FLORIDA SUPREME COURT

CASE NO. 88,148

IN RE: CODE OF JUDICIAL CONDUCT
_____/

COMMENTS REGARDING AMENDMENTS OF MAY 30, 1996

The Court, upon its own Motion, having amended Canon 7 as reported at FLW S241 and having invited "...comments directed toward the propriety or wisdom of these amendments for further consideration..." the following observations and questions are submitted by Walt Logan, Esquire:

1. The Court undoubtedly had in mind certain purposes that were served by the amendments set forth in the Court's opinion of May 30, 1996. Unfortunately the specific reasons are not readily apparent to this observer who in the past has run for Circuit Judge in the Sixth Judicial Circuit and is considering yet another run for Circuit Judge this election cycle. The approach of general rules rather than specific rules sometimes leads to either confusion or to interpretation that favors the candidate seeking to interpret the general rules so as to either limit or broaden the activity leading to the election.

2. The change in sub-paragraph (d) deleting the word "gatherings" and inserting the words "party functions" seems to be a positive clarifying change in some respects and confusing in other respects. Functions such as Tiger Bay gatherings in various parts of the State would seem to be okay whereas functions

sponsored by a political party would be out of bounds. On the other hand would a partisan candidate's open house be okay since it is not a "party function"? Prior to the May 30, 1996 amendment the partisan candidate's open house would have most probably fallen under the definition of "political gathering" whereas with the amendment the open house is not a "party function." This would be particularly true in a partisan primary election because the political parties are prohibited by Statute from taking sides in the primary, thus the open house could not be fairly read to be a "party function."

Summertime in the Sixth Judicial Circuit means picnics for both political parties. Under the amendment it would seem that the picnic would be a "party function" and unless the candidate had an invitation to speak the attendance at the picnics of each political party would seem to be prohibited.

3. The change in Paragraph (3) deleting "After qualifying for judicial office with the appropriate qualifying officer" seems confusing to the undersigned. Prior to those words being stricken it seemed clear that one became a "judicial candidate" when papers were first filed in accordance with the provisions of Chapter 106 with the Secretary of State. If the deletion of those ten words has the intent of establishing a broader scope of when a person becomes a "judicial candidate" then inquiry would be made as to when that point in time might be?

Comment can only be made as to local practice under the election laws and Canons in judicial races as observed by the undersigned. Many times people give active consideration to becoming a judicial candidate for several months prior to actually filing the initial qualifying or the final qualifying papers with the Secretary of State. Some candidates have waited until the filing week in July to begin their campaign even though the "Courthouse rumor mill" has them as candidates long before those filings. Does the deletion of those ten words from Paragraph (3) intend to address that sort of situation where a lawyer who has not started the formal process is "working the community" for the next election?

4. The exception to the prohibition against attending political party functions either confuses many candidates or is ignored by many candidates.[1/] The exception provides in part that the candidate "...may attend a political party function to speak on behalf of his or her candidacy...and the invitation to speak must also include the other candidates, if any, for that office..." The local practice in this Circuit is for candidates to show up at political party functions with the hope of being allowed a couple of minutes to speak and for the opportunity to hand out literature.

1/ Judicial races are labeled as "non partisan" but in reality judicial races are "bipartisan." Judicial candidates are called upon to seek support from both political parties while at the same time walking a tightrope of propriety that does not provide clear direction as to areas of allowed conduct.

The candidates in the past have presumed that they might have the opportunity to speak, but sometimes that presumption turns out to be false hope. If the purpose of this exception is to limit the exposure of the judicial candidate to appearing to speak on behalf of their own candidacy then perhaps provision should be made that the invitation must be in writing, must include opposing candidates for the same office to speak at the same time, and for the candidates to excuse themselves and leave the political party function once the opportunity to speak has occurred.

General Comments

The above comments are in regard to the scope of the Court's amendments as announced May 30, 1996. The undersigned has been a candidate for Circuit Judge here in the Sixth Judicial Circuit and is currently considering yet another race. After observing the election process with regard to the Trial Courts it is the undersigned's opinion that serious study is needed in several respects. Some areas of adjustment would be legislative (The Florida Bar might consider the legislative areas) and others judicial.

The legislative area would include changing the reference in judicial races from "Group 1" to "Seat 1." The voters do not understand why two people running for one office are labeled as running for a "Group." There is no good reason for this confusion and the Legislature should be requested to visit that unnecessary confusion in labels.

Another legislative area would be to consider changing the qualifying date for judicial races or in the alternative moving the time for judicial elections. Under the present setup the qualifying time is less than six weeks away from the final election. This situation should be studied with regard to whether the qualifying time should be earlier so the judicial races are not condensed (another problem is that the races are in the summer time when voter activity is at the lowest point) or perhaps the judicial races should be on the general election ballot rather than the primary date.

