 51-511(a) (West 1985); DEL. CONST. art. IV, § 37; D.C. CODE ANN. § 11-1528 (1981); Fla. CONST. art. V, § 12(d) (1885, amended 1976); RULES OF THE JUDICIAL QUALIFICATIONS COMMISSION, 246 Ga. 823, 834 (1980); RULES OF COURT, THE JUDICIARY OF HAWAI'I vol. 2, Sup. CT. RULE 8.4 (1984); IDAHO CODE § 1-2103 (1979); ILL. CONST. art. VI, § 15(c); KY. REV. STAT., SUP. CT. RULE 4.130 (1983); LA. REV. STAT. ANN., SUP. CT. RULE XXIII, § 23(a) (West 1986); MD. CONST. art. IV, § 4B(a) (1867, amended 1980); MASS. ANN. LAWS ch. 211C, § 2 (Michie/Law. Co-op. Supp. 1985); Mich. CONST. art. VI, § 30(2); MINN. RULES OF COURT, RULES OF BOARD ON JUDICIAL STANDARDS Rule 5 (West 1986); MISS. CONST. art. 6, § 177A; MO. RULES OF COURT, SUP. CT. RULE 12.23 (West 1986); NEB. REV. STAT. § 24-726 (Supp. 1984); NEV. CONST. art. 6, § 21(5)(a); N.M. CONST. art. VI, § 32 (1911, amended 1978); N.Y. JUD. LAW § 45 (McKinney Supp. 1986); N.C. GEN. STAT. § 7A-377(a) (1981); N.D. CENT. CODE § 27-23-03(5) (Supp. 1985); OHIO REV. CODE ANN., SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY Rule I(21) (Page Supp. 1984); OKLA. STAT. ANN. tit. 20, § 1658 (West Supp. 1985); OR. REV. STAT. § 1.440 (1985); PA. CONST. art. V, § 18(h); R.I. GEN. LAWS § 8-16-4(c) (1985); S.D. CODIFIED LAWS ANN. § 16-1A, app., Rule 4 (1979); TENN. CODE ANN. § 17-5-304 (Supp. 1985); TEX. CONST. art. V, § 1-a(10) (1876, amended 1984); UTAH CODE ANN. § 78-7-30(3) (Supp. 1985); VA. CODE § 2.1-37.13 (Supp. 1985); WASH. CONST. art. IV, § 31; W. VA. CODE, CT. RULES OF PROC. FOR HANDLING OF COMPLAINTS AGAINST JUSTICES, JUDGES AND MAGISTRATES Rule II(G.}
discipline of a judge. Indeed, although there is one case in which a judge was issued a public reprimand for a single occasion of soliciting campaign funds, most reported cases concern judges who have been involved in many different kinds and repeated instances of judicial misconduct. Moreover, certain statements of the survey respondents seem to indicate that there are numerous undisciplined abuses of Canon 7B(2).

There are code enforcement difficulties unique to Canon 7B. While Canon 7B(2) applies to all candidates for judicial office, state judicial conduct commissions only have jurisdiction over judicial officers. However, in at least one state, the attorney general has


175. In re Kapcia, 389 Mich. 306, 312, 205 N.W.2d 436, 439 (1973) ("violation of the canons of ethics does not necessarily warrant disciplinary action through the Tenure Commission; ... each case is to be judged in the light of all the circumstances"). The statute of one state provides: "If the preliminary investigation discloses that there exists a violation of the canons of judicial ethics and said violation is not one of a serious nature, the commission may in its discretion issue a private reprimand to the judge . . . ." R.I. GEN. LAWS § 8-16-4(c) (1985).


177. E.g., Steinberg v. State Comm'n on Judicial Conduct, 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980) (acted as broker in several high interest loan transactions; received percentage of interest rate on loans; attempted to conceal true identity from borrower in one of the transactions; and intentionally misrepresented income and allowable deductions on Federal income tax returns); In re Jordan, 290 Or. 303, 622 P.2d 297 (1981) (gave false testimony under oath; in sentencing defendants, was influenced by previous, improper ex parte recommendations; was discourteous to parties in court; improperly held private conference in chambers with witness; held trial and entered finding of guilty against absent defendant; and refused to disqualify himself from hearing in which his impartiality might reasonably be questioned); In re Heuermann, 90 S.D. 312, 240 N.W.2d 603 (1976) (for over a decade, sat on cases in which wife appeared; approved attorney fees paid to wife, which were then deposited into joint checking account; sent letter strongly criticizing attorney to both the attorney's client and parties considering suit against that client; and revoked suspension of a juvenile sentence without a hearing; traveled at county expense to Florida to pick up runaway boys and while there attended a football game); In re Buchanan, 100 Wash. 2d 396, 669 P.2d 1248 (1983) (engaged in several instances of sexual harassment, both verbal and physical; made religious slurs; and gave indication of retaliation against witnesses who testified against him before the Commission).

178. See infra note 245 and accompanying text.

179. See supra notes 55-60 and accompanying text. One state's Code of Judicial Conduct makes explicit that the Canon applies to all candidates for judicial office. See OR. CODE OF JUDICIAL CONDUCT Canon 7D (1983) (available in Fordham Urban Law Journal Office).

180. See ALA. CONST. amend. 328, § 6.17(b); ALASKA CONST. art. IV, § 10 (1956,
ruled that the commission has jurisdiction over other successful candidates for past campaign conduct violations. In other states, courts have held that judicial conduct commissions may investigate acts committed by a judge prior to the time he assumed judicial office. In two states, a judge may be censured or removed "for action occurring not more than 6 years prior to the commencement of the judge's current term." Thus, it would appear that the commissions in these states would be able to recommend the discipline of a successful candidate for past campaign conduct violations.

Under no circumstances would the majority of judicial conduct commissions have jurisdiction over unsuccessful candidates who have never been members of the bench. However, some states have 


followed the ABA Model Code of Professional Responsibility\textsuperscript{185} or Model Rules of Professional Conduct\textsuperscript{186} in requiring that a lawyer who is a candidate for judicial office abide by Canon 7 of the Code of Judicial Conduct.\textsuperscript{187} In these states, unsuccessful candidates would be subject to the jurisdiction of a separate disciplinary authority empowered to enforce the Code of Professional Responsibility.\textsuperscript{188} New Mexico's Code of Judicial Conduct provides:

Violations hereof by candidates for judicial office who are not current members of the judiciary shall, in respect to persons who are members of the bar, be deemed to constitute violations of the Code of Professional Responsibility. Such violations shall be investigated, charged, prosecuted and disposition made thereof in the same manner as other violations of the Code of Professional Responsibility.\textsuperscript{189}

In Alabama, “a candidate for any judicial office not subject to the jurisdiction of the judicial inquiry commission or the court of the

\textsuperscript{185} \textit{Model Code of Professional Responsibility} DR 8-103 (1979).

\textsuperscript{186} \textit{Model Rules of Professional Conduct} Rule 8.2(b) (1984).


judiciary who breaches any applicable mandatory provision of [the] canons shall be subject to the original jurisdiction of the supreme court [of the state].”

In sum, several states have expressed dissatisfaction with Model Canon 7B(2), by either eliminating or substantially modifying their own campaign conduct provisions. While most of the states have created judicial conduct enforcement commissions, it appears that few have taken steps to police the campaign conduct of all candidates for judicial office. It is time for both the adoption of a more generally acceptable Model Canon 7B(2) and the establishment of state procedures for effective enforcement of the provision against judges and non-incumbents, alike.

