

Campaign Conduct and Statements Regarding Opponents

JUDICIAL QUALIFICATIONS COMMISSION

OPINION #1-22

Code of Judicial Conduct Canon 4

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

Issue

Canon 4 of the Code of Judicial Conduct states the general principle that judges and candidates for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. The purpose of this Advisory Opinion is to provide judges and candidates for judicial office with guidance on the Commission's interpretation of the Code of Judicial Conduct as to what constitutes permissible campaign conduct and statements regarding opponents. Specifically, the following queries have been posed:

- 1) May a judicial candidate comment on the qualifications (or lack thereof) or background of an opponent?
- 2) May a judicial candidate attribute positions or philosophies to an opponent based on the manner in which the opponent handled a particular type of case?
- 3) May a judicial candidate make comments in campaign communications attributing certain events (e.g. an increase in the local crime rate or an increased caseload) to an opponent?

While judicial candidates will want to distinguish themselves from opposing candidates during a campaign, they must be particularly cautious to not make any false or misleading campaign statements about an opponent or about an opponent's record.

Analysis

Public confidence in the independence, integrity, and impartiality of judges is essential for a healthy judiciary. Even when subject to public election, judges serve a fundamentally different role than legislative and executive branch officials. Jud. Cond. R. 4.1, cmt. 1. “Voters elect mayors, city councilmen, governors, state legislators, presidents and members of congress to pursue certain public policies. But voters elect judges to ‘listen and rule impartially on the issues brought before the bench.’” [Matter of Bybee, 716 N.E.2d 957, 959-60 \(Ind. 1999\)](#) (citing Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1075-77 (1996)).

The way a judicial candidate campaigns for judicial office can directly affect public perception regarding the candidate’s subsequent ability to impartially provide litigants with due process and due course of law. *Id.* at 960. Litigants may believe that judges will act in a way consistent with their campaign behavior. *Id.*

This concern arises not only when judicial candidates make “pledges, promises, or commitments” that are inconsistent with the impartial performance of the adjudicative duties of judicial office, but also when candidates engage in campaign conduct and speech that undermines public confidence in the judiciary. For instance, if a candidate releases misleading campaign materials, the public later may question the candidate’s integrity and decision making in future court cases if the candidate wins. Therefore, it is important for judicial candidates to be scrupulously fair and accurate in all communications issued by the candidates or their campaign committees.¹

¹ While remaining mindful of the “cherished place free and unfettered campaign speech holds in our constitutional order,” the interest in free speech must be balanced against the countervailing interests in due process and impartiality. [Matter of Bybee, 716 N.E.2d. at 959](#). Significantly, judges and judicial candidates are encouraged to engage in temperate and judicious speech on a variety of subjects “so long as the speech does not compromise the high ethical standards by which judges, unlike other citizens, are held.” [Public Admonition of Letsinger \(Ind. 1997\)](#).

Truthfulness and integrity are two such high standards expected of those seeking judicial office, and the State has a compelling interest in safeguarding the public’s confidence in maintaining those values in the judiciary. See [Williams-Yulee v. Florida Bar, 575 U.S. 433, 447 \(2015\)](#) (“The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling.”); see also [Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 \(1978\)](#) (Stewart, J., concurring) (“There could hardly be a higher governmental interest than a State’s interest in the quality of its judiciary.”); [Winter v. Wolnitzek, 834 F.3d 681, 693 \(6th Cir. 2016\)](#).

Quite simply, “Distortions and misrepresentations have no place in campaigns for judicial office ... because judges are called upon to administer oaths and are ‘sworn to uphold the law and seek the truth,’” and “[t]he integrity of a candidate who runs misleading campaign ads is compromised even before he or she takes the oath of office.” [NY Adv. Comm. on Jud. Ethics, New York Judicial Campaign Ethics Handbook, p. 33 \(2019\)](#).

