

# Conduct and its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?

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## Introduction

The world of judicial elections is experiencing an arms race with aggressive campaign tactics once confined to executive and legislative races increasingly being used by interest groups and political parties but also by some judicial candidates themselves. Countermeasures are being taken to keep judicial elections different from those of the political branches by reinforcing traditional forms of conduct in getting or retaining a judgeship.<sup>1</sup>

Judicial campaign oversight committees, which “encourage and support appropriate conduct by candidates for judicial office,” are one countermeasure currently being tested. Such committees, it has been argued, over the long run, “help create a culture and climate in which the expectations of all involved—candidates, political consultants, the bar, interest groups, the media, and the public—promote judicious campaigning.”<sup>2</sup> Campaign oversight committees are therefore proactive rather than reactive in nature. They anticipate problems by taking steps to minimize the likelihood that they will arise and, if they do arise, provide the terms of reference through which they should be resolved.

The American Bar Association, which in 2003 adopted a resolution encouraging the formation of oversight committees, describes them in this way:

These committees seek to improve the conduct of judicial campaigns by promoting compliance with the spirit and letter of the state canons of judicial ethics that govern campaign speech and conduct. Conduct, or oversight, committees serve three primary functions: educating candidates at the beginning of the campaign about relevant judicial canons and campaign finance regulations; reviewing campaign materials in advance and answering candidates’ questions about campaign communications or tactics; and, as a last resort, publicly disclosing any instances of misconduct or referring complaints to the official judicial discipline entity.<sup>3</sup>

The U.S Supreme Court’s decision in *Republican Party v. White* established a climate in which judicial campaign oversight committees might be expected to flourish. First, subsequent federal court decisions removed much of the force from the Canons, greatly diminishing the role of official regulation in judicial campaigns. Second, two Justices gave explicit endorsement for the active involvement of entities like campaign oversight committees. Justice Kennedy’s concurring opinion focused on the power of persuasion to fill the gap left by overturning the “announce clause.”

The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so.<sup>4</sup>

Justice Stevens (dissenting on behalf of four justices) was just as direct:

The limits of the Court's holding are evident: Even if the Minnesota Lawyers Professional Responsibility Board (Board) may not sanction a judicial candidate for announcing his views on issues likely come before him, it may surely advise the electorate that such announcements demonstrate the speaker's unfitness for judicial office. If the solution to harmful speech must be more speech, so be it.<sup>5</sup>

With these endorsements, and the turn toward aggressively fought judicial elections with partisan and interest group participation in many states, often funded or led by out of state sources, judicial campaign oversight committees are a potential source of stability in the post-2000, post-*White* world of judicial election campaigns. This article explores the contribution that judicial campaign oversight and similar committees can make in a world of judicial elections newly heated at the same time as they are newly less regulated.

### **The Nature of Oversight Committees**

Oversight committees undertake a number of steps that seek to head off problems prior to and during elections. They educate the media, candidates, and the public on how a judicial election should be conducted, seek candidate agreement to campaign according to clear standards, and promote a high standard in campaign advertising. A committee's existence is a reminder that judicial candidates are expected to campaign as befits the office they seek. Some committees also offer an informal and speedy process for resolving disputes that arise during a campaign, but all are primarily focused on setting the right tone for candidates to follow in a judicial election.<sup>6</sup>

Some oversight committees are effectively official, being appointed by a mandatory bar association or a state supreme court. Other committees are unofficial even if initiated at the urging of a state supreme court or a mandatory bar. Each type of committee, however, has strengths and weaknesses.

Official committees have teeth because of their formal role in the professional or judicial disciplinary process. Their status also provides for a staff that can investigate and process complaints and an institutional memory that can easily prepare for the next election season. But official committees are vulnerable to the charge of being incumbent-protective in design and effect. Their effectiveness is also questionable because in practice the Canons were rarely invoked by most official oversight committees, or indeed enforced by judicial discipline bodies in the years before *White*.<sup>7</sup> In the post-*White* world, official committees are certainly liable to lawsuits.

Unofficial committees are not liable to lawsuits when exercising their members' own First Amendment rights, although their credibility must be beyond reproach if the committee is to compete in the marketplace of individuals and groups seeking to influence public opinion. State supreme courts, for example, played an important role in establishing oversight committees in Kentucky and Mississippi but the resulting committees, once formed, opted for independence and so were without ties to the judicial and legal establishments in their states.

On balance, the world of judicial elections now favors the unofficial oversight committees that rely entirely on the reputations of their members, who include diverse community leaders.<sup>8</sup> The newer oversight committees thus rely on persuasion to promote appropriate expectations for how judicial candidates should conduct themselves. New Mexico's Fair Judicial Elections Committee established in 2007 by the Board of Bar Commissioners is an example: "The committee was not given enforcement authority, such as the power to issue cease and desist orders; it acts through peer pressure."<sup>9</sup>

The tilt toward unofficial committees is evident in the structure of the 15 statewide oversight committees and (at least) ten local committees active in August 2007 (See Table 1).<sup>10</sup> Of the statewide committees, only the "older" Nevada committee can implement disciplinary action. While unofficial in nature, the committees in New Mexico and West Virginia are affiliated with mandatory bar associations, and South Dakota's committee is an adjunct to the state supreme court. All but two oversight committees, even ones formed by mandatory bars, have non-attorney members. If one excludes Georgia's sixty-one-member committee, one-third (34 percent) of all statewide oversight committee members are not attorneys. Most oversight committees are authorized to receive and investigate complaints and then issue public statements. No local committee can administer disciplinary action directly because all are voluntary in nature. All but one are authorized to issue public statements or cease-and-desist requests to candidates.

Non-lawyer members are less common in local as opposed to statewide committees. Just under one-fifth (19 percent) of local oversight committee members are non-lawyers, and several committees (Dade County and Jacksonville in Florida and King County [Seattle], Washington) are all lawyer committees. However, for local as well as state oversight committees, the added value that non-lawyer members bring seems clear. The following two tables show the specific structure and actions available to specific oversight committees.

**\*Authorized Actions For Tables 1a and b**

- 1 = Outreach to candidates
- 2 = Educate candidates
- 3 = Candidate hotline
- 4 = Receive complaints
- 5 = Initiate investigations

- 6 = Referral to disciplinary boards
- 7 = Implement disciplinary actions
- 8 = Issue public statements
- 9 = Issue cease-and-desist requests/orders
- 10 = Collect information on campaign advertisements

**Table 1a: Statewide Oversight Committees - Structure**

Official Name	Date Established	How Established	Members		Authorized Actions*
			TOTAL	No. Non-Attorneys	
2006 Alabama Judicial Campaign Oversight Committee	2006	By voluntary bar association	13	4	1, 2, 4, 5, 8
Florida Judicial Ethics Advisory Committee	1976	Appointed by supreme court	12	0	2
Georgia Committee for Ethical Judicial Campaigns	2004	Established by group of concerned citizens	61	6	1, 2, 4, 5, 8
Illinois State Bar Association Supreme and Appellate Court Election Tone and Conduct Committee	2004	By voluntary bar association	10	1	1, 2, 4, 5, 8
Kentucky Judicial Campaign Conduct Committee	2005	Established by group of concerned citizens	17	8	1, 2, 4, 5, 6, 8
Louisiana Judicial Campaign Oversight Committee	2002	Appointed by supreme court	15	5	1, 2, 4, 5, 6, 8
Maryland Judicial Campaign Conduct Committee	2005	Established by chief judge	14	8	1, 2, 4, 5, 6, 8
Mississippi Special Committee on Judicial Election Campaign Intervention	2002	Appointed by supreme court; judicial code of conduct	5	2	2, 4, 5, 6, 8, 9
New Mexico State Bar Association Fair Judicial Election Committee	2006	By mandatory bar association	N/A		10
Nevada Standing Committee on Judicial Election Campaign Intervention	1997	Appointed by supreme court	28	12	1, 2, 4, 6, 7, 8
New York State Bar Association Special Committee on Judicial Campaign Monitoring	2003	By voluntary bar association	8	0	4, 8
Ohio State Bar Association Judicial Election Campaign Advertising Monitoring Committee	2002	By voluntary bar association	11	3	4, 5, 8
South Dakota Special Committee of Judicial Election Campaign Intervention	2006	Appointed by supreme court	9	3	1, 2, 4, 5, 6, 8
Washington Commission on Judicial Conduct	1980	Established by state constitution as independent agency in judicial branch	11	6	2, 4, 5, 7, 8
West Virginia State Bar Judicial Election Campaign Advertising Commission	2006	By mandatory bar association	11	3	1, 2, 4, 5, 8

**Table 1b: Local Oversight Committees - Structure**

State	Official Name	Date Established	How Established	Members	Authorized Actions*
				TOTAL / No. Non-Attorneys	
CA	Santa Clara County Bar Association Fair Election Practices Commission	ca. 1990	Established by a voluntary bar association	12 / 1	1,2,4,5,9
FL	Broward County Fair Campaign Practices Commission	ca. 2001	Established by group of concerned citizens	13 / 10	4,6,9
FL	Dade County Bar Association Judicial Campaign Practices Commission	1986	Established by a voluntary bar association	6 / 0	4,8
FL	Jacksonville Bar Association Judicial Campaign Practices Commission	2004	Established by a voluntary bar association	8 / 0	1,2,4,8
GA	Atlanta Bar Association Judicial Campaign Conduct Committee	2004	Established by a voluntary bar association	12 / 3	1,2,3,5,8
IL	Task Force on Illinois Judicial Elections	2000	Established by group of concerned citizens	N/A	1,2,3,8
MN	Hennepin County Bar Association Judicial Campaign Conduct Committee	2006	Established by a voluntary bar association	10 / 3	N/A
NY	Bar Association of Erie County Judicial Election Oversight Committee	1985	Established by a voluntary bar association	10 / 5	1,2,4,8,9
OH	Columbus Bar Association Judicial Campaign Advertising Committee	1988	Established by a voluntary bar association	11 / 3	2,6,8,10
WA	King County Bar Association Fair Campaign Practices Committee	1970s	Established by a voluntary bar association	25 / 0	1,2,6,9