IV. The Survey

In April of 1985, a survey91 regarding judicial elections was mailed to a nationwide random sample of elected judges.92 The purpose of the survey was to determine the judges’ views as to the stance the legal profession should take regarding the financing of campaigns for judicial election. The judges were asked to answer six multiple choice questions, each with six possible responses, and to write, at their option, one essay. The multiple choice questions were based upon the suggestions and requirements of Canon 7B(2) of the CJC,93 particularly on the financing guidelines of the campaign conduct provision.94 The essay question allowed the judge a final opportunity to provide any additional comments he had concerning ethics and judicial campaign conduct, including descriptions of his own campaign experiences. In an attempt to obtain candid results, the judges were requested not to reveal their names. However, for the purposes of statistical analysis, the judges were requested to provide the names of their states.

191. The survey is reprinted in full at Appendix A.
192. For a discussion of the selection and composition of the sample group, see infra notes 195-99 and accompanying text.
193. MODEL CODE OF JUDICIAL CONDUCT (1972). See supra note 16 and accompanying text for the full text of this Canon.
194. Each judge was asked to answer the questions in accordance with his personal opinions regarding appropriate campaigning behavior, and not to answer solely upon his state’s current code of ethics. For a discussion of the various state codes of ethics, see supra notes 105-55 and accompanying text.
A. Selection and Composition of Sample Group

The survey was sent to 1,000 general jurisdiction judges in the states that elect judges at that level. The sample group was limited to judges who must initially stand for election, because it is this group that is most directly affected by the tensions that are created when a judge is required to campaign. The sample group did not include those judges who are initially appointed and may or may not be required to stand for retention election. The sample group was limited to the general jurisdiction level because it is that level that provided the largest single elected group. The judges were randomly selected to participate in the survey.

B. The Results of the Survey—Multiple Choice Questions

Each judge was requested to answer the multiple choice questions in accordance with his own personal beliefs about appropriate campaign behavior for a candidate in a judicial election. The judge was given a choice of six possible responses for each question:


196. For a discussion of judicial selection methods, see supra notes 88-104 and accompanying text.

197. For a discussion of these tensions, see supra notes 6-10 and accompanying text.

198. For a discussion of judicial selection methods, see supra notes 88-104 and accompanying text.

199. The total number of general jurisdiction judges in the 34 states was 6,236 at the time of the mailing of the survey. A complete list of the names and addresses of the judges was supplied by the National Judicial College, Reno, Nevada.

A chart of random numbers was used to select the 1,000 participants and to
— No, I believe the behavior is definitely inappropriate.

— No, I believe the behavior is generally inappropriate.

— No, I believe the behavior is generally inappropriate, but there are exceptions: [space was left for any comments the judge might have as to exceptions].

— Yes, I believe the behavior is generally appropriate, but there are exceptions: [space was left for any comments the judge might have as to exceptions].

— Yes, I believe the behavior is generally appropriate.

— Yes, I believe the behavior is definitely appropriate.\(^{200}\)

Approximately fifty percent of the judges questioned responded to the survey.\(^{201}\) The results of the survey have been analyzed from two viewpoints. First, this Note will discuss the statistical breakdown and interpretation of the multiple choice questions,\(^{202}\) and subsequently it will discuss the judges responses to the essay question.\(^{203}\)

1. Question 1: “Do you believe a judicial candidate should be permitted to personally solicit campaign funds for his/her own election campaign?”

Over two-thirds of the judges who responded to question one stated that they believed that this particular campaign activity is inappropriate behavior for a judicial candidate.\(^{204}\) Forty-four percent of the judges revealed that they felt that personally soliciting campaign funds for a judicial campaign is definitely inappropriate behavior,\(^{205}\) while a total of thirty percent of the judges responded that the behavior is appropriate, in varying degrees.\(^{206}\) Canon 7B(2) of the CJC states, “a candidate . . . should not himself solicit . . .
campaign funds."\textsuperscript{207} A total of seventy percent of the judges who responded to this question revealed that they are in general agreement with the model provision.\textsuperscript{208}

2. Question 2: "Do you believe a judicial candidate should be permitted to personally accept campaign contributions for his/her own election campaign?"

Canon 7B(2) of the CJC also prohibits a candidate from accepting campaign contributions.\textsuperscript{209} Fewer judges felt that acceptance of contributions is inappropriate, in comparison to the percentage that found personally soliciting campaign funds unacceptable.\textsuperscript{210} Thirty-three percent of the judges who responded to this question felt that personally accepting campaign contributions is definitely inappropriate behavior, whereas, forty-four percent of those responding stated that personally soliciting campaign contributions is definitely inappropriate behavior.\textsuperscript{211} Thirty-eight percent of the judges responding to question two stated that personally accepting campaign contributions is appropriate behavior, in degrees varying from six percent stating that the behavior is definitely appropriate, eleven percent stating that the behavior is generally appropriate, to twenty-one percent believing that the behavior is generally appropriate, but that there are exceptions.\textsuperscript{212}

It is apparent from the responses to questions one and two that a large percentage of the judges questioned are in general agreement with the CJC prohibitions against a candidate personally soliciting and accepting campaign funds, as presently set out in Canon 7B(2).\textsuperscript{213} Curiously, ten percent more of the judges found personally soliciting

\textsuperscript{207} For a discussion of this prohibition, see \textit{supra} notes 16, 30-43 and accompanying text.

\textsuperscript{208} See \textit{infra} Appendix B.

\textsuperscript{209} In the same sentence as it prohibits solicitation of campaign contributions, Canon 7B(2) states, in pertinent part: "a candidate . . . should not himself solicit or accept campaign funds . . . ." \textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 7B(2) (1972). For a discussion of this prohibition, see \textit{supra} notes 30-43 and accompanying text.

\textsuperscript{210} Sixty-two percent of the judges stated that the acceptance of campaign contributions by a candidate is inappropriate behavior, while 70\% of the judges deemed solicitation of contributions unacceptable. For the full statistical analysis of the results of question two, see \textit{infra} Appendix B.

\textsuperscript{211} For the full statistical analysis of the results of the survey, see \textit{infra} Appendix B.

\textsuperscript{212} \textit{Id}.

\textsuperscript{213} See \textit{supra} note 16 and accompanying text for a discussion of the prohibition. It should also be noted that it is difficult to determine the impact of the large percentage of respondents who opted for the generally appropriate or generally inappropriate responses which provided space for the respondent to state exceptions,
campaign contributions to be inappropriate behavior than did those who found personally accepting campaign contributions to be inappropriate behavior. 214

3. Question 3: "Do you believe a judicial candidate should be permitted to establish a committee to secure funds for his/her own election campaign?"

Eighty-eight percent of the judges responding to question three felt that it is appropriate behavior for a judicial candidate to be permitted to establish a committee to solicit funds for the candidate's campaign. 215 Forty-two percent of these respondents stated that they felt the behavior is definitely appropriate, whereas, only seven percent of the judges felt that the behavior is definitely inappropriate. 216 The CJC recommends the creation of such a campaign committee, stating: "[the candidate] may establish committees of responsible persons to secure . . . funds for his campaign . . . ." 217 It follows that since a large percentage of judges responded that they believe direct solicitation of campaign contributions by a judicial candidate is inappropriate behavior, 218 many of the judges responding to question three would believe that it is appropriate for a candidate to form a committee to perform those functions that he may not do himself.

4. Question 4: "Do you believe a judicial candidate should be permitted to establish a committee to manage his/her own campaign funds for his/her own election campaign?"

Canon 7B(2) also permits a judicial candidate to "establish committees of responsible persons to . . . manage the expenditure of funds for his campaign . . . ." 219 Only nine percent of the judges as very few of the judges actually stated what they felt the permissible or impermissible exceptions would be. The few judges who did provide examples of specific exceptions to questions one and two generally stated that it would be permissible for a candidate to accept or solicit contributions from members of the candidates' families. Only five judges set forth exceptions to questions one and two, out of a total of 29% of the responses to question one and 36% of the responses to question two which requested specification of exceptions. See infra Appendix B, for the full statistical analysis of the results of the survey.