A. Potentially Misleading Statements about an Opponent’s Qualifications or Background

In seeking judicial office by election, candidates undoubtedly will want to distinguish themselves from other individuals who are running for the same seat. Such campaign speech typically falls within the realm of protected political speech; however, judicial candidates still must be mindful of their ethical obligation under Rule 4.1(A)(11) of the Code of Judicial Conduct, which prohibits judicial candidates from knowingly, or with reckless disregard for the truth, making any false or misleading statements. This includes false or misleading statements regarding the identity, present position, experience, qualifications, integrity, or fitness for office of a candidate. See Jud. Cond. R. 4.1, cmt. 10.

Judicial candidates should ensure that statements expressing subjective views about an opponent’s qualifications are truthful and not misleading. For example, a candidate may state that he or she is “more qualified” or “more prepared” than an opponent so long as that opinion is supported by the candidate’s actual experiences and professional background in comparison to the opponent’s. See, e.g., [NY Adv. Comm. on Jud. Ethics, Op. 17-139 \(June 21, 2018\)](#). A candidate should also take care to corroborate information that the candidate relies on when criticizing an opponent’s experience or qualifications, as failure to do so could lead to false or misleading statements that could subject the candidate to discipline. See, e.g., [Inquiry Concerning DuPont, 252 So.3d 1130, 1143 \(Fla. 2018\)](#); [Disciplinary Counsel v. Tamburrino, 87 N.E.3d 158, 172 \(Ohio 2016\)](#). In discussing an opponent’s qualifications for office, a candidate may comment on an opponent’s public disciplinary history (if applicable) but should do so in a manner that maintains the dignity appropriate to judicial office. See Jud. Cond. R. 4.2(A)(1).

However, judicial candidates should be cautious to avoid speculation, hyperbole, innuendo, and omitting salient facts when making statements about an opponent’s background or qualifications. See, e.g., [NY Adv. Comm. on Jud. Ethics, Op. 19-112 \(October 24, 2019\)](#). For example, if an opponent dropped out of law school for a period of time, it would be misleading to suggest the opponent was “flunked” out of law school if the individual may have taken a leave for another reason, such as to care of an ailing parent.

B. Potentially Misleading Statements about an Opponent’s Positions or Rulings

When evaluating whether to comment on specific aspects of an opponent’s record or judicial philosophy, a judicial candidate should consider the ethical perils of: 1) using emotionally-charged buzzwords that carry misleading connotations; 2) casting negative aspersions on certain roles in the legal system as purported evidence of unfitness; or 3) mischaracterizing or overstating the role and powers of the judiciary.

A candidate for judicial office should avoid attributing a position or policy perspective to an opponent (such as calling an opponent “liberal” or “soft on crime”) based solely on the handling of a particular type of case. Not only does such conduct impinge on the independence, integrity, and impartiality of the judiciary (see Jud. Cond. R. 4.2(A)(1)), but it may also raise questions about whether the candidate has acted knowingly or with reckless disregard for the truth by miscasting an opponent’s views. Jud. Cond. R. 4.1(A)(11). In [*In re Judicial Campaign Against Hein*, 706 N.E.2d 34, 37 \(Ohio 1999\)](#), the Ohio Commission of Judges noted that such terms did not allow for a fair and accurate portrayal of the incumbent judge-opponent’s overall record and were inappropriate in judicial campaigns.

Likewise, attempts to characterize an opponent as unfit for judicial office because of the legal role the opponent performs in the justice system will be viewed with disfavor. In [*Inquiry Concerning Santino*, 257 So.3d 25, 27-28 \(Fla. 2018\)](#), the Florida Supreme Court removed a judge for campaign statements that described her opponent as representing “individuals who commit heinous crimes” rather than victims and as “making a lot of money” freeing the worst criminals. The Florida Supreme Court determined that the respondent’s campaign statements evinced clear bias against criminal defendants and falsely communicated to the public that her opponent was unfit for judicial office “because of the type of law he practiced, and the type of clients he represented.” *Id.* at 35-36.

