



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

December 14, 2018

Re: JIC Advisory Opinion 2018-22.

Dear

Your recent requests for an advisory opinion have been reviewed by the Judicial Investigation Commission at its December 7, 2018 meeting. Since both of you asked the same questions regarding similar circumstances that occurred just before the election, your advisory opinion requests have been consolidated into one response. The facts giving rise to your requests are as follows:

Both of you were candidates for judicial office in the November 2018 election. Both of you were subjected to media advertisements from Political Action Committees ("PACs"). A PAC is a popular term for an independent political committee organized to raise and spend money to influence the outcome of elections on a local, state and/or national level. They generally represent political, business, labor and/or other special/ideological interests. A PAC is separate and distinct from a judicial campaign committee and the two are wholly autonomous of one another.

You both want to know if it is permissible for candidates to accept/receive endorsements from PACs? Similarly, you want to know if it is acceptable to allow the publication of campaign advertisements on television or social media that are paid for by

a PAC? You also want to know if a PAC can run ads on your behalf that state you are going to “throw the book at child predators” or “make drug dealers pay dearly with harsh sentences?” Lastly, you want to know what your obligations are if a third-party PAC makes false or misleading statements about an opponent in the campaign?

Rule 4.2(B)(4) states that “[a] judge or candidate subject to public election may, except as prohibited by law seek, accept or use endorsements **from any person or organization**” (emphasis added). The Rule places no restrictions on who may endorse a judicial candidate. In fact, Comment [3] states:

A judge or candidate may be a member of a political party, and that affiliation is and has been a matter of public record in West Virginia. A judge or candidate may be endorsed by or otherwise publicly identified or associated with a political party by a person or entity not affiliated with the judicial campaign. Therefore, a judge or candidate may maintain his or her party affiliation through a judicial election, and he or she may include political party affiliation or similar designation in campaign communications and literature.

Thus, the Commission is of the opinion that a judicial candidate may seek, accept, and use endorsements from a PAC. The Commission also believes that the Code does not preclude the PACs from running campaign advertisements for or against a judicial candidate.

Likewise, the Code does not limit the content of advertisements that a PAC may run for or against a judicial candidate. Importantly, the duty is on the judge or judicial candidate to disavow any advertisements or comments made by a PAC that are false or misleading, fail to accurately reflect the duties and role of a judge, or indicate that a judge is not neutral and detached but would be biased in favor of or against an individual, group or legal issue.

Rules 4.1(A) (9), (10) and (11) are relevant to this position and state:

- (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
 - (9) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
 - (10) make any statement that would reasonably be expected to affect the outcome or impair

the fairness of a matter pending or impending in any court; or

- (11) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 4.1(B) provides that “[a] judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).”

Comment [1] to the Rule cautions that “a judge plays a role different from a legislator or executive branch official” when running for public election. A judge “makes decisions based upon the law and the facts of every case” instead of upon the expressed views or preferences of the electorate. “Therefore in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.” Comment [3] states that “[p]ublic confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence.”

Comment [7] provides that judicial candidates “must be scrupulously fair and accurate in all statements made by them and their campaign committees.” Significantly, Comment [8] states in its entirety:

Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate’s integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(9), (A)(10), or (A)(11), the candidate may make a factually accurate public response. In addition, when an independent third party has made unwarranted attacks on a candidate’s opponent, **the candidate may disavow the attacks, and request the third party to cease and desist.**

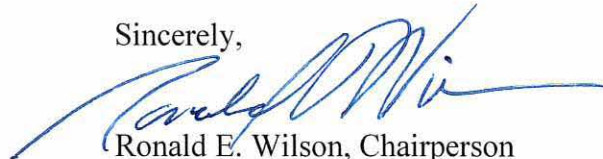
(emphasis added).

Based upon the foregoing, the Commission is of the opinion that judicial candidates must disavow: (1) any false or misleading statements made about opponents

by a third-party or PAC; (2) any statements that do not accurately reflect the duties and role of a judge made by a third party or PAC; or (3) any statement made by a third party or PAC 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. Further, a judge or judicial candidate should request the third-party or PAC to immediately cease and desist from making such statements. To refrain from taking such action would give the public the impression that the judge or judicial candidate endorses the improper statements in violation of the Code of Judicial Conduct.

Thank you for your inquiry. If there is any further question regarding this matter please do not hesitate to contact the Commission.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ronald E. Wilson", with a long horizontal flourish extending to the right.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat