



JUDICIAL INVESTIGATION COMMISSION

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JIC Advisory Opinion 2024-03

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

The facts giving rise to this opinion are as follows: A political party has sent a questionnaire to all judicial candidates asking questions which, for the most part, seek to learn their views on disputed or controversial legal issues. For example, the questionnaire asks: (1) which of two U. S. Supreme Court Justices (Scalia or Breyer) the candidate agrees with in interpreting the U.S. Constitution; and (2) whether the candidate agrees with U.S. Supreme Court decisions overturning *Roe v. Wade*, 410 U.S. 113 (1973), protecting the right of an individual to possess firearms, and that a contraception mandate imposed by the federal government violated the Freedom Restoration Act. The questionnaire provides in pertinent part:

We believe you are able to answer each one of these questions as we carefully searched precedent and chose questions that even U.S. Supreme Court Justices have publicly disclosed. If you choose not to return the questionnaire, your score will be “zero” and we will distribute that score to voters. Failing to answer a question will result in a “zero” for that question, lowering our overall score. All questions are weighted equally.

Importantly, the questionnaire states that it “requests [the candidate’s] **opinion on settled legal precedent**. These questions **do NOT ask for your personal opinions on specific issues** (emphasis added).

The questionnaire does not give the responder the option to explain his/her answer. Instead, the form of each question is multiple choice -- asking the candidate to agree with a specific justice or agree/disagree with the legal reasoning of a decision or the

majority/dissent. Absolutely, no mention is made of the West Virginia Code of Judicial Conduct.

Rule 4.1(A)(10) and (11) of the Code of Judicial Conduct state:

- (A) Except as permitted by law or Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
 - (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.

The Comments to the Rules are instructive:

- [11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.
- [12] Paragraph (A)(11) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B) relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.
- [13] The making of a pledge, promise or commitment is not dependent upon, or limited to the use of any specific words or phrases; instead, **the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.** Pledges, promises or commitments

must be contrasted with statements or announcements of **personal views on legal, political, or other issues, which are not prohibited. When making statements, a judge should acknowledge the overwhelming judicial obligation to apply and uphold the law, without regard to his or her own personal views.**

[14] A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom such as working toward an improved jury selection system or advocating for more funds to improve the physical plant and amenities of the courthouse.

[15] **Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(11) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidate responses might be viewed as pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(11), therefore, candidates who respond . . . should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification.**

(emphasis added).

In JIC Advisory Opinion 2023-23, the Commission addressed Rule 2.10(A) which is the mirror of Rule 4.1(A)(10). The Commission stated that “a judge cannot . . . comment when the topic involves a pending or impending case before any Court. A judge may . . . address Court procedures if the subject . . . is about general court procedures and not tied to any specific pending or impending matters.”

We now take this opportunity to address Rule 4.1(A)(11), which is the parallel of Rule 2.10(B), as it relates to the issues at hand. The questionnaire by its own admission does not ask for the candidate's personal opinions which would be perfectly acceptable as long as the responder was given the opportunity to explain that he/she could apply and uphold the law without regard to his/her own personal views. Instead, the questionnaire claims that it is seeking "opinions on settled legal precedent." However, abortion rights, contraception and the right to bear arms, as of today, are still not truly settled, and the wording and format of the questionnaire at issue is such that candidate responses without any explanation might be viewed by the public however wrong it may be as a pledge, promise or commitment to perform his/her adjudicative duties of office other than in an impartial way. This is particularly true when there is no mechanism for the candidate to assure the public that he/she will faithfully and impartially carry out his/her duties if elected or for him/her to explain why he/she answered in the way that he/she did.

Based upon the foregoing, the Commission is of the opinion that it would be improper for candidates to address questions like those outlined above in the manner in which they have been asked and without any opportunity to expound on the answer.

The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Alan D. Moats, Chairperson
Judicial Investigation Commission