COMMONWEALTH OF KENTUCKY
ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY
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FRANKFORT, KENTUCKY 40601

ANTHONY M. WILHOIT
Court of Appeals

THOMAS J. KNOPF
District Court

JOSEPH H. ECKERT
Circuit Court

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Judicial Ethics Opinion
JE - 62

Formal

Question #1: If a judicial candidate's opponent claims that he is experienced, may the candidate question his opponent's experience or demand that his opponent's experience be set out in detail?

Answer #1: Yes. Canon 7B(1)(c); In re Baker, 542 P.2d 701 (Kan. 1975); Berger v. Supreme Court of Ohio, 598 F. Supp. 69 (S.D. Ohio 1984).

Question #2: What position must a candidate for judicial office take when asked to participate in a political forum with his opponents?

Answer #2: A candidate for judicial office may participate in a debate against his opponents but his comments must be limited by Canon 7B (1)(c). Canon 7A(2); Judicial Ethics Opinions JE-38 and JE-39; Thode, Reporter's Notes to Code of Judicial Conduct (American Bar Association 1973); Morial v. Judiciary Commission of Louisiana, 565 F.2d 295 (5th Cir. 1977) cert. den. 435 U.S. 1013 (1978); ABA Formal Ethics Opinion 113.

Question #3: May a candidate for judicial office properly discuss qualifications, experience and facts which would tend to show good character and sense of responsibility?

Answer #3: Yes. Canon 7B(1)(c); In re Baker, 542 P.2d 701 (Kan. 1975); Berger v. Supreme Court of Ohio, 598 F. Supp. 69 (S.D. Ohio 1984).

I. A JUDICIAL CANDIDATE MAY QUESTION HIS OPPONENT'S CREDENTIALS AND ENDORSE HIS OWN SO LONG AS HIS COMMENTS ARE NOT UNTRUTHFUL OR MISLEADING

Canon 7B(1)(c) states as follows:

> [A candidate]. . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other facts.

Kentucky's Canon 7B(1)(c) is substantially the same as Canon 7B(1)(c) in the State of Kansas. While there are no Kentucky cases on point, the Supreme Court of Kansas has interpreted the above provision. In a campaign between an incumbant judge and a challenger, the challenger accused the incumbant of not being able to fulfill the duties of his office because of ill health. The Kansas Supreme Court found these comments accurate and therefore acceptable. "In our view the health, work habits, experience and ability of candidates are all matters of legitimate concern to the electorate who must make the choice." In re Baker, 542 P.2d 701, 705 (Kan. 1975).

The Baker case has been cited approvingly by a federal district court in the State of Ohio. In that case, the constitutionality of Canon 7B(1)(c) was questioned because the litigant claimed that Canon 7B(1)(c) prohibited criticism of judicial administrations and incumbants. The court found Canon 7B(1)(c) to be constitutional and in addition stated: "The court is not persuaded that this provision prohibits criticisms of judicial administrations and incumbants, assuming such criticisms are not untruthful or misleading." Berger v. Supreme Court of Ohio, 598 F. Supp. 69, 75 (S.D. Ohio 1984).

For these reasons, the Committee believes that a candidate for judicial office may safely question his opponents credentials and endorse his own so long as his comments are not untruthful or misleading.

II. A JUDICIAL CANDIDATE MAY PARTICIPATE IN A DEBATE AGAINST HIS OPPONENTS BUT HIS COMMENTS ARE LIMITED BY CANON 7B(1)(c).

The second question was not entirely clear, but the Committee assumed that by a "political forum with his opponents," the candidate meant a debate. There is no prohibition in the Code against a judicial candidate participating in a debate. In fact, Canon 7A(2) specifically states that a judge campaigning for election or reelection may attend political gatherings and speak on his own behalf. But what a judicial candidate may say is controlled by Canon 7B(1)(c).

The Judicial Ethics Committee has previously interpreted Canon 7B(1)(c) in JE-38 with regard to what a candidate may say during a political campaign. In that opinion it was stated that a judicial candidate might express an opinion on the use of computers in hopes of making the judicial system more efficient. But he should not comment upon the effect of plea bargaining on the judicial system as this was disputed legal and political issue. Commenting about proposed civil rules was interpreted as risky as this could be construed as a pledge of future conduct.

In JE-38, the Committee quoted from Thode, Reporter's Notes to Code of Judicial Conduct (American Bar Association 1973) at p. 98:

> What kind of campaign may the candidate for judicial office conduct? He cannot campaign on a platform of partiality for specific persons or groups, nor can he commit himself in advance on disputed legal issues, nor should he mispresent himself in any way. . . . The Committee was also of the opinion that a candidate should not base his campaign on his view of the solutions to disputed political issues. He can campaign on the basis of his ability, experience, and record.

It is obvious that the above guidelines restrict a judicial candidate's freedom of speech. But restrictions on a judge's political freedom were held permissible in Morial v. Judiciary Commission of Louisiana, 565 F.2d 295 (5th Cir. 1977) cert. den. 435 U.S. 1013 (1978). Quoting from Judicial Ethics Opinion JE-39, "It is commonly said that a judge or judicial candidate voluntarily relinquishes certain rights when he becomes a judge or candidate." The following language was found in ABA Formal Ethics Opinion 113:

> It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, ex necesitate rei, he thereby voluntarily places certain well recognized limitations upon his activities.

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Ethics Committee of the
Kentucky Judiciary