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ETHICAL CONDUCT IN A JUDICIAL CAMPAIGN: IS CAMPAIGNING AN ETHICAL ACTIVITY?

I. INTRODUCTION

A duty of ethical conduct restricts the manner in which attorneys manage their professional affairs. This ethical duty pervades all phases of the activities undertaken by members of the bar.

The professional activities of attorneys include running for judicial office. As a consequence of their duty of ethical conduct, candidates for a judicial post, unlike non-lawyers running for partisan political office,

1. Note, for example, the statement of the Washington Supreme Court: "These [ethical] rules permeate all aspects of an attorney's life, whether he be engaged in the active practice of law, campaigning for a political position or adjudicating disputes as a judge." In re Donohoe, 90 Wn. 2d 173, 180, 580 P.2d 1093, 1096 (1978). Likewise, the American Bar Association's rules governing attorney conduct "define the type of ethical conduct that the public has a right to expect . . . in all matters pertaining to professional employment." Preliminary Statement to ABA Model Code of Professional Responsibility (emphasis added).

The requirements of legal ethics also apply to activities of attorneys outside the scope of their professional lives. See, e.g., Wash. Discipline Rules for Attorneys 1.1(a) (premises disciplinary action upon, inter alia, "[t]he commission of any action involving moral turpitude, dishonesty, or corruption, whether the same be committed in the course of his relations as an attorney, or otherwise"); ABA Comm. on Ethics and Professional Responsibility, Recent Ethics Opinions, No. 336 (1974) ("[A] lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity").

2. As of 1976, 12 states used partisan elections and 13 used nonpartisan elections to select judges to their courts of highest appeal. P. Dubois, From Ballot to Bench 257 n.6 (1980). Lower court positions also commonly are elective. See S. Escovitz, Judicial Selection and Tenure 17-42 (1975) (survey by state of method of court selection).


In pursuit of election, judicial candidates frequently engage in controversy in order to attract more votes. As one judge reflected:

Because the electorate is uninformed, a judicial candidate is tempted to make sensational statements, which he hopes will call the voters' attention to his candidacy and at the same time appeal to what he believes to be the majority view. I know one judge who campaigned throughout the state announcing that he was for the death penalty, another who promised that if elected he would "take the handcuffs off the police," another whose television advertisement showed him, in his robes, slamming shut a prison door.

Spaeth, Reflections on a Judicial Campaign, 60 Jud. 10, 13 (1976). Further, judicial campaigns sometimes reduce to "campaign oratory that a Judge is a 'strict constructionist' or 'civil righter' or a 'liberal' or 'conservative' or 'hard' or 'soft' or 'compassionate' with respect to persons charged with crime." Morial v. Judiciary Comm'n, 438 F. Supp. 599, 606 (E.D. La.), rev'd, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978).

3. Attorneys who are candidates for partisan political office are also subject to considerations of legal ethics. See State v. Russell, 227 Kan. 897, 610 P.2d 1122 (1980), cert. denied, 449 U.S. 983 (1980) (attorney censured for campaign acts while running for local utilities board); ABA Comm. on
must limit the activities they undertake in furtherance of their candidacies.

The purpose of this comment is twofold. First, through a comprehensive survey of the codes that comprise the sources of legal ethics, the comment elucidates a body of ethical law governing the conduct of candidates in a judicial campaign. Second, after identifying the basic principle found to underlie these ethical codes, this comment argues that the scope of permissible judicial campaigning should be strictly confined.

II. THE SOURCES OF LAW OF LEGAL ETHICS

The law of legal ethics consists of the codes that, by court order or by legislative act, each jurisdiction adopts as the body of rules governing the conduct of its bar. Although these codes vary from state to state, in general they are patterned upon model versions developed and promulgated by the American Bar Association. The Code of Professional Responsibility (CPR), the broadest of these rules, addresses those problems of

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4. These ethical rules, "having been adopted and promulgated by this court as the rules which govern professional conduct of those practicing law in this jurisdiction, are of dignity and status equal to any other rule this court has adopted." In re Chantry, 67 Wn. 2d 190, 193, 407 P.2d 160, 161 (1965).

The function of regulating legal practice is often said to be inherent in judicial systems. Although the function has been ostensibly delegated to the courts by legislation in some states, the basic theory is that all courts have inherent power to regulate practice before them, and thus to determine who may, or may not, engage in such practice. That power has been extended to all aspects of the practice of law, and is not just limited to determining who may represent others before a court. This appears to have been a natural concomitant consequence of the development of the legal profession in the United States.

5. Since these codes originate in professional organizations of lawyers with vested interests in the outcomes, arguably they cannot be deemed to concern "ethics," at least not in the philosophical sense of the word. See note 13 infra. Note, however, that in the United States the term "unethical" has come to mean conduct in violation of the accepted code of a profession or business. H.W. Fowler, A Dictionary of Modern English Usage 171 (2d ed. 1965).

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professional ethics encountered primarily by the practicing attorney. The Code of Judicial Conduct (CJC), the other principal model code, deals with the ethics of the bench. These codes by no means exhaust the scope of ethical problems that attorneys as individuals might encounter. Nevertheless, the CPR and CJC, along with other incidental bar rules, constitute the primary authority upon which the legal profession relies in answering its questions of ethics. Therefore, it is to these sources that this comment shall look in analyzing the ethics of judicial campaigns.


8. These other bar rules pertain primarily to administrative matters and consequently are of small importance as sources of substantive ethical law. Further, even in those aspects in which they are relevant, these sources do little more than duplicate parallel provisions of the CPR and hence add little to the analysis.

The Discipline Rules for Attorneys make acts involving "moral turpitude, dishonesty, or corruption" or demonstrating unfitness to practice law subject to disciplinary sanction. WASH. DISCIPLINE RULES FOR ATTORNEYS 1.1(a), (k). These provisions are duplications of proscriptions in DR 1–102 of the CPR. See note 12 and accompanying text infra. As noted in the discussion of DR 1–102, such provisions define only the minimum behavior necessary to avoid sanction and therefore do not help delimit the scope of ethical campaign activity. See note 13 and accompanying text infra. The Discipline Rules were adopted by the Washington Supreme Court in 1975. The sanctions for their violation are censure, reprimand, suspension, disbarment, and transfer to inactive status. WASH. DISCIPLINE RULES FOR ATTORNEYS 1.2.