214. See infra Appendix B.
215. Id.
216. Id.
217. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972). For a discussion of this provision, see supra note 16 and accompanying text and notes 44-54 and accompanying text.
218. See supra notes 204-08 and accompanying text.
219. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972).
responding to this question felt that permitting a committee to manage a candidate's campaign funds is inappropriate behavior.\textsuperscript{220} Forty-five percent of the respondents stated that the establishment of a committee to manage the funds of a judicial candidate is definitely appropriate behavior, while only six percent of the judges felt that the behavior is definitely inappropriate.\textsuperscript{221}

The judges who responded to the survey had stronger reactions to this question than they did to question three, regarding the appropriateness of permitting the candidate's committee to secure the funds.\textsuperscript{222} Under the CJC, the candidate is not permitted to engage in either of these activities directly, and it is the function of the committee to accomplish for the candidate any of these campaigning activities.\textsuperscript{223} Even though a majority of the respondents to questions one and two stated that soliciting or accepting campaign contributions by the judicial candidate is inappropriate behavior, it is significant that an overwhelming percentage of the judges felt that it is permissible for the candidate to establish a committee to solicit and manage the candidate's campaign funds. It is apparent from the results of the survey that a majority of the judges who responded are in general agreement with the prohibitions and the recommendations of Canon 7B(2) as they are presently set out in the CJC. However, many more of the judges felt that there are exceptions to what type of behavior will or will not be tolerated when the issue is solicitation or acceptance of campaign funds directly by the candidate, as opposed to when the issue is the formation of a committee to secure and manage the campaign funds.\textsuperscript{224}

\textsuperscript{220} See \textit{infra} Appendix B for the the full statistical analysis of the results of the survey.

\textsuperscript{221} Id.

\textsuperscript{222} Ninety-one percent of the judges were in favor of establishing the committee to manage the funds and 87.7\% of the judges were in favor of establishing the committee to secure the funds. See \textit{infra} Appendix B.

\textsuperscript{223} For a discussion of the role of the campaign committee, see \textit{supra} notes 44-54 and accompanying text.

\textsuperscript{224} Twenty-nine percent of the judges responding to question one felt that there are exceptions to direct solicitation by the candidate being appropriate (15.1%) or inappropriate (14.2%) behavior; 36.7\% of the judges responding to question two felt that there are exceptions to direct acceptance by the candidate being appropriate (20.8\%) or inappropriate (15.9\%) behavior. By contrast, only 17.3\% of the judges responding to question three felt that there are exceptions to allowing the candidate to establish a committee to secure funds being appropriate (14.0\%) or inappropriate (3.3\%) behavior and only 16.6\% of the judges responding to question four felt that there are exceptions to allowing the candidate to establish a committee to manage funds being appropriate (14.8\%) or inappropriate (1.8\%) behavior. See \textit{infra} Appendix B.
5. Question 5: "Do you believe a judicial candidate should be permitted to attend a fund raiser on his/her own behalf?"

Almost three-quarters of the judges that responded to this question felt that it is appropriate behavior for a judicial candidate to attend his own fund raiser. This question is the only one in the survey that was not drafted in the exact words of the campaign conduct provision of the CJC. The CJC makes no direct reference to this type of activity, but Canon 7B(2) does prohibit the candidate from learning the names of the contributors to his campaign unless state law requires that the list of contributors be filed. Therefore, if a candidate attends a fund raiser held on his behalf where he has been involved in any way with the planning of the event, or if any portion of the admission price to the event is to go to his campaign, he will be in violation of the CJC. Nevertheless, seventy-four percent of the judges who responded to this question felt that attending a fund raiser is appropriate behavior for a judicial candidate.

Several of the judges did respond that they felt the behavior to be appropriate, but that there are exceptions to what should be tolerated as generally acceptable behavior. As one judge stated, "I see nothing wrong with a fund raiser being held for a judicial candidate provided that his only participation is his appearance thereat." Another judge felt that attendance at a fund raiser is permissible so long as the candidate does not ask for funds when he is in attendance. The goals of the CJC are to maintain the independence and integrity of the judiciary. Several of the judges who responded to this question with detailed exceptions voiced concern with respect to these aims of the CJC. One judge stated that he felt that attendance at a fund raiser is generally appropriate behavior "except where it would reflect adversely on the image of impartiality.

225. See infra Appendix B for the full statistical analysis of the results of the survey.
226. For the full text of Canon 7B(2), see supra note 16 and accompanying text.
227. Id.
228. For a discussion of a candidate's attendance at a fund raising event, see supra notes 48-49 and accompanying text.
229. See infra Appendix B for the full statistical analysis of the results of the survey.
230. Because the survey was conducted anonymously, it is both impossible and undesirable to reveal the sources of the comments that will be quoted throughout Section IV.
231. For a discussion of the aims of the Code of Judicial Conduct, see supra note 12 and accompanying text.
of the judge.” In summary, although a technical reading of the campaign conduct provision suggests that attendance by a judicial candidate at a fund raiser held on his behalf is a violation, a large majority of judges surveyed clearly would prefer a more permissive interpretation.232

6. Question 6: “Do you believe a judicial candidate should be permitted to know the names of the individuals who provide campaign funds for his/her own election campaign?”

The commentary that follows Canon 7B(2) of the CJC states: “Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.”233 The judges who responded to this question were almost evenly divided as to whether this behavior is appropriate or inappropriate for a judicial candidate. Fifty-four percent of the respondents expressed the feeling that it is acceptable behavior for a judicial candidate to learn the names of the contributors to his campaign, and forty-six percent of the judges responded that such behavior is inappropriate.234 Twenty-three percent of the judges felt that the behavior is definitely inappropriate, while twenty-two percent of the judges felt that the behavior is definitely appropriate.235 After responding that he felt the behavior is definitely appropriate, one judge stated: “I do not think the judicial candidate should be permitted to make promises or commitments in exchange for contributions. I do not think knowing the identity of contributors imputes special or favorable treatment.” On the other hand, one judge who felt that the behavior is definitely inappropriate suggested that his supporters would not have contributed to his campaign had they been aware that he was forbidden from learning their names. To further exemplify the judges’ conflicting views, a third judge stated that he felt that the behavior is generally inappropriate, but presently unavoidable.

The responses to question six are irreconcilable with the responses to question five.236 It is often the case that where a candidate attends

232. See infra Appendix B for the full statistical analysis of the results of the survey.
233. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) commentary (1972).
234. See infra Appendix B for the full statistical analysis of the results of the survey.
235. Id.
236. There is more than a twenty percentage point differential between the same responses to each question. See infra Appendix B for the full statistical analysis of the results of the survey.
a fund raiser on his behalf, he will learn the names of the individuals
who will contribute or already have contributed funds to his campaign.
While twenty-six percent of the respondents felt that attending a fund
raiser is inappropriate behavior, forty-six percent of the respondents
felt that knowing the names of the contributors is inappropriate behavior
for a judicial candidate.237 One judge addressed these disparate results,
commenting that not knowing who contributed to a candidate’s cam-
paign “is fiction because pragmatically even though you may not know
who has or how much has been contributed by your appearance [at
a fund raiser] it . . . would permit you to favor those who attended.”

The responses to the six multiple choice questions have raised
issues that are not effectively addressed by the CJC. If a judicial
candidate attends a fund raiser on his own behalf, can he possibly
do so without learning the names of those who contribute to his
campaign, or without falling within the prohibition against personally
soliciting contributions? Canon 7B(2) of the CJC attempts to alleviate
some of the tensions created when one must run for judicial office.
Clearly, it falls short of its goals.

