



JUDICIAL INVESTIGATION COMMISSION

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JIC ADVISORY OPINION 2019-15

Rule 2.13(c) of the Rules of Judicial Disciplinary Procedure gives the Judicial Investigation Commission the authority to promulgate advisory opinions on ethical issues pertaining to the Code of Judicial Conduct. The Rule provides that “[t]he Commission may render in writing such advisory opinion as it may deem appropriate. *Id.*”

In JIC Advisory Opinion 2018-22, issued on December 17, 2018, the Commission was asked, among other things, what a judicial candidate’s obligations were if a third-party political action committee (“PAC”) makes false or misleading statements about an opponent in a campaign. We held that judicial candidates must disavow attacks and request a third party or PAC to cease and desist: (1) any false or misleading statements made about opponents; (2) any statements that do not accurately reflect the duties and role of a judge; or (3) any statements that indicate that a judge or candidate is not neutral and detached but would be biased in favor of or against an individual, group or legal issue. In reaching these conclusions, the Commission relied on Rule 4.1(A)(9), (10) and (11) and Rule 4.1(B) of the Code of Judicial Conduct.

The purpose of this opinion is to provide some understanding of when and where the obligations to disavow and request the third-party or PAC to cease and desist arise. Category Nos. (2) and (3) above are self-explanatory. With respect to Category No. (1), we do not believe that a judicial candidate is obligated to disavow every third-party or PAC misrepresentation. Indeed, Comment [8] to Rule 4.1(B) above states in pertinent part “... the candidate may disavow the attacks, and request the third party to cease and desist.” However, Comment [8] should not be construed and we do not mean to suggest that a judicial candidate’s failure to address a known third-party or PAC misrepresentation would never violate the Code of Judicial Conduct. We believe that there are times “where a candidate must address an independent [third-party] statement in order to uphold judicial integrity and independence, avoid impropriety, or maintain dignity” *In re District Court Judge*, 382 P.3d 480, 486 (Alaska 2017).

A judicial candidate’s awareness of the third-party or PAC campaign, is not, in and of itself, enough to impose a duty to monitor and address the group’s statements.

Importantly, the Commission is of the view that the obligation to disavow is not triggered until the following criteria are met: (a) the statement must involve a fact and not an opinion; (b) the fact must be substantive and significant; (c) the misstatement must actually be false or a material misrepresentation; and (d) the judicial candidate has knowledge of the third-party or PAC's factual statement and its falsity. Once the obligation to disavow is initiated, the Commission finds that the situation is resolved through the timely issuance of a press release to all area news media and a prompt letter to third-party PAC notifying it to immediately stop running the false statement in question.

Like the Court in *District Court Judge*, the Commission believes that an objective test should be applied to determine whether a judicial candidate's failure to address a false or misleading statement by a third-party or PAC creates a likely violation of the Code of Judicial Conduct. The test is as follows:

[W]e evaluate "whether the judge failed 'to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot.'" This duty is "one of taking 'reasonable precautions' to avoid having 'a negative effect on the confidence of the thinking public in the administration of justice.'

Id.

Determination should be made on a case by case basis after a careful review of the totality of the circumstances. As the State Supreme Court noted:

The law . . . takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

In the Matter of Callaghan, 238 W. Va. 495, 518, 796 S.E.2d 604, 627 (2017), quoting Syl. Pt. 4, in part, *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 480 S.E.2d 548 (1996).

Sincerely,



The Honorable Alan D. Moats, Chairperson
Judicial Investigation Commission