Under the Oath of Attorney, lawyers have a duty to "maintain the respect due to the courts of justice and judicial officers." WASH. RULES FOR ADMISSION TO PRACTICE 5.G.4. Use here of the word "due" is subject to several interpretations. The requirement should probably be taken, however, to mean simply that considerations of fairness to the judge and of preserving the decorum of the judiciary's public face are to be given "due" weight in assessing the ethics of actions that affect the bench. Such an interpretation supports the general purposes of legal ethics and makes for a workable standard of enforcement of the Oath. In this respect, the duty imposed by the Oath is simply a generalized formulation of the CPR duty under Canon 8 to refrain from undue criticism of the bench. See section II.A.3 infra. Although the obligation of "due respect" thus has great bearing on the question of ethical campaigning, the issue in its relevant aspects is more appropriately treated in the discussion of that Canon. Swearing to the Oath of Attorney is a requirement of admission to the Washington bar. WASH. RULES FOR ADMISSION TO PRACTICE 5.E. See also WASH. REV. CODE § 2.48.210 (1979). Violation of the Oath is a ground for disciplinary sanctions. WASH. DISCIPLINE RULES FOR ATTORNEYS 1.1(c). See also WASH. REV. CODE § 2.48.220(3) (1979).

In addition to the rules of legal ethics surveyed in this comment, there may be financial disclosure or other statutory election requirements that apply to judicial campaigns. See, e.g., WASH. REV. CODE § 42.17.030 (1979).
A. The Code of Professional Responsibility

The CPR is the principal source of ethical duties applicable to the campaign activities of non-incumbent judicial candidates. The specific issue of campaign conduct, however, receives little explicit treatment in the CPR. Consequently, the attorney-candidate must look to general rules and standards of the CPR that do not expressly address the issue of judicial campaigning in order to assess the ethics of proposed campaign acts. Three such rules and standards pertain to the types of activities that judicial candidates might undertake in the course of a campaign: (1) standards of general attorney behavior; (2) restrictions on publicity; and (3) limita-

9. See generally note 6 supra. The CPR has a tripartite organization: "Canons," "Ethical Considerations" (EC's), and "Disciplinary Rules" (DR's). The three parts, as explained in the CPR, are differentiated as follows:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public. . . . They embody the general concepts from which the Ethical Consideration and Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Preliminary Statement to CPR (footnote omitted). For background behind the development of the CPR's three-part structure, see Wright, The Code of Professional Responsibility: Its History and Objectives, 24 Ark. L. Rev. 1 (1970). For a consideration of the character of the obligation imposed by the Ethical Considerations, see notes 13 & 17 infra.

10. Because the CPR's provisions address only the acts of "a lawyer," it is not apparent whether the CPR is meant to reach the acts of incumbent judges. But see In re Donohoe, 90 Wn. 2d 173, 180, 580 P.2d 1093, 1096 (1978) (dictum) (The CPR's requirements "permeate all aspects of an attorney's life . . . [including] adjudicating disputes as a judge"). In general, the issue will not arise since the courts are not dependent upon the CPR for the discipline of members of the bench. Nevertheless, the CPR's Disciplinary Rules sometimes have been extended to reach those judicial acts that, due to the judge's resignation from the bench prior to the disciplinary proceeding, would otherwise be unsusceptible of judicial control. E.g., In re Vasser, 75 N.J. 357, 382 A.2d 1114, 1116 (1978); State ex rel. Okla. Bar Ass'n v. Sullivan, 596 P.2d 864, 866-67 (Okla. 1979). In at least one case, the CPR was made to reach judicial acts even while the judge remained on the bench. In re Littell, 260 Ind. 187, 294 N.E.2d 126, 130 (1973). See also In re Simmons, 65 Wn. 2d 88, 94, 395 P.2d 1013, 1016 (1964) (Judge of a non-court-of-record disbarred under former Canons of Professional Ethics: "[A] judge thereof, although prohibited by statute (RCW 35.20.170) from the practice of law during his tenure, remains a member of the bar of this state (RCW 2.48.021)").

As a general proposition, courts have been willing to discipline incumbent judges qua attorneys for misconduct during their tenure in judicial office, at least where "moral turpitude" is involved. E.g., State ex rel. Dill v. Martin, 43 Wash. 76, 89, 87 P. 1054, 1056-57 (1906). See generally Annot., 57 A.L.R. 3d 1150 (1974). Further, even if not serving as the basis for the order of discipline itself, the CPR may still be relevant as a standard by which to measure the propriety of a judge's conduct. See, e.g., In re Donohoe, 90 Wn. 2d 173, 180, 580 P.2d 1093, 1097 (1978) ("We feel that the minimum dignity appropriate to judicial office is that the lawyer, judge, or judicial candidate abide by the Code of Professional Responsibility").
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tions on criticisms of the bench made by members of the bar. In addition to these general rules of conduct, several measures under Canon 8 of the CPR specifically address the question of ethical campaign conduct.

1. Standards of General Attorney Conduct

A number of measures under the CPR prescribe standards of conduct applicable to all forms of professional activity. These require that attorneys act so as to preserve for the bar a seemly and professional image in the public eye.11 Pursuant to this policy, for example, Ethical Consideration (EC) 1–5 directs that an attorney’s conduct be “temperate and dignified,” and EC 9–6 requires an attorney to “conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust . . . of the public.”

The CPR includes a rule of minimum conduct that serves as an unambiguous floor on the bounds of attorney conduct consistent with these general ethical standards. In any setting, an attorney’s actions must not amount to misconduct within Disciplinary Rule (DR) 1–102, which prescribes illegal or dishonest acts.12 DR 1–102, however, contributes very little to a substantive delineation of the scope of ethical campaign conduct. Something more than the minimum is required for a candidate’s behavior to be ethical.13 Judicial candidates must comport with the CPR’s

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11. For example, EC 9–2 states that “[p]ublic confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. . . . [A] lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.” (footnote omitted). Analogously, EC 1–5 bases its disparagement of even slight violations of law by attorneys on the apprehension that these “may tend to lessen public confidence in the legal profession.” See CPR EC 9–1, EC 9–6. See also CPR EC 8–1 (the legal system “should function in a manner that commands public respect”).