C. Results of the Survey—The Essay Question

Additional comments and suggestions were provided in the essay
question by fifty-three percent of the judges who responded to the
survey.238 The responses covered a wide spectrum of opinions, ranging
from the desire to abolish the elective system altogether,239 to the
belief that the system, as it now stands, requiring the appointment
of committees to solicit and manage a candidate’s campaign con-
tributions, is too restrictive and that the candidate should be allowed
to conduct his campaign in any manner he feels appropriate.240 The
judges who expressed dissatisfaction with the elective process em-
phasized three different, yet related themes. A number of the judges
expressed disapproval of the subjection of judicial candidates to the
political arena, while others stressed the irreconcilable dichotomy

237. Id.
238. A total of 256 judges completed the essay question.
239. After having responded that he believed that all of the activities discussed
in the multiple choice questions were definitely inappropriate behavior for a judicial
candidate, one judge stated: “I simply believe that election of judges is wholly
and definitely inappropriate. Period.”
240. One judge stated: “If society is going to insist on electing judges, then as
candidates they must be free to engage in the elective process. It is hypocrisy to
attempt to isolate the candidate from the fundraising necessary to carry on a
campaign.”
between judicial ethics and the elective process. In addition, several of the judges expressed total dissatisfaction with the election process and suggested proposals for reform.

Most of the judges asked to participate in the survey were candidates at one time in an election contest, either on a partisan or nonpartisan basis. Predominantly, the judges who were required to run on a partisan ticket expressed dislike for the political aspects of judicial elections. One judge expressed his anger at being forced into the “political arena” to become a “political beast.” He added that the only way to avoid playing the “game” is to “take the judiciary out of politics.” Several of the judges also expressed the view that as long as they are required to run for election to judicial office, they should not be held to higher ethical standards than federal legislators.

The sentiment that “there is a definite conflict in running a political campaign and trying to be non-political,” parallels the view expressed by many of the judges that elections and judicial ethics are virtually irreconcilable. One judge asserted that “[t]he elective process and unbiased judges are mutually exclusive.” Another judge found that it is inevitable that a candidate for judicial office will “break all the rules.”

Several judges, in addition to expressing their views on the political and ethical dilemmas of campaigning for judicial office, suggested several options for reform. For example, a large percentage of judges who expressed dissatisfaction with the present election process suggested that judges, at all levels, should be chosen by some form of

241. See supra notes 6-10 and accompanying text for a discussion of this conflict.
242. See supra notes 88-104 and accompanying text for a discussion of the elective system adopted by each state.
243. After having participated in his first contested election, one judge stated: I can frankly say that partisan judicial elections are entirely distasteful! You have to run as a member of a political party and attend rallies to become “known,” but the judicial canons make you walk the line. . . . Judges are not highly paid in this state, and election costs mandate some sort of fund raising.
244. Another judge responded: “money can corrupt . . . but that is true of legislators, and judges.”
245. One judge expanded on this notion of being forced to break the rules of the game: Fund raising is usually only necessary where the position is elective. Inevitably the candidate will come to know the identity of at least some of the contributors. Always this knowledge is in the back of the mind of the successful candidate. This places a stress on the judge, even those pure of heart.
merit system,246 either initial selection on a merit basis or by initial appointment and a subsequent merit retention election.247 As one judge stated, "[o]bviously, the whole system of judges having to run and accept contributions from attorneys and potential case participants is nothing but a Catch-22 of the most obvious type. The 'system' is no better than its parts and this part is indefensible; merit retention would be better." Several judges expressed dissatisfaction with any type of elective system and suggested that state trial level judges be appointed to terms of specified duration with no additional terms, or simply that they be appointed to life terms. One judge stated that "[a]bsent either lifetime or limited time appointments, the problems [of campaigning for judicial office] are probably unsolvable."

Although the majority of respondents who addressed the issue of judicial selection methods seemed to express a preference for non-elective systems, there were others who stood firm in their support for popular elections. For example, one judge wrote: "NOTWITHSTANDING all of the problems with judicial elections, the process is a head taller than appointments (federal or state) and the so-called Missouri Plan or any plan of the half-blood." Similar statements focused on two interrelated themes: that the elective process is no more political than other selection methods and that judges should be chosen only by the "people" of their respective jurisdictions.248

246. Examples of the judges' suggestions include: (i) "I am in favor of judicial selection commissions, followed by a retention election where the judge runs on his record, unopposed;" (ii) "It is my personal opinion that judges should be elected solely on a retention basis. The very nature of campaigning seems to place a person in an obligatory position;" and (iii) "Merit selection of judges eliminates these ethical and practical problems."

247. For a discussion of the merit form of selection, see supra notes 97-102 and accompanying text.

248. Such statements included: (i) "I am a strong believer in the election of the judiciary. The appointment of judges not only deprives the citizen of his/her right to choose, but it places this precious right in the hands of either an 'elite' group or executives who will appoint according to their own political philosophy or personal preference. In order for one to stand for election to the judiciary he must be able to raise the funds. How this may be accomplished I am not certain but certain I am that judges should be elected"; (ii) "[Judges] should in the first instance be elected by the public, not appointed by social status, political contacts or media control"; (iii) "Merit selection would be best if there was a non-political way to select—at present, election is the fairest way to select with a periodic retention vote"; (iv) "I believe judges should be elected and their work reviewed by the electorate every few years just to remind them of their humility"; and (v) "Judges should be answerable to the masses rather than the 'politics' of a 'blue ribbon' committee.'
Regardless of their individual selection preferences, most of the judges who responded to the essay question recognized the probable continued existence of judicial elections, and thus, provided their thoughts on the conflicts associated with the financing of a judicial campaign. One of the judges felt that these conflicts are simply unavoidable, while another believed that they would be adequately resolved by most candidates even in the absence of currently existing restrictions. Maintaining the appearance of judicial impartiality was a prime concern of several respondents. One judge who always ran, and paid for, his own campaign declared: “I am free in every sense of the word to administer justice in as even handed a fashion as I know how. My conscience is clear. I have peace of mind and I am beholden to no man.” However, a greater number of those who responded to the survey emphasized the pressures of political reality and, in running their campaigns, “would probably follow [a] basic tenet of politicians: ‘Your first job is to get elected.’”

The majority of essay respondents, who discussed whether there should be partisan or nonpartisan elections for judicial offices, expressed a preference for nonpartisan elections. With respect to

249. See Emperor’s Clothes, supra note 39, at 121. Voter surveys conducted in New York, Texas and Wisconsin revealed that well over sixty percent of those polled believe that judges should be elected. See id. at 86-88.

250. He wrote: “Running for judicial office is definitely a difficult task. . . . Crossing ethical lines is almost inevitable if not unavoidable if success is the ultimate goal. The gray areas become blurred during the heat of the campaign. Although serious breaches can be avoided, minor ones create much more discipline and challenge.”

251. This respondent stated: “I am aware of the ethical considerations involved but believe that most of the persons aspiring for judicial election are honorable and do not need the many constraints placed upon them. The few others can be caught and ultimately removed.”

252. One respondent wrote: “A judge who is required to run for election is placed in an untenable position; the standards which a judge should observe are unworkable for a politician.” Along the same lines, another judge maintained that “[i]t is necessary that a judge be elected and inappropriate steps sometimes have to be taken.”

253. One respondent wrote:

The public expects judges to rise above petty politics and render justice, not decide cases based on their political implications. This puts elected judges in an awkward position. I wish I could provide a solution—my only suggestion would be that judges run without a party label being used, and let the public make their choice without regard to whether the candidate is a Republican or Democrat. Party philosophy SHOULD be irrelevant in a judicial position, so the elimination of the label should not be a problem.

