

Fair Campaign Practices in King County and the Role of the KCBA Fair Campaign Practices Committee

By Neal Philip

As the readers of this article are undoubtedly aware, unless one is temporarily appointed to a judicial position, one must be elected by the public to become a judge. For better or worse, this means that candidates for judicial office must participate in the political process, which generally involves campaigning, fundraising, shaking hands, and perhaps kissing babies.

Unlike candidates for other governmental positions, however, candidates for judicial office are held to a higher standard with regard to their political activities.

Contests for judicial seats are fundamentally different from other political contests. Members of the executive and legislative branches are representatives and agents of a constituency and are expected to act in their constituents' best interests. Judges, on the other hand, are expected to follow the law based upon the facts of each individual case before them. Given this presumption that judges are to act impartially when performing their duties, and given that judges must avoid even the appearance of impropriety, special problems arise during judicial campaigns that are absent from other political campaigns.

Unfair or potentially deceptive campaign conduct by judicial candidates can quickly undermine public confidence in the courts unless the public is certain that such conduct will not be tolerated. Because preservation of the integrity of the judicial office is vital if public respect for the law and the courts is also to be preserved, the King County Bar Association formed the Fair Campaign Practices Committee to monitor judicial elections that take place in whole or in part in King County and respond to complaints of unfair judicial campaign practices in those elections.

This includes elections for Superior Court, Division I of the Court of Appeals, the Washington Supreme Court, and local municipal and district courts. It is the charge of the Committee to quickly and fairly resolve allegations of unfair conduct by judicial candidates, both to correct potentially misleading campaign activities and deter violations from happening in future campaigns. The committee's membership is open to all members of the KCBA, as well as retired judges.

The Committee's Standards for Determining Unfair Campaign Conduct

Judicial candidates are generally held to the standards of the Code of Judicial Conduct, particularly Canon 7, and the Public Disclosure Act, RCW 42.17. The CJC and the PDA impose requirements upon candidates regarding their political activities, including fundraising and campaigning. They also preclude candidates from, among other things, making statements that appear to commit the candidate with respect to certain issues, or making knowing misrepresentations regarding the candidate or the candidate's opponent.

It is the position of the KCBA Board of Trustees, however, that the provisions of the CJC and the PDA will not necessarily be determinative of whether certain campaign

conduct is unfair, and the Committee must analyze complaints on a case-by-case basis. Therefore, in addition to the CJC and the PDA the Committee also relies upon the KCBA's Fair Campaign Practices Guidelines, previous opinions by the King County and Washington State Bar Associations, caselaw, and common sense.

The Committee may thus find campaign conduct to be unfair and/or misleading even if it appears to be arguably permissible under the CJC and PDA. Again, the Committee holds the judicial candidates to the highest ethical standards and, in the event of conduct that has the potential to mislead the voting public, may recommend corrective action by the Trustees in response to any misleading impressions and to deter present and future candidates from engaging in unfair campaign practices.

Examples of Unfair Judicial Campaign Activities

The Committee has been called upon to review many different types of alleged unfair campaign practices in recent years. As one might imagine, the allegations vary greatly, though the use of campaign signs is often the source of complaints.

A common complaint in the recent past has been that a candidate falsely suggested that he or she is an incumbent judge. With respect to campaign signage, this can occur when a candidate uses the word "Judge" in such a way as to imply that he or she already holds this position. For example, it is not misleading to use a yard sign that states:

*Vote
For
John Smith
Superior Court Judge Position 85*

However, it may be misleading, for a non-incumbent, to use a sign that states:

*Vote
Superior Court Judge
John Smith*

Although whether the sign is determined to be misleading will depend upon the precise words used and the way in which they are sized and positioned, candidates need to be mindful that the signs will be analyzed from the perspective of the voting public, not from the perspective of lawyers who are knowledgeable about the candidates and the judicial positions they seek.

Another example of yard signs that has been determined to falsely suggest incumbency involves candidates who, although they may hold a judicial position, are seeking a position on a higher court and do not make it clear that they are not actually a judge of the higher court. Or the candidate who is not actually a sitting judge is pictured on a sign wearing a judicial robe. In various contexts each of these actions has been found to be potentially misleading.

Although every written complaint to the Committee results in an investigation, not every complaint results in further action by the Committee. The Committee

recognizes that judicial candidates must campaign in order to be elected, and strives to balance the right to effective campaigning against the obligation to avoid deception.

How the Committee Functions

The Committee's sole purpose is to prevent judicial campaign misconduct in order to better ensure that the public is not deceived into voting for a candidate by false or deceptive statements or actions of a candidate. It does this by investigating complaints of unfair campaign conduct and making recommendations to the Board of Trustees of the KCBA on what, if any, action should be taken regarding the Compliant.

When corrective action has been deemed necessary and appropriate, actions taken by the Trustees have included the issuance of press releases, obtaining agreements from candidates to refrain from engaging in certain types of behavior, and having candidates take corrective action with respect to potentially misleading conduct.

The Committee itself issues no public statements. It is not a disciplinary group, nor is it a governmental entity. Its proceedings and discussions are confidential. It is made up of lawyers from King County who agree that, if we must have judicial elections, it is in the public interest to have judicial elections that are "above the fray" of elections that do not involve potential judges. To that end, the Committee strives to quickly respond to complaints of unfair campaign conduct, determine if the conduct at issue is truly "unfair" – not always an easy task – and recommend a course of action to the Board of Trustees.

Once the Committee makes its recommendation, its involvement in the matter ceases. After that point the KCBA Board of Trustees determines the appropriate course of action to take, assuming that it agrees that any action is necessary.

The Agreement for the Conduct of Judicial Campaigns

Once all judicial candidates have declared their candidacy, the King County Bar Association sends the candidates an informational letter, accompanied by the Fair Campaign Practices guidelines and a proposed Agreement for the candidate to sign, in which the candidate agrees to abide by the guidelines. The Agreement states:

I agree to familiarize myself with all applicable laws and regulations regarding judicial campaigns, including Canon 7 of the Code of Judicial Conduct, and to conduct my campaign in accordance therewith. I further agree to familiarize myself with and abide by the King County Bar Association's Guidelines for the Conduct of Campaigns for Judicial Office, a copy of which I have received. I shall also cause those managing my campaign to read this Agreement and to abide by its terms.

The candidates, of course, are not required to sign the Agreement; their decision is completely voluntary. Information about which candidates have signed the Agreement, however, is available to the public.

How Complaints are Processed

The Committee acts when it receives a written complaint. Under the Fair Campaign Practices guidelines, one or more Committee members are assigned to investigate the Complaint within one business day, and the goal is to complete the investigation within two business days after the investigation begins.

The Committee then meets to discuss the investigation, after which it decides whether to dismiss the complaint, come to an agreed resolution of the issue with the candidate, or refer it to the KCBA Board of Trustees with a recommendation for particular action.

Conclusion

The Committee and the KCBA Board of Trustees are mindful that judicial candidates in Washington are required to engage in the political process and by no means wish to inhibit their ability to get their messages out to the voting public. Candidates need to remember, however, that their colleagues expect nothing less than absolute honesty with respect to their public statements. In the past, some candidates, whether through carelessness or intent, have made statements that might be regarded as misleading to the voting public.

It is the hope of the Committee and the KCBA Board of Trustees that this article will help candidates understand the purpose of the Fair Campaign Practices Committee and avoid potentially misleading conduct during the course of their campaigns.

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