### A Short History of Oversight Committees

Judicial campaign oversight committees emerged in the 1970s and 1980s in cities and counties experiencing campaign conduct in trial court races that challenged longstanding local expectations of candidate behavior. The first was established in 1976 when the San Mateo (California) County Bar Association created the Fair Election Practices Committee for Judicial Campaigns to provide:

a resource and a hearing forum for a candidate who might be the victim of an opponent's false or misleading statements. It also provides a forum for the truthfulness of a candidate's allegations. It is the obligation of the Committee to

assist candidates in an advisory capacity. The Committee is constituted in such a fashion that it can act swiftly in the event of untruthful or misleading statements by a candidates as to his qualifications or as to the qualifications of his opponent.<sup>11</sup>

The context was a period of newly sharply contested trial court races in California that reached its peak in the 1978 elections. In that year, deputy district attorneys in Los Angeles encouraged opposition to judges they believed to be “soft on crime” and nine incumbent judges in nearby Orange County hired a prominent political consulting firm to run their successful campaigns.<sup>12</sup>

A sea change in the conduct of judicial elections in other states, often an offshoot of the “tort wars” between the plaintiffs’ bar and business interests, prompted creation of a second wave of oversight committees at the state level during the late 1990s.<sup>13</sup> Statewide committees were established in 1997 in Nevada and in Alabama, Georgia, Michigan (there active for only one election cycle), and Oklahoma in 1998. In Oklahoma, activity on the part of conservative groups such as Oklahomans for Judicial Excellence and Oklahomans for Jobs and Economic Growth and the Christian Coalition precipitated establishment of the state’s committee. One judge was quoted as saying, “They’ve stricken fear into the judiciary.”<sup>14</sup> Another change was the increase in the proportion of non-partisan trial court seats that were being contested (55 percent in metropolitan areas and 21 percent in non-metropolitan areas).<sup>15</sup>

The unprecedented level of spending and interest group involvement in the 2000 judicial elections and the open door to aggressive campaigning offered by the 2002 *White* decision and its progeny provoked a third wave of oversight committee expansion. The legal and good government establishments of some states, concerned about the contaminating effect of negative television advertisements and massive campaign spending in other states, saw oversight committees as a prophylactic step.

Since 2002, new statewide committees have been established or reestablished for eleven states: Alabama, Georgia, Illinois, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, Ohio, South Dakota, and West Virginia. Efforts are underway to form statewide committees in Florida (by the State Bar), and Minnesota (haltingly). Three regional committees are in various stages of formation in North Carolina.<sup>16</sup>

Most of the “new” oversight committees found support in their formative stages from one of the two national workshops convened by the National Ad Hoc Advisory Committee on Judicial Campaign Conduct in February 2004 and in October 2005. Teams from 16 states and localities attended one of the Workshops on Establishing and Operating Effective Judicial Campaign Oversight Committees to begin planning for campaign conduct committees that would fit their state’s method of judicial selection, relevant laws, code of judicial conduct, legal culture, etc. Nine of the current statewide committees were established after 2004.

The Ad Hoc Committee was created to serve as a mechanism for encouraging the creation of new conduct committees or the rejuvenation of existing conduct committees. Sponsored by the National Center for State Courts with the cooperation of the American Bar Association and other prominent national organizations, the Ad Hoc Committee’s membership

includes many of the bar and civic leaders with significant experience regarding the factors that make a campaign conduct committee effective.<sup>17</sup>

### **The Role of Oversight Committees in the 2006 Judicial Elections**

In the 2006 judicial election cycle, six of the committees were in their first elections, with the New Mexico and West Virginia oversight committees insufficiently organized to participate (See Table 2). Of the active committees, those in Georgia, Kentucky, Louisiana, Maryland, Ohio, and South Dakota requested that all candidates sign an agreement or statement that typically reflected the wording of the ethical standards set by the Canons regardless of the legal status of those canons.

It is noteworthy that all of the statewide committees with the exception of New York and Ohio engaged in efforts to educate judicial candidates early in the election cycle (See Table 2); in both of those states, official programs filled that purpose. This fulfills a key recommendation from the National Summit on Improving Judicial Selection: “Educational programs . . . should be conducted for all judicial candidates, together with their campaign staff, consultants, and interested family members.”<sup>18</sup>

Formal complaints were received and investigated by committees in Alabama (3), Georgia (1), Kentucky (19), Louisiana (2), Maryland (10), Nevada (2), and South Dakota (10). Other inquiries or complaints were received, investigated, and resolved without coming to public attention, as shown in Table 2.

**Table 2a: Statewide Oversight Committees: 2006 Elections**

<i>Official Name</i>	<i>Preparation for Elections</i>	<i>Complaints Received</i>	<i>Public Statement Issued?</i>
2006 Alabama Judicial Campaign Oversight Committee	Candidates, local bar presidents, and several newspaper editorial boards were informed about the committee. An op-ed was also produced and made available about the committee.	3	No
Georgia Committee for Ethical Judicial Campaigns	Media were alerted to the committee's existence and purpose. Candidates were encouraged to uphold committee's principles regarding judicial campaign conduct.	1	No
Kentucky Judicial Campaign Conduct Committee	Candidates were sent letters regarding candidate questionnaires, ethical campaigning, and encouraging them to sign a "good conduct" pledge. A brochure on judicial campaigning was widely distributed. They participated in a panel discussion on the same topic at the state bar convention. A committee Web site responded to candidate questions and posted press releases. Voter education included addresses to citizens groups and distribution of brochures at libraries, courthouses, and the state fair.	19 complaints filed in 15 races	Yes, in response to several of the complaints. Statements were issued in the form of press releases posted on the committee Web site
Louisiana Judicial Campaign Oversight Committee	All candidates in contested judicial races received a committee packet including a letter from the chair, an informational paper titled "Ethical Guidelines for Judicial Campaigning," and a form that the candidate was asked to sign and return regarding their acknowledgment that they were bound by Canon 7 of the Louisiana Code of Judicial Conduct.	2	No
Maryland Judicial Campaign Conduct Committee	A public-education campaign was launched including editorial board and other media meetings and a press conference. Committee handbooks were distributed to all circuit court candidates. An accompanying letter invited candidates to subscribe to the committee's Standards for Judicial Elections. Public outreach and education efforts occurred through participation in public forums and legal community events.	10	Yes
Nevada Standing Committee on Judicial Election Campaign Intervention	Candidates were sent letters advising them of the committee and its purpose. It also included the booklet <i>An Aid to Understanding Canon 5, Guidelines to Assist Judicial Candidates in Campaign &amp; Political Activities</i> .	2	No
Ohio State Bar Association Judicial Election Campaign Advertising Monitoring Committee	Candidates received requests to sign the candidate agreement to abide by the committee guidelines regarding candidate conduct.	0	N/A
South Dakota Special Committee of Judicial Election Campaign Intervention	The committee held an election school to educate candidates and conducted a media outreach. A separate committee on the Code of Judicial Conduct completed revisions to the code governing candidate behavior following the <i>White</i> decision.	10	No
West Virginia State Bar Judicial Election Campaign Advertising Commission	Not in existence at time of 2006 elections	N/A	N/A

**Table 2b: Local Oversight Committees: 2006 Elections**

<i>State</i>	<i>Official Name</i>	<i>Preparation for Elections</i>	<i>Complaints Received</i>	<i>Public Statement Issued?</i>
<b>CA</b>	Santa Clara County Bar Association Fair Election Practices Commission	Candidate education session, press release about Commission.	N/A	Yes
<b>FL</b>	Broward County Fair Campaign Practices Commission	N/A	2	Yes
<b>FL</b>	Dade County Bar Association Judicial Campaign Practices Commission	N/A	11	Yes
<b>FL</b>	Jacksonville Bar Association Judicial Campaign Practices Commission	Letter sent to candidates.	1	No
<b>GA</b>	Atlanta Bar Association Judicial Campaign Conduct Committee	Drafted and publicized revised bylaws and pledge.	0	N/A
<b>IL</b>	Task Force on Illinois Judicial Elections	Sent ethics pledges to candidates, informed candidates of hotline and ethics guides.	N/A	N/A
<b>MN</b>	Hennepin County Bar Association Judicial Campaign Conduct Committee	Members were recruited and held an orientation meeting.	1	No
<b>NY</b>	Bar Association of Erie County Judicial Election Oversight Committee	Letters sent to candidates including ethical materials, committee information, and a pledge candidates are asked to sign and return.	1	No
<b>OH</b>	Columbus Bar Association Judicial Campaign Advertising Committee	Met with political parties and candidates to go over review process.	5	No
<b>WA</b>	King County Bar Association Fair Campaign Practices Committee	Article written by former Committee chair appeared in May issue of Bar publication; worked with Judicial Selection Coalition to sponsor a summit on Judicial Selection & Independence, assist in drafting/lobbying for legislation that established limits on campaign finance contributions, voter information website, candidate forum for SC candidates, developed a draft court rule requiring campaign donor contributions.	3	Yes

Six of the ten local oversight committees active in 2006 included candidate education in their repertoire of authorized actions. Seven committees had a formal complaint procedure (See Table 1). All seven committees received at least one complaint against conduct by a candidate for a total of 24 complaints, 11 of which were filed in Dade County. Four committees issued public statements after investigating complaints (See Table 2).

