



JUDICIAL INVESTIGATION COMMISSION

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Charleston, West Virginia 25326-1629
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March 24, 2008

Re: JIC Advisory Opinion 2008-04

Dear

The Judicial Investigation Commission reviewed the faxed information you sent on March 6, 2008 concerning a statement you wish to use in your upcoming campaign. In a recent conference call the members reviewed your request. Their opinion is as follows:

An advisory opinion of the Commission is not binding on the Judicial Hearing Board or the Supreme Court of Appeals of West Virginia, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be admissible in any subsequent disciplinary proceeding involving a judge.

Issue

In Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002), the Supreme Court decided by a 5-4 vote that, under the First Amendment, states cannot prohibit a candidate for judicial office from 'announc[ing] his or her views on disputed legal or political issues.' The "Announce Clause" provided that a judge shall not "announce his or her views on disputed legal or political issues." When White was decided, only eight states had some version of the Announce Clause (which was part of the 1972 ABA Model Code of Judicial Conduct).

West Virginia does not have the announce clause in its Code of Judicial Conduct. However, the Commission's advice to judicial candidates about permitted campaign speech has been based on our interpretation of Canons 5A(3)(d)(i) and (ii), the rules against making pledges or promises of conduct in office and against making statements which appear to commit the candidates to the outcomes of cases. In the past the commission has counseled candidates against announcing views on disputed social and legal issues.

March 24, 2008

Page Two

In this advisory opinion the Commission is amending its prior advice about certain campaign speech where it concludes that its prior limitations on campaign speech would not be enforceable under White.

However, it is important to note that the West Virginia Supreme Court of Appeals has not changed any of the existing Canons. Therefore the Commission will continue to enforce the rules in Canon 5 requiring candidates to maintain the dignity appropriate to the office and to act consistently with the integrity and independence of the judiciary, Canon 5A(3)(a), to not make pledges and promises of conduct in office, Canon 5A(3)(d)(i), and to not make statements which commit or appear to commit the candidate with respect to cases likely to come before the court. Canon 5A(3)(d)(ii).

The rules governing campaign speech, which bind incumbents and lawyer candidates alike, are:

1. A candidate . . . for a judicial office . . . shall maintain the dignity appropriate to judicial office and act in the manner consistent with the integrity and independence of the judiciary. Canon 5A(3)(a).
2. A candidate . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office. Canon 5A(3)(d)(i).
3. A candidate . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. Canon 5A(3)(d)(ii).
4. A candidate . . . shall not . . . knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent. Canon 5A(3)(d)(iii).

Analysis

It is expected by the Commission that judicial candidates in West Virginia will conduct themselves in a manner that will promote the impartiality and integrity of the judiciary during their campaign and not look at the White decision as a tool for avoiding disciplinary charges. However, the Commission acknowledges that the White decision permits candidates under the first amendment to state their general views about disputed social and legal issues. White and post-White case teach that candidates have a constitutional right to state their views on, for example, abortion or the death penalty, to characterize themselves as "conservative" or "tough on crime," or to express themselves on any number of other philosophies or perspectives. White also teaches that while a candidate may have views on disputed issues and may announce them,

March 24, 2008

Page Three

once elected, the judge must be able to listen to the arguments of all litigants and give each due consideration.

White did not give a candidate the right to express bias toward a particular class of litigants. The post-White cases upholding the Canons prohibit candidates from binding themselves, or appearing to bind themselves, to take action against particular kinds of parties a candidate cannot say that he or she would "assist" the police or say that he would use "high bail" and "harsh sentences" to those who come to to sell drugs. The Canons still protect a litigant's right to a meaningful opportunity to be heard.

When a judicial candidate makes more specific campaign statements, such as "those who bring drugs into for sale should be dealt with harshly." When there is the likelihood that a case with that charge will be before that judge, the Judge runs the risk of violating the "commitment" clause and/or the "promises" clause.

Clearly, a statement indicating that as judge you will rule in a particular way violates the "commitment" clause and the "promises" clause. And, even where the campaign promise does not violate Canon 5, a statement of dealing with a certain category of accused persons harshly may invite future recusal requests, or even mandate recusal on future cases. This would not, of course, be consistent with the proper performance of your judicial duties and with the proper administration of justice. It is all right to state your position of concern about drugs coming into

County and your determination to set those cases promptly for trial. However, a statement that appears to constitute a mere expression of fact, such as a judge's reference to a record of imposing harsh penalties in criminal cases or being "tough on crime," statements not prohibited by the canons, may be considered an implied promise of future conduct and subjects the judge to criticism by calling into question his or her ability to rule in each case on the evidence and the law.

A judge has to be careful that what he or she says does not represent a bias against criminal defendants who later may appear before the judge. For example, an expressed philosophy that "All drunk drivers should spend some time in jail," probably falls somewhere between a pledge of future conduct and a permissible statement about how properly to address a societal problem. This statement is not necessarily inconsistent with a pledge to address each case on its merits, but certainly invites criticism on the basis that future defendants accused of that crime likely will have little faith that the judge will entertain a legitimate plea for leniency and, therefore, may seek and deserve the judge's disqualification.

The Commission is also of the opinion that White does not mean that candidates are obligated to answer questions about their views on social and legal issues. They may take the position that their opinions are not relevant to their obligations as judges to follow the law and to rule on each case on its facts and merits. And, opponents of those candidates who express their views can criticize their opponents for those expressions for that same reason.

March 24, 2008

Page Four

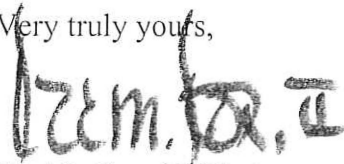
Conclusion

For the reasons stated, it is the opinion of the Commission that you should not advertise that your judicial philosophy is that those who bring drugs into _____ County for sale should be dealt with harshly.

The Commission acknowledges that the answers to many questions about campaign speech will have to be addressed as they arise, and in context, and are not subject to blanket approval or disapproval. The Commission will attempt to answer campaign speech questions within a reasonable period of time.

It is hoped that this opinion fully addresses your concerns. Should you have any other question please do not hesitate to contact the Commission.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Fred L. Fox, II". The signature is stylized with a large, looped "F" and a distinct "II" at the end.

Fred L. Fox, II, Chairperson
Judicial Investigation Commission

FLF:nb