In imposing disciplinary sanctions upon attorneys, the courts have continually stressed this need to maintain public respect for the legal system. E.g., Jackson v. State Bar, 23 Cal. 3d 509, 591 P.2d 47, 50, 153 Cal. Rptr. 24, 27 (1979); Kentucky Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168–69 (Ky. 1980), cert. denied, 449 U.S. 1101 (1981); In re Albright, 274 Or. 815, 549 P.2d 527, 529 (1976); In re Cary, 90 Wn. 2d 762, 766, 585 P.2d 1161, 1163 (1978); In re Case, 59 Wn. 2d 181, 184, 367 P.2d 121, 122–23 (1961). In Case, the court stated: “Disciplinary proceedings . . . are not prosecuted primarily to punish the offender, but to curb disrespect for the profession, to maintain its honor and dignity . . . .” Id.

12. “A lawyer shall not: . . . (3) Engage in illegal conduct involving mortal turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law.” CPR DR 1–102(A) (footnotes omitted).

13. The term “ethical” is used here in its moral philosophical sense, referring to the “challenge of excellence” that determines the conduct of those interested in realizing their fullest capabilities. It corresponds with what Professor Fuller has labelled the “morality of aspiration,” which, as a source of human motivation, stands opposed to the pressures of deterrence caused by the fear of disciplinary
ethical directives, which charge an attorney with maintaining "the highest standards of ethical conduct" and with "uphold[ing] the integrity and honor of his profession." The vagueness of these general ethical standards serves to delegate to attorney-candidates a great deal of personal discretion in deciding what is ethical conduct. In practice, custom undoubtedly operates as a norm by which to evaluate the exercise of this discretion. Custom, however, is an insufficient basis for evaluating the propriety of a proposed action. Rather, the starting point of a candidate's analysis should be whether the action's effect will be to promote or to harm public faith in the bar. Conduct tending to tarnish public faith in the integrity and efficiency of the bar should be beyond a candidate's ethical liberty unless it can be justified.

sanction (the "morality of duty"). L. FULLER, THE MORALITY OF LAW 5–13 (rev. ed. 1969). Professor Fuller explains:

The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty, for shortcoming, not for wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as befits a human being functioning at his best.

Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.

Id. at 5–6 (footnote omitted).

Note that the conception of the two moralities elucidated by Professor Fuller is strongly mirrored in the bifurcation of the CPR into "Ethical Considerations" and "Disciplinary Rules." See Preliminary Statement to CPR, reprinted in part in note 9 supra: Wright, supra note 9, at 10 n.26. As with the "morality of aspiration," the CPR acknowledges that "[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards." Preamble to CPR. But want of sanction in the Ethical Considerations does not bear on their authoritativeness as sources of obligation. But see note 17 infra. The threat of professional sanction is not the relevant determinant of the conduct of an attorney who is interested in his or her own human excellence. In reference to the Disciplinary Rules, as stated by the chairman of the committee that drafted the CPR:

A lawyer who complies with these minimum standards may be an ethical lawyer only in a marginal sense, for he may have failed to conform to the higher ideals and traditions of the profession. The Disciplinary Rules are to be firmly and uniformly enforced; but a lawyer, to be deserving of the approbation of his fellow man, must conform to higher standards than those set forth in the Rules.

Wright, supra note 9, at 11.

14. Preamble to CPR (emphasis added). See CPR EC 1-5 ("A lawyer should maintain high standards of professional conduct").

15. CPR EC 9–6.
by reference to some other factor. It should thus be possible to discern objective limits on the scope of discretion entrusted to the candidate. Nevertheless, the courts have shown little willingness to recognize such boundaries and have found grounds to discipline judicial candidates only for violations of other, more specific rules.

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16. Given that a campaign act is otherwise ethical, it is difficult to conceive of any possible justification for performing that act in a manner that is harmful to public faith in the legal system. Cf. In re Simmons, 71 Wn. 2d 316, 319, 428 P.2d 582, 585 (1967) (A lawyer "has a right as a member of a free society to express his views; however, as a representative of the legal profession, a lawyer has a duty not to express those views irresponsibly and in a manner which will bring discredit upon the profession and the courts"). But cf. CPR EC 9–2:

While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty ... to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism.

17. In general, only egregious instances of attorney misconduct are susceptible of disciplinary action. The immediate practical reason for this limitation is built into the CPR itself: only violations of Disciplinary Rules are subject to disciplinary sanctions; and these rules in general delineate only patently unethical forms of behavior. Nevertheless, some courts have been willing to use their inherent powers of regulation over the bar to depart from the CPR's disciplinary regime, including basing disciplinary action upon the CPR's Ethical Considerations. See, e.g., Florida Bar v. Dawson, 318 So. 2d 385 (Fla. 1975) (disbarment action grounded on violation of EC 5–8); Committee on Professional Ethics v. Durham, 279 N.W.2d 280 (Iowa 1979) (reprimand and admonishment based upon violations of EC 1–5 and EC 9–6, requiring lawyers to be "temperate and dignified" and to avoid "even the appearance of impropriety"); cf. City Council v. Sakai, 58 Hawaii 390, 570 P.2d 565, 572 (1977) ("[CPR] disciplinary rules establish only minimum standards and may not foreclose the weighing of other considerations"). See generally Steele, Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature, 20 Ariz. L. Rev. 413, 413–14 (1978); Note, Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions, 65 Iowa L. Rev. 1386, 1386–409 (1980).

For a rare case dealing with the ethics of conduct undertaken by an attorney-candidate in the course of a judicial campaign, see In re Donohoe, 90 Wn. 2d 173, 580 P.2d 1093 (1978). Especially striking in Donohoe is the severity of the candidate's ethical misfeasance, found sufficient to uphold two reprimands. The first of these was for publishing, over the course of two separate campaign bids, a series of deliberately false statements about actions taken by her incumbent opponents while on the bench. Id. at 177–79, 580 P.2d at 1095–96. The second reprimand was for printing and circulating a "doctored" version of a letter originally written by her opponent's reelection committee chairman. As described by the court:

Appellant, without permission, cut, pasted and altered that letter and had it reproduced along with her own campaign statement at the bottom of the page. The doctored letter included the original letterhead ... along with [the committee chairman's] signature. This was used as a piece of campaign literature.

