



# from the president

by David A. Kutik

President | Cleveland Bar Association

**T**hese days, there are lots of things you're not supposed to say, or at least there are things some people think you're not supposed to say. And when you say those things, these people have no problem telling you you're not supposed to say them. No, I'm not talking about George Carlin's famous seven words or even about the traditional notions of political correctness. As the pundits say, "It's the 'silly season'" – meaning we're in the stretch run towards election day. The particular "silliness" at work is the election of judges.

A few months ago, *The Plain Dealer* published an editorial decrying the "name game" that, in its view, judicial elections had become. (The "name game" being the phenomenon of candidates with certain politically popular surnames running for judicial and non-judicial positions in this county, and winning.) The editorial further contended that the election of judges had caused the quality of justice in our county to suffer. After that editorial came out, I was at a function with my predecessor as president of our Association, Steve Kaufman. A common pleas court judge turned to Steve and me and complained about the editorial and pointedly asked why the Bar Association had not responded to the editorial. Apparently, according to this judge, people are not supposed to say there's a "name game" and that the "name game" affects the quality of our courts.

To some degree, the judge's complaint was well-taken, but to some degree, it was not. The judge was wrong if the judge truly believed the "name game" doesn't exist. I won't cite specific examples, but let me demonstrate it another way. Two years ago, then-Cleveland Bar President Robin Weaver asked me to chair a task force to look at our Association's participation in the Judicial Candidates Rating Coalition (JCRC), a combination of our Association with other bar associations and the Citizens League. As part of that effort I spoke with many candidates for judicial office (both successful and unsuccessful candidates) about their campaigns. The overwhelming view from the candidates themselves was that the "name game" is indeed a pervasive influence. I asked one judge, who had what most would regard as a fairly politically-potent name to identify the three most important factors in judicial campaigns. His candid response: "Your name, your name and your name."

The judge who complained to Steve and me was right, however, to criticize the *Plain Dealer's* assumption that "name" judges are bad, and "no-name" judges are good. Like most lawyers who appear in common pleas court, I have opinions about judges. I believe there are good "name" judges and not so good "name" judges. Similarly, there are good "no-name" judges

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and not so good “no-name” judges. Others won’t necessarily share my views about particular judges, but my bet is that almost all lawyers who deal with our county judges would probably agree with my last two sentences.

People are not supposed to say that electing judges is a bad idea. I have heard fairly strident criticism of anyone who would question whether we should elect our judges at all. People who suggest that electing judges is bad are called “anti-democratic,” and “elitist,” among other things. Certainly, reasonable people can disagree on whether electing or appointing judges results in getting better justice. But what can’t be denied is that judicial campaigns raise a host of other issues that impact the quality of justice — or at least perceptions about the quality of justice. Campaign funding is one of those issues.

In one of my cases several years ago, things weren’t going very well. It appeared that every discovery request (and there were many requests) was the subject of a motion. We lost almost all of these motions, including some we had absolutely no business losing. It was clear: No matter what my client and I did or said, it seemed we were going to lose on whatever issue was put before this judge. At one point I told my client, “Just be glad the other side hasn’t moved to have us stripped naked and staked to a pole in Public Square.” The client laughed, but then did something troubling. He looked up the campaign contribution records for our judge’s most recent campaign. He came back and reported on his review. The judge had received contributions from almost every lawyer in the law firm on the other side. My client said, “Explains everything doesn’t it?” Frankly, I didn’t know what to say, and whatever I said, I’m sure my client wasn’t persuaded that there was any flaw in his theory that the contributions made by the other side’s lawyers to our judge had been the reason for our lack of success. The system not only allows, but in many ways encourages that perception.

Equally troubling is the issue of what candidates can say (or given the title of this “President’s Page,” what they’re not supposed to say) during their campaigns. Some think a candidate for judicial office should not say where he or she stands on issues. This thinking also would discourage judicial candidates from overtly aligning themselves with any group or organization. The rationale behind this view is this: Cases will be decided on a judge’s preconceptions or on the identity of the parties; cases will not be decided on the facts and the law. If someone who becomes a judge has to decide an issue on which that person has announced his or her position, a party advocating a position to the contrary may believe they have no chance of success because the case will have already been decided. Similarly, when a judicial candidate aligns himself or herself with a particular group, a party not belonging to that group may understandably believe they have no chance before that judge in any case against a party belonging to the group. Canon 7 of the Model Code of Judicial Conduct, a form of which has been adopted in Ohio, addresses these issues and in some ways restricts what types of things a judicial candidate may say.

