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Limit judicial campaign advertising

Recent political advertisements critical of a judicial candidate's prior decision raise important questions about judicial independence and the role of advertising in judicial campaigns, particularly when it comes to ads not directly sponsored by the judicial candidates.

The television advertisement in question used inflammatory images, and suggested the judicial candidate would be too lenient on those accused of driving while intoxicated. The political party that ran the ad stated that the party's candidate was not involved in planning the ad and did not know about it in advance, and that constraints on what the candidate may say do not apply to the political parties.

Now that the election is over, the validity of that position should be considered further, and an effort should be made to encourage agreement among the parties as to the permissible scope of advertisements relating to judicial campaigns but not directly sponsored by the candidates themselves.

The heart of the issue is judicial independence. Several of the rules governing judicial conduct in New York State relate to judicial independence and permissible advertising by candidates for judicial office. The very first rule begins by stating: "An independent and honorable judiciary is indispensable to justice in our society."

That rule requires that judges personally observe high standards to preserve the independence and integrity of the judiciary. A judge must apply the law faithfully, regardless of his or her personal views, and "shall not be swayed by partisan interests, public clamor or fear of criticism."

The rules of judicial conduct also provide that a judge, as a candidate for judicial office, shall not make any commitments about cases or issues that might come before the court, or make any false statements or misrepresentations concerning the adverse candidate.

Those fundamental principles reinforce the judge's obligation to apply the law fairly to the facts, regardless whether the judge agrees with the law, the law is popular or there will be public outcry or criticism.

The judicial candidate, knowing those obligations as well as the rules of judicial conduct, may not criticize another candidate for making an unpopular decision, and may not misrepresent what the other judge has done. The constraints can appear less straightforward when the statements at issue are made by the political party and not directly by or on behalf of the candidate for judicial office.

The parties also argue that freedom of speech should not be curtailed, and that the First Amendment protects all such communications. Given the purpose of the prohibition on misleading or false advertising relating to judicial campaigns, however, there should not be any difference whether a given ad in a judicial campaign is produced by a party rather than a candidate.

Regardless whether a candidate knows about the advertisement in advance, he or she is obligated to speak out against the ad or make all reasonable efforts to cause the ad to be withdrawn if it is misleading or false. The rules governing judicial candidates prohibit them from condoning advertising they cannot initiate. The purpose of the rules would be frustrated if a candidate could remain silent and allow his or her political party to do what the candidate cannot do directly. The electorate also has the right to expect the candidate to be responsible for the messages presented on his or her behalf. The candidate is not just a figurehead: The judge, not the party, will be making the decisions once elected to a judicial office.

Serving as a judge is a lonely and difficult job. A judge is bound to follow the law, to be impartial, treat each side equally and ensure a trial is fair. In a criminal case, the judge must safeguard the constitutional rights and procedural protections guaranteed to defendants under our system of justice. That includes such basic principles as the presumption of innocence, proof of guilt beyond a reasonable doubt and not requiring a person to testify in his or her own defense. Those and other such principles make convictions more difficult to achieve. In some cases, they can cause a guilty person to go free, for instance in situations when a jury is not satisfied the burden of proof has been met.

When the crimes are horrific or the facts seem compelling, there can be public outcry that the defendant must be guilty and the defense has no merit. Such pressure must be resisted, and the person who must do so, and who must protect the rights of the defendant, is the trial judge. The duty may mean making an unpopular decision, and it requires courage. To protect the independence of the judiciary, the rules of judicial conduct must be enforced. If the adversary — or the adversary's party — can criticize the judge in a misleading or false way, it will be even more difficult for the trial judge to exercise his or her responsibilities properly and fairly. Judicial

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independence is thereby threatened, and confidence that the next judge will be courageous enough to withstand aggressive critical advertising will be diminished.

Now that the election is over, but memories are still fresh, it is important to call on all political parties to adhere to these simple principles governing judicial elections. The political parties should commit not to run any ads that the judicial candidates themselves would not have been allowed to say or sponsor.

In the name of preserving the principle of judicial independence, the MCBA stands ready to work with the political parties and judicial candidates to agree to abide by a common set of principles governing political party advertising in future races. Doing so should benefit the candidates, the parties, the voters, and all who come before the courts in future cases.

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