Appellant removed the essence of three paragraphs. She deleted reference to the King County Bar poll wherein 81 percent had rated [the incumbent judge] as good or excellent while she received less than 2 percent in those categories and 55 percent rated her poor. . . .

Appellant then sent the altered letter to all King County taverns with the hope that it would be publicly posted. Id. at 182–83, 580 P.2d at 1098. For other cases concerning the campaign conduct of candidates in judicial elections, see In re Baker, 218 Kan. 209, 542 P.2d 701 (1975); Annot., 57 A.L.R.2d 1362 (1958).
2. Attorney Publicity

The CPR’s restrictions on attorney publicity\(^\text{18}\) comprise a second source of ethical duties bearing on the issue of campaign activities. These restrictions primarily concern the direct advertising methods used by practitioners of law to solicit clients. Nevertheless, the advertising rules are fully operative in the context of a judicial campaign and govern the manner by which a candidate may use public communications in presenting his or her candidacy to the electorate.\(^\text{19}\)

The basic rule is that lawyers may not employ "any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."\(^\text{20}\) In practice, only the prohibition on self-laudatory statements should actually pose a significant limit on the scope of proposed campaign acts. The use of false, fraudulent, or deceptive communications in a campaign is probably aberrational. Further, although there may arise close factual disputes about whether particular communications are misleading or unfair, few would argue with the appropriateness of the basic rule as a general ethical standard.\(^\text{21}\)

The prohibition against self-laudatory statements, on the other hand, is more likely to limit the campaigning attorney. The distinction between self-praise and informing the public of one’s qualifications is difficult to draw both on a practical and a theoretical level.\(^\text{22}\) Consistent with the pur-

\(^\text{18}\) CPR DR 2–101.

\(^\text{19}\) This follows from the general applicability of the CPR to campaign activities. See note 1 supra. The particular applicability to campaigning of the publicity restriction is further indicated by the explicit treatment given to “political campaigns” in CPR DR 2–101(H)(1) (DR 2–101(F)(1) of the Washington version). DR 2–101(H)(1) allows more freedom in a political campaign, however, than if campaigns were regulated solely by DR 2–101(A). See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS, No. 546 (1962), reprinted in part in note 23 infra; cf. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, No. 1366 (1976) (attorney-candidate for United States Senate subjected to tests of legal ethics regarding publicity in his campaign).

\(^\text{20}\) CPR DR 2–101(A). Another prohibition relevant to campaign publicity is DR 2–101(I) (DR 2–101(C) of the Washington version), banning payments by an attorney for "professional publicity in a news item."

\(^\text{21}\) One could argue with the rule’s appropriateness, however, not as a general ethical standard but as an enforceable rule of election campaigns. Further, a system of democratic elections generally leaves the determination of deceptive or falsity to the electorate.

\(^\text{22}\) For instance, it has been ruled that it is not self-laudatory for candidates to assert in campaign publicity "the fact or contention that they have performed free legal services for various people" or "that they have never turned down clients on the ground of impecuniosity or inability to pay a fee." ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS, No. 795 (1965) (District Attorney race; Opinion was based on Canon 27 of the former Canons of Professional Ethics, which contained a similar ban on self-laudation). Since the Committee recognized that such remarks did not bear on the qualifications of the candidate to hold office, it is difficult to understand how they could be characterized as anything other than "self-laudation." The result rested, apparently, upon a finding that the remarks did not operate as indirect advertising for the candidate’s private law practice. See generally note 23 infra. Even this finding is questionable.
poses of the publicity restrictions, the guiding principle should be to pro-
hibit judicial candidates from indirectly advertising their own legal prac-
tices through representations of personal legal prowess made during the
course of a campaign. In conflict with this principle, however, an indi-
vidual’s ability as a practicing attorney obviously is relevant to whether
that person is desirable as a judge and, for this reason, should be com-
communicated to the public.

The CPR offers little help in resolving this conflict. It simply author-
izes the identification of the candidate as a lawyer when done in a “limited
and dignified” manner and when germane to a campaign issue. The
professional status of the candidate as a lawyer, however, may not be the
only qualification relevant to his or her desirability as a judge. Other mat-
ters should be allowed publicity so long as the publicized matter is rea-
sonably related to the duties of the office sought. In general, one might
question the realism of a rule that limits publicity in a campaign to pur-
poses other than that of boosting the esteem of the candidate in the eyes of

23. This derives from the traditional limit imposed upon attorney advertising. See, e.g., ABA
COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS, No. 546 (1962):
Canon 27 [of the former ABA Canons of Professional Ethics] prohibits direct, as well as
indirect advertising for professional employment. [The prohibition] is directed at any newspaper
releases designed directly or indirectly to accomplish the objective forbidden by the Canon, i.e.,
professional employment as a lawyer, thus directly or indirectly to further his professional inter-
est as a lawyer.

Newspaper releases intended only to further the candidacy of a lawyer for a political office,
obviously are not forbidden by the Canon.

.. .

[T]he news releases must have the objective of furthering the candidacy of the lawyer for
political office only, and not be motivated for the purpose, directly or indirectly, of obtaining
professional employment as a lawyer.

In a similar vein, see WASHINGTON STATE BAR ASS’N LEGAL ETHICS COMM., OPINIONS, No. 93 (1961)
(“It is proper for a lawyer’s profession to be made known when he is running for office, but not to use
such language as ‘outstanding’ attorney in his advertising”).

In the wake of the landmark case of Bates v. State Bar, 433 U.S. 350 (1977), holding that blanket
suppressions of attorney advertising violate the free speech clause of the first amendment, the string-
cency with which restrictions on advertising impinge upon the content of campaign publicity may
well have abated. See also note 25 infra. However, whatever restrictions on advertising still remain
should, pro tanto, apply as much to indirect forms of advertising, such as might arise in the context of
a judicial campaign, as to direct advertising.