To illustrate what such committees accomplish and by what means, the experiences of six campaign oversight committees' involvement will be examined below. Four statewide committees are considered. All were involved in their first election cycles—Alabama, Kentucky, Maryland, and South Dakota.<sup>19</sup> Local committees in Florida and Ohio active in 2006 are also described.

#### **Four Statewide Committees in Action**

*Alabama.* Alabama's history of judicial campaign oversight committee is tied to the tort wars in which plaintiff's attorneys and business interests invested heavily in partisan Supreme Court races. Highly contentious elections in 1994 and 1996 led the Supreme Court to establish the Judicial Campaign Oversight Committee, first in 1998 and then again in 2000.<sup>20</sup>

The concept of an oversight committee was resurrected for the 2006 elections on the recommendation of a State Bar Task Force. The Alabama Judicial Campaign Oversight Committee consisted of retired judges, lawyers, and non-lawyers, with a retired trial judge and prominent businesswoman serving as co-chairs.<sup>21</sup> Despite that sponsorship, the Committee was independent of both the bar and the judiciary. Early in the campaign—in April—the Committee held workshops in Birmingham and Montgomery for candidates, their campaign committee chairpersons, and anyone else connected to the campaign at which candidate pledges were distributed.

The Committee's mettle was tested in a strikingly aggressive judicial race in which the sitting Chief Justice was challenged by another member of both his political party and Court. After winning in the primary, the Chief Justice campaigned for the November election by testing the boundaries of what a judicial candidate can say and do after *White*. The Committee chose not to comment on the negative television advertising run by the Chief Justice, but it was drawn into the contest nonetheless. As this news report described:

The Democratic candidate for chief justice of the Alabama Supreme Court called on her opponent Tuesday to halt negative advertisements linking her to gambling money. Sue Bell Cobb, who called one of the advertisements “distorted,” made the comments at a news conference at the Alabama Supreme Court, where she signed a pledge to limit public comments to experience and qualifications and asked her opponent, Chief Justice Drayton Nabers, to do the same.<sup>22</sup>

The Chief Justice lost the election. On any election outcome noted in this article, it is impossible to establish a correlation between candidate conduct cited or the intervention of the oversight committee and the outcome of a judicial race.

One sign of success for a judicially sponsored oversight committee is continued existence. The Alabama committee will be renewed for the 2008 judicial elections with the same co-chairs. Imitation is also reassuring; the Birmingham Bar Association has announced that it will establish a committee for the next round of trial court elections. Other marks of success include recognition from opinion-makers: the co-chairs of the 2006 Alabama oversight committee received the state bar association's 2007 Award for Merit for their efforts.

**Kentucky.** "A perfect storm" was one description of the Kentucky's 2006 judicial elections as all but two of the state's appellate and general jurisdiction judgeships were on the ballot in nonpartisan contestable elections.<sup>23</sup> Further complicating the election was a decision of the Sixth Circuit Court of Appeals in *Family Trust Foundation of Kentucky v. Judicial Conduct Commission* that dismantled the state's canons regulating judicial campaign conduct.<sup>24</sup> That decision left considerable uncertainty in its wake as to what candidates could say or do to promote their candidacy.<sup>25</sup>

Anticipating the impending storm, the state's chief justice took the lead in establishing the oversight committee by bringing a group of judges, lawyers, and civic leaders to the October 2005 Workshop on Establishing and Operating Effective Judicial Campaign Oversight Committees. Chief Justice Joseph Lambert subsequently said that the new committee would "preserve the dignified culture of judicial elections in Kentucky."<sup>26</sup> The non-judicial members of the Kentucky group joined with other individuals to incorporate as a nonprofit organization in November 2005 as the Kentucky Judicial Campaign Conduct Committee; the committee has no affiliation with the bar. The President was selected by the chief justice, but all subsequent decision regarding membership, bylaws, and operating procedures were made by the committee as it formed. The Committee privately raised the \$25,000 spent on its operations during the campaign.<sup>27</sup>

The committee's 2006 election preparation began in January 2006 with an announcement in the state bar association's monthly newsletter. This was followed by a newspaper op-ed piece, mailing of letters to all candidates involved in the more than 100 contested elections, organizing six regional meetings for candidates and eight for members of the public, and maintaining a Web site. Candidates were asked to sign an agreement to campaign

in accordance with the Kentucky Code of Judicial Conduct and to disavow advertisements that are false or misleading and/or accusations to impugn the integrity of the judicial system, the integrity of a candidate or erode public trust and confidence in the independence and impartiality of the judiciary.<sup>28</sup>

Approximately 70 percent of the candidates in contested races signed the Committee pledge and were acknowledged for doing so on the Committee's web-site.

The Committee also promoted its own view on how a judicial candidate should campaign by creating a pamphlet summarizing a set of expectations and distributing 40,000 copies throughout the state. In responding to specific complaints against candidates, the Committee wrote op-ed letters to the editors of the local newspapers where the campaign was taking place.<sup>29</sup>

One candidate, an intermediate appellate court judge running for an open seat on the Supreme Court against a trial court judge, was chastised for signing the pledge and then speaking out on issues like abortion and for baselessly accusing an opponent of allowing convicted rapists to go free, one of whom subsequently murdered a child. The candidate that broke his pledge was defeated in the election. Other public statements dealt with a television commercial that “seriously and inappropriately misrepresents” opinions written by another candidate, and a telephone survey sponsored by a supreme court candidate that an opponent had inaccurately labeled a “push poll.” In several races both candidates complained to the Committee about the others’ conduct.<sup>30</sup>

A notable feature of this rather assertive committee’s efforts was the positive media treatment their intervention received. It was described favorably as “a non-partisan group that has stepped up to referee candidates’ claims and tactics”<sup>31</sup> and “a non-partisan group formed to monitor Kentucky’s judicial campaigns.”<sup>32</sup>

Looking ahead to 2008, the Committee’s president said “[w]e don’t have nearly as many races coming up next year. But we are still in operation and still going.”<sup>33</sup>

**Maryland.** A team from Maryland that participated in the 2005 workshop convened by the National Ad Hoc Advisory Committee subsequently formed the Maryland Judicial Campaign Conduct Committee (MJCCC). The state’s chief justice selected the co-chairs, a former U.S. attorney and former state attorney general of different political parties at which point the committee became self-governing. The committee made its plans public on May 1, 2006, noting that “[a]ll we have is our credibility and public attention to what we say.”<sup>34</sup>

The committee received ten complaints through its hotline. Findings were issued in nine of the complaints. The complaints were consolidated into five decisions on actions by four candidates. One complaint was against a candidate for the Baltimore City Orphan’s Court. The Committee agreed with the complaint finding that the candidate misleadingly portrayed herself as being a judge on the Orphan’s Court and confusingly used several surnames, possibly in contravention of the affidavit of alternate names the candidate had filed.<sup>35</sup>

The Committee received public support from editorial boards. It continues to operate.

**South Dakota.** The Special Committee on Judicial Election Campaign Intervention was established in 2006 by the state supreme court with the duty “to alleviate unethical and unfair campaign practices in judicial elections” (SDCL ch. 16-A [Appendix]). A retired chief justice served as its chair. A team of judges and bar and civic group leaders from South Dakota participated in one of the National Ad Hoc Committee’s workshops. The Special Committee was new in one sense but followed the structure for such a committee put forward in a 1997 Supreme Court rule.<sup>36</sup>

Formal opinions were issued when the committee felt an issue of general interest had been raised. Copies of the eleven formal opinions issued by the committee during the election were redacted and provided to the news media and all judicial candidates; they were also posted on the special committee’s Web site and were filed with the clerk of the supreme court. In one

instance, an informal opinion was provided to the state's trial lawyers' association, because the issue failed to rise to the standard of general interest. The special committee used private letters of admonishment sent to individual candidates, rather than issuing public statements. Some of these private letters were made public with the names of those involved redacted to guide other candidates. No recourse was made to further discipline concerning possible violations of the Code of Judicial Conduct. The committee also intervened in a dispute about the use of state employees to perform campaign functions based on an inquiry from the Office of the State Court Administrator.

