

Advisory Committee on the Judicial Code of Conduct

Hon. James J. Wechsler, Chair
Hon. Marie A. Baca
Paul L. Biderman, Esq.
Thaddeus Bejnar, Esq.

September 9, 2004

Re: Advisory Opinion No. 04-05

Dear

You have requested an opinion from the Advisory Committee on the Code of Judicial Conduct concerning statements on the website of the candidate who opposes you in the upcoming election for district court judge. You have told us that your opponent makes statements about you on the website that are misleading or false. In particular, you have expressed that the website refers to cases over which you had presided and misstates the facts and rulings made therein.

By way of example, you state that the website contains a claim that you, "sentenced a man to one year of custodial treatment after molesting (name of victim omitted) beginning when she was six." You indicate that this statement refers to a case in which you entered a disposition of one-year commitment to the New Mexico Boys' School with a recommendation that the offending child be placed in the sex offender unit for treatment. You state that this case had been tried by a jury and that no evidence had been presented of repeated molestations from when the victim was six, as stated on the website. You also indicate that your opponent represents on the website that he has endorsements of two organizations, while, to your knowledge, one of those organizations has not endorsed your opponent as of the date of your letter of inquiry.

Rule 21-700(B)(6) and (7) NMRA of the Code of Judicial Conduct provides in relevant part:

Candidates for election to judicial office in partisan... elections, including judges, lawyers and non-lawyers, are permitted to participate in the electoral process, subject to the requirements that all candidates:

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum...; and

(7) may respond to personal attacks or attacks on the candidates record as long as the response does not violate Paragraph B(4) of this rule.

Rule 21-700 (B) (4) has been amended by the Supreme Court effective August 31, 2004. As amended, it provides that a candidate for election to judicial office shall not:

- (a) with respect to 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 adjunctive duties of the office;
- (b) misrepresent the candidate's or the candidate's opponent's identity, qualifications, present position or other material fact.

The newly amended version of Rule 21-700(B)(1) may also pertain to your inquiry. It now requires candidates, in addition to their obligation to maintain the dignity appropriate to judicial office, to "act in a manner consistent with the impartiality, integrity and independence of the judiciary."

The Committee considers material published on a candidate's website to be advertising for the purpose of Rule 21-700(B). As a result, a candidate for election to judicial office may not use the candidate's website to publish misleading information for the purpose of advancing a candidacy for election to judicial office, including false allegations about significant rulings made by an incumbent. The Committee also considers the type of allegations you have identified on your opponent's website as "material facts" concerning qualifications and fitness for judicial office within the meaning of Rule 21-700(B)(4)(b). However, having no investigative authority or resources, this Committee can offer no opinion as to whether the specific allegations on your opposing candidate's website violate the standards of the Code.

The Code addresses violations by candidates who are not judges but who are members of the Bar in Rule 21-900(B) NMRA. Under that provision, a violation of the Code of Judicial Conduct in the form of misleading campaign advertising or otherwise, is considered a violation of the Rules of Professional Conduct. Under Rule 21-900(B), as it currently stands, the resources of a candidate to correct a violation alleged against an opposing attorney candidate who is not a judge is to file a complaint with the Disciplinary Board of the Supreme Court. Thus, it is within the province of that Board, and not of this Advisory Committee, to investigate and evaluate the merits of a claim of misleading campaign advertising. We opine only that the applicable standard is set forth in Rule 21-700(B)(4)(b) and (6) and that the available remedy is to file the complaint as indicated.

You have also suggested that material on your opponent's website exceeds the bounds of proper judicial decorum as defined in the Code of Judicial Conduct. As noted above; the Code requires candidates for judicial office "to act in a manner consistent with the impartiality, integrity and independence of the judiciary" and that advertising must remain "within the bounds of proper judicial decorum." Rule 21-700(B) (1), (6). We note considerable material on your opponent's website stating his empathic views on the direction of the judiciary. Samples of his statements include, "It is time to take back the courts," "Our values are under attack in the courts," "We, the citizens of ___ have lost faith in our court system," and "Our courts often seem to view the perpetrator of the crime as the real victim while blaming society as the culprit."

Such statements are certainly controversial. On the other hand, the United States Supreme Court has afforded strong First Amendment protection to campaign speech, notwithstanding restrictions in state codes of judicial conduct. Republican Party of Minnesota v. White, 536 U.S. 765 (2002). As a result of White, the New Mexico Supreme Court has revised our Code of Judicial Conduct, lifting certain restrictions on campaign speech. See Rule 21-700(B) as amended. The Court in White applied a strict scrutiny test to analyze state restrictions on permissible campaign speech in judicial campaigns. Id. at 774-75.

As we have noted, it is currently the role of the Disciplinary Bard to investigate and determine whether any statements made in the course if a campaign offended "proper

judicial decorum" or "the integrity and independence of the judiciary" to such a degree that they fall outside the bounds of constitutional protection.

The committee understands that the Supreme Court has published in the Bar Bulletin, January 29, 2004, Volume 43, No. 4, at 16-20 and now has under advisement, a proposed modification to Rule 21-900 to permit an aggrieved candidate to file an expedited action in district court for appropriate relief under such circumstances as those you have alleged. No modification to Rule 21-900 has been adopted as of this writing. We further note that as provided in Rule 21-700(B) (7), the Code of Judicial Conduct permits you to respond to personal attacks or attacks on your record without violating Rule 21-700(B) (4), in addition to any action you may take in filing a complaint with the Disciplinary Board.

Very truly yours,

James J. Wechsler
Chair

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