Note that the reference to self-laudatory statements has been eliminated from the section corre-
sponding to DR 2–101 in the proposed final draft of the Model Rules of Professional Conduct, pro-
posed as an eventual replacement for the CPR. ABA COMM’N ON EVALUATION OF PROFESSIONAL
STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.1(b) (Proposed Final Draft, May 30,
1981). Rather, the proposed new rule prohibits only those statements that are “likely to create an
unjustified expectation.” Id.


25. Any rule to the contrary would almost surely fail to survive a first amendment challenge. In
selecting the holder of a public office, the dissemination of relevant information is basic to the proper
functioning of the democratic process and hence is at the “core” of protected first amendment rights.
the public. Presumably, the purpose of all campaign publicity is to increase such esteem and, hence, is inherently self-laudatory. For this reason, the CPR’s advertising restrictions should “bend” to accommodate the practical necessities of a democratic election. Nevertheless, an ethical judicial candidate should beware of the potential for unethical abuse of any such accommodation and should act to reasonably restrain the tone with which campaign publicity thrusts his or her professional image upon the electorate.

3. Limitations on Criticisms of the Incumbent

An attorney-candidate for a judicial post may discover ethical limits on the criticisms he or she may direct at the incumbent opponent. The CPR restricts criticisms of the bench made by members of the bar on two grounds: first, that these tend to lessen public confidence in the legal system; and second, that they are often unfair to the judge.26

Because they undercut public faith in the courts, statements critical of an incumbent are ethical only if justified by countervailing considerations. Two such considerations operate in a judicial campaign: the right of the public to an open debate of the candidates’ qualifications; and the attorney-candidates’ freedom of speech.27

26. These concerns are evident primarily in CPR EC 8–6, which states in part:
Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.

Id. (footnotes omitted). In addition, EC 9–6 imposes upon every attorney “a solemn duty . . . to encourage respect for the law and for the courts and judges thereof.” See also, e.g., Kentucky Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980), cert. denied, 449 U.S. 1101 (1981) (attorney disciplined on basis of finding that his public criticism of a judge’s ruling “tend[ed] to bring the bench and bar into disrepute and to undermine public confidence in the judicial process”); In re Raggio, 87 Nev. 369, 487 P.2d 499, 500 (1971) (finding that attorney’s public criticisms had caused the state supreme court to become “the center of controversy” and that “[e]ssential public confidence in our system of administering justice may have been eroded”).

27. The Washington Supreme Court has acknowledged that these considerations may justify campaign statements critical of an incumbent judge. In a disciplinary action against an attorney who, as part of an unsuccessful attempt to unseat an incumbent judge, had deliberately misrepresented the incumbent’s judicial record and other matters, the court stated:
We are dealing with a delicate balancing of rights involving the public, the incumbent judge, and the lawyer candidate for judicial office. On the one hand the courts, as an institution, are entitled to the respect due to the office because the acceptance of judicial decisions ultimately depends upon the citizens’ belief in the integrity and impartiality of the courts. On the other hand, the members of the judiciary are subject to legitimate and accurate criticism and evaluation. A candidate for judicial office has a right to challenge an incumbent judge’s ability, decisions and judicial conduct, but it must be done fairly, accurately and upon facts, not false repre-
The CPR implicitly recognizes that the public’s right to an open debate may justify criticism of the incumbent. This right is the correlative of the duty expressed in EC 8–6 that "[l]awyers should protest earnestly against the . . . election of those who are unsuited for the bench. . . ."\(^{28}\) By these terms, the incumbent is not immune from being made the subject of such protests, nor is the challenging attorney barred from being the protestor.\(^{29}\) The principal ethical inquiry of the candidate should be whether a proposed criticism is motivated by a desire to improve the legal system. This is the underlying policy element that justifies permitting the criticism,\(^{30}\) and EC 8–6 explicitly bans criticisms motivated by any other reason.

The CPR expressly recognizes that an attorney’s freedom of speech may justify public criticisms of the incumbent.\(^{31}\) This exception, however, is narrowly construed against the complaining attorney. To be ethical, the benefits of free speech must remain greater than the costs to the legal system associated with the candidate’s criticisms. Consequently, DR 8–102(B) prohibits accusations against a judge which are knowingly false.\(^{32}\) DR 8–102(B), however, states only the minimum conduct necessary to avoid disciplinary sanction: to act ethically, a candidate who criticizes the incumbent "should be certain of the merit of his complaint."\(^{33}\)
The CPR likewise restricts criticisms of the bench on the grounds that they are often unfair to the judge. As the holder of a public office, an incumbent judge clearly is subject to a public accounting for conduct during the period of incumbency. This, however, does not justify accusations that do not address either the qualifications of the judge to remain in office or a breach of some duty of office. Such accusations may be unfair because of the judge’s inability to respond publicly to criticisms concerning matters that might appear before the judge in litigation. Further, unrestrained and unfair criticisms of the judiciary hamper the ability of judges to maintain a proper judicial detachment. Unjust criticisms of judges, therefore, should be prohibited as a matter of social policy. Judicial candidates should not publicly criticize their incumbent opponent unless the criticism is “‘well founded, on a high plane, factual, and not personal.’”

4. Specific Campaign Directives

The CPR devotes scant attention to the specific issue of conduct in a judicial campaign. However, the issue does receive treatment in two Disciplinary Rules under Canon 8.

The first of these bans the making of knowingly false statements of fact about the qualifications of a rival candidate. In the context of judicial elections, this rule parallels the proscription on false accusations against a judge, but applies to statements made about non-incumbent candidates as well.

The second rule is of considerably greater significance since it summons into operation important provisions of the Code of Judicial Conduct. DR 8–103 mandates compliance by attorney-candidates for judicial office with the CJC’s provisions on campaign conduct. These provi-
Judicial Campaigning

sions are thereby incorporated into the CPR and constitute an authorita-
tive general guide to campaign conduct that is applicable to incumbent
and non-incumbent judicial candidates alike.

B. The Code of Judicial Conduct

The CJC is the primary source of ethical law applicable to the cam-
paign activities of incumbent candidates. Like the CPR, the CJC con-
tains standards of general conduct that do not specifically address the
question of campaign conduct. Consequently, each judicial candidate
must individually ascertain what bearing these general rules might have
upon the conduct of his or her campaign. Unlike the CPR, however, the
CJC also devotes a considerable amount of attention to the manner of
conduct of judicial campaigns. These directives, contained in Canon 7B,
set out both general standards of campaign conduct and specific rules with
which all candidates must comply.