Mischaracterizing an opponent’s rulings or actions by promoting the public’s misunderstanding of the judiciary’s role also is inconsistent with the Code of Judicial Conduct. In [*In re Judicial Campaign Complaint Against Kienzle*, 708 N.E.2d 800, 802 \(Ohio 1999\)](#), an Ohio judicial candidate was disciplined for inaccurately stating in campaign materials that his opponent “imposed \$430,000 in taxes on [county residents]. The Court of Appeals said he was wrong.” The statement involved the incumbent judge-candidate’s ruling on the interpretation of a statute in a tax case but never mentioned that a judge has no authority to impose taxes. *Id.* The respondent’s materials were deemed misleading because the candidate led voters to believe that the judge had the power to levy taxes in our form of government. *Id.*

C. Potentially Misleading Statements Attributing Opponents’ Actions to Negative Events

A judicial candidate may draw ethical scrutiny by issuing campaign statements that speculate about an opponent’s past or future conduct based on incomplete negative statistical or historic data or by drawing misleading conclusions from that data. Before drawing a causal connection in campaign materials, a judicial candidate should consider whether sufficient corroborating evidence exists to establish that an event is tied to an opponent’s actions or inactions.

In [*Matter of Bybee*](#),² 716 N.E.2d at 962, the Indiana Supreme Court publicly reprimanded a judicial candidate for distributing a campaign brochure that attributed the doubling of pending cases on the court's docket to the incumbent judge/opposing candidate and asserted that hundreds were waiting for their disputes to be resolved in the incumbent judge's court. *Id.* at 961. The Court concluded, "While Respondent's brochure may have been technically correct, her purpose was to create an impression that [the incumbent judge] was causing needless delays and holding a large number of cases under advisement," when there was contrary evidence, and the respondent failed to fully analyze the data supporting her contentions. *Id.* at 962. By selectively using anecdotal information and statistics, the respondent tried to create the false impression that the incumbent judge was causing needless delays and holding large numbers of cases under advisement, despite her knowledge to the contrary. *Id.* at 963. Such "campaign innuendo or equivocal statements designed to raise doubts about a judge destroy public confidence in the judicial office" and violate judicial conduct rules prohibiting candidates from making knowing misrepresentations of an opponent's record. *Id.*

As part of a candidate's evaluation of whether sufficient corroborating evidence exists to support a causal connection, the candidate should consider whether there are alternative explanations for the negative event (e.g. a rise in local crime rates). The judicial candidate should also consider whether contrary evidence exists refuting the connection. *See, e.g., NY Adv. Comm. on Jud. Ethics, Op. 12-129 (September 13, 2012)* (advising a candidate who noticed that his incumbent opponent had handled less than one-third of the court's caseload in a two-judge court to consider other reasons for the imbalance prior to making a statement that the opponent was shirking his responsibilities).

This is not to say that judicial candidates are prohibited from ever criticizing an opponent or republishing negative reports about the opponent. Rather, the Commission reminds candidates to be mindful of their ethical obligation to be scrupulously fair and accurate in all statements made by the candidate or the candidate's campaign committee. Jud. Cond. R. 4.1, cmt. 9.

Conclusion

When engaging in campaign conduct and speech about opponents, judges and judicial candidates must be cognizant of their duties to protect the integrity, independence, and impartiality of the judiciary. Judicial candidates must ensure that statements that they (or their campaign committees) issue: 1) are fair, accurate, and truthful; 2) are factual rather than speculative; 3) do not omit salient facts; 4) are pertinent and material to the office; and 5) do not unfairly question the impartiality of the opponent or the judiciary. Because this analysis often is a fact sensitive one, the Commission encourages all judges and judicial candidates to consult

² In *Matter of Bybee*, the Court addressed the application of Canon 5(A)(3)(d)(iii) of the Code of Judicial Conduct, which was replaced by Rule 4.1(A)(11). *Id.* at 958.

with Commission staff to evaluate the wisdom of making specific campaign statements about opponents.

This nonbinding advisory opinion is issued by the Indiana Commission on Judicial Qualifications. The Indiana Commission on Judicial Qualification is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.