However, one judge did express a strong preference for partisan elections. He said:

The nonpartisan, popular election, judicial selection process robs the
the impact of partisanship on fund raising, one judge noted that as a nonpartisan candidate, he has not had a need to solicit funds or conduct fund raisers. Another individual emphasized that it is “absolutely necessary” that partisan candidates be able to solicit funds, noting that he spent over $40,000 in 1982 for election expenses. However, other survey participants felt that a nonpartisan candidate may face even greater difficulties in his fund raising efforts. One respondent stated that in nonpartisan races, candidates are on their own with respect to fund raising. Another suggested that if political parties raised and handled a candidate’s campaign funds, “[i]t would avoid a great amount of embarrassment and the concomitant ethical considerations.”

In addition to their general thoughts on judicial campaign financing ethics, the majority of essay respondents provided specific proposals for a more effective model Canon 7B(2). These proposals fall into six general categories: 1) self-funding; 2) public financing; 3) unrestricted fund raising to the extent granted by law to other elected officials; 4) additional procedures for regulating the conduct of non-incumbents; 5) public disclosure with subsequent recusal; and 6) amount limitations on expenditures and contributions.

1. Self-funding

“An obligated candidate becomes an obligated judge,” asserted one respondent who accepted no money, gifts or services during his three election campaigns. While several of the judges surveyed agreed that “the only funds used should be the candidate’s own”, many others pointed out that the considerable expense of a campaign necessitates additional resources. One essayist summarized this problem as follows: “A campaign is very expensive and most judges take a cut in income in order to serve. If they are not permitted to have funds raised on their behalf, the only attorneys who could pursue a judgeship would be those who are independently wealthy.”

career judge of most of the individual political clout he or she might have had at one time. This becomes apparent when the judge seeks higher judicial office. If we must run for office, we should be allowed to participate in party process.

254. Comments included: (i) “I simply am opposed to acquiring campaign funds from others, under any circumstances. In my humble opinion, the receipt of such funds from others will serve to ruin our independent judiciary”; and (ii) “In the first place, judges should not be elected. But, since we are, the candidate should handle his own campaign and funds. The only funds used should be the candidate’s own. Anything else is bound to cause conflicts.”
Another disagreed, maintaining that "an attorney should be able to finance his own campaign as a result of his successful practice." However, it is clear that self-funding, while creating the strongest appearance of impartiality, is an impractical financing device for most attorneys seeking an elective judicial office. 255

2. Public Funding

A small number of survey participants suggested that public financing would virtually eliminate the conflicts currently associated with judicial campaigns. It would provide candidates with a financially effective means of achieving an appearance of judicial impartiality. Specifically, it "would ensure a modicum of equality, prevent candidates' feeling obligated to donors, and open the door to less affluent candidates."

Unfortunately, few respondents provided concrete suggestions for the implementation of a public financing plan. One judge wrote that in his state taxpayers contribute to a state campaign fund that is made available to state senate and representative candidates. He felt that "these monies should be used for nonpartisan . . . judicial elections, rather than [for] political partisan candidates, with judicial races having a limit as to total expenditures, with no contributions being allowed." 256 As a variation on public funding, another respondent suggested that a "bar group could be formed to raise anonymous funds for deserving judicial candidates."

3. Unrestricted Fund Raising

An overwhelming number of the essayists felt that "as long as judges are elected, they should be treated as any other political candidates." 257 One judge asked: "Although we don't accept contributions from those with matters pending, should our standards

255. One respondent noted that a race for judicial office is just as expensive as other political races and could cost as much as $100,000. For a discussion of the actual amounts spent on various recent judicial campaigns, see Emperor's Clothes, supra note 39, at 59-60.

256. For a discussion of expenditure and contribution limitations, see infra notes 276-79 and accompanying text.

257. Such comments were repeated several times: (i) "Ideally, judges should be uninvolved with politics, but if they are to be subjected to the political process in their selection and in the retention of their office, it is unfair to tie the judge's hands behind his back at election time"; (ii) "As long as judges are elected by the voters, then they are in politics and should be allowed to campaign as any other political candidate. Since money is [the] life of any political campaign and
be higher (as they are) than our U.S. elected officials who accept money and vote on special interest matters pending?" Another respondent suggested that judges not only should, but regularly do, participate in the political process to the fullest extent permitted by election law. 258

While some of the respondents seemed to believe that the problems of funding a judicial campaign simply outweigh the risks and appearances of judicial partiality, 259 others felt that the impartiality of the bench would not be compromised in any event in the absence of fund raising restrictions. 260 Indeed, one judge believed that "[t]he best safeguards for the judiciary are found in the minds and hearts of honest, ethical, independent candidates, not in unenforceable statutes and regulations."

One respondent suggested that, given the fact that judicial candidates currently are held to higher standards than other political candidates, "[t]he bar (state and/or national) should underwrite printed materials that can be used to educate the voter on campaign restrictions unique to judicial offices." He noted that "voters expect that any candidates for any office will campaign [and] do not differentiate between judicial offices and other offices as to what politician, the judges should be allowed to raise money for political campaigns just as any other office seeker. The only other alternative is to appoint judges for life"; (iii) "I am not sure that judges should be elected but as long as they are, they are candidates just as any other politician. It is therefore necessary to raise money to campaign—there is no other way"; and (iv) "If the system provides for a judge to run for office, then it should provide a way to raise funds."

258. He wrote:

It is unfortunate that judges are forced into the political arena and in order to get elected, they are forced to play the game like everyone else. If they do otherwise, they will not be elected. So long as we are forced into politics, we will do as others do in that regard.

259. One judge wrote:

While a complete divorce of the candidates for judicial office from a campaign and the money it takes to run a campaign may be ideal, it will have as its only effect the electing of wealthy judges. A balancing of the "goods" leads me to believe a judicial candidate must be allowed to raise money for the campaign.

For related statements, see supra note 252.

260. One judge wrote: "A judicial candidate must secure funds to run a campaign just like any other elected official. I do not feel fund raising will affect adversely judicial ethics post campaign." Another respondent commented:

With respect to the conflict created by accepting a campaign contribution from an individual, I see less of a conflict in accepting a $100 cash gift than in allowing people to get wrapped up in one's campaign activities. I could be much more impartial in making a decision involving someone who has contributed money than someone who has contributed hours of their time.
campaign behavior is or is not appropriate.’’ However, education of the public is unlikely to satisfy those judges who felt that there should be no such differentiation in campaign behavior.

4. Regulation of Non-incumbents

Some survey participants stated that all candidates for judicial office, incumbents and non-incumbents alike, should be held to identical campaign fund raising standards. Since Canon 7B(2) at the present time does apply to all candidates for judicial office, the unstated concern of some respondents may be that, as one judge explained, ‘‘usually an opponent does not feel bound by the ethical standards that bind judges.’’ Violations are thus more likely to be committed by an incumbent’s opponents than by the incumbent himself, according to some of the respondents. One judge suggested that the public should be made aware of the differences not only between candidates for judicial office and candidates for other offices, but also between incumbents and other candidates for judicial office.

One judge maintained that it is the lack of a procedure for sanctioning non-incumbents who violate the CJC that accounts for such candidates’ lack of incentive to adhere to the spirit or intent of the CJC. He related one case where an incumbent, who had served for sixteen years, filed a grievance against his successful challenger for violating the CJC, but ultimately found that there was no forum to redress the wrong. The respondent suggested: ‘‘Either strike the candidate who violates the [CJC] from the ballot or let all candidates run a no-holds barred campaign.’’ However, he did not specify a possible forum in which the parties could be heard, and made no mention of the role state bar associations might play in the enforcement of Canon 7B(2) against non-incumbents.

261. Statements included: (i) ‘‘Ethically, it would be better to not have to solicit funds. However, as long as elections are being waged, you cannot hold the judge to a different standard regarding raising campaign funds than their opponents’’; (ii) ‘‘I do not think it is fair to take every means from a judge to defend his job when there are no holds barred on those who wish to take his job from him’’; and (iii) ‘‘I feel that the judicial ethics judges must live by when seeking re-election should also apply to their opposition.’’