1. General CJC Directives

The CJC's general directives operate, in a manner parallel to those of
the CPR, to ensure that the bench presents a decorous public face. This
overriding concern is particularly visible in Canon 2, which directs a

PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE at x, 929L–68L
(1980), but non-incumbent candidates are generally held to the same standards as are incumbent
candidates even without express provision. See, e.g., ABA COMM. ON ETHICS AND PROFESSIONAL
RESPONSIBILITY, FORMAL ETHICS OPINIONS, No. 312 (1964); Committee on Professional and Judicial
41. See generally note 7 supra.
42. By its terms, the CJC applies to "anyone, whether or not a lawyer, who is an officer of a
judicial system performing judicial functions." Preamble to CJC. However, the campaign provisions
of CJC Canon 7B are expressly made applicable to attorney-candidates for judicial office by CPR DR
8–103, and upon judicial candidates generally by CJC 7B(1).
43. See note 11 and accompanying text supra.
44. "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of His Activi-
ties." The assumed causal link between appearances of propriety and public confidence in the bench
is explicitly treated in the Commentary to Canon 2, which states that "[p]ublic confidence in the
judiciary is eroded by irresponsible or improper conduct by judges," and requires that a judge "must
avoid all impropriety and appearances of impropriety" (emphasis added). Further concern in Canon
2 with proper appearances is apparent in paragraph (B), which proscribes any act by a judge that
might "convey the impression that [others] are in a special position to influence him."

Other Canons of the CJC reflect this basic concern. Canon 1 states that a judge should observe
"high standards of conduct so that the integrity and independence of the judiciary may be preserved"
and that the provisions of the Code "should be construed and applied to further that objective." To
this same purpose, CJC Canons 4 and 5 both restrict a judge's extrajudicial activities to those which
"do not reflect adversely upon his impartiality." CJC Canon 5B.

See also, e.g., Spruance v. Commission on Judicial Qualifications, 13 Cal. 3d 778, 789, 797, 532
P.2d 1209, 1216, 1222, 119 Cal. Rptr. 841, 848, 854 (1975) (municipal judge removed from office
judge to "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Given the purpose of protecting appearances, two considerations suggest that the standards of conduct applicable to judges under the CJC should be stricter than those applicable under the CPR to lawyers in general. First, judges are subject to a greater degree of public scrutiny than are other lawyers. Second, because of its judgmental role in society, the bench is the facet of the legal profession that is most vulnerable to criticism and public depreciation. This warrants greater protective precautions in the form of stricter standards of conduct.

In the context of a judicial election, however, a non-incumbent candidate should not be held to a lower standard of conduct than an incumbent. Fairness to the incumbent provides a good reason why non-incumbent candidates should be subject to the same high standard of conduct. Besides fairness to the incumbent, the other reasons for permitting more lax standards for non-judges are less compelling in the case of a judicial candidate. For example, both non-incumbent and incumbent are subject to a high degree of public exposure, and both have similar power to reflect pejoratively on the judiciary's integrity. Hence, recognizing a single

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on basis, inter alia, that his "giving the finger or digitus impudicus" in reprimanding a defendant for tardiness in arriving for a proceeding constituted "conduct prejudicial to public esteem for the judicial office"); In re Hardt, 72 N.J. 160, 369 A.2d 5, 8-9 (1977); Lonschein v. State Comm'n on Judicial Conduct, 50 N.Y.2d 569, 572, 408 N.E.2d 901, 902, 430 N.Y.S.2d 571, 572 (1980) ("Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved").

45. Judges "must expect to be the subject of constant public scrutiny." Commentary to CJC Canon 2. This extraordinary scrutiny is due, in part, to judges' fiduciary role in respect of their office, and in part to judges' greater public visibility.

46. There are indications that these considerations do in fact operate in the CJC to determine the applicable standard of conduct. The Commentary to Canon 2 states that a judge, by virtue of his subjection to "constant public scrutiny," must consequently "accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen." By this logic, it may be inferred that the CJC's standards are more restrictive than those which bind an ordinary lawyer under the CPR. Since the ordinary lawyer is more like the ordinary citizen in drawing public scrutiny. Further, while the CJC and CPR both impose duties of "high standards of conduct," the statement of this duty is in the CJC more closely predicated upon assumed vulnerabilities of the legal system. Compare, e.g., CJC Canon 1 with CPR EC 1-5. See generally notes 11 & 44 supra. Arguably, this evidences recognition of the greater vulnerability of the bench to public depreciation than of the bar generally.

Consistent with this interpretation of the CJC, a number of courts have stated that judges are subject to a higher standard of conduct than lawyers generally. See Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270, 287, 515 P.2d 1, 12, 110 Cal. Rptr. 201, 212 (1973), cert. denied. 417 U.S. 932 (1974); In re LaMotte, 341 So. 2d 513, 517 (Fla. 1977); Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 291 N.E.2d 476, 482 (1972); In re Piper, 271 Or. 726, 534 P.2d 159, 164 (1975); In re Douglas, 135 Vt. 585, 382 A.2d 215, 219 (1977).


While it is recognized that a candidate must have political and legal views that will inevitably
standard of general conduct for all candidates alike would better serve the overall purposes of legal ethics. Consistent with these purposes, that standard should be the stricter one implicit in the CJC.

Apart from this stricter standard, the evaluation of the ethics of a candidate’s campaign conduct should proceed through the same analysis as under the CPR’s general mandates. Conduct inimical to the appearance of judicial integrity is ethical only if justified by the weight of countervailing considerations. Such a preponderance will be harder to meet for a judicial candidate than for an ordinary, non-candidate attorney: since the CJC’s general ethical standards are stricter than those of the CPR, departures from the former will be justified in fewer circumstances.

2. Explicit Campaign Directives of Canon 7B

CJC Canon 7B is the only rule of legal ethics that attempts a comprehensive, explicit treatment of the question of ethical judicial campaigning. This explicitness makes it the most authoritative guideline to ethical campaign conduct. It deals with the general ethical standard applicable to all candidates as well as several explicit rules governing particular instances of campaign activities.

