PRELIMINARY ADVISORY OPINION

Code of Judicial Conduct **#1-02**
Canon 5

The Indiana Commission on Judicial Qualifications issues the following preliminary opinion concerning the Code of Judicial Conduct and permissible campaign speech. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

In *Minnesota Republican Party v. White*, 122 S. Ct. 2528 (2002), a majority of the United States Supreme Court found unconstitutional the "announce clause" in Minnesota's Code of Judicial Conduct. The "announce clause" provided that a judge shall not "announce his or her views on disputed legal or political issues." Indiana eliminated the announce clause from Canon 5 in 1993; however, to some extent, the Qualifications Commission's advice to judicial candidates about permitted campaign speech has been based on a broad interpretation of 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. *Canons 5A(3)(d)(i) and (ii).* In doing so, the Commission, in effect, has counseled candidates against announcing views on disputed social and legal issues.

Therefore, the Commission is amending its advice about certain campaign speech where the prior limitations would not be enforceable under *White*. However, 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).* And, of course, the rule against knowingly misrepresenting facts about the candidate or the opponent are in place and will continue to be enforced. *Canon 5A(3)(d)(iii).*

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 a 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 fair 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 identify, qualifications, present position or other fact concerning the candidate or an opponent. *Canon 5A(3)(d)(iii).*

ANALYSIS

This opinion begins with an expression of the Commission members' hope that judicial candidates in Indiana will conduct themselves during their campaigns with a focus not on avoiding disciplinary charges and, instead, on the promotion of the impartiality and integrity of the judiciary. Nonetheless, in light of the *White* opinion, the Commission is compelled to acknowledge that candidates are permitted under the first amendment to state their general views about disputed social and legal issues. 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. These examples are not exclusive, but are those about which candidates in Indiana most often inquire.

Of course, candidates are not obligated to respond to inquiries about their views on social and legal issues, and may legitimately respond that their views are not relevant to their obligations as judges to follow the law and to rule on each case on its facts and merits. Conversely, opponents of candidates who do express their views are free to criticize their opponents for those expressions for that same reason.

Beyond simple expressions of views on disputed issues, there are myriad other examples of campaign speech which were not clearly affected by *White,* but which often are expressed in judicial campaigns. While the Commission members recognize that judicial candidates would take comfort in a list of approved and disapproved statements, it has become clear that the propriety of more particularized statements is too dependent upon

context and facts to allow the Commission's prejudgment in most instances. Instead, many issues about campaign speech will require ad hoc analysis. In that regard, judicial candidates are encouraged to contact the Commission directly and in advance to discuss the propriety of their campaign statements, or to discuss the appropriateness of their opponents' statements and the proper responses to those statements. Nonetheless, the Commission will attempt in this opinion to set out some parameters based on hypothetical examples of campaign speech.

As a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous "tough on crime" statement, or broad statements relating to the candidate's position on disputed social and legal issues, the candidate incurs the risk of violating the "commitment" clause and/or the "promises" clause. And, even where those clauses are not violated, the candidate's statements may invite future recusal requests, or even mandate recusal on future cases; as such, they are subject to criticism both by the opponent and by the Commission as interfering with the proper performance of the judicial duties and with the proper administration of justice. As Justice Kennedy wrote in his concurring opinion, "The legal profession, the legal academy, the press, volunteer groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence." *Id.* at 2545. And, as Justice Stevens said in his dissenting opinion, "Even if the Minnesota…Board may not sanction a judicial candidate for announcing his views on issues likely to come before him, it may surely advise the electorate that such announcements demonstrate the speaker's unfitness for judicial office. If the solution for harmful speech is more speech, so be it." *Id.* at 2546.

Clearly, a statement indicating that a candidate will rule in a particular way violates the "commitment" clause and the "promises" clause. A candidate's statement must not be mutually exclusive with a pledge to be faithful to the law and to judge without partiality.