262. See supra notes 55-60 and accompanying text.

263. See supra notes 257-60 and accompanying text.

264. For suggestions related to unrestricted campaign financing, see supra notes 257-60 and accompanying text.

265. For a discussion of the enforcement of Canon 7B(2) against non-incumbents, see supra notes 179-90 and accompanying text.
It should be noted that not all of those who participated in the essay question felt that sitting judges are at a disadvantage in running their judicial campaigns. One judge wrote: "Running for judicial office is definitely a difficult task, particularly challenging an incumbent." Another respondent commented that while on the one hand, non-incumbents are less restricted in running their judicial campaigns, on the other hand, "there is subtle pressure put upon members of the bar by judges not to make campaign races against other judges."  

5. Public Disclosure/Recusal  

Many of the essay respondents believed that it is appropriate for a judicial candidate to know the names of those who have contributed to his campaign. One respondent wrote that he did not "believe that campaign contributions are ever so large as to get favors from the judge just because the judge knows who contributes," and another found that most contributors do not expect such favors. However, another judge viewed the situation differently: "Most of my money was contributed by my parents or myself. I very much appreciated the contributions I received from others. However, it makes me feel uncomfortable dealing with them in court. Perhaps it would be better if we didn't know where the contributions came from."

266. He stated:  
I feel that it is unfair for a sitting judge to be bound by many campaign restrictions but yet have an opponent who has ample time to accumulate resources and political support without restrictions. Example: suppose the county political party chairman of long standing decides to run against a sitting judge.

267. Indeed, according to another judge, it is the bar association, rather than standardized campaign guidelines, that should protect a judicial incumbent. He wrote: "Good judges seldom have opposition and if they do, the bar association should rally to their support."

268. Fifty-four percent of all survey respondents believe that a judicial candidate should be permitted to know the names of individuals who contribute funds to his election campaign. See supra notes 233-37 and accompanying text for an analysis of this result.

269. The latter respondent wrote:  
My experience has been that persons who make campaign contributions do so because of friendship or concern for competence and impartiality in the judiciary and NOT in any effort to influence the outcome of any particular case in which they may be involved. If a judicial candidate should suspect that a contribution is tendered for the latter reason, it should be refused or returned with a polite explanation that it would not be proper for the candidate to accept a contribution from someone who has pending litigation or problems that may lead to litigation because of the possibility of the appearance of impropriety.
Nevertheless, there were several respondents who believed that judicial candidates not only should, but must, know who has contributed to their campaigns.

Most of these judges felt that they should be prepared to recuse themselves from cases in which contributors appear. In addition, others believed that it is necessary so that they may refuse contributions from inappropriate sources.

According to many of the respondents, in order to avoid the appearance of judicial partiality, disclosure should be made both to the candidates and the public. One respondent makes it his practice to tell the lawyer on the other side when a person involved in a case has contributed financially to his campaign. He noted: “If he or his client requests, I will then disqualify myself. Usually they don’t, perhaps thinking I’ll bend over backwards to the other side, which perhaps sub-consciously I might.” Another respondent believed that in order to avoid improprieties, a judge need only disqualify himself from cases in which generous contributors appear. Campaign managers, treasurers and members of their law firms should not be allowed to appear in front of their candidate for a number of years, according to another respondent.

Although public disclosure and subsequent recusal would be unnecessary where a judge remains unaware of who has contributed to his campaign, one respondent noted that “if the judge is going to base his decisions on who provided campaign funds, that judge will make a point of finding out who provided funds, whether it is permitted or not.” Thus, perhaps it would be better to require, as another judge suggested, “the full reporting of all campaign

270. Another respondent wrote: “Perhaps it would be all right to know of non-lawyers who contribute, but not lawyers.”

271. One respondent wrote: “I am required to run for office. I need to know who contributed to my campaign so that I can immediately disqualify [myself] if they are involved in litigation.”

272. One judge wrote: “I believe a judge should know who contributes to his campaign so that the judge can refuse any contributions from a doubtful source.” See also supra note 269.

273. One judge proposed:

The judge and the public should know the names of contributors for the protection of the litigants who, with access to that information, could question the propriety of a judge sitting on a case wherein a contributor is a party, and for the protection of the judge who, with access to that information, could legitimately recuse himself from the case.

Some respondents noted that they are required by law to file a list of all contributors to their election campaigns. For a discussion of disclosure requirements in the various states, see supra notes 138-42 and accompanying text.
contributions," which would permit "anyone to challenge the judge for favoritism." It would follow that the judge should also know who has contributed to his campaign so that he may disqualify himself where necessary and, thus, protect himself from charges of partiality. However, another respondent cautioned that, particularly in a small rural community, recusal is not always a feasible solution to the problem of the appearance of judicial partiality.274

One judge suggested that, provided a judicial candidate's actions are fully and publicly disclosed, he may even solicit and accept funds on his own behalf without risking any appearance of impropriety.275 However, other essay respondents would limit their solicitation to relatives and close friends and would not accept contributions from attorneys or from anyone with pending charges. Furthermore, these individuals would recuse themselves from subsequent cases in which their contributors might appear.

6. Amount Limitations on Expenditures and Contributions

Several survey participants recommended that a limit should be set on the amount of both the expenditures and the contributions allowed for a judicial campaign. The limit should ensure that contributions are "not only free from 'buying' a judge, but also have no appearance of 'purchase.'" Another judge believed that an individual contribution of $300 to $500 would be within the appropriate limit. One respondent voluntarily set limits on contributions to his local and state-wide races of $50 and $100, respectively.276

274. He explained:
   I am a judge in a county of 12,XXX people. I hear a number of cases involving people who are distantly related, as well as acquaintances. Judges from a metropolitan area would probably disqualify themselves under the same circumstances where I might hear a case. Most other judges from rural [areas] that I talk to do the same as I do. We bail out only where a party is a good friend or close relative. To some not from a rural area, this may seem bad. The real justification in my mind is that everyone knows everyone else's business in a small community. If what I am doing would be perceived as improper, I would not be the judge for long. Ultimately, the people are the judges of my performance and that is the way I think it should be.

275. However, only about thirty percent of all survey participants responded that it is appropriate for a candidate for judicial office to personally solicit funds and only thirty-eight percent of the respondents believed that it is appropriate for a candidate to personally accept campaign contributions. See supra notes 204-14 and accompanying text for an analysis of these results.

276. Another stated that contributions generally range from $10 to $500. For a discussion of contribution limitations currently established in the various states, see Emperor's Clothes, supra note 39, at 95, 125-26.
One judge stated that "there must be some constitutionally sound scheme adopted and implemented to limit campaign expenses." Indeed, while the Supreme Court has upheld contribution ceilings, it has held campaign expenditure limitations unconstitutional under the First Amendment. However, if a candidate is receiving public funds, limitations may be placed upon the amount of his campaign spending.

V. Proposal

The goal of the drafters of Canon 7B(2) of the CJC was to guide candidates for judicial office to a resolution of the conflict between the candidate's need to fund his campaign and the requirement that he maintain an appearance of impartiality and independence. This objective has not been achieved by the present CJC Canon 7B(2). It is clear from the results of the survey and the variant approaches taken by several states that Canon 7B(2) of the CJC does not effectively regulate the financing of judicial campaigns. It is time for the ABA to reevaluate Canon 7B(2) and to adopt a provision that will incorporate the suggestions raised herein. The proposal that follows is an attempt to address and resolve the issues and concerns raised by the respondents to the survey.

7B(2) FUND RAISING CONDUCT

A candidate for election to, retention in, or re-election to judicial office should conduct his campaign in a manner consistent with the requirements of Canon 1, to uphold the integrity and independence of the judiciary. A candidate should not personally

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277. Buckley v. Valeo, 424 U.S. 1, 26-35 (1975). The Court stated that limiting both the actuality and the appearance of corruption is a constitutionally sufficient justification for a $1000 contribution limitation. However, the Court also recognized that "[u]nder a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign." Id. at 26.