Section (1)(a) of Canon 7B directs that all judicial candidates should “maintain the dignity appropriate to judicial office” in the conduct of their campaigns. This requirement aims to preserve the judiciary’s appearance of propriety, an objective that lies at the heart of the CJC. Conformity with this objective thereby is expressly made a general guideline by which the ethics of all candidates, including non-incumbents, are to be judged. Hence, CJC 7B(1)(a) expressly confers upon all candidates

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48. See generally text accompanying note 16 supra.
49. It is authoritative also in the sense that compliance with CJC Canon 7B is mandated by CPR DR 8–103.
50. In addition to these two matters, Canon 7B also deals with matters collateral to the issue of campaign behavior. These include the manner of dealing with campaign contributions and the conduct of a candidate’s family members and others when acting to promote a candidate’s election.
51. See note 44 and accompanying text supra.
the duty of upholding the CJC’s standard of general ethics, which is stricter than that of the CPR.52

The rules dealing with explicit instances of campaign conduct,53 in substance, simply apply the CJC’s general duty of protecting judicial appearances to the campaign setting. These rules prohibit the use of certain types of assertions by a candidate in the course of a campaign: (1) pledges or promises of conduct in office; (2) expressions of view on disputed legal or political issues; and (3) misrepresentations of the candidate’s qualifications or other facts.54

Campaign statements are unethical if they create the impression that the candidate would administer the judicial office with bias or partiality if elected. Two of the three proscriptions in CJC 7B(1)(c) are directed toward such campaign statements. Pledges and promises of conduct in office, other than the pledge of faithful execution of official duties, tend to subvert the appearances of judicial impartiality and judicial dignity essential to public faith in the courts.55 Similarly, a candidate’s expression of views on a disputed legal issue puts into question the candidate’s impartiality should that particular issue come up before him or her once elected.56 Hence, by prohibiting such statements, these rules fall wholly within the purposes implicit in the CJC’s general ethical standard.

52. See notes 45–46 and accompanying text supra.
53. CJC 7B(1)(c).
54. Id. This Canon states:
   A candidate, including an incumbent judge, for a judicial office. . . .
   
   (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, qualifications, present position, or other fact.
55. A campaign statement such as “I favor pro-abortion rulings” or “I favor use of the death penalty” carries an implicit pledge of conduct in office that affects the public’s perception of the judiciary’s impartiality and integrity. See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, No. 1444 (1980) (the slogan, “A strict sentencing philosophy!,” used as part of a judicial campaign, is a pledge of conduct in violation of CJC 7B(1)(c)).
56. But cf. Laird v. Tatum, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.). wherein Justice Rehnquist, despite the fact that he had, shortly before his nomination to the Court, made strong public assertions on the merits of a certain case, insisted nevertheless on participating in the decision of the case. The plaintiff-respondent had moved for the Justice’s recusal, arguing:
   Under the circumstances of the instant case, Mr. Justice Rehnquist’s impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents’ allegations, and because of his public statements about the lack of merit in respondents’ claims.
   Id. at 824. Justice Rehnquist based his decision to participate upon his reading of the requirements of the Judicial Code, 28 U.S.C. § 455 (1976), on an analysis of prior Court practice, and on an aversion to permitting the alternative result of affirmance by an equally divided court. However, he distinguished from his situation the circumstances wherein such statements are made by an individual after nomination to the bench—circumstances more akin to those of a judicial candidate. 409 U.S. at 836 n.5.
The same is true of the third subpart of Canon 7B(1)(c), which prohibits a candidate's misrepresentation of his or her qualifications. It is apparent, even without reference to Canon 7B(1)(c), that such misrepresentation is a violation of ethics under both the CPR and CJC.\footnote{See, e.g., CPR DR 1–102(A)(4); CJC Canon 1.} The principal value of Canon 7B to the candidate, therefore, is that it deals in an explicit and authoritative manner with particular ethical situations with which the candidate must be concerned.

These considerations of the explicit campaigning rules of Canon 7B(1)(c) suggest possible limits upon the reach of these rules, not otherwise apparent. The set of activities proscribed by the Canon should be narrowly defined by interpreting the "black letter" statement of these rules in accordance with the underlying purposes of the CJC.\footnote{See, e.g., In re Baker, 218 Kan. 209, 542 P.2d 701, 705 (1975); Committee on Professional and Judicial Ethics, Ethical Guidelines for Judicial Campaigns, 28 Rec. A.B. City New York 364, 371 n.25 (1973): Canon 7(B)(1)(c) would appear to prohibit a candidate from any announcement of his views on disputed legal or political issues. We believe a candidate should be free to express his views on issues that do not foreseeably bear on any case that may come before him as a judge, such as certain aspects of judicial administration.} Campaign acts, including pledges or expressions of views touching legal matters, should be permitted unless they affront these basic purposes. Canon 7B should be understood as an application, not an extension, of the basic rule that lawyers not unduly harm the prestige of the legal system.

III. IS CAMPAIGNING AN ETHICAL ACTIVITY?

Members of the public register their social policy preferences by means of partisan political elections. Consequently, a candidate who aspires to political office has a burden of persuading members of the general public that his or her views on social policy are representative of their own.\footnote{This narrow view of the political process disregards the elements of personality and character in campaigning. Especially in a relatively non-ideological country like the United States, candidates are often elected because of who they are—their character—as well as for what they stand. But cf. The Federalist No. 10 (J. Madison) (narrow view of the political process as a forum in which factions of the public compete in promoting particular interests). Legal ethics has no special bearing on this aspect of the election process. See note 61 infra. Accordingly, this aspect of campaigning is beyond the scope of this comment.} Logically, this compels the result that the rhetoric of political campaigns consists largely of candidates expressing views on social policy issues.

The propriety of such expressions in judicial campaigns is, however, highly questionable. The ethical duties of the CPR and CJC limit the activities that may be undertaken in promoting candidates for judicial office. CJC Canon 7B, in particular, pares down the liberty of candidates to
make campaign assertions which, if made in a partisan political election, would be wholly proper. A consistent adherence to the policy underlying these rules of legal ethics would bar any statement by a judicial candidate of his or her position on controverted social policy issues.