But two years ago, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the U.S. Supreme Court struck down a clause in Minnesota’s Code of Judicial Conduct, which provided that a judicial candidate could not “announce his or her views on disputed legal or political issues.” The Court held that the “announce” clause improperly infringed on a candidate’s First Amendment free speech rights. Notably, using a strict scrutiny analysis, the Court rejected the argument by Minnesota that having candidates state their views on issues adversely impacted the public’s perception of the judiciary. Specifically, Minnesota argued that where a candidate expressed a view on an issue, that candidate may not be perceived as being impartial on that

issue. It also argued that promoting the perception of an impartial judiciary was a compelling state interest. Justice O’Connor’s concurring opinion was particularly critical of judicial elections, concluding, “If the State has a problem with judicial impartiality, it is largely one the State brought on itself by continuing the practice of popularly electing judges.”

Contrary to much of what has been written about the *White* case, the Court did not strike down all restrictions on speech and political activities by candidates for judicial office. The opinion of the Court expressly observed that it was not commenting on other parts of the Minnesota Code of Judicial Conduct. The Court also stated, “We neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.” Other courts have subsequently upheld other restrictions in state judicial codes of conduct against First Amendment-based attacks. These courts have relied on the Due Process Clause to justify the “restrictions” on judicial candidate speech. These courts have noted the Due Process Clause guarantees litigants a fair and impartial court, that “[t]he ability to be impartial is an indispensable requirement for a judicial officer” and that “the perception of impartiality is as important as actual impartiality.”<sup>1</sup> Because the judicial codes of conduct were found to have properly restricted certain campaign activities in order to assure at least the perception of judicial impartiality, these codes have been upheld.

But the issue of what judicial candidates can or should say (or can’t or shouldn’t say) is hardly resolved, especially in Ohio. Recently, James Trakas, the chair of the Cuyahoga County Republican Party sent a letter to a number of entities, including the Office of Disciplinary Counsel, claiming that some of the advertising material of Judge William O’Neill of the 11th District Court of Appeals, who is running for the Ohio Supreme Court, violates certain parts of the Ohio Code of Judicial Conduct. For example, Judge O’Neill’s website states:

*Judge William O’Neill . . . believes that the idea of bankrolling judicial campaigns is a bad idea. “Money and judges don’t mix,” he said. “Never have. Never will.” . . .*

*Judge O’Neill seeks your support in his bid for the Ohio Supreme Court. The time has come to end the public’s suspicion that political contributions influence court decisions. The election of Judge O’Neill is the best step toward sending the message: “This Court Is Not For Sale!”*

Among other problems he had with Judge O’Neill’s campaign materials, Trakas complained that this type of statement violated Canon 7(B)(1), which requires a judge or a candidate to “maintain the dignity appropriate to judicial office.” There is little doubt that the concern expressed by this candidate is real. Indeed, another supreme court candidate stated, “Campaign fundraising has created the misperception that fairness comes at a price.” That statement was made by none other than Chief Justice Thomas Moyer.<sup>2</sup>

Following its routine procedure for investigating a grievance, the Office of Disciplinary Counsel sent a form letter to Judge O’Neill, requesting him to respond to the grievance. Rather than deal with the merits, Judge O’Neill filed an action in federal court, seeking to enjoin the Disciplinary Counsel from even investigating the Trakas complaint. At this writing, the court had granted Judge O’Neill’s motion for a temporary restraining order. The sad

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<sup>1</sup> *In re Watson*, 100 N.Y.2d 290, 301-302, 794 N.E.2d 1, 6-7 (Ct. App. 2003). See also *In re Rabl*, 100 N.Y.2d 305, 795 N.E.2d 1287 (Ct. App. 2003).

<sup>2</sup> Speech to the Ohio State Bar Association on Campaign Reform, May 16, 2002, available at [www.sconetstate.oh.us/Communications\\_Office/Speeches/2002/0516cjm.asp](http://www.sconetstate.oh.us/Communications_Office/Speeches/2002/0516cjm.asp)