The committee's final report concluded:

While at times the Committee was frustrated with its inability to rein in what it believed was questionable campaign conduct, particularly in the Seventh Judicial Circuit race, the Committee also believes it provided timely and effective advice to candidates that prevented the occurrence of conduct that would have required its intervention.<sup>37</sup>

### **Two Local Committees in Action**

**Columbus, Ohio.** The Columbus Bar Association Judicial Campaign Advertising Committee was founded in 1988. During the 2006 elections, it met with representatives of the two political parties early in the election cycle, then, once the candidates had announced, met with them and their representatives to go over the advertisement review process. It reviewed 235 advertisements, received five complaints, but issued no public statements. The Committee made available a copy of its "internal regulations and procedures" to representatives of the political parties and each judicial candidate, and asked each candidate to sign an agreement regarding ethical conduct in judicial election campaign advertising.<sup>38</sup> The internal regulations included the guidelines that were used by the Committee for common phrases, such as "experience" and "trial experience."<sup>39</sup>

**Miami, Florida.** The Dade County (Miami) Judicial Campaign Practices Commission was established in 1986 by the county bar association. The Commission assumed its current form after the 1996 judicial elections in which "the tactics used by the candidates for judicial office in 1996 so incensed many of the lawyers in our Association."<sup>40</sup> The transformed Commission is noteworthy for its dual emphasis on the speedy disposition of complaints and due process. The Commission is reactive, considering only written complaints. A complaint is immediately sent to all Commission members and the candidate against whom the complaint is made. The candidate is asked to file a written response within 48 hours, with a copy sent to the complainant. The Commission for its part guaranteed to act on a complaint and any written response within 24 hours, and set a goal of 24 hours for issuing a written opinion. Special provision was made for processing complaints submitted on the Saturday and Sunday immediately before Election Day.<sup>41</sup>

In the words of a former chairperson, the Commission:

was credited with helping to change the tactics and behavior of judicial candidates in 1998. The attack ads were greatly reduced, advertisements were far more dignified, and the number of complaints about campaign behavior was greatly reduced. The experience in 2000 was not quite as good. Many complaints were filed, but in general ads were tame and dignified.<sup>42</sup>

In 1998, 2000, and 2002, all candidates for judicial office signed the pledge distributed by the Commission. The Commission acknowledged the “active participation” of the *Miami-Herald* in its activities.<sup>43</sup>

The Commission was active in 2006. Fifty-nine of the 64 judicial candidates signed its pledge.<sup>44</sup>

### **Roles for Judicial Campaign Conduct Committees: A Prospectus**

The optimal role for an oversight committee depends on the jurisdiction it serves. A choice to be made includes the range of issues a committee should seek to influence. A restrictive view argues that oversight committees

[c]an do their best work by exposing the unethical nature of ‘pledges or promises of conduct in office’ or commitments ‘with respect to cases.’ Not only are such promises harmful to the judicial process, but they also appear to have a multiplier effect, as one candidate’s promise may lead to an opponent’s promise in response. The candidates (or their supporters) cannot be relied upon to remedy this one way ratchet. Thus, the intervention of an ethics committee can be most helpful in breaking or forestalling a cycle of unethical promises.”<sup>45</sup>

Other commentators argue for a broader focus that embraces making public rulings on complaints brought by one candidate against an opponent.

Thirty years of experience with the judicial campaign oversight committee concept suggests a variety of roles judicial campaign oversight committees can fill inside and outside of election years.

***Set expectations.*** An oversight committee can translate the provisions of the canons into “a higher” or “aspirational” standard for campaign conduct. Writing at the end of 2006 in the local newspaper, the president of the Columbus Bar Association said:

Before election season fades from memory, one group of closely watched candidates deserves special recognition for their sensible and above-board conduct. Congratulations to the men and women who ran for judicial seats in central Ohio. They fought their campaigns with passion and integrity—and did it without misleading materials and virulent attack ads that mired contests for most other public offices.<sup>46</sup>

Most oversight committees distribute candidate pledges that are based on traditional Canons, whether enforceable or not through regulation, describing what judicial candidates and their committees can and cannot do. Some committees include specific provisions on the content of campaign advertising in their pledges. For example, the Maryland oversight committee prepared and circulated a candidate agreement form to all candidates in contested circuit-court races (appellate judges in Maryland are appointed to the bench). Candidates were asked to agree that they and their staff would abide by a set of standards linked to the Maryland Code of Judicial Conduct and the Maryland Rules of Professional Conduct. Of thirty-five candidates, twenty-six signed the agreement (74 percent). The committee reserved the right to address complaints against candidates who failed to sign the agreement, “noting, however, that the candidate who did not agree to abide by the Standards cannot be said to have violated any agreement.”<sup>47</sup>

***Advise and Educate Candidates.*** The Chair of Alabama’s 1998 Campaign Conduct Committee received a phone call from an incumbent judge running in a contested election. The judge had just received an invitation to the politically important County Volunteer Firefighter Department’s fundraiser in which all candidates, judicial candidates included, were expected to appear in drag, serve as ushers or ticket-sellers at the event, and be voted on as part of the “Ugliest Woman” contest. His opponent had agreed to those terms. The advice of the Committee proved decisive:

Now I’d been on the bench, what, fourteen years at that point, making decisions about people’s lives and who goes to prison and who doesn’t go to prison and where their children live and I just thought it would be really demeaning of the office to have to resort to that, and I was prepared not to do it (I think) if I didn’t have the back-up, but the judicial oversight committee made it, my whole decision a whole lot easier and took away any possible politics in the situation.”<sup>48</sup>

Sound advice is one of an oversight committee’s most important commodities in the post-*White* world, which brings even veteran judicial candidates into unfamiliar territory. Federal court decisions eviscerating the Canons regulating campaign conduct have emboldened interest groups to pressure candidates to engage in previously prohibited campaign actions, notably to complete questionnaires that request views on disputed legal, political, or social controversies. In addition to providing general advice on such matters to all candidates, some oversight committees set up “hotlines” for providing confidential advice to candidates on demand.

The Kentucky committee consistently stressed that candidates taking advantage of their newly granted freedom to ignore traditional ethical standards were compromising the independence of the judicial branch. The committee spoke out frequently against candidates responding to questionnaires that sought views on legal and social controversies

Five states currently operate educational programs for judicial candidates. Participation is mandatory in New York<sup>49</sup>, Ohio<sup>50</sup> and South Dakota (for candidates with an opponent); non-attendance is a disciplinary offense. Programs in Florida<sup>51</sup> and Kentucky are optional but strongly encouraged and impressively well attended.

In Kentucky, candidate education is provided exclusively through the campaign oversight committee. In advocating for an oversight committee, the state's chief justice envisioned that candidate education would be an important role it would fill. He argued for the efficacy of candidate education in this way:

Early in the election process most candidates for judicial office are filled with high ideals and the best of intentions. It isn't until the last few weeks that those high ideals evaporate, often at the urging of consultants, in favor of a win-at-all-costs notion. If candidates are educated as to acceptable campaign practices and make a commitment early in the process to an elevated, high-minded campaign, it will be more difficult for those same persons to compare their opponents to potential roadkill in the last three weeks before the election.<sup>52</sup>

In 2006, the oversight committee convened six regional meetings for candidates between late August and early September.<sup>53</sup>

***Review Campaign Advertisements.*** In advocating "non-governmental monitoring groups," the National Summit on Improving Judicial Selection urged that "they should be willing, if requested, to conduct advance review of paid advertisements to ensure accuracy and fairness."<sup>54</sup>

Ohio oversight committees have specialized in monitoring and speaking out on inappropriate advertisements. In 1985, a prototype of what became the Columbus Judicial Campaign Conduct Committee was initiated by the local bar president to include non-lawyer members. In the next judicial elections, the committee stopped an advertisement that urged voters to "Elect Judge X" although X had never been a judge, and another that attacked a candidate for having represented particular criminal defendants.<sup>55</sup>

In 2000, Ohio was one of three states with television advertisements in judicial races. The ads included some of what remain the most controversial examples of such advertising. The low point was the costly negative advertising funded by the Ohio Chamber of Commerce against one incumbent. In the advertisements, Lady Justice peeks through her blindfold and uses campaign contributions to shift the balance on the scales of justice, and the announcer asks, "is justice for sale in Ohio?"<sup>56</sup> That ad was the subject of a press release and public appearance, which was included in television news accounts, by the state bar president.

Before the 2002 elections, the Ohio State Bar Association responded by establishing a full committee for that purpose, the Ohio Advertising Monitoring Committee. This committee continues to distribute an "Agreement Regarding Judicial Elections" to candidates, who are asked to agree that

[b]ased on my personal examination of judicial advertisements, to publicly disavow advertisements that impugn the integrity of the judicial system, the integrity of a candidate for the Supreme Court, or erode public trust and confidence in the independence and impartiality of the judiciary by verbally or

visually attempting to lead voters to believe that a candidate will decide issues or cases in a predetermined manner.<sup>57</sup>

In 2002, the committee reviewed seven controversial advertisements. By 2006, all but one candidate, who lacked sufficient funding to mount television ads, signed the agreement.

***Dispute Resolution.*** Oversight committees often assume a fact-finding role in resolving complaints filed by candidates against one another. A Florida judge with substantial experience in judicial campaign argued against such a role, noting that “when you find facts for somebody, that means necessarily you are finding against somebody, and that will destroy your credibility.”<sup>58</sup> Moral persuasion, not fact determination, should be in the modus operandi of an oversight committee.

Some oversight committees refer complaints to the official disciplinary bodies responsible for candidates. Such bodies tend to be slow in reaching decisions; unless a complaint refers to something that occurred early in the election period, it is likely to be unresolved at the time the election is held.

Thus in the 2004 race the newly formed Georgia Committee for Ethical Judicial Campaigns was able to use speech in a situation where a Court of Appeals candidate described his opponents as former prosecutors who were now “working to keep drunk drivers, drug dealers and child molesters out of jail.” The Committee condemned this and similar ads as “misleading and inaccurate.” The candidate so criticized lost at the polls; the contribution or lack thereof of the Committee’s intervention to that outcome is unknowable.<sup>59</sup>

***Media and Public Education.*** Oversight committees that have credibility and comfort dealing with the media enjoy a critical asset. Many committees visit editorial boards and develop lists of media contacts in anticipation of the election season. They seek publicity for their efforts and understanding of their distinctive role. During elections, oversight committees issue public statements through op-ed pieces or letters to the editor that set expectations for how judicial candidates should campaign.

Close ties to the news media can be an advantage. The President of the Kentucky Committee attributed the good media relations it enjoyed, and its overall effectiveness, to having “absolutely one of the best journalists that’s ever been in the state of Kentucky” as a member.<sup>60</sup> More generally, effective oversight committees establish early contact with media representatives, including editorial board members and reporters, to explain why and how the committee was established, to provide at least an elemental sense of how judges are different from non-judicial public officials, and how judicial elections are different from those for political office. This is a recurring task because turnover among reporters with assignments related to the judiciary or to elections is often high.