Finally, the "alphabet advantage" should be taken out of judicial races (and contested primaries for that matter but that is beyond the comments presented here). Justice England once noted in a talk that the experts told him in a statewide race for the Supreme Court that 20% or 30% advantage came from the alphabet and he jokingly made reference not wanting to waste time on those potential voters. Being first on the ballot is purely a function of the alphabet under current Statute and provides unfair advantage to those early in the alphabet and unfair disadvantage to those later in the alphabet. Should you study the present Judges on the Bench by way of election the study undoubtedly would show heavy bias towards the early part of the alphabet. The solution would be simply to request the Legislature to enact a Statute requiring the Supervisor of Election in the largest county included in the Circuit to hold a drawing the Monday after final qualifying to

determine ballot position by draw rather than by the accident or advantage of birth name.

Possible Areas For Court Visitation

The areas for potential visitation by the Court would include a study for the potential of a more clearly defined Code of Conduct for judicial candidates as well as the study of enforcement of the rules governing candidates. Over the past several years the Florida Bar has spent more time implementing changes in the manner in which candidates run for the office of presidency of the Florida Bar than has been spent in studying the manner in which candidates run for Trial Judge positions. Perhaps the lack of study has been an optimism that the Legislature would place on the ballot and the voters would approve the end to judicial elections, however, that optimism has not been proven to be well placed. Judicial elections are apparently going to remain a fixture in the State of Florida and therefore the area is one that could benefit greatly from study and clarification regarding the rules and the sanctions for violation of the rules.

The current system for enforcement of provisions in Chapters 105 and 106 and Canon 7 relating to judicial races is very non-responsive to the types of potential violations that go on from time to time in judicial races. Examples such as candidates looking at utility poles as a fruitful place for their signs, the placement of "yard signs" illegally on right-of-ways, the attendance at functions that are not appropriate, misleading

information in campaign literature, using names on campaign literature or fund-raising letters without written approval as required by Chapter 106.143(3), and such other violations have no place to be aired from a practical standpoint. As support for this observation look to the reported cases re judicial candidates. There are fewer than a half dozen reported cases in the last ten years - can we assume this is because all races are run within the rules...? Going back for a moment to the invitation to speak question, the ambiguity as to whether there really was an invitation to speak could be cleared by requiring the invitations to be in writing and copied to all others running for the same Seat (Group). Consider a hearing on the question as to whether a candidate gained unfair advantage by attending a "party function" on the assumption that they were going to be allowed to speak pursuant to an implied invitation unbeknownst to other candidates for the Seat. Assume further that the assumption re the implied invitation was incorrect. The combined ambiguity from the factual situation plus Canon 7 would undoubtedly carry the day before a trier of fact. Can the Court reasonably expect rules restricting conduct which includes speech to be restricted by such general language?

Judicial candidates should not be able to hide behind confidentiality provisions with regard to discipline matters. Serious consideration should be given to confidentiality being waived by the act of qualifying for a judicial election. In the

Sixth Circuit a couple of elections ago one candidate reportedly advised the Editorial Board of the local newspaper that Bar Grievance matters could not be discussed by the candidate because by Statute and Rule those matters were confidential!!! The elected office of Trial Judge is too important to allow candidates to hide behind confidentiality.

There are many other areas of concern. One of the most fertile areas for input would be former candidates - both successful and unsuccessful. Few lawyers become very involved with the rules and the provisions of Canon 7 until they become a candidate and see to their great surprise the "liberal" interpretation of the rules by some candidates as opposed to what the clear meaning of some of the rules seems to be.

One example of confusion arises out of sub-paragraph (C)(1). The following presents a chicken and egg type question with regard to the provision that "...candidates shall not personally solicit campaign funds or solicit attorneys for public stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law..." The question arises as to how a candidate would establish a committee of responsible persons without personally asking attorneys for their support? See the chicken and

egg question? Perhaps the answer is that one can engage the prohibitive activity before one reaches the status of becoming a "judicial candidate."

In closing, the following questions are posed as just a few areas that might be appropriate further study:

(a) Before filing the first paper with the Secretary of State and thus becoming a "judicial candidate" can future judicial candidates go about asking lawyers and others for commitments to contribute money and other support on behalf of the future candidate once the campaign account is opened without running afoul of Chapters 105 and 106 or Canon 7?

(b) Is there any activity, short of accepting funds or spending funds toward an election, prior to filing the initial or qualifying papers with the Secretary of State, that would be prohibited by a future judicial candidate?

(c) In the event a judicial candidate is invited to speak at a party function for two minutes can the candidate stay at the function the entire two or three hours passing out literature and talking to the politically active people in attendance?

The above comments and observations were made pursuant to the Court's invitation included in the opinion of May 30, 1996. Under the current general provisions judicial candidates walk a fine line that is not easily determined. The electorate would benefit by liberalizing the areas that are free for discussion by judicial candidates. The comments are made for consideration of the

betterment of the system which apparently will be with us for the foreseeable future.

Respectfully submitted,

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