278. Id. at 58. The Court stated that "[x]penditure ceilings impose direct and substantial restraints on the quantity of political speech." Id. at 39. They restrict "the number of issues discussed, the depth of their exploration, and the size of the audience reached." Id. at 19.

279. Id. at 57 n.65.
280. See REPORTER'S NOTES, supra note 7, at 98-99.
281. See supra Section IV.
282. See supra Section III.
283. See supra note 82 and accompanying text.
284. See supra notes 238-79 and accompanying text for a discussion of the results of the survey.
solicit or accept campaign contributions. Unless his campaign is to be financed solely with personal funds or funds donated from the immediate members of his family, a candidate should establish a committee of responsible persons to secure and manage the expenditure of funds for his campaign. A candidate should refer all prospective contributors to his campaign committee. A candidate is not prohibited from attending fund raisers on his own behalf, provided that during his attendance thereat he makes no direct appeals for contributions to his campaign.

A candidate's committee is not prohibited from soliciting campaign contributions from lawyers. However, such committee should not solicit or accept contributions from attorneys or litigants with cases pending before the candidate or the court in which the candidate would sit upon election to judicial office. In the event that a contributor should appear before a judge after his election, the judge should make that fact known to all parties involved in the litigation, and, at the request of any party, disqualify himself from the case, if, in his discretion, he believes that his disqualification would not prejudice the rights of any other party. A candidate for judicial office shall comply with all applicable provisions of the state's election law, as stated at [ ].

[Each state shall set forth the name and authority of the judicial commission that will have jurisdiction to police and enforce the above provision.]

The proposal set forth above differs substantially from Canon 7B(2) of the CJC. It incorporates the views of the judges surveyed and the modifications and variations adopted in several of the states. As indicated by its title, the proposed Canon relates solely to fund raising conduct. The CJC's provisions concerning the solicitation and acceptance of publicly stated support may raise additional issues that were not addressed in this Note, and thus, those provisions have been eliminated from the proposal. In addition, 7B(3) has been eliminated and incorporated into 7B(2). Thus, subdivision (2) applies to all candidates, including an incumbent judge who is running unopposed for retention in, or re-election to, office.

Proposed Canon 7B(2) includes a reminder to all candidates that upholding the integrity and independence of the judiciary is their prime responsibility. It has become increasingly apparent that election campaigns require a significant amount of money. Therefore, as long as any state requires the election of any of its judges, it is

285. See supra note 26 and accompanying text.
imperative that the candidates are made fully aware of their social and ethical responsibilities. The proposed canon stresses the goals of the CJC, while easing some of the tensions that arise when a candidate must raise funds for his election campaign.\(^{287}\)

Several ethics opinions have provided that a candidate is free to use his own funds and funds contributed by the immediate members of his family.\(^{288}\) The proposed canon specifically provides that this behavior is acceptable, alleviating any confusion that may arise during a campaign.\(^ {289}\)

Proposed Canon 7B(2) retains the CJC's provision that a candidate should not personally solicit or accept campaign contributions. Several states have amended Canon 7B(2) to allow a candidate to accept contributions.\(^ {290}\) Although the proposed canon prohibits a candidate from personally accepting contributions,\(^ {291}\) it does not require a candidate to turn away prospective contributors. Rather, it provides that should a candidate be approached by a prospective supporter, he should refer that person to his campaign committee. A candidate should not feel he is violating any ethical code should an unsolicited contributor approach him.\(^ {292}\)

The most significant change in proposed Canon 7B(2) is the statement that a candidate is not prohibited from attending a fundraiser held on his own behalf. Under the CJC, attendance at such an activity would result in a technical violation of Canon 7B(2).\(^ {293}\) However, seventy-five percent of the judges who responded to the survey felt that attendance at such a fund raising activity is appropriate behavior for a judicial candidate.\(^ {294}\) Clearly, Canon 7B(2) does

\(^{287}\) See supra notes 8-10 and accompanying text for a discussion of these tensions.

\(^{288}\) See supra note 49 and accompanying text for a discussion of these opinions.

\(^{289}\) It should be noted that several of the judges who responded to the essay question felt that self-funding is the only way to run a completely independent and impartial campaign. As this would effectively exclude the great majority of candidates, the proposed canon suggests that there will be no violation of the Code of Judicial Conduct if the candidate should choose to use some of his own or his family's money, but does not restrict the candidate to this type of campaign funding. See supra notes 254-55.

\(^{290}\) For a discussion of the amendments adopted by several states, see supra notes 105-55 and accompanying text.

\(^{291}\) Sixty-three percent of the judges who responded to the survey felt that personally accepting campaign contributions is inappropriate behavior. See infra Appendix B for the full statistical analysis of the results of the survey.

\(^{292}\) For a discussion of the elimination of the Commentary, which states that a candidate should not know the names of the contributors to his campaign, see infra note 297-99 and accompanying text.

\(^{293}\) See supra note 41 and accompanying text.

\(^{294}\) See supra notes 225-32 and accompanying text.
not adequately address the current needs of election campaigns. The proposed canon more accurately responds to the ethical as well as the financial demands of judicial campaigns. As long as the candidate does not engage in the direct solicitation of funds at a fund raiser, attendance at the event is well within the acceptable boundaries of the CJC.

Proposed Canon 7B(2) also qualifies the propriety of allowing a candidate's committee to solicit contributions from attorneys. Several of the judges who responded to the essay question of the survey voiced concern about the possibility of contributors appearing before the candidate once he has been elected. The proposed canon attempts to alleviate this dilemma in three ways. First, the proposal prohibits the candidate's committee from soliciting or accepting funds from current litigants. Second, it provides that in the event a contributor should appear before the judge, the judge should disqualify himself if any party so requests, provided that no other party would be prejudiced by his resignation from the case. Finally, the proposal deletes the commentary of Canon 7B(2), requiring that the names of contributors not be revealed to the candidate.

Since the solicitation and acceptance of contributions from current litigants excludes any possibility of the appearance of judicial impartiality, such conduct is expressly forbidden by the proposed Canon 7B(2). Furthermore, the proposal's recommendation that a judge recuse himself from a case in which a contributor appears is an attempt to establish the fairest and most equitable course of action by requiring that the judge determine whether the rights of any party would be prejudiced by his recusal. Factors to be considered include the geographic location of the court and the availability of other forums in which the parties might be heard.

The commentary to Canon 7B(2) has been eliminated for three reasons. First, a candidate for judicial office must know the identity of his contributors in order to refuse or return contributions from inappropriate sources and to recuse himself from cases in which his contributors appear. Second, the commentary, if retained, would be inconsistent with the proposed Canon's provision permitting a candidate to attend a fund raiser on his own behalf. Finally, the

295. For a discussion of these survey responses, see supra notes 268-75 and accompanying text.
296. For a discussion of the impracticability of recusal in rural areas, see supra note 274 and accompanying text.
297. Many of the survey participants felt a need to know the identity of their contributors for these reasons. See supra notes 268-75 and accompanying text.
298. See supra note 294 and accompanying text.
commentary has been rendered obsolete by the enactment of laws in each of the fifty states and the District of Columbia requiring that a candidate for any elective office file a list of the names of his campaign contributors. 299

Two final additions have been made in proposed Canon 7B(2). The proposal deletes any reference to time limitations on soliciting funds. However, the candidate is instructed to comply with all of the applicable provisions of his respective state’s election laws, including any proscriptions on soliciting campaign contributions for prescribed time periods before and after the election. It is up to each individual state to direct the candidate to the appropriate provisions, and to adapt Canon 7B(2) to its judicial selection methods. Each state has its own method of selection and goals to be achieved by those methods. 300 Therefore, each state must set out for the candidates its particular rules and regulations that have been implemented to promote its system. The CJC is a model provision that must be adapted to the needs of each individual state. The proposed canon also provides that each individual state should set forth the jurisdictional provision of a committee whose chief responsibility is to police judicial campaigns and to enforce Canon 7B(2). 301 As each state must create its own committee with whatever powers it deems necessary, the proposal only provides that each state should set forth the name and the scope of the authority of such a committee. The existence of these committees should be disclosed to the candidates and the public before the commencement of any judicial election campaigns. It is imperative that the candidates, as well as the public, be fully informed of the behavior deemed appropriate and therefore required of a candidate for judicial office.