Public education is also a vital oversight committee responsibility. Judicial elections are “low information” contests in which the typical voter has little relevant information on which to make a choice whether it is a contestable or retention election. News media coverage of even

state supreme court races is sparse, and tends to focus on the “horse race” rather than provide information relevant to the qualifications of the candidates.<sup>61</sup>

***Counterweight to Interest Groups.*** The California political consultant who pioneered the management of judicial election campaigns in the 1970s opined that “[o]ur senators have a political operation for use in retaliation. For the most part, judges are standing naked in the political process not knowing what, when, or how to do anything.”<sup>62</sup> Campaign oversight committees potentially serve as counterweights to the role of outside interest groups. They establish the context for third party activities by explaining the interests underlying the advertisements, which typically pursue economic or social agendas in the guise of protecting the public from crime. They also point out to the public appropriate criteria for evaluating the information provided through advertisements.

Oversight committees have a potential role in promoting the discriminating use of information on judicial candidates circulated by various groups with a particular interest in shaping the composition of the bench. This includes national and state groups that issue judicial scorecards. In New Mexico, for example, the New Mexico Alliance for Legal Reform and the New Mexico Association of Commerce and Industry currently issue scorecards.<sup>63</sup>

A public statement issued by the Alabama Judicial Campaign Oversight Committee early in the 2006 campaign serves as another example:

The Committee cautions voters to listen carefully to ads run not by candidates themselves, but by advocacy groups. These groups may have their own agendas and it is important for voters to know and understand what the organization stands for and why it presents the view it presents before giving any credence to the message. Judicial candidates have a canon of ethics to guide them in their campaigns, but advocacy groups are not held to the same high standard.<sup>64</sup>

***Pursue Campaign Reform.*** The King County (Washington State) Bar Association’s Fair Campaign Practices Committee in 2006 co-sponsored a Summit on Judicial Selection and Independence. The Committee assisted in drafting and lobbying for legislation that imposed limits on campaign contributions for judicial candidates and developed a draft court regarding campaign donor contributions (See Table 2). Similarly, the Georgia Committee for Ethical Judicial Campaigns plans to be active in between election years to advocate for an agenda of actions that will reform judicial election campaigns.

## **Prospects for Effective Oversight Committees**

### ***The Bright Side***

Judicial campaign oversight committees rely upon informal methods for securing candidate compliance with traditional expectations for how they should campaign although exceptions exist. They apply peer pressure to candidates and seek to influence public opinion in ways that will render certain methods of campaigning ineffective. There are two main reasons for optimism that such an approach will bear fruit.

First, most judicial candidates continue to campaign in the traditional manner. There has been no stampede by judicial candidates to go into the rough and ready world of politics opened to them by the federal courts. Judicial candidate behavior in responding during the 2006 elections to questionnaires sent to candidates by special interest groups, testifies to the continuing strength of norms on how candidates should campaign. This preference for tradition is evident in the response to questionnaires circulated to judicial candidates by right to life groups in Florida, Idaho, Iowa, Ohio, and Tennessee. The specific format of the questionnaire was new to the political scene, a product of *White* and an instrument in subsequent litigation challenging the canons.<sup>65</sup> Of the 64 Tennessee judges who were sent questionnaires, 25 sent letters declining to respond (some citing Chief Justice Roberts's statements during his confirmation hearings), 35 did not return the survey, and three gave limited responses (e.g., the President or Supreme Court Justice closest to their political or judicial philosophies). A few weeks later, the 27 appellate judges facing retention elections received an average of 75 percent vote *for* retention.<sup>66</sup>

Judicial candidates in other states responded in much the same way. Of 85 Iowa candidates for appellate or trial judgeships, 70 did not respond, 14 sent letters declining to answer questions on cases or controversies, while one candidate answered two questions but declined to answer the rest.<sup>67</sup> In Arkansas, with 24 state judgeships on the ballot, two groups distributed questionnaires to candidates. No candidates completed the Arkansas Family Council's version and one completed the Arkansas Right to Life version.<sup>68</sup>

In other states, candidates responding in all or in part to questionnaires made up a significant minority of those running for judicial office.<sup>69</sup> A similar mood was evident among candidates for an interim appointment to the Idaho Supreme Court in 2007. None of the 19 named candidates responded to a questionnaire distributed by the Idaho Values Alliance.<sup>70</sup>

The highest response rate was to a questionnaire distributed by the Florida Family Policy Council (FFPC) to 268 judicial candidates during the 2006 Florida elections. None of the 140 unopposed candidates returned the questionnaire. Of the 128 candidates with an opponent, 13 percent answered all of the questions (this includes candidates who consistently refused or declined to respond). In all, 23 percent of the candidates in contested races returned a questionnaire partly or entirely completed. The remaining 77 percent chose not to respond to the questionnaire.<sup>71</sup>

Second, there are more abstract reasons to complement the concrete evidence offered by recent judicial candidate conduct that suggest the conditions are ripe for successful oversight committees. The response thus far to candidate questionnaires is consistent with what a social scientist would have anticipated based on sociological and psychological theories. Informal mechanisms are more potent than formal regulatory schemes because they are based on normative expectations rooted in a professional community. The canons are not merely externally applied rules. Rather, "[t]o no small extent, the current disciplinary rules codify the norms of an Anglo-American legal culture that has been centuries in the making."<sup>72</sup> It is unlikely that this normative structure will weaken even if a future Supreme Court decision removes the prospect of formal discipline for judicial candidate conduct. Moreover, the force of the canons

was never dependent on disciplinary actions; few judges have been removed from the bench on the basis of official complaints concerning the campaign conduct that led to their elections.

Norms make social life possible by allowing us to anticipate how others will act and react. But norms are not merely ideals; rather, they are constraints on the choices we make. Violating a norm imposes a cost that is not monetary but is real nonetheless: “The cost attached to an action is what we have to give up in order to carry out that action.”<sup>73</sup> For judicial candidates, one cost to deviating from norms on how to campaign may be a reduction in the esteem they enjoy from their social and professional networks.<sup>74</sup>

There is evidence, albeit largely anecdotal, that judicial campaign oversight committees are effective. In its December 2006 report, for example, the Louisiana Judicial Campaign Oversight Committee noted that between 2003 and 2006 judicial elections “were less acrimonious than in past years” and that two-thirds of all candidates signed the campaign conduct acknowledgement form distributed by the Committee.<sup>75</sup>

In reflecting on the 2006 election, two members of the Kentucky oversight committee were modest in describing the committee’s impact:

We believe our activity reminded voters that judicial elections are supposed to be different than those for legislative and executive office, and probably influenced voters to cast ballots for candidates who demonstrated that they agreed with that principle.<sup>76</sup>

### ***Challenges Ahead***

Judicial campaign oversight committees are vulnerable to accusations that they seek to inhibit public debate and, in doing so, protect the establishment in the form of incumbent judges. The Georgia Committee for Ethical Judicial Campaigns, a citizens’ body unaffiliated with even a bar association, was repeatedly attacked during the 2006 elections by a columnist for the *Atlanta Journal-Constitution* as being the “speech police.” His complaint was not that the committee gave voice to its opinions, but that “it crosses the line...when the opinion is framed as authoritative, based on some expertise or standing, and it has free-speech consequence for the disfavored.”<sup>77</sup>

The Hillsborough County (Tampa, Florida) Campaign Practices Committee was established in 2004 but disbanded after that year’s elections. “Responding to a complaint, the committee said incumbent Judge Charles Bergmann knowingly violated election rules. Bergmann wrote to the committee saying he was not given a fair chance to air his side of the story. Eventually, the committee reversed its opinion, saying it did not have enough information to find Bergmann in violation. That reversal, however, came after the election, which Bergmann won.” The Chief Judge of the Circuit did not support the committee’s continuation “because it did not seem to act fairly. It was set up with grand ideas and good ideals . . . but I do not believe with Judge Bergmann it was handled anywhere near appropriately.” The bar president shut down the committee, “saying he did not want to force it on judges if they did not support it . . .”<sup>78</sup>

A more significant challenge to oversight committees may come from malicious imitation, as groups with a stake in election outcomes create their own oversight groups to monitor and comment on judicial campaigns. It is here that the canons as aspirational statements will prove their worth. An oversight committee must proffer a higher standard specific to judicial elections.

The modest recent growth in the number and reach of oversight committees has not been continuous. The longest lifespan of a statewide committee is eight years, although several states have seen successive committees of varying sponsorship and terms of reference replace one another. Local committees were more durable, with several operating continuously and often largely without controversy for more than 20 years.<sup>79</sup> Experience also shows that unofficial committees tend to be more long-lived than their official counterparts, despite their lack of an infrastructure or dedicated funding.

## Conclusion

Judicial campaign oversight committees emerged and evolved in response to changing campaign practices and conduct. The basic concept of such a committee has proved flexible and adaptable. Although the evidence is more anecdotal and impressionistic than definitive, there are ample reasons for being optimistic about their potential contribution in other states.

Yet optimism as to their value must be tempered by realism. Oversight committees will need sound judgment as they establish a form and style that fits their locality and specific conditions, and they will need outside help. The best judgment at present is that oversight committees should be unofficial. In replacing an official oversight committee, the Georgia Committee for Ethical Judicial Campaigns chose to operate independently.

With the role of these committees comes the possibility of their being criticized (e.g., as speech police). The best way to head off such criticism or meet it if it does arise is to have a broad-based committee membership. The natural allies of oversight committees, the bar and lawyers generally, have limited credibility with the public because they are seen as the defenders of the establishment. The growing involvement of non-lawyers in committees makes it less likely that they will be dismissed as part of the establishment. An expert on judicial ethics argues that “committee membership should be extended in nontraditional directions to include civic activists, school teachers, community organizers, small business owners, and, shall we say, ordinary people.”<sup>80</sup> However, it should be recognized that a committee’s leadership must work to ensure that such diversity is consistent with the efficient conduct of committee business.