A statement which appears to constitute a mere expression of fact, such as a candidate's reference to a record of imposing harsh penalties in criminal cases, may be deemed an implied promise of future conduct and, certainly, subjects the candidate to criticism for calling into question his or her ability to rule in each case on the evidence and the law, and not for the purpose of fulfilling a personal predilection. Such a statement will be looked upon by the Commission with disfavor, as it likely represents a bias against criminal defendants who later may appear before the candidate.

Expressions of a philosophy concerning the appropriate sanction for certain crimes, such as a statement that "All drunk drivers should spend some time in jail," may fall 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.

A candidate may criticize an opponent's qualifications or record, so long as the criticism is based on objective facts; otherwise, the candidate violates the rule against misrepresentations. While a candidate may offer characterizations of himself or herself ("tough on crime" "conservative" "pro-life"), labeling one's opponent in the same fashion ("soft on crime" "liberal" "pro-choice") tends to mislead the voters and violate the Code. A candidate willing to label the opponent is these ways must have an objective, demonstrable basis for the description. A far safer approach to criticism of an opponent is to avoid broad labels and to state the facts on which the criticism is based.

Generally, candidates are free to criticize their opponents' past decisions, but with the same caveat expressed above, that such statements violate the Code if they constitute an implied promise or commitment to rule differently in the future. While it may be permissible to state, "In that particular case, based on the evidence, I would have found in favor of the plaintiff," a candidate may not criticize an opponent's past decisions by stating, for example, "I will not let criminals back on our streets based on technicalities." The latter example, in the Commission's view, is a promise inconsistent with a judge's duty to follow and uphold the law.

Of course, truthful statements of fact about one's opponent are permissible. An incumbent judge who has been the subject of public discipline, or, conversely, a lawyer/candidate who has been sanctioned publicly, might expect the opponent to inform the voters of those facts. For example, if true, it is permissible to state that one's opponent was suspended from the bar after the Supreme Court concluded he or she violated a client confidence, but it would be impermissible to state, based on those facts alone, that "The Supreme Court found my opponent unfit to serve as a judge." The candidate may express a view that the suspension renders the other candidate unworthy of the judicial office, but the statement characterizing the Court's finding would violate the Code.

In some instances, a statement of literal fact may be misleading nonetheless. In *In Re Bybee,* 716 N.E.2d 957 (Ind. 1999), the candidate was charged with making a misleading statement to the effect that "Hundreds of litigants are still waiting for their cases to be heard." Bybee's opponent presided in a busy court and, indeed, hundreds of cases were pending, but the statement was made without regard for the status of the pending cases and misled voters into believing that the judge was neglecting his duties.

Finally, Canon 5A(3)(d)(i), which states that a candidate may not make pledges or promises of conduct in office other than the fair and impartial performance of the duties of the office does not limit the candidate to that simple pledge. Any number of specific

promises relating to court administration or the improvement of the judicial system are appropriate.

A candidate may pledge, for example, to begin court promptly each morning, to rule expeditiously, to urge colleagues to amend a local rule relating to case allocation, to hold "night court," to seek additional funds to expand court staff, or to consider creative sentencing options. A candidate may pledge to rule with integrity; in the Commission's view, this statement is not an unfair implication that the opponent does not or would not rule with integrity. Conversely, promises to "return integrity" to the bench, or to "change the court to a forum where litigants will be treated with dignity" mislead voters about the incumbent's record unless, again, the statement is made on the basis of objective and demonstrable facts about the incumbent's qualifications or record.

CONCLUSION

In conclusion, the Commission reiterates that the answers to many questions about campaign speech must be considered as they arise, and in context, and are not subject to blanket approval or disapproval. Questions should be directed to Meg Babcock, Counsel to the Commission, at the address or telephone number above, or at mbabcock@courts.state.in.us. Requests for advice from the Commission itself will be honored, but may not be subject to expedited responses.

Moreover, as in the past, the Commission will act swiftly to address violations of campaign misconduct and, when the members deem it appropriate, will publicize its conclusions about whether a candidate has violated the Code. And, as stated earlier in this opinion, the Commission will exercise its right to publicly criticize campaign speech which undermines confidence in the impartiality of the judicial office or impairs the proper administration of justice. All candidates are urged to place above campaign rhetoric their respect and desire for an independent and honorable judiciary.