Effective administration of the law depends upon the maintenance of public faith in the legal system. For this reason, an attorney’s conduct that unduly harms public faith in the legal system is professionally unethical. This is the tenet underlying all of the ethical provisions surveyed above and in general justifying interference by the court with the professional liberty of an attorney.

In turn, public faith in the legal system rests principally upon the appearance of judicial impartiality. The model of an impartial judiciary is based on a concept of “law” as an abstract entity operating through the determinism of reason, rather than by the free discretion of judges according to their personal social policy views. CJC restrictions upon a

60. See notes 53–56 and accompanying text supra.
61. Much of the public is aware of that which all lawyers know: value judgments play an important role in judicial decision-making. The result argued for here is not to prohibit consideration in a campaign of judicial candidates’ “values.” Arguably, the purpose of state constitutional provisions for the election of judges includes permitting the public to select judges, in part, on the basis of those values. Hence, the electorate may have a strong and constitutionally sanctioned interest in securing information about candidates’ values.

As used here, however, the term “values” refers to the candidates’ innate attributes of character and judgment—not to their sentiments and predispositions on legislative-type matters of social policy. Publication of such predispositions does not comport with the model of unbiasedness contained in the constitutional grant of the judicial power to the courts. Therefore, the protected informational interest of the electorate, if any, does not reach information about the candidates’ predispositions on such public policy questions. Further, an additional purpose of the constitutional provision for judicial elections is, arguably, to further the insulation of the legal system from the influence of political factions, since judges otherwise would be political appointees. If so, then arguments based on the constitutional provision for judicial elections militate against candidates running on the basis of public policy issues more appropriately within the legislative domain.

It might be further objected that restraining judicial candidates from campaigning on the basis of public policy issues infringes their first amendment liberties. However, there is a distinction between the utterance of such statements in a partisan political election—clearly protected speech—and utterance by a candidate for judicial office. First, unlike in a partisan political election, the publication by a judicial candidate of his or her predispositions on controverted social policy issues is of itself harmful to the state interest—preservation of faith in the impartiality of its courts. Second, in the case of a judicial election, no general public benefit flows from such debate since the asserted matters are, or should be, irrelevant.

62. This conception of the legal system is, in its strongest form, one of “natural law,” a theory of jurisprudence which maintains that the validity of a rule of law derives from “moral” or ethical factors existing wholly apart from the influence of personalities or institutions. See T. BENDIT, LAW AS RULE AND PRINCIPLE 91–92, 93 (1978); H.L.A. HART, THE CONCEPT OF LAW 182 (1961). For general discussions of the natural law approach to legal theory, see T. BENDIT, supra, at 90–116; L. FULLER, supra note 13, at 96–106; H.L.A. HART, supra, at 181–207. For an expression of a natural law approach in the context of litigation, see Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring) (concerning the requirements of 14th amendment due process in a state criminal proceeding):
judge’s extrajudicial activities, including campaign activities, operate so as to protect this concept. Any representation by a judge that the outcome of litigation is a function of his or her personal social policies is inimical to this concept of law, upon which rests the appearance of judicial impartiality. Adherence to the purposes underlying legal and judicial ethics implies that such representations should be deemed unethical.

These same considerations are present in the case of a candidate for judicial office. Making a public assertion on an issue implies that the candidate’s views are relevant to the manner of performance of the office sought. Hence, assertions by judicial candidates of their views on disputed issues represent that such personal views are relevant to deciding cases. Such a representation undercuts the policy behind legal ethics to the same extent it would if made by a judge. For these reasons, the proscription of CJC 7B(1)(c) on announcements of a candidate’s “views on disputed legal or political issues” should be strictly construed to prohibit any statement of position by a candidate for judicial office on a matter of social policy.

Expressions by judicial candidates of their views on controverted public policy issues undermine the appearance of judicial impartiality. The interests of the legal system deserve priority over the ambitions of individual candidates. It is not unreasonable to require that an individual who is seeking to be made one of the guardians of the legal system act so as to protect that system in the means he or she employs in seeking election.

But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied.

Campaign commentary on substantive legal or other public issues implies that “law” has no selfsubsisting reality, but is merely “what judges say it is”—the position which is taken, in fact, by the school of legal “realism.” The “natural law” school of legal philosophy comports best with the purposes of professional ethics, however, and supports most strongly the result urged in this comment.

63. See CJC Canons 4, 5, 7.

64. Doctrinally, the result argued for in this comment may be achieved by applying CJC 7B(1)(c), particularly the second clause, in strict compliance with the underlying purpose of legal ethics—maintenance of public faith in the legal system. Note that the result argued for would not deprive a judicial candidate of the right to present a vigorous campaign. For example, vigorous debate on the qualifications of the candidates does not contradict the basic purpose, assuming compliance with other ethical requirements. See, e.g., In re Baker, 218 Kan. 209, 542 P.2d 701, 705 (1975) (“In our view, the health, work habits, experience and ability of the [judicial] candidates are all matters of legitimate concern to the electorate who must make the choice”). Nor would the urged result necessarily cut off all debate on the manner of administration of the judicial office, since not all such affairs touch upon issues that might come before the candidate as a judge. See note 58 and accompanying text supra.
IV. CONCLUSION

Ultimately, courts are powerless to impose upon members of the bar, in their capacity as officers of the court, a requirement that they adhere to high ethical standards.65 But, particularly where the office of judge is being aspired to, the calling is one to which high ethics are well suited. The ethical standards expected of the profession are set out in the CPR and the CJC. These codes suggest that statements of views on social policies by judicial candidates are unethical and should not be permitted. While this conclusion restricting speech appears, perhaps, contrary to the result that might be expected in a country with a tradition of free political speech and democratic elections, nevertheless this conclusion comports with a proper view of the judiciary as an apolitical institution purposely separated by the constitution from the political branches of government. Information relevant to the proper execution of the duties of a judgeship should be all that the electorate requires. The peculiarity that we elect our judges does not occasion cause to deviate from the requirement of ethical conduct.

J. Scott Gary

65. "There is no way by which the law can compel a man to live up to the excellences of which he is capable." L. Fuller, supra note 13, at 9.