One dimension of diversity key to effective campaign oversight committees is a membership that is *bi-partisan* rather than notionally non-partisan and includes people with political savvy and experience. A disinterested group of political novices may prove a handicap, not an advantage. Co-chairs associated with the two main political parties can ensure an image of bipartisanship. The inclusion of judges, even retired judges, on oversight committees may be problematic. An effective oversight committee is likely to be one that is independent in all senses from the judiciary and free of any accusation of protecting incumbents.

In addition to diversity of membership, judicial campaign oversight committees will be strengthened if they adopt a broad mission of improving judicial elections. Assuming roles that are on-going (rather than limited to election years) will respond to the problem of identifying new leaders and willing committee members at the start of each election cycle and the loss of institutional memory that entails. Committees that do not, as in Louisiana, become activated by unscheduled elections to fill vacancies, need continuity to remain effective over time.

Voluntary judicial campaign oversight committees will best prosper with support from state and local entities. At the state level, in March 2001, the Administrative Board of the Courts of New York State provided the impetus for building on a few longstanding local committees for a comprehensive effort. The Board endorsed the establishment by statewide and local bar associations of judicial election campaign practices committees that, as part of the bar associations' process of evaluating candidates for judicial office, "request candidates to provide written commitments that they will campaign in accordance with the requirements of the Code . . . applicable case law and ethics committee."<sup>81</sup>

Support at the national level is also necessary. The National Ad Hoc Advisory Committee on Judicial Campaign Oversight works to build a national community of individuals who have an interest in and experience with oversight committees. Current steps include publication of the first issue of a biannual electronic newsletter, the *Judicial Campaign Oversight Digest*<sup>82</sup> and sponsorship of a national conference to be held early in 2008. A major step forward will be to establish a sense of shared identity and commitment to a common cause that can give members of oversight committees a mission to fulfill and a set of standards and best practices for how to achieve it.

On balance, judicial campaign oversight committees and their powers of moral persuasion are potent weapons to keep judicial election campaigns consistent with the role of a judge. Like a lightweight ground to air missile launcher in true combat, their value far outweighs their low cost and lack of complexity. They are inexpensive to operate, relying upon the credibility and reputations of a diverse membership, and deploy speech to influence events, as Justice Kennedy in his concurrence and Justice Stevens in his dissent urged in *White*. Critically, oversight committees are pre-emptive rather than responsive in nature. A successful committee establishes the expectations for judicial elections that are held by the media, the public, candidates, and campaign workers.

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<sup>1</sup> See CONFERENCE OF CHIEF JUSTICES, JUDICIAL ELECTIONS ARE DIFFERENT FROM OTHER ELECTIONS, (2007), available at <http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html>. The Conference described the uniqueness of judicial elections:

For almost 200 years, our states have chosen a striking diversity of judicial selection systems. State constitutional provisions in all thirty-nine states with judicial elections seek to ensure that judges are elected through a process that reflects the distinctive role of a judge. For example, in all these states, judges' terms are longer than any other elective officials' and almost all these states have constitutional provisions similarly unique to the judiciary. These thirty-nine states have recognized that any effort to treat judicial elections like other elections would undermine the judiciary's crucial independent role under their constitutions. In enacting these constitutional and statutory provisions, the states that chose judicial elections for some or all of their judges, explicitly chose to keep judges uniquely different from other elective officials. Each state can choose their judicial selection method from the long-standing range of alternatives. As the

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Supreme Court said in *White*, "We neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."

<sup>2</sup> NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT, EFFECTIVE JUDICIAL CAMPAIGN CONDUCT COMMITTEE: A HOW-TO HANDBOOK, at iii (National Center for State Courts 2004).

<sup>3</sup> AMERICAN BAR ASSOCIATION, ENSURING JUDICIAL INDEPENDENCE IN THE 21<sup>ST</sup> CENTURY: JUDICIAL CAMPAIGN CONDUCT COMMITTEES, available at [www.abanet.org/judind/resourcekit/conductcomm.html](http://www.abanet.org/judind/resourcekit/conductcomm.html), 2007). See also National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Judicial Campaign Conduct – Committees by State <http://www.judicialcampaignconduct.org/committees.htm> (last visited Sept. 19, 2007) [hereinafter Judicial Campaign Conduct Committees List] (describing the current status of state and local committees).

<sup>4</sup> Republican Party of Minnesota v. White, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

<sup>5</sup> *Id.* at 797 (Stevens, J., dissenting). Judicial campaign oversight committees respond to the spirit of more venerable opinions, notably that of Justice Brandeis: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis J., concurring).

<sup>6</sup> See Rick Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1459 (2001).

[J]ust as our judicial system has developed methods of resolving legal disputes as alternatives to litigation, several jurisdictions have established informal procedures for deciding campaign disputes. Whether these procedures consist of informational hotlines, advisory opinions, or voluntary campaign oversight committees, they can provide faster and more satisfactory means of addressing claims of inappropriate behavior. Moreover, while informal efforts may not allow for imposition of sanctions that directly affect a judge's tenure or a lawyer's ability to practice law, they can be effective in deterring or halting inappropriate campaign conduct.

<sup>7</sup> See generally CHARLES GARDNER GEYH, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH-PRESS: THE COLLISION OF COURTS, POLITICS AND THE MEDIA (Keith J. Bybee ed., forthcoming 2007).

<sup>8</sup> See Judicial Campaign Conduct Committees List, *supra* note 3. The move away from official status is evident in the nomenclature: what were formerly called judicial campaign *conduct* committees have in most recent treatments become judicial campaign *oversight* committees.

<sup>9</sup> Norman S. Thayer, *Ethical Constraints on Advertising in Judicial Elections in New Mexico*, 46 NEW MEX. B. BULL., 12, 12-13 (2007).

<sup>10</sup> The National Center for State Courts distributed a survey to all known state and local judicial campaign oversight committees. Questions inquired as to how the oversight committee is organized and its involvement during the 2006 elections. The contents of Tables 1 and 2 in this article and, unless otherwise noted, all factual statements referring to oversight committees are drawn from the responses submitted to those surveys.

<sup>11</sup> Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 J.L. & POL. 57, 93 n.92 (1985). Schotland concluded the San Mateo County Bar Association was "refreshing in its realism" as expressed in the Guidelines for Judicial Candidates issued by the Association:

The Committee recognizes that a contested election for judicial office is still a political contest and fully embraces the concepts of free speech and fair comment. The Committee also realizes that during the heat of a campaign candidates may be the subject of vicious, untruthful and libelous statements against which they have no adequate remedy except by an immediate reference to a neutral committee, which is then empowered to provide a prompt public response.

<sup>12</sup> See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1094 (2007). See also ROY A. SCHOTLAND, *Judicial Elections*, in GUIDE TO POLITICAL CAMPAIGNS IN AMERICA 391, 395-96 (Herrnson ed., 2005).

<sup>13</sup> There are nineteenth and early twentieth century precedents for nasty and noisy judicial elections. See KERMIT L. HALL, *Judicial Independence and the Majoritarian Difficulty*, in THE JUDICIAL BRANCH 60-85 (Kermit L. Hall and Kevin McGuire eds. 2005) Hall cites the defeat of a Republican California Supreme Court Justice in 1898 based on a decision in a single case. Justice Van Fleet overturned a damage award to a family whose child was killed after being run over by a train. The state's Democratic press attacked the incumbent in these terms: "Van Fleet is the judge who rendered the Loren Fox decision, declaring that the life of a poor man's child is not nearly as valuable as that of a rich man's darling." *Id.* at 67. Hall refers to Ohio campaigns as another example of the kind of influence issues can have over how judicial campaigns are run: "In Ohio between 1850 and 1920, for example, 20 percent of

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the incumbent supreme court justices went down to defeat, often after bruising campaigns . . . Controversial issues could and did become part of the judicial campaign, and they frequently worked to the disadvantage of incumbent judges.” *Id.* at 67.

<sup>14</sup> Robert Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907-1998*, 26 OKLA. CITY U.L. REV. 519, 537 n.47 (2001).

<sup>15</sup> *Id.* at 539 tbl.6.

<sup>16</sup> Some of the “new” committees had official committees as predecessors. In Georgia, for example, the special committee formed by its Judicial Qualification Committee was the defendant in the successful challenge to an application of the state’s canons which effectively removed it as a force in regulating candidate conduct. *See Weaver v. Bonner* 309 F.3d 1312 (11<sup>th</sup> Cir. 2002). After the *Weaver* decision, the Georgia Judicial Qualifications Commission opted out of its oversight role, which was restricted to intervening only in respect to “false statements, knowing or recklessly made.” Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 930 (2005).

<sup>17</sup> *See* National Ad Hoc Advisory Committee, Mission Statement, available at

<http://www.judicialcampaignconduct.org/mission.htm>. The Ad Hoc Committee’s mission statement reads:

Judges play a unique and critical role in our democratic system of government. Mindful of the constitutionally-mandated right of litigants to an impartial judge, and recognizing the importance of maintaining public confidence in the integrity of judicial decision-making, the Ad Hoc National Advisory Committee was established to enhance the quality of judicial campaigns and candidate behavior by encouraging the establishment of and supporting the work of judicial campaign conduct committees. Such oversight committees resolve issues relating to claims of improper conduct during judicial campaigns. Conduct committees also participate in setting the tone of judicial elections in their jurisdiction.