VI. Conclusion

Canon 7B(2) of the CJC does not presently set out appropriate or feasible guidelines for a judicial candidate. This Note recommends adoption of the proposal set forth above, which incorporates both the suggestions of a large sampling of elected trial level judges who responded to the survey and the amendments made to Canon 7B(2) by several states. Maintaining the integrity and independence of the

299. See supra notes 138-42 and accompanying text.
300. See supra notes 88-104 and accompanying text for a discussion of the various selection methods.
301. For a discussion of the need for a committee to adjudicate such matters, see supra notes 163-90 and accompanying text.
judiciary is the stated goal of the CJC. This goal can be more readily achieved by adopting a canon that is a closer reflection of reality. By allowing the candidate to attend a fund raiser held on his behalf, or by requiring the successful candidate to recuse himself in certain situations where a contributor later appears before him, the candidate is given a freer reign during his election campaign, without forcing him to compromise his ethical values. A provision that gives guidance to the candidates, as well as to the public, is essential for the fair resolution of a problem that plagues judicial election campaigns.

Leona C. Smoler
Mary A. Stokinger

Survey Re: Judicial Elections

INSTRUCTIONS: Check the space that corresponds to your view as to the stance the legal profession should take regarding each of the following election activities if the rules of judicial ethics were to be changed. Please do not place your name anywhere on the survey.

1. Do you believe a judicial candidate should be permitted to personally solicit campaign funds for his/her own election campaign?
   - No, I believe the behavior is definitely inappropriate.
   - No, I believe the behavior is generally inappropriate.
   - No, I believe the behavior is generally inappropriate, but there are exceptions:
     - Yes, I believe the behavior is generally appropriate, but there are exceptions:
     - Yes, I believe the behavior is generally appropriate.
     - Yes, I believe the behavior is definitely appropriate.

2. Do you believe a judicial candidate should be permitted to personally accept campaign contributions for his/her own election campaign?
   - No, I believe the behavior is definitely inappropriate.
   - No, I believe the behavior is generally inappropriate.
   - No, I believe the behavior is generally inappropriate, but there are exceptions:
     - Yes, I believe the behavior is generally appropriate, but there are exceptions:
     - Yes, I believe the behavior is generally appropriate.
     - Yes, I believe the behavior is definitely appropriate.

3. Do you believe a judicial candidate should be permitted to establish a committee to secure funds for his/her own election campaign?
   - No, I believe the behavior is definitely inappropriate.
   - No, I believe the behavior is generally inappropriate.
   - No, I believe the behavior is generally inappropriate, but there are exceptions:
     - Yes, I believe the behavior is generally appropriate, but there are exceptions:
Yes, I believe the behavior is generally appropriate.
Yes, I believe the behavior is definitely appropriate.

4. Do you believe a judicial candidate should be permitted to establish a committee to manage his/her own campaign funds for his/her own election campaign?
   No, I believe the behavior is definitely inappropriate.
   No, I believe the behavior is generally inappropriate.
   No, I believe the behavior is generally inappropriate, but there are exceptions:
   Yes, I believe the behavior is generally appropriate, but there are exceptions:
   Yes, I believe the behavior is generally appropriate.
   Yes, I believe the behavior is definitely appropriate.

5. Do you believe a judicial candidate should be permitted to attend a fund raiser on his/her own behalf?
   No, I believe the behavior is definitely inappropriate.
   No, I believe the behavior is generally inappropriate.
   No, I believe the behavior is generally inappropriate, but there are exceptions:
   Yes, I believe the behavior is generally appropriate, but there are exceptions:
   Yes, I believe the behavior is generally appropriate.
   Yes, I believe the behavior is definitely appropriate.

6. Do you believe a judicial candidate should be permitted to know the names of the individuals who provide campaign funds for his/her own election campaign?
   No, I believe the behavior is definitely inappropriate.
   No, I believe the behavior is generally inappropriate.
   No, I believe the behavior is generally inappropriate, but there are exceptions:
   Yes, I believe the behavior is generally appropriate, but there are exceptions:
   Yes, I believe the behavior is generally appropriate.
   Yes, I believe the behavior is definitely appropriate.

7. Finally, we would appreciate your providing us with any additional comments you may have concerning ethics and judicial campaign conduct, including your own campaign experiences:
In order to calculate accurate results, we request that you furnish the state in which you are a judge:_____.

THANK YOU FOR COMPLETING THE SURVEY. PLEASE PLACE IT IN THE ENVELOPE PROVIDED AND RETURN IT TO US AS SOON AS POSSIBLE.

Appendix B

Statistical Analysis of the Results of the Survey

Question 1:

Definitely inappropriate: 43.5%
Generally inappropriate: 12.6%
Generally inappropriate, but there are exceptions: 14.2%
Generally appropriate, but there are exceptions: 15.1%
Generally appropriate: 10.5%
Definitely appropriate: 4.1%

Histogram Frequency:

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I ........ I ........ I ........ I ........ I ........ I
0 80 160 240 320 400

One symbol equals approximately 8.00 occurrences
Question 2:

Definitely inappropriate: 32.6%
Generally inappropriate: 13.4%
Generally inappropriate, but there are exceptions: 15.9%
Generally appropriate, but there are exceptions: 20.8%
Generally appropriate: 11.3%
Definitely appropriate: 6.0%

Histogram Frequency:

Count  Value
158  1.00  ***********************************
  65  2.00  **************
  77  3.00  ***************
 101  4.00  **************
  55  5.00  **********
   29  6.00  ****

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One symbol equals approximately 4.00 occurrences

Question 3:

Definitely inappropriate: 7.2%
Generally inappropriate: 1.9%
Generally inappropriate, but there are exceptions: 3.3%
Generally appropriate, but there are exceptions: 14.0%
Generally appropriate: 31.7%
Definitely appropriate: 42.0%

Histogram Frequency:

Count  Value
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    9  2.00  *
   16  3.00  **
   68  4.00  ********
 154  5.00  *************
 204  6.00  *****************

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One symbol equals approximately 8.00 occurrences
Question 4:

Definitely inappropriate: 5.7%
Generally inappropriate: 1.2%
Generally inappropriate, but there are exceptions: 1.8%
Generally appropriate, but there are exceptions: 14.8%
Generally appropriate: 31.2%
Definitely appropriate: 45.2%

Histogram Frequency:

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One symbol equals approximately 8.00 occurrences

Question 5:

Definitely inappropriate: 13.8%
Generally inappropriate: 6.0%
Generally inappropriate, but there are exceptions: 5.8%
Generally appropriate, but there are exceptions: 16.7%
Generally appropriate: 23.9%
Definitely appropriate: 33.8%

Histogram Frequency:

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One symbol equals approximately 4.00 occurrences
Question 6:

Definitely inappropriate: 23.8%
Generally inappropriate: 13.9%
Generally inappropriate, but there are exceptions: 8.3%
Generally appropriate, but there are exceptions: 10.1%
Generally appropriate: 22.4%
Definitely appropriate: 21.5%

Histogram Frequency:

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I ........ I ........ I ........ I ........ I ........ I
0       40     80     120    160    200

One symbol equals approximately 4.00 occurrences