The Ad Hoc Committee engages in the following activities: making groups such as state and local bar associations and civic organizations aware of the campaign conduct committee model; offering advice on the organization, procedures, and operations of such committees; establishing best practices for such committees, serving as a clearing house for the exchange of information about the conduct committees and their impact, and collaborating with local and national organizations to analyze issues facing such committees. *Id.*

<sup>18</sup> *Call To Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1355 (2001).

<sup>19</sup> *See generally* Barbara Reed and Roy A Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781, 786 n.19 (2002). The Alabama and South Dakota committees were new in one sense but had traditions to build on. Alabama’s oversight committee had predecessors in 1998 and 2000 and the South Dakota committee was built on state supreme court rules that had guided previous efforts at using oversight committees to expedite the handling of campaign complaints. The South Dakota Supreme Court in 1998 created a mechanism for dealing with complaints regarding judicial campaign conduct in the Special Committee on Judicial Election Campaign Intervention. The five member committee was to issue advisory opinions and to deal expeditiously with allegation of ethical misconduct. The Committee’s status was clear in the absolute immunity given to its members and staff. There were five members, the Chair of the Judicial Qualifications Commission appointing two of its former members, the Chair of the state bar disciplinary board appointing two of its former members, and the Chief Justice appointing a retired judge or justice. *Id.* The same framework was used when a new oversight committee was established for the 2006 elections.

<sup>20</sup> DANIEL BECKER & MALIA REDDICK, *JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES* 11 (2003). Twelve judges, attorneys, and non-lawyers formed the 1998 committee, chosen by leaders of the various levels in judicial hierarchy. Nonetheless, the Committee was unofficial. In addition to fielding a pledge signed by most candidates of “commitment to compliance with the ethical standards and goals of the Committee,” it processed over 350 formal candidate inquiries and less formal requests for “non-partisan practical advice about the ethics of judicial campaigning.” *Id.* At 15. The 2000 successor committee was larger—26 members—but restricted to attorneys and judges. To handle the large volume of requests, a subcommittee was sent to the region of a state in which a dispute arose and candidate forums were held. Although the earlier committees were seen as a success by observers in the state and outside—“impressive because they changed the spirit of judicial campaigns in Alabama”—no oversight committee was established in 2002 or 2004. *Id.* At 15.

<sup>21</sup> Ultimately a retired appellate court judge became the retired judge’s co-chair.

<sup>22</sup> Mike Linn, *Cobb Criticizes ‘Distorted’ Ads*, MONTGOMERY ADVERTISER, October 25, 2006.

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<sup>23</sup> James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Testing Legitimacy Theory in the Context of 'New-Style' Judicial Campaigns*, *American Political Science Review* (forthcoming 2007).

<sup>24</sup> *Family Trust Foundation of Kentucky v. Judicial Conduct Commission*, 338 F.3d 224 (6<sup>th</sup> Cir. 2004).

<sup>25</sup> See T.R. Goldman, *In Kentucky Supreme Court Races, Judges Get Out Their Soapboxes*, *LEGAL TIMES*, November 6, 2006.

<sup>26</sup> Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 *KY. L. J.* 1, 13 (2005).

<sup>27</sup> Spencer Noe, President, Kentucky Judicial Campaign Conduct Committee, Address at a Conference sponsored by Annenberg Public Policy Center and FactCheck.org: *Mudslinging in Judicial Campaigns: Beginning to Look a Lot Like Congress* 51, 53 (May 23, 2007).

<sup>28</sup> Al Cross & William H. Fortune, *Kentucky 2006 Judicial Elections*, 55 *DRAKE L. REV.* 637 (2007).

<sup>29</sup> See Noe, *supra* note 27. A sense of an active oversight committee at work is given by Mr. Noe in that speech:

If we had a complaint, and we investigated it, and we felt like that there was a justified complaint that ought to be rectified or we ought to say something about it, we would write an op-ed letter to the editor of the newspaper where that individual was running. And those op-eds were pretty effective. It stopped a lot of ads, a lot of statements that were being made that shouldn't have been made. A couple of examples were we had one sitting judge on the Court of Appeals who had a tax arrearage of something like \$19,000 on his real estate that he had not paid. It was brought to his attention.

But his opponent continued to run that on her website. He complained about it. We wrote a letter about it. And she took it down and apologized saying she didn't realized it had been paid. Then we had another case down in western Kentucky where one candidate for the Supreme Court was accusing another candidate of allowing a rapist to be pardoned. And the guy got out of jail and killed some girl within 13 days. It was totally fabricated. There was no truth to it at all. And we criticized him for that. We wrote letters to editors. And we also think that that had an effect.

Both of those individuals lost their races. But other than that, you know, we really had no power. But those candidates seemed to respect what you can do with a newspaper or a radio ad. And although, as I said, we had no absolute power, we did have the ability and the contacts to get our message out through various newspaper articles and editorials.

<sup>30</sup> KENTUCKY JUDICIAL CAMPAIGN CONDUCT COMMITTEE, PUBLIC STATEMENT, <http://www.judicialcampaignconduct.org/committees.htm#KENTUCKY>.

<sup>31</sup> Ryan Alessi, *New Group Surveys Judicial Candidates*, *LEXINGTON HERALD-LEADER*, October 2, 2006.

<sup>32</sup> S. Jafari, *Fletcher's Supreme Court Appointees Face Tough Competition*, *ASSOCIATED PRESS STATE AND LOCAL WIRE*, November 8, 2006.

<sup>33</sup> Noe, *supra* note 27.

<sup>34</sup> E. Hartley, *Panel: Keep Judicial Races Civil*, *CAPITAL*, (May 1, 2006).

<sup>35</sup> See MARYLAND JUDICIAL CAMPAIGN CONDUCT COMMITTEE, INC. COMPLAINTS (2006), available at [www.mdjcc.org/complaints.html](http://www.mdjcc.org/complaints.html). The Committee issued a statement that a challenger for a Baltimore County Circuit Court judgeship who, although not a judge, used campaign materials reading "People's Choice for **Judge** Arthur M. **Frank**" (font variation in original) misleadingly portrayed the candidate as currently holding a judgeship. *Id.* The Committee found "no adequate basis for further inquire" regarding a second complaint against the same judge. *Id.* The Committee also found insufficient evidence, and issued a public statement to that affect, for a complaint against a separate candidate who allowed members of his campaign to refer to him as "Judge Titman." *Id.* The Committee also issued a public statement regarding a group of sitting judges running as a slate who "carelessly and unintentionally violated standards of truthfulness by listing as endorsers in campaign materials individuals who had not actually endorsed the slate of sitting judges." Basically, the candidates' and their campaign workers relied on informal statements of support that were not verified before being used in printed campaign materials. All four incumbents were re-elected. *Id.*

<sup>36</sup> See *South Dakota Adopts Procedure for Handling Judicial Campaign Complaints*, 19 *JUDICIAL CONDUCT REPORTER* 1 (1998). See also *South Dakota Adopts Procedure for handling Judicial Campaign Complaints* 20 *JUDICIAL CONDUCT REPORTER* 9 (1998).

<sup>37</sup> SOUTH DAKOTA SPECIAL COMMITTEE ON JUDICIAL ELECTION CAMPAIGN INTERVENTION, *ELECTION YEAR 2006 FINAL REPORT* (2007).

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<sup>38</sup> See Survey by the National Ad Hoc Advisory Committee on Judicial Campaign Conduct, on file with National Center for State Courts (2007).

<sup>39</sup> For example, “Experience” means the candidate’s having spent a substantial amount of activity with respect to the subject matter for which ‘experience’ is claimed and/or participation and the acquisition of skill that includes more than a mere appearance before a court or the listing of one’s appearance on a pleading.” (Committee document on file with the author)

<sup>40</sup> Joseph H. Serota, Past President of the Dade County Bar Association and former chair of the Association’s Special Commission on Judicial Elections, Presentation to the Circuit Court Bench, November 4, 2003 (copy on file with author).

<sup>41</sup> DADE COUNTY BAR ASSOCIATION, JUDICIAL CAMPAIGN PRACTICES COMMISSION, *Operating Procedures* (2006).

<sup>42</sup> Serota, *supra* note 40.

<sup>43</sup> *Id.*

<sup>44</sup> Dade County Bar Association, 2006 Judicial Elections, available at <http://web.archive.org/web/20060829030245/www.dadecountybar.org/customhtml2/>.

<sup>45</sup> Steven Lubet, *Judicial Campaign Conduct Committees: Some Reservations About an Elegant Solution*, 35 IND. L. REV. 807, 808-22 (2002). *Id.* at 807.

<sup>46</sup> Belinda S. Barnes, *Local Judicial Candidates Took the High Road*, COLUMBUS DISPATCH, November 20, 2006.

<sup>47</sup> See MARYLAND JUDICIAL CAMPAIGN CONDUCT COMMITTEE, INC. COMPLAINTS, *supra* note 35.

<sup>48</sup> Interview with Ned Suttle, Judge, in Birmingham, Alabama (video-tape and transcript available from author).

Judge Suttle further described his predicament in this way:

I took the bench in 1984 and was elected in ‘86 without opposition. In ‘92 I had opposition and I won and in 1998 I had opposition and so it was the second time I’d had a contested election. Well in 1998 I got a telephone call from an official with the Lauderdale County Volunteer Firefighter Department. And anyway, one of their officers had called me up and they were having a talent show at one of the high schools as part of a fundraiser for this volunteer firefighter department. And they had decided that one good aspect of the fundraiser would be if local candidates running for office, including the judicial candidates, would dress up in drag and serve as the ushers and ticket-takers and ticket-sellers at the event. Well, when I indicated some mild hesitation about doing that the official was quick to inform me that my opponent had already agreed to perform those duties and I hemmed and hawed and said I didn’t think that was really going to comport with judicial ethics and let me think about it and check around and call him back.

Well of course I hung up the phone and immediately found the telephone number of somebody with the judicial oversight committee and it happened to be Mark White. I called Mark and explained the situation and of course he agreed with me that there might be some problems with that from a dignity-of-the-office standpoint and that he would check with the rest of the committee and get back with me promptly. And within an hour or two I was able to call that official back with the volunteer firefighter department and tell him I thought they were a great organization, which I do believe, and they do good work, and they do do good work, but that was just not something that would be befitting that office. And that was the end of it; it was a nice peaceful resolution to the situation.

<sup>49</sup> See 22 NYCRR § 100.5 (A)(4)(f). The rules states that all candidates, other than those seeking town or village justice positions, “shall complete” the training program “within 30 days after receiving the nomination or 9 days prior to receiving the nomination for judicial office.” *Id.* The education is provided by the court system’s Judicial Campaign Ethics Center: The two-hour training program consists “of a discussion of rules of court relevant to judicial candidates, common ethical questions that arise in a judicial campaign and hypothetical scenarios.” Candidates in 2006 could attend one of three live training sessions or simulcast session broadcast throughout the State. Judicial Campaign Ethics Center, Mandatory Judicial Campaign Ethics Training: Frequently Asked Questions, [http://www.nycourts.gov/ip/jcec/training\\_faq.shtml](http://www.nycourts.gov/ip/jcec/training_faq.shtml) (last visited Sept. 19, 2007).

<sup>50</sup> See OHIO REV. CODE JUDICIAL CONDUCT ANN. Canon 7(B)(5) (Supp. 1999) (requiring all judicial candidates to complete a two-hour course on campaign conduct and finance). Candidates are encouraged to bring their campaign committee members and other volunteers to the seminars. Attendees at past seminars have included state and county political party staff, including the state chairmen of the Republican and Democratic parties, members of local judicial monitoring committees, and members and staff of county boards of election with which local judicial candidates must file campaign finance reports. See Dove, *supra* note 6.

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- <sup>51</sup> See Reed and Schotland, *supra* note 19 at 781, 795-802.
- <sup>52</sup> See Lambert, *supra* note 26, at 14.
- <sup>53</sup> Al Cross & William H. Fortune, *Kentucky 2006 Judicial Elections*, 55 DRAKE L REV. 637 (2007).
- <sup>54</sup> See *Call To Action: Statement of the National Summit on Improving Judicial Selection*, *supra* note 18.
- <sup>55</sup> *Id.* at 31.
- <sup>56</sup> DEBORAH GOLDBERG, AND SAMANTHA SANCHEZ, WASHINGTON DC: JUSTICE AT STAKE CAMPAIGN, *The New Politics of Judicial Elections* 21 (2002).
- <sup>57</sup> OHIO STATE BAR ASSOCIATION, AGREEMENT REGARDING JUDICIAL ELECTIONS (2004).
- <sup>58</sup> Charles Kahn, Judge, Address at the National Symposium on Judicial Speech, Post-White 88 (February 24-25, 2005). Transcript on file with the author.
- <sup>59</sup> See STATE BAR OF GEORGIA, GEORGIA COURT FUTURES COMMITTEE, PATHS TO JUSTICE: THE FUTURE OF JUDICIAL SELECTION IN GEORGIA. RECOMMENDATIONS OF THE COURTS FUTURES COMMITTEE 20-21 (2005) (describing the incident).
- <sup>60</sup> Noe, *supra* note 27, at 62: “He knew . . . absolutely knew every editor of every newspaper in the state on a first name basis, just about.”
- <sup>61</sup> See B. F. SCHAFFNER AND J.S. DIASCRO, *Judicial Elections in the News*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 115-139 (M. J. Streb ed., 2007). Over the 2000-2004 period in states with contestable judicial elections the average supreme court race attracted less than 10 news articles (in the state’s capital city media), a fourth of which were editorials. Most stories were not printed in the first section of the newspaper, and one story in three did not mention the judicial campaign at the article’s start: “the typical judicial campaign may receive as little as two news stories that both appear in the front section of the paper and mention the contest prominently.” *Id.*
- <sup>62</sup> Schotland, *supra* note 11, at 71-72.
- <sup>63</sup> Thayer, *supra* note 9, at 13.
- <sup>64</sup> Press Release, Alabama Judicial Campaign Oversight Committee (June 2, 2006). The Committee described itself as “a non-partisan group actively working to encourage, support and protect the public interest in a dignified and highly competent judiciary by educating the candidates, media, and voting public about judicial campaign conduct that will reflect the highest levels of personal integrity.”
- <sup>65</sup> The questionnaires asked candidates to indicate their positions on “hot button” legal and social controversies. The response categories offered to the candidates include the options of “decline” and “refuse”, the difference being explained by a lengthy footnote worthy of any law review. If one or more candidates in a state chose the option that references the Canons, a federal lawsuit typically follows, claiming that the candidates’ rights to free speech are being denied.
- <sup>66</sup> Florida Family Policy Council, <http://www.flfamily.org/ffpcnew3.php?alertid=107> (last visited on September 19, 2007) (listing copies of returned questionnaires).
- <sup>67</sup> Letters/responses on file with author OR are available online: <http://www.iowansconcernedaboutjudges.com/responses.html>.
- <sup>68</sup> *Clubbing*, ARKANSAS TIMES, June 1, 2006.
- <sup>69</sup> For responses to an Ohio 2006 survey by the Citizens for Community Values, a group “officially affiliated with Focus On The Family” (see [www.ccv.com](http://www.ccv.com)), access: <http://www.ohioelectioncentral.com/>.
- <sup>70</sup> See Idaho Values Alliance, [www.idahovaluesalliance.com](http://www.idahovaluesalliance.com) (last visited on September 2, 2007). The questionnaire was novel in that it presented 19 “specific declarations” drawn from the State’s Constitution and that the candidates were being considered not by the electorate but by the Idaho Judicial Council for recommendation to the Governor. Other questions requested a “yes” or “no” response to the statement, “If sworn in as a justice of the Idaho State supreme Court, I will uphold that part of the Idaho State Constitution which says, “As the founders of the state of Idaho were, I am grateful to Almighty God for our freedom” and asked which U.S. Supreme Court justices best reflects their judicial philosophy and which U.S. President their political philosophy.
- <sup>71</sup> The Florida Family Policy Council’s 2006 Statewide Judicial Candidate Questionnaire, responses on file with the author and accessible at: [http://www.flfamily.org/uploadfile/Judicial%20Voter%20Guide/Florida\\_Changes\\_1024.pdf](http://www.flfamily.org/uploadfile/Judicial%20Voter%20Guide/Florida_Changes_1024.pdf)
- <sup>72</sup> GEYH, *supra* note 7.
- <sup>73</sup> RICHARD BREEN AND DAVID ROTTMAN, CLASS STRATIFICATION: A COMPARATIVE ANALYSIS 9 (1995).
- <sup>74</sup> GORDON MARSHALL, THE CONCISE OXFORD DICTIONARY OF SOCIOLOGY 359 (Oxford University Press 1994). The key social science concept being invoked is that of the “norm”: “a shared expectation of behavior that connotes

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what is considered culturally desirable and appropriate. Norms are similar to rules or regulations in being prescriptive, although they lack the formal status of rules. Actual behavior may differ from what is considered normative and, if judged by existing norms, may be deemed deviant.” *Id.*

<sup>75</sup>Joe Gyan, Jr., *Panel Works to Keep Judicial Elections Civil*, THE ADVOCATE, January 9, 2007. Candidates are asked to sign the form to acknowledge that they “[H]ave read and understand the Louisiana Code of Judicial Conduct, including the Canon specific to conduct during judicial elections.” *Id.*

<sup>76</sup>Cross & Fortune, *supra* note 28, at 637.

<sup>77</sup>Jim Wooten, *Speech Police Should Always Be Off Duty*, ATLANTA JOURNAL-CONSTITUTION, July 17, 2006, at A11.

<sup>78</sup>Thomas W. Krause, *Judicial Elections Oversight Lax*, TAMPA TRIBUNE, August 12, 2006. The article notes that in the absence of an oversight committee, complaints cannot be adjudicated until after the election either for the winners (before the Judicial Qualifications Commission) or the losers (before the bar association). The other option is the state’s Elections Commission, which applies the same standards to all candidates, judicial and non-judicial. *Id.*

<sup>79</sup>The most venerable are Erie County, New York (established in 1985) and Columbus (Franklin County), Ohio (established in 1987). The earliest known committee, in San Mateo County, California, is no longer active after successive election cycles without contested races. Telephone Interview by Denise Dancy, NCSC staff member, with Adam Kent, President since 2002 of the San Mateo County Bar Association (September 20, 2007).

<sup>80</sup>Lubet, *supra* note 45, at 820.

<sup>81</sup>*See Call To Action: Statement of the National Summit on Improving Judicial Selection*, *supra* note 18, at 1356. The effort was inspired by a recommendation from the November 2000 National Summit on Improving Judicial Selection. It read, in part: “Non-governmental monitoring groups should be established to encourage fair and ethical judicial campaigns.” *Id.*

<sup>82</sup>*See* Judicial Campaign Oversight Digest, [http://www.judicialcampaignconduct.org/Newsletter/JCOC\\_Newsletter\\_July07\\_V1N1.pdf](http://www.judicialcampaignconduct.org/Newsletter/JCOC_Newsletter_July07_V1N1.pdf) (last viewed